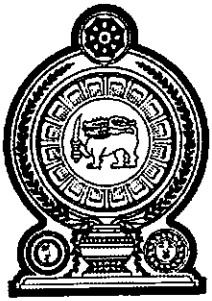

THE
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Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2008] 2 SRI L.R. – PARTS 13,14 and 15

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DIGEST

CIVIL PROCEDURE CODE – Section 75 (d) – Section 76 – Averments in the plaint – Neither denied nor accepted – Are they deemed to be admissions? – Specific Sinhala formula to be used in denying?

FUNDAMENTAL RIGHTS – Article 12(1) – Public Interest litigation – Time limit – locus standi – Doctrine of Public Trust – Violation – Is the President subject to the Rule of the Law? – What is public purpose requirement?

RENT ACT – Subletting – Supreme Court Rules (1990) – Do they apply to appeals from judgments from the original Court? What is material to prove sub-tenancy? Exclusive possession of a defined area necessary?

Perusal of the answer of the defendant reveals that she had jointly and severally denied all the other averments contained in the plaint except those are specifically admitted in the answer – vide paragraph 1 of the answer dated 04.06.2000 (P1). The said paragraph 1 is to the following effect:

"මෙම විත්තිකාරිය තම උත්තරයේ විශේෂයෙන් පිලිගන්නා කරුණු හැර පැමිණිල්ලේ සදහන් අන් සියලුම කරුණු එක්ව හා වෙන් වෙන්ව ප්‍රතික්ෂේප කරයි."

In the light of the above I am unable to hold the view that any specific mention about the averments with regard to the other paragraphs of the plaint would be necessary or that would be a mandatory requirement. In the present case the main basis of the learned judge's finding to record the averments contained in paragraphs 21, 23 to 26 and 29 to 32 of the plaint was that there was no specific denial of the same in the answer.In view of the above the necessity has now arisen to consider the provisions of Section 75(d) of the Civil Procedure Code. Section 75(d) thus reads as follows:

"A statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the mattersof fact and law, and the circumstances of the case upon which the defendant means to rely for his defence; this statement shall be drawn in duly numbered paragraphs, referring by number, where necessary, to the paragraphs of the plaint."

What has been made mandatory by the above sub-Section is that an answer should contain a statement admitting or denying the several averments of the plaint. In the answer filed by the defendant in this case by paragraph 1 it has been specifically averred that the rest of the averments of the plaint are denied jointly and severally except what is specifically admitted therein. I am of the view that this is sufficient compliance of the requirements envisaged in Section 75(d) of the Civil Procedure Code and further Civil Procedure Code does not provide any other requirement that should be complied with when denying averments of a plaint, except when disputing the averments in the plaint as to the jurisdiction of the Court (Vide Section 76).

In this regard assistance could be derived from the decision of this Court in *Hassan* v *Iqbal*[1]. In this case Justice Weerasooriya has held that (Udalagama, J. agreeing):

> "Though in the English Courts allegations of fact not denied specifically or by necessary implication are taken to be admitted, in the Code there is no such provision and the non-denial of an allegation is not taken as an admission of it."

Per Weerasooriya, J. referring to the decision in *Fernando* v *The Ceylon Tea Company Limited*[2] at 152 and 153 of the said Judgment:

> "It has been held that although in the English Courts allegations of fact not denied specifically or by necessary implication are taken to be admitted, in our Code there is no such provision and the non-denial of an allegation is not taken as an admission of it (Vide *Fernando* v *The Ceylon Tea Company Ltd.* (*supra*)"

What needs consideration now is the two questions raised by this Court when granting leave in this case. I am inclined to hold the view that both questions have to be answered in the negative for the following reasons:-

(a) with regard to the first question to wit – "specific Sinhala formula to be used ....." – sections embodied in Chapter IX of the Civil Procedure Code re-filing answer are self explanatory.

(b) For the reasons given above – No.

For the foregoing reasons I conclude that the learned trial Judge was in grave error when she held that the averments contained in paragraphs 21, 23 to 26, 29 to 32 should be recorded as admissions and I proceed to set aside the impugned order of the learned District Judge dated 30.05.2002. Accordingly this appeal is hereby allowed. In all circumstances of the case no order is made with regard to costs.

Appeal allowed.

SUGATHAPALA MENDIS AND ANOTHR

V

CHANDRIKA KUMARATUNGA AND OTHERS

(WATERS EDGE CASE)

SUPREME COURT
S.N. SILVA, C.J.
TILAKAWARDANE, J
RATNAYAKE, J.
SC FR 352/07
MAY 29, 2008
JUNE 25, 26, 2008
JULY 14, 31, 2008

Fundamental Rights – Article 12(1) – Public Interest litigation – Time limit – locus standi – Doctrine of Public Trust – Violation – Is the President subject to the Rule of the Law? – What is public purpose requirement?

The petitioners/Intervenient petitioners complained of infringement pertaining to the acquisition of land on the premise that such land would be utilized to serve a public purpose whereas by the impugned executive or administrative action the land was knowingly, deliberately and manipulatively sold to a private entrepreneur to serve as an exclusive private golf resort in Sri Lanka. It was contented that, this was done through a process thatwas conniving and contrary to the equal protection of the law guaranteed by Article 12(1) of the Constitution which assures to the people the Rule of Law. It was further contended that those alleged to have initiated, facilitated and or empowered to achieve this outcome were those from the highest echelons of the executive and included senior officials members of the public sector, statutory bodies of the government, the former President (1st respondent) high government agencies.

Held:

(1) The Nature of large scale developments is that they occur over-time. In the instant case, though communication with UDA commenced in1997, completion of the project was delegated extensions granted and particulars changed, such that the project at the time this claim was brought remained unfinished. The nature of the project was such that it

did not manifest itself until long after the expiration of such window of opportunity for the public to object. There is compliance with the time requirement.

(2) As regards *locus standi* petitioners in such public interest litigations have a constitutional right given by Article 17 read with Article 12 and 126 to bring forward their claims. Petitioners to such litigation, cannot be disqualified on the basis that their rights happen to be ones that extend to the collective citizenry of Sri Lanka. The very notion that the organs of government are expected to act in accordance with the best interest of the people of Sri Lanka necessitates a determination that any one of the people of Sri Lanka may seek redress in instances where a violation is believed to have occurred.

To hold otherwise would deprive the citizenry from seeking accountabilities of the institutions to which it has conferred great power and to allow injustice to be left included solely because of technical shortcomings – Petitioners have *locus standi*.

Held further:

(3) Public purpose requirement has for its primary object the general interest of the community. Though in achieving the further purpose the individual/s may be benefited, the benefit to such individual/s must only be indirect. The object to be arrived at must be the general interest of the country.

(4) When the Court is satisfied that the view taken by government is contrary to the sanctity of the above declaration or otherwise arrived at on an entirely unreasonable, subjective arbitrary or capricious basis, the Court has sufficient jurisdiction to interfere and conclude that the purpose for which the land was acquired was not a public purpose.

(5) No single position or office created by the Constitution has unlimited power and the Constitution itself circumscribes the scope and ambit of even the power vested at with President who sits as the Head of the country. In exchange for a conferment of extensive executive power, the Constitution requires the President among other things, an affirmation by oath that she/he once elected will faithfully perform the duties and discharge the functions of the President in accordance with the Constitution and the law and she/he will be faithful to the Republic of Sri Lanka and that she/he will to the best of her/his ability uphold and defend the Constitution.

(6) It is to be noted that all facets of the country its land, economic opportunities or other assets are to be handled and administered under the stringent limitations of an trusteeship posed by the Public Trust

Doctrine and must be used as a manner for economic growth and always for the benefit of the entirety of the citizenry of the country – not for the benefit of granting gracious favours to a privileged few.

Per Shiranee Tilakawardane, J.

"Being a creature by the Constitution – the President's powers in effecting action of the government or of State officers is also necessarily limited to effecting action by him that accords with the Constitution. In other words President does not have the power to shield; protect or coerce the action of state officials or agencies when such action is against the tenets of the Constitution or Public Trust, and any attempts on the part of the President to do so should not be followed by the officials ....."

(7) The expectation of the 1st respondent as a custodian of executive power place upon the 1st respondent a burden of the highest level to act in a way that evinces proprietary of all her actions.

(8) The transaction discloses a patient systematic failure of the public bodies charged with adequately and accurately judging the viability of what was ostensibly a foreign investment project. The UDA and BOI both engaged in a cursory analysis of the particulars of the transaction and issued their approval largely on the face of the recommendations by other approved authorities and the directions of the Cabinet despite significant evidence that, if properly, reviewed would have in all likelihood disclosed the falsity of the application.

Per Shiranee Tilakawardane, J.

"While Court cannot enact legislation Court is able to direct the appropriate state authorities to accordingly pursue, concretize and legislate law that will serve as checks and balance to fill the void in the law of the lack of supervision, the UDA and BOI and all other agencies involved with the investment process in Sri Lanka must take steps to create publicly available guidelines regarding the mechanisms of approval ..." .....whatever the legislations drafted it must ultimately accord with the sovereignty vested in the people by furthering the doctrine of public trust.".

(9) A review however of the financial aspects of the corporation reveal that though lofty aims were sought there was no in fact much in the way of actual investment during the period the original shareholders owned the company.

Per Shiranee Tilakawardane, J.
"The fundamental law in the investment system I see is that despite such alleged autonomy, the fact remains that, such bodies are ultimately under the thumb goes to speak of the executive heads of the country whether it as the Minister of Finance ..... or even the President".

(10) The entire transaction – the transfer of the land to Asia Pacific, the subsequent removal of the use and development restrictions appurtenant to the land and the eventual freehold alienation of underdeveloped portions of the land – was a result of actions, omissions and decisions made in violation of the doctrine of public trust.

Per Shiranee Tilakawardane, J.

"The transaction before us is one that in the 10 years of its existence has served to draw and make clear the negative effect of the politicization of investment promotion on the success of Sri Lanka's economic liberalization. It is quite ironic that Singapore a country that once looked to Sri Lanka as a model for the realization of its own economic blossoming has not only surpassed Sri Lanka in that regard but also in the words of Lee Kuan Yew "watched promising country go to waste".

APPLICATION under Article 126 of the Constitution.

Cases referred to:

(1) *De Silva* v *Athukorala* 1993 1 Sri LR 283, 296-297.
(2) *Jayawardane* v *Wijayatilleke* 2001 1 Sri LR 132, 149, 159.
(3) *Bulankulama* v *Secretary, Ministry of Industrial Development* 2000 3 Sri LR 243
(4) *Bandara* v *Premawardane* 1994 1 Sri LR 301.
(5) *Egodawala* v *Dissanayake* SCM 3.4.2001.
(6) *Sriyani* v *Iddemalgoda* SCM 10.12.2002 SCM 8.8.2003.
(7) *Framji* v *Secretary of State* 17 BOM LR 100 (PC).
(8) *People United for Better Living in Calcutta* v *West Bengal* AIR 1933 Cal 215.
(9) *Citizens Welfare Forum* v *Union of India* 1995-5-SCL 647.
(10) *A.P.Pollution Control Board* v *Nayudu* 1992 2 SCC 718.
(11) *Senerath* v *Kumaratunga* 2007 SC FR 503/2005.
(12) *Karunatileke* v *Dissanayake* 1999 1 Sri LR 157.
(13) *Premachandra* v *Major Montague Jayawickreme* 1994 2 Sri LR 90.
(14) *ICECA* v *Union of India* AIR 1997 SC 3519.
(15) Hameed vs Ranasinghe - 1983 -1 Sri LR 104, 118. cur. adv. vult
(16) Faiz vs AG - 1990 1 Sri LR 372

J.C. Weliamuna with *Maduranga Ratnayake* for the petitioners.

M.U.M.Ali Sabry for the intervenient petitioner.

Manohara de Silva, P.C. with *Dilhan Jayasooriya* for the intervenient petitioner.

Faiz Musthapha, P.C. with *Ms. Faisza Markar* for the 1st to 8th intervenient petitioners.

Nihal Jayawardane for the 3rd and 3A respondents.
Romesh de Silva, P.C. with *Harsha Amarasekera* for the 6th respondent.
N. Pulle, S.S.C. with *Rajiv Goonetilleke*, S.C. for the 8th respondent and A.G.
Uditha Egalahewa with *Ranga Dayananda* for the 19th respondent.
Kuvera de Zoysa with *Senaka de Saram* for the 20th respondent.

October 8, 2008

SHIRANEE TILAKAWARDANE, J.

This Court granted the petitioners leave to proceed on 12th November 2007 on an alleged infringement of Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The petitioners presented their case on the basis of an infringement pertaining to the acquisition of land on the premise that land would be utilized to serve a public purpose whereas, by this impugned executive or administrative action the land was knowingly, deliberately and manipulatively sold to a private entrepreneur to serve as an exclusive and private golf resort in Sri Lanka, one carrying a membership fee of Rs.250,000/-. Learned Counsel submitted that this was done through a process that was "conniving and contrary" to the equal protection of the law guaranteed by Article 12(1) of the Constitution which assures to the People the Rule of Law. Counsel also submitted that the facts in this case reflected a flagrant betrayal of the purported policy of the 1994 government under the 1st respondent to establish transparent governance and eliminate corruption, and that the facts disclose that this transaction "reeked of corruption".

