# 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 8**

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# BASNAYAKE
# VS
# PETER AND OTHERS

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
EKANAYAKE, J.
CA 883/94 (F).
DC TANGALLE 2338/P.
AUGUST 24, 2004.
NOVEMBER 25, 2004.

*Partition Law, No. 2 of 1977, section 25 - Investigation of Title–Answering of points of contest - Mandatory - Bare answers to issues - Does it suffice? - Settlement? – Civil Procedure Code - section 187.*

The trial Judge in his judgment while ordering the partition of the land has stated that although there was a contest at the commencement, later as the case had been concluded only with the plaintiff's evidence and since no evidence had been led by the defendant, he was accepting the evidence given by the plaintiff and accordingly it was concluded that parties should be entitled to undivided shares in the judgment.

On appeal it was contended that there had not been a settlement and the trial judge has failed to investigate title and to even answer the points of contest.

**HELD:**

1. It is to be observed that there is nothing in the record to infer that a settlement was arrived upon.

2. In such circumstances firstly, the trial judge should have answered the points of contest after due evaluation of the available evidence.

3. The trial judge has totally failed to answer any of the points of contest admitted to trial.

*Held further*:

4 Bare answers without reasons to issues or points of contest raised at a trial are not in compliance with the requirements of section 187 of the Civil Procedure Code.

**APPEAL** from the judgment of the District Court of Tangalle.

**Cases referred to** :

1. *Cooray vs. Wijesuriya* 62 NLR 158
2. *Dona Lucy Hamy vs. Cicillianahamy* 59 NLR 214
3. *Warnakula vs. Ramani Jayawardena* 1990 1 Sri LR 207

*M. B. Morais* with *P. Wijetilake* for 8th defendant - appellant.

*W. Dayaratne* for plaintiff–respondent.

*Cur. adv. vult.*

June 15, 2005.

**CHANDRA EKANAYAKE, J.**

This is an appeal preferred by the 8th Defendant - Appellant (hereinafter sometimes referred to as the 8th Defendant) against the judgment of the learned District Judge of Tangalle dated 15.03.1994 moving to set aside the same and for judgment as prayed by the 8th Defendant in her statement of claim.

The Plaintiff - Respondent (hereinafter sometimes referred to as the Plaintiff) by amended plaint dated 25.03.1991 sought to partition lot 6 of land called and known as "Bahinamankadahena" situated in Galagama, Dedduwawala and moved for an undivided 12/48 share from the *corpus* together with the improvements and plantation as prayed in sub paragraph (ii) of the prayer to the amended plaint. The devolution of title relied upon was averred and the shares were shown in paragraph 10 of the said amended plaint.

The 8th defendant by her statement of claim dated 09.12.1991 whilst only admitting that the *corpus* described in paragraph 2 of the amended plaint comprises of lots1, 2 and 3 depicted in preliminary plan No.2664 and averments in paragraph 3 of the said amended plaint pleaded *inter alia*

that she be granted undivided 1/9th share as shown in paragraph 9 of the said statement of claim.

As seen by the proceedings of 15.02.1993 a trial *de novo* had commenced on that day. The plaintiff, 7th defendant and the 8th defendant had been represented by Counsel on that date. Points of contest 1 to 8 had been raised on behalf of the plaintiff. 9 to 12 and 13-14 had been raised on behalf of the 7th and 8th defendants respectively. When the plaintiff was testifying he had been even cross examined by the respective Counsel who had represented 7 th and 8th defendants. At the conclusion of the cross examination it is recorded that the plaintiff has closed his case reading in evidence documents marked P1 to P14 and thereafter a date had been moved for tendering of plaintiff's documents. Accordingly, 22.03.1993 had been given for the plaintiff's documents. After obtaining several dates by plaintiff, on 14.02.1994 Samarasekera Kankanamge Caralina (substituted plaintiff) the widow of the deceased original plaintiff had been called to give evidence with regard to document marked P1 being the final decree in Case No. 840/P. However, evidence of this witness had been to the effect that although every attempt was made to obtain P1 she was unsuccessful. She had stated in her evidence (at page 125 of the brief) to the following effect.

> "පැ 1 දරන ලේඛනය ලබා ගැනීමට සෑම උත්සාහයක්ම ගත්තා. නමුත් එම ලේඛනය ලබා ගැනීමට නොහැකි වුනා. එම නිසා මෙම නඩුවට අදාල ඉඩමේ මුල් අයිතිකරු හේවා පත්තිනිගේ ජේමිස් අප්පු වශයෙන් පිළිගන්නා ලෙස මා ඉල්ලා සිටිනවා"

It is to be observed from the proceedings of 14.02.1994 that this witness had not been cross examined either by the 7th defendant or 8th defendant. However, after conclusion of examination-in-chief of that witness, case had been fixed for judgment on 15.03.1994.

On a perusal of the impugned judgment it is found that the learned Judge has stated (at page 128 of the brief) as follows :-

> "පාර්ශවකරුවන් අතර මුලදී හබයක් පැවතුන ද, පසුව පැමිණිල්ලේ සාක්ෂි පමණක් මෙහෙයවීමෙන් නඩුව අවසන් කර ඇත. විත්තිකරුවන්ගේ සාක්ෂි මෙහයවීමක් සිදුවී නැත. එබැවින් පැමිණිලිකරු මෙම නඩුවේදී දී ඇති සාක්ෂි පිලිගනිමි".

As seen above, it has become crystal clear that the learned Judge had totally failed to investigate the title to the *corpus*. He has stated that although there was a contest at the commencement, later as the case had been concluded only with the plaintiff's evidence and since no evidence had been led by the defendant, he was accepting the evidence given by the plaintiff and accordingly it was concluded that parties should be entitled to undivided shares as in the judgment. (as appearing at page 128 of the brief).

