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

[2008] 2 SRI L.R. – PARTS 11 & 12

PAGES 281 - 336

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at Sarvodaya Vishva Lekha, Moratuwa.

Price : Rs. 40.00

DIGEST

CIVIL PROCEDURE CODE – Sections 17, 18 and 18(2) – Section 755(1)C, Section 758(1)(b)(c), Section 759(2) – Necessary party not named in the notice of appeal and petition of appeal – Fatal? Is the failure to comply with Section 18(2) a procedural irregularity? Does non-joinder of parties defeat an action? – Accident – Proper evaluation on damages necessary? – Court making an equitable assessment – When?

Jayampathi and Another v Kudabanda 289

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

Kariyawasam v Rajasuriya 335

COMMON INTENTION – Failure to consider the principles of law relating to the common intention – Fatal – Criminal Procedure Code – Section 334 – Constitution Article 138.

Rajadheera and Others v Attorney-General 321

CONSTRUCTIVE MALICIOUS DESERTION – Date on which malicious desertion took place not specified – Is it fatal? – Issue raised giving the exact date – Permissibility? – Evaluation and analysis of evidence? – Observations regarding credibility – Warranted?

Nilanthie Siriwardane v Krishantha 281

DEBT RECOVERY ACT NO. 2 OF 1990 – Sections 6 (2), 6 (A) – Order nisi entered – Party absent – Order nisi made absolute – By consent order absolute vacated – Time granted to show cause why order nisi should not be made absolute? Should the matter be fixed for inquiry under Section 7? Civil Procedure Code – Sections 384, 385, 386, 387, 390 and 391, – Section 703 – Procedure to be followed.

Perera v National Development Bank 296

DEBT RECOVERY (SPECIAL PROVISIONS) ACT 2 OF 1980 AMENDED BY ACT 9 OF 1994 – Section 7 matter adjusted or compromised in the Supreme Court – Case remitted to District Court – Supreme Court granting time to file answer – Contrary to Section 7 of the Act? – Can the correctness of an order given by the Apex Court be decided by an inferior Court?

Union Bank of Colombo Ltd. v Wijayawardane and Another 306

PARTITION LAW – Section 48(1) – Section 48(4)(c) – Section 48 (4)(d) – Applicability – Procedure – Mandatory? Failure – Is it fatal?

Pandiwela v Ashoka and Others 312

SERVITUDES – RUSTIC SERVITUDES – Unsafe to act on mere assertions? Acquisition by prescription or by transfer of land and right to use the land – Footpath only?

Karolis v Amaradasa and Others 325

WRIT OF MANDAMUS – Compelling Urban Development Authority (UDA) to enter into a lease agreement – Legal right – performance of a legal duty – Essence of Mandamus?

Janak Housing (Pvt) Ltd and Another v Urban Development Authority..... 302

NILANTHIE SIRIWARDANE
v
KRISHANTHA

COURT OF APPEAL
SALAM, J.
CA 347/04 (F)
DC TANGALLE 1281/D
JUNE 28, 2005

Constructive Malicious Desertion – Date on which malicious desertion took place not specified – Is it fatal? – Issue raised giving the exact date – Permissibility? – Evaluation and analysis of evidence? – Observations regarding credibility – Warranted?

The District Court granted a divorce in favour of the plaintiff-respondent on the ground of malicious desertion.

It was contended by the defendant-appellant that, the trial Judge has accepted an issue relating to malicious desertion totally outside the pleadings indicating the exact date of desertion, when the pleadings were silent on the 'date' of desertion. It was also contended that, the trial Judge has failed to evaluate and analyze the evidence in the correct perspective.

Held:

(1) The failure of the plaintiff-respondent to specify the exact date or probable date of desertion is important in the light of the defence raised by the defendant in that she took up the position that she never deserted her husband.

(2) Since the defendant-appellant has denied the allegation of malicious desertion and made a counter allegation specifying the exact date that the plaintiff chased her out of the matrimonial house, the trial Judge should have been cautious in allowing the plaintiff to introduce the date of desertion for the first time – in the issues.

(3) The trial Judge has erred himself in not taking into consideration, the balance of probabilities as between the version of the plaintiff and that of the defendant by weighing the evidence relating to malicious desertion and constructive malicious desertion.

Held further:

(4) The transfer of the title of the matrimonial house to his mother was a ruse adopted by the plaintiff, it is more so when the plaintiff has given it on rent to an outsider, moreover the mother of the plaintiff-respondent has later transferred the rights in the matrimonial house for valuable consideration to an outsider – the day on which it is alleged that the defendant-appellant maliciously deserted him, the house in which they lived as husband and wife had been transferred to his mother and was not available for the occupation of the respondent.

Per Abdus Salam, J.

"Had the learned District Judge addressed his mind as to which version is more probable in the light of the evidence led before him he would certainly not have concluded that the defendant is guilty of malicious desertion – on the contrary, the totality of the evidence indicates constructive malicious desertion of the defendant by the husband".

APPEAL from the District Court of Tangalle.

Cases referred to :

(1) *Pathmawathie* v *Jayasekera* 1997 1 Sri LR 248.

Anoma Gunatilake for defendant-appellant.
Mohan Peiris PC with *Widura Ranawaka* for plaintiff-respondent.

July 27, 2007

ABDUS SALAM, J.