Counsel submitted that the most disturbing factor of all was that those alleged to have initiated, facilitated and/or conspired to achieve this outcome were those from the highest echelons of the executive and included senior officials, members of the public sector and statutory bodies of the government, the former President (the 1st respondent), multiple government agencies, the 4th respondent Company, and as Counsel submitted in particular, the 5th respondent Mr. Ronnie Peiris, who chose not to take part in the proceedings despite notices being served on him,and who through tax declarations, was revealed to have

obtained a sum of approximately Rs. 60 million in profit from the transaction despite having no disclosed association with it. Counsel additionally submitted that there had been a series of deliberate acts of gross abuse of executive power by the 1st respondent.

Counsel submitted that given the executive or administrative power wielded by those involved, the nature of the allegations made, and the seriousness of the implications of such allegations upon the national interest and national economy and, importantly, the citizenry of this country, the ramifications of this case, though exceedingly complex, should be carefully and incisively scrutinized by this Court. He further submitted that this Court was the "last bastion of hope" to the People in whom sovereignty is reposed who are the most affected by the patent abuse of executive or administrative power especially by the 1st, 3A, and 7th respondents in this case.

The facts indeed are complex, as one would expect from the voluminous pleadings presented to Court. Despite its scale and magnitude, a detailed study of the facts of the case has been done and it is appropriate to begin at the inception with an analysis which chronologically unravels the basic, relevant and important sequence of events of the impugned transaction.

- According to the petitioner, on or about 1984 Hon. Gamini Dissanayake, then Minister of Lands, decided to acquire a large tract of land situated in Kalapaluwawa, Rajagiriya, under the provisions of the Land Acquisition Act No. 9 of 1950 as amended by No. 39 of 1954, No. 22 of 1955, No. 28 of 1964, No. 20 of 1969, No. 48 of 1971, No. 8 of 1979 and No. 12 of 1983 (referred to hereinafter as the "Land Acquisition Act"), for the public purpose of urban development and "ostensibly for increasing the Parliamentary Administrative Complex and for providing water retention as a low lying area". This fact has not been substantively contested by any of the respondents.

- In terms of Section 5 of the said Land Acquisition Act, as amended, a declaration was issued through the publication

of a Gazette notification dated 14th October 1988 (Document P1 (b) of the petitioner's amended petition) to notice the owners of the land being acquired,some of whom have intervened in this case as intervenient petitioners (hereinafter referred to as the "Intervenient petitioners"). Section 5 of the Land Acquisition Act mandates that the Minister, before acquiring land, "shall" make a written declaration that such land is needed for a "public purpose and will be acquired under the Act." In terms of this section, he accordingly named S. Sakalasuriya, the Divisional Secretary/Additional Government Agent, as the acquiring officer. This officer made payment of compensation in a sum of Rs. 312 per perch, and a Certificate of Vesting was issued, vesting the land with the 3A respondent, the "Urban Development Authority" (referred to hereinafter as the "UDA"). It is to be noted that (i) Document P1(b) categorically declared that the land had been acquired for a public purpose and (ii) the second annexure to the Certificate of Vesting granting the land to the UDA from the Divisional Secretary/Additional Government Agent (Document P1(a) of the petitioner's amended petition) expressly declared that *"the land should not be utilized for any other purpose than that for which it was originally acquired."* (Vide Schedule 2)

- In spite of the supposed urgency for acquiring the land, no action regarding the said land occurred for approximately 9 years subsequent to the vesting of the land with the UDA. On 14th May 1997 the 7th respondent, the Board of investment (referred to hereinafter as the "BOI") approved by letter dated 5th June 1997 (Document F of the affidavit dated 13th June 2008) a BOI proposal dated 7th April 1997 (Document B through B4 of the aforementioned affidavit), submitted by one Shantha Wijesinghe in is capacity as Managing Director of Asia Pacific Golf Course Ltd. *referred to hereinafter as "Asia Pacific") to establish an 18-hole Golf Course on 150 acres of the aforesaid land. There are several matters of significance that must be noted at this point. This land was recommended to Asia Pacific by the

UDA in response to Asia Pacific's original inquiry letter. In addition to the aforementioned golf course and despite a pledge to "harmonize" the said golf course with the flood retention purposes of the land, Asia Pacific also proposed the construction of a park, football pitch, cricket pitch, and a hawker centre, which was to be made available to the public, (*vide* B referred to above) ostensibly to satisfy in some minimal way the original purpose for which such land was acquired. It is to be noted that the purpose for which it was acquired being solely to serve a public purpose, was to serve the needs of the general public as distinct from the elitist requirements of the relatively small segment of society in Sri Lanka. It is significant to note that under the law this public purpose was attached to the land at the point it was acquired from the original owners. The enactment of laws to allow for such land acquisition was only done because of a legislative belief that private ownership in Sri Lanka is subject to the paramount, essential and greater need to serve the general public, a significant segment of who lack even basic living amenities like running water,electricity, and housing.

- Through a Cabinet Memorandum entitled "Release of Land on Concessionary terms – Asia Pacific Golf Courses Ltd." and dated 9th February 1998 (Document P3 of the petitioner's Amended petition and hereinafter referred to as "Cabinet Memorandum P3") the 1st respondent in her capacity as the Minister of Finance and Planning, submitted a strong recommendation of the project, and of its participants, or "promoters". In the Cabinet Memorandum P3, the 1st respondent enumerated the names of the promoters involved and acknowledged, underscored and advocated in favour of the promoters' request for special concessions accompanying the transfer of the land, suggesting approval of the project with such significant concessions solely (i) because of the proposed size of the project and (ii) in light of the "benefit of having an additional golf course in Colombo". Given the means by which the land was acquired, this benefit, whatever it may

be, should necessarily have accorded with the public purpose of the land, but no such objective was ever enumerated or alluded to, either succinctly or comprehensively. Despite the obvious and clearly deliberate omission to spell out the real and tangible benefits to the public so that the Cabinet could make an informed decision, Cabinet approval was granted on 4th March 1998 in total accordance with the terms of the Cabinet Memorandum P3, without query, clarification and/or amendment.

- After approval of the Cabinet Memorandum P3, a letter dated 27th April 1998 (Document U17 of the UDA's written submission) from the Director-General of the BOI requested the UDA to prepare and enter into a lease agreement with Asia Pacific in conformity with the terms of the Cabinet Memorandum P3. The UDA, created by the Urban Development Act, and required to be an independent, autonomous and accountable body, appears to have hastily entered into a lease without any query or scrutiny as to whether it served, or accorded with, the public purpose for which the land was originally acquired.

- On or about the 19th of February 2000, a Cabinet Memorandum entitled "Development of Public Playground at Battaramulla in Kaduwela Pradeshiya Sabha Area" (Document U20 of the UDA's written submission), was submitted by Hon. Indika Gunawardhana, then Minister of Urban Development, Construction & Public Utilities, to allocate another 7.8 hectares (approximately 19 acres) of the said land to the Kaduwela Pradeshiya Sabhawa for the ostensible purpose of developing a public playground. Cabinet approval was granted on 23rd March 2000 (Document U22 of the UDA's written submission). The land was filled by the expenditure of public funds by the said Pradeshiya Sabhawa.

- By letter dated 26th April 2000 (Document U23 of the UDA's written submission), the BOI requested the Minister of Urban Development to consider the feasibility of a request by Asia Pacific to obtain, in order to "enhance the

appearance of the entrance to their golf-course", the 7.8 hectares of Acquired Land allocated a month earlier to the Kaduwela Pradeshiya Sabhawa for the explicit public purpose of constructing a public playground.

- Shortly thereafter, an internal Board Paper (Document U24 of the UDA's written submission) prepared by K.L.W. Perera, Assistant Director; checked by R.M. Ariyadasa, Deputy Director; and approved, in addition to the abovementioned persons, by P.N. Fernando, Acting Director (Western Province), Hester Basnayake, Director (Environment and Landscape); E.M.R.U.B. Dorakumbura, Director (Lands), C.S. Nagage, Deputy Director-General (F); D.P. Amarasinghe, Deputy Director-General (O); S.H. Fernandez, Director-General;, and Professor T.K.N.P. de Silva, Chairman on 3rd May 2000 allowed for a 'license Indenture' to Asia Pacific, free of charge, of 41 acres of low-lying land in addition to the 140 acres already leased to Asia Pacific. On 30th May 2000, the Board of Management of the UDA issued its approval (Document U25 of the UDA's written submission).
- On 4th September 2000, Indenture of Lease No. 758/760 (Document U26 of the UDA's written submission and hereinafter referred to as the "Lease") was entered into between the UDA and Asia Pacific, providing Asia Pacific with approximately 140 acres of the Acquired Land to Asia Pacific for a term of 99 years at a per annum rental amount derived using the Chief Valuer's Rs. 300 Million valuation (hereinafter referred to as the "CV's Valuation") and using a concession advocated by the 1st respondent in the Cabinet Memorandum P3 and approved by the Cabinet. Concurrently executed with the Lease was Indenture No. 759/767 (Document U27 of the UDA's written submission and hereinafter referred to as the "First License") licensing to Asia Pacific, free of charge, 41 acres of low-lying land contiguous to the leased land purportedly for maintenance as a flood retention area.
- An undated UDA Board Paper (Document U28 of the UDA's written submission) prepared by Hester Basnayake,

Director (Environment and Landscape); checked by P.N. Fernando, Director (Western Province); and approved, in addition to the aforementioned persons, by W.A. Siriwardena, Director-General; Ananda Gunasekera, Acting Chairman, and E.M.R.U.B. Dorakumbura, Director (Lands); sought to effect the following changes to the transaction:

(i) To licence to Asia Pacific, free of charge, a further 44 acres of low-lying land situated in front of the leased land, also for maintenance as a flood retention area, and for a duration of 99 years.

(ii) To amend the First Licence for 41 acres to survive for 99 years and narrow the rights of the UDA under it to revoke the license only upon Asia Pacific's failure to comply with the terms of the license.

(iii)To reallocate to Asia Pacific, free of charge, the 7.8 hectares of land allocated to the Kaduwela Pradeshiya Sabhawa for construction of a public playground and f which a large amount of public funds had been expended to fill up the land.

(iv)To allow Asia Pacific to build 100 luxury holiday villas on stilts in the marsh areas of the leased land previously designated as unavailable for development, and

(v) To remove the restrictions prohibiting sale of the Acquired Land to 3rd parties and permit Asia Pacific to sell the aforementioned holiday villas on a freehold basis.

- By a Cabinet Memorandum dated 18th January 2001 (Document U30 of the UDA's written submission), Hon. Mangala Samaraweera, the subsequent Minister of Urban Development, sought approval of the Cabinet for the above-mentioned actions. Cabinet approval was granted on 31st January 2001 (Document U31 of the UDA's written submission) in flagrant disregard of the public purpose specifically contained as a condition attached to this land and clearly documented in the file.

- The BOI and Asia Pacific formally entered into an agreement through execution of Agreement No. 3146 on 21st June 2001 (Document BB of the BOI's affidavit).
- A Deed of Rectification No. 821 was executed on 9th August 2001 (Document U35 of the UDA's written submission) to amend the Lease to reflect the changes imposed by cabinet approval of the abovementioned memorandum. Licence Agreement No. 822 (Document U36 of the UDA's written submission and hereinafter referred to as the "Second Licence") was entered into between the UDA and Asia Pacific on 9th August, 2001 to effectuate the approved release of the further 44 acres of low-lying area referred to above.
- The UDA invited the Cabinet, as per the amended terms of the lease, to determine the sale price of the land to be sold to Asia Pacific (i) by market valuation or (ii) as a pro-rata share of the CV's Valuation. The Cabinet once again disregard of the public purpose, unquestioningly and damagingly issued its approval on 18th September 2001 (Document U37 of the UDA's written submission) to use the latter.
- Shortly thereafter, the 6th respondent, through Access Holdings (Private) Ltd. (hereinafter referred to as "Access Holdings"), a company of which he is majority shareholder and Chairman, became a beneficial owner of 50% of Asia Pacific through Access Holdings' purchase of 1,500,000 shares of the company's stock at a per share price of Rs. 10. Pursuant to the Shareholder Agreement dated 22nd January 2002 that effected such purchase (Document U39 of the UDA's written submission), the remaining 50% of Asia Pacific's outstanding shares continued to be owned by Mr. Siva Selvaratnam, Mrs. Suwaneetha Selvaratnam, Mr. Shantha Wijesinghe, Mrs. Susan Jane Wijesinghe, Ms. Thuhashini Selvaratnam and Swami Pandikoralage Mahanama Perera (hereinafter referred to as the "Original Shareholders").

