THE
Sri Lanka Law Reports

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

[2005] 3 SRI L. R. - Part 3

PAGES 57 - 84

PUBLISHED BY THE MINISTRY OF JUSTICE

Printed at the Department of Government Printing, Sri Lanka

Price : Rs. 12. 50
1- CM 7217

DIGEST

CIVIL PROCEDURE CODE –

(1) Sections 146 (1), 146 (2) and 147 - Objection to jurisdiction pleaded - Not put in issue - Could it be raised half way through the trial?- Judicature Act, section 39 - National Environment Act, No. 47 of 1980 - Does it oust the jurisdiction of the District Court to deal with nuisance?

Edmund Perera v. Nimalaratne and Another 87

(2) Sections 75, 75(d) – General denial of averments in plaint - Is it a denial contemplated under section 75(d) ?

Ravindran and Another v. Soysa and Another 56
(Continued from Parts 1 & 2)

(3) Sections 146, 753-Issues-Disallowed-Partition action-Sections 18(2), 19,23(1), 48(1) - Plan depicting a larger land – No leave to appeal application-Revisionary Jurisdiction invoked - Maintainability ?

Senaratne and Another v Wijelatha 76

DEBT RECOVERY – (Special Provisions) Act, No. 2 of 1990, amended by Act, No. 09 of 1994 - Defendant directed to deposit money or provide security to defend the action - Does leave to appeal lie? - Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 - Compared - Exercising revisionary jurisdiction - Civil Procedure Code, sections 756 and 763.

Mawsook v. People's Bank 63

MEDICAL ORDINANCE – sections 19(c), 29(l)(iv)(cc) – Act 16 Examination- Recognition of foreign medical degrees, – Duty cast on the 1st respondent to permit the applicant to sit Act 16 Examination,

Jinadasa v. Sri Lanka Medical Council and Others 82

PETROLEUM PRODUCTS – (Special Provisions) Act, No. 33 of 2002, section 5 - Common User Facility (C.U.F.) agreement - Rights of parties in the CUF agreement - Could it take away the statutory powers of the Minister?

Lanka Marine Service (Pvt) Ltd. vs. Sri Lanka Ports Authority and Others 60

CM 7217 – 2,500 (2007/03)

July 22, 2005
ANDREW SOMAWANSA, J. (P/CA)

This an application for leave to appeal from the order of the learned District Judge of Mt. Lavinia dated 11.02.2004 permitting the plaintiffs-respondents' application to have averments in paragraphs 2, 3, 4, 5(i), 5(ii), 6, 7, 10, 12 and 17 in the answer of the defendants - petitioners recorded as admissions.

As there was no response to the notices issued to the plaintiffs-respondents on several occasions the matter was fixed for inquiry and the counsel for the defendants-petitioners moved to tender written submissions and the same has been tendered.

It is contended by counsel for the defendants-petitioners that the aforesaid order dated 11.02.2004 is wrong since the defendants-petitioners have denied all averments in the plaint by averments in paragraph 01 of their answer. He submits that the words in paragraph 01 of their answer or their meaning will not have any effect if the learned District Judge's order is allowed to stand. I am unable to agree with this submission for section 75 of the Civil Procedure Code which deals with the requirements of an answer does not contemplate a general denial of the averments in the plaint but requires a statement admitting or denying the several averments of the plaint. The relevant part of section 75 of the Civil Procedure Code applicable to the issue at hand is sub-section 'd' which reads as follows :

(d) "a statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of 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".

In answer to averments in paragraphs 2, 3, 4, 5 (i), 5 (ii), 10, 12 and 17 in the plaint the defendants-petitioners by paragraphs 3, 4, 5, 7, 9 and 12 in their answer states as follows :

3. පැමිණිල්ලේ දෙවෙනි ඡේදයට පිළිතුරු දෙමින් කියා සිටිනුයේ. එම කරුණු පැහැදිලිව නොදන්නා අතර. එය ඔප්පු කළ යුතු බව ය.

4. තෙවන, හතරවෙනි, ඡේද හා පස්වන ඡේදයෙහි 1 අනුඡේදයෙහි ව්‍යාකුල හා අපහැදිලි වන අතර, නිසි ලෙස පිළිතුරු දිය නොහැක. තවදුරටත් විත්තිකරුවන්ට අගතියක් නොවන සේ කියා සිටිනුයේ, එම කරුණු නොදන්නා බව හා සනාථ කළයුතු බව ය.

5. පස්වන ඡේදය II අනුඡේදයේ ද හයවෙනි හත්වෙනි ඡේදවලද සඳහන් කරුණු නොදන්නා බවත්, එවා සනාථ කළ යුතු බවත්, ප්‍රකාශ කර සිටිනු ලැබේ.

7. දහවෙනි ඡේදයේ දක්වා ඇති කරුණු පිළිගනු ලැබේ.

9. දොළොස් වෙනි ඡේදයේ කරුණු නොදන්නා අතර සනාථ කළ යුතු ය.

12. දාහත්වෙනි ඡේදයෙහි සඳහන් පිඹුර පිළිබඳව නොදන්නා හෙයින් එම පිඹුරට අදාළ මෙහි කරුණු නොදනී සනාථ කළ යුතු ය.

It is to be seen that there is no reference either denying or admitting the averments in paragraphs 6 and 7 of the plaint. While conceding that nowhere do the defendants-petitioners in their answer admit the averments in paragraphs 2, 3, 4, 5, 6, 7, 12 and 17 of the plaint, there is also no denial of the averments therein other than a general denial in paragraph 1 in the answer.

In *Fernando* vs. *Samarasekara* [1] it was held :

"Where a defendant does not deny an averment in the plaint he must be deemed to have admitted that averment".

The facts in that case were as follows :

It appears from the plaint that Miguel Appuhamy died leaving the third to the eighth plaintiffs as his heirs. While not denying this averment in his answer the appellant goes on to say that he makes no claim to the share allotted to Miguel Appuhamy. It is admitted by the counsel for the respondents that there is no evidence that the plaintiffs are the heirs of Miguel Appuhamy. He however, relies on the fact that it was never denied or disputed throughout the proceedings.