This is an appeal from the judgment of the learned District Judge of Tangalle, granting a divorce (*a vinculo matrimonii*) in favour of the plaintiff-respondent (As and when the context so requires hereinafter referred to as the "plaintiff") from the defendant-appellant (hereinafter similarly referred to as the 1st defendant) on the ground of malicious desertion.

It was not contested that the parties entered into the matrimonial bond on 7th September 1995 and that they elected the house belonging to the plaintiff at Medaketiya in Tangalle as their matrimonial home. It was also common ground that the parties were blessed with a son named as Sooriya Krishna born on 23rd of October 1996, by the said marriage.

The plaintiff who is an engineer by profession, left for Japan in October 1997, for purpose of employment and returned to Sri

Lanka on 15 December 2001. The plaintiff claimed that he made remittances at various times, in favour of the defendant, from Japan aggregating to Rs. 2,800,000/- (2.8 million). Upon his return, he claims to have requested from the defendant a part of the money so remitted to enable him to engage in a business. The defendant having refused to accede to the request is said to have fallen out with the plaintiff then avoided payment and thereafter maliciously deserted him.

The plaintiff maintained that subsequently the defendant had come to his residence on several occasions in the company of her brother and threatened to kill him. For purpose of convenience paragraphs 8, 9 and 10th of the plaint are reproduced below as have been pleaded in Sinhala.

8. එසේ ශ්‍රී ලංකාවට පැමිණ රැකියාවක් සොයාගැනීමට උත්සාහ දරන ලද නමුත් සාර්ථක නොවීම නිසා පැමිණිලිකරු විත්තිකාරියට එවන ලද මුදලින් ව්‍යාපාරයක් පටන් ගැනීමට අපේක්ෂාවෙන් ඇයගෙන් මුදල් ඉල්ලා සිටියත් ඇය එය ප්‍රතික්ෂේප කරන ලද අතර, පැමිනිලිකරුට ජීවත් වීමටවත් එම මුදලින් කීයක් වත් ලබා නොදෙන ලදි.

9. ඉන් පසුව විත්තිකාරිය එම මුදල් පැමිණිලිකරුට දීම මගහැරීමට පැමිනිලිකරු හා අමනාපව ද්‍රාවිශසහගතව අතහැර ගොස් ඇයගේ දෙමාපියන් සමග ජීවත්වේ.

10. ඉන් පසුව පැමිනිලිකරු සහ ඔහුගේ දෙමව්පියන් විත්තිකාරිය කැඳවාගෙන ඒමට උත්සාහ කරන ලද නමුත් එය ප්‍රතික්ෂේප කරමින් පැමිනිලිකරුට දික්කසාද වන ලෙසට දන්වන ලද අතර ඊට අමතරව විත්තිකාරිය ඇයගේ සහෝදරයා සමග පැමිනිලිකරුගේ නිවසට පැමිණ ඔහු මරන බවටද තර්ජනය කරන ලද අතර මේ පිළිබඳව පැමිණිලිකරු 2001.01.11 දින නංගල්ල පොලීසියට ද පැමිණිලි කරන ලදි.

It is quite clear from the averments quoted above that the plaintiff had based his cause of action on the malicious desertion of the plaintiff motivated by her desire to avoid payment of money requested by the plaintiff from and out of the remittances made to the defendant from Japan. A glaring omission in the averment regarding the malicious desertion is the failure on the part of the plaintiff to set out as to exact or probable point of time at which the defendant (wife) deserted him. However, the plaintiff maintained that the defendant is guilty of malicious desertion and the matrimonial bond should no longer be regarded as in existence.

On the contrary, the defendant took up the position in her answer that she never deserted the plaintiff. Further answering she maintained the position that on the 31st January 2002, the plaintiff having chased her and the only child of the marriage away, rented out the matrimonial home to an outsider. The defendant further alleged that the plaintiff subsequently sold the house to third party, thus depriving them of the right to have a shelter. Even though the allegation of the defendant tantamount to constructive malicious desertion on the part of the plaintiff, she did not seek a counter divorce. The defendant in her answer only sought a dismissal of the plaintiff's action.

The learned District Judge after trial arrived at the conclusion that the plaintiff has proved the allegation of malicious desertion and that the version of the defendant is unacceptable. Hence, he granted a divorce as prayed for in the plaint and legal custody of the child to the defendant.

It was strongly urged by the defendant that the learned District Judge has erred in coming to the conclusion that the plaintiff has proved the charge of malicious desertion levelled against her. The learned Counsel of the defendant has drawn the attention of court to the pleadings of the plaintiff, where he has failed to specify the exact date or period of the alleged malicious desertion.

As far as the plaint is concerned, admittedly the plaintiff has not specified the date on which he alleges malicious desertion took place nor has he explained the reason as to why he cannot give the date of desertion. The failure of the plaintiff to specify the exact or probable date of desertion is important in the light of the defence raised by the defendant, in that she took up the position that she never deserted her husband.

However, the learned District Judge accepted an issue relating to malicious desertion totally outside the pleadings, as suggested by the plaintiff indicating th exact date of desertion. Even though the said issue has not been objected to by the defendant, it is contended on behalf of the defendant that the learned District Judge has failed to ascertain exactly material proposition of facts on which the parties were at variance.