- On 19th June 2002 the Hon. Ravi Karunanayake, then Minister of Trade & Commerce, submitted a Cabinet Memorandum (not directly provided, but referred to in Document U40 of the UDA's written submission) seeking to cancel the allocation of lands to Asia Pacific. Seven days later, the memorandum was withdrawn without reason.
- Altering the original UDA Board approval on 4th March 1998 which allowed for the sale of constructed villas and apartments by the UDA to willing buyers, a Board Paper (Document U41 of the UDA's written submission) was prepared by A.R.P.O.A. Rajapakse, Deputy Director; checked by E.M.R.U.B. Dorakumbura; and approved, in addition to the aforementioned persons, by S. Karunanayake, Director (Legal Services); K.V. Dharmasiri, D.D.G. (P.&O); D.E.L.G. Perera, D.D.G. (Finance), and J.M.L. Jayasekera, Director-General on 8th January 2003 which allowed for the sale of land directly to Asia Pacific and to do so though no villas had yet been built (Document U42 of the UDA's written submission). The Minister of Urban Development under Section 18(1) of the UDA Law No. 41 of 1978 issued its approval on 28th November 2002 (Document U43 of the UDA's written submission). Even a cursory perusal of the basic documents would have immediately revealed the fact that this was not permitted by law and that the land was specifically acquired for public purpose and not for re-sale to private entities. The UDA was never intended by law to be a land sales agent or empowered by law to acquiesce indirectly or actively in land sales.
- The UDA and Asia Pacific entered into Agreement to Sell No. 473 on 3rd March 2003 (Document U44 of the UDA's written submission), which effected the transfer of the aforementioned land for approximately Rs. 60 million.
- On 17th June 2003, the Original Shareholders and Access Holdings executed an Agreement (Document 6R3 of the 6th respondent's objections) whereby (i) they terminated the abovementioned Shareholder Agreement and (ii) the

Original Shareholders sold all of their shares of Asia Pacific to Access Holdings resulting in Access Holdings 100% ownership of Asia Pacific.

- The Sri Lanka Land Reclamation and Development Corporation (hereinafter referred to as SLLR & DC) issued its approval on 24th December 2003 (Document U45 of the UDA's written submission) of the revised master plan which now contemplated the construction of villas and the use of marsh previously designed as not to be developed and specifically kept for flood retention and demarcated as wetlands.

On the aforesaid, it is incumbent upon this court to analyze the facts in the context of the "administrative and executive actions" taken, to determine whether there has been an infringement of the petitioners' fundamental rights.

The principle that those charged with upholding the Constitution – be it a police officer of the lowest rank or the President – are to do so in a way that does not "violate the Doctrine of Public Trust" by state action/inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People. The "Public Trust Doctrine" is based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain or favour, but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution, the Sovereignty reposes. Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review (Vide *De Silva* v *Atukorale*[1]; *Jayawardene* v *Wijayatilake*[2]. The Public Trust Doctrine application is only enhanced by the Directive Principles of State Policy. In *Bulankulama* v *Secretary, Ministry of*

Industrial Development[3]. It was stated with respect to the environment, and held that,

> *The Constitution today recognizes duties both on the part of Parliament and the President and the Cabinet of Ministers .... "Article 27(14) states that "The State shall protect, preserve and improve the environment for the benefit of the community." Article 28(f) states that the exercise and enjoyment of rights and freedoms (such as the 5th and 7th respondents claimed in learned Counsel's submissions on their behalf to protection under Article 12 of the Constitution relating to equal protection of the law) "is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka to protect nature and conserve its riches."*

The Public Trust Doctrine, taken together with the Constitutional Directives of Article 27, reveal that all state actors are so principally obliged to act in furtherance of the trust of the People that they must follow this duty *even when* a furtherance of this trust necessarily renders inadequate an act or omission that would otherwise legally suffice. In other words, it is not enough to argue that procedure has been followed, when procedural compliance results in a violation of the public trust. **That action was either taken or not taken due to contravening orders from a superior or because reliance upon another entity's or individual's discretion was deemed sufficient, it simply not a defense afforded to state institutions or state actors.** In *De Silva* v *Atukorale (supra)* the Court, quoting Wade (Administrative Law, 5th ed., pp. 353-354) observed that,

> *.... the powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon the*

lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

The oral arguments and written submissions presented on behalf of the principal respondents in this case engage in precisely this abdication of responsibility, that have come to be seen as a hallmark of Sri Lanka's governmental bureaucracy. Following *Bandara* v *Premachandra*(4) in which the Court held that ".... the State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the Judiciary must endeavour to ensure that this expectation is realized ...." We recognize that this duty has to be upheld not only in the name of good governance but also for sustainable economic development of the nation and all of its People, especially the economically challenged, the disadvantaged and the marginalised. In time this will empower the marginalised and disempowered members of our society, and will in due course establish a true Democratic Socialist Republic with equality for all.

Before an analysis of the substantive details can be dealt with, it is necessary to deal with a procedural defense asserted by at least one respondent. It has been argued that petitioner's allegations cannot be entertained because (i) they relate to a violation that has occurred several years prior, and (ii) the petitioner's Amended Petition is "invalid in law", as the petitioners lack standing or *locus standi*. In respect of the first point, this Court laid down in *Bulankulama (supra)* that "the respondents submitted that the application must be rejected, since it has been made out of time. However, no indication was given by the respondents of the date from which the period of one month specified in Article 126(2) of the Constitution is to be reckoned." The nature of large scale developments is that they occur over time. In the instant case, though communication with the UDA commenced in 1997, completion of the project was delayed, extensions granted and particulars changed – such changes are, in fact, central to the case – such that the project, at the time this

claim was brought forward, remained unfinished. For this Court to ignore the continuing nature of a large-scale development project would be to ignore the continuing nature of any violations that stem out of such a project. We are unwilling to accept the respondents argument that the public hearing afforded by the initial EIA investigation provided for adequate time to launch objections to the project for the simple fact that the project has not been a venture of static specifications – the nature of the project as one including the same of luxury condominiums and a take over of the company (with its sole asset being a lease and license of the acquired land) for approximately Rs. 150 million, did not manifest itself until long after the expiration of such window of opportunity for the public to object. Accordingly, we are of the opinion that the petitioners are, in the circumstances of this case, in compliance with the time requirement required by Article 126(2) of the Constitution.

With respect to the submission of standing, or *locus standi*, we concur with the opinion of the learned Judge in *Bulankulama* (*supra*), namely that petitioner in such public interest litigation have a constitutional right, given by Article 17, read with Articles 12 and 126, to bring forward their claims. Petitioners to such litigation cannot be disqualified on the basis that their rights happen to be ones that extend to the collective citizenry of Sri Lanka. The very notion that the organs of government are expected to act in accordance with the best interests of the People of Sri Lanka, necessitates a determination that any one of the People of Sri Lanka may seek redress in instances where a violation is believed to have occurred. To hold otherwise would deprive the citizenry from seeking accountability of the institutions to which it has conferred great power and to allow injustice to be left unchecked solely because of technical shortcomings. This position is consistent with several instances where this Court has held standing to be adequate. (*vide Egodawela* v *Dissanayake*[5]; *Sriyani* v *Iddamalgoda*[6]. In light of the above, we hold that the petitioners have *locus standi*.

Our substantive analysis begins with the UDA, the government entity without whose approval the later questionable actions of the other respondents at issue, and the transaction itself, would

not have come to pass. As evidenced by the preamble of Urban Development Authority Law No. 41 of 1978 (hereinafter referred to as the "UDA LAW"), the UDA was formed for the primary purpose of promoting "integrated planning and implementation of economic, social and physical development of certain areas" determined to be areas requiring urban development. Charged with this directive, the UDA's independent and autonomous discretion over the conveyance of state land in an extremely important power, one so important that the UDA must err on the side of caution and exercise only the utmost care in making its decision where there may be questions as to the feasibility of a proposed project and/or the safety of the citizenry and environment posed by the same. In the context of land taken from private owners, this already high threshold of their duty of care is further heightened as the land potentially conveyed is land which, when seen under the lens of the Public Trust principles, can be said to have been taken from the very People who conferred such power upon the UDA. Despite the importance of attending to these grave responsibilities, the evidence submitted reveals that the UDA dismally failed and neglected to discharge them, even marginally.

The first of many dubious actions on the part of the UDA was their "keenness" to allocate the Battaramulla land to Asia Pacific despite having nothing more than a letter and a conversation to go on. A letter issued by the UDA dated 5th March 1997(Document U2 of the UDA's written submission) suggests that Asia Pacific had approached the UDA by letter and engaged in conversation with the Chairman of the UDA. A result of this communication led to the aforementioned letter which curiously states what, in essence, seems to be a determination by the UDA that land in Battaramulla was suitable for a project they, without guidance and approval from environmental (CEA) or economic (BOI) agencies, could not have known anything about, apart from the information provided by Asia Pacific. This Court finds the UDA's "overeager" behaviour unusual and, in retrospect, a foreshadowing of the UDA's later decisions to ignore significant questions as to the suitability of the land for such a project.

In defense of the propriety of their action and the sutability of the golf course project proposed by Asia Pacific, the UDA has placed evidence that, shortly before Asia Pacific first contacted them about the idea of their golf course project, several golf course projects had been received and considered. The UDA, however, claimed that it is somehow "unclear" for what reasons those several proposals failed to come to pass – a strange propositionconsidering the predilection for detail they have otherwise shown in compiling their written submission. While we can only speculate as to the reason such projects did not ultimately succeed, it is clear from the evidence submitted by the UDA, however, (i) that such projects were, at the very least, not optimally suitable for the purposes of flood retention that was required of the land and (ii) that the UDA was fully aware of the significant alterations that would be necessary to harmonize the existence of a golf course with the flood retention purposes – a public purpose – for which the Acquired Land was obtained in the first place.

The facts show that Kabool Engineering & Construction Company had a few months prior to Asia Pacific's proposal, forwarded an application to the BOI to develop a Golf Course on a 136 acre block of low-lying land in Battaramulla – a proposition essentially identical in location and scope to that initially proposed in the instant case. Accepted "in principle" by the BOI according to a letter dated with a partially illegible date (25th September 199_), the BOI thereupon requested the UDA (Document U61 of the UDA's written submission) to consider – though the UDA admits in their written submission at page 12 that "the idea to set up Golf Courses in low-lying areas does not seem to have been conceived by them – whether such land could be developed in conformity with the UDA's Master Plan for the area. The UDA, in turn, requested the expertise of the SLLR & DC, as it should have, considering its lack of expertise with respect to determining the impact of the creation of a golf course on the flood retention capacity afforded by an untouched wetland. The SLLR & DC response letter dated 16th October 1996 (Document U61A of the UDA's written submission) advanced a list of several conditions to which any development on an approximate 50 to 75 acres of land would have to be subject to in order to avoid "any net change in

the volume of flood water which can be retained in the area." Notably, the remaining land requested for development was categorically deemed by the SLLR & DC to be unavailable for development as it was "acquired by the government and reserved for flood retention purposes under the Greater Colombo Flood Control & Environment Improvement project and therefore cannot be allowed for filling."

Learned Counsel for the UDA has suggested both during oral arguments and in his written submission, that the legitimacy of the UDA's decision to alienate the land to Asia Pacific is substantiated by the existence of these approvals. Indeed, the SLLR & DC's response to the Asia Pacific proposal was a positive one, formally approving the proposal subject to the establishment of extensive drainage systems, and the EIA assessment prepared by the National Building Research Organization (hereinafter referred to as the "NBRO") was ultimately approved by the CEA on 21st February 2000. However, while the UDA may well have "gone by the book", so to speak, with respect to the contemplation of approvals obtained in such a transaction, the mere fact that the various environmental authorities said the project *could be done,* does not in itself suggest that it *should have been done.* On the contrary, such external approvals are to be seen merely as conditions precedent to the commencement of UDA analysis of the viability of any given project, and not as the basis for their decision. In the instant case, the approvals granted to the project all shared a common theme – all provided approval for the project subject to *significant* alterations and changes in the fundamental nature of the land in order to allow for adequate flood retention of the land to continue. Given the weight and extent of these conditions, the UDA, as an autonomous body having sole discretion over conveyance of the land, was under a duty to weigh with the utmost care the perceived benefits of such a development project against the significant and potentially damaging changes – the Environmental Impact Assessment Report warned of irreversible ecosystem changes and habitat fragmentation – that would have to be made to the Acquired Land, land *already fit and functioning* for the water retention purpose for which it was originally acquired. The UDA's implication that these approvals constitute proof of the UDA's competency in this

transaction is tantamount to suggesting that the decisions to be made with respect to whether land should be developed are to be made by entities other than the UDA, a repugnant abdication of their responsibility as an authority created specifically to handle the multi-faceted nature of land alienation and development. Put simply, if such approvals were all that were necessary, the UDA would not need to exist.Nevertheless, the UDA also alleges that it did engage in such an analysis, and it was only after a consideration of the potential benefits such a project would bring, that approval of the project was granted. The benefits considered by the UDA in its analysis, as gathered from their written submission and oral presentation, can be summarized to the following: (i) an increase in land value to surrounding landowners, (ii) a "beautification" of the area. (iii) the creation of a few hundred jobs, (iv) the prevention of unauthorised occupation and filling of the Acquired Land, (v) the creation of a public playground, cricket pitch, and hawking stand, and (vi) the ability to have the above benefits obtained at the expense of a developer, rather than at the hands of the State.

