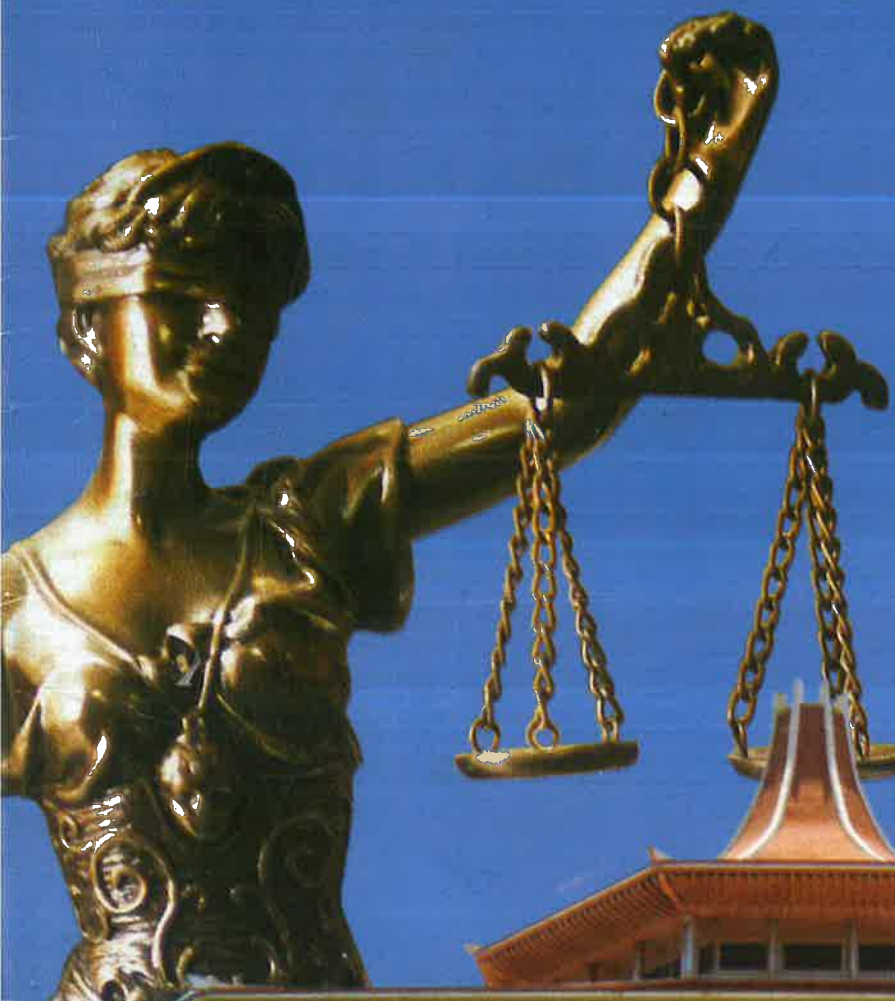
News Letter

THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA



2018 VOLUME 02

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WE CONGRATULATE FOLLOWING JUDGES WHO HAVE BEEN APPOINTED AS HIGH COURT JUDGES RECENTLY

(From left to right except Hon. Chief Justice)
Mr. M. A. A. Anawaratna | Mr. A. L. B. Wickramasooriya| Mr. R. P. D. P. P. Ratnayake

Editorial

Justicia non novit patrem nec matrem; solam veritatem spectat justitia[1]

This has been derived from the maxim "Fiat Justitia ruat caelum" which means "let justice be done though the heavens fall". This dictum was used in certain controversial cases[2] disregarding the consequences of the decision. "Justice" is defined in oxford dictionary as "just behavior or treatment" / "quality of being fair and reasonable" and "the administration of the law or authority in maintaining this". There are personal relationships of every person. Judges are not an exception. However; it should not be a reason to deviate from the way of dispensing justice. Relationships should not be influential and affect the process of dispensing justice. Truth must be revealed in a given situation and judges are to act as per their own conscience. No favors whatsoever for either party in a case due to the relationship with such party and if influential relationship exists, it itself disqualify the judge from hearing the particular case.

Fairness/ Justice is the fundamental requirement of a legal system which guarantees the common good of the people in the society. Sometimes the decision of the court may be against a common practice (customs), religious belief/view[3], morality[4] or political agenda[5]. Irrespective of any of these, it is required to take an accurate decision without fear, favor or affection. In *R* Vs. *Sussex justices, exparte McCarthy*[6], Chief Justice Hewart stated that, "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". It is the responsibility of the judges to dispense justice by preserving these fundamental norms.

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1. Justice knows neither father nor mother; justice regards truth alone.
2. Lord Mansfield in R Vs. Wilkes (1558-1774) AER 570, Justice Nariman R.F. in SCBI Vs. Kalyan singh and others Criminal appeal No. 751/2017, Justice Nair in Perumatty grama panchayat Vs. State of kerala, 16/12/2003- Kerala High court
3. Shayara Bano Vs. Union of India and others known as triple Thalaqe case, Supreme court of India Writ petition (civil) 118/2016 where Triple Talaq in muslim law was considered as unconstitutional and directed legislature to take action (by introducing proper law) immediately. Supremacy of the constitution over any other personal laws was reiterated.
4. Navtej Singh Johar and others Vs Union of India and Others Writ Petition (Criminal) No. 76 of 2016. On 06th September 2018, Indian Supreme court decriminalized homosexuality.
5. Liberal interpretation given by Indian Supreme court when the meaning of right to life is expanded to include clean and clear environment. See Subhash Kumar Vs. State of Bihar, Rural litigation and environment Kendra, Dehradun Vs. State of Uttar Pradesh, M.C.Mehta Vs. Union of India(pollution by vehicles), Murli S. Deora Vs. Union of India (protection against passive smoking)
6. (1924)1 KB 256, (1923) AER 233

JSA News Letter

2018 Volume 02

School Admission for Grade 1 in year 2018

JSA is preparing a list of requests, regarding school admissions for Grade 1 in year 2019, which is to be sent to Ministry of Education through Judicial Service Commission. It is requested from members those who are expecting to admit their children to Grade 1 in year 2019, to forward their requests on or before 25.09.2018 to Secretary, Judicial Service Association.

Farewell ceremony to his Lordship the Chief Justice

According to the long-standing tradition of the judiciary, Judicial service association with the collaboration of High Courts Judges Association and Labour Tribunal Presidents Association has planned to hold a ceremony to bid farewell to his Lordship the Chief Justice Priyasath Dep P.C., who is due to retire from services on the 12th of October 2018.

The said function will be held on the **06th of October 2018 at Waters Edge, Battaramulla**. We very cordially request you to contribute a sum of **Rs. 6000/= on or before 25th September 2018**, and confirm your participation.

We firmly believe that the entire membership would render us the support to make the said function a success.

Your payment can be made to the JSA account No.176100190001291 at Peoples Bank, Mid City Branch.

After the payment is made please be kind enough to send a copy of the payment slip to Mr. Prasanna Alwis, Magistrate, Kaduwela (0772988807/ 0753988807) or Mr.Pasan Amarasena, Addl. Magistrate, Mahara (0759524154) and confirm the payment.

M.M.M.Mihal,
Secretary, Judicial Service Association.

Invitation

The Judicial Service Association has taken steps to publish JSA Law journal Volume VI in December 2018. The journal will contain articles from legal luminaries and articles submitted by members for the Justice Amarathunga Memorial Award competition.

The Judicial Service Association of Sri Lanka invites its membership to submit their articles (soft copy to dissa.jaya@yahoo.com) on or before 1st November 2018 for the Justice Amarathunga Memorial Award competition and for publication of the journal.

Annual Conference 2018

JSA is making arrangements in organizing its Annual Conference in December 2018. JSA is also planning to organize the talent show of JSA 'Rhythm of purple' in a vibrant manner with a new twist.

Further details will be communicated in due course.

Letter Sent to Ministry of Justice Regarding Tax Issue

2018. 06. 06

ඩබ්ලිව්. එම්. එම්. ආර්. අදිකාරි මහත්මිය,
ලේකම්,
අධිකරණ අමාත්‍යාංශය,
කොළඹ 12

අධිකරණ නිලධාරින්ගේ වැටුපෙන් සහ දීමනාවලින් 2017 අංක 24 දරන දේශීය ආදායම් පනත යටතේ උපයන විට ගෙවීමේ බදු අය කිරීමේ දී සිදුවන අසාධාරණය පිළිබඳව දැනුම් දීම.

වැටුපෙන් සහ දීමනාවෙන් උපයන විට බදු අය කිරීමේ වර්තමාන ක්‍රමවේදය අනුව අධිකරණ නිලධාරින්ගෙන්, රජයෙන් ලබාදෙන වැටුප් සහ අනෙකුත් දීමනාවලින් අසාධාරණ ලෙස විශාල වශයෙනු බදු අය කිරීම මත අන් සියලු වෘත්තිකයන්ට වඩා විනිසුරුවරුන්ට බලවත් අගතියක් සිදු වී ඇති බව අවධානයට යොමු කර සිටිමු. මෙම බදු අය කිරීමේ ක්‍රමය හේතුකොට ගෙන වර්තමාන රජය විසින් විනිසුරුවරුන්ගේ වැටුප් සහ දීමනා වැඩි කිරීම ප්‍රතිඵල රහිත තත්ත්වයකට පත් කර ඇති බව ද කාරුණිකව අවධානයට යොමු කර සිටිමු.

මීට පෙර පැවති උපයන විට ගෙවීමේ බදු අය කර ගැනීමේ ක්‍රමය අනුව 2015. 07. 06 දිනැති චක්‍රලේඛ අංක SCE /2015/05 මගින් මහාධිකරණ විනිසුරුවරුන් ඇතුළු අධිකරණ සේවයේ නිලධාරීන් ට ද වෙනත් රජයේ වෘත්තිකයන්ට ද බදු සහන රාශියක් ලබා දී තිබිණි. නමුත් වර්තමාන බදු අය කර ගැනීමේ ක්‍රමය අනුව ඒ සියළු සහන ඉවත් කරමින් අධික බදු අය කිරීමක් සිදු කෙරේ. මෙහි දී විශේෂයෙන් අවධානය යොමු කර සිටින්නේ වෘත්තිය ආචාරය ධර්මය අනුව වෙනත් කිසිදු ආදායම් මාර්ගයක් තබා ගත නො හැකි වැටුපෙන් පමණක් ජීවත් විය යුතු එකම වෘත්තිකයන් වන්නේ අධිකරණ සේවයේ නියුතු විනිශ්චයකාරවරුන් බවයි.

ඉහත සඳහන් චක්‍රලේඛය මේ සමග අමුණා ඉදිරිපත් කරන අතර, එම චක්‍රලේඛය මගින් විනිසුරුවන්ට පහත සඳහන් බදු සහන ලබා දී තිබිණි.

I. රජයෙන් වාහනයක් ලබා දීම වෙනුවට ගෙවනු ලබන දීමනාවෙන් රුපියල් පනස්දාහක් දක්වා බද්දෙන් නිදහස් කර තිබේ.
II. නිල නිවාස ලබා දීම වෙනුවට ගෙවනු ලබන දීමනාව බද්දට යටත් නොවේ.
III. දුරකතන ගාස්තු ප්‍රතිපූර්ණය කිරීම සඳහා දෙනු ලබන දීමනාව බදු කාර්යයන් සඳහා සැළකිල්ලට ගනු නොකල යුතු බව සඳහන් වේ.
IV. අධිකරණ සේවයේ පුද්ගලික දීමනාව බද්දෙන් නිදහස් කර තිබිණි.
V. අධිකරණ සේවයේ අභියාචන දීමනාව බද්දෙන් නිදහස් කර තිබිණි.

❖ රියදුරු දීමනාව

වර්තමාන බදු අය කිරීමේ ක්‍රමය අනුව බද්දෙන් නිදහස් කර තිබූ ඉහත සඳහන් සියලු දීමනා සඳහා විශාල බදු මුදලක් අය කෙරේ. මෙහිදී විශේෂයෙන් සඳහන් කළ යුතු කරුණක් වන්නේ බද්දෙන් නිදහස් කරන ලද ඉහත සඳහන් දීමනා හැරුණු කොට විනිශ්චයකාරවරයෙකුගේ නිල වාහනයේ රියදුරුට වැටුප් ගෙවීම සඳහා දෙනු ලබන සුළු දීමනාව සඳහා ද බදු අය කෙරේ. එය කිසිසේත්ම විනිශ්චයකාරවරයාගේ ඉපයීමක් නොවන අතර, නිල වාහනයේ රියදුරුට වැටුප් ගෙවීමට ප්‍රමාණවත් නොවන බව ද පැහැදිලිව පෙනී යනු ඇත. එසේ තිබියදී එම දීමනාවෙන් ද බදු අය කිරීමෙන් විනිශ්චයකාරවරයා බලවත් අපහසුතාවයකට ලක් වේ.

❖ ඉන්ධන දීමනාව

විනිශ්චයකාරවරයෙක්ට තම නිල කටයුතු සඳහා පාවිච්චි කිරීම පිණිස මසකට ලීටර් 225ක ඉන්ධන ප්‍රමාණයක් සඳහා අවශ්‍ය මුදල දීමනාවක් වශයෙන් ගෙවීම සිදු කෙරේ. එම ඉන්ධන දීමනාව ගෙවනු ලබන්නේ වාහනයට ඉන්ධන ලබා ගැනීම සඳහා ය. එසේ නමුත් ඒ සඳහා බදු මුදලක් අය කිරීමෙන් විනිසුරුවරයාට ලැබෙන ඉන්ධන දීමනාව සෑහෙන ප්‍රමාණයකින් අඩු වේ. එහි ප්‍රතිඵලය වන්නේ විනිශ්චයකාරවරයෙකුට මසකට ලීටර් 225ක ඉන්ධන සඳහා දීමනාවක් ගෙවන බව සඳහන් කලත් බදු අය කිරීම නිසා ගෙවනු ලබන්නේ ඊට වඩා අඩු ලීටර් ප්‍රමාණයක් සඳහා මුදලක් පමණකි. එය පැහැදිලිව ම ලබා දෙන ලද දීමනාවක් අඩු කිරීමකි.

❖ රජයේ නිල රථයක් ලබා දීම වෙනුවට ගෙවනු ලබන දීමනාව.

රජය විසින් තීරණය කරන ලද පරිදි රජයේ වාහනයක් වෙනුවට දිසා විනිසුරු/මහේස්ත්‍රාත්වරයෙට ලබාදෙනු ලබන දීමනාව රුපියල් එක්ලක්ෂයක් (රු. 100,000/-) දක්වා වැඩි කරන ලදි. රජය විසින් ගත් මෙම තීරණය පිළිබඳව සියළුම විනිශ්චයකාරවරුන්ගේ ස්තුතිය පිරිනැමෙන නමුත් වර්තමාන බදු අය කර ගැනීමේ ක්‍රමය අනුව එම දීමනාවෙන් විනිශ්චයකාරවරයාට ලැබෙන්නේ රුපියල් අසූදාහක් (රු. 80,000/-) වැනි මුදලක් පමණකි.

රජය විසින් මෙම වාහන දීමනාව ගෙවනු ලබන්නේ නිල වාහන සම්බන්ධව සම්පූර්ණ වගකීම්වලින් අධිකරණ අමාත්‍යාංශය මිදීම සඳහායි. මෙම වාහන දීමනාව ලබා ගන්නා විනිශ්චයකාරවරයෙකු වාහනයේ සියළු නඩත්තු කටයුතු කිරීම, රක්ෂණ වාරික ගෙවීම ආදී සියළු කටයුතු පුද්ගලිකව දැරිය යුතුය. රජයෙන් නිල වාහනයක් සැපයීමේදී එම සියළු කටයුතු සඳහා විශාල මුදලක් වැය වේ. තවද දැනට විනිශ්චයකාරවරුන් පාවිච්චි කරන වාහන වසර හතකටත් වඩා පැරණි වාහන වන බැවින්, මෙම වාහනවල අලුත්වැඩියා කටයුතු නිරන්තරව සිදු කිරීඔට වීමෙන් රජයට තවත් වැඩි බරක් දැරීමට සිදු වී ඇත. ඒ අනුව මහාධිකරණ විනිශ්චයකාරවරයෙකුට කිසිදු බද්දක් අය නො කර රුපියල් එක්ලක්ෂයක (රු.100,000/-) මාසික දීමනාවක් ගෙවුවද එය රජයට වාසිදායක වේ.

කිසිම බාහිර ආදායම් මාර්ගයක් නොමැති විනිශ්චයකාරවරුන්ට වාහනයක් මිලදී ගත හැකි වන්නේ බැංකු ණයක් ලබා ගැනීමෙන් පමණකි. මෙම රුපියල් එක්ලක්ෂයක (රු.100,000/-) දීමනාව රජය විසින් ලබා දීමට තීරණය කල පසුව විනිශ්චයකාරවරුන් සෑහෙන ප්‍රමාණයක් එම දීමනාවෙන් ණය වාරික ගෙවීමේ පදනම මත බැංකු ණය ලබා ගෙන නව වාහන මිලදී ගැනීම සිදු කරන ලදී. එසේ වාහන මිලී ගැනීමේ දී තමන්ට කැමති ඕනෑම වාහනයක් මිලදී ගත නො හැකි අතර, විනිශ්චයකාරවරයෙකුගේ තත්ත්වයට ගැලපෙන ආකාරයට පාවිච්චි කල යුතු වාහන පිළිබඳව අධිකරණ සේවා කොමිෂන් සභාව මගින් නිර්නායක නියම කර ඇත. ඒ අනුව විනිශ්චයකාරවරුන්ට එවැනි වාහනයක් මිලදී ගැනීම සඳහා විශාල මුදලක් දැරීමට සිදු වේ. එසේ වාහන මිලදී ගත් විනිශ්චයකාරවරුන්ගෙන් මෙම වාහන දීමනාවෙන් රුපියල් විසිදාහක (රු.20,000/-) පමණ මුදලක් බදු වශයෙන් කපා ගැනීම නිසා එම වාහන මිලදී ගත් විනිශ්චයකාරවරුන් බරපතල අපහසුතාවයට ලක්වී ඇත.