Learned Counsel of the defendant has adverted to the decision of this Court in *Pathmawathie* v *Jayasekara* (1), where it was held that though in practice Counsel appearing for the plaintiff or defendant to suggest the issues, it is the prime responsibility of the Judge to frame issues. It is more so, because it is ultimately the Judge who should make a finding and without clear understanding of the dispute and the issue that he has to determine, it would be a most dangerous exercise to embark upon a voyage of discovery. Since the defendant in this case has denied the allegation of malicious desertion and made a counter allegation specifying the exact date that the plaintiff chased her out of the matrimonial home, the learned District Judge should have been cautious in allowing the plaintiff to introduce the date of desertion for the first time.

The learned Counsel of the defendant has submitted that in accepting issue No. 8 the learned District Judge has entertained a purported issue, which is very different to the dispute placed before court for adjudication on the pleadings. By allowing, the plaintiff to introduce the alleged date of desertion the learned District Judge has in fact permitted the defendant indirectly to raise an issue, which had the effect of allowing an amendment to the plaint that, was only possible if the plaintiff was not guilty of laches. Even if the plaintiff amended the plaint, yet the defendant would have had the opportunity of replying to it by way of an amended answer.

Let us examine for a moment, as to what really was the main dispute presented for the adjudication, between the parties on the pleadings. According to paragraphs, 9 and 10 of the plaint the defendant deserted the plaintiff and thereafter came to reside at the residence of her mother and later in the company of the brother came back to the house of the plaintiff and threatened him with death. The plaintiff has complained of alleged threat to the police on 11.01.2001. According to the police complaint marked as p22 the defendant has deserted the plaintiff on the 4th of January 2002. It is further confirmed by paragraph 10 of the plaint that the defendant has come to the house of the plaintiff in the company of her brother on the 11th of January 2001. However, the issue raised is whether the defendant has deserted the plaintiff on the 14th of January 2002.

On the contrary, the position taken up by the defendant is that

the plaintiff chased both the defendant and the child from the matrimonial home on the 31st January 2002. The result in position would be summarised as follows.

1. The plaintiff never specified the date of desertion in the plaint.
2. In any event, by paragraph 10 of the plaint the defendant has indirectly admitted that the date of desertion had occurred prior to the 11/1/2001.
3. The defendant's position is that the constructive malicious desertion on the part of the plaintiff had taken place on the 31st of January 2002.
4. According to p22, the complaint made to the police by the plaintiff on 11/1/2002 the malicious desertion has taken place on 4/1/2002.
5. According to issue number 8, which is answered by the learned District Judge in the affirmative the defendant has deserted the plaintiff on 14/1/2002.

In the light of the above it would be seen that the learned District Judge has not only misdirected himself completely with regard to the date and time of the alleged desertion but had exceeded the limits of his jurisdiction as decided in the case of

Pathmawathie v *Jayasekara (supra).*

Even as regards the reasons for the finding that the defendant has deserted the plaintiff on the 4th of January 2002, the learned District Judge has erred with regard to the facts that were disclosed at the trial. At page 162 of the judgment, the learned District Judge has stated as follows:

2002.01.04 වන දින ගාල්ල ට්‍රයිකෝ ආයතනයට ගොස් එනවිට ඇය නිවසේ බඩු බාහිරාදිය රැගෙන නිවසින් පිටව ගොස් ඇති බව පැමිණිලිකරු සාක්ෂියෙන් කියා ඇති බවත් විත්තිකාරියගේ මව කියා සිටියේ දරුවාට ප්‍රතිකාර ගැනීමට ගාල්ල ගිය බවත් විත්තිකාරිය කියා සිටියේ දරුවාට ප්‍රතිකාර ගැනීමට තමා සමග ගාල්ලේ ගිය බවත් අසා එය ප්‍රතික්ෂේප කරන බවත් ප්‍රකාශ කර ඇත.

The passage quoted from the judgment of the learned District Judge is confusing as to its meaning. Even if it is regarded, as contradictions arising from the evidence of the defendant and that of her mother, yet the observations of the learned District Judge,

do not appear to be in accordance with the evidence led at the trial. As far as the evidence goes, the plaintiff's version is that he proceeded to Galle on 4 January 2002 and the defendant and the child were missing from home from that day. On the contrary, at the evidence of the defendant was that she was at home when the defendant returned from Galle on the 4th of January 2002. The evidence of the mother of the defendant was that they went to Galle to obtain treatment for the ailment of the child on the 8th January 2002. In the light of the evidence given by the defendant and her mother the observation of the learned District Judge, made with regard to the credibility of the evidence of the defendant and her mother appear to be highly unwarranted and does not stand to reasons.

The learned Counsel of the defendant has argued that the transfer of the title of the matrimonial home was a ruse adopted by the plaintiff. It is more so when the plaintiff has given it on rent to an outsider. Moreover, the mother of the plaintiff has later transferred the rights in the matrimonial home for valuable consideration to an outsider. As has been admitted by the plaintiff under cross-examination on the 4th of January 2002, the matrimonial home was not available to the defendant and the child to live. He has admitted that the day on which alleged that the defendant maliciously deserted him, the house in which they lived as husband and wife had been transferred to his mother, and was not available for the occupation of the defendant.

The learned Counsel of the defendant has submitted that the plaintiff has well planned a scheme within a matter of 20 days and systematically chased the defendant away from the matrimonial home and immediately thereafter obtained vacant possession and then leased it out. Added to it the plaintiff has transferred the rights in the house to his mother on document marked as D1.