Apart from the creation of a handful of low-level jobs, what is notably lacking from this list, and from any of the statements submitted in evidence by the UDA in this regard, however, **is any significant benefit of a *sufficiently direct nature* to the community of People of the Battaramulla area.** Indeed leaving the land alone would have retained it as a wetland which would have prevented the flooding of this area. The "public purpose" requirement imposed as a condition on the land by means of its acquisition under the Land Acquisition Act is one that contemplates a benefit of a sufficiently direct nature. Our interpretation of this requirement is guided by (i) the history of large-scale land alienations by the UDA – indeed a list of the 5 other land alienation projects for which the BOI has granted equivalent special concessions consists of 3 hospitals (Asiri, Apollo, Ninewells) and 2 housing developments (Nivasi Consortium, Millennium City), and (ii) the accepted rules of legal construction in Sri Lanka jurisprudence. If the intent of the drafters was to define the scope of "people purpose" in the Land Acquisition Act to include any benefit to the public whatsoever, no matter how marginal, indirect or tenuous, then they would simply

not have articulated such a restriction in the first place. After all, even the most profit-minded of projects – the creation of an exclusive golf resort, for example – can be said to confer some measure of public benefit, it simply for the fact that, by virtue of being a business, it spurs economic activity or increases surrounding land value. We find it highly unlikely that the drafters intended this express restriction to be negated by such a broad interpretation. From the definition in *Framji* v *Secretary of State*[7], it is clear that this "public purpose" requirement has for its primary object, the general interest of the community. Though in achieving the public purpose the individual or individuals may be benefited, the benefit to such individual or individuals must only be indirect. The object to be aimed at must be the general interest of the community. When the Court is satisfied that the view taken by government is contrary to the sanctity of the above declaration or otherwise arrived at on an entirely unreasonable, subjective (as distinct to objective), arbitrary or capricious basis, the Courts has sufficient jurisdiction to interfere and conclude that the purpose for which the land was acquired was not a public purpose. It is to be emphatically noted that public purpose connotes as the primary object, public utility and benefit of the community as a whole. Accordingly, we are of the opinion that the tenuous benefits advanced by the UDA, even taken together, fail to meet even the threshold meaning intended by law of public benefit posed by the aforementioned "public purpose" restriction.

The alleged "beautification" of an area is simply too abstract and indirect a benefit to suffice as a reason to approve a project to alienate the land at issue, in light of the potential detriment that such beautification can bring as well as the high public purpose threshold posed by the nature of this land as one being acquired from the citizenry, whose need for affordable housing is far more urgent and paramount than the cosmetic improvement of land. Ironically the increase in market value of the land and its surrounding area from a beautification of the land has made it more it *more* difficult for the lower-income segment of the People to obtain affordable housing. It is emphatically reiterated that public purpose connotes as its primary object, public utility and benefit of the community as a whole.

Apart from having to assume that beautification is something objectively achieved – we, for example, do not consider untouched wetlands to be "ugly" – the grooming of land and neighbouring flora carries with in the risk of detriment to the fragile ecosystem hidden underneath. In the Indian case of *People United for Better Living in Calcutta* v *State of West Bengal*[8], Umesh Chandra Banerjee, J. drawing from both scientific research done in Australia and the United States of America, comprehensively ad succinctly explains the nature of wetlands as follows:

...Wetlands, often called bogs, swamps, marshes, billabongs and a host of other names, are areas of wetland. The amount of water in them varies depending on the weather and the time of year. Sometimes they can be quite dry. Special, plants such as reeds grow in wetland areas. Wetlands also provide a home for a host of different wildlife ranging from migratory and local birds to fish, reptiles, amphibians and insects. All these living things depend on wetlands for their existence ....

.... Each wetland functions as an ecosystem that is a system where all the parts (land, plants, animals, water and solar energy) depend on each other. If one part of the system, the amount of sunlight for instance, is changed, all the other parts will be affected too. Often change to one element of an ecosystem results in the destruction of the whole.

Not only are the wetlands fragile ecosystems in themselves, but they form a vital parts of the world's ecosystem as well.

Wetlands rely on an established water drainage pattern. Any population nearby with its paved streets, gardens, storm water waste etc. inevitably alters water drainage patterns and affects the wetland.

We need to take steps to prevent destruction of our wetlands ....

As to the functional importance of wetlands, the Indian Judge further explains:

.... Even though many People never notice wetlands, they play a very important part in our lives.

Wetlands provide a haven for a vast number of living creatures, which rely on them for food, shelter and as a breeding place. While they may not live permanently in the area, a huge number of birds, animals, reptiles, fish, amphibians and insects regularly visit and use wetlands. Disappearance of wetlands threatens their very existence.

Many kinds of fish hatch and grow to maturity in the safety of the wetland mangrove swamps. When they are adults they move in to the ocean. Most of the fish we eat depend on these mangrove 'nurseries' for hatching their young and for the survival of the species.

Many species of plants survive only in the special environment of the wetlands. Loss of wetlands threatens their survival.

Wetlands play an important role in the ***water cycle, cleaning and purifying water as it passes through them.*** *They can also help control flood water by stopping and releasing it slowly through the ground.*

There is growing evidence that wetlands are a vital link in the food chain, 'processing' food for some species, and also play a part in nitrogen fixing, a process which alters nitrogen to a form where it can be used by living creatures ....

Therefore there is no doubt the long-term effect would be that the natural purity and cleanliness of the water in all the wells of the surrounding lands would be affected.

According to the Environment impact Assessment Report (Document U19 of the UDA's written submission and hereinafter referred to as the 'EIA Report") prepared by the National Building Research Organization in December 1999, the land that was ultimately alienated to Asia Pacific for the Golf Course Project was home to nine threatened species of animal including, for example, the fishing cat. Met with evidence that explicitly raised issues regarding environmental safety of the project, the UDA, if sincere in its desire to subject the decision-making process to the appropriate level of diligence, would have, at the very least, investigated the viability of the mitigating measures in more detail to determine if this animal and the other resident fauna and flora

would be adequately preserved, It seems that, though ample documentation exists to establish that the SLLR & DC as well as the UDA did to some small extent deliberate on matters of flood regulation, there had been Little concern to deliberate as intensely on such other equally vital yet far more complex matters such as the degradation of fauna and flora and the long-term effects of such development upon the underlying ecosystem, microclimate and the surrounding water table content. The 49 page-long EIA report includes only 1 page devoted to monitoring measures, and only contemplates the monitoring of pesticides and sewage treatment, hardly sufficient treatment for an area of land home to endangered species. Analysing the balance of interests in the impact of development projects upon the environment, the Indian Supreme Court in *Vellore Citizens' Welfare Forum* v *Union of India*[9], stated that,

> *... where there is an identifiable risk of serious or irreversible harm, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. The burden of proof in such cases is therefore placed firmly on the developer or industrialist who wishes to alter the* ***status quo*** *...*

But apart from the direct economic values and other benefits of the environment, preservation and commitment to the environment is a goal that must be sought for its own sake, as the Indian Supreme Court in *A.P. Pollution Control Board* v *Nayudu*[10] has made clear:

> *... the environment must not only be protected in the interest of health, property and economy, but also for its own sake. Precautionary duties are triggered not only by concrete knowledge of danger but also by a justified concern or risk potential.*

Likewise, the UDA's contention that illegal occupation, filling and other prohibited actions were being committed on the land is insufficient and inappropriate to justify a measure as radical as developing land that was otherwise appropriately functioning for the purpose for which it was intended, especially considering that such acts could simply have been stopped by recourse to a legal

procedure encapsulated within the UDA Law for speedy and expeditious removal of such persons who are in unlawful occupation. Such an argument on the part of the UDA, along with the absence of any evidence to show otherwise, clearly disclose that the UDA had failed to engage with the appropriate government institutions to rectify these issues, or had been deliberately unwilling to do so for reasons best known to them.

The written submissions have all correctly pointed to other golf courses like the Digana Golf Course Project as successful examples of the introduction of this type of project to Sri Lanka. **What is at issue, however, is not simply whether the kind of project itself was a viable one but whether, given the nature of the lands as one (i) acquired using the Land Acquisition Act, (ii) consisting of valuable marshland, and (iii) reserved for a public purpose, the decision to implement such a project on this particular land involved an analysis of adequate depth to ensure arrival at a decision that would be in furtherance of the trust that the People have reposed in the Government.** A golf course may have proven to be appropriate for Digana and may well prove to be appropriate for another area in the future, but such a project, on balance of conveniences, on the proven facts before this court, was not an appropriate project and not in accordance with the Public Purpose for the Acquired Land.

Even if we are to assume that the UDA's consideration of the alleged benefits provided by the Golf Course Project as initially proposed by Asia Pacific, was, in fact, a product of due deliberation and sound judgment, we simply do not see how the UDA's decision (i) to use the unrevised CV's Valuation as basis for rent under the lease, (ii) to convey land free of charge, (when there are hundreds of thousands including middle class government servants who desperately need housing, who could have benefited by such a conveyance of land), (iii) to alter the project to effectively allow for freehold alienation of undeveloped state land and (iv) to do so with prices derived from the aforementioned Valuation, furthered the apparent benefits the UDA claims to have sought. Rather, such actions seem to only

have benefited a few persons and have been a result of mere unquestioned obedience to the 1st respondent's Cabinet Memorandum titled 'Proposals to Streamline Land Alienation Procedures and Provide Relief to Large Scale BOI Approved Projects" and dated 22nd September 1997 (Document G of the BOI's affidavit and hereinafter referred to as the "Special Projects Memorandum").

According to the explanation of the Chief Valuer (hereinafter, "CV") (Document U10 of the UDA's written submission), the CV's Valuation of Rs. 300 million was a value arrived at in contemplation of, *inter alia*, (i) the fact the land was to remain with Asia Pacific as a single unit and not be re-transferred in parcels to others, (ii) the fact that a significant part of the land consisted of marsh that was not to be disturbed, and (iii) the fact that a development restriction covered a significant part of this marsh, all such terms provided to the Chief Valuer by the UDA (*vide* paragraph 4(xvii), Document EE of the BOI's Affidavit). It is to be noted at this point, that these terms provided by the UDA all seek to manipulate the valuation process by actively and deliberately reducing the land value for the specific and singular benefit of the purchaser, when there were indeed compelling reasons to increase the valuation. As is made clear in the case of *People* Municipalities in the United States have taken effort to ascribe monetary value to undeveloped wetlands as they contribute several functions including water purification – the destruction of the marsh land in this case would in the long-term affect the quality and purity of all the wells in all the surrounding and adjacent lands – and protection of wildlife, among other benefits, which this Court believes is no less direct in benefit than any alleged beautification of such an area can be said to be: it has been calculated in the United States of America that one acre of wetland is worth tens of thousands of US dollars for the services it renders." It is apparent, given the above, that the UDA saw this land as a place valuable only for its cosmetic and development potential and not as a valuable natural resources providing both environmental and long-term economic benefits in its unaltered state. It is for this amongst many other reasons adverted to above, that the UDA failed to adequately deliberate on the

prudence of allowing the proposed golf project and engaged in the illogical pricing procedure detailed below.

Despite the significant downward adjustment of the land valuation by the terms provided by the Chief Valuer, the UDA nevertheless incorporated into the lease further rent concessions which had been advanced by the 1st respondent in the Cabinet Memorandum P3, **though such concessions were already taken into consideration by the CV's Valuation which had already been adjusted by request of the UDA itself.** Furthermore, in the later stage of the transaction when approval had been made to allow freehold alienation, the UDA Board, by Memorandum dated 29th June 2001 (Document U34 of the UDA's written submission), *voluntarily offered* the Cabinet the opportunity to use the CV's Valuation as the basis from which the land to be sold would be priced, despite that obvious value-adding changes in character of the land that the UDA itself had authorized. It is inexplicable why the UDA unquestioningly consented to the 1st respondent's suggestion with respect to the lease rental rate and invited such an inaccurate valuation of the land for sale purposes, given that one of the main reasons the UDA advances in defense of its approval of the transaction was the economic benefit to be obtained by having development occur at the hands of a private developer. Due to these UDA decisions, any benefit to have been had by the use of Asia Pacific was negated by the leasing and eventual conveyance of the land with an economic return so far below that which could have been obtained had a market valuation been used. Even if this offering of compounded concessions to Asia Pacific can somehow be justified on the grounds that such concessions were necessary in light of the "bleak outlook of investment" interest in a war-torn Sri Lanka – an argument advanced by the 1st respondent but fatally contradicted by the UDA's own allegation of the availability of multiple golf course proposals for precisely this land – the UDA's decision to alter the originally approved plan and issue the Second License, free of charge, is tantamount to providing a third round of concessions as well as rewarding Asia Pacific's profit-driven deviation from the originally approved plan. Through this Second License, like the First License, is advanced as a one-

sided bargain which places burden upon Asia Pacific to develop and maintain a flood retention area, Asia Pacific's need for this further 44 acres was due to a voluntary redesign of their golf plan to develop a portion of the leased 140 acres initially agreed to be left as undeveloped marsh.