Per Basnayake, J. :–

"Section 75(d) of the Civil Procedure Code requires that the answer should contain a statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence. If the defendant disputed such an important

averment the proper place for him to raise it was in his answer which he was free at any stage of the proceedings to amend with the leave of Court. The provisions of section 75 are imperative and are designed to compel a defendant to admit or deny the several allegations in the plaint so that the questions of fact to be decided between the parties may be ascertained by the Court on the day fixed for the hearing of the action. A defendant who disregards the imperative requirements of this section cannot be allowed to take advantage of his own disobedience of the statute. To permit such a course of conduct would result in a nullification of the scheme of our Code of Civil Procedure.

We hold therefore that the appellant cannot take this objection in appeal. His failure to deny the averment in accordance with the requirements of the statute must be deemed to be an admission by him of that averment.

Learned counsel for the appellant submitted to me in Chambers after we reserved judgment the case of *Lokuhamy* vs. *Sirimala*[2] and *Fernando* vs. *The Ceylon Tea Company Ltd.*[3] These cases have no bearing on the matter we have to decide in the present case. They deal with the effect of the failure of a plaintiff to deny by replication the statements made by a defendant in his answer.

The appeal is dismissed with costs."

Again in *Mudaly Appuhamy vs. Tikerala* at 35 it was held :

"An objection to a pleading for want of particulars is not a matter to be set up by plea. A party requiring more particulars should, before pleading to the merits, take the objection by way of motion to take the pleading off the file".

It is to be seen that the learned District Judge has considered the provisions contained in section 75(d) of the Civil Procedure Code as well as the authorities applicable and has come to a correct finding.

For the above reasons, I see no basis to interfere with the order of the learned District Judge and accordingly leave to appeal is refused and stands dismissed. I make no order as to costs.

WIMALACHANDRA, J., — I agree,

Application dismissed.

LANKA MARINE SERVICES (PVT) LTD
VS
SRI LANKA PORTS AUTHORITY AND OTHERS

COURT OF APPEAL.
SRIPAVAN, J. AND
BASNAYAKE, J.
CA 829/2005.
JULY 6, 24, 27, 2005.

Petroleum Products (Special Provisions) Act, No. 33 of 2002, section 5 - Common User Facility (C.U.F.) agreement - Rights of parties in the CUF agreement - could it take away the statutory powers of the Minister?

The petitioner sought to quash the licenses issued by the Minister of Power and Energy the 6th Respondent under the provisions of Act, No. 33 of 2002 to the 4th and 5th respondents and further sought an interim order preventing the 1st respondent Sri Lanka Ports Authority from permitting the 4th and 5th respondents from landing/transporting bunkers/marine fuel within the port of Colombo without using the common user facility (CUF).

It was contended that the CUF agreement was entered into on 20.08.2002 among the petitioner, 4th respondent, 3rd respondent Ceylon Petroleum Corporation and the Secretary to the Treasury and that, the Government has in terms of the CUF agreement covenanted, promised and undertaken that all bunkers/marine fuel handled and transported within the Port of Colombo should be handled and transported using the CUF and that, the 4th and 5th respondents were not parties to the CUF agreement. It was contended that the impugned licences are invalid *ex- facie*, contrary to the terms and conditions of the CUF agreement and be quashed.

HELD -

(1) The impugned licences were issued in terms of the provisions contained in section 5 of Act, No. 33 of 2002, passed by Parliament on 17.12.2002.

(2) The Act was passed after the CUF agreement was entered into by the parties.

(3) The powers of the 6th respondent Minister as contained in the Act cannot be taken away by the CUF agreement.

(4) The statute being superior reflects the will of the legislature and takes priority over the CUF agreement.

(5) Certiorari does not lie to remedy grievances from an alleged breach of contract.

APPLICATION for a writ of certiorari.

Cases referred to :

1. *Podi Nona vs Urban Council, Horana* (1981) 2 Sri LR 141
2. *Jayaweera vs. Wijayaratne* (1985) 2 Sri LR 413

Romesh de Silva, P. C. with *Harsha Amarasekera* for petitioner.

Wijedasa Rajapakse, PC. with *Kapila Liyanagamage* for 1st respondent.

S. S. Sahabandu, P. C. with *S. Dissanayake* for 3rd respondent.

Shibly Aziz, P. C. with *W. Dayaratne* for 4th respondent.

K. Kanag-Iswaran, P. C. with *Nigel Bartholameuz* for 5th respondent.

M. Gunatilleke, Senior State Counsel for 2nd, 6th, 7th and 8th respondents.

Cur. adv. vult.

August 01, 2005.

SRIPAVAN, J.

The Petitioner whilst seeking to quash the licences marked P8, P9 and P10 issued by the sixth respondent under the provisions of Act No. 33 of 2002 also seeks an interim order preventing the first respondent from permitting the fourth and fifth respondents from handling and/or transporting bunkers/marine fuel within the port of Colombo without using the Common User Facility (hereinafter referred to as the CUF).

It is common ground that the CUF agreement marked P1 was entered into on 20th August 2002 among the petitioner, first respondent, third respondent and the Secretary to the Treasury acting for and on behalf of the Government of Sri Lanka. The learned President's Counsel as averred in paragraph 57 of the petition submitted that the Government of Sri Lanka has in terms of P1, covenanted, promised and undertaken that all bunkers/ marine fuel handled and transported within the Port of Colombo should be handled and transported using the CUF. It is observed that the fourth and the fifth respondents are not parties to the said CUF agreement.

Counsel contended that the first and the second respondents be prevented from acting contrary and/ or in breach of the CUF agreement and thereby the fourth and fifth respondents be prohibited from handling and/or distributing bunkers/marine fuel to ships lying within the Port of Colombo without using the CUF, (*Vide* paragraph 83 of the petition.) The petitioner pleads in paragraph 35 of the petition that the first respondent is about to permit the fourth and fifth respondents to supply bunkers/ marine fuel without using the CUF. It is on this basis Counsel submitted that the impugned licences are invalid *ex-facie*, contrary to the terms and conditions of the CUF agreement and be quashed. (*Vide* paragraph 43 of the petition.)