ඒ අනුව රුපියල් එක්ලක්ෂයක (රු. 100,000/-) දීමනාවක් ලැබෙනැයි බලාපොරොත්තුවෙන් වාහන මිලදී ගත් විනිශ්චයකාරවරුන්ට මෙම අධික බදු අය කිරීම මත පුද්ගලික වාහන පාවිච්චි කිරීමට නොහැකි තත්ත්වයක් උද්ගත වී ඇති බැවින්, එසේ වාහන මිලදී ගත් බොහෝ දෙනෙකු නැවත රජයෙන් වාහන ඉල්ලා සිටීමේ තත්ත්වයක් උද්ගත වී ඇත. විනිශ්චයකාරවරුන්ට අනිවාර්යයෙන් රජයෙන් නිල වාහනයක් සැපයිය යුතු ය.

අධිකරණ අමාත්‍යාංශයේ ලේකම් තුමිය විසින් විනිශ්චයකාරවරයෙකුට 24. 04. 2018 දිනැති ලිපියකින් දන්වා ඇති පරිදි ටොයෝටා AXIO වර්ගයේ රථයක් ලබා ගැනීමට පවා මාසයකට රුපියල් එක් ලක්ෂ අසූදාහක් (රු. 180,000/-) වැය වන බවට සඳහන් කර ඇත. (එම ලිපියේ ඡායා පිටපතක් මේ සමඟ ඉදිරිපත් කර ඇත.) ඒ අනුව රජය විසින් වාහනයක් සපයන්නේ නම් රුපියල් එක් ලක්ෂ අසූදාහක් (රු.180,000/-) ගෙවිය යුතුව ඇති තත්ත්වයක් යටතේ විනිශ්චයකාරවරයාට බදු අය කර ගැනීමකින් තොරව රුපියල් එක් ලක්ෂයක (රු100,000/-) වාහන දීමනාව ලබා දෙන්නේ නම්, එය විනිශ්චයකාරවරයාට විශාල සහනයක් වනවා මෙන් ම රජයට ද විශාල ලාභයක් වන බව කාරුණිකව පෙන්වා දෙනු කැමැත්තෙමු.

තව ද රජය විසින් විනිශ්චයකාරවරයෙකුට නිල රථයක් සැපයීම සඳහා රුපියල් එක්ලක්ෂ අසූදාහක (රු.180,000/-) මුදලක් ලබා දෙනු ලබන්නේ පුද්ගලික ව්‍යාපාරිකයෙකුට වන අතර බදු අය කිරීමකින් තොරව රුපියල් එක් ලක්ෂයක් (රු.100,000/-) ලබා දෙන්නේ නම් එහි ප්‍රතිලාභය හිමි වන්නේ තම වෘත්තිය ජීවිතයම යුක්තිය පසිඳලීමේ ක්‍රියවලියේ නිරත වූ විනිශ්චයකාරවරයෙකුට ය. ඒ පිළිබඳව ද ඔබගේ කාරුණික අවධානය යොමු කරන ලෙස ඉල්ලා සිටිමු.

❖ නිල නිවාස ලබා දීම වෙනුවට ගෙවනු ලබන දීමනාව.

ඉහළ නිලතල දරණ රාජ්‍ය නිලධාරීන්ට රජය විසින් නිල නිවාස ලබා දීම සිදු කරන අතර, විනිශ්චයකාරවරුන්ගේ නිල නිවාස ඊට වඩා වෙනස් තත්ත්වයක් පවතී. අනෙකුත් බොහෝ රජයේ නිලධාරීන් නිල නිවාස පාවිච්චි කරන්නේ පදිංචිය සඳහා පමණක් වුවද, විනිශ්චයකාරවරුන් නිල නිවාස වලද තමන්ගේ රාජකාරිය සිදු කරයි. මහේස්ත්‍රාත්වරයෙකු දවසේ පැය විසි හතරම නිල කාර්යය ඉටු කරන අතර, සැකකරුවන්ට ඇප නියම කිරීම, රිමාන්ඩ් බන්ධනාගාර ගත කිරීම වැනි රාජකාරි කටයුතු නිල නිවාස වල සිදු කරයි. එනිසා විනිශ්චයකාරවරයෙකුට නිල නිවාසයක් පාවිච්චි නො කර තමාගේ පුද්ගලික නිවසේ සිට යෑම් ඒම් සිදු කිරීමට අවශ්‍ය වුවද රාජකාරිමය අවශ්‍යතා මත නිල නිවසම පාවිච්චි කල යුතු බවට බොහෝ අවස්ථාවල අධිකරණ සේවා කොමිෂන් සභාව මගින් නියම කරනු ලබයි. එසේ ම රජයෙන් සපයා දෙන නිල නිවාසයක් ඇත්නම්, කිසිම විනිශ්චයකාරවරයෙකුට නිල නිවාස වෙනුවෙන් ලබා දෙනු ලබන දීමනාව ලබා ගත නොහැකිය. ඒ නිසා රජයෙන් නිල නිවාසයක් සැපයීමට නොහැකි අවස්ථාවල ඒ වෙනුවෙන් ගෙවනු ලබන දීමනාවට මෙලෙස බදු අය කිරීම ඉතාම අසාධාරණ වේ. ඉහත කී SCE /2015/05 දරණ චක්‍රලේඛයෙන් එම දීමනාව බද්දෙන් නිදහස් කර ඇත්තේ මෙම කරුණු සලකා බැලීමෙන් අනතුරුව ය.

තවද දැනට ලබා දෙනු ලබන නිල නිවාස දීමනාව ද ප්‍රධාන නගරාසන්න ප්‍රදේශවල පදිංචි වන විනිශ්චයකාරවරුන්ට නිවාස කුලී වශයෙන් ගෙවීමට ප්‍රමාණවත් නොවන මුදලකි. එම නිල නිවාස දීමනාවෙන් ද බදු මුදලක් අය කර ගනිමින් තවත් අඩු ප්‍රමාණයක් පමණක් විනිශ්චයකාරවරයාට තමුන්ගේ පුද්ගලික වියදමින් ගෙවල් කුලී වලින් කොටසක් ගෙවීමට සිදු වන තත්ත්වයක් උදා වී ඇත. ඒ අනුව අවම පහසුකම් යටතේ උපරිම සේවයක් සිදු කරන විනිශ්චයකාරවරුන්ගෙන් මෙසේ බදු අය කිරීම ඉතාම අසාධාරණ වේ.

❖ දුරකතන දීමනා

නිල නිවාස දුරකතනය සහ විනිශ්චයකාරවරයාගේ ජංගම දුරකතනය යන සියල්ල සඳහා දැනට දෙනු ලබන්නේ ඉතා සීමිත දුරකතන ගාස්තු දීමනාවකි. වර්තමානයේ විනිශ්චයකාරවරයෙකුට රාජකාරි කටයුතු කිරීමේදී ඉන්ටර්නෙට් පහසුකම් අත්‍යවශ්‍ය වන අතර ඒ සඳහා ද ගෙවනු ලබන්නේ මෙම දුරකතන දීමනාවෙනි. දුරකතන බිල්පතකින් බදු කීපයක් ම අය කෙරේ. වර්තමානයේ ක්‍රියාත්මක වන බදු ක්‍රමය අනුව එම බදු කීපයක් සහිත දුරකතන ගාස්තු ගෙවීම සඳහා දෙනු ලබන සුළු දීමනාවෙන් ද තවත් බද්දක් අය කෙරේ. මෙලෙස බදු අය කිරීම ඉතාම අසාධාරණ වන අතර, මීට පෙර ඉහත සඳහන් චක්‍රලේඛයෙන් ලබා දුන් සහනය පරිදි දුරකතන ගාස්තු ගෙවීම සඳහා දෙනු ලබන දීමනාව බදු කාර්ය සඳහා සැලකිල්ලට භාජනය නො කරන ලෙසට ඉල්ලා සිටිමු.

ඉහත සඳහන් කරුණු කාරුණිකව අවධානයට යොමු කරමින්, අධිකරණ සේවා සංගමය විසින් ඉල්ලා සිටින්නේ ඉහත සඳහන් දීමනා වන,

I. රියදුරු දීමනාව
II. ඉන්ධන දීමනාව
III. නිල රථයක් ලබා දීම වෙනුවට ලබා දෙන දීමනාව
IV. නිල නිවාස ලබා දීම වෙනුවට ලබා දෙන දීමනාව
V. දුරකතන දීමනාව

යන දීමනාවන් සම්බන්ධයෙන් එම දීමනාවන් උපයන විට අය කරනු ලබන බදු ගණනය කිරීම් වලින් ඉවත් කර පෙර පැවති ආකාරයට බදු සහනයක් ලබා දීම සඳහා බලධාරීන්ගේ අවධානයට යොමු කරමින් අවශ්‍ය පියවර ගන්නා ලෙසයි.

ආර්. එස්. ඒ. දිසානායක
සභාපති,
අධිකරණ සේවා සංගමය.

පිටපත : ලේකම්තුමා, අධිකරණ සේවා කොමිෂන් සභාව.

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අධිකරණ හා බන්ධනාගාර ප්‍රතිසංස්කරණ අමාත්‍යාංශය
நீதி மற்றும் சிறைச்சாலைகள் மறுசீரமைப்பு அமைச்சு
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Superior Courts Complex,
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My No. MOJ/E09/J.N.S.S./2018
Your No.
Date 2018.07.11

ලේකම්
මූල්‍ය හා ජනවාර්ධන අමාත්‍යාංශය

අධිකරණ නිලධාරීන්ගේ වැටුපෙන් සහ දීමනාවලින් 2017 අංක 24 දරන දේශීය ආදායම් පනත යටතේ උපයන විට ගෙවීමේ බදු අය කිරීමේ දී සිදුවන අසාධාරණය පිළිබඳව දැනුම් දීම

උක්ත කරුණ සම්බන්ධයෙන් අධිකරණ සේවා සංගමයේ සභාපති විසින් මා වෙත යොමු කර ඇති 2018.06.06 දිනැති ලිපිය හා බැඳේ. (පිටපතක් අමුණා ඇත)

02. එම ලිපිය අනුව මීට පෙර පැවැති උපයන විට ගෙවීමේ බදු අයකර ගැනීමේ ක්‍රමය සම්බන්ධයෙන් 2015.07.06 දිනැති චක්‍රලේඛ අංක SCE/2015/05 අනුව මහාධිකරණ විනිසුරුවරුන් හා අධිකරණ සේවයේ නිලධාරීන් හට ලබා දී තිබූ බදු සහන 2017 අංක 24 දරන දේශීය ආදායම් පනත යටතේ අහිමි වී ඇති බව දන්වා ඇත. ඒ අනුව විනිසුරු වැටුපෙන් සැලකිය යුතු ප්‍රතිශතයක් බදු ලෙය ගෙවීමට වන බවද එමඟින් මෙම වර්ෂය මුලදී සිදු කළ වැටුප් වැඩිවීම ප්‍රතිඵල රහිත තත්වයකට පැමිණ ඇති බවත් නවදුරටත් දන්වා ඇත.

03. ඒ අනුව අධිකරණ සේවා සංගමයේ ඉල්ලීම පරිදි මීට පෙර බදු සහන හිමිව තිබූ දීමනා වන

I. රියදුරු දීමනාව
II. ඉන්ධන දීමනාව
III. නිල රථයක් ලබා දීම වෙනුවට ගෙවනු ලබන දීමනාව
IV. නිල නිවාස ලබා දීම වෙනුවට ගෙවනු ලබන දීමනාව
V. දුරකථන දීමනාව

යන දීමනාවන් බද්දට යටත් ආදායම ගණනය කිරීමේ දී එකතු නොකිරීම සඳහා හැකියාවක් නිබෙද යන්න කරුණාවෙන් සලකා බලන ලෙස කාරුණිකව ඉල්ලමි.

ඩබ්ලිව්.එම්.එම්.ආර්.අදිකාරී
ලේකම්
අධිකරණ හා බන්ධනාගාර ප්‍රතිසංස්කරණ අමාත්‍යාංශය

පිටපත :

01. කොමසාරිස් ජනරාල්, දේශීය අදායම් දෙපාර්තමේන්තුව
02. ලේකම්, අධිකරණ සේවා කොමිෂන් සභාව
03. සභාපති, අධිකරණ සේවා සංගමය

Letter Sent Regarding Judges Security

පද්මසිරි ජයමාන්න මහතා,
ලේකම්,
රාජ්‍ය පරිපාලන කලමණාකාර සහ නීතිය හා සාමය පිළිබඳ අමාත්‍යාංශය,
නිදහස් චතුරස්‍රය,
කොළඹ 07.

විනිශ්චයකාරවරුන්ගේ ආරක්ෂක රාජකාරී

ශ්‍රේෂ්ඨාධිකරණ සහ අභියාචනාධිකරණ විනිශ්චයකාරවරුන් හැර අනෙක් විනිශ්චයකාරවරුන්ගේ ආරක්ෂාව සහ එම විනිශ්චයකාරවරුන්ගේ පුද්ගලික ආරක්ෂක නිළධාරීන් ලබා දීම සිදු වන්නේ ඒ ඒ විනිශ්චයකාරවරයා රාජකාරී කරන අධිකරණ බල ප්‍රදේශයන්ට අයත් පොලිස් ස්ථාන වලින් වේ. මේ සම්බන්ධයෙන් පොලිස්පතිවරයා විසින් පොලිස්පති චක්‍රලේඛ 2323/11 සහ 2011. 12. 13 දිනැති චක්‍රලේඛය මගින් සියලුම නියෝජ්‍ය පොලිස්පතිවරුන්ට සහ එයින් පහළ පොලිස් නිළධාරීන් වෙත දැනුම් දී ඇත. **(එම චක්‍රලේඛයේ පිටපතක් මේ සමග අමුණා ඉදිරිපත් කරමි.)**

එම චක්‍රලේඛයට වැඩිමනක් ලෙස 2012. 09. 19 සහ 2013. 05. 15 වන දින දරණ ලිපි මගින් වැඩිදුරටත් සමහර නියමයන් පොලිස්පතිවරයා විසින් සිදුකර ඇත. **(එම 2012. 09. 19 සහ 2013. 05. 15 දිනැති ලිපිවල පිටපතක් මේ සමග අමුණා ඉදිරිපත් කරමි.)**

එලෙස චක්‍රලේඛ නිකුත් කරමින් විනිසුරුවරුන්ගේ ආරක්ෂක රාජකාරී විධිමත් කිරීම සඳහා පොලිස්පතිවරයා විසින් නියමයන් කර තිබුණ ද, බොහෝ පොලිස් ස්ථාන වලින් එම චක්‍රලේඛ සහ නියමයන් අනුව විනිශ්චයකාරවරුන්ට අවශ්‍ය ආරක්ෂාව ලබා නොදෙන බවත්, එසේම විනිශ්චයකාරවරුන් අපහසුතාවයට පත් වන ආකාරයෙන් ක්‍රියා කරන බවත් පෙනී ගොස් ඇත.

බොහෝ පොලිස් ස්ථානාධිපතිවරුන් ඉහත චක්‍රලේඛ අනුව කටයුතු නොකරන අතර ඉහළ ඇපොලිස් නිළධාරීන් පවා ස්ථානාධිපතිවරුන් ඉහත චක්‍රලේඛයන් අනුව කටයුතු කරන්නේ ද යන්න පිළිබඳ කිසිඳු සොයා බැලීමක් සිදු නොකරයි. මේ පිළිබඳව අධිකරණ සේවා සංගමය විසින් විවිධ අවස්ථාවල දී අධිකරණ සේවා කොමිෂන් සභාව දැනුවත් කිරීමට කටයුතු කරන ලද අතර, එහි ප්‍රතිඵලයක් වශයෙන් අධිකරණ සේවා කොමිෂන් සභාව ද විවිධ අවස්ථාවල මේ සම්බන්ධයෙන් මැදිහත් වීම් සිදු කරන ලදි. ඒ අනුව අධිකරණ සේවා කොමිෂන් සභාව මේ සම්බන්ධයෙන් පොලිස්පතිවරයා දැනුවත් කිරීම මත මහාධිකරණ විනිසුරුවරුන් සහ අධිකරණ නිළධාරීන්ගේ ආරක්ෂාව පිළිබඳ සොයා බැලීම සඳහා නියෝජ්‍ය පොලිස්පති රොෂාන් ප්‍රනාන්දු මහතා පත් කරන ලද අතර, එම නිළධාරියා සමග සෘජුව සම්බන්ධ වී කටයුතු කරන ලෙසට අධිකරණ සේවා කොමිෂන් සභාවේ ලේකම්වරයාගේ JSC/SEC/CIR/2016 දරණ 2017. 01. 31 දින ලිපිය මගින් සියලු මහාධිකරණ විනිසුරුවරුන් සහ අධිකරණ නිළධාරීන් වෙත දන්වා සිටින ලදි. (එම ලිපියේ පිටපතක් මේ සමග අමුණා ඉදිරිපත් කරමි.)