As evidenced by the proceedings before the learned District Judge after raising points of contest, nowhere has it been recorded that the aforesaid contest was settled and/or that there was no contest among the parties. It has to be further observed that there is nothing in the record to infer that a settlement was arrived upon. In those circumstances firstly the learned District Judge should have answered the points of contest after due evaluation of the evidence available before Court. In this regard it would be pertinent to consider the decision in *Cooray vs. Wijesuriya*[1] where the Court held thus :

> **"Section 25 of the Partition Act imposes on the Court the obligation to examine morefully the title of each party to the action."**

In the instant case I conclude that the learned Judge has committed a cardinal error by not investigating the title to the *corpus*. It is to be further noted that the learned Judge also has failed to answer the points of contest which had been admitted to trial. In the case of *Dona Lucyhamy vs Cicillinahamy*[2] it was held by the Supreme Court to the following effect :

> "Bare answers, without reasons to issues or points of contest raised in a trial are not in compliance with the requirements of section 187 of the Civil Procedure Code"

The above principle of law was followed by the Court of Appeal in *Warnakula vs. Ramani Jayawardena*[3] wherein it was held :

> "Bare answers to issues without reasons are not in compliance with the requirements of section 187 of the Civil Procedure Code. The evidence germane to each issue must be reviewed

or examined. The Judge must evaluate and consider the totality of the evidence. Giving a short summary of the evidence of the parties and witnesses and stating that he prefers to accept the evidence of one party without giving reasons are insufficient."

In the instant case the learned Judge has totally failed to answer any of the points of contest admitted to trial.

For the aforesaid reasons I conclude that the impugned judgment cannot be allowed to stand and the judgment dated 15.03.1994 is hereby set aside. Although I am quite mindful of the inconveniences that would be caused to the parties by a trial *de novo*, I conclude that this Court is left with no alternative but to order a trial *de novo*. Accordingly the case is remitted to the District Court for a trial *de novo* and the learned District Judge is hereby directed to conclude the same as expeditiously as possible. Parties to bear their own costs incurred in the lower court and here.

The Registrar of this Court is directed to forward the record in case No. 2338/P to the respective District Court forthwith.

**SOMAWANSA, J(P/CA).** – *I agree.*

*Appeal Allowed.*

*Trial de Novo Ordered.*

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**SOBANAHAMY**

**VS**

**SOMADASA**

COURT OF APPEAL.
EKANAYAKE, J.
RANJITH SILVA, J.
CA 707/91.
DC, MATARA 289/SPL.
FEBRUARY 16, 2005.

*Civil Procedure Code, section 187 - Issues - Necessity to answer all - Bare answers without reasons?–Judgment to be in conformity with* section *187 - Failure?*

The plaintiff–appellant instituted action seeking a declaration of title to the land in question and to eject the defendant respondent from the subject matter. The trial Court dismissed the plaintiff's action. On appeal–

**HELD:**

1. The Trial Judge has failed to answer issues 1-7 raised by the plaintiff. Having answered only the issues of the defendant the trial Judge has erred in arriving at the finding that therefore the need does not arise to answer the plaintiff's issues. This is a cardinal error.
2. Bare answers without reasons raised in a trial are not in compliance with the requirement of section 187.
3. Bare answers to issues are insufficient unless all matters which arise for decision under each head are examined.

*Per* Chandra Ekanayake, J. :

"The impugned judgment is not in conformity with the provisions of section 187 and failure of the trial judge to examine the evidence and to answer the issues of the plaintiff has definitely prejudiced the substantial rights of the parties"

**APPEAL** from the judgment of the District Court of Matara.

**Cases referred to :**

*Dona Lucinahamy vs. Cicillinahamy* - 59 NLR 214

*Rohan Sahabandu* for plaintiff - appellant.

*N. R. M. Daluwatte*, P. C. for defendant - respondent.

*Cur. adv. vult.*

October 20, 2005.

**CHANDRA EKANAYAKE, J.**

This is an appeal preferred by the Plaintiff - Appellant (hereinafter sometimes referred to as "the Plaintiff" from the judgment of the learned Additional District Judge of Matara dated 02.10.1991 moving to set aside the same and for the reliefs prayed by the Plaintiff in the prayer to the plaint.

The Plaintiff has instituted this action in the District Court of Matara seeking *inter alia*, a declaration of title to the subject matter *viz* : Lot No. 3 of the land called and known as "Gederawatta" situated in Welihena

morefully described in paragraph 3 of the plaint, a declaration for cancellation of the deed of mortgage bearing No. 36791 dated 24.03.1960 on receipt of Rs.500 by the Defendant, damages as averred in sub-paragraph (3) of the prayer to the plaint and for ejectment of the Defendant and all those holding under him from the subject matter.

The Defendant - Respondent (hereinafter sometimes referred to as "the Defendant") by his amended answer dated 26.05.1982, whilst admitting the jurisdiction of this Court and averments in paragraph 3 and 4 of the plaint specifically denied the accrual of a cause of action and the rest of the averments in the plaint and prayed for a dismissal of the Plaintiff's action, for a declaration that the Defendant be declared entitled to the aforesaid rights mentioned in the amended answer. After two abortive trials. a trial de novo had commenced on 30.01.1990. On this day both parties had admitted that the subject matter was owned by the Plaintiff as averred in paragraph 4 of the plaint and that M. P. Carolis and Lokuhamy by deed of mortgage bearing No. 27453 dated 01.07.1946 had mortgaged same to one M. P. Solomon and that he had re transferred the Mortgage to M. P. Somadasa, the Defendant in this case by deed bearing No. 36791. Case had proceeded to trial on issues 1 to 7 raised on behalf of the Plaintiff and issues 8 to 11 raised on behalf of the Defendant.

The Plaintiff's case had been concluded with her evidence. The Defendant , Registrar of the District Court of Matara one S. P. Gunapala and one M. Gamage Gunapala (Secretary of the Conciliation Board of Godapitiya) had testified for the case of the Defendant. Thereafter the impugned judgment had been pronounced by the learned judge dismissing the Plaintiff's action.