Having considered the submissions of the learned President's Counsel, the court is of the view that the first respondent's decision to permit the fourth and the fifth respondents to supply bunkers/ marine fuel without using the CUF as contained in the document marked P6 is one taken within the context of the CUF agreement and not in the exercise of any statutory powers vested in the first respondent authority. It is a decision made in the exercise of a power which springs from the agreement marked P1. The contractual relationship among the parties to use the CUF is not regulated by the statute. A distinction needs to be drawn between duties which are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies. (*Vide Podi Nona vs. Urban Council, Horana* [1] *Jayaweera vs. Wijayaratne* [2] Certiorari lies where statutory authorities with powers vested by Parliament exercise those powers to the detriment of the public. It does not lie to remedy grievances arising from an alleged breach of contract.

The impugned licences were issued by the sixth respondent in terms of the provisions contained in Section 5 of Act No. 33 of 2002 passed by Parliament on 17th December 2002. It is thus seen that the said Act was passed after the CUF agreement was entered into by the parties. The powers of the sixth respondent as contained in the said Act cannot be taken away by the CUF agreement marked P1. In other words, the rights of parties in the CUF agreement cannot override the statutory powers of the sixth respondent contained in Act No. 33 of 2002. The grounds on which the petitioner seeks to challenge the impugned licences are succinctly stated in paragraphs 79 and 80 of the petition.

Having regard to the established principles, the statute being superior, reflects the will of the legislature and takes priority over the CUF agreement.

It is an authentic expression of the legislative will and the function of the court is to interpret the statute according to the intent of Parliament. The responsibility of this court is to construe and enforce the laws of the land as they are and not to legislate social or government policy on the basis of the CUF agreement. The court will only intervene and declare the act of the sixth respondent as invalid if it is found that the sixth respondent has exercised his powers in violation of the provisions contained in the said Act. The petition does not disclose any such violation by the sixth respondent. In view of the foregoing, the court does not see any legal basis to issue notice on the repondents. Notice is therefore refused.

BASNAYAKE, J. - I agree.

Notice refused

MAWSOOK
VS
PEOPLE'S BANK

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CA 102/2004(REV).
DC BATTICALOA 8691/M.
MAY 13, 2005.

Debt Recovery (Special Provisions) Act, No. 2 of 1990, amended by Act, No. 09 of 1994 - Defendant directed to deposit money or provide security to defend the action - Does leave to appeal lie? - Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 - Compared - Exercising revisionary jurisdiction - Civil Procedure Code, sections 756 and 763.

The defendant-petitioner sought to revise the order of the District Court of Batticaloa directing the defendant-petitioner to deposit money or provide security to defend the action. It was contended by the plaintiff-respondent that revision does not lie as the proper remedy is by way of leave to appeal.

HELD:

(1) The defendant-petitioner's only explanation as to why he did not come by way of a leave to appeal application is that he had no right of appeal is without merit the proper remedy is by way of a leave to appeal application.

(2) Furthermore, no exceptional circumstances have been urged.

APPLICATION in revision against the order of the District Court of Batticaloa.

Cases referred to :

1. *Dassanayake vs. Sampath Bank* (2002) 2 Sri LR 268 (distinuguished)
2. *Bandara vs. People's Bank* (2002) 2 Sri LR 21
3. Rustom vs. Hapangama 1978 - 80 Vol. (I) SLR 352

H. G. Hussain with *A. H. K. Sepali* for petitioner.

Naveen Marapana for respondent.

Cur. adv. vult.

July 29, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application for revision seeking to set aside the order of the learned District Judge of Batticaloa dated 19.12.2003 directing the defendant-petitioner to deposit money in a sum of Rs. 3 million or provide security to the value of Rs. 6 million to defend the action.

When this application was taken up for hearing counsel for the plaintiff-respondent raised two preliminary objections one of which has a direct bearing on the maintainability of this action. They are as follows :

(1) Can the stay order be operative when the other two defendants have not moved this Court canvassing the impugned order of the learned District Judge of Batticaloa.

(2) Is the petitioner entitled in law to move this Court by way of revision when the remedy by way of leave was available to the defendant-petitioner.

Both parties agreed to tender written submissions on the aforesaid preliminary objections and have tendered their written submissions.

In the written submissions tendered by counsel for the plaintiff-respondent he has indicated that he restricts his objections to the aforesaid 2nd objection only in view of the fact that he has come to know that 2nd and 3rd defendants have not been served with summons in the original Court. It appears that he is well advised for it appears that summons have been served only on the defendant-petitioner and the objection taken is without any merit.

As for the 2nd objection counsel for the plaintiff-respondent submits that the impugned order was made on 19.12.2003 and as per paragraph 6 of the petition tendered to this Court the petitioner states that he received a certified copy of the order on 24.12.2003. Therefore if the defendant-petitioner seeks to challenge the said order he had ample time to file a leave to appeal application in this Court seeking to challenge the said order. He submits that the defendant-petitioner has not given any explanation as to why he did not file a leave to appeal application and in any event he does not state anywhere in his petition that any exceptional circumstances exists that would give him the right to move this Court in revision. I would say there is force in this argument.

In his written submissions tendered by the defendant-petitioner, counsel submits that the application of the defendant-petitioner arises from an order made in the course of proceedings and as such the only remedy available as the law stood is by way of revision as decided in the case of *Dassanayake* vs. *Sampath Bank Ltd*[1]. In the circumstances the defendant-petitioner is entitled to prosecute this application as presently preferred to this Court. He further submits that the defendant-petitioner has no other alternative remedy other than to move in revision as decided by another division of this Court is without any merit and I would say is misconceived for the simple reason is that the question considered in *Dassanayake* vs. *Sampath Bank Ltd (Supra)* is Section 16 in the Recovery of Loans by Banks (Special Provision) Act No. 4 of 1990 and no doubt jurisdiction exercised by the District Court under Act No. 4 of 1990 is in the nature of special jurisdiction created by the Act and does not permit a party who is dissatisfied with an order made in the course of proceedings under it to seek relief by way of leave to appeal. However the instant action instituted against the

defendant-petitioner is as admitted in the written submissions tendered on his behalf in terms of the provisions of the Debt Recovery Act as stated in the very first paragraph of his written submissions. In the circumstances, neither the provisions contained in Act No. 4 of 1990 or the decision in *Dassanayake* vs. *Sampath Bank Ltd.(supra)*, would be applicable to the facts of the instant action. The fact that the instant action is instituted in terms of the provisions of the Debt Recovery Act is admitted by the defendant-petitioner in his petition as well as in his affidavit supporting the petition. In the circumstances, the provisions that would be applicable to the issue at hand is clearly the provisions contained in the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994. In the case of *Bandara* vs. *The Peoples Bank* [2] Court considered the provisions of the aforesaid Act No. 2 of 1990 as amended by Act No. 9 of 1994 wherein the facts were as follows :

After institution of the action, the trial Judge acting under the provisions of the Debt Recovery Act, having entered decree *nisi*, subsequently made it absolute. Thereafter, the fiscal executed the writ.