The peculiarity of the transaction between the UDA and Asia Pacific is clear when the essence of it is summarized as follows:

1. Asia Pacific was conveyed land with concessions on the basis that much of the land was to be set aside for flood retention, and the entirety of the land was restricted to a public purpose use and inalienable to 3rd parties. Such concessions, however, were applied to a land valuation *already discounted* in contemplation of these same restrictions.

2. To increase profitability through the construction of luxury villas, Asia Pacific wanted to develop more of the land than originally planned and approved. Such a development change rendered inadequate the flood retention capacity of the allocated land – the singular purpose for which the land was originally taken from the citizenry.

3. Rather than reject such a drastic project change which served to extend the physical layout and introduce an element of exclusivity to the project, the UDA rewarded Asia Pacific's decision to alter its development project further away from the stated public purpose of flood retention by giving Asia Pacific *even more land,* and did so *free of charge* on the ground that Asia Pacific would have to incur heavy costs to achieve the flood retention levels the company, in fact, had itself compromised by altering the original plan, flood retention that would have naturally occurred had the land been left untouched altogether.

4. In addition to the UDA's cost free conveyance of more land, the UDA approved Asia Pacific's wish to sell the luxury villas, after they were to be constructed. However, the UDA ultimately entered into agreement with Asia Pacific to sell the land despite the fact that no villas had yet been constructed, and did so at a price derived from the original CV Valuation, effectively

underselling the land to Asia Pacific at an incredible and unjustified discount.

Given the above, it is clearly apparent that the UDA's actions in its dealings with Asia Pacific amount to a total abdication of the UDA's authority to the dictates of the 1st respondent and the profit-minded activity of Asia Pacific, and accordingly, stands in violation of the Doctrine of Public Trust and of Article 12(1) of the Constitution. It is no defense to this Court that such actions were allowed or even encouraged by the Special Projects Memorandum, when the result of the actions were clearly to facilitate a massive reduction of the value of the land so as to extinguish any economic benefit sought by the UDA in having an external developer maintain and develop the land.Though it should go without saying, we emphatically note that the UDA is under no duty to protect the profitability of the developers to which they have alienated land. Yet, the UDA somehow saw it fit to reverse each and every restriction that existed on the land at the request of Asia Pacific's obviously profit-minded and self-serving requests, and in so doing, effectively converted land acquired from the citizenry for a public purpose into land optimized for premium private benefit, all at a compounded discount custom-tailored and immensely profitable for Asia Pacific. A glaring example that further suggests the UDA's failure to properly protect the land it has been entrusted with protecting and developing was the failure of the UDA to appropriately deal with Asia Pacific though the company's filling of land prior to CEA approval of the amended EIA report, in the UDA's own words, could be construed as "a violation of a material covenant in the agreement and imperative requirements under the environmental laws of Sri Lanka." Such a declaration was made by the UDA in its letter dated 11th November 2004 to Asia Pacific (Document U51 of the UDA's written submission) whereby the UDA ordered the company to cease all development activities pending further investigation. While such a move was appropriate, strangely no evidence has been provided to suggest that the UDA actually investigated, punished or otherwise held Asia Pacific accountable for this affirmative violation.

Though the UDA cannot disclaim responsibility for the decisions that were made by them, underlying their response in this case is a notion that they were "compelled to cooperate and facilitate the project" by the nature and the correspondence of the BOI (Section 21 of the UDA's written submission), as well as other individuals and entities. While an abdication of their responsibility will not be entertained – the autonomy and independence of the UDA has, by now, been articulated several times – we recognize that to view the excesses in the instant case as resulting solely from the actions of the UDA would be grossly myopic. There is no doubt that several other actors engaged in the facilitation of this transaction.

The Board of Investment, another key player in this drama, was created under the Greater Colombo Economic Commission Act No. 4 of 1978, and renamed by Act No. 49 of 1992, the BOI's prime directive is, *inter alia*, to foster and generate economic development of Sri Lanka by promoting and facilitating primarily foreign investment here. However, inherent to its role as a facilitator is a responsibility to properly ascertain viability of proposed projects as well as the managerial competence and creditworthiness of the parties who propose such projects – after all, even the most well-conceived of projects may prove to be an exercise in disaster if those at the helm lack the requisite skill and financial strength to see a project through to its completion. Such an analysis, at the very least, should include a review of the (i) managerial experience and financial strength of the promoters of a project and (ii) the solvency, capitalization and asset profile of the project company, if such company has been formed. Furthermore, when tax concessions are requested – such concessions are almost invariably the reason for application to the BOI in the first place – the BOI is under a duty to even more carefully scrutinize the size and capitalization of the investment and the quality and character of the investors. Apart from ensuring project feasibility and financial strength of the investors, the BOI's has a duty to use the utmost care in scrutinizing the character and nature of the investors, a duty warranted by the very real possibility that the individuals involved in a project may harbour a criminal agenda and the nature of the funds fueling the

project may have been ill-gotten. In order to avoid falling into a role as a facilitator of money-laundering or other illegal activity, the BOI must take extra care to understand the background of the investors – especially the foreign investors – involved. Lastly, the importance of the BOI's duty to provide such protective analysis is substantiated by the fact that, in most cases, BOI approval will help facilitate land alienation, as it did in the present case. Unfortunately, the submitted evidence reveals that rather than acting in furtherance of the Public Trust, the BOI failed to engage in the required analysis of the Original Shareholders and of Asia Pacific, a review that, if property performed, would have raised serious questions as to the existence of the principal foreign investor as well as the sincerity, integrity and *bona fides* of the Original Shareholders as developers.

Upon recommendation by the UDA, the 9th respondent in his capacity as then Managing Director of Asia Pacific,submitted to the BOI a covering letter, completed BOI application, and annexure, which ostensibly proposed the specifics of the Golf Course Project. The disclosed material reveals that Asia Pacific had submitted very little of the particulars ordinarily expected to be disclosed. The most notable example of this was the woefully insufficient response to the most important of questions, namely Question No. 1 which requests the following information (taken directly from the application):

(1) Names and addresses of Collaborators (Local and Foreign) with names and addresses of their Bankers. (Provide documentary evidence relating to business background e.g. Company Profile, Current Annual Report, Bank References, etc)

To this broad and inclusive question which aims to obtain information for the BOI to determine creditworthiness and legitimacy of the collaborators of a project. Asia Pacific simply mentioned that "a Japanese individual, along with others from abroad are joining our group (details attached) to design, construct, build and manage a Golf Course" as well as mentioned that the UDA had agreed to provide them land in Battaramulla. A look at those attached "details" reveals no project summary and merely a description of the golfing accomplishments of the

Selvaratnam family and and some board positions held by Mr. Wijesinghe. No bank references, financial audits or independent testimonials as to financial and managerial backgrounds were provided. Despite this glaringly insufficient submission of information, the BOI issued a letter to the 10th respondent 10 days later informing him that the application was satisfactorily completed (Document U4 of the UDA's written submission).

According to the original application, the "Japanese individual" which would later be revealed as Mr. J. Yangihara, was to be the sole initial foreign investor and the stated total of the project cost would be Rs. 210 million, with Mr. Yangihara to invest Rs. 30 million, the Original Shareholders to collectively invest Rs. 30 million and the remainder to be raised through locating more collaborators. Less than 2 months after submission of the application, notification of approval (Document U8 of the UDA's written submission) was sent to Mr. J. Yangihara – the investor with the largest apparent individual investment obligation – to be the principal investor, informing him of a 15% tax rate for 15 years provided the initial investment in the project was not less than $250,000. Various time extensions were provided to Asia Pacific and an amended application was eventually submitted to the BOI, containing an amended project cost of Rs. 510 million. Asia Pacific subsequently gave notice to the BOI that the project would now include the construction of villas, increasing the project cost to Rs. 1.4 Billion, and later to Rs. 1.96 Billion – each increase, one that brought the project over the threshold of the next level of tax holiday, and served to help legitimize the reduce rental rate (2% of market value) ultimately drafted into the Lease. In light of these notices and requests for concessions, the BIO ultimately entered into Agreement No. 3146 on 21st June 2001, providing a 12-year tax holiday to Asia Pacific.

Despite the extent of the communication between the BOI and Asia Pacific (and its Original Shareholders in the earlier stages) – the written submission reveals no less than 9 pieces of concession-related correspondence between the parties during the period leading up to execution of the BOI agreement on 21st June 2001– no evidence has been provided to suggest that any actual investigation occurred whatsoever into the credit-

worthiness or managerial competency of either Mr. J. Yangihara, the Original Shareholders, or Asia Pacific. In fact, it does not appear that any inquiry was made as to whether Mr.Yangihara even existed, with the entirety of the evidence submitted regarding communication with this individual being the letter of approval sent by the BOI to him in Japan. Given the details of the written submission on behalf of the BOI, the lack of such evidence is disturbing and, to this Court, a clear indication that no effort was spent on investigating the economic and managerial particulars alleged by the Original Shareholders in their BOI application. As noted above, the BOI granted approval within 2 months to an application that **failed to contain any concrete financial or independent references of the collaborators**. This Court believes that the BOI, at the time of issuing its approval, had never even learned of Mr. Yangihara's first name. Such a lack of information on the part of the BOI lends much credibility to the submission of the petitioners' Counsel that (i) Mr. Yangihara was a fictitious individual, merely introduced to inject a foreign flavour to the transaction so that it would appear on its surface to be a typical BOI investment, and that (ii) the BOI could not have possibly performed the due diligence required for a prudent determination of project feasibility.

While the above allows for this Court to conclude that the BOI, without a shadow of a doubt, failed to discharge its duties appropriately, further concrete proof that the BOI effectively allowed an otherwise entirely undercapitalized company to obtain significant tax concessions only available to highly-capitalized projects is revealed both by Nihal Hettiarachchi & Co., Chartered Accountants in the audited financial statements of Asia Pacific for the 2001 tax year, as well as an internal BOI Memorandum. The audited financials for the fiscal year ending March 31, 2001– the BOI had entered into agreement with Asia Pacific 3 months earlier – reveal that Asia Pacific had nearly no capitalization and no assets other than this land which had, by then, been leased to them by the UDA. The BOI's failure to ascertain, or decision to ignore, these facts is unequivocally proven by an Internal Memorandum of the BOI dated 13th March 2003 (Document FF of the BOI's Affidavit) which states, in part, that "although the

Monitoring Dept. has requested the company to provide details of actual investment and paid up capital, the company had not complied with this request *to date*" (Italics added). In other words, Asia Pacific had alleged a projected investment increase 3 times before ultimately arriving at a projected cost Rs. 1.96 Billion and the BOI had approved such downward adjustment in concessionary offerings each and every time without having ever held a shred of knowledge as to the actual, or likelihood of, capitalization of the company and the project. By the date of this letter, it is revealed that nearly 3 years after entering into agreement with Asia Pacific, the BOI still had not yet known the financial particulars of the company. Such egregious inaction is a clear violation of the Public Trust.

The foregoing, taken in total, leave this Court to view the actions of the UDA and BOI, not as a series of discrete and otherwise unintended missteps, but rather as all part of a larger agenda to successfully consummate the transaction, in spite of a procedural process that, if properly executed, would have prevented it. With this realization, we now turn to an analysis of the actions of the 1st respondent as well as those of the shareholders behind Asia Pacific to gain insight into this larger agenda.