On a careful consideration of the judgment it is found that he has correctly identified the question for determination as whether there had been a settlement with regard to this land dispute before the Concilliation Board as contended by the defendant. The Learned Judge while observing the failure on the part of the Plaintiff to call any witnesses to place evidence with regard to the settlement arrived upon between the parties before the Conciliation Board in application No.297 had proceeded even to consider the documents marked V2 and V3 being documents pertaining to the settlement arrived upon by the parties before the Board and the certificate of settlement issued by the Board respectively. But the learned Judge has

answered issues 8 to 11 raised on behalf of the defendant in his favour and has proceeded to record as follows : (As appearing at page 379 of the brief).

"ඒ අනුව පැමිණිල්ලේ විසඳිය යුතු ප්‍රශ්න වලට පිළිතුරු දීමක් පැන නගින්නේ නැත"

From the judgment it is clear the that the learned Judge has totally failed to answer issues 1 to 7 raised on behalf of the plaintiff. Having answered only the issues of the defendant the learned Judge has erred in arriving at the finding that therefore the need does not arise to answer plaintiff's issues.

In the case of *Dona Lucihamy vs. Cicilinahamy*[1] it was held that :

> **"Bare answers without reasons, to issues or points of contest raised in a trial are not in compliance with the requirement of the section 187 of the Civil Procedure Code."**

Per L. W. De Silva, A. J. at 216 ;

**" Bare answers to issues or points of contest- whatever may be the name given to them - are insufficient unless all matters which arise for decision under each head are examined."**

In the instant case the learned Judge has not only failed to give reasons when answering the issues, but totally failed to answer issues 1 to 7, and in my view which is a cardinal error committed by the learned Judge and therefore the judgment is not in conformity with section 187 of the Civil Procedure Code.

Section 187 thus reads as follows :-

> **"The judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision ; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively."**

For the above reasons I conclude that the impugned judgment is not in conformity with the provisions of the above section and failure of the trial Judge to examine the evidence and to answer the issues of the plaintiff has definitely prejudiced the substantial rights of the parties.

In those circumstances this Court is left with no alternative but to order a retrial. Accordingly, the appeal is allowed and the impugned judgment of the learned District Judge is hereby set aside. A trial *de novo* is hereby ordered and the learned District Judge is directed to conclude the trial as expeditiously as possible. Each party must bear their own costs so far incurred, both here and in the Court below.

The Registrar of this Court is directed to forward the record in Case No. 289/SPL. to the respective Court forthwith.

**RANJITH SILVA J.** – *I agree.*

*Appeal allowed.*
*Trial de Novo ordered.*

---

**FELIX PREMAWARDANE**
**VS**
**BASNAYAKE AND OTHERS**

COURT OF APPEAL.
SOMAWANSA, J(P/CA).
WIMALACHANDRA, J.
CALA 50/2004 (LG).
MAY 3, 2005.

*Civil Procedure Code, section 16 - Court making order to comply with section 16- Not complied with - Injunction refused - Application made again after a long period - Court refusing such application - Validity?*

Plaintiff–petitioner obtained an enjoining order but was asked to comply with section 16. As the plaintiff–petitioner had not complied with section 16-interim injunction was refused.

The defendant–respondent filed answer and the plaintiff - petitioner on 23.01.2004 sought permission to comply with the earlier order made to comply with section 16 on 25.10.2001

The Trial Judge refused the said application on the ground of delay.

**HELD:**

1. When Court granted permission for such publication on - 25.10.2001 the Court did not specify a particular date by which such publication was to be made.

2. Justice demands that such an application should be allowed. specifically so when the application is for to carry out a step for which the court had already granted permission.

3. As the trial had not commenced in the interests of justice, it would be most appropriate if the court had allowed the plaintiff–petitioner's application to comply with section 16.

**APPLICATION** for leave to appeal with leave being granted.

**Cases referred to** :

1. *Ranasinghe vs. Nandasena Abeydeera* 1997 Sri LR 41
2. *Suppiaihpillai vs. Ramanathan* 39 NLR 30.

*Lucky Wickremanayake with Mohamed Adamelly for the petitioner.*

*Thilan Liyanage with Hessan Manikhewa for 1st, 4th, 5th, 7th, 8th, 10th, 12th, and 13th respondents.*

*Cur. adv. vult.*

June 3, 2005.

**ANDREW SOMAWANSA, J. (P/CA).**

This is an application for leave to appeal against the order of the learned District Judge of Colombo dated 23.01.2004 marked X6(a) wherein the learned District Judge refused permission to publish notice of the instant action by newspaper advertisement and or to comply with the Court's own previous order dated 25.10.2001.

This Court having heard both parties has made order granting leave on the question whether the learned District Judge should have considered the powers vested in court to grant permission to the plaintiff - petitioner to

comply with section 16 of the Civil Procedure Code notwithstanding his failure to act on the directions given by Court to publish the notice in terms of section 16 of the Civil Procedure Code. Thereafter both parties have agreed to resolve the matter by way of written submissions and both parties have tendered their submissions.

The relevant facts are, on an application of the counsel for the plaintiff - petitioner Court made order as follows :

(a) granting permission to the plaintiff - petitioner to notice the other members of the Nugegoda Baptist church by way of newspaper advertisement in terms of section 16 of the Civil Procedure Code.

(b) granting an enjoining order as prayed for and ;

(c) to issue notice of injunction and summons on the defendants - appellants.

The defendants -respondents filed objections to the issue of an interim injunction and the extension of the enjoining order and at the inquiry both parties agreed to tender written submission. The Learned District Judge by his order dated 18.10.2002 refused to grant an interim injunction primarily on the basis that the plaintiff - petitioner has failed to publish notice in terms of section 16 of the Civil Procedure Code. The plaintiff - petitioner preferred an application for leave to appeal to this Court which was numbered CALA 439/02 wherein the substantial question of law that was to be decided was whether the plaintiff - petitioner's failure to publish notice of the action in the newspapers as permitted by court on 25.10.2001 was fatal to the grant of interim relief. This matter was inquired into and this Court by its order dated 10.12.2003 refused leave to appeal. However Court took the view that the Plaintiff - petitioner is entitled to make an application to the District Court for leave to comply with the order of Court dated 25.10.2001 and also that it is for the learned District Judge to consider that application after hearing both parties. The aforesaid order is marked X3.