Taking into consideration all these matters, the evidence adduced by both parties on a balance of probability shows that the version of the plaintiff is highly improbable. The learned District Judge has not taken into consideration the peculiar circumstances in which the plaintiff has leased out the property in question to an outsider at the crucial point of alleged desertion.

Further the intention and the scheme of the plaintiff is quite clear when the mother had sold the property to an outsider. If the intention of the plaintiff in transferring the rights in the matrimonial home to his mother was the threat, there was no necessity for the mother to have re-transferred the property to an outsider.

These circumstances clearly indicate the *malafides* of the plaintiff and the scheme he has put into effect to chase out the defendant, in the guise of malicious desertion. The learned District Judge has erred himself in not taking into consideration, the balance of probabilities as between the version of the plaintiff and that of the defendant by weighing the evidence relating to malicious desertion and constructive malicious desertion.

The learned District Judge has failed to evaluate the version of the defendant as has been disclosed in the evidence. As regards the allegation of constructive malicious desertion, the learned District Judge has failed to properly analyse the evidence adduced by both sides, before he concluded that the defendant is guilty of malicious desertion.

The evidence adduced by the plaintiff does not indicate the mental or Physical element on the part of the defendant to maliciously desert the plaintiff. On the contrary, the totality of the evidence indicates constructive malicious desertion of the defendant by the plaintiff.

Moreover, the evidence led in the case, does not appear to warrant the conclusion that the District Court has finally arrived at. The transfer of the matrimonial home in the name of the mother of the plaintiff and the fact that the defendant rented it out to a third-party, clearly indicates the mind of the plaintiff to desert the wife than the defendant to desert her husband. Had the learned District Judge addressed his mind as to which version is more probable in the light of the evidence led before him, he would certainly not have concluded that the defendant is guilty of malicious desertion.

The judgment of the learned District Judge therefore seems to be perverse. His judgment does not appear to me as based on facts nor is it consistent with the evidence led in the case. Upon a consideration of the totality of the evidence, the only decision

the learned District Judge could have come to is to disbelieve the plaintiff's evidence and dismissed the plaintiffs action.

For the above reasons the judgment and decree of the learned District Judge, are set-aside. Hence, the plaintiff's action in the original court should be deemed as having been dismissed.

The appeal is allowed with costs.

Appeal allowed.

JAYAMPATHI AND ANOTHER
v
KUDABANDA

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 919/03(F)
DC MATALE 4681/MR
JUNE 10, 2005
JUNE 8, 2006

Civil Procedure Code – Sections 17, 18 and 18(2) – Section 755(1)C, Section 758(1)(b)(c), Section 759(2) – Necessary party not named in the notice of appeal and petition of appeal – Fatal? Is the failure to comply with Section 18(2) a procedural irregularity? Does non-joinder of parties defeat an action? – Accident – Proper evaluation on damages necessary? – Court making an equitable assessment – When?

The plaintiff and his daughter who were injured, as a result of a motor cycle and a bus collision were awarded damages against the defendant-appellants. In appeal the respondent contended that, the daughter has not been included as a party in the notice of appeal and the petition of appeal and therefore the appeal should be dismissed in limine. The defendant-appellants contended that, the Court erred on the law and facts.

Held:

(1) The original record indicates that an application was made to add the daughter and it was allowed, but no amended caption had been filed. The respondent is himself responsible for not taking steps under Section 18.

(2) There was no proxy filed on behalf of the intended added party, the order to add has been made after the commencement of trial, several lapses had

taken place in the original Court itself, these lapses cannot be cured in the Court of Appeal.

(3) This being a case of general damages and special damages not being pleaded, Court could only make an equitable assessment.

Appeal from the judgment of the District Court of Matale.

Cases referred to:

(1) *Wijeratne* v *Wijeratne* 74 NLR 193.

(2) *Ibrahim* v *Bee bee* 19 NLR 289(FB)

(3) *Nanayakkara* v *Wamakulasuriya* 1993 2 Sri LR 289.

(4) *Nadarajah* v *CTB* 79 NLR at 53.

(5) *Jayakody* v *Jayasuriya* 2005 1Sri LR at 220 and 221.

S.J. Mohideen for defendant-appellant.
Bimal Rajapakse for plaintiff-respondent.

August 27, 2007

ANIL GOONERATNE, J.

This is an appeal from the judgment of the District Court of Matale awarding a sum of rupees Three Hundred Thousand against the two defendant-appellants jointly and severally for causing severe injuries to the plaintiff and his daughter, as a result of a motor cycle and a bus collision on the Matale/Dambulla road as described in paragraph 5 of the plaint, on 20.2.1994.

The 1st defendant was the driver of the bus owned by the 2nd defendant at the time of the collision. Plaintiff attributed the collision to the negligence of the 1st defendant and the District Judge has entered judgment in favour of the plaintiff.

When this appeal was listed on 30.5.07 Counsel on both sides indicated to Court that they are agreeable to resolve this matter by way of written submissions filed of record, and this judgment is based on the written submissions and the material contained in the appeal brief.

The Plaintiff-Respondent has contended as a preliminary issue that the appeal is bad in law in as much as the plaintiff's daughter who was a pillion rider and a minor at the time of the collision (as in

paragraph 5 of the plaint) has not been included as a party in the Notice of Appeal and the petition of appeal filed of record though the daughter had been added as a party in the original court. The original court record indicates that an application was made to add the daughter (18 years) and it was allowed without any objection (proceedings of 7.9.2000). The Appellant however contends that although the District Court permitted to add a party no amended caption had been filed. On a perusal of the record, I find that the appellant's position is correct in this regard.