In considering the part played by the 1st respondent, it is important to specifically understand that no single position or office created by the Constitution has unlimited power and the Constitution itself circumscribes the scope and ambit of even the power vested with any President who sits as the head of this country. In exchange for a conferment of extensive executive powers, the Constitution requires of the President, among other things, an affirmation by oath that s/he, once elected, will "faithfully perform the duties and discharge the functions of the office of the President in accordance with the Constitution of the Democratic Socialist Republic of Sri Lanka and the law", and that s/he will be faithful to the Republic of Sri Lanka and that s/he will to the best of her/his ability uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka. (*vide* Chapter VII, §33, 4th Schedule). Similarly, a Minister is required to give affirmation by oath of the same attestations, and in the same

manner. Common to both roles is the expectation and understanding that any person who is elected to the Presidency or appointed to Ministerial service – and as in the case of the 1st respondent, serves in both capacities due to self-appointment as Minister of Finance using the power of the Presidency are so chosen because they are deemed able to embrace, uphold, and set example as a follower of the Rule of Law created pursuant to the Constitution and they hold in trust the executive power of the People acquired **through the Sovereignty of the People**. While the exercise of Presidential power is a duty that must accord with the Rule of Law, such compliance should also come from one's own conscience and sense of integrity as owed to its People. This means that whilst they can use their private power and their private property in an unfettered manner when granting any privileges or favours and, even in an overwhelming act of great generosity, give all their private property away, **their public power must only be used strictly for the larger benefit of the People, the long term sustainable development of the country and in accordance with the Rule of Law**.

Consequent to this framework, it is to be noted for our purposes that all facets of the country – its land, economic opportunities or other assets – are to be handled and administered under the stringent limitations of the trusteeship posed by the Public Trust Doctrine and must be used in a manner for economic growth and always for the benefit of the entirety of the citizenry of the country and we repeat, not for the benefit of granting gracious favours to a privileged few, their family and/or friends. Furthermore, being a creature of the Constitution, the President's powers in effecting action of the Government or of state officers is also necessarily limited to effecting action by them that accords with the Constitution. **In other words, the President does not have the power to shield, protect or coerce the action of state officials or agencies, when such action is against the tenets of the Constitution or the Public Trust,** and any attempts on the part of the President to do so should not be followed by the officials for doing so will (i) result in their own accountability under the Public Trust Doctrine, betraying the trust of good governance reposed in them under the

Constitution by the People of this nation, in whom sovereignty reposes and (ii) render them sycophants unfit to uphold the dignity of public office.

At the base of her defence, the 1st respondent principally alleges that her involvement in the instant transaction was minimal, and limited to only the action she was expected to take in her capacity as Minister of Finance and as head of the Cabinet of Ministers. Moreover, she argues that when she saw the project undergoing "substantial change", she immediately sought to cancel the transaction. Such statements, however, fail to explain the submitted evidence, resulting in a series of contradictions and inconsistencies that lead us to no other conclusion than a determination that the 1st respondent has failed to function in a manner consistent with the expectations of a Public Officer, much less an Executive President, and in doing so, has completely betrayed the position of trust bestowed upon her by the Constitution and by the People of Sri Lanka. The 1st respondent has grossly abused her power.

The first action of the 1st respondent significant to the present case involved the issue of the Special Projects Memorandum. Only 4 months after the initiation of the Asia Pacific project, the 1st respondent issued the Special Projects Memorandum that, quite conveniently, aimed to facilitate and "streamline" the alienation of land in situations precisely, like the kind at issue. In contemplation of the Special Projects Memorandum, was the later issuance of the Cabinet Memorandum P3 which, as set out in the facts above, sought to facilitate the approval of Asia Pacific's Golf Project and sought, among other things, significant economic concessions for the project. Though the 1st respondent argues that the issuance of this Memorandum was both customary and in response to a recommendation of the project by the BOI, the BOI has expressly stated (*vide* para, 3, Document FF of the BOI's Affidavit) that at ***no time was a recommendation ever made*** to the 1st respondent to issue the special concessions she advanced. The BOI's assertion is substantiated by the fact that letters dated 25th August 1997 (Document JJ(1) of the BOI's Affidavit) and 3rd September 1997 (Document JJ(2) of the BOI's Affidavit) reveal that the Digana Golf Course was still under

construction and encountering financial difficulty which would result in a 2-year delay to complete the project. Such a blatant misrepresentation by the 1st respondent only strengthens the allegations of the petitioners that such behaviour had ulterior motives unrelated to furthering the Public Trust.

Regardless of the 1st respondent's argument that her behaviour was 'customary', the fact remains that the promoters themselves received payment for transfer of the shares of Asia Pacific, whose sole significant asset at the time of sale was the leasehold of the land with the UDA and the approval agreement with the BOI, both containing provisions exceptionally and unusually favourable to Asia Pacific – such provisions she had successfully lobbied for approval. Given such a result, it was the duty of the 1st respondent to, at the very least, inform the Cabinet through a subsequent memorandum – it must be remembered that the 1st respondent was the Minister of Finance during the year of the sale (2002) – of the material change to the project resulting from the sale of Asia Pacific to Access Holdings. While the 1st respondent argues as evidence for the normality of this transaction that "it is an everyday commercial reality that the very basis of commercial transactions is to make a profit", **the sale of a development company after obtaining state-subsidized assets and inordinately favourable tax incentives, before significant investment into the company or the commencement of development is anything but an "everyday commercial reality".** Given the fact that the 1st respondent actively and successfully lobbied the Cabinet for concessions for Asia Pacific beyond and in excess of the guidelines she herself had promulgated in her capacity as President, it is patently disingenuous for the 1st respondent to now abdicate responsibility and claim ignorance of the nefariousness of the transaction. Quite simply, it is unacceptable and reprehensible for the 1st respondent to have made use of the power conferred upon her by the People to advance this Project, and now distance herself from the responsibilities inherent to such power.

Notably, this is not the only instance in which she has interceded in land alienation procedures for the purpose of

"actively facilitating," if not seeking to bypass the appropriate approval process. According to a report of Committee of Inquiry delivered on 6th November 2002 regarding, in part, the propriety of alienation of land in Narahenpita to Lifestyle Health Services (Private) Limited, the 1st respondent issued several pieces of correspondence through which she, *inter alia*, expressed repeated concern over procedural delays and instructed the BOI to expedite the process of vesting of the land by "eliminating some of the steps outlined or by accelerating the same." (Document EE of the BOI Affidavit page 9 paragraph ix) From the documentation presented to this court it appears this transaction too was another 'favour' granted – and as submitted by the petitioner, according to some in the media, a favour to her masseur. This court directs the BOI and the SLLR & DC to immediately investigate this dubious alienation and to act forthwith to restore the public purpose for which the said land was acquired especially as the affidavit of the SLLR & DC reveals that several installments amounting to approximately Rs. 25 million have not yet been paid. This is of particular importance given the pressing problem of the lack of housing for middle class government officials who reside in Colombo, since no development whatsoever has taken place on this land.

In her written submission for the instant case, the 1st respondent advanced as reasons for her submission of such extensive concessions (i) the fact that the country had faced low levels of foreign investment due to the country's extensive political strife and terrorist violence, (ii) the fact that a significant portion of the property was to be preserved as undeveloped marsh, and (iii) the success of the Digana Golf Project. However, the concessions the 1st respondent sought do not accord with the guidelines she herself had promulgated earlier on in her Presidency, and the reasons provided in defence of such action do not accord with the facts then available to her and of which she was reasonably expected to be aware of even if she had only superficially scrutinised this transaction. In the Cabinet Memorandum P3 advanced by the 1st respondent to obtain cabinet approval of the project, the 1st respondent put forth the use of a rental rate based at 2% of the market value of the project,

excluding the land value. Such rate, however, pursuant to her own Special Projects Memorandum, was only available to projects costing in excess of Rs. 1 billion, a project size Rs. 490 million more than the proposed project cost at the time the 1st respondent issued the Cabinet Memorandum P3. In addition to this concession, the 1st respondent also saw fit to seek a Rs. 90 million offset against the CV's Valuation of the land in consideration of the fact that the property was not to be developed, and because the "promoters" had suggested that the CV's Valuation would make the project untenable. However, the 1st respondent's request for a Rs. 90 million offset evidences her deliberate dismissal of the UDA-issued terms – enumerated *supra* – by which the Chief Valuer had already downwardly adjusted his valuation for this very issue. Why this desire to violate her own guidelines and offer concessions *in excess* of those she saw fit to earlier promulgate as "special concessions" for select projects? Furthermore, despite a suggestion that the Country was in great need of foreign investment due to the unstable political climate of the country and that her enthusiasm for such project was fuelled by the success of the Victoria Golf Course in Digana, the UDA and BOI have revealed, respectively the interest by multiple golf course companies with respect to land at the Battaramulla location and the fact that, at the time of the Cabinet Memorandum P3 was issued, the Digana project was only at most 50% complete. In light of such evidence, the legitimacy and purpose of the 1st respondent's request for such extensive and non-compliant concessions is based on falsehood and is called into question.

Interestingly, as part of a plea of propriety, the 1st respondent blames the issuance of the Cabinet Memorandum approving the construction of villas and apartments as an action taken while she was out of the country and a result of the shift of government control to the UNF in 2001, and further submits that she moved to terminate the transaction "no sooner" than when "it took a different turn during the period of the UNF Government." Several peculiarities arise, however, when viewing this abdication of responsibility in light of the submitted evidence. Apart from the fact that such an assertion implies that the position of Executive

President was essentially powerless during the latter part of her Presidency – an assertion belied by the inordinate constitutional power held by the President as Head of the Cabinet that remained unchanged from prior to that period and, frankly, a statement unbecoming of a former holder of such post – the assertion ignores the fact that the Memorandum she issued to seek cancellation of the transaction (Document U46 of the UDA's written submission), by her own words, states that the "substantial changes" at the basis of her objection had, in fact, been approved *prior* to this alleged shift in power, **a time in which she, by her own logic, was in control.** Furthermore, the need to issue such a cancellation appears to have been obviated by the fact that the CEA had already issued an order one year earlier to cease activity pending CEA approval of the environmental impact of the proposed villas and the SLLR & DC had subsequently given its approval to the revised master plan (Document U45 of the UDA's written submission) – apparently, a resolution for which the 1st respondent felt unnecessary when declaring without substantiation that the villas posed a flooding hazard. Even assuming the legitimacy of the above suggestions, a question remains as to why the 1st respondent waited till the end of 2004 to act upon the results of an investigation she reinstated and which were delivered in late 2002 (Documents EE and FF of the BOI's Affidavit) revealing, *inter alia*, the inconsistency in the use of the CV's Valuation with respect to the freehold sale of the luxury villas and associated land. Given, then her presumed awareness in 2002 of the "substantial change" to the plan to include villa construction, such a delay to cancel the transaction belies the 1st respondent's assertion that she took action "no sooner" than she found out about such change, and gives rise to the idea that the cancellation sought was for reasons other than a newly-found appreciation of environmental protection.

The irregularities of the above actions cannot be dismissed. Such actions can be seen to be, at best, revealing an incompetence and an unacceptable abdication of responsibility of the most powerful state official of Sri Lanka, and at worst, a pattern of behaviour evidencing an agenda at odds with ensuring optimal use of public lands (the Court at this stage will not deal

with the submission of Counsel for the petitioner that her "lapses" were deliberate, merely to secure a favour to her friend, the 5th respondent, Mr. Ronnie Peiris). His Lordship, Sarath N. Silva in *Senerath* v *Kumaratunga*[11], espoused in the context of inappropriate action by the 1st respondent, that:

> *The case of the petitioners is that the 1st respondent and the Cabinet of Ministers of which she was the head, being the custodian of executive power should exercise that power in trust for the People and where in the purported exercise of such power a benefit or advantage is wrongfully secured there is an entitlement in the public interest to seek a declaration from this Court as to the infringement of the fundamental right to equality before the law.*

I am in full agreement with the spirit of His Lordship's characterisation of the 1st respondent's responsibility. The expectation of the 1st respondent as a custodian of executive power places upon the 1st respondent a burden of the highest level to act in a way that evinces propriety of all her actions. Furthermore, although no attempt was made by the 1st respondent to argue such point, we take opportunity to emphatically note that the constitutional immunity preventing actions being instituted against an incumbent President cannot indefinitely shield those who serve as President from punishment for violations made while in office, and as such, should not be a motivating factor for Presidents – present and future – to engage in corrupt practices or in abuse of their legitimate powers. That the President, like all other members of the citizenry, is subject to the Rule of Law, and consequently subject to the jurisdiction of the courts, is made crystal clear by a plain reading of the Constitution, a point conclusively established in *Karunathilaka* v *Dissanayake*[12] by Justice Fernando:

> *The immunity conferred by Article 35 is neither absolute not perpetual. While Article 35(1) appears to prohibit the Institution or continuation of legal proceedings against the President, in respect of all acts and omissions (official and private), Article 35(3) excludes immunity in respect of the acts therein described. It does so in two ways. First, it completely removes immunity in respect of one category of*

acts (by permitting the institution of proceedings against the President personally); and second, it partially removes Presidential immunity in respect of another category of acts, but requires the proceedings be instituted against the Attorney-General ..... It is also relevant that immunity endures only "while any person holds office as President". It is a necessary consequence that immunity ceases immediately thereafter, indeed it would be anomalous in the extreme if immunity for private acts were to continue. Any lingering doubt that is completely removed by Article 35(2), which excludes such period of office, when calculating whether any proceedings have been brought within the prescriptive period. The need for such exclusion arises only because legal proceedings can be instituted or continued thereafter. If immunity protected a President even out of office, it was unnecessary to provide how prescription was to be reckoned.