The petitioner contends that he was not served with notice of execution of decree, although he has preferred an appeal against the decree absolute.

It was held that :

"The Debt Recovery (Special Provisions) Act is an Act which has created special jurisdiction and it is a procedure whereby no right of appeal has been bestowed on a party aggrieved by a decree absolute."

It was observed by Court that :

"The only remedy which was available to the defendant-petitioner in terms of section 16 of the Debt Recovery (Special Provisions) Act was to have sought relief by way of leave to appeal against the order dated 13.11.1996 making the decree *nisi* absolute which the defendant failed to avail himself".

It is pertinent at this stage to refer to Part III of the aforesaid Act No. 2 of 1990 wherein sections 16 and 17 reads as follows :

Section 16. Subsection (7) of section 756 of the Civil Procedure Code is hereby amended by the addition of the following proviso at the end thereof :-

"Provided however that in an application for leave to appeal in respect of any order made in the course of any action instituted under the Debt Recovery (Special Provisions) Act No. 2 of 1990 proceedings in the original court shall not be stayed when Leave to Appeal is granted unless the Court of Appeal otherwise directs and the Court of Appeal shall where it decides to grant Leave to Appeal call upon the appellant to give security in cash or by a guarantee from a banker for the satisfaction of the entire claim of that plaintiff or such part thereof, as the court deem fit in all the circumstances of the case, in the event of the appeal being dismissed".

Section 17 Section 763 of the Civil Procedure Code is hereby amended by the addition immediately after paragraph (b) of subsection (2) of that section, of the following :-

"Provided that in the case of decrees entered under the provisions of the Debt Recovery (Special Provisions) Act No. 2 of 1990 the security to be given by the judgment debtor shall be the full amount of the decreed sum or such part thereof as the court deem fit in all the circumstances of the case".

It appears to me that the defendant-petitioner has filed a flawed application, abused the process of Court and obtained an *ex-parte* stay order effectively circumventing the aforesaid provisions in Part III of Act No. 2 of 1990 which is a clear abuse of the process of Court.

It is to be seen that the defendant-petitioner's only explanation as to why he did not come by way of a leave to appeal application is that he had no right of appeal is without any merit. Furthermore, he does not state anywhere that any exceptional circumstances exist that would give him the right to invite this Court to invoke its revisionary jurisdiction despite the fact that inexcusably the defendant-petitioner has not availed himself of the proper remedy that was available to him. In this respect I would refer to the leading decision on this point, the case of *Rustom* vs. *Hapangama & Co.*[3] at 352. The head note reads as follows :

The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available, only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise its powers in revision.

The appellant has not indicated to Court that any special circumstances exist which would invite this Court to exercise its powers of revision, particularly since the appellant had not availed himself of the right of appeal under section 754(2) which was available to him.

For the foregoing reasons, I would uphold the objection taken by the counsel for the plaintiff-respondent and dismiss the application for revision with costs fixed at Rs. 10,000/-.

WIMALACHANDRA, J. - I agree.

Application dismissed.

EDMUND PERERA
VS
NIMALARATNE AND ANOTHER

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.,
CALA 389/2004(LG).
DC GAMPAHA 58/L.
SEPTEMBER 16, 2005.

Civil Procedure Code - Sections 146 (1), 146 (2) and 147 - Objection to jurisdiction pleaded - Not put in issue - Could it be raised half way through the trial?- Judicature Act, section 39 - National Environment Act, No. 47 of 1980 - Does it oust the jurisdiction of the District Court to deal with nuisance?

The plaintiff-petitioner instituted action seeking an order to abate a nuisance and to recover damages. The defendant-respondents while denying

the averments in the plaint averred that court has no jurisdiction "according to statute law." No issue was raised on jurisdiction. Half way through the trial the defendants-respondents raised an issue on jurisdiction. The trial Judge accepted the issue.

HELD -

(1) There was a conscious decision to drop the objection to jurisdiction raised in the answer.

(2) Once a decision is made not to proceed with the objection to jurisdiction though pleaded it is to be seen that in terms of section 39 Judicature Act such court shall be taken and held to have jurisdiction over such action.

(3) If the objection to jurisdiction had been raised at the commencement of the trial then section 147 would come into operation and that would have been an issue on which court could have proceeded to hear and dispose of this action without calling for evidence.

HELD FURTHER -

(4) In relation to the two issues raised on jurisdiction it would be quite impossible to understand the basis as the issues are vague and framed in terms of utmost generality; the pleadings as well as the issues on jurisdiction are defective.

(5) There is nothing in the Acts for the protection of the Environment which has taken away the jurisdiction of the District Court to deal with problems of nuisance ; the new issue raised based on "statutory law" is vague.

APPLICATION for Leave to Appeal from an Order of the District Court of Gampaha with leave being granted.

Cases referred to :

1. *Mariamma vs Oriental Government Security and Life Insurance Company Ltd.*, - 57 NLR 145 at 149.
2. *Melis vs. Adonisa* - 57 NLR 303 (distinguished)
3. *Rodrigo* vs. *Raymond* (2002) 2 Sri LR 78
4. *Mrs. R. M. Jalaldeen* vs. *Dr. H. Rajaratnam* (1986) 1 CALR 640
5. *Seneviratne* vs. *Francis Fonseka* (1986) 2 Sri LR 1

P. A. D. Samarasekera, P. C. with *S. C. B. Walgampaya, P. C.* and *S. A. D. S. Suraweera* for plaintiff petitioners.

M. Premachandra for defendant - respondents.

Cur. adv. vult.