The relevant portion of Section 18(2) of the Civil Procedure Code reads thus "*And in the case of a party being added, the added party or parties shall be named, with the designation "added party" in all pleadings or processes or papers entitled in the action and made after the date of the order".*

The record does not show any amended caption being filed in the original court and it is apparent that the above Section 18(2) of the Civil Procedure Code has been breached by the plaintiff. Therefore, the question is whether the authorities cited by the respondent viz. Wijeratne vs Wijeratne[1].and Ibrahim vs Bee Bee[2]. etc. would have any application? Is there a failure on the part of the appellant to name the necessary party as a respondent to the appeal where there is non-compliance with Section 18(2) of the Code, by the plaintiff. Further the judgment of the District Judge dated 9.9.2003 refer only in the opening sentence to the plaintiff and the plaintiff added subsequently but does not thereafter specifically refer to the added plaintiff. However, the issues have been raised based on the injuries suffered to both plaintiff and his daughter. (Issue No. 7) There had been no objection to any of the plaintiff's issues. Even the plaint refer to injuries caused to both.

Failure to comply with Section 18(2) is definitely a procedural irregularity. On the other hand Section 17 of the Code states that non-joinder of parties does not defeat an action. All these matters should have been considered in the original court.

The Respondent though raised an objection as above for the omission/mistake of the Appellant for not including the plaintiff's daughter (who was added) as a party in the notice of Appeal/Petition of Appeal is himself responsible for not taking the steps as required

to do under Section 18(2) of the Code. One has to consider this from the point of view of the original court order permitting addition of parties under Section 18 of the Civil Procedure Code.

Section 755(1) (c) and (d) and Section 758 (1)(b) and (c), requisites of notice of Appeal and Petition of Appeal respectively of the Civil Procedure Code contemplates of the following particulars:

1. Names and addresses of parties
2. Names of the Appellant and Respondent.

Except in the Petition of Appeal, the notice of Appeal suggest inclusion of the address of parties.

In the above circumstances I would observe that much confusion would have prevailed upon on Attorneys on either side resulting from the lapse that occurred from the original court. However the code has made provision to cure a lapse but it is doubtful whether the following provision would apply in a situation of this nature, and to the case in hand.

Section 759(2) reads thus ....

> *In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, (other than a provision specifying the period within which any act or thing is to be done) the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just.*

Decisions of the Appellate Court in which Section 759(2) could be invoked may be gathered from the following case law.

> The power of the court to grant relief under Section 759(2) of the code is wide and discretionary and is subject to such terms as the court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the court is of opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.
>
> *Nanayakkara* v *Warnakulasooriya*[3].

However, there appears to be fundamental mistake, though procedural, which will cause difficulty as a result of non-compliance with mandatory provision of the Civil Procedure Code (Section 18(2)). The District Judge by order dated 7.9.2000 permitted the addition of the 2nd added plaintiff (daughter of the plaintiff). As observed above there is no amended caption/pleadings filed subsequent to the said order. There was no proxy filed on behalf of the intended added party. The order to add has been made after the commencement of trial. Several lapses had taken place in the original court itself. The above lapses cannot be cured in the Court of Appeal. Inspite of all this case proceeded to trial and I find the following material on which a judgment had been pronounced.

The learned District Judge has more or less narrated the evidence, but has referred to the cross-examination of each important witness from which the truthful account of the story could be gathered. The plaintiff's version is that the accident occurred on the Matale-Dambulla road at a place called Huganwella, Naula, when he was riding his motor cycle and his daughter on the pillion. After having had tea with the daughter at a kiosk he proceeded on the highway about a 100 yards, when a bus approaching from the opposite direction on the wrong side collided with the motor cycle and caused severe injuries to him and the daughter. At that point of impact there was a hilly area or higher elevation of the road and the bus had been coming down the slope. It is his evidence that as a result of the accident he suffered a fracture of the hip and right leg. He was also unconscious until he was taken to the Matale hospital, and later transferred to the Peradeniya Teaching Hospital. The daughter's evidence also had been considered by court with the narration of the evidence and reference being made to cross examination of the witness. The medical reports of both were marked as 'P1' & 'P2'.

The plaintiff according to 'P1' had the following injuries.

(a) contusion left foot.

(b) fracture of pubre bone.

The added plaintiff (daughter) according to 'P2' had the following injuries (a) compound fracture of the bones of the lower limb (Tibia & Fibula). Both reports indicate grievous injuries. The Doctor who gave

evidence concludes that in view of the severe injuries caused to the added plaintiff it cannot be said that the patient would after some time be her normal self, of what she was prior to the accident. In fact the injuries caused to her may have been fatal. However the Doctor states that since the added plaintiff was not available in court he cannot comment on the added plaintiff's present condition. This seems to be the reason for the original court to answer issue No. 4 as not proved. This Doctor was not examined on report marked 'P1".

> The sketch plan was marked as 'P3', which also gives an indication as to how the accident occurred. The bus had gone across the road and very much on the wrong side. The breadth of the road is 6.1 meters. Left side of the motor cycle had been damaged, and at a point from about 3 meters from the edge of the road.