නියෝජ්‍ය පොලිස්පති රොෂාන් ප්‍රනාන්දු මහතා මේ සම්බන්ධයෙන් ඉතා හොඳින් සොයා බලමින් කටයුතු කළ බව ප්‍රකාශ කළ යුතුය. නමුත් පසුව ඒ මහතා යාපනය කොට්ඨාශයේ ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පති ලෙස පත් වී යාමෙන් පසුව ඒ සම්බන්ධයෙන් සොයා බැලීම සඳහා නියෝජ්‍ය පොලිස්පති පද්මසිරි

මුණසිංහ මහතා පත්කළ බවත්, එම නියෝජ්‍ය පොලිස්පතිවරයා විසින් ඒ සම්බන්ධයෙන් සම්බන්ධීකරණ නිලධාරියා වශයේන පොලිස් අධිකාරි ඩී. ජේ. ඇතුලත්මුදලි පත් කරන බවටත්, අධිකරණ සේවා කොමිෂන් සභාව වෙත 2017. 06. 23 වන දින දන්වා ඇත. (එම ලිපියේ පිටපතක් ද මේ සමග අමුණා ඉදිරිපත් කරමි.)

ඉහත නම් සඳහන් නියෝජ්‍ය පොලිස්පති පද්මසිරි මුණසිංහ මහතා හෝ පොලිස් අධිකාරි ඩී. ජේ. ඇතුලත්මුදලි මහතා විනිශ්චයකාරවරුන්ගේ ආරක්ෂාව සම්බන්ධයෙන් කිසිදු සොයා බැලීමක් සිදු නොකළ අතර, ඉන්පසුව මෙම නිලධාරීන් ද අදාල වගකීමෙන් ඉවත් වී ඇති බව දැන ගන්නට ලැබී ඇත. ඒ අනුව මේ වනවිට කුමන නිලධාරියෙකු ඒ සම්බන්ධයෙන් අනුයුක්ත කර තිබේද යන්න පවා අධිකරණ සේවා සංගමය හෝ විනිශ්චයකාරවරුන් නොදනී.

ඒ අනුව විනිශ්චයකාරවරුන්ට ආරක්ෂාව සැයසීමේදී පොලිසිය විසින් පහත සඳහන් ආකාරයේ ගැටළු සහ අපහසුතාවයන්ට විනිශ්චයකාරවරුන් පත් කරන බව අප සංගමයේ සාමාජිකයන් විසින් විවිධ අවස්ථාවල අප හට දැනුම් දී ඇත. ඒවා නම්,

01. චක්‍රලේඛවල විධිවිධාන ප්‍රකාරව බොහෝ අවස්ථාවල එහි සඳහන් කර ඇති පරිදි නිලධාරීන් නිළ නිවාසවල ආරක්ෂාව සඳහා යෙදවීමට කටයුතු නොකිරීම.

02. චක්‍රලේඛයට පරිහාහිරව බොහෝවිට එක් නිළධාරියෙකු හෝ එසේත් නොමැති නම් ග්‍රාම ආරක්ෂක භටයකු හෝ පොලිස් ආරක්ෂක සහයකයකු ගිනිඅවි නොමැතිව නිළ නිවාසවල ආරක්ෂාවට යෙදවීම.

03. එම යොදවන නිළධාරීන් කිසිදු පෞරෂයකින් තොර සහ නිසියාකාරව රාජකාරි කිරීමට නොහැකි නිළධාරීන් වන අතර, පොලිස් ස්ථානයේ වෙනත් කිසිදු රාජකාරියක් පැවරිය නොහැකි පොලිස් නිළධාරීන් විනිශ්චයකාරවරුන්ගේ නිළ නිවාස වල ආරක්ෂාව සඳහා එවනු ලැබීම.

04. සමහර නිළධාරීන් නිළ නිවාස වල ආරක්ෂාව සඳහා යෙදවීමේදී පැය 08ක සේවා මුරයකට වඩා වැඩි කාලයක් රාජකාරි යෙදවීම හේතුකොට ගෙන එම නිළධාරීන්ට නිසියාකාරයෙන් රාජකාරි කටයුතු ඉටු කිරීමට නොහැකි වීම.

05. ඉහළ නිළධාරීන් මෙම ආරක්ෂක නිළධාරීන් සම්බන්ධයෙන් කිසිදු සොයා බැලීමක් නොකරන බැවින්, එම නිළ නිවාසවල ආරක්ෂාව සඳහා පැමිණෙන පොලිස් නිළධාරීන්, විනිශ්චයකාරවරයා සම්බන්ධයෙන් කිසිදු ගෞරවයකින් තොරව හැසිරෙන අතර, ඔවුන් බොහෝවිට ඔවුන්ගේ හිතුමතේට ක්‍රියා කරන බව පෙනී යයි.

06. පුද්ගලික ආරක්ෂක නිළධාරීන් යෙදවීමේදී චක්‍ර ලේඛයේ සඳහන් කර ඇති පරිදි, මනා පෞරුෂයකින් යුත් නිළධාරීන් යෙදවීමට කටයුතු නොකරන අතර, ඉහත සඳහන් කළ ආකාරයෙන්ම පොලිසියේ වෙනත් රාජකාරි පැවරිය නොහැකි ඉතා නුසුදුසු නිළධාරීන් පුද්ගලික ආරක්ෂක නිළධාරීන් ලෙස යෙදවීම.

07. යම් විනිශ්චයකාරවරයෙකුට පුද්ගලික ආරක්ෂක නිළධාරියෙකු හෝ විනිශ්චයකාරවරයාගේ නිළ නිවසට ආරක්ෂාව සැපයීම සම්බන්ධයෙන් පොලිස් ස්ථානාධිපතිවරයාට පාලනයක් ඇති බැවින්, ඔහු එය විනිශ්චයකාරවරුන්ගේ අධිකරණ ක්‍රියාවලියට බලපෑමක් වන ආකාරයෙන් යොදා ගන්නා අවස්ථා ද දැකිය හැකි ය. තමාට කැමිත ආකාරයෙන් නියෝග ලබා නොදෙන විනිශ්චයකාරවරයෙකු සිටීනම්, හිතාමතාම එම විනිශ්චයකාරවරයාගේ ආරක්ෂාව සම්බන්ධයෙන් හා එම විනිශ්චයකාරවරයාට යොදවනු ලබන පුද්ගලික ආරක්ෂක නිළධාරීන් සම්බන්ධයෙන් ඉතා නොසැලකිලිමත් ලෙස ක්‍රියා කරන අතර පොලිස්ථාන වල සිටින අවිනීත නිළධාරීන් විනිශ්චයකාරවරුන්ගේ පුද්ගලික ආරක්ෂක නිළධාරීන් ලෙස යෙදවීමට කටයුතු කරයි. මෙය විශේෂයෙන්ම සමහර විනිශ්චයකාරවරියන් සම්බන්ධයෙන් ඉතාම වැරදි ආකාරයෙන් යොදා ගන්නා අතර, විනිශ්චයකාරවරියන් ඉතා අපහසුතාවයට පත්වන ආකාරයේ පුද්ගලයින් පුද්ගලික ආරක්ෂක නිළධාරීන් ලෙස යෙදවීමට කටයුතු කරයි.

08. පොලිස්පතිවරයා චක්‍රලේඛයට අනුව විනිශ්චයකාරවරයා රාජකාරී අවසන් කර රාජකාරී නිළ නිවසට පැමිණීමෙන් පසුව ඔහුගේ රාජකාරිය අවසන් වේ. මෙය ප්‍රායෝගික නොවන තත්ත්වයක් වන අතර, සමහර අවස්ථාවල විනිශ්චයකාරවරුන්ට රාත්‍රී කාලයේ ද යම් රාජකාරී කටයුත්තක් සඳහා යෑමට සිදුවන අවස්ථාවලදී ඒ සඳහා නිවසේ රාජකාරියේ යෙදී සිටින ආරක්ෂක නිළධාරියෙකු රැගෙන යෑම පවා එම නිළධාරියා විසින් කරනු ලබන වරදක් සේ සලකා සමහර ස්ථානාධිපතිවරුන් එම නිළධාරීන් සම්බන්ධයෙන් ක්‍රියා කරන බව දැන ගැනීමට ලැබී ඇත.

ඉහත කරුණු අනුව මනාව පැහැදිලි වන්නේ, පොලිස් ස්ථානාධිපතිවරුන් විසින් පොලිස්පතිවරයාගේ චක්‍ර ලේඛය ප්‍රකාරව විධිමත් ආරක්ෂාවක් විනිශ්චයකාරවරුන්ට සැපයීම සිදු නොකරන බවයි. විශේෂයෙන් ම විනිශ්චයකාරවරුන්ට තම ආරක්ෂාව සලසා ගැනීම සඳහා පොලිස් ස්ථානාධිපතිවරුන් මත යැපීමට සිදු වීමෙන් තම රාජකාරිය ස්වාධීනව සිදු කිරීමට සමහර විනිශ්චයකාරවරුන්ට බාධා ඇති වී ඇත. අධිකරණ සේවා සංගමයට වාර්තා වන පරිදි සමහර විනිශ්චයකාරවරුන්ට සිදු වී ඇති ගැහැට පිළිබඳව සලකා බැලීමේදී ඉතා පැහැදිලිව පෙනී යන්නේ දැනට පොලිසිය විසින් විනිශ්චයකාරවරුන්ට ලබාදෙනු ලබන ආරක්ෂාව පිළිබඳව කිසිඳු ආකාරයකින් සෑහීමට පත්විය නොහැකි බවය. පොලිස් නිළධාරීන් විසින් ක්‍රියා කරන ආකාරය අනුව බොහෝ විනිශ්චයකාරවරුන් දැඩි අපහසුතාවයට පත් වී ඇති අතර, ඔවුන්ට ගෞරවනීය ලෙස තම රාජකාරී ඉටු කිරීමට නොහැකි වී ඇත. මේ අනුව මහාධිකරණ විනිසුරුවරුන් සහ පහළ අධිකරණ විනිශ්චයකාරවරුන්ගේ ආරක්ෂාව සඳහා යම් විශේෂිත ක්‍රමවේදයක් අවශ්‍ය බව පෙනී ගොස් ඇත.

ඒ අනුව අධිකරණ සේවා සංගමය ඉල්ලා සිටින්නේ, විනිශ්චයකාරවරුන්ගේ ආරක්ෂාව විධිමත්ව ලබා දීම සඳහා විධිමත් වැඩපිළිවෙලක් සකස් කරන ලෙයසි. ඒ සඳහා අධිකරණ සේවා සංගමය පහත සඳහන් යෝජනා ඉදිරිපත් කර සිටී.

(I) දැනට උපරිමාධිකරණ විනිශ්චයකාරවරුන් සඳහා පිහිටුවා ඇති අධිකරණ ආරක්ෂක කොට්ඨාශය (JSD) තවදුරටත් පුළුල් කර සියළු විනිශ්චයකාරවරුන් සඳහා එම අධිකරණ ආරක්ෂක කොට්ඨාශය යටතේ විශේෂයෙන් පුහුණුව ලැබූ නිලධාරීන් අනුයුක්ත කිරීම.

(II) එසේ නොමැති නම් පොලිස් විශේෂ කාර්ය බලකායේ නිලධාරීන් අනුයුක්ත කර ගනිමින් විනිශ්චයකාරවරුන්ගේ ආරක්ෂාව සඳහා වෙනම ආරක්ෂක කොට්ඨාශයක් සකස් කිරීම.

ඉහත යෝජනා සම්බන්ධයෙක් ගරු නීතිය හා සාමය පිළිබඳ අමාත්‍යවරයාගේ ද අවධානයට යොමු කර ඉක්මන් පියවරක් ගැනීමට කටයුතු කරන ලෙස ඉල්ලා සිටිමි.

අධිකරණ සේවා සංගමය වෙනුවෙන්,

ආර්. එස්. ඒ. දිසානායක,

සභාපති,

අධිකරණ සේවා සංගමය.

2018. 06. 13

පිටපත - ලේකම්තුමා, අධිකරණ සේවා කොමිෂන් සභාව, කොළඹ 12.

Notification of Progress to the President, JSA

රාජ්‍ය පරිපාලන, කළමනාකරණ සහ නීතිය හා සාමය පිළිබඳ අමාත්‍යාංශය
அரசாங்க நிர்வாக, முகாமைத்துவ, சட்டம் மற்றும் ஒழுங்கு அமைச்சு
Ministry of Public Administration, Management and Law & Order

මගේ අංකය / எனது இல / My No: 02/35/06/18
ඔබේ අංකය / உமது இல / Your No:
දිනය / திகதி / Date: 2018.06. 26

පොලිස්පති,
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02. එහි සඳහන් කරුණු සම්බන්ධයෙන් පරීක්ෂා කර බලා ඔබගේ නිරීක්ෂණ සහිත වාර්තාවක් කඩිනමින් මා වෙත යොමු කරන ලෙස කාරුණිකව දන්වා සිටිමි.

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පිටපත -: ආර්.එස්.ඒ. දිසානායක මහතා, - දැන ගැනීම සඳහා
සභාපති,
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IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SEC. 36 A OF THE PARTITION ACT AND SEC. 754 OF THE C.P.C.

Kopiyawattage Herman Perera

and another

Vs

Richard Alfred Edissuriya,

and another

SC APPEAL 27/2011 ,

SC HC CA LA 363/2010

HCCA (Kalutara) 25/2001(F)

D. C. Kalutara Case No. 3089/P

Before : S. Eva Wanasundera PCJ.,
Prasanna Jayawardena PCJ. &
L. T. B. Dehideniya J.

Decided On : 03. 08. 2018.

S. Eva Wanasundera Pcj.

This Appeal arises from the judgment of the Civil Appellate High Court which set aside the ' impugned order ' of the District Court in a Partition Action. This Court has granted leave to appeal on three questions of law, two of which are as suggested by the Appellant and one of which was suggested by the 8th and 4th to 11th Defendant Respondent Respondents. They read as follows:-

1. Have the learned High Court Judges failed to evaluate and address their minds as to the provisions of the Section 36 A of the Partition Law which specifically states that leave to appeal must be first had and obtained in respect of an appeal against an order relating to final partition?
2. Have the learned High Court Judges erroneously held that the Section 754 with regard to Appellate procedure is applicable to an application made under and in terms of Section 36 of the Partition Law when Section 36A of the Partition Law specifically deals with the Appellate procedure with regard to an **order** made under and in terms of Section 36?
3. Can the 32A Defendant Respondent Petitioner invoke the jurisdiction of the Supreme Court by way of leave without having participated in the case before the Civil Appellate High Court?

First and foremost the factual position has to be understood. The Plaintiff, Ileperuma Arachchige Edwin Perera Gunathilaka had filed a Partition action on 20.05.1969 against 43 Defendants to partition the land named Muruthagaha-aswedduma, Thirimawaladenibima and Godelle situated at the village Bahurupola within the Kalutara District containing in extent of 7 Acres 3 Roods and 14 Perches (A7 R3 14 P). At the trial, the corpus was identified and admitted by all the parties as depicted in the Preliminary Plan No. 486 dated 23.06.1975 prepared by Premaratne, Licensed Surveyor. Shares were allotted by the judgment of the District Court after about 15 years and **no appeal** was preferred by any party against the judgment and the interlocutory decree. The District Court then issued a Commission to the Surveyor, Seneviratne to prepare **the Final Scheme of Partition**. The final Plan No. 9014 dated 08.04.1996 and the commission report was filed in Court.

Both in the Preliminary Plan No. 486 dated 18.03.1972 prepared by Premaratne, Licensed Surveyor and in the **final Plan No. 9014 dated 08.04.1996 by Seneviratne** Licensed Surveyor, a large water hole of an extent of A 1. R 1. P 29 was shown within the land. This area is like a huge basin which contains water and was identified as Lot C in Plan No. 486 and as **Lot 3 in Plan No. 9014.** This had been created due to the removal of soil by various people for a long time for the purpose of making bricks and selling the same to outsiders.

In the Final Scheme of Partition , the said Lot 3 in Plan No. 9014 was allocated to the 4th to 11th Defendants. They objected to the final scheme on the ground that it is unreasonable to include the said water hole entirely in their allotment and moved for an **alternative plan.** Another ground alleged was that **Lot 3 had been allocated without any road access** to the said Lot 3 in the final plan. Court issued a

commission and an **alternative plan dated 21.05.1998 was prepared by Serasinghe,** Licensed Surveyor. This alternative plan bears no number on the copy filed in the brief before this Court. It provides for an access road to the new Lot 3 and the said new Lot 3 covers only 70% of the water hole and the new Lot 3 also includes a portion of the high land as well. The alternative plan has changed the boundaries to Lots 3,4, and 5 and those who got Lots 4 and 5 in the final plan, namely the 32A Defendant and '19th and 41 Defendants together' also got their proper shares as well. In this Partition action, I observe that there is Lot 16 from the high land which is of an extent of 1 A 0 R 16.3 P which was left unallotted and a common access road of 12 Perches marked as Lot 17 was allotted to those who received Lots 7, 12, 13, 14 and 15 in the final plan as well as the alternative land.

I also observe that the Plaintiff, Ileperuma Arachchige Edwin Perera Gunathilaka, had received only Lot 9 which is only 17.3 Perches in extent.