September 16, 2005
ANDREW SOMAWANSA, J. (P/CA)

The present application for leave to appeal and the appeal for leave if granted both relate to the important question as to whether an objection to jurisdiction which though pleaded had not been put in issue could be raised half way through the trial.

When this application for leave was taken up for inquiry it was agreed that both the question of leave and the main appeal could be decided on written submissions and accordingly both parties have tendered their written submissions.

The facts in brief are as follows : The plaintiff-petitioner' instituted the instant action in the District Court of Gampaha seeking an order to abate a nuisance and to recover damages from the defendants -respondents. The plaintiff-petitioners position was that the defendants-respondents were causing a nuisance by conducting and / or carrying on a 'day care centre' adjacent to the plaintiff-petitioner's house causing nuisance. The defendants-respondents while denying the averments pleaded by the plaintiff-petitioner in paragraph 2 of the answer denied the jurisdiction of Court stating that the Court had no jurisdiction according to statutory law. There was no mention however as to the statute which took away the jurisdiction of the Court to hear the case.

At the commencement of the trial though the defendants-respondents raised 16 issues significantly they did not raise any issue objecting to the jurisdiction of Court or regarding the statute law referred to in paragraph 2 of their answer. Thereafter evidence of the plaintiff-petitioner and one other witness was recorded and while the 3rd witness the wife of the plaintiff-petitioner was giving evidence counsel for the defendants-respondents sought to raise the following issues which reads as follows :

24. අ මෙම නඩුවට ඉදිරිපත් කර ඇති උත්තරයේ 2 වන ඡේදයේ සඳහන්ව ඇති කරුණක් මත එනම් මෙම අධිකරණයට මෙම නඩුව විභාග කිරීමට ව්‍යවස්ථාපිත නීතිය යටතේ බාධාවක් ඇද්ද?

ආ. එසේ නම් එම කරුණ මත පැමිණිල්ල නිෂ්ප්‍රභා කල යුතුද?

The counsel for the plaintiff-petitioner objected to the said issues being raised and both parties having agreed to tender written submissions on this matter tendered their written submissions and the learned District Judge by her order dated 30.09.2004 over-ruled the objections of the plaintiff-petitioner and accepted the aforesaid two issues. It is from the aforesaid order that the plaintiff-petitioner has preferred this application for leave to appeal.

It is submitted by counsel for the plaintiff-petitioner that the objection to jurisdiction in this case is one which was never properly pleaded with clarity and precision. At the stage of raising issues it was abandoned and the trial commenced by the parties submitting themselves to the jurisdiction of the Court. Therefore there is no right in any party to re-agitate the question of jurisdiction. In any event, the objection to jurisdiction raised in this case is not a valid objection as there is nothing in the Acts for the Protection of the Environment or any other Act which has ousted the jurisdiction which the District Court has always enjoyed to prohibit private nuisance as part of the Roman Dutch Law. He further submits that for the moment all that we need to submit is that these issues could not have been permitted at this stage and in the vague terms in which they were proposed. The case has to go to trial on the other issues as agreed at the commencement of the trial where jurisdiction of the Court was not considered as a matter in issue between the parties. I would say there is merit in this argument.

It is to be seen that there was a conscious decision to drop the objection to jurisdiction raised in paragraph 2 of the answer. It follows that at the commencement of the trial the jurisdiction of Court was not a material proposition of law on which the parties were at variance and in fact the parties were agreed as to the question of fact and law to be decided between them as stated by them to Court in the form of issues in terms of sub-section (1) of section 146 of the Civil Procedure Code and there was no occasion for the learned District Judge to act under sub-section (2) of section 146 of the Civil Procedure Code. For sub-section (2) of section 146 came into operation only in cases where the parties are not agreed as to the question of fact or law to be decided between them.

At this point it would be useful to examine section 39 of the Judicature Act which deals with 'objection to jurisdiction'. The section and the proviso reads as follows :

"Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter.

Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."

Section 146 of the Civil Procedure Code reads as follows :

"146 (1) "On the day fixed for the hearing of the action, or on any other day to which the hearing is adjourned, if the parties are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and the court shall proceed to determine the same.

(2) If the parties, however, are not so agreed, the court shall, upon the allegations made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall threupon proceed to record the issues on which the right decision of the case appears to the court to depend.."

In the instant action as stated above in terms of section 146(1) parties were agreed as to the question of fact or law to be decided between them and have stated the same to Court in the form of issues. Sub-section (2) of section 146 never came into operation as the parties were agreed on the issues. In the circumstances once a decision is made not to proceed with

objection to jurisdiction though pleaded it is to be seen that in terms of section 39 of the Judicature Act such Court shall be taken and held to have jurisdiction over such action, proceeding or matter. In any event, if the objection to jurisdiction had been raised at the commencement of the trial then section 147 of the Civil Procedure Code would have come into operation and that would have been an issue on which Court could have proceeded to hear and dispose of this action without calling for evidence. In any event, the objection to jurisdiction embodied in the issues did not arise on the basis of any evidence given by the plaintiff-petitioner or his witnesses in the course of the trial, but is sought to canvas in the form of an issue solely on the basis that they had a right to do so as it was pleaded in the answer. It is to be noted that when the plaintiff-petitioner objected to the issue being raised at the trial stage the defendants-respondents did not offer any explanation as to why they did not raise this issue at the time the issues were raised but relied on the fact that it was pleaded in the answer.

Let us now consider the objection to jurisdiction taken in the answer. The defendants-respondents have pleaded in paragraph 2 of the answer that the Court has no jurisdiction to hear the case under statutory law. What statute is referred to by the defendants-respondents is nowhere stated in the answer. Counsel for the defendants-respondents submits that the defendants-respondents were entitled in law to take up the position in their answer that there was a statutory bar to the maintainability of the action and that there was no duty cast upon the defendants-respondents to reveal their total defence to the plaintiff-petitioner in their pleadings. However in their written submissions the defendants-respondents have explained their position fully and the written submissions tendered to the original Court is reproduced in paragraph 27 of the written submissions. However as neither the answer nor the issues raised by the defendants-respondents say what this statutory law that takes away the jurisdiction of the District Court how is the plaintiff-petitioner to meet such an objection to jurisdiction? Is the plaintiff-petitioner expected to know the entire gamut of statutory laws in operation in this country? No doubt until the reference in the written submissions of the defendants-respondents to the National Environmental Act No. 47 of 1980 even the Court was kept in the dark.