On the question of damages I find that the learned District Judge has not made a proper evaluation on damages although his ultimate decision was to award damages on a reduced amount from the amount claimed in the prayer to the plaint. (may be for the reason of plaintiff's contributory negligence).

I wish to cite the following authorities where awarding of damages under various heads had been considered. This being a case of general damages and special damages not being pleaded, court would only make an equitable assessment. In *Nadarajah* v *C.T.B.*[4] at 53....

> In a claim for damages for personal injury, whether caused by negligence or otherwise, the damages are, apart from special damages, at large, and will be given for the physical injury itself, and in case of disablement, for its effect upon the physical capacity of the injured person to enjoy life as well as for his bodily pain and suffering. "Such damages cannot be a perfect compensation but must be arrived at by a reasonable consideration of all the heads of damages in respect of which the plaintiff is entitled to compensation and of his circumstances, making allowances for the ordinary accidents and chances of life Halsbury-Laws of England (3rd Edition), Vol. 11, paragraph 427.

Jayakody v *Jayasuriya*[5] at 220 and 221.

McKeron in the Law of Delict (1965) 6th edition at page 114 under the heading personal injuries has stated:

In an action for personal injuries the plaintiff is entitled to claim compensation for:

(1) actual expenditure and pecuniary loss;
(2) Disfigurement, pain and suffering and loss of general health and the amenities of life;
(3) Further expenses and loss of earning capacity ...

The damages recoverable under the second head cannot be assessed on any arithmetical or logical basis ...

The usual method adopted is to take all the circumstances into consideration and award substantially an arbitrary sum.

Macintosh and Scoble, on "Negligence in Delict" 5th edition at page 261, under the head of "Damages for Personal Injury" has stated that "the general principles in relation to compensation payable for injuries negligently inflicted on oneself personally have been laid down in a number of decisions ..... to the effect that the plaintiff is entitled to compensation for both pecuniary and non-pecuniary loss such as:

(a) all necessary expenses such as medical and hospital alteration.
(b) Loss of future earnings.
(c) compensation for loss of amenities.
(d) compensation for the shortening of one's expectation of life.
(e) compensation in respect of pain, suffering or deformity sustained .... Where damages are claimed for bodily injury, the plaintiff is not required to put a separate money value on each different element of the general damages he has suffered .....In regard to pain and suffering there are really no scales by which pain and suffering can be measured and there is no relationship between pain and money.
(f) Loss of wages.
(g) compensation for change in personality ....

Item (c) and particularly (e), however are not capable of any precise estimate, the court can only give a general equitable assessment".

This Court need not come to a finding on the negligence aspect of the defendants or support the views of the District Judge as the Judgment of the Original Court cannot stand in view of the above procedural lapses. The answers to issue Nos. 6, 7 & 8 being important issues cannot be considered without a proper addition of parties until and unless the lapses stated above are rectified. In the circumstances I would set aside the Judgment of the District Judge and direct that a re-trial be held. The Registrar of this Court is directed to forward the record in D.C. Matale 4681/MR to the relevant District Court.

EKANAYAKE, J. - I agree.

Appeal allowed.
Re-trial ordered.

PERERA
v
NATIONAL DEVELOPMENT BANK

COURT OF APPEAL
WIMALACHANDRA , J.
BASNAYAKE, J.
CALA 7/2006
FEBRUARY 22, 2007

Debt Recovery Act No. 2 of 1990 – Sections 6 (2), 6 (A) – Order nisi entered – Party absent – Order nisi made absolute – By consent order absolute vacated – Time granted to show cause why order nisi should not be made absolute? Should the matter be fixed for inquiry under Section 7? Civil Procedure Code – Sections 384, 385, 386, 387, 390 and 391, – Section 703 – Procedure to be followed.

In an action filed under the Debt Recovery Law (DR Law) *order nisi* was entered against the three defendants. The 2nd defendant did not appear and the *order nisi* was made absolute. This order was set aside by consent as the *order nisi* was not served on the 2nd defendant. The Court gave the defendant 14 days to show cause as to why the *order nisi* should not be made absolute.

The 2nd defendant sought leave to appeal, from the said order contending that since the Court had vacated the order absolute, it should be fixed for inquiry under Section 7.

Held:

(1) When a defendant purges default the only consequence is vacating the order absolute. This does not give the defendant an added advantage of over coming the request of showing a defence.

(2) Purging of default does not allow the defect to by pass the request of disclosing a defence.

(3) Section 7 is based upon the defendant appearing and obtaining leave. The 2nd defendant has to appear and obtain leave. If leave is not obtained, no further steps can be taken in terms of Section 7. It is mandatory for the 2nd defendant to obtain leave.

APPEAL from leave to appeal from an order of the District Court of Kandy.

Riza Muzni for 2nd defendant-petitioner.

Romesh de Silva, PC, with *Geethaka Gunawardane* for plaintiff-respondent-respondent.

November 13, 2007

ERIC BASNAYAKE, J.

The 2nd defendant-petitioner-petitioner (2nd defendant) filed this leave to appeal application to have the order of the learned Additional District Judge, Kandy, dated 30.12.2005, set aside.

The plaintiff-respondent-respondent (plaintiff) filed this action under the provisions of the Debt Recovery Act No. 2 of 1990 as amended (the Act) against three defendants including the 2nd defendant, to recover a sum of Rs. 1,032,472.03. The *order nisi* was entered and was ordered to be served on the defendants. After the service the 1st and the 3rd defendants appeared in court. The 2nd defendant did not appear. Hence the *order nisi* was made absolute against the 2nd defendant.