After the alternative plan was filed, the matter regarding the way the Surveyor Seneviratne, the Court Commissioner had allocated the land at the Final Scheme of Partition was fixed for inquiry. At the end of the inquiry, the learned District Judge made Order dated 23.05.2001 rejecting the alternative plan and confirming the final plan and entered the final decree accordingly.

The 8th Defendant was aggrieved by that Order of the District Judge and appealed against the same on the ground that the learned District Judge had erred in his findings on facts by not evaluating the evidence at the inquiry with regard to the Final Scheme of Partition, properly and that the learned District Judge had misled himself by misconceiving in law as well. The Plaintiff raised a preliminary objection with regard to the maintainability of the Appeal on the ground that the 8th Defendant had not obtained " leave to appeal" from the Civil Appellate High Court before he filed the Petition of Appeal. The Plaintiff had submitted that the Order of the learned District Judge was made under Section 36(1) (a) of the Partition Law after holding an inquiry regarding the reasonableness of the proposed division of the land into different allotments; that Section 36A of the Partition Law provides that any person who is dissatisfied with an Order of court made under Section 36 should prefer an Appeal against such Order to the Court of Appeal with the leave of the Court of Appeal first had and obtained; and that the 8th Defendant who had appealed, instead of first seeking leave to appeal, had therefore not followed the proper procedure which is bad in law and is misconceived in law. The Plaintiff moved for a dismissal of the Appeal.

The 4th to 11th Defendant Respondents before the Civil Appellate High Court supported the 8th Defendant Appellant's Appeal and moved Court to allow the Appeal of the Appellant. The Plaintiff Respondent, namely Ileperuma Arachchige Edwin Perera Gunathilaka filed written submissions. The 4th to 11th Defendant Respondents filed one written submission in support of the 8th Defendant Appellant. The 8th Defendant Appellant also filed written submissions as directed by Court. The learned High Court Judges considered the written submissions of the parties who filed them and delivered their judgment on 23.09.2010 , setting aside the Judgment of the District Judge and confirming the alternative plan marked as 8D dated 21.05.1998 made by Serasinghe, Licensed Surveyor and directed to demarcate new boundaries to Lots 3, 4, and 5 since the other allotments and the improvements allocated to them are not affected and remained unchanged from the demarcation done in the Final Scheme of Partition plan made by Seneviratne Licensed Surveyor.

Then, the 32 A Defendant Respondent Appellant had obtained leave to appeal from this Court, on the three questions of law as aforementioned above against the judgment of the Civil Appellate High Court.

The name of Kopiyawattage the 32A Haramanis Defendant Perera of Respondent Bahurupola.

Appellant He was is also named known as as Kopiyawattage Herman Perera. He passed away on 12. 05. 2012 while this Appeal was pending in the

Supreme Court and he was substituted by his son, Kopiyawattage Indika Nalin Perera and named in the Caption as " Substituted 32A Defendant Respondent Appellant".

At the time oral submissions were made before this Court, the Counsel for the 8th Defendant Appellant Respondent alleged that the substituted 32A Defendant Respondent was not a party who contested the Appeal before the Civil Appellate High Court and that due to that reason , he cannot appeal to the Supreme Court against the judgment of the Civil Appellate High Court. The Substituted 32A Defendant Respondent Appellant brought up an argument to the effect that his client was a contesting party before the Civil Appellate High Court even though there was no such contest by him according to the Court record. He explained why he submitted that his client was a contesting party, the reason being that the said 32 A Defendant Respondent Appellant was substituted in the District Court in the room of the Plaintiff when the Plaintiff had passed away while the case was pending in the District Court and that the Plaintiff had contested the Appeal before the Civil Appellate High Court.

The Counsel for the substituted 32A Defendant Respondent Appellant drew the attention of this Court to the journal entry number 194 dated 07.07.1992 which reads as that 32A Defendant is appointed as the Substituted Plaintiff. Even then, in this new Amended Caption which is filed by the said Substituted 32A Defendant Respondent Appellant himself, also, the Plaintiff Respondent Respondent's name appears as Ileperuma Arachchige Edwin Perera Gunathilaka. Even at the time the 8th Defendant Appellant Richard Alfred Edussuriya appealed to the Civil Appellate High Court from the judgment of the District Court , in the caption , the name of any Substituted Plaintiff is not mentioned. It may be that the caption was not corrected to carry out the appointment of the substituted plaintiff mentioning the name of the 32 A Defendant Respondent, Kopiyawattage Haramanis Perera alias Kopiyawattage Herman Perera as the Substituted Plaintiff. Yet, I observe that the name of the Substituted Plaintiff in the District Court is mentioned as 'K.M.Perera' and not as 'K.H.Perera'.

I decide however that this Court sees no need to consider the argument of the Appellant's counsel, at this hour, that he was a contesting party before the Civil Appellate High Court as he was the substituted plaintiff in the case at that time, since there are complications with regard to the caption of the District Court and the Civil Appellate High Court as well as observing that the caption alone before this court runs to 9 typewritten A4 size papers.

The Partition Law was amended by Act No. 17 of 1997 and the amended Section 36 and Section 36A read as follows:-

Section 36 (I) - On the date fixed under Section 35, or on any later date which the Court may fix for the purpose, the Court may, after summary inquiry:

a. Confirm with or without modification the scheme of partition proposed by the surveyor and enter final decree of partition accordingly;

b. Order the sale of any lot, in accordance with the provisions of this Law, at the appraised value of such lot given by the Surveyor under Section 32, where the Commissioner has reported to Court under Section 32 that the extent of such lot is less than the minimum extent required by written law relating to the subdivision of land for development purposes and shall enter final decree of partition subject to such alterations as may be rendered necessary by reason of such order of sale.

Section 36(2) – The provisions of Sections 41, 42, 43, 44, 45, 45A, 46, 47 and 48(2) shall mutatis mutandis apply to a sale ordered under paragraph (b) of subsection(I).

The said sections 36(I) and 36(2) are with regard to the final decree of partition.

Section 36A is with regard to Appeals.

Section 36A reads as follows:

Any person dissatisfied with an order of the court

made under Section 36, may prefer an appeal against such order to the Court of Appeal, with the leave of the Court of Appeal first had and obtained.

The 32A Defendant Respondent Appellant argued that the 8th Defendant Appellant Respondent had not obtained leave to appeal when he was aggrieved by the Order of the District Judge and had instead incorrectly preferred the Appeal against the said Order, contrary to the prevailing law, i.e. Section 36A of the Partition Law.

I observe that the Civil Appellate High Court has not specifically mentioned and /or quoted Section 36A within the judgment. The learned Judges have quoted from Section 36 stating that , " Firstly it should be noted that the abovementioned contention is baseless because the Section 36 of the Partition Law envisage in the following manner." He had then placed the exact wording as it is in the amended Section 36(I)(a) and placed the same within inverted commas. The learned High Court Judges then referred to Section 754(4) and 754(5) of the Civil Procedure Code and had come to the conclusion that ' the order of the District Judge rejecting the alternative plan ought to be considered as an order having the effect of a final judgment because the said Order has dealt with not only refusal of the alternative scheme of partition but also confirmation of the final scheme of partition and entering the final decree accordingly.' The finding of the Civil Appellate High Court Judges was that there was no necessity to obtain leave to appeal from the Order of the District Judge.

In the case in hand the question in hand is whether the District Judge when delivering his conclusion in the matter after the summary inquiry, has delivered an Order as referred to in Section 36A of the Partition Law as amended by Act No. 17 of 1997. Even though Section 36A refers to "an Order of Court made under Section 36" , does it mean 'an order made under Section 36 (I)(a)' or 'an order made under Section 36(I)(b)' or both?

Reading Section 36A with Section 36(I) (b) , it is understood that any party who is aggrieved by the order of a sale of any lot in the final partition scheme, may prefer an Appeal against such order , with the leave of the Court of Appeal first had and obtained. However, reading Section 36A with Section 36(I)(a) ,this Court has to decide whether it can be understood that the conclusion reached by " Court after summary inquiry , confirming the scheme of partition proposed by the surveyor and entering final decree of partition accordingly" is equal to an Order as envisaged by Section 36A or whether it can be understood that such conclusion reached by the Court is not equal to an Order as envisaged by Section 36A.

The learned District Judge has come to a conclusion after having heard all parties and after considering the final scheme of partition done by the court commissioner and the alternative scheme of partition done again by another court commissioner with the permission of court as requested by some of the affected parties, at the end of the summary inquiry. Therefore the District Judge had come to a decision which is conclusive on merits. It is a confirmation of the scheme of partition proposed by one of the surveyors. It has brought the matter to a finality. The District Judge's conclusion is the confirmation of the final scheme of partition made under Section 36(I)(a).

There are legal authorities which have been followed at different times by our Courts with regard to' 'Orders' and 'Judgements' and 'Orders which can be categorized as a final adjudication of the matters before Court' in deciding whether litigants should file a final appeal or an appeal with leave of the Court of Appeal first had and obtained. In the case of Dona Padma Priyanthi Senanayake Vs H.G. Chamika Jayantha and two Others, 2016 BLR 74 which is contained in the 2017 Bar Association Law Journal Reports Vol XXIII at page 74 in case number SC Appeal 41/2015 (SC Minutes of 04.08.2017) decided by a bench of 7 Judges, Chief Justice, Priyasath Dep PC it was held that the proper approach to decide whether an order given by court has the effect of a final judgement or not, is the approach adopted by Lord Esher in Salaman Vs Warner [1891, I QBD 734] , 60 L J Q B 624 and cited with approval later by Lord Denning

in Salter Rex and Co. Vs Gosh [1971, 2 All ER 865].

In Salaman Vs Warner,(supra) Lord Esher stated thus:

"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands finally disposed of the matter in dispute, I think that for the purpose of these rules, it is final. On the other hand, if their decision , if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final but interlocutory."

In fact, the decision of the 7 Judge Bench in the case of Dona Padma Priyanthi Senanayake Vs H.G. Chamika Jayantha and two Others 2016 BLR 74 confirmed the stand taken by the 5 Judge Bench presided by Dr. Shirani

Bandaranayake J (as she then was) in deciding the case of S.R. Chettiar and Others Vs S.N.Chettiar and Others 2011 BLR 25, 2011 2 SLR 70.

In the case in hand, I find that the judgment of the District Judge of Kalutara had given an order/ conclusion which finally disposed the matter in dispute because giving that order/conclusion either way, in favour of the Appellants or the Respondents, it had the effect of a finality. In other words, if the District Judge concluded the other way, granting that the alternative scheme of partition was correct instead of granting that the final scheme of partition was correct, then again the matter comes to a finality. Therefore, according to the aforementioned authorities, I am of the view that, the decision of the District Judge was an order/conclusion with a finality and therefore the party who preferred the appeal had taken the correct path of having filed a Final Appeal. It was not an interlocutory order from which a leave to appeal application would have had to be filed by the aggrieved party.

I hold that the confirmation of the final scheme of partition by the District Judge was a decision bringing the matter to a finality and it is not an Order as envisaged by Section 36A of the amended Partition Law. The argument of the 32A Defendant Respondent Appellant against the 8th Defendant Appellant Respondent fails.

The learned Judges of the Civil Appellate High Court has correctly analyzed the law and interpreted the Section 754(4) and 754(5) of the Civil Procedure Code and held thus at page 8 of their judgment:

" When this rule is applied to the facts of this case, it would appear that the order rejecting the alternative scheme of partition and plan while confirming the final partition scheme is an order which has a character of a final judgment because the rights of the 8th Defendant is completely denied by the said order."

Having said that, and then having analyzed the evidence before the inquiry with regard to the nature of the case, the Civil Appellate High Court Judges have concluded that Surveyor Seneviratne had acted in an arbitrary manner when he prepared the Final Scheme of Partition disregarding the directions given in the interlocutory decree as regards the allotment of shares. According to this final scheme Lot 3 allotted to the Appellant has no access to the main road. No adequate access was given to any roadway from Lot 3, nor to the main road nor to the road depicted in the North Eastern side of the land. In fact the District Judge seems to have turned a blind eye to the said fact of not granting any roadway from Lot 3 to the Appellant. The water hole or the water basin is about 10 feet deep and covers a huge area. Having analyzed the evidence and the plans before the Appellate Court, the High Court has arrived at the conclusion that " on comparison with the Final Plan, the Alternative Plan is much more pragmatic and realistic". They have confirmed the demarcations marked in the alternative plan.

I answer the questions of law aforementioned in favour of the Appellant and against the Respondents. I affirm the judgment of the Civil Appellate High Court.

The Appeal is dismissed. However I do not order costs.

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

Judge of the Supreme Court

Prasanna Jayawardena PCJ.

I agree.

Judge of the Supreme Court

L.T.B. Dehideniya J.

I agree.

Judge of the Supreme Court

STATE LANDS (RECOVERY OF POSSESSION) ACT

Lakshman Ravendra Watawala,

Vs.

Kulappuarachchige Don Dhammika Perera,

And Others

SC Appeal 31/2009 and
SC Appeals 35/2009 – 78/2009
SC Spl LA No. 237/2008
HC Kegalle No. 2901/Appeal
MC Warakapola No. 37925

Before : Priyantha Jayawardena PCJ,
Nalin Perera J and
Vijith Malalgoda, PC, J

Decided on : 6th July, 2018

Priyantha Jayawardena PC, J

This is an appeal filed against a Judgment of the High Court of the Sabaragamuwa Province holden in Kegalle setting aside an Order of Ejectment made by the Magistrate's Court of Warakapola under the provisions of the State Lands (Recovery of Possession) Act No.07 of 1979 as amended.

At the commencement of the hearing of this Appeal, the parties in SC Appeal Nos. 35/2009 to 78/2009 agreed to abide by the judgment of this appeal since the questions of law where leave was granted in this appeal and all the said appeals are identical. The grounds of appeal, inter alia, are as follows:

a) Did the Respondent not have a right of appeal in respect of the Order of the Magistrate overruling the preliminary objections dated 15th February, 2007 and the Order of Ejectment dated 1st March, 2007 in view, inter alia, of the provisions of Section 10(2) of the State Lands (Recovery of Possession) Act as amended?

b) Did the High Court act without jurisdiction and/or err in law by entertaining the appeal and giving Judgment thereon?

c) Did the High Court err in law by giving Judgment on the merits of the appeal without first considering and making an order on the aforesaid preliminary objections raised by the Appellant?

d) Did the High Court err by not considering the aforesaid preliminary objection raised and maintained by the Appellant and in rejecting/ overruling the said objections?

e) Did the High Court err in law by holding that the learned Magistrate should have considered/ determined *the questions of:*

   i. Whether the Appellant was a 'Competent Authority'; and

   ii. Whether the land in question was 'State Land';

in view, inter alia, of Section 9 of the State Lands (Recovery of Possession) Act?

Factual Matrix

The Applicant instituted Application No. 37925 and another fifty applications in the Magistrate's Court of Warakapola against the Respondent and others (hereinafter collectively referred to as 'the Respondents') in terms of Section 5 of the State Lands (Recovery of Possession) Act No.07 of 1979 as amended for the ejectment of the Respondents from the lands described in the Schedule to the said applications.

The Counsel for the Respondents appearing before the Magistrate's Court raised the preliminary objection in all cases stating that the land in question was not a

'State land' and the Applicant was not a 'Competent Authority' in terms of the State Lands (Recovery of Possession) Act No. 07 of 1979 as amended.

The learned Magistrate by his Order dated 15th February, 2007 amalgamated all the applications (Nos. 32925 to 37944, 37946 to 37969, and 37980 to 37985) and overruled the said preliminary objections and granted a date for the Respondents to show cause as to why the Respondents and their dependents, if any, should not be ejected from the land.

Thereafter, the Respondents filed Petitions of Appeal on 22nd February, 2007 against the said Order of the learned Magistrate. However, these Appeals were not pursued by the Respondents.

As there was no stay order to stay the proceedings, the Magistrate's Court took up the said applications for inquiry on 1st March, 2007 and issued Orders of Ejectment as the Respondents failed to produce a valid permit or other written Authority of the State granted in accordance with any written law.

The Respondents appealed to the High Court of the Sabaragamuwa Province Holden in Kegalle against the Judgment of the learned Magistrate made on 1st March, 2007 issuing the Order of Ejectment on the Respondents. The appeals in this Court stem from these appeals.

Further, in addition to the said Appeals, the Respondents subsequently filed Revision Applications dated 13th March, 2007 praying for the revision of the Order made on 1st March, 2007 and to have the said Order set aside.

When the said Appeals were taken up for hearing before the High Court, the Applicant-Respondent raised the preliminary objection that the Respondent-Appellants had no right of appeal in terms of the State Lands (Recovery of Possession) Act.

However, the High Court by its Judgment dated 9th September, 2008 overruled the said preliminary objections and held that the Order of the learned Magistrate dated 15th February 2007 overruling the preliminary objections and the Order of Ejectment dated 1st March, 2007 were contrary to the law and set aside the said Judgment. The High Court further held that the said Judgment was applicable to the other connected Appeals.

Later, the High Court dismissed the abovementioned Applications for Revision on 23rd September, 2008 as the High Court had already entertained the appeals and set aside the Orders of the learned Magistrate.

Being aggrieved by the Judgment of the High Court dated 9th September, 2008, the Applicant-Respondent had filed the instant appeals against the said Judgment and leave was granted by this Court on the aforementioned questions of law.