I would say that pleadings and issues in such wide terms defeat the object of pleadings and of raising issues when the object of pleadings and

issues is to identify with precision the matters which have to be decided in the case and to give notice of such matters to the opposing parties. In relation to the two issues raised on jurisdiction by the defendants-respondents, it is to be seen that it would be quite impossible for the plaintiff-petitioner or for that matter anyone even for the Court to understand the basis on which the objection was taken therein by the defendants-respondents. In the original Court the objection was taken to these two issues by the plaintiff-petitioner was not on the basis that they were not pleaded but on the basis that they were vague and framed in terms of utmost generality.

In the case of *Mariamma* vs *The Oriental Government Security and Life Assurance Company Ltd.* [1] Per Gratiaen, J at 149 :

> *"The defendant's pleadings were defective, and the plaintiff (let it be conceded) had not been as vigilant as he should have been to protect herself against surprise. But it was still the Judge's duty to control the trial. He should have ordered the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge had ascertained for himself "the propositions of fact or of law" upon which the parties were at variance".*

Applying this proposition of law laid down in that case to the instant action I would say the pleadings as well as the issues on jurisdiction is defective. The submission of counsel for the defendants-respondents that there is no duty cast upon the defendants-respondents to reveal their total defence to the plaintiff-petitioner is unacceptable and should be rejected in toto.

It is to be seen that the reference made in the written submissions of the defendants-respondents to the National Environmental Act No. 47 of 1980 as amended find no mention in the answer, in any of the issues or in the evidence in the trial up to the time the new issues were sought to be raised. What the defendants-respondents are seeking to do in the written submissions is to describe the plaintiff-petitioner's action as one based on sound pollution and thus coming under the Environmental Protection Act. The plaintiff-petitioner's case is a straight forward case to prohibit a nuisance. Such actions are well known as part of our law of delict. It comes under the wider subject of wrongs against property and nuisance

are described under 2 heads : viz : public nuisance and private nuisance. The instant action is one of private nuisance which is a part of our law long before the Acts for the Protection of the Environment were enacted. There is nothing in any of these enactments which has taken away the jurisdiction of the District Court to deal with problems of nuisance.

It appears that counsel for the defendants-respondents as well as the learned District Judge placed reliance on the decision in *Melis* vs. *Adonisa* [2] In fact the learned District Judge in his order refers to that decision and held that the failure of a party to raise an issue in the first instance is not a bar to the issue being raised at a later stage and had decided to accept issue no. 24. *Melis vs. Adonisa (supra)* is no authority to be followed in the instant action for in that case the main issue that was considered was the awarding of costs in respect of additional issues raised.

In the case of *Rodrigo* vs. *Raymond* [3] the facts were as follows :

The plaintiff-respondent instituted action, *inter alia,* for the ejectment of the defendant-petitioner from the premises in suit.

After the plaintiff-respondent's evidence the defendants-petitioner sought to formulate three issues which were based on the value of the action and the jurisdiction of the Court to entertain the respondent's case.

The District Court rejected the additional issues.

It was contended that the action cannot be maintained without first obtaining a certificate of non-settlement from the Mediation Board.

It was held :

"The defendants-petitioner has failed to formulate an issue relating to the jurisdiction of the Court at the commencement of the trial. His failure to frame an issue on such a vital matter will amount to a waiver of objections in regard to lack of jurisdiction of Court to hear and determine the respondent's action. The defendants-petitioner is deemed to have consented and submitted to the jurisdiction of the court and he cannot now be permitted to challenge the jurisdiction".

It was also observed in that decision at page 83 as follows :

" Moreover, it should be stated that when the admissions were recorded at the commencement of the trial, the parties have in clear terms admitted the jurisdiction of the Court. Therefore, the defendant cannot be permitted at this late stage after several dates of trial to deny jurisdiction of the Court. The defendant had ample opportunity of objecting to the jurisdiction of the Court, if he has chosen or elected to waive such objections, he cannot subsequently be permitted to challenge it. The defendant should not be allowed to blow hot and cold at the same time, in this matter. The defendant is deemed to have submitted to the jurisdiction of the Court".

In this respect the decision in *Mrs. R. M. Jalaldeen* vs. *Dr. H. Rajaratnam* [4] and *Seneviratne* vs. *Francis Fonseka Abeykoon* [5] is also relevant.

For the foregoing reasons leave to appeal is granted and the appeal is allowed. The order of the learned District Judge dated 30.09.2004 is set aside. I also make order rejecting issue no. 24 raised on behalf of the defendants-respondents. The defendants-respondents will pay a sum of Rs. 15,000/- as costs of this application.

WIMALACHANDRA, J., — I agree.

Appeal allowed.

SENARATNE AND ANOTHER
VS
WIJELATHA

COURT OF APPEAL.
SOMAWANSA, J. (P/CA), AND
BASNAYAKE, J.
CA 701/2004 (REV.).
DC PANADURA 783/P.
FEBRUARY, 8, 2005.

Civil Procedure Code, sections 146, 753-Issues-Disallowed-Partition action-Sections 18(2), 19,23(1), 48(1) - Plan depicting a larger land – No leave to appeal application-Revisionary jurisdiction invoked - Maintainability ?

The defendant-petitioners sought to vacate the orders made by the District Judge disallowing certain issues, and recording of an admission. The issues were rejected on the basis that once parties admit the corpus, no issue could be allowed disputing the corpus, the other issues were rejected as they did not arise from pleadings.

The defendants moved in revision.

HELD:

(i) The preliminary plan contained 6.25 perches more than the area described in the plaint. The Surveyor does not explain the disparity.

(2) Though the parties have agreed with regard to the land referred to in the preliminary plan as the land to be partitioned it was incumbent upon the trial Judge to question the Surveyor with regard to the extra 6.25 perches added, when it was brought to his notice, and re— issue the Commission to survey the land as referred to in the plaint.

(3) Revisionary powers could be exercised where a miscarriage of justice has occured due to a fundamental rule of procedure being violated only where a strong case is made out amounting to a postive miscarriage of justice.

APPLICATION in revision from an order of the District Court of Panadura.