In the meantime the defendants - respondents had filed their answers on 10.12.2003 and consequently to the aforesaid order made by this Court marked X3, the plaintiff - petitioner preferred a motion to the District Court

seeking permission of Court to comply with the Court's order dated 25.10.2001 permitting the publication of notice of the action in the newspapers. The said application was supported on 23.01.2004. The defendants-respondents objected to the aforesaid application of the plaintiff - petitioner and at the inquiry counsel appearing for the respective parties made oral submission. At the conclusion of the inquiry the learned District Judge made order refusing the application of the plaintiff - petitioner. It is from the aforesaid order that the plaintiff - petitioner has preferred this leave to appeal application. Leave to appeal was granted by this Court on 30.09.2004 on the questions of law formulated by this Court as aforesaid.

It is to be observed that the order of the learned District Judge was based on the ground that :

The plaintiff - petitioner made an application and had been given permission to take steps to comply with section 16 of the Civil Procedure Code on 25.10.2001 and that up to 23.01.2004 the plaintiff - petitioner has failed to take steps in terms of section 16 of the Civil Procedure Code. Accordingly the learned District Judge following the decision in *Ranasinghe vs. Nandanie Abeydeera*[1] wherein this Court held that it is imperative to issue notice as contemplated by section 16 of the Civil Procedure Code had rejected the aforesaid application. The said judgment delivered by another division of this Court followed the decision in *Suppaiahpillai vs. Ramanathan*[2] wherein the head note reads :

> Where plaintiffs, representing a number of persons, sued the defendants for the return of money held by the latter for the benefit of the plaintiffs and those whom they represented -
>
> Held, "That the plaintiffs had a common interest in bringing the action within the meaning of section 16 of the Civil Procedure Code.
>
> Where the Court in giving permission to the plaintiffs to sue on behalf of the others directed them to give the required notice under the section in two publications, -
>
> Held, that failure to comply with the order was a fatal irregularity."

My considered view is that none of the aforesaid decisions would apply to the facts of this case for unlike in those two cases the plaintiff - petitioner in paragraph 4 of his plaint specifically averred that :

> "The defendants are made parties hereto in reference to the acts hereinafter morefully described, committed by them in the capacity of Committee Members and as representing the membership of the Nugegoda Baptist Church, it being impractical and inexpedient to cite the entire membership of the said Church as party defendants hereto".

These facts were brought to the notice of Court and an application was made and the Court granted permission to notice the other members of the Nugegoda Baptist Church by way of newspaper advertisement in terms of section 16 of the Civil Procedure Code. It is to be noted that when Court granted permission for such publication the Court did not specify a particular date by which such publication was to be made. On the material placed before us it appears that trial had not commenced at the time the plaintiffs petitioner moved Court to obtain permission to comply with section 16 of the Civil Procedure Code in terms of permission granted by Court on 25.10.2001.

On an examination of the facts and circumstances of this case, I am unable to agree with the order of the learned District Judge in refusing the application made by the plaintiff - petitioner to comply with the provisions contained in section 16 of the Civil Procedure Code before the trial commenced. If the trial commenced without such notice then certainly the failure on the part of the plaintiff - petitioner to comply with the provisions of Section 16 would be a fatal irregularity. However as in the instant case where an application is made to Court seeking permission as per the order made by this Court to comply with the provisions contained in section 16 of the Civil Procedure Code justice demands that such an application should be allowed, specifically so when the application is for to carry out a step for which the Court had already granted permission.

In the interests of justice, it would be most appropriate if the learned District Judge had allowed the plaintiff - petitioner to comply with section 16 of the Civil Procedure Code as the trial had not commenced and no

prejudice would be caused to any party in allowing this application to comply with the provisions contained in section 16 of the Civil Procedure Code.

For the foregoing reasons and in the interests of justice, I would answer the questions of law formulated by Court in the affirmative. Accordingly I would set aside the order of the learned District judge dated 23.01.2002 and direct the learned District Judge to grant the plaintiff - petitoner permission to comply with the requirement in section 16 of the Civil Procedure Code and thereafter proceed to hear and determine the action. The defendants - respondents will pay a sum of Rs. 5000 as costs of this application to the plaintiff - petitioner.

**WIMALACHANDRA, J.** – *I agree.*

*Appeal allowed.*

*Trial judge directed to grant permission to the plaintiff petitioner to comply with section 16; thereafter to hear and determine the action.*

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**ROGERS AGENCIES (PVT) LTD**

**VS**

**PEOPLE'S MERCHANT BANK LTD**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
BASNAYAKE, J.
CALA 370/2004.
DC COLOMBO 26645/MR.
FEBRURAY 09, 2005.

*Civil Procedure Code, sections 121(2) and 175(2) - Filing of list of witnesses/ documents after the case was fixed for trial - Applicability of section 175 (2) - Can the whole list be accepted ?- Objection to be taken at what point of time? - Meaning assigned to "before the day fixed for hearing".*

The Trial Judge overruled the objections of the plaintiff - petitioner to the marking of a document /witnesses filed by the defendant - respondent after the case was fixed for trial on the ground that it was a belated objection and accepted the entire list of documents witnesses filed by the defendant respondent after the case was fixed for trial on the ground that it was a belated objection.

On leave being sought,

**HELD:**

1. The meaning assigned to the words "before the day fixed for hearing" is the first date on which the trial is fixed for hearing.

2. The question whether the trial Judge can allow the entire list of documents in the event of overruling an objection raised by a party in respect of a single document contained in such list, should be answered in the negative

*Per* Somawansa, J.(P/CA) :

"The trial Judge's finding that the plaintiff–petitioner's objection was belated is an error as the procedure adopted in the original courts when objecting to a document/witness, is namely, to object when the document in question is sought to be marked or when the witness in question is called to the witness box to give evidence."