Submissions of the Appellant

At the hearing, the learned President's Counsel for the Applicant-Respondent-Appellant (hereinafter 'the Appellant') submitted that as the right of appeal has been taken away by Section 10(2) of the State Lands (Recovery of Possession) Act, the only remedy available to those who are adversely affected is to institute actions against the State for vindication of title under Section 12 of the Act. In support of his submission, he cited Farook v Gunewardene, Government Agent, Amparai (1980) 2 SLR 243 at 247 wherein the Court of Appeal held that:

"When the Legislature has made express provision for any person who is aggrieved that he has been wrongfully ejected from any land to obtain relief by a process described in the Act itself, it is not for this Court to grant relief on the ground that the petitioner has not been heard. Where the structure of the entire Act is to preclude investigations and inquiries and where it is expressly provided (a) the only defence that can be put forward at any stage of the proceedings under this Act can be based only upon a valid permit or written Authority of the State and (b) special provisions have been made for the aggrieved parties to obtain relief, I am of the opinion that the Act expressly precludes the need for an inquiry by the competent authority before he forms the opinion that any land is State land."

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

Submissions of the Respondent

The Counsel for the Respondent-Appellant-Respondent (hereinafter 'the Respondent') stated that the Legislature would never have intended to deprive litigants of the right of appeal with regard to Orders, particularly from Orders made by the lower courts. In support of his submission, he cited Section 31 of the Judicature Act No. 2 of 1978 which states:

"Any party aggrieved by any conviction, sentence or order entered or imposed by a Magistrate Court may subject to the provisions of any law appeal therefrom to the Court of Appeal in accordance with any law, regulation or rule governing the procedure and manner for so appealing." [Emphasis added]

He further cited Article 154P(3) of the 1979 Constitution of the Democratic Social Republic of Sri Lanka (hereinafter referred to as 'the Constitution') which states:

"Every such High Court shall –

(a) ...

(b) Notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates'

Courts and Primary Courts within the Province..." [Emphasis added]

The Respondent further submitted that in the light of the aforementioned provisions of legislation, the Respondents were entitled to appeal to the High Court as the abovementioned legislation conferred the right of appeal against the Orders and Judgments of the Magistrate's Court.

Now I shall consider the questions of law where the leave was granted by this Court.

Did the Respondent not have a right of appeal in respect of the Order of the Magistrate overruling the preliminary objections dated 15th February, 2007 and the Order of Ejectment dated 1st March, 2007 in view, inter alia, of the provisions of section 10(2) of the State Lands (Recovery of Possession) Act?

This Court is called upon to consider whether the Respondent had a right of appeal against the Orders of the learned Magistrate made on 15th February, 2007 overruling the said preliminary objections and the Order of Ejectment dated 1st of March, 2007 to eject the Respondents under the State Lands (Recovery of Possession) Act.

Is There a Right of Appeal Under the State Lands (Recovery of Possession) Act?

Section 10 of the State Lands (Recovery of Possession) Act No.7 of 1979 as amended states:

"(1) If after inquiry the Magistrate is not satisfied that the person showing cause is entitled to the possession or occupation of the land he shall make order directing such person and his dependents, if any, in occupation of such land to be ejected forthwith from such land.

(2) No appeal shall lie against any order of ejectment made by a Magistrate under subsection (1)." [Emphasis added]

Therefore, I shall now consider whether a party can file an appeal against an Order of Ejectment made by a Magistrate's Court and under Section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

Restrictions on Appellate Jurisdiction

Section 10(2) of the said Act states that no appeal shall lie against an order of ejectment made by the Magistrate under Section 10(1) of the Act. Such clauses are referred to as ouster clauses.

The purpose of an ouster clause is to oust the jurisdiction of the courts. Ouster clauses can be broadly split into two types, namely:

(a) public law ouster clauses; and

(b) jurisdictional ouster clauses.

Ouster Clauses in Public Law

Public law ouster clauses are clauses that oust the supervisory jurisdiction of the courts regarding administrative decisions made by administrative bodies. These clauses preclude the judicial review of

such decisions. In public law, a clause which states "shall not be called into question in any court" is known as a finality clause or an ouster clause.

In light of the doctrine of separation of powers, ousting the jurisdiction of the court undermines the principle of checks and balances as judicial review has often been considered an integral part of the democratic system. However, ouster clauses have been recognised as a necessary provision of law because such clauses offer finality. Hence, the Legislature, in its own wisdom, introduces ouster clauses in appropriate instances when enacting legislation. However, our Courts entertain Revision Applications if a grave prejudice has been caused to a litigant even if there is an ouster clause. Such instances will be considered later in this judgment.

Section 22 of the Interpretation Ordinance No. 21 of 1901 as amended enshrines an ouster clause applicable to matters of administrative law. However, the proviso to the abovementioned section enables a party to invoke the writ jurisdiction of the Court of Appeal under Article 140 and 141 of the Constitution.

Jurisdictional Ouster Clauses

I shall now consider jurisdictional ouster clauses. Jurisdictional ouster clauses partially or as a whole oust the jurisdiction of court to review an order or judgment of a lower court and make the decisions of the lower courts final.

Jurisdictional ouster clauses may be categorised into the following two categories:

(a) partial ouster clauses; and

(b) total ouster clauses.

(a) Partial Ouster Clauses

Partial ouster clauses retain the jurisdiction of courts subject to imposing certain restrictions on jurisdiction; such as by limiting the grounds of appeal or by providing a specific procedure of appeal.

More often than not, similar provisions are found in Sri Lankan legislation and some of those provisions are considered below.

Further, Section 317 of the Code of Criminal Procedure Act No. 15 of 1979 as amended states as follows:

"(1) An appeal shall not lie from a conviction –

(b) Where an accused has under section 183 made an unqualified admission of his guilt and been convicted by a Magistrate's Court.

(2) An appeal upon a matter of law shall lie in all cases." [Emphasis added]

The abovementioned section ousts the jurisdiction of the Appellate Courts if the accused had been convicted by a Magistrate's Court consequent to an unqualified admission of guilt.

A similar ouster clause can also be found in Section 318 of the Code of Criminal Procedure which states:

"An appeal shall not lie from an acquittal by a Magistrate's Court except at the instance or with the written sanction of the Attorney-General."

In this instance, an appeal against an acquittal can be lodged only after obtaining the sanction of the Attorney General.

Further, Section 31D of the Industrial Disputes Act No. 30 of 1950 as amended restricts the right to appeal to only on questions of law. Section 31D states:

"(2) Save as provided in subsection (3) an order of a labour tribunal shall be final and shall not be called in question in any court.

(3) Where the workman who, or the trade union which, makes an application to a labour tribunal, or the employer to whom that application relates is dissatisfied with the order of the tribunal on that application, such workman, trade union or employer may, by written petition in which the other party is mentioned as the respondent, appeal from that order on a question of law."

[Emphasis added]

Thus, an appeal against a Labour Tribunal Order is restricted only to a question of law arising out of a Labour Tribunal order. Similar provisions are found in Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended; Section 5 of the Arbitration Act No. 11 of 1995 and Article 128(1) of the 1979 Constitution of Sri Lanka.

(b) Total Ouster Clauses

These ouster clauses completely oust the jurisdiction of the courts.

The Exercise of Revisionary Jurisdiction in the Presence of Ouster Clauses

Notwithstanding the provision of total ouster clauses, the courts exercise revisionary powers where they deem fit.

In Sirimavo Bandaranaike v Times of Ceylon [1995] 1 SLR 22, the Supreme Court held that Section 88(1) of the Civil Procedure Code merely excluded appeals and could not be taken to infer an exclusion of revisionary jurisdiction. Further, the Court held that the express exclusion of an appeal justified the inference that other remedies, such as revision, were permitted.

Moreover, in Rasheed Ali v Mohamed Ali and Others [1981] 1 SLR 262, the Supreme Court held that the removal of the right of appeal does not prevent the exercise of revisionary jurisdiction in exceptional circumstances. The Court held at 265:

> "... the powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. When, however, the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstance. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm." [Emphasis added]

In the early case of Ranesinghe v Henry et al 1 NLR 303, Chief Justice Bonser held that while there can be no appeal from a claim order, the Court can exercise its revisionary powers when the matter comes up on appeal and exercised its powers in revision to quash the order of the District Court judge.

This principal was followed in The King v Seeman Alias Seema 9 CLW 76 wherein the court held that where the appeal was out of time by one day, it could be treated as an Application for Revision.

Moreover, in Nissanka v The State [2001] 3 SLR 78, the Court of Appeal considered a Petition of Appeal that was filed out of time as an Application for Revision on the basis that the revisionary powers that had been conferred by Section 364 of the Code of Criminal Procedure Act No. 15 of 1979 as amended is wide enough to permit the exercise of revisionary powers in this instance as it is warranted to meet the ends of justice.

Therefore, it is evident that in appropriate instances, the Court has entertained Revision Applications when there was no right to appeal.

However, in the instant appeal, the Revision Applications against the Orders of the learned Magistrate were dismissed by the High Court as the High Court had entertained the appeals and set aside the judgment. Further, the appeals before this Court arose from the judgments delivered in the appeals filed before the High Court. Thus, the above proposition of law shall not apply to the instant appeal.

Furthermore, I am of the opinion that where the right of appeal is taken away by explicit words, it is not possible to consider an appeal filed in such an instant as a Revision Application as the court has no jurisdiction to entertain such appeals.

The Nature of the Right of Appeal

There are several Acts that have conferred the right to appeal. Section 754 of the Civil Procedure Code states:

> "(1) Any person who shall be dissatisfied with any judgment, pronounced by any original Court in any civil action, proceeding or

matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.

(2) Any person who shall be dissatisfied with any order made by an original Court in the course of any civil action, proceeding or matter to which he is, or seeks to be a party, may prefer an Appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained."

Section 4 of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 as amended provides a general right of appeal as follows:

> "A party aggrieved by any conviction, sentence or order, entered or imposed, by a Magistrate's Court ... may, subject to the provisions of any written law applicable to the procedure and manner for appealing and the time for preferring such appeals, appeal therefrom to the High Court established by Article 154P of the Constitution for the Province within which such court or tribunal is situated ..."

In instances where the Act is silent with regard to the right of appeal, the courts have held that there can be no right of appeal as the right of appeal is a substantive right. In Re Wijesinghe 16 NLR 312, the Court held, "it is a well-established principle of law that an appeal never lies to a party to a legal proceeding from an order made in it unless the right is expressly given by statute." [Emphasis added]

The Supreme Court in The Indian Bank Ltd v Sri Lanka Shipping Company Limited 79 NLR I followed the judgment of Morris LJ in Healey v Minister of Health (1954) 3 WLR at page 821 wherein it was held, "the Court cannot invent a right of appeal where none is given" as there was no explicit right of appeal given to the court from the determination of the Minister and held that since there was no right to appeal under the Administration of Justice Law except in limited circumstances, a right of appeal "can be taken away by statute either expressly or by necessary intendment" and the Court had no power to confer upon themselves a jurisdiction that they did not possess.

However, with the subsequent enactment of other Acts which confer jurisdiction on appellate courts to hear appeals in the absence of a specific provision for appeal in the principle enactment, our courts have interpreted the law to enable such appeals to be entertained.

In the recent case of Mallawarachchige Kanishka Gunawardhana v H K Sumanasena SC Appeal No. 201/2014, where the Supreme Court held that although there was no right of appeal in the Sri Lankan Bureau of Foreign Employment Act No. 21 of 1985 (hereinafter the 'SLBFE') by applying Section 4(2) of the International Covenant on Civil and Political Rights Act No. 56 of 2007 which provided a general right of appeal against convictions in respect of criminal offences by the Magistrates' Courts. The court held that a right of appeal exists regarding such convictions notwithstanding the fact that the SLBFE Act has no specific provision of appeal.

The Effect of Section 10(2) of the State Lands (Recovery of Possession) Act

The preamble of the State Lands (Recovery of Possession) Act states that it is an Act to make provision for the Recovery of Possession of State Lands from person in unauthorised possession or occupation.

Since the language of Section 10(2) is plain and clear, it can be interpreted by applying the literal rule of interpretation. It is clear from a plain reading of Section 10(2) of the State Lands (Recovery of Possession) Act No. 7 of 1979 that the Legislature intended that the ouster clause should effectively remove the right of appeal in respect of Orders of Ejectment made under Section 10(1) of the State Lands (Recovery of Possession) Act.

Prior to the enactment of the State Lands (Recovery of Possession) Act in 1979, an encroachments survey was carried out in 1979 which revealed that 951,000 acres of State land were encroached by over 600,000

persons; thus, the Act was proposed to provide an expeditious procedure for the State to regain control of these lands (as referred to in the Hansard of 8th August, 1981). As ordinary civil action may result in protracted litigation, the expedited recovery process in the Magistrates' Courts were implemented. This highlighted the intention of Parliament to expedite the recovery of State land occupied by encroachers or occupation of such lands.

When the Supreme Court restricted the powers of the State under the said Act by its judgment in Senanayake v Damunapola (1982) 2 SLR 621, the Legislature amended the said Act by enacting Act No. 29 of 1983 to express where the Competent Authority is of the opinion that a land is State land and a person is in unauthorised possession or occupation of such land, the Competent Authority may serve a notice on such person to vacate the said land with his dependents and deliver vacant possession to the Competent Authority. Moreover, Section 1A was added to state that no person could make any representation or be entitled to a hearing regarding the abovementioned notice.

Further, by Act No. 29 of 1983, Section 5(a)(ii) and Section 5(a)(iv) of the principal enactment was amended by replacing the following words "application is State land" and "application is in unauthorised possession or occupation"; and substituting them with the words "application is in his opinion State land" and "application is in his opinion in unauthorised possession or occupation", respectively.

Thus, it was ensured that the recovery procedure is expedited. Therefore, the ouster clause which removed the right to appeal must be considered in this context.

The State Lands (Recovery of Possession) Act was enacted prior to the present Constitution and was preserved by Article 168(1) of the 1978 Constitution. Thus, when interpreting such Acts that have been preserved by the Constitution, they must be interpreted in a manner harmonious with the present Constitution and the legislation enacted under the said Constitution.

Section 10(2) specifically removes the right of appeal against the Orders of Ejectment by the Magistrates' Courts. Thus, when there is a specific ouster clause enshrined in an Act, it is not possible to read such an Act along with another Act which provides a right of appeal against an Order or Judgment of a particular Court. Therefore, these acts have no application to the instant case.

In light of the above, I am of the opinion that the questions of law posed to the Court should be answered as follows:

(a) Did the Respondent not have a right of appeal in respect of the Order of the

Magistrate overruling the preliminary objections dated 15th February, 2007 and the Order of Ejectment dated 1st March, 2007 in view, inter alia, of the provisions of Section 10(2) of the State Lands (Recovery of Possession) Act as amended?

Yes.

In view of the foregoing answer, the question of considering the other questions of law will not arise.

Hence, I am of the opinion that the High Court lacked jurisdiction to entertain the appeal. Accordingly, I allow the appeal and set aside the judgment of the High Court dated 9th September, 2008.

This judgment is applicable to SC Appeal Nos. 35/2009 to 78/2009 and therefore, I allow the SC Appeal Nos. 35/2009 to 78/2009.

I order no costs.

Judge of the Supreme Court

Nalin Perera, J

I agree
Judge of the Supreme Court

Vijith K. Malalgoda, PC, J

I agree **Judge of the Supreme Court**

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

MOTOR TRAFFIC ACT, ADEQUACY OF PUNISHMENT

Ponnadura Shantha Silva

Vs.

Officer In Charge, Kalutara South.

SC Appeal 163/2014,

SC (Spl) LA.143/2014

High Court Kalutara Appeal No.546/2011,
Magistrate's Court Kalutara Case No.97938

Before : Buwaneka Aluwihare, PC,J
Priyantha Jayawardena, PC, J &
Nalin Perera, J.

Decided On : 03.08.2018

Aluwihare, Pc, J:

The Accused-Appellant-Appellant (hereinafter referred to as Accused-Appellant) had been charged before the Magistrate's Court of Kalutara under the following counts:-

(1) Committed an offence punishable under Section 149(1) of the Motor Traffic Act by failure to avoid an accident and thereby

(2) By rash or negligent act as to endanger human life, caused grievous hurt to one Kandadurage Lalithangani Rani, an offence punishable under Section 329 of the Penal Code.

(3) Failed to report an accident and thereby violated Section 161(1)A(iv) of the Motor Traffic Act.

Consequent to the accused appellant pleading not guilty to the charges aforesaid, the case against the accused-appellant proceeded to trial. At the conclusion of the trial, the learned Magistrate found the accused-appellant guilty on counts 2 and 3 aforementioned and proceeded to convict and sentence the accused-appellant.

The learned Magistrate imposed a term of imprisonment of three months and a fine of Rs.1000/- on count No.2 and proceeded to suspend the operation of the term of imprisonment for a period of five years.

With regard to the 3rd count the accused-appellant was imposed a fine of Rs. 1,500/- and a default term of one-month simple imprisonment was also imposed.

Aggrieved by the conviction and the sentence imposed by the learned Magistrate the accused-appellant appealed against the judgment to the High Court.

The learned High Court Judge by his judgment dated 28th July,2014 affirmed the conviction of the accused-appellant.

At the hearing of the appeal before the High Court it had been submitted on behalf of the state that the sentence imposed by the learned Magistrate is inadequate when one considers the rashness and the negligence on the part of the accused-appellant and the State moved to have the sentence imposed by the learned Magistrate enhanced.