The 2nd defendant appeared on a later date and urged that the 2nd defendant was not served with *order nisi* and therefore requested that the order absolute be vacated. The learned Counsel appearing for the plaintiff consented to vacating the order absolute. Order absolute was thereby vacated. Thereafter the Court gave the 2nd defendant 14 days time to show cause as to why the *order nisi*

should not be made absolute. The 2nd defendant without complying with the said order filed this leave to appeal application.

Submission of the learned Counsel for the 2nd defendant

The learned Counsel appearing for the 2nd defendant submitted that since the Court has vacated the order absolute it should be fixed for inquiry under Section 7 of the Act No. 2 of 1990 as amended. The learned Counsel rests his submission on Section 6A(2) which is as follows:

> *6A(2) : Where the ground on which an application is made under subsection (1) is duly established to the satisfaction ..... the court may set aside the decree absolute upon such terms and conditions as the court shall consider it just and right to impose upon the applicant and upon the decree absolute being set aside,* ***the court shall proceed with the hearing and determination of the matter in accordance with the provisions of Section 7 of this Act.***

The learned Counsel appearing for the 2nd defendant submitted that since the 2nd defendant's application to purge the default has been allowed, Section 7 of the Act applies. In terms of Section 7 of the Act, the Court must treat the 2nd defendant as having obtained leave to appear and now proceed in terms of sections 384, 385, 386, 387, 390 and 391 of the CPC. He further submitted that the Court has set aside the order absolute in terms of Section 6A(2). Therefore, court is required to proceed with the hearing and determination thereafter in accordance with the provisions of Section 7. He submitted that Section 6A(2) does not leave room for the defendant to go back to Section 6 and obtain leave to appear

and defends, but to move forward by having a hearing and determination in terms of Section 7. What is required is a hearing in terms of Sections 384, 385, 386, 387, 390 and 391 of the CPC. He submitted that there is no provision for the defendant who has already faced an inquiry with regard to non-service of the *order nisi* to go through a second inquiry to obtain leave to appear and defend. Therefore, he submitted that the order dated 30.12.2005 is erroneous.

The question to be answered in this case is with regard to the procedure that has to be followed, when a *decree* absolute is set aside pursuant to an application made by a defendant to purge the default.

Submission of the learned President's Counsel appearing for the plaintiff

The learned President's Counsel appearing for the plaintiff submitted that the basis of the Debt Recovery (Special Provisions) Act is that no person is entitled as of right to answer to the *decree nisi*. All defendants have to first obtain leave of court (Section 6). Normally a defendant has a right to be heard or has a right to file answer. A defendant can file answer irrespective of whether he has good or bad reasons or is without any defence. However, in certain specific instances, the right to file answer has been taken away by the legislature. One such example is summary procedure on liquid claims under Section 703 of the Civil Procedure Code.

It was further submitted that the Legislature has enacted the Debt Recovery (Special Provisions) Act to ensure speedy recovery of monies lent by banks and lending institutions. Thus the Legislature has specially legislated that defendants have no right to answer unless they first obtain leave to appear and show cause. The procedure is laid down in Section 6 of the Act in terms of which leave has to be obtained. If the *decree nisi* is served and the defendant does not appear, the *decree nisi* has to be made absolute. However if a party complains that the *decree nisi* has not been served (to the satisfaction of Court) the *decree* absolute has to be set aside (Sections 6A(1) and 6A(2)).

Some uncertainty has been created by the wording in section 6A(2) with the words "the court shall proceed with the hearing and determination of the matter in accordance with the provisions of Section 7 of this Act."

Section 7 is as follows:

> ***If the defendant appears and leave to appear and show cause is given*** *the provisions of Sections 384, 385, 386, 387, 388, 390 and 391 of the Civil Procedure Code (Chapter 101) shall,* ***mutatis mutandis****, apply to the trial of the action (emphasis added).*

The learned President's Counsel submitted that according to the proper interpretation of Section 7, the Court must now look in to the question of whether the 2nd defendant had obtained leave in terms of Section 7. The 2nd defendant has filed his objections and now the Court has to hold an inquiry as to whether the 2nd defendant should be allowed to appear and show cause. It is only in the event such leave is granted that the 2nd defendant should be entitled to a hearing under Sections 384 of the CPC.

The learned President's Counsel submitted that although the 2nd defendant appeared and purged the default as provided for by Section 6A(1) of the Act, the 2nd defendant should obtain leave to appear in order to defend the action. The learned President's Counsel submitted that vacating the order absolute for the reason that the 2nd defendant was not served with *order nisi* does not give him the leave and license to forego Section 6(2) of the Act. Section 6(2) of the Act provides the requirements under which leave to appear and show cause could be considered. Leave is required in terms of the provisions of Section 6(1) which states thus: "*In an action instituted under this Act the defendant shall not appear or show cause against the decree nisi unless he obtains leave from court to appear and show cause.*"

Section 6(2) is as follows:

> *6(2): The court shall upon the filing by the defendant of an application for leave to appear and show cause ..... shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what*
>
> *facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the* ***decree nisi*** *either.*
>
> *(a) Upon the defendant paying in to court the sum mentioned in the* ***decree nisi*** *or*
>
> *(b) upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the* ***decree nisi*** *in the event of it being made absolute or*

(c) upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence which is ***prima facie*** *sustainable and on such terms as to security, framing and recording of issues, or otherwise the court thinks fit".*

Where the defendant .... having appeared, his application to show cause is refused, the court shall make the *decree nisi* absolute (6(3)).