**APPLICATION** for leave to appeal from an order of the District Court of Colombo.

**Case referred to :**

*Kandiah vs. Wiswanathan 1991 1 Sri L. R. 269.*

*C. Paranagama* for petitioner,

*Palitha Kumarasinghe* for respondent.

*Cur. adv. vult.*

June 3, 2005.

**ANDREW SOMAWANSA, J.**

This is an application for leave to appeal against an order made by the learned District Judge of Colombo dated 07.09.2004 whereby the learned District Judge having overruled the objection of the plaintiff - petitioner to the marking of a document not only permitted the said document -V6 to be marked in evidence but accepted the entire list of documents and witnesses

filed by the defendant - respondent after the case was fixed for trial to be a duly filed list of documents and witnesses.

At the inquiry both parties agreed to resolve the question of leave as well as the main matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are as per journal entry (6) dated 18.01.2002 the trial had been fixed for 13.05.2002. On that day as per journal entry (8) trial had been re-fixed for 13.09.2002. As per journal entry (10) dated 13.09.2002 issues had been settled and further trial had been fixed for 27.01.2003 and on the said date the trial had been re-fixed for 23.05.2003. In the meantime, as per journal entry (14) dated 13.05.2003 the defendant - respondent's Attorney-at-Law had filed an additional list of witnesses. The said journal entry is as follows :

"විත්තිකරුගේ නීතිඥ මයා පැමිණිලිකරුගේ නීතිඥ වෙත දැන්වීම් යවමින් සාක්ෂි හා ලේඛණ ලැයිස්තුව පිලිගත ගොනු කරන ලෙසත්, සාක්ෂි කරුවන්ට සාක්ෂි සිතාසි නිකුත් කරන ලෙසත් අයැද සිටී.

1. ගොනු කරන්න.
2. සිවිල් නඩු සංග්‍රහයේ 121(ii) වගන්තියට අනුකූල නොවේ.
3. විරෝධතා වලට යටත්ව සාක්ෂි සිතාසි සපයා ඉල්ලීම් කල පසුව සාක්ෂි සිතාසි නිකුත් කරන්න."

Thereafter as per journal entry (15) dated 13.05.2004 the plaintiff - petitioner has closed his case and further trial had been postponed to 07.09.2004 on which date when the defendant-respondent's case commenced, one A. Wimalaratne was called by the defendant-respondent to give evidence. In the course of his evidence counsel for the defendant - respondent sought to mark in evidence the document marked V 6 a complaint made to the Colombo Frauds Bureau on the basis that the said document is listed in the additional list of documents and witnesses filed by the defendant - respondent on 09.05.2003. Counsel for the plaintiff - petitioner objected to the production of the said document marked V6 on the basis that the said document had been listed after the commencement of the trial and that the said document has not been listed in compliance with the provisions contained in section 121(2) of the Civil Procedure Code. Section 121(2) of the Civil Procedure Code reads as follows :

**"Every party to an action shall, not less than fifteen days before the date fixed for the trial of an action, file or cause to be filed in court after notice to the opposite party -**

**(a) a list of witnesses to be called by such party at the trial, and**

**(b) a list of the documents relied upon by such party and to be produced at the trial".**

It appears to me that the meaning assigned to the words "before the day fixed for the hearing" is the first date on which the trial is fixed for hearing. The meaning of the aforesaid words are clear and no other meaning could be assigned to the aforesaid words. Accordingly it is apparent that as per journal entry (6) dated 18.01.2002 the first date on which the trial had been fixed for is 13.05.2002 and the defendant - respondant's additional list of witnesses and documents have been filed on 09.05.2003 clearly not in compliance with the requirements in section 121(2) of the Civil Procedure Code.

Section 121(2) of the Civil Procedure Code is to be read with section 175(2) of the Civil Procedure Code which reads as follows :

**"A document which is required to be included in the list of documents filed in court by a party as provided by section 121 and which is not so included shall not, without the leave of the court, be received in evidence at the trial of the action;**

**Provided that nothing in this subsection shall apply to documents produced for cross examination of the witnesses of the opposite party or handed over to a witness merely to refresh his memory"**

In the case of *Kandiah vs. Wiswanathan*[1]

"When an unlisted document is sought to be produced in a District Court trial, the question as to whether leave of court should be granted under section 175(2) of the Civil Procedure Code is a matter eminently within the discretion of the trial Judge. The precedents indicate that leave may be granted,

(1) where it is in the interests of justice to do so ;
(2) where it is necessary for the ascertainment of the truth ;
(3) where there is no doubt about the authenticity of the documents (as for instance certified copies of public documents or records of judicial proceedings);
(4) where sufficient reasons are adduced for the failure to list the document (as for instance where the party was ignorant of its existence at the trial).

Where the Court admits such a document, an appropriate order for costs will generally alleviate any hardship caused to the said party.

Leave may not be granted where the other side would be placed at a distinct disadvantage.

When an objection is taken to the admissibility of a document it is desirable that such objection should be recorded immediately before any further evidence goes down.

Per Wijeyaratne, J "It happens frequently in District Court trials that material witnesses and documents have not been listed as required by law. The failure to do so entails considerable hardship, delay and expense to parties and contributes to laws delays. It should be stressed that a special responsibility is cast on Attorneys-at-Law, who should endeavour to obtain full instructions from parties in time to enable them to list all material witnesses and documents as required by Law"

When one examines the reasons given by the learned District Judge for over-ruling the objections of the plaintiff - petitioner, it appears that he has solely gone on the basis that the objections raised by the plaintiff - petitioner is belated.

On an examination of the reasons given by the learned District Judge over ruling the plaintiff - petitioner's objection, it is to be seen that as submitted by the counsel for the plaintiff - petitioner the learned trial judge has without considering any of the matters referred to by both counsel in

their submissions over - ruled the objections solely on the ground that the objection taken by the plaintiff - petitioner to the questioned document marked V6 was belated. The Learned District Judge's reasoning is that the additional list of witnesses and documents dated 09.05.2003 marked P4 had been accepted subject to objections and the plaintiff - petitioner had failed to take up any objection at any of the trial dates after the aforesaid additional list marked P4 was filed and not even at the closure of the plaintiff - petitioner's case did the plaintiff- petitioner take up this objection. In the circumstances, the learned District Judge has come to a finding that the plaintiff - petitioner's objection was belated and proceeded not only to allow the aforesaid document V6 to be marked but also accepted the whole list of witnesses and documents listed in the additional list which I think is an error on the part of the learned District Judge.