The learned High Court Judge thereupon had called on the accused-appellant to show reasons as to why the application of the State should not be allowed.

Having heard the accused appellant on the issue of sentence, the learned High Court Judge having set aside the sentence imposed by the learned Magistrate on count 2, substituted the same with a custodial sentence of imprisonment of one year.

When this matter was supported, the court granted special leave on the following questions of law: (Sub-paragraphs (b) (g) (i) and (j) of paragraph 17 of the Petition.)

(i) Has the Provincial High Court erred in Law by failing to appreciate that the Prosecution failed to establish the degree of proof required in establishing a charge of criminal Negligence?

(ii) Has the Provincial High Court erred in Law by affirming the conviction without considering that the Learned Magistrate failed to evaluate the evidence of the defence witnesses as required by the Law?

(iii) Did the Learned High Court err in Law by imposing a custodial sentence of 1-year rigorous imprisonment on the Petitioner contrary to the principles of sentencing

(iv) In any event was the sentence imposed to the Petitioner is excessive?

At the hearing of this appeal the learned President's Counsel for the accused-appellant confined his submissions to the questions of law referred to in paragraph (i) and (j) of paragraph 17 of the Petition [(i) and (ii) above].

It was contended on behalf of the accused-appellant that he had been employed as a driver with the Sri Lanka Transport Board and that he had no previous convictions. It was also contended that he is a father of three children and two of them were engaged in higher studies.

It was also strenuously argued on behalf of the accused-appellant that the learned High Court Judge misdirected himself with regard to the degree of negligence that is needed to establish criminal negligence and submitted that the principles laid down by courts suggests that the prosecution has to establish a high degree of negligence on the part of the accused, if the accused is to be found guilty for criminal negligence and the prosecution had not adduced sufficient evidence to establish the degree of negligence required to convict a person for criminal negligence.

The facts albeit briefly can be narrated as follows;

The injured who was a teacher; in order to reach the school at which she was teaching, had taken the bus driven by the accused to come to Katukurunda junction. Before the bus could reach the destination, however, the accused-appellant had indicated that the bus will not proceed beyond a particular point and wanted all the passengers to disembark. There had been about 15 passengers, and she was also in the process of getting off the bus as it was announced that the bus would not proceed further.

As she was about to get off, the bus had pulled out and as a result the injured had got thrown off the bus. Due to the impact of the fall, she had suffered a fracture of her left wrist, among other injuries. The bus, however, had proceeded without stopping.

In the case before us the only issue that needs to be addressed is as to whether the learned High Court Judge was justified in enhancing the sentence. Prior to that, the Court must first look to see whether the burden of proof has been discharged by the Prosecution, since that is the predicate for enhancing the sentence.

The requirement of high degree of negligence to establish criminal negligence, referred to by the learned President's Counsel for the Appellant, no doubt, was a reference to the decision in King Vs. Leighton 47 NLR 283., where it was held that "[...] in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the State and conduct deserving punishment.?" a standard which was articulated by Hewart CJ in R v Bateman (1925) 19 Cr App R 8 - later explained in Andrews v DPP [1937] AC 576—and followed by our Courts in Lourenz V Vyramuttu 42 NLR 472 and in King v Leighton (supra).

However, as explained by Atkins J. in Andrews V DPP [1937] AC 576 and later by Lord Mackay of Clashfern LC in Regina V Shulman, Regina V Prentice,

Regina V Adomako; Regina V Hollowa [1995] I AC 171, [1994] UKHL 6, [1994] 3 WLR 288, [1994] 3 All ER 79 the circumstances in which negligence has to be considered may make an elaborate and rather rigid directions inappropriate. Trying to achieve a 'spurious precision' in a branch of law, i.e, criminal negligence, which extends not only to acts causing death but also hurt and grievous hurt, the degree of circumspection as is expected of the average man must necessarily be considered vis a vis the circumstances under a particular situation. Although decided in the latter part of 19th century words of O'Brian J in the case of R Vs. Elliot (1889) 16 Cox 710 would be of relevance even of today. O'Brian J observed that, "the degree of care to be expected from a person, the want

of which would be gross negligence or less than that, must in the necessity of things, which the law cannot change, have some relation to the subject and the consequences" ... What O'Brian J referred to, appears to be, the want of care required, must relate to the act and the consequences.

Whether a person was negligent or not has to be considered taking into account the facts and circumstances of each case and upon consideration of the duty of care expected of him under the circumstances of the case. The seriousness of the breach of duty must be judged based on the circumstances in which the defendant was placed when it occurred. As Lord Mackay of Clashfern LC observed in relation to the charge of manslaughter in R v Adamako (supra) "The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal. [...] The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission." This is similar to what O'Brien J said "the want of care required must relate to the act and the consequences to some degree". He went on to state that "if the prisoner was absorbed in the business and interests of the company as to give no heed to their (passengers) safety, that might be considered as negligence". (Elliot supra at page 714). It appears here, that O'Brian J referred to an inadvertent state of mind as opposed to recklessness. Particularly when one is entrusted with a responsibility such as carrying passengers, he is expected, at all times to be mindful of the duty cast on him and there is no room for inadvertence.

In the case before us, the accused-appellant was entrusted with the responsibility of carrying passengers in an omnibus and had a duty of care that by his conduct, he does not expose the passengers to any danger that would result in any injury or harm being caused to them. Pulling away in the middle of passengers disembarking, to say the least is grossly a rash act and, in my view, goes beyond inadvertent state of mind that Judge O'Brian spoke of in the case of Elliot (supra).

According to the accused-appellant's own admission under oath he had seen the injured falling. The position taken up by the accused-appellant was that the passenger fell after she got off the bus and that was the reason for him to drive off.

The learned Magistrate had accepted the evidence of the injured and had rejected the version of the accused-appellant and had come to the conclusion that the bus driven by the accused-appellant had pulled off before she could disembark and this resulted her fall, an act imminently dangerous that there was every likelihood of a passenger falling off the bus and coupled with that, the accused-appellant had no excuse for his course of conduct. The accused-appellant had a duty of care to ensure safety of the passengers he carried. The conduct of the accused-appellant is reprehensible to say the least and sufficiently grave to fall within the ambit of criminal negligence.

Under these circumstances I am of the view that the learned High Court Judge was correct in enhancing the sentence imposed on the accused-appellant by the Magistrate and I see no reason to interfere with the same. One must bear in mind that punitive action is not only to reform the offender but should serve as a deterrence as well.

Chief Justice Basnayake in the case of A.G v. H. N De Silva [1955] 53 C.L.W 49 observed;

"In assessing a punishment that should be passed on an offender. A judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the point of view from the angle of the offender. A judge should in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the

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

offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys public confidence that must be taken into account in assessing the punishment [...] I have mentioned where public interest or welfare of the state (which are synonymous) outweigh the previous good character, antecedence and the age of the offender. Public interest must prevail...."

For the reasons set out above, I answer all the questions of law on which leave was granted in the negative and accordingly this appeal is dismissed.

In the Petition filed before this court the accused-appellant has averred that before he could invoke the jurisdiction of this court by way of special leave to appeal, the learned High Court Judge directed the Magistrate concerned to carry out the sentence which appears to have been complied with by the learned Magistrate.

The court directs the learned Magistrate to ascertain from the Prison authorities, whether the accused-appellant had served any part of the sentence imposed by the learned High Court Judge and if so, to give necessary direction to the Prison authorities that the accused-appellant is required to serve only the balance part of the one-year sentence imposed, after discounting the period of said sentence the accused-appellant had already served.

Appeal dismissed

Judge Of The Supreme Court

Priyantha Jayawardena, Pc

I agree

Judge Of The Supreme Court

Justice H. N. J. Perera

I agree

Judge Of The Supreme Court

SEC 41 OF THE C.P.C.

K.A. Chandralatha

Vs

Keeralage Parakrama

SC Appeal 188/2011,

SC/HCCA/LA287/2010,

NCP/HCCA/APP/299/07

DC Anuradhapura Case No.16676/L

Before : Sisira J de Abrew J,
Priyantha Jayawardena PC J,
Murdu Fernando J

Decided on : 18.7.2018

Sisira J de Abrew J

This is an appeal against the judgment of the Civil Appellate High Court dated 22.7.2010 wherein the learned Judges of the Civil Appellate High Court set aside the judgment of the learned District Judge and gave judgment in favour of the Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent). Being aggrieved by the said judgment the 2nd Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) has appealed to this court. This court by its order dated 28.11.2011 granted leave to appeal on questions of law set out in paragraphs 12(b),(d),(g),(i),(j),(k) and (m) of the Amended Petition of Appeal dated 14.9.2011which are set out below.

1. The learned Judges have erred in law by not considering the fact that the Respondent has failed to identify the corpus.
2. The learned Judges have failed in law in applying Section 103 0f the Evidence Ordinance to this case.
3. The learned Judges have erred in law by granting damages whereas no evidence had led in this case with regard to damages.
4. The learned Judges have erred in law by not giving any reason in their judgment for dismissing the Petitioner"s counter claim.

5. The said judgment is against the weight of the evidence placed before the court.
6. The judgment is contrary to legal precedents created by superior courts in similar circumstances.
7. The said judgment is inconsistent with the evidence transpired during the trial and thus bad in law.

The Plaintiff-Respondent filed this case against the Defendant-Appellant seeking a declaration that he is the lawful permit holder of the lands described in the 1st and the 2nd schedules of the plaint. He also sought an order to eject the Defendant-Appellant from the land described in the 2nd schedule of the plaint and compensation amounting to Rs.20,000/- per month from the year 1992. The land described in the 2nd schedule of the plaint is a part of the land described in the 1st schedule of the plaint. The land described in the 1st schedule of the plaint has been given to the Plaintiff-Respondent by a permit (P1) given by the State in terms of Section 19(2) of the Land Development Ordinance on 2.12.1991. This fact has been proved by the Plaintiff-Respondent. The learned District Judge by his judgment dated 1.6.2005 dismissed the case of the Plaintiff-Respondent on the basis that the corpus had not been identified. Is the judgment of the learned District Judge correct? I now advert to this question. The land for which the Plaintiff-Respondent seeks a declaration of title has been described in the plaint by reference to physical metes and bounds. According to Section 41 of the Civil Procedure Code the land must be described in the plaint so far as possible by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan. The word „or" is important. Section 41 of the Civil Procedure Code expects the plaintiff to describe in the plaint the land by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan. In the present case the land has been described in the plaint by reference to physical metes and bounds. The son of the Plaintiff-Respondent gave evidence and also produced the permit marked P1which describes the land by reference to physical metes and bounds. His evidence was not challenged by the Defendant-Appellant. The son of the Plaintiff-Respondent was not cross-examined by the Defendant-Appellant. This shows that the Defendant-Appellant has admitted the boundaries of the land of the Plaintiff-Respondent. When I consider all the above matters, I hold that the Plaintiff-Respondent has complied with Section 41 of the Civil Procedure Code with regard to the land for which he sought a declaration of title and has proved the identification of corpus. The learned District Judge has concluded that the land for which the declaration of title is sought has not been identified. I must mention here that there was not even an issue on the question whether corpus has not been identified. When I consider all the above matters, I hold that the conclusion reached by the learned District Judge is wrong.

The Plaintiff-Respondent"s son, in his evidence, stated that the Defendant-Appellant encroached on to his land described in the 1st schedule of the plaint; that the encroached area of the land is described in the 2nd schedule of the plaint; and that the land described in the 2nd schedule of the plaint is a part of the land described in the 1st schedule of the plaint. The Defendant-Appellant did not cross-examine the above witness. This shows that the Defendant-Appellant has not challenged the evidence of the Plaintiff-Respondent. Therefore it appears that the Plaintiff-Respondent has proved that the Defendant-Appellant has encroached to his land and that the encroached area has been described in the 2nd schedule of the plaint. Further the Plaintiff-Respondent has proved that the land described in the 2nd schedule of the plaint is a part of the land described in the 1st schedule of the plaint. The Defendant-Appellant did not give evidence. The learned District Judge decided that the Permit of the Plaintiff-Respondent (P1) has been proved by him. When I consider the evidence led at the trial, I am of the opinion that the Plaintiff-Respondent has proved that he is the lawful permit holder of the land described in the plaint. If the Plaintiff-Respondent is the permit holder of the land

described in the plaint, he can maintain a rei-vindicatio action. In Palisena Vs Perera 56 NLR 407 it was held that a permit holder under the Land Development Ordinance enjoys a sufficient title to enable him to maintain vindicatory action against a trespasser. In Bandarnayke Vs Karunawathi [2003] 3SLR 295 it was held that a permit holder under the LDO enjoys sufficient title to enable him to maintain a vindicatory action against a trespasser. In Dharnadasa Vs Jayasena [1997] 3SLR 327 GPS de Silva CJ held that in a rei vindicatio action, the burden is on the plaintiff to establish the title pleaded and relied on by him. In the present case the learned District Judge also decided that the permit of the Plaintiff-Respondent had been proved by him. Considering all the above matters, I hold that the Plaintiff-Respondent has established his title to the land to maintain a vindicatory action.

The Defendant-Appellant has however raised an issue on prescription in respect of his land. According to the conclusion of the learned District Judge, this issue has not been proved. What is the intention of an encroacher to a land? His intention is to secretly possess and acquire lands for which he has no title and to expand the area of encroachment day by day. His intention is secret and dishonest. A person who possesses a land with a secret intention cannot claim prescription in terms of Section 3 of the Prescription Ordinance because his possession cannot be considered as an adverse possession. Even a co-owner who possesses a co-owned land cannot claim prescription in terms of Section 3 of the Prescription Ordinance. This view is supported by the judgment delivered by the Privy Council in Corea Vs Appuhamy 15 NLR 65 and the judgment of Basnayake CJ in the case of Gunawardene Vs Samarakoon 60 NLR 481.

In Corea vs Appuhamy (supra) Their Lordships held as follows. „ A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result□ .

In Gunawardene Vs Samarakoon (supra) Basnayake CJ held that possession qua co-owner cannot be ended by any secret intention in the mind of the possessing co-owner. The possession of one co-owner does not become possession by a title adverse to or independent of that of the others till ouster or something equivalent to ouster takes place.

An Encroacher starts encroaching upon lands for which he has no title and continues to possess the encroached portion of the land with a secret and dishonest intention. Therefore his possession in the encroached portion of the land cannot be considered as an adverse possession. Such a person cannot claim prescriptive title to the encroached area of the land under Section 3 of the Prescription Ordinance because his possession is not an adverse possession. Section 3 of the Prescription Ordinance reads as follows.

Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

Provided that the said period of ten years shall only begin to run against parties claiming estates in

remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

To claim prescriptive title in terms of Section 3 of the Prescription Ordinance, the claimant"s possession to the land should be an adverse possession. This is one of the conditions that should be proved by the claimant. This view is supported by the judgment of Weerasuriya J in the case of Seeman Vs David [2000] 3 SLR 23 wherein His Lordship held as follows. "The proof of adverse possession is a condition precedent to claim prescriptive rights". Considering all the above matters, I hold that an encroacher to a land is not entitled to claim prescriptive title in terms of Section 3 of the Prescription Ordinance to the encroached area of the land or to the entire land. In fact when a person encroaches upon lands for which he has no title, he acquires status of a trespasser in respect of the encroached area of the land. Trespasser starts possessing lands for which he has no title and continues to possess the land secretly. As I pointed out earlier, to claim prescriptive title in terms of Section 3 of the Prescription Ordinance claimant"s possession should be an adverse possession. A person who possesses a land with secret intention cannot claim that his possession is an adverse possession. Possession of a land by a person with secret intention cannot be considered as an adverse possession in terms of Section 3 of the Prescription Ordinance. Thus a trespasser who violates the law of the land and possesses the land cannot claim benefit of the law of the land. Thus a trespasser cannot acquire prescriptive title in terms of Section 3 of the Prescription Ordinance. Same principle applies to an encroacher. Considering all the aforementioned matters, I hold that an encroacher cannot claim prescriptive title in terms of Section 3 of the Prescription Ordinance.

In a rei vindicatio action, once the court decides that the plaintiff is the owner of the land and that the defendant has encroached on to the land of the plaintiff, the court must declare that the plaintiff is the owner of the land and also make an order for the ejectment of the encroacher (the defendant) since possession of the encroacher becomes an unlawful possession. This view is supported by the judicial decision in Pathirana Vs Jayasundera 58 NLR 169 wherein Gratiaen J at page 172, held that „in rei vindicatio action proper, the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation." In the same way, in a case where the plaintiff seeks a declaration that he is the lawful permit holder of the land given to him in terms of Section 19(2) of the Land Development Ordinance, once the court decides that the plaintiff is the lawful permit holder of the land and that the defendant has encroached on to the land of the plaintiff, the court must make an order declaring that the plaintiff is the lawful permit holder of the land and also must make an order to eject the encroacher (the defendant). In the present case the Plaintiff-Respondent has established that he is the lawful permit holder of the land described in the 1st schedule of the plaint and the Defendant-Appellant has encroached upon the said land. Therefore it becomes the duty of the court to make an order ejecting the Defendant-Appellant.

Learned counsel for the Defendant-Appellant contended that the area alleged to have been encroached by the Defendant-Appellant has not been identified by the Plaintiff-Respondent by way of a plan and that therefore the case of the Plaintiff-Respondent should fail.

In Gunasekara Vs Punchimenika [2002]2 SLR 43 the Court of Appeal observed the following facts.