Cases referred to :

1. *Bininda vs. Sediris Singho 64 NLR 48*
2. *Sopaya Silva vs. Magilin Silva (1989) 2 Sri LR 105*
3. *Brampy Appuhamy vs. Manis Appu-60 NLR 337*
4. *Athukorale vs. Samyanathan 41 NLR 165*
5. *Rustom vs. Hapangama (1978/79) Sri LR. 225*
6. *Thilagatnam vs. Edirisinghe (1982) 1 Sri LR 56*
7. *Iynul Kareeza vs. Jayasinghe (1986) 1 Car 109*

8. *Hotel Galaxy (Pvt.) Ltd. vs. Mercantile Hotels Management Ltd (1987) Sri LR 5*
9. *Jonita vs. Abeysekera - Sri Kantha Law Reports Vol. IV-2*
10. *Wljesinghe vs. Thamararatnam - Sri Kantha Law Reports Vol. IV-2*
11. *Gnanapanditham vs. Balanayagam (1998(Sri LR 391*
12. *Vanik Incorporation Ltd. vs. Jayasekera (1997(2 Sri LR 365*

C. Hewamanage for 2nd and 3rd respondents-petitioners.

Thisath Wljegunawardane with Sandhaya de Silva for 1st defendant-respondent.

Plaintiff-respondents absent and unrepresented.

Cur. adv. vult.

29th September, 2005.

ERIC BASNAYAKE, J.

The 2nd and 3rd defendant petitioners (herein after referred to as 2nd and 3rd defendants) filed this application seeking to vacate the orders made by the learned District Judge Panadura on 09.01.2004. By that order the learned District Judge overruled an objection raised by the counsel for the 2nd and 3rd respondents on the recording of the 2nd admission and also disallowed issues 14,15,16,17,22,30 and 32.

The 2nd admission is with regard to the corpus (as shown in plan No. 1289A of 21.01.1999 drawn by D. A. Wljesuriya, Licensed Surveyor). The 2nd defendant filed a statement of claim on 20.03.2000 and an amended statement of claim on 10.03.2003 and another amended statement of claim on 27.11.2003. The 3rd defendant filed his statement of claim on 15.10.2000 and an amended statement of claim on 10.03.2001. In all these statements of claim the 2nd and 3rd defendants admitted the corpus as shown in the preliminary plan 1289A and also claimed 5/20 and 1/20 shares respectively. The learned District Judge said that the defendants, having admitted the corpus, cannot be heard to say that they deny it.

The disputed issues are as follows :

14. Was the land surveyed substantially larger than the land sought to be partitioned ?

15. Was a lis *pendens* registered in respect of the larger land ?

16. Should the plaintiff file an amended plaint and register a lis *pendens* in respect of the larger land ?

17. Should lot 1 of Plan No. 720 be excluded ?

22. Could the deed No. 365 get the benefit of prior registration, when it is not registered in the correct folio ?

30. Did the 1st defendant deny that he was entitled to 1/2 by deed No. 365 ?

32. Could the 2nd and 3rd defendants claim lot 1 in plan No. 720 by way of prescription ?

The learned District Judge rejected issues 14 to 17 on the basis that once parties admit the corpus, no issues could be allowed disputing the corpus. The rest of the issues were disallowed as they did not arise from pleadings.

The 1st defendant respondent (1st defendant) filed objections to the present application and prayed for a dismissal on the ground that *(a)* the defendants having admitted the corpus cannot be allowed to deny it. (b) Failure to explain the reason for not exercising the right of appeal. *(c)* Not showing exceptional circumstances to entitle them to invoke revisionary jurisdiction. *(d)* Laches.

The plaintiff filed this partition action to partition a land of 30.75 perches as shown in plan No. 2202 of 27.11.1939 drawn by A. S. Fernando Licensed Surveyor. *Lis pendens* was registered for 30.75 perches of land. Commission was issued to the Court Commissioner to survey the land described in the schedule to the plaint in extent 30.75 perches. Anyhow the preliminary plan contained an extent of 37 perches of land which is 6.25 perches more and about 20% larger than the area described in the plaint. The surveyor claims that the land surveyed is the same as that described in the schedule

to the plaint. The surveyor does not explain the disparity. It is irregular for a surveyor, when preparing a preliminary plan to survey and include in the corpus any land other than that which is referred to in the plaint in the absence of an additional commission issued under section 23(1) of the Partition Act. *Bininda and Sediris Singho*[1] *etc.*

The case record contained a motion dated 28.11.2003 filed on behalf of the plaintiff moving to re—issue the commission to the surveyor to survey 30.75 perches of land which was not adhered to. In *Sopaya Silva vs. Magilin Silva*[2] S. N. Silva J. (as he then was) finds no fault in the *lis pendens* when registered as described in the schedule to the plaint but in the preliminary plan. S. N. Silva J. (as he then was) said "If the land surveyed is substantially different from the land as described in the schedule to the plaint the court has to decide whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land as surveyed".

Referring to *Bramphy Appuhamy vs. Monis Appuhamy*[3] where a land substantially smaller than the land described in the plaint was surveyed Silva J. said "the reasons underlying the decision of the Supreme Court that is the finality and conclusiveness attaching to the interlocutory and final decrees in terms of section 48(1) apply with even greater force to a situation where larger land is surveyed". Silva J. having held that the District Judge erred in proceeding with the action to partition the substantially larger land, suggested the following courses of action after hearing the parties, namely :

(i) to re—issue the commission with instructions to survey the land as described in the plaint. The Surveyor could have been examined orally as provided in section 18(2) to consider the feasibility of this course of action ;

(ii) to permit the plaintiff to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of other consequential steps including the registration of a fresh lis *pendens.*

(iii) to permit any of the defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action invloves an amendment of the statement of claims of that defendant and the taking of such other steps as may be necessary in terms of section 19 (2).

The plaint, the deeds and the *lis pendens* describe only an extent of 30.75 perches of land. The preliminary plan contained an extent of 6.25 perches more which is more that 1/5th of the extent of the land described in the schedule to the plaint. Although the parties have agreed with regard to the land referred to i n the preliminary plan as the land to be partitioned, it was incumbent upon the District Judge to question the surveyor with regard to the extra 6.25 perches added, at least when it was brought to his notice, and re—issue the commission to survey the land as referred to in the plaint. This was the desire of the plaintiff too as disclosed in a motion. The learned Judge was too hasty in taking the case for trial without considering the preliminary steps which are very vital in partition actions due to the finality attached to it.