It is to be seen that the objection taken by the plaintiff - petitioner was in respect of document marked V6 and the parties made submissions on the question of admissibility of document marked V6 only. In the circumstances an admission of the entire additional list of witnesses and the documents without the plaintiff - petitioner being given a hearing has certainly placed the plaintiff - petitioner at a distinct disadvantage and certainly the order is bad in law. The learned District Judge has not addressed his mind to provisions contained in section 175(2) of the Civil Procedure Code in granting leave of Court to produce a document in evidence. Court has to be satisfied with certain requirements as laid down in *Kandiah vs. Wiswanathan (supra).* In any event, my considered view is that the objection taken by the plaintiff - petitioner is not belated for the plaintiff - petitioner has objected to the document marked V6 at the appropriate time and at the first opportunity he got. This it appears is the procedure adopted in the original Courts when objecting to a document or witness *viz* : to object when the document in question is sought to be marked or when the witness in question is called to the witness box to give evidence. The reason is obvious for though listed, documents may not be produced or witnesses may not be called and then again there may be no reason or necessity to object to a document or a witness listed in an additional list.

In any event, I would say that there is no practice or procedure known to law to allow an entire list of witnesses and documents simply by over -

ruling an objection taken in respect of a single document in such a list of witnesses and documents and that too for the reason that objections had not been taken up at the time of filing of such a list of witnesses and documents.

Counsel for the defendant - respondent contends that no prejudice would be caused to the plaintiff - petitioner by admitting the police statement V6 in that the plaintiff petitioner has the right to cross - examine the witness on the document and that the plaintiff - petitioner will not be placed at a disadvantage by allowing the said document marked V6. In support of this submission counsel for the defendant - respondent had cited a series of decisions. I have no reason to disagree with them but none of those decisions deal with a situation as that we are faced with in the instant action. The cases cited by counsel for the defendant - respondent deals with the proposition that non - compliance with the procedure is not fatal to an action, that this is a Court of Justice and is not an academy of law, that it is not the duty of the judge to throw technicalities in the way of the administration of justice and that a Court should not be fettered by technical objections solely based on procedure are not relevant to the instant application.

In this application the proposition of law the Court is called upon to adjudicate is as to whether the trial judge can allow the entire list of documents in the event of over-ruling an objection raised by a party in respect of a single document contained in such list.

I am of the view that the proposition of law as aforesaid should be answered in the negative. For the foregoing reasons, I would allow this application for leave to appeal and set aside the order of the learned District Judge dated 07.09.2004. I direct the learned District Judge to make a fresh assessment of the objections taken by the plaintiff - petitioner in accordance with the law. Costs fixed at Rs.5000 to be paid by the defendant - respondent to the plaintiff - petitioner.

**BASNAYAKE, J.** – *I agree.*

*Application allowed. District Judge directed to make a fresh assessment of the objections taken by the plaintiff-petitioner in accordance with the law.*

# RATNAPALA
# VS
# METRO HOUSING CONSTRUCTIONS (PVT) LTD

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CALA 115/2005.
DC MT LAVINIA 1974/05/01.
April 25, 2005.
May 13, 2005.

*Civil Procedure Code, sections 664 (1), 664(2) and 756(4) - Enjoining order sought - Interim injuction refused - Validity? - Application for leave to appeal- Interim order obtained exparte? -Validity? - Should the same registered Attorney-at- Law file the leave to appeal application? Misstatement of the true facts - Does it warrant dissolution of an interim order without going into its merits? - Damages quantified - No injunction/ interim order should be granted? - Court of Appeal Rules 1990, Rule 2(1) - Interim Orders?*

The plaintiff –petitioner sought an enjoining order with notice to the defendant–respondent. Court after an interpartes inquiry dismissed the plaintiff's application for an interim injunction.

On leave being sought it was contended by the defendant–respondent that -

(1) The petition for leave to appeal was signed by a different Attorney -at- Law and not by the registered Attorney - at - Law who filed proxy in the lower court, thus the application is bad in law.

(2) The interim order granted ex-parte by the Court of Appeal is bad in law as no plausible explanation was given as to why it was supported exparte.

(3) As the plaintiff has quantified damages no injunction/interim order should be granted.

**HELD:**

1. A leave to Appeal application is a step in the proceedings of the original court but according to section 756 (4) it originates in the Court of Appeal. Hence the proxy in an application for leave to appeal can be filed either by the registered Attorney who filed proxy in the lower Court or by an other Attorney.

2. When the inquiry is held *inter partes* there is no necessity to support for an enjoining order. The court is free to make an order based on the material placed before it with regard to the application for an interim injunction.

3. The plaintiff petitioner supported for an interim stay order in the Court of Appeal fifteen days after the delivery of the impugned order without notice to the defendants. The plaintiff–petitioner had sufficient time to give notice to the defendant before supporting for an interim stay order.

The Rules make it compulsory to give notice to the party concerned before such an application is supported unless the petitioner comes with a plausible explanation that the matter is of such urgency that it is not possible to give such notice.

4. A misstatement of the true facts by the plaintiff which put an entirely different complexion on the case as presented by him when the interim stay order was applied exparte would amount to a misrepresentation or suppression of material facts warranting its dissolution without going into its merits. The description of the building in the premises of the plaintiff as a residential house when it was not amounts to a misrepresentation of the true facts which give a different picture to his case as presented by him.

5. If the damage caused to the plaintiff has been quantified then no injunction or interim order will usually be granted.