I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not the act. Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct.

Such a conclusion is unequivocal. To hold otherwise would suggest that the President is, in essence, above the law and beyond the reach of its restrictions. Such a monarchical/dictatorial position is at variance with (1) the Democratic Socialist Republic that the preamble of the

Constitution defines Sri Lanka to be, and (ii) the spirit implicit in the Constitution that **sovereignty reposes in the People and not in any single person**. As His Lordship G.P.S. De Silva explained in *Premachandra* v *Major Montague Jaya-wickrema*[13] (quoting Wade):

> *Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that,* ***in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms****.*

In light of the foregoing, which has given much credibility to the emphatic allegations of Counsel for the petitioners. I can say without reservation that the 1st respondent has failed to act with the requisite level of responsibility warranted by her position, abused her power and has acted in a manner that reveals a desire to accommodate an interest or interests other than that of the People of Sri Lanka.

Accordingly, the Court finds that the 1st respondent has failed to further the Public Trust, has betrayed such trust and stands in infringement of Article 12(1) of the Constitution.

The next issue to be dealt with is the role of the Original Shareholders of Asia Pacific, as well as the company itself. As gathered from the various documentation provided – including the original and amended BOI application – the Original Shareholders apparently had experience on several company boards, were active in golf and headed several golf clubs both in Sri Lanka and abroad. Based upon their belief that Golf was "the passport to International Business" and the means by which tourism and investment could be drawn to Sri Lanka, they suggested a project to build a golf course with little more than their proposed personal investment, that of "a Japanese Individual" and the collection of more collaborators. Asia Pacific was the vehicle by which their desire to build a golf course was to be achieved.

A review, however, of the financial aspects of the corporation reveal that though lofty aims were sought, there was not, in fact, much in the way of actual investment during the period the Original Shareholders owned the company – in fact, despite requesting and obtaining a BOI agreement based upon a project cost of 1.96 billion dollars, at the time Access Holdings bought into the company in 2002, the company had a paid-up capital amount of only Rs. 15 million (vide Para. 7 of the 6th respondent's written submission). The Court notes and understands the realities of business, namely that projects of this scope require significant investment, often much of which is not immediately available upon the project's commencement. It is precisely for this reason that BOI agreements contemplate a grace period for which project completion is to be completed (and precisely for this reason that the BOI, as mentioned above, needed – but failed – to take great pains in assessing the realistic expectation that such promoters would be able to obtain the financing necessary for such an endeavour before issuing approval).

Any credibility of the Original Shareholders' declarations of sincerity with respect to this project, however, is fatally undermined by what this Court has come to see, from its discovery of materials from the Inland Revenue Department, as a willful decision on the part of the Original Shareholders to conceal certain information from this Court, and by doing so, casts doubt upon their claims that their sale of Asia Pacific, and more importantly, their decision to initiate this project in the first place, was a product of sincere ambition and not just a ruse by which to make use of the laws of land alienation to turn an immense profit. An analysis of several documents submitted by the Inland Revenue Department reveal that the 5th respondent, a Mr. Ronald Srikanth Peiris (hereinafter referred to as "Mr. Peiris"), was, in fact, an original shareholder in the transaction. Rather than buying shares outright and being party to the various incorporating documents and shareholder agreements later executed to bring in, and eventually sell Asia Pacific to, Access Holdings, Mr. Peiris held shares through a trust arrangement by which a certain amount of shares were allocated to, or"held in trust" for him, to be held and disposed of at his behest. A concise

explanation of the arrangement appears in correspondence issued in connection with an investigation by the Inland Revenue Department of Mr. Peiris' taxable income (the particulars of which are not given to preserve the confidentiality of the investigators and the investigatory process):

> *You have asked for documentary evidence in proof of acquisition of shares by Mr. R.S. Peiris in Asia Pacific Golf Course Limited. The best evidence of acquisition of shares in a company would be the share certificates themselves. But, in the case of Mr. R.S. Peiris no such evidence is available. The reason for this was that Mr. Peiris did not acquire the shares in his own name. They were acquired in the names of the other shareholders of the company who held the shares in trust for Mr. Peiris. In these circumstances the legal owners of the shares were the shareholders who were the trustees in respect of the shares. Mr.Peiris was the beneficial owner of the shares. Since Mr. Peiris was the beneficial owner of the shares the trustees paid to him the entirety of the proceeds of the sale of the shares when the shares were finally disposed of.*

Reviews of the several trust agreements which were executed by Mr.Siva Selvaratnam, Mrs. Suwaneetha Selvaratnam and Mr.Shantha Wijesinghe to provide for the above arrangement reveal that Mr. Peiris was a beneficial owner of 600,020 Rs. 10 par value shares of Asia Pacific, having an amount at sale of Rs. 57,200,000 million according to the Inland Revenue Department. This amount represents the profit Mr. Peiris derived from the sale of the company to Access Holdings and for which he was ultimately held liable by the Inland Revenue Department to pay tax.

The above discovery raises two important questions before this Court: (1) why was this arrangement not disclosed by the Original Shareholders to this Court, and (2) why was such an arrangement made in the first place? While this Court can only speculate as to the broader reasons for such an arrangement apart from what appears to be a failed attempt at tax evasion, it is clear that, as the very least, the arrangement was made to disguise Mr. Peiris' involvement in the transaction, such

concealment that could be for no other purpose than to effect some result – whatever it may be – that would have not been gotten, facilitated and/or concealed, had he been included as a known investor. It is to be noted in this vein, that Mr. Peiris has, to date, failed to respond to the petitioner's Amended Petition or in any other way defend himself in the case at hand, largely, we believe, because to do so would require him to explain this peculiar arrangement. The petitioner's allege that this transaction was facilitated by Mr. Peiris' relationship with the 1st respondent, and that such an arrangement was in essence a disguised brokerage fee for his "influence peddling". Such silence, if not deceit, on the part of the Original Shareholders regarding Mr. Peiris' involvement certainly lends credibility to the petitioners' allegations referred to above. In light of the Original Shareholders' lack of forthrightness with this Court, we, as noted below, direct an investigation by the Commission to investigate Allegations of Bribery or Corruption for further inquiry into Mr. Peiris' and the Original Shareholders' actions.

Since its independence in 1948, the world has been witness to Sri Lanka's economic transformation from a country primarily subject to the closed-system economic socialist policies of the initial years of independence to an open system of foreign economic investment, ushered in by a wave of economic liberalization policies adopted by the United National Party government with the assistance of guidelines established by the Word Bank. Rather than standing as an illustrious example of the benefits that have come from an open economy, however, the transaction before us is one that, in the 10 years of its existence, has served to draw and make clear the negative effect of the politicization of investment promotion on the success of Sri Lanka's economic liberalization. It is quite ironic that Singapore, a country that once looked to Sri Lanka as a model for the realization of its own economic blossoming, has not only far surpassed Sri Lanka in that regard, but has also, in the words of Lee Kuan Yew, "watched a promising country go to waste."

The transaction before discloses a patent systematic failure of the public bodies charged with adequately and accurately judging the viability of what was ostensibly a foreign investment project.

The UDA and BOI both engaged in a cursory analysis of the particulars of the transaction and issued their approval largely on the basis of the recommendations by other approvals authorities and the directives of the Cabinet, despite significant evidence that, if properly reviewed, would have in all likelihood disclosed the falsity of the application.

The fundamental flaw in the investment system I see is that, despite such alleged autonomy, the fact remains that such bodies are ultimately "under the thumb", so to speak, of the executive heads of this country, whether it be the Minister of Finance at the helm of the BOI, the Minister of Urban Development at the helm of the UDA, the President-appointed Board of the BOI, the directives of the Cabinet of Ministers or even of the President. There can never be any expectation that corruption will not rear its ugly head when no definitive, public guidelines to ensure transparency and accountability exist. As long as the investment infrastructure remains politicized to the extent as revealed in this case, coercive forces will continue to relegate the autonomy afforded to these agencies to the realm of theory and transactions laced with characteristics of fraud and corruption will continue to be shuffled through to completion.

The main method by which such imbalance can be countered is through establishing appropriate and complete guidelines by which state actors are to operate, a terrain largely left empty by current legislation. While Court cannot enact legislation, Court is able to direct the appropriate state authorities to accordingly pursue, concretize and legislate law that will serve as checks and balances to fill the void in the law of the lack of supervision. The UDA and BOI, and all other agencies involved with the investment process in Sri Lanka must take steps to create publicly available guidelines regarding the mechanisms of approval. The analysis that each agency undertakes will necessarily be germane to their operating purpose, but all such agencies should, at the least, provide for an open auditing and tendering process including, but not limited to, (i) an analysis of the direct costs of proposed projects, (ii) an analysis of any indirect costs incurred by the project or the general public, including social costs, (iii) an analysis of the basis for calculation, including any independent

assessments of calculations, (iv) a detailed analysis and publication with all approvals of the reason for choosing the approved project in light of relevant alternatives, and (v) a publication of the analysis in significant detail of the potential benefits and detriments. Whatever the legislation drafted, it must ultimately accord with the Sovereignty vested in the People, by furthering the Doctrine of Public Trust.

The Indian Supreme Court emphatically stated in *ICELA* v *Union of India*[14] that "the enactment of a law and tolerating its infringement, is at times worse than not enacting a law at all." In the instant case, the end result of a tainted investment process was the approval of a project aimed at reaping profit through the creation of exclusivity on land originally acquired for a public purpose – a result directly contravening the public purpose nature inherent to acquired land, and not made any less so by the attempt to disguise it with patches of altruism like a public playground and cricket pitch. That such a project was allowed to proceed to finish on land taken from the citizenry is testament to the breakdown of the procedural process that was meant to protect the Public Trust and the repugnant actions of several principal actors in this case, causing government losses running into hundreds of millions of Rupees.

On the basis of the aforesaid findings, I hold that the entire transaction – the transfer of land to Asia Pacific, the subsequent removal of the use and development restrictions appurtenant to the land, and the eventual freehold alienation of undeveloped portions of the land – was a result of actions, omissions and decisions made in violation of the Doctrine of Public Trust.

For these reasons I allow the application and grant to the petitioners and intervenient petitioners the declaration prayed for that their fundamental right to equality before the law guaranteed under Article 12(1) of the Constitution has been infringed by executive and administrative action. Having been executed without lawful authority, the operative documents by which the transaction was consummated – including, but not limited to, the Lease, the First Licence and Second Licence, and the Agreement to Sell – and all other instruments made in furtherance of the transaction in relation to the land referred to in this case is

declared invalid in law and thereby declared null and void. Given this finding, this Court makes the following further orders and declarations:

> Transfer of Title of the approximately 225 acres transferred to Asia Pacific by way of (i) a leasing of Lot 1 in Plan No. 1481 under Deed of Lease No. 758/760 dated 4th September 2000 and 18th September 2000 and attested by S. Jayamaha of Colombo, Notary Public, (ii) a licensing of Lots 2 to 6 in Plan No. 1481, and Lot 1 in Plan No. 1484, under Deed of Indenture No. 759/767 dated 18th October, 2000 and attested by S. Jayamaha of Colombo, Notary Public and (iii) a licensing of Lots 1 to 4 and Lots 6 in Plan No. 1456 under License Agreement No. 822 dated 9th August 2001 attested by S. Jayamaha of Colombo, Notary Public, is hereby declared null and void (*ab initio* void) and all subsequent conveyances up to the date of this judgment are declared null and void and shall have no force or avail in law. The total extent of land reverts back to the UDA. Such reversion is to be executed by the UDA by a Deed of Cancellation and registered with the Registrar of Lands Colombo, executed in terms of the declarations contained in this judgment within one (1) month of the date of this judgment. A copy is to be filed of record.
>
> This Court is well aware that, despite all arguments otherwise, the land's flood retention capacity has only diminished since the commencement of this misguided project nearly 10 years prior. Given that part of this land has already been built upon, this Court finds it prudent to make use of that part of the effectively irreversible development to provide for relocation of governmental agencies as a means of decentralizing it from Colombo's commercially sensitive areas. Therefore, within (3) months of the date of this judgment, the SLLR & DC and CEA and the UDA shall deliver to this Court a joint Master Plan to accord with the aforesaid public purpose, and to bring as much of the land as possible back to the flood retention purposes for which the land was initially taken, so that flooding of the surrounding suburban areas will cease or be minimized.

In consideration of the construction of buildings by Asia Pacific, the UDA will pay to Asia Pacific, a sum representing the cost of construction of the buildings as at the date of construction, excluding all other development on the said land by Asia Pacific, to be assessed by the Chief Valuer of the Valuation Department, and paid within four (4) months of the date of this Judgment. From this amount the UDA will withhold the sum of public funds spent by the Kaduwela Pradeshiya Sabhawa, which was clearly deceived into expending public funds on the mistaken belief that this was for a public purpose, in filling up the 7.8 hectare portion of land originally vested to the Kaduwela Pradeshiya Sabhawa for the building of a playground and which was, however, subsequently allocated to Asia Pacific. This money so withheld is to be returned to the Pradeshiya Sabhawa by the UDA. The Pradeshiya Sabhawa shall expend this money for projects that benefit the public.