Now I shall deal with the revisionary powers of this court. Section 753 of the Civil Procedure is as follows :

753.—The Court of Appeal may of its own motion or on any application made call for and examine the record of any case, whether already tried or pending trial, in any court, for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed thereon or as to the regularity of the proceedings of such court.... and may upon revision of the case brought before it pass any judgment or make any order thereon, as the interests of justice may require.

The powers of the Appeal Court with regard to revision is well accepted in a large number of cases. These powers are wide enough to give it the right to revise any order made by an original court whether an appeal has been taken against it or not. *Atukorala vs Samynathan* [4] However such powers would be exercised only in exceptional circumstances which depend on the facts of each case, *Rustom vs. Hapangama* [5] *Thilagatnam v. Edirisinghe* [6] *Iynul Kareeza v. Jaysinghe* [7] *Hotel Galazy Pvt. Ltd. v. Mercantile Hotels Management Ltd.* [8] *Jonita v. Abeysekera* [9] Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shock the conscience of the court. *Wljesinghe vs. Thamararatnam* [10] The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case and having regard to the very special and exceptional circumstances of the case. *Gnanapanditham vs. Balanayagam.* [11] These powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only where a strong case is made out amounting to a positive miscarriage of justice—*Vanik Incorporation Ltd. vs. Jayasekera* [12]

I am of the view that this is a fitting case to exercise revisionary jurisdiction.

Due to the aforesaid reasons I allow this application and set aside the order made by the learned District Judge on 09.01.2004. I direct that a commission be issued to the surveyor to resurvey the land as described in the schedule to the plaint without any additional charge and to commence the proceedings afresh from the stage of the return to the commission by the surveyor. I make no order as to costs of this application.

SOMAWANSA J. (P/CA) — I agree.

Application allowed.

JINADASA
VS
SRI LANKA MEDICAL COUNCIL AND OTHERS

COURT OF APPEAL.
IMAM, J AND.
SRISKANDARAJAH, J.
CA 290/2005.
AUGUST 23,2004.
JULYM 27,2005.
AUGUST 23,2005.

Medical Ordinance, sections 19(c), 29(l)(iv)(cc) – Act 16 Examination- Recognition of foreign medical degrees, – Duty cast on the 1st respondent to permit the applicant to sit Act 16 Examination,

The petitioner having completed her Medical Course obtained the MBBS degree in 2004, from the Faculty of Medicine from the International Medical and Technological University of Tanzania (IMTU), which is recognized by the 1st respondent Medical Council.

The petitioner seeks a writ of mandamus directing the respondents to accept the application of the petitioner and admit her to the Act 16 Examination.

The 1st respondent Council opposed the application on the basis that the entire course was not followed at IMTU Tanzania, as para-clinical training was held in Gunton India, an off shore teaching centre.

HELD:

(1) Under section 29(1)(b)(ii)(cc) of the Medical Ordinance, a citizen of Sri Lanka who holds a MBBS degree from a University of any other country other than Sri Lanka, which is recognized by the Sri Lanka Medical Council is required to sit and pass the special examination Act 16.

(2) If the 1st the respondent Medical Council was not satisfied with the standards maintained at IMTU an application could have been made under section 19(c) to the Minister of Health for de-recognition.

As the 1st respondent has not sought to de-recognize the University, the 1st respondent Council is legally bound to recognize the Medical degree of IMTU.

(3) It is also apparent that a Degree in Medicine and Surgery (MBBS) awarded by IMTU Dar-es-Salaam, Tanzania has been recognized by the 1st respondent Council from 1999 onwards.

(4) There is no basis in fact or in law for the 1st respondent Medical Council to decline to carry out its statutory obligation to permit the petitioner to sit the Act 16 examination.

Application for a writ of mandamus.

Faiz Musthapha, P. C. with Faisza Markar and Thushani Machado for petitioner.

D. P. Kumarasinghe, P. C. with Shamindra Rodrigo for 1st respondent.

Shibly Aziz, P. C. with Senani Dayaratne and Sharmeen Ahamed for 2nd respondent.

Cur. adv. vult.

12th September, 2005,
IMAM, J.

The Petitioner is seeking a mandate in the nature of a Writ of Mandamus directing the 1st and 2nd Respondents to accept the application of the Petitioner and to admit the Petitioner as a candidate for the special examination prescribed by the 1st respondent in terms of section 29(1)(iv)cc of the Medical Ordinance which is referred to popularly as "Act 16" Examination as a precondition for provisional registration as a Medical Practitioner to serve a period of internship in order to secure registration to practice. The Petitioner has obtained a Bachelors Degree (P1) in Medicine and surgery (MBBS-First Class) issued by the Faculty of Medicine from the International Medical and Technological University of Tanzania hereinafter referred to as (IMTU) on 17.04.2004 with regard to the Examination held in November 2003, which is recognized (P2) by the 1st Respondent Medical Council as required by section 29(2)(b)(iii)(bb)(i), and thus the question is whether the 1st respondent has a legal duty and is bound to register the Petitioner and permit her to sit the aforesaid examination. IMTU is a University recognized by the 1st Respondent from September 1999, with regard to the MBBS Degree, as illustrated by P2 which sets out the list of Foreign Medical degrees recognized under Act 16 of 1965.

In accordance with the Medical Ordinance section 29(1)A person shall, upon application made in that behalf to the Medical Council be registered as a Medical Practitioner. Under section 29(1)(b)(ii)cc of the Medical Ordinance, a citizen of Sri Lanka who holds the degree of Bachelor of Medicine of a University of any other country, other than Sri Lanka, which is recognized by the Sri Lanka Medical Council is required *inter alia*, to pass a special examination prescribed by the 1st Respondent to be registered as a Medical Practitioner.

In terms of the guidelines (P3) issued by the 1st Respondent to Medical graduates with foreign qualifications, an application should be submitted on a form titled "Recognition of degree or equivalent qualifications" together with the original and two photocopies of the degree to enable the applicant to sit the aforesaid Examination.