**APPLICATION** for leave to appeal from an order of the District Court of Mt. Lavinia.

**Cases referred to :**

1. *Saravanapavan vs. Kandasamydurai* 1984 1 Sri LR 268
2. *Gilinona vs. Minister of Land Development and Mahaweli Development and two others* 1978 - 79 1 Sri. L. R. 10 at 13
3. *Duwearachchi and Another vs. Vincent Perera and Others* 1984 2 Sri LR 94
4. *Hotel Galaxy (Pvt) Ltd and Others vs. Mercantile Hotel Management* 1987 1 Sri LR 5 at 36
5. *Jinadasa vs. Weerasinghe* 31 NLR 33, 35
6. *American Cyanamid Co vs. Ethicon Ltd* (1975)1 ALL ER at 510

*Ikram Mohamed,* PC with *M. Lankatilaka* for plaintiff–petitioner.

*L. C. Seneviratne,* PC with *Anil Selvaratnam* for defendant–respondent.

*Cur. adv. vult.*

May 25, 2005.

**WIMALACHANDRA, J.**

This is an application for leave to appeal from the order of the learned Additional District Judge of Mount Lavinia dated 16.03.2005. By that order the learned judge refused to grant the interim injunction prayed for by the plaintiff–petitioner (plaintiff) in paragraph "ඉ"of the prayer to the plaint. Briefly, the facts relevant to this application as set out in the petition are as follows :

The plaintiff is the owner of the premises bearing No.11, Pennyquick Road, Wellawatte, Colombo 6. The premises bearing assessment Nos. 49 and 51, 37th Lane, Colombo 6 are adjoining the aforesaid property of the plaintiff. The defendant-respondent (defendant) commenced construction of a multi storied building in the said premises and for that purpose excavation had been done to lay the foundation. The plaintiff states that the operation of the heavy machinery had caused heavy damage to his property. The plaintiff orginally instituted action No. 1962/4/L on 16.12.2004 in the District Court of Mount-Lavinia and sought *inter-alia* an interim injunction restraining a company called Metro Contruction Ltd. from excavating and/or doing any construction work in the premises Nos. 49 and 51 and obtained an enjoining order *ex-parte.* The said company filed a petition and affidavit dated 04.01.2005 pleading that the construction work was not done by that company but by a company called "Metro Housing Construction (Pvt.) Ltd, a B. O. I. approved company. The Court after an inquiry, held that the construction work in the said premises had been carried out by Metro Housing Construction (Pvt.) Ltd. and not by Metro Construction (Pvt.) Ltd. Accordingly, the Court set aside the enjoining order and refused to grant interim injunction on 25.03.2005.

The plaintiff thereafter instituted the present action No. 1974/095 on 20.01.2005 against Metro Housing Construction (Pvt.) Ltd. seeking the same relief. The plaintiff supported for an interim relief with notice to the

defendant. The Learned Additional District Judge after an inter - partes inquiry made order on 16.03.2005 dismissing the plaintiff's application for an interim injunction. It is against this order that the plaintiff has filed this leave to appeal application.

The plaintiff filed this application for leave to appeal on 31.03.2005 which was supported on 01.04.2005 without notice to the defendant - respondent (defendant) and obtained an interim order restraining the defendant, its agents and servants from carrying out any construction and/or excavation work in premises Nos : 49 and 51, 37th Lane, Colombo 06.

When the matter came up before this Court on 25.04.2005, both counsel made submissions with regard to the extension of the interim order granted by this Court on 01.04.2005 and on the question whether this is a fit case to grant leave to appeal against the aforesaid order of the learned Additional District Judge dated 16.03.2005.

The Learned President's Counsel for the defendant in his written submissions raised a preliminary question of law relating to the procedure. The learned President's Counsel submitted that the proxy in this application before this Court has been filed by Mr. S.B. Dissanayake, Attorney-at-Law. However the proxy granted to Mrs. Subashini De Costa still remains and the journal entries in the District Court record show that it has not been revoked. The learned counsel for the defendant contended that, petition for leave to appeal signed by another Attorney -at - Law is not valid and therefore the petition is bad in law for want of proper authority. This preliminary question of law has no merit in view of the decision in the case of *Saravanapavan vs. Kandasamydurai*[1] where it was held that,

> **"A leave to appeal application is a step in the proceedings of the original court but according to section 756(4) it originates in the Court of Appeal. Hence the proxy in an application for leave to appeal can be filed either by the registered attorney who filed proxy in the lower court or by any other attorney. Further, there is a long standing practice for an attorney not necessarily the registered attorney in the lower court to file proxy in the Court of Appeal.**
>
> **There is a long standing and reasonable practice which has grown up since 1974 when the Administration of**

**Justice Law, No. 44 of 1973, came into force, in the interests of the diligent and expeditious conduct of proceedings. The practice causes no prejudice and involves no breach of the provisions of the Civil Procedure Code and it has now become a *cursus curiae*."**

I shall first deal with the main ground of objection raised by the learned President's Counsel for the plantiff with regard to the procedure adopted by the learned District judge at the inquiry into the plaintiff's application for the enjoining order. The learned counsel submitted that the inquiry was held on the application made for an enjoining order and not on the application for an interim injunction but that the learned judge has made an order on the application for the interim injunction and not on the application made for the enjoining order, and further submitted that the learned judge has failed to realize that the inquiry was limited to the issue of the enjoining order sought by the plaintiff.

The Learned Judge in his order has stated that on 22.02.2005 both parties were represented by President's Counsel and made submissions with regard to an interim injunction, and the order relates to the interim injunction.

The provisions relevant to the granting of enjoining orders and interim injunctions are found in section 664(1) and 664(2) of the Civil Procedure Code. It reads as follows :

> 664(1). The court shall before granting an injunction cause the petition of application for the same together with the accompanying affidavit to be served on the opposite party.

664(2) Where it appears to court that the object of granting an injunction would be defeated by delay, it may until the hearing and decision of the application for an injunction, enjoin the defendant for a period not exceeding fourteen days in the first instance, and the court may for good and sufficient reasons, which shall be recorded, extend for periods not exceeding fourteen days at a time, the operation of such order. An enjoining order made under these provisions, shall lapse upon the hearing and decision of the application for the grant of an injunction.