Asia Pacific, its assignees, successors, servants, agents and all those holding under it, are permitted to remove all movables within four (4) months of the date of this judgement and shall hand over vacant possession of the said land free of all or any encumbrances whatsoever on or before 8th of February, 2009.

The decisions that have been made from time to time by the Cabinet of Ministers – including, but not limited to, their Approval dated 4th March 1998 which approved the 1st respondent's Cabinet Memorandum P3 without query, clarification and / or amendment (Document U16 of the UDA's written submission) and the Cabinet Approval dated January 31, 2001 (Document U31 of the UDA's written submission) which approved the removal of the freehold alienation restriction of the Acquired Land – are of no force or effect in law insofar as they are ratifications of actions in violation of the Public Trust and, therefore, an infringement of Article 12(1) of the Constitution.

As Head of the Cabinet which made such ratifications, and herself responsible for issuance of the Cabinet Memorandum P3 that set in motion the entire transaction,

the 1st respondent is hereby ordered to pay Rs. 3 million to the State as compensation by a deposit in this case, no later than January 31, 2009. We believe such a token payment of the real loss to the state of several hundreds of millions, will serve to "remind" present and future state actors and agencies (i) of their paramount duty to further the Public Trust and (i) that their actions are subject to the Rule of Law.

The 5th respondent has procured favours by the executive in violation of the Public Trust doctrine in infringement of Article 12(1) of the Constitution. He has profited from the transaction through a carefully concealed ownership of Asia Pacific, and which concealment, this court believes, was effected to hide what was in essence a commission for peddling executive favours of the 1st respondent.

Similarly, the 9th, 10th and 11th respondents whose declarations of propriety regarding their intentions towards the Golf Project are fatally and fully negated by their proactive concealment of the 5th respondent's hand in the ownership of Asia Pacific (i) from all operative and material documents relating to this transaction, and (ii) from their written and oral submissions to this Court, actions which the evidence convincingly reveals were an effort to mask the arrangement by which they procured the approvals needed to obtain and profit from the alienation. As was noted in *Hameed* v *Ranasinghe (15)* and affirmed in *Faiz* v *Attorney-General*, (16) "This Court has the power to make an appropriate order even against a respondent who has no executive status where such respondent is proved to be guilty of impropriety or connivance with the executive in the wrongful acts violative of fundamental rights..."

The above makes it amply clear that this Court is well within its powers to determine and mete punishment for private actors who, like in the instant case, make use of government corruption to procure special benefit, and by doing so, deprive the citizenry of their fundamental right to equality. Accordingly, the 5th respondent is ordered to pay Rs. 2 million, and the 9th, 10th and 11th respondent are each

ordered to pay Rs. 1 million, to the State by a deposit in this case no later than January 31, 2009.

We direct the 15th respondent, the Director-General Commissioner of the Commission to Investigate Allegations of Bribery or Corruption, to conduct an immediate inquiry of the entire transaction in terms of Section 17(a), Section 70 and all other relevant Sections of the Bribery Act No. 11 of 1954, as amended (hereinafter referred to as the "Bribery Act") with particular scrutiny on the actions of the 1st, 3A, 4th,5th, 7th, 9th, 10th, and 11th respondents.

In accordance with our findings on the alienation of the land in Narahenpita to Lifestyle Health Services (Private) Limited referred to above, we order a full investigation into the

particulars of that transaction by the Commission to Investigate Allegations of Bribery or Corruption in terms of Section 17(a), Section 70 and all other relevant sections of the Bribery Act, as amended.

We order Costs in a sum of rs. 500,000/- to be paid to each of the petitioners and also costs of Rs. 100,000/- to each of the intervenient petitioners who came into this court as some of the owners of the original land, by the 1st, 3A, 4th, 5th, 7th,9th, 10th, and 11th respondents in equal proportion. The application is allowed.

S.N. SILVA, C.J. - I agree.

RATNAYAKE, J. - I agree.

Relief granted.

Declarations/orders issued.

PERIANAN
v
GUNASINGHE AND ANOTHER

COURT OF APPEAL
EKANAYAKE, J.
GUNARATNE, J.
CA 1092/98(F)
DC NUWARA-ELIYA DE/12
SEPTEMBER 25, 2007

Rent Act – Subletting – Supreme Court Rules (1990) – Do they apply to appeals from judgments from the original Court? What is material to prove sub-tenancy? Exclusive possession of a defined area necessary?

Judgment was entered in favour of the plaintiff-respondent on the basis that, the defendant-appellant has sublet the premises.

The 2nd defendant's position was that, he was the tenant of the plaintiff's father.

Held:

(1) It is necessary to ascertain (1) as to who was the tenant i.e. 1st or the 2nd defendant (2) sub-tenancy and (3) payment, if not action would fail.

(2) The portion sub-let should be capable of ascertainment as an identifiable entity occupied by the sub-tenant to the exclusion of the tenant.

(3) A landlord who pleads a sub-tenancy has to discharge the burden of proving that some person not only occupied the premises or some part thereof but that he paid rent for his occupation.

(4) The necessity for proof of exclusive possession of a defined area is a *sine qua non* of a finding as to sub-letting.

(5) There is no cogent evidence to prove and discharge the burden of proving sub-letting

Per Anil Gunaratne, J.

"Rules – SC Rules 1990 – refer to Article 140 and 141 of the Constitution which deals with writs and writs of *Habeas Corpus* and not with appeals from

judgments from the original Court."

APPEAL from the judgment of the District Court of Nuwara-Eliya.

Cases referred to:

(1) *Perera* v *Seneviratne* 77 NLR 403.

(2) *Suppiah Pillai* v *Muttukaruppa Pillai* 54 NLR 572.

(3) *John Singho* v *Meeran Bee Bee* 1969 75 CLW 107.

Hugo Anthony with *A.P. Kanapathipillai* for appellant.
L.C. Kumarasinghe for respondent.

January 14, 2008

ANIL GUNARATNE, J.

This is an appeal from the Judgment of the District Court of Nuwara-Eliya in a rent and ejectment case delivered on 15.7.1998 entering judgment in favour of the plaintiff as prayed for in the plaint and damages. The plaintiff-Respondent's position was that the 1st Defendant was the tenant of the premises described in the schedule to the plaint and the premises in dispute referred to in the said schedule to the plaint had been sub-let to the 2nd defendant-appellant. On that basis filed action to eject the defendants. 2nd defendant-appellant filed answer denying above and took up the position that one John Singho (plaintiff's father) rented the premises in dispute to him and paid rent to him and on his demise to his agent.

Plaintiff-respondent's father John Singho was the owner of the business premises which fact is not disputed by either party to this action and that the plaintiff-respondent by deed No. 4765 of 21.3.1979 marked P1 became the owner of the premises in suit. Owner of premises in suit and paragraph 5 of the plaint are recorded as admissions in this case. As such sub-tenancy as raised by the plaintiff and that payment was made for such occupancy would have to be proved. Further in view of the 2nd defendant-appellant's position it would be necessary to ascertain as to who was the tenant i.e. 1st or 2nd defendant? Nevertheless sub-tenancy and payment for occupancy would have to be proved by plaintiff. If not action would fail.

Plaintiff-respondent's position was that his father rented the premises in dispute to one Karuppiah Pillai, on or about 1953 and on his death the wife of the said Karuppiah Pillai and thereafter their son the 1st defendant K. Selvarajah became the tenant. The 1st defendant had defaulted and the case had been fixed *ex-parte* against the 1st defendant.

Plaintiff-respondent *inter alia* contends that

(1) 2nd defendant's name not found in any of the rent receipts marked D1-D41 but the said John Singho, plaintiff's wife and plaintiff had their signature placed on these receipts.

(2) 2nd defendant had an agreement with Karuppiah Pillai who was the first person to start the business of Saraswathie Stores which would prove that Karuppiah Pillai originally rented the stores from John Singho.

(3) Supports the Judgment of the District Judge.

(4) 2nd defendant had not obtained permission of the Rent Board to deposit rent with the Nuwara Eliya Development Council.

(5) 2nd defendant is a partner of Saraswathie Stores. Initially in his evidence 2nd defendant stated he was the owner of Saraswathie Stores, Later on admitted that he is a partner.

(6) The mandatory requirement in terms of Rule 3(2) of the Supreme Court Rules of 1990, which should contain an averment that jurisdiction of Court not previously invoked not fulfilled.

This Court observed that this is a frivolous objection since the said rules refer to article **140 & 141** of the Constitution which deal with Writs and Writs of *Habeas Corpus* and not with Appeals from Judgments from the Original Court. The particulars of the Petition of Appeal and Notice of Appeal are embodied in Section 758(1) and 755(1) of the Civil Procedure Code. The objection raised do not fall with the above provisions of the Civil Procedure Code.

(7) Appellant had not prayed in his Petition of Appeal to set aside the Judgment or Order of the learned District Judge.

The 2nd defendant-appellant *inter alia* contends that:

(a) Plaintiff's father was the original land lord and that the premises were rented from him.

(b) Rent were paid by the 2nd defendant-appellant to the plaintiff and/or his Agents.

(c) That by the admission of signatures of plaintiff's father in D1-D4 it is apparent that the plaintiff's father was the landlord and 2nd defendant was his tenant.

(d) Plaintiff's version in the plaint differ from the material elicited in cross-examination.

(e) Partnership agreement 2nd defendant-appellant had with Karuppiah Pillai had no bearing and he died in 1962 long prior to enactment of the rent Act of 1972.

(f) Document D1-D42 not challenged by plaintiff.

On a perusal of the Judgment of the District Court I find that the learned District Judge having narrated the gist of the evidence of each party, refer to inconsistencies in the evidence. The following may be noted.

(i) That the receipts issued are not issued in the name of the 2nd defendant, but some of the receipts name Saraswathie Stores of which the 2nd defendant claim to be it's owner. On cross-examination the Trial Court Judge states that the 2nd defendant admitted that he was a share holder and that the other share holder was Karuppiah Pillai. It is the view of the Trial Court Judge that the above position contradicts the position taken in the answer of the 2nd defendant.

I wish to observe that even if there is a contradiction and the fact that the receipts do not show the name of the 2nd defendant, the fact of sub-tenancy cannot be proved or inferred. One could be a shareholder of a business and also be the tenant. There is an absence of clear evidence to establish sub-tenancy.

(ii) District Judge has referred to the principles in *Perera* v *Seneviratne*[1] case which I would refer to in this Judgment.

> Even with or without inconsistencies what is material would be to prove sub-tenancy and payment of rent on that account. These two aspects cannot be inferred from the evidence led in the Trial Court.

At the least even if the learned District Judge concludes that the tenant was the 1st defendant such view would not give rise to a sub-tenancy between the 1st defendant and the 2nd defendant in the absence of cogent evidence. I have to observe that the learned District Judge had been misdirected in law and fact on this aspect.

In *Suppiah Pillai* v *Muttukaruppa Pillai*[2].

> In an action for ejectment on the ground that the tenant had sub-let portions of the leased premises in breach of Section 9(1) of the Rent Restriction Act, the essential test is whether there is evidence from which one can infer that there is at least some part of the premises over which the tenant has, by agreement, placed the alleged sub-tenant in exclusive occupation. The portion sub-let should be capable of ascertainment as an identifiable entity occupied by the sub-tenant to the exclusion of the tenant.

At 575 ....

> But the essential test in every case is whether there is evidence from which one can infer there is at least some part of the premises over which the tenant has, by agreement, placed the sub-tenant in exclusive occupation.

Perera v *Seneviratne* (*supra*).

> A landlord who pleads a sub-tenancy has to discharge the burden of proving that some person not only occupied the premises or some part thereof, but also that he paid rent for his occupation.

The requirement relating to exclusive possession of a defined area of the premises, has been consistently applied in subsequent decisions. The necessity for proof of this element, as a *sine qua non* of a finding as to sub-letting, was taken for granted by Wijetilleke J. in *John Singho v Meerian Beebie*[3].

In the circumstances essential requirements as borne out in the above decided cases have not been proved by the plaintiff in the present case to establish sub-tenancy. The examination in chief of the plaintiff itself is very brief which lay more emphasis to prove tenancy rather than establishing sub-tenancy of the 2nd defendant. In the absence of cogent evidence to prove and discharge the burden of proving the requirements as indicated in the case of *Perera* v *Senaratne* (*supra*) and the other case law cited above would compel me to set aside the Judgment of the District Court of Nuwara Eliya.

Therefore I allow the appeal and dismiss plaintiff's action with costs, in this Court and in the Original Court.

EKANAYAKE, J. - I agree

Appeal allowed.