> "The plaint was filed seeking a declaration of title to an undivided share of a land. It was pleaded that the defendant-appellant had encroached upon a portion- the encroached portion was not described with reference to physical metes and bounds or by reference to any map or sketch. The matter was fixed for ex-parte trial; after ex-parte trial an application was made to issue a commission to survey the land and identify the same. The ex-parte trial did not end up in a judgment. After the return of the commission, the plaint was amended, a fresh ex-parte trial was thereafter held. After

the decree was served, the defendant-appellant sought to purge default, which was refused."

Court of Appeal held as follows.

"The Court was obliged initially to have rejected the original plaint since it did not describe the portion encroached upon – section 46(2)(a) read together with section 41 of CPC."

What happens when a plaint is rejected on the basis that the encroached area has not been described by way of a plan or a sketch in a case where a plaintiff seeks a declaration of title to his land (main land) described in his plaint by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan? Then the encroacher would be placed at an advantageous position and would continue to possess the land without any legal right. Further encroacher may later make a claim for prescriptive title to the encroached area on the ground that his right to possess the land has been recognized by court since the plaintiff"s case had earlier been rejected. However it is a question whether the encroacher in such a case would be successful in his claim. Thus, when the plaint is rejected in a case of this nature on the aforementioned ground the encroacher who violates the others" legal rights would be placed at an advantageous position and the owner of the land would be placed at a disadvantageous position. Thus if orders of this nature are permitted to stand, an encroacher who does not respect the law of the land and violates the others" rights would be protected by orders of court and the rights of lawful owners of properties would not be protected by courts. At this juncture it is pertinent to consider observation made by Sansoni J in the case of M. Kanapathipillai Vs M. Meerasaibo 58 NLR41 at page 43 wherein His Lordship observed as follows: "There is a well-established rule that the law will presume in favour of honesty and against fraud." The learned District Judge, before making the impugned order in this case, should have been mindful of the above observation made by His Lordship Sansoni J in M. Kanapathipillai"s case (supra). I do not doubt that Gunasekara"s case (supra) would have been differently decided if the above material and legal principle enunciated by Sansoni J were considered. Thus if courts make orders of this nature (rejecting plaint on the basis that the encroached area has not been described by way of a plan or a sketch), the courts would be encouraging violators of law. Therefore, in my view when an owner of a land files a plaint seeking a declaration of title to his land and to eject an encroacher or encroachers from his land, he should describe his main land by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan. In this regard one should not forget the fact that the plaintiff is seeking a declaration of title to his main land which has been described in the above manner which is in conformity with Section 41 of the Civil Procedure Code. The situation would have been different if an encroacher to a land seeks a declaration on prescription to the encroached area. Then such a portion of land should be described by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan in the plaint. Section 41 of the Civil Procedure Code reads as follows.

"When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan to be appended to the plaint, and not by name only."

What is the specific portion of land discussed in Section 41 of the Civil Procedure Code? It has to be noted here that in an action for declaration of title, the claim is made for the main land. Therefore in an action for a declaration of title, „the specific portion of land" discussed in Section 41 of the Civil Procedure Code is the land for which the plaintiff seeks a declaration of title. Therefore in an action for a declaration of title and ejectment of encroacher from the land, when the land is described in the plaint by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan, it is wrong for court to reject the plaint on the basis that the encroached area has not been described in the plaint by reference to a sufficient sketch, map or plan.

As I pointed out earlier, the intention of an encroacher is to expand his area of encroachment day by day. If the encroached area is described by way of a plan or sketch at the time of filing the case, it may not be the same encroached area at the time of conclusion of the case. Thus at the time of filing action for a declaration of title if a plan is annexed to the plaint describing the encroached area and the court makes an order ejecting the encroacher as per the plan, the encroacher would still be holding on to another portion of the land even after the order of ejectment is implemented because his area of encroachment at the time of ejectment may be larger than what was shown in the plan. In such an event the Plaintiff may have to file another case to eject the encroacher from the other portion of the land. Thus there would not be an end to litigation and this type of procedure would support the allegation of laws delays. Therefore it appears that the unwritten principle in law enunciated by Sansoni CJ in the case of H.A.M Cassim Vs Government Agent Batticaloa 69 NLR 403 that 'there must be finality in litigation' would be violated if the courts of this country start rejecting plaints as discussed above. When I consider all the above matters, I feel that producing a plan describing the area of encroachment cannot be expected when the owner of a land files action seeking a declaration of title to his main land and for ejectment of encroacher. In an action for a declaration of title, if the plaintiff establishes his case and the court gives judgment in favour of the plaintiff, and in the plaint an order for ejectment of encroacher or encroachers is also sought, it becomes the duty of court to make an order to eject the encroacher from the main land irrespective of the fact that the encroached area is described by way of metes and bounds or a plan or a sketch. Considering all the aforementioned matters, I hold the view that when the plaintiff who claims to be the owner of a land files a case seeking a declaration of title to his land and also an order to eject an encroacher or encroachers from his main land, what is expected by Section 41 of the Civil Procedure Code is to describe his main land by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan but the said section does not expect to describe the encroached area in the plaint by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan.

But in the present case although learned counsel for the Defendant-Appellant contended that the encroached area has not been described by way of a plan, the encroached area has been identified by way of boundaries. In this connection Section 41 of the Civil Procedure Code is important.

In the present case, the encroached area by the Defendant-Appellant has been described in the 2nd schedule of the plaint by way of boundaries. Thus the encroached area has been described in the plaint by reference to physical metes and bounds. I therefore hold that the Plaintiff-Respondent has complied with Section 41of the Civil Procedure Code even with regard to the encroached area which is not necessary. When I consider all the aforementioned matters, I reject the contention of learned counsel for the Defendant-Appellant. When I consider all the above matters, I hold that the learned Judges of the Civil Appellate High Court have come to the correct conclusion and the learned District Judge was wrong when he dismissed the Plaintiff"s case. In view of the conclusion reached above, I answer the above questions of law No.1,3,4,5,6,7 in the negative. The question of law No.2 does not arise for consideration. For all the above reasons, I affirm the judgment of the Civil Appellate High Court and dismiss this appeal with costs. The Plaintiff-Respondent is entitled to the costs in all three courts.

Appeal dismissed.

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court

Murdu Fernando PC J

I agree.

Judge of the Supreme Court

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

DEFAMATION

R.A.C. Ranawaka

Vs.

Upali Chandrawansha

Supreme Court Appeal 135/2012

High Court (North Central Province)

NCP/HCCA/ARP/878/2010

Polonnaruwa District Court

Case No. 10645/Damages/2005

Before : S.E. Wanasundera PC J
K.T. Chitrasiri J
Vijith K. Malalgoda PC J

Decided on : 05.04.2018

Vijith K. Malalgoda PC J

Plaintiff Respondent Appellant Ranawaka Arachchige Chandrakanthi Ranawaka had filed the present appeal against the decision of the Provincial High Court (Civil Appellate) of the North Central Province holden in Anuradhapura in Appeal Case No. NCP/HCCA/ARP/ 878/2010 dated 14.12.2011.

When this matter was supported for leave, the Supreme Court after considering the material placed on behalf of the Plaintiff Respondent Appellant had granted leave to appeal on the questions set out in paragraph 7 (f) (g) (h) and (k) of the petition, and re-numbered those issues as 1,2,3,4, in the journal entry dated 30.07.2012 which reads as follows;

1. Did the Learned Judges of the Provincial High Court (Civil Appellate) of the North Central Province err in law, by holding that the statement complained of was a privileged statement, and hence not defamatory?
2. Did the Learned Judges of the Provincial High Court (Civil Appellate) of the North Central Province err in law, by holding that animus injuriandi was not attributable to the Respondent in respect of the said statement complained of?
3. Did the Learned Judges of the Provincial High Court (Civil Appellate) of the North Central Province err in law, by holding that the Respondent could not be held responsible for the publication of the said statement complained of?
4. Did the Learned Judges of the Provincial High Court (Civil Appellate) of the North Central Province err in law, by holding that the Petitioner's claim of loss and damage to reputation, good name, and professional standing and prospects, due to the statement complained of was not substantiated by evidence?

As revealed before this court the Defendant Appellant Respondent (hereinafter referred to as the Respondent) to the present appeal was the Revenue Administrator at Lankapura Pradeshiya Sabha in the North Central Province. The Plaintiff Respondent Petitioner (hereinafter referred to as the Petitioner) who is a legal practitioner in the Polonnaruwa and Hingurakgoda Courts, was engaged by the said Lankapura Pradeshiya Sabha to attend to all legal matters of the said Pradeshiya Sabha.

The Petitioner had initiated legal proceedings initially against two Defendants namely the Respondent above named and the Lankapura Pradeshiya Sabha claiming damagers of Rs. 2,500,000/- in the District Court of Polonnaruwa. The events that lead to initiate the said proceedings before the District Court can be summarized as follows;

a) On or about 31st January 2005 the monthly meeting of the Pradeshiya Sabha was held at its Auditorium
b) During the said meeting, certain issues were raised with regard to the recovery of lease rentals by initiating legal proceedings
c) When the said issues were raised, certain queries were made from the Respondent who is the Revenue Administrator of the Pradeshiya Sabha with regard to initiating proceedings before the Magistrate's Court
d) Answering the said issues raised, the Respondent made a statement to the effect that the Appellant appeared on behalf of the opposing party in a Magistrate's Court proceeding against the interest

of the Pradeshiya Sabha, and therefore steps were taken to retain a new Attorney at Law in order to send letters of demand at a lower fee.

e) The said reply given by the Respondent at the meeting of the Pradeshiya Sabha was reported in the "Dinamina" Daily Sinhala News Paper on 31st March 2005

f) Whilst initiating the proceedings before the District Court, the Petitioner had claimed that, as a consequence of the said publication based on the utterances made by the Respondent, the Petitioner suffered loss and damage to her reputation, good name, professional standing and prospects

As revealed before us, the Petitioner had withdrawn her case against the 2nd Defendant Pradeshiya Sabha and proceeded only against the 1st Defendant who is the Respondent to the present application.

The trial before the District Court of Polonnaruwa was commenced after recording 07 admissions, 06 issues in favour of the Plaintiff and 09 issues in favour of the Defendant. At the conclusion of the District Court Trial, the learned District Judge of Polonnaruwa answering the 1st to the 6th issues in favour of the Plaintiff had granted damages in sum of Rupees 15 lacks to the Plaintiff.

Being dissatisfied with the said decision of the District Judge, the Respondent appealed to the Provincial High Court (Civil Appellate) of the North Central Province. During the said appeal, the judges of the Provincial High Court (Civil Appellate) of the North Central Province, by the judgment dated 14.12.2011, set aside the judgment of the District Judge of Polonnaruwa.

The instant appeal is against the said decision of the Provincial High Court, and when the matter was supported for leave, this court had granted leave, on the questions of law referred to above.

When considering the appeal before us it is important for this court to first satisfy, whether the statement referred to above had in fact been made by the Respondent and whether it was made to or published to some person other than the person defamed. This position was discussed by R.G. McKerron as follows;

> "By publication is meant the act of making known the defamatory matter to some person or persons other than the person defamed."

(R.G. McKerron, Law of Delict 7th Edition at page 183)

In the case of the Independent News Papers Ltd V. Devadas (1983) 2 Sri LR 505 it was held that,

> "It is an essential element of defamation that the words complained of should be published of the plaintiff. Where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to"

As revealed before the trial court the statement referred to as defamatory against the Appellant was made by the Respondent at a meeting of the Pradeshiya Sabha held at its auditorium attended by its members. During the trial before the District Court, in addition to the News Paper referred to above, minutes of the Lankapura Pradeshiya Sabha dated 31.01.2005 was produced marked P-1. In the said minute, at page 6 the statement said to have made by the Respondent was recorded as follows;

> "එම අවස්ථාවේදී ආදායම් පරිපාලක මහතා සභාවට කැඳවා වඩාත් විස්තර දැනගැනීමට සභාව තීරණය කරන ලදි. ආදායම් පරිපාලක ඊ.පී. උපාලි චන්‍ද්‍රවංශ මහතා කඩකාමර හිඟ අයකර ගැනීමට ඇති ප්‍රමාණය සඳහන් කරමින් පළමුව උසාවි දැමීමට පෙර පළමු පියවර වශයෙන් නීතීඥවරයෙකු මාර්ගයෙන් එන්තරවාසි යැවීම සිදුකල බව පැවසීය. සභාව මගින් පත් කර ගත් නීතීඥවරිය සභාව මගින් පවරන ලද නඩුවක විත්තිය වෙනුවෙන් පෙනීසිටීම නිසා එම නීතීඥවරිය විශ්වාසය තැබීම අසීරු වී ඇති හෙයින් වෙනත් නීතීඥවරයෙකු හරහා අඩු නීතීඥ ගාස්තුවක් යටතේ එන්තරවාසි යැවීමට කටයුතු කළ බව පැවසීය."

When going through the said minute it appears that, what was reported in the News Paper was the correct proceeding of the Lankapura Pradeshiya Sabha taken

place on 31.01.2005. However as transpired before us, the Plaintiff in the District Court proceedings (the Appellant before us) has decided not to proceed against the News Paper which published the said news item, but decided to proceed against the maker of the said statement. As further transpired, the Petitioner got to know about the said statement when it was reported in the News Paper but, the Appellant whilst giving evidence before the trial court had further said "that the members of the Pradeshiya Sabha had telephoned her and asked whether she is not ashamed to accept money from both sides." The said statement made by the witness clearly indicates that the members of the Pradeshiya Sabha had taken note of the statement made by the Respondent and confronted the same with the Petitioner.

When considering the matters referred to above this court is satisfied that the statement said to have made by the Respondent had been published within the meaning of the term 'Publication'.

However as observed by the Judges of the Provincial High Court of Civil Appeal as well as by the District Judge, Polonnaruwa, the most important matter to be resolved is to consider whether the said publication comes within privilege communication or not.

The possible defences in a case of this nature was discussed by Lord Uthwatt of the Privy Council in the Privy Council decision of M.G. Perera Vs, A.V. Peiris 50 NLR at page 159, as follows;

> "Their Lordships' attention has not been drawn to any case under the Roman Dutch Law or the common law which exactly covers the point at issue. Both systems accord privilege to fair reports of judicial proceedings and of proceedings in the nature of judicial proceedings and to fair reports of parliamentary proceedings, and much time might be spent in an inquiry whether the proceedings before the Commissioner fell within one or other of these categories. Their Lordships do not propose to enter upon that inquiry. They prefer to relate their conclusions to the wide general principle which underlies the defence of privilege in all its aspects rather than to debate the question whether the case falls within some specific category.

The wide general principle was stated by their Lordships in Macintosh V. Dun[1] to be the "common convenience and welfare of society" or "the general interest of society" and other statements to much the same effect are to be found in Stuart V. Bell[2] and in earlier cases, most of which will be found collected in Mr. Spencer Bower's Valuable work on Actionable Defamation. In the case of reports of judicial and parliamentary proceedings the basis of the privilege is not the circumstance that the proceedings reported are judicial or parliamentary-viewed as isolated facts- but that it is in the public interest that all such proceedings should be fairly reported. As regards reports of judicial proceedings reference may be made to Rex V. Wright[3] where the basis of the privilege is expressed to be "the general advantage to the country in having these proceedings made public", and to Davison V. Duncan[4] where the phrase used is "the balance of public benefit from publicity"; while in Wason V. Walter[5] the privilege accorded to fair reported of parliamentary proceedings was on the same basis as the privilege accorded to fair reports of judicial proceedings- the requirements of the public interest."

In the said decision Lord Uthwatt had further observed, the importance of malice in relevant publication as follows;

> "As regard the News Paper the Report was sent to it by the authorities in the ordinary course. Nothing turns on any implied request to publish–that would in their Lordships opinion be relevant only if malice were in issue...."

When going through the facts of the case in hand as discussed above and the evidence given by the Respondent before the trial court it appears that the Respondent was summoned before the monthly meeting by the members of the Pradeshiya Sabha and questioned him with regard to the recovery of arrears money and steps taken to recover those monies.

When the Respondent explained the steps taken, it was transpired that the services of a new Attorney at Law was obtained by the Respondent in order to send letters of demand to the respective tenants and the Respondent had justified his decision to retain a new Attorney at Law of his choice without obtaining the prior approval of the Pradeshiya Sabha by making the statement in question.

As observed earlier in this judgment the Petitioner has decided not to prosecute the News Paper which published the news item but decided to prosecute the maker of the statement. When considering the circumstances under which the Respondent had made the above statement, it is important to consider whether the said statement was made strictly within his employment and therefore his statement comes within a privilege statement.

In this regard, it is also important to consider the facts transpired before the District Court from the evidence by both parties.

The Appellant whilst giving evidence, had denied the fact that she appeared for an accused person in a case filed by the Pradeshiya Sabha and produced the certified proceedings of the case in question namely Magistrate's Court, Polonnaruwa case No 98660 as P-I. According to the evidence of the Appellant, the case was called on a motion filed by Nalaka Bandara Attorney at law on 17.12.2004. Since the accused Renuka Jayasuriya of Ideal Pharmacy produced the payment receipt, the Appellant who represented the Pradeshiya Sabha admitted the payment and the accused was discharged accordingly by court. The said fact was confirmed by Nalaka Bandara AAL when he was called as a witness for the Plaintiff.