It appears from section 664 (2) that, where the object of granting an injunction will be defeated by delay, the Court may grant an enjoining oder, until the hearing and decision of the application for an injunction, valid

for a period of not exceeding fourteen days, in the first instance. Accordingly, enjoining orders are granted after an ex-parte hearing, but when the matter is fully argued and exhaustive submissions are made by counsel appearing for both parties the Court need not consider granting an enjoining order. After notice to the opposite party, and the opposite party had filed objections with affidavits and after a full inquiry, as in the present case, the Court is free to make an order based on the material placed before it by the parties with regard to the application for an interim injunction. When the inquiry is held inter-partes, there is no necessity to support for an enjoining order. In the circumstances I am of the view that there is no merit in the submissions made by the learned President's Counsel for the plaintiff with regard to the objection that the impugned order should have been confined to the granting of the enjoining order.

The Learned President's Counsel for the plaintiff also contended that the said order of the learned Judge is erroneous and is based on the proposition that since the plaintiff has quantified the damage an injunction will not lie, without examining the plaintiff's averments in the plaint that further excavation would cause further damage which cannot be ascertained at the time of filing the plaint. The Learned Judge has come to the finding on the material placed before Court that the excavation work in the site was completed and the building has now reached the stage of the ground floor. The Learned Trial Judge in his order at page four has stated as follows :

> "මෙම අතුරු තහනම් නියෝගය පිළිබඳ විමසීමේ ප්‍රධාන අරමුණ වන්නේ පැමිණිලිකරුගේ නිවසට තවදුරටත් හානි සිදුවීම වැලක්වීමයි. ඉදිරිපත් කර ඇති කරුණු අනුව පැමිණිලිකරුගේ ගොඩනැගිල්ලට හානි සිදුවී ඇත්තේ විත්තිකරු විසින් පොළොව කැනීමේ හේතුව මතවේ. දැනටමත් කැණීම් කටයුතු අවසන් වී ඇති නිසා තවදුරටත් පැමිණිලිකරුගේ ගොඩනැගිල්ලට හානි සිදුවීමට ඉඩ නැති බව ඉතා පැහැදිලි වේ. දැනට පැමිණිලිකරුට සිදුවී ඇති අලාභ පිළිබඳව විභාගයේ දී සාක්ෂි ඉදිරිපත් කිරීමෙන් පසුව එම කරුණු ඔප්පු කිරීමට පැමිණිලිකරුට හැකි වේ."

The Learned Judge has referred to the document marked "D3". It is an affidavit filed by the Chief Engineer, Department of Buildings, According to "D3", the excavation work has been completed, four retention walls have been constructed on all four sides and they cover the common boundary between the two premises. Accordingly, the possibility of any damage

being caused to the plaintiff's property and the building standing thereon is unlikely.

The possibility of further excavation and the use of heavy machinery are the main grounds upon which the plaintiff sought to restrain the defendant from further construction of the building. In this regard the consultant civil engineer Mr. Ernest has filed an affidavit, wherein, *inter-alia*, he has observed that since the construction of retaining walls on all sides are now being completed in premises Nos. 49 and 51, 37th Lane, Wellawatta, there is no possibility of any damage being caused to the wall and the building in premises No. 11, Pennyquick Lane, Colombo 06.

The Learned Counsel for the plaintiff submitted that even though the learned trial judge has relied on the report marked "D3" (also marked as "E25") of Mr. Jayachandran, Chief Engineer of the Buildings Department, produced by the defendant, it makes no reference to the damage caused to the plaintiff's building or steps taken by the defendant to prevent further damage. In the report marked "D3" it is clearly stated that excavation work has been completed and adequate precautionary measures have been taken by the defendant.

The Learned Judge has therefore observed that the excavation work has now been completed and that there is no possibility of causing further damage to the plaintiff's building. The affidavit filed by the Resident Engineer of the defendant, Mr. Atputhananthan dated 19.04.2005 marked as "X14" annexed to the statement of objections reveals that the construction of the foundation and the retaining walls up to ground level have been completed by the date of filing the affidavit marked "X14". The said Resident Engineer has also sworn the affidavit dated 19.04.2005 marked "X4" wherein he states that the following items of work have commenced and been completed:–

(i) Laying of foundation
(ii) Construction and completion of a retention wall right around the building site.
(iii) Construction and completion of the ground - floor slab after erecting the necessary pillars
(iv) Construction of 1/4 th of the floor.

The averments in the affidavits marked "X4" and "X14" are confirmed by the affidavit of T. A. Ernest, a chartered Civil Engineer, marked "X2" annexed to the statement of objections which describes the experience and qualifications of Mr. Ernest.

The Plaintiff produced an inspection report (marked "A(e)" annexed to the petition) prepared by the Chartered Engineer M. K. A. N. B. Alwis in respect of the premises No. 11, Pennyquick Road, Wellawatte, which belongs to the plaintiff. It speaks of the damage that has been caused as a result of the excavation work. However, from the affidavits of the Chief Engineer of the Buildings Department (vide- document marked 'D3') and from the affidavit of the Resident Engineer (vide document marked 'D2b'), it can be seen that the excavation work was completed before the date of petition. This is confirmed by the photographs marked "X3" annexed to the statement of objection. The learned trial judge in his order at page four has observed that the photographs marked 'D1(a)'to'D1(b)' show no further damage would be caused to the plaintiff's building and the defendant has taken all possible steps to prevent any further damage to the building. This has been confirmed by the Chief Engineer, Department of Buildings in his affidavit marked 'D3'.

In these circumstances, the question that arises is whether the petitioner in entitled to the extension of the interim order granted in terms of paragraph (d) of the prayer to the petition, and to an interim injunction.

As regard to the issue of an interim order, the Court must take into account certain principles. In the case of *Billimoria Vs. Minister of Land Development and Mahaweli Development and Two Others*[2] at 13 *Samarakoon, C. J.* observed :

> **"In considering this question we must bear in mind that a stay order is an incidental order made in the exercise of inherent or implied powers of Court."**