Upali Chandrawansa the Respondent when giving evidence before the District Court whilst challenging the above position had confirmed the fact that the Petitioner appeared for an accused person in the Magistrate's Court as follows;

> (Examination in chief of witness Chandrawansa proceedings at pages 8-9 dated 21.01.210)

"98660 කියන නඩුවට වර්ෂ 2004.12.17 වන දින මහේස්ත්‍රාත් අධිකරණයේ දී තිබුන නඩුවට සහභාගී වුනේ නෑ. මේ අධිකරණයේ වෙනත් නඩුවක් තිබුනා. 98412 කියන නඩුව තිබුනේ. එදින විත්තිකාරිය අධිකරණයට ආවා. අංක 02 උසාවියේ නඩුව ගන්නකොට මම හිටියේ නෑ. මම මේ දිස්ත්‍රික් උසාවියේ හිටියේ. මම එදින ලංකාපුර ප්‍රාදේශීය සභාව වෙනුවෙන් පෙනී සිටින්න කියලා මේ පැමිණිලිකාර මහත්මියට උපදෙස් දීලා තිබුනේ නෑ. ඒ නඩුවේ විත්තිකාරිය රේණුකා ජයසූරිය. ඒ නඩුවේ විත්තිකාරිය වෙනුවෙන් හිටිය නීතීඥවරිය වන්නේ රණවක මහත්මියයි. රණවක මහත්මිය මේ විත්තිකාරිය එක්ක මගේ ලඟට ආවා. විත්තිකාරිය වෙනුවෙන් පෙනී සිට නඩුවක් දැම්මා කියලා මට සාක්ෂි දෙන්න කීවා උසාවියට ඇවිල්ලා. ඊට පස්සේ මම ගියේ නෑ මම මෙතනම හිටියා. මෙදින විත්තිකාරිය විසින් 98660 කියන මෙම නඩුවේ පැමිණිලිකාර මහත්මියට පෙනී සිටින්න කියලා මුදල් දෙනවා මම දැක්කා. මේ විත්තිකාරිය එක්කගෙන එහා පැත්තට යනවා මම දැක්කා. මුදල් ප්‍රමාණයක් මම දැක්කේ නෑ. මුදල් ගණුදෙනුවක් කලා මම දැක්කා. එදින 2004.12.17 වන දින මීට කලින් සාක්ෂි ලබා දුන්න නීතීඥ නාලක බංඩාර මහතා පෙනී සිටියේ නෑ. වී 05 පෙන්වා සිටී. (2005 ජූලී 12 වන දින දාතමින් යුතු දිවුරුම් ප්‍රකාශයක් පෙන්වා සිටී) සාක්ෂිකරු එය හඳුනා ගනී. එය වී. 05 ලෙස ලකුණු කර ඉදිරිපත් කරයි. මේ දිවුරුම් ප්‍රකාශය රේණුකා ජයසූරිය කියන විත්තිකාරිය මට දුන්නේ. මේ දිවුරුම් පත්‍රයේ අධිකරණයට ඉදිරිපත් කරන්න කියලා වරෙන්තු කරා කියලා තිබෙනවා. 03 වන ඡේදයේ නීතීඥ රණවක මහත්මිය රුපියල් 300ක මුදලක් ගෙවා මේ නඩුව අවසන් කර ගත්තා කියලා තියෙනවා."

As referred to in the said evidence the Respondent had seen one Ms. Jayasuriya giving some money to the Appellant and in support of his version he had submitted an affidavit from the said Renuka Jayasuriya as well.

However under cross examination this witness's credibility was challenged and at one stage witness had to admit that he was in a different court house on that day and some of the answers were given by going through the proceedings of that day.

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

Some of the important questions put to the Respondent and answers given by him are referred to as follows;

(Cross examination of witness Chandrawansa proceedings at pages 16-19 dated 21.01.2010)

ප්‍ර: 98960 කියන නඩුව තිබුනේ කොයි උසාවියේද?

උ: එහා එකේ

ප්‍ර: ඒක මෝෂමකින් කතාකල එකක්ද වරෙන්තු කල නඩුවක්ද?

උ: උත්තරයක් නැත

ප්‍ර: එදින පෙනී සිටියේ කව්ද?

උ: මම නෙමෙයි

ප්‍ර: විත්තිකාර මහත්මිය වෙනුවෙන් කව්ද පෙනී සිටියා කීවේ කව්ද?

උ: නීතීඥ රණවක මහත්මිය

ප්‍ර: කව්ද තමුන්ට කීවේ? දිසා අධිකරණයේ ඉඳලා මහේස්ත්‍රාත් අධිකරණයේ වෙච්ච දේවල් දන්නේ කොහොමද?

උ: මම දැක්කා මෙතනින් එක්ක යනවා විත්තිකාරිය තමයි රණවක නෝනා එක්කගියේ

ප්‍ර: උසාවියේ පෙනී සිටියා කියලා දැක්කද?

උ: උත්තරයක් නැත.

මේ අවස්ථාවේ දී සාක්ෂිකරු අසන ලද ප්‍රශ්නවලට උත්තර නොදෙන බැවින් අසන ලද ප්‍රශ්නවලට නිවැරදි පිළිතුරු දෙන ලෙසට නියම කරමි.

ප්‍ර: තමුන් දැක්කද උසාවියේ ඉන්නවා?

උ: මම දැක්කේ නෑ.

ප්‍ර: තමුන් කොහොමද කියන්නේ පෙනී සිටියා කියලා?

උ: කාර්ය සටහන් අනුව මම කීවේ.

ප්‍ර: මොකක්ද සටහන්වල තියෙන්නේ?

උ: විත්තිකාරිය වෙනුවෙන් නීතීඥ රණවක මහත්මිය පෙනී සිටියා කියලා.

ප්‍ර: නීතීඥ මහත්මිය කවුරු වෙනුවෙන් පෙනී සිටියා කියලද හිතන්නේ?

උ: රේණුකා වෙනුවෙන් පෙනී සිටියා කියලා.

වි. 03 පෙන්වා සිටී.

ලංකාපුර ප්‍රා. සභාව වෙනුවෙන් පෙනී සිටින නීතීඥ මහත්මිය වගඋත්තරකරු..... කියවා සිටී.

ප්‍ර: මේකේ සටහන් වෙලා තියෙනවද නීතීඥ මහත්මිය වගඋත්තරකාර පාර්ශවය වෙනුවෙන් පෙනී සිටියා කියලා?

උ: මෙතන එහෙම නෑ.

ප්‍ර: මේ සටහනේ නීතීඥ මහත්මිය කවුරු වෙනුවෙන්ද පෙනී සිටියේ කියලා තියෙනවද?

උ: නෑ.

ප්‍ර: මම තමුන්ට කියන්නේ තමුන් සටහන් බලලා මේ ගරු අධිකරණයට බොරු කියන්නේ කියලා කියනවා?

උ: මම පිළිගන්නේ නෑ.

ප්‍ර: මේ නීතීඥ මහත්මිය සමඟ තියෙන අමනාපය නිසා තමයි මේ බොරු කියන්නේ කියලත් යෝජනා කරනවා?

උ: පිළිගන්නේ නෑ.

උ: පිළිගන්නේ නෑ.

An affidavit and a letter said to have prepared by one Renuka Jayasuriya had been produced marked "ú-5" and "ú-6" respectively during the trial in the District Court. Even though several objections were raised with regard to the admissibility of the said affidavit, I don't think it is necessary to consider them at this juncture, since the document itself is contradictory to the testimony of witness Renuka Jayasuriya. In her affidavit affirmed on 12.07.2005 and the letter dated 26.03.2005 addressed to the Chairman Lankapura Pradeshiya Sabha, she had taken up the position that she paid Rs. 300/ to the Petitioner in order to withdraw the case filed against her. However whilst giving evidence on behalf of the Respondent the witness had explained as to what happened in the Magistrate's Court, when her evidence being led by the counsel on behalf of the Respondent as follows;

"අංක 2 දරණ මහේස්ත්‍රාත් අධිකරණයේ ලංකාපුර ප්‍රාදේශීය සභාවට පවරන ලද නඩුවක් තිබුනා. ඒ නඩුව මට පවරලා තිබුනේ ප්‍රාදේශීය සභාවේ බදු ගෙව්වේ නෑ කියලා. රු. 450/ ක මුදලක් ගෙවන්න තිබුනේ. ඒ මුදල මම ප්‍රාදේශීය සභාවට ගෙව්වා. අධිකරණයට නෙමෙයි ගෙව්වේ. මම නීතීඥ රණවක මහත්මියට කතාකලා. නීතීඥ මහත්මිය කීවා එයාට ඒක භාරගන්න බෑ. උසාවියට එන්න කීවා අපිට

නීතීඥ වරයෙක් හඳුන්වලා දෙන්නම් කීවා. ලංකාපුර ප්‍රාදේශීය සභාවට ලිපියක් ඉදිරිපත් කලා. ඒ අකුරු මගේ. මට මේ ලිපියේ කොපියක් දුන්නා. ප්‍රාදේශීය සභාවේ රාජමන්ත්‍රී මහත්මයා මට කීවා මේ බදු මුදල් වලට අමතරව නීතීඥ රණවක මහත්මියට මුදල් දුන්නා කියලා නෑ මේ ලිපියේ නෑ. නාලක මහතාටත් මුදල් දුන්නා කියලා ඒ විදිහට ලියලා දෙන්න කීවා. (මේ අවස්ථාවේදී විත්තියේ නීතීඥ මහතා විත්තියේ සාක්ෂි කරුවන්ගෙන් යෝජනා කරමින් ප්‍රශ්ණ අසන හෙයින්, සාක්ෂි ආඥා පනත යටතේ එලෙස ප්‍රශ්ණ කිරීමට නොහැකි බව නීතීඥ මහත්මාට දන්වා සිටිමි.) මට මේ විදිහට සාක්ෂි දෙන්න කියලා කව්රුත් උපදෙස් දුන්නේ නෑ. මේ දිවුරුම් ප්‍රකාශයේ තිබෙන්නේ මගේ අත්සන. මේ දිවුරුම් ප්‍රකාශය ගැන මම දන්නේ නෑ. මේ ස්වාමීණ්වහන්සේ ඉදිරිපිට මම අත්සන් කලේ නෑ."

When considering the above evidence with the two documents referred to above, the affidavit and the letter produced marked "වි-5" and "වි-6" respectively, it is clear that the Respondent had made an attempt to introduce some evidence in support of his version. The said attempt by him clearly indicates his intention to mislead the court to cover up his position which appears to be untrue. The said conduct of the Respondent indicates the fact that the Respondent when making the statement in question had acted in malice against the Petitioner.

In the case of David V. Bell 16 NLR 319 it was held that,

In the case of defamation malice in modern English Law is no more than the absence of just cause or excuse and similarly an actual intention or desire to injuria is not under the Roman Dutch Law necessary to continue the animus injuriandi. Rackless or careless statements may be taken as proof of animus injuriandi and while English Law malice can only be refuted by showing the occasion was privileged or that the words were no more than honest and fair expression of opinion or matters of public interest and general concern, the Roman Dutch Law allows proof not only of such circumstances that the occasion was privileged but of any other circumstances that furnish a reasonable excuse for the use of words explained of"

The position taken up by the Respondent when he was subject to cross examination and the evidence of witness Jayasuriya clearly establish that the statement referred to was made not only with malicious intent towards the Appellant but was also made recklessly.

In the said circumstances I observe that the Judges of the Civil Appellate High Court err in law when they conclude that the statement made by the Respondent was a privilege statement since it was made at the monthly meeting to some questions raised from him within the four walls of the committee hall, even though it was found to be a untrue statement.

The Petitioner whilst testifying before the District Court had explained the embarrassment she had to undergo when the statement was made by the Respondent at the meeting as well as it was later published in the News Paper. The above evidence was sufficiently considered by the trial judge in her order when granting compensation.

It is further revealed that the said Pradeshiya Sabha had promptly taken steps with regard to the complaint made by the Respondent to the effect that the Petitioner had appeared in a case filed by the Pradeshiya Sabha against the interest of the Pradeshiya Sabha and taken steps to remove her from the work assigned to her.

The above position clearly shows that the statement made by the Respondent was considered by the Lankapura Pradeshiya Sabha as a statement made by the Respondent in his official capacity as the revenue administration of the said Pradeshiya Sabha and decided to act upon the said statement.

When considering whether the statement made by the Respondent was defamatory on the Appellant the Judges of the High Court of Civil Appeal had further observed that there wasn't sufficient material before the District Court to conclude that the said statement was made with malice or with the intent of defaming her or with the intent of putting her in difficulty.

In this regard the Judges of the High Court of Civil Appeal have referred to the decision of Pittard V. Oliver (1981) 60 L.J.Q.B. 219 where it was observed

that an answer given to a quarry made by the members of a Local Authority does not amount to defamation on a third party but as observed by me, the matters elicited before the District Court had clearly indicated that the Respondent had made the said statement with the intention of harming the Petitioner and the necessary animus injuriandi was present in the case in hand.

In the case of Dahanayake V. Jayasekara 5 NLR 257 it was held that the Plaintiff in a defamation case must be given the opportunity to establish that the alleged statement was untrue and that it was made with improper motive.

Considering all the matters referred to above, I answer the questions of Law raise before this court in favour of the Petitioner and allow the appeal before us. I therefore make order setting aside the judgment of the Provincial High Court of Civil Appeal of the North Central Province dated 14.12.2011 in Appeal Case No. NCP/HCCA/ARP/878/2010 and affirm the judgment of the District Judge of Polonnaruwa in case No. 10645/Damages/2005, dated 18.10.2010.

However, I make no order with regard to cost.

Appeal allowed no costs.

Judge of the Supreme Court

Acts passed in 2018

9/2018	:	Judicature (Amendment)
10/2018	:	Penal Code (Amendment)
11/2018	:	Code of Criminal Procedure (Amendment)
12/2018	:	Civil Aviation (Amendment)
13/2018	:	Sri Lanka Tea Board (Amendment)
14/2018	:	Shop and Office Employees (Regulation of Employment and Remuneration (Amendment)
15/2018	:	Maternity Benefits (Amendment)
16/2018	:	National Defence Fund (Amendment)
17/2018	:	General Sir John Kotelawala Defence University (Special Provisions)
18/2018	:	1990 Suwaseriya Foundation
19/2018	:	National Audit
20/2018	:	Nation Building Tax (Amendment)
21/2018	:	Land (Restrictions on Alienation) (Amendment)
22/2018	:	Bribery (Amendment)
23/2018	:	Apartment Ownership (Special Provisions)
24/2018	:	Mutual Assistance in Criminal Matters (Amendment)

Few Legal Maxims

- Actus non facit reum, nisi mens sit rea – An act itself does not make one guilty, unless done with guilty intent.
- Bonus judex secundum aequum et bonum judicat, et aequitatem stricto juri praefert – A good judge decides according to justice and right and prefers equity to strict law
- Crimen ex post facto non diluitur – A crime cannot be expiated by after deeds.
- Droit ne done pluis que soit demande – The law gives no more than is demanded
- Executio juris non facit injuriam – The execution of the process of the law does no injury
- Fiat jus, ruat Justitia – let law prevail, though justice fail
- Grammatica falsa non vitiate chartam – False grammer does not vitiate a deed
- Hominum causa jus constitutum est. – Law is constituted for the benefit of man
- Impuris minibus nemo accedat curiam – No one may come into court with unclean hands
- Judicis est jus dicere non dare – it is the duty of a judge to declare, not to make the law
- Justitia nemini neganda est. – Justice should be denied to no one.
- Lex vigilantibus non dormientibus subvenit – Law assists the wakeful, not the sleeping
- Minima poena corporalis est major qualibet pecuniara – The smallest bodily punishment is greater than any pecuniary one.
- Nihil facit error nominis cum de corpore constat – An error of name is nothing when there is certainty as to the person
- Omnia praesumuntur legitime facta donec probetur in contrarium – All things are presumed to be legitimately done, until it be proved to the contrary
- Ponderantur testes non numerantur – Witnesses are weighed not counted
- Quando aliquid prohibetur prohibetur omne, per quod devenitur ad illud – When anything is prohibited, all that relates to it is prohibited
- Res inter alios judicatae nullum aliis praejudicium faciant – Matters adjudged in a cause do not prejudice those who were not parties to it
- Suppressio very, expression falsi – Supression of the truth is equal to the expression of the false
- Terra transit cum onere – Land passes with its incumbrances
- Ubi lex aliquem cogit ostendere causam, necesse est quod causa sit justa et legitima – Where the law compels a man to show cause, it is necessary that the cause be just and legal

Amarasinghe Kankanamlage Kamal Rasika Amarasinghe Vs O.I.C., S.I.U. AND Hon. Attorney General

SC Appeal No.140/2010
SPLA No. 118/10
HCMCA 127/07
MC Colombo 71986/04

Decided on 18/07/2018

Sisira J. de Abrew,J. cited the Indian Supreme court Judgment **Bhoginbhai Hirjibhai V. State of Gujarat** where it was decided as follows.

" By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to attune to absorb the details.

The power of observation differs from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on."

The worst form of inequality is to try to make unequal things equal.

- Aristotle -

"Judex damnatur cum nocens absolvitur"
The judge is condemned when guilty are acquitted

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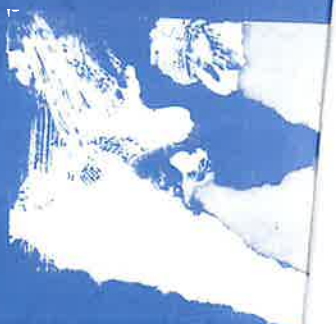
News Letter

THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA



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