The learned President's Counsel for the plaintiff submitted that Section 7 is based upon the defendant appearing and obtaining leave. In this case the 2nd defendant has to appear and obtain leave. If leave is not obtained, no further steps can be taken in terms of Section 7. He submitted that it is mandatory for the 2nd defendant to obtain leave.

The learned President's Counsel submitted that the interpretation given by the Counsel for the 2nd defendant would only lead to absurdity. The reason is that a defendant who makes an application to purge a default and succeeds would be in a better position than that of a defendant who responds to the *decree nisi.* The learned President's Counsel submitted that this would nullify the very basis for which the Debt Recovery (Special Provision) Act was created.

Section 6(1) states that the defendant shall not appear or show cause ... Unless he obtains leave to appear. To obtain leave the defendant shall file an application. Together with this application the defendant should file an affidavit. This application shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it. Thereafter the defendant shall be heard. The court would grant leave only in three situations as prescribed by Section 6(2). It is only if leave to appear and show cause is given (Section 7) that the provisions of Sections 384, 385, 386, 387, 390 and 391 of the CPC shall apply.

Therefore in all the circumstances, it is mandatory upon the defendant to obtain leave. When a defendant purges default, the only consequence is vacating the order absolute. This does not give the defendant an added advantage of overcoming the

requirement of showing a defence. Purging the default does not allow the defendant to by pass the requirement of disclosing a sustainable defence. In this case the 2nd defendant never filed papers as required by law to satisfy court that he has a *prima facie* sustainable defence. Hence the 2nd defendant has no right to appear without satisfying the requirements specified in Section 6(2) of the Act. I am of the view that this application is without merit. The learned Judge is directed to make the *decree nisi* absolute. Leave refused with costs fixed at Rs. 15,000/-.

WIMALACHANDRA, J. - I agree.

Application dismissed.

JANAK HOUSING (PVT) LTD AND ANOTHER
v
URBAN DEVELOPMENT AUTHORITY

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 1131, 2005 (writ)
JULY, 9. 2007

Writ of Mandamus – Compelling Urban Development Authority (UDA) to enter into a lease agreement – Legal right – performance of a legal duty – Essence of Mandamus?

Held:

(1) The petitioner seeking a *writ of mandamus* must show that there resides in him a legal right to the performance of a legal duty by the party against whom the *mandamus* is sought.

(2) The general rule of *mandamus* is that its function is to compel a public authority to do its duty. The essence of *mandamus* is that it is a command issued by the Superior Court for the performance of public duty. Where officials have a public duty to perform and have refused to perform, *mandamus* will be to secure the performance of the public duty, in the performance of which the appellant has sufficient legal interest.

Held further:

(3) The petitioners have failed to show that the respondent has a legal duty to enter into a lease agreement and it is not sufficient, to show that the respondent has the power to enter into a lease agreement with the petitioner. The petitioners have also not shown that they have a legal right to enter into a lease agreement with the respondent.

APPLICATION for a *writ of Mandamus.*

Cases referred to :

(1) *Ratnayake and Others* v *C.D. Peiris and Others* 1982 2 Sri LR 451 at 456.
(2) *Credit Information Bureau of Sri Lanka* v *Jafferjees and Jafferjees (Pvt.) Ltd.* 2005 1 Sri LR 89 at 93.
(3) *R* v *Barns Staples Justices Exp. Carder* 1938 1KB 385.
(4) *Napier ex parte* 1852 18 QB 692 at 695.
(5) *R* v *Lewisham Union Guardians* 1897 1 QB 498.
(6) *P.K. Benarji* v *H.J. Simonds.*

Faiz Musthapha PC with *Faizer Markar* and *Tushani Machado* for petitioner.
Nihal Jayawardane with *Malith Kumara* for respondent.

September 12, 2007

SRISKANDARAJAH, J.

The 1st petitioner is a private limited liability company engaged in the business of a property developer. The 2nd petitioner is the Chairman and the Managing Director of the 1st petitioner Company. The 1st petitioner in or about 21st of January 2003 submitted a project proposal to the Respondent to construct 710 houses at Hi-Ton City New Town (Weralupe), Ratnapura and sought allocation of land for the said project on a 50 years lease. In this regard the respondents called for additional particulars by its letter of 19.3.2003. The petitioners contended that after furnishing the particulars the respondent informed them that the approval from the state land alienation committee was obtained for the allocation of the UDA land at new Town Ratnapura for the said purpose and it was awaiting the valuation of the chief valuer's report. The petitioners were also called upon by the respondent by its letter of 2.3.2004 to obtain environmental clearance, sub-division approval and a building permit. The Respondent by its letter dated 12th November 2003 informed the Board of Investment with a copy to the 2nd petitioner that on the receipt of the

Environmental Impact Assessment Report from the developer, action will be taken to expedite the Chief Valuer's valuation and offer the land to the Company for payment and enter in to a lease agreement for development. The respondent contended that the respondent authority was made to understand that the petitioners are engaged in unauthorised activities at the proposed site and the 2nd petitioner was requested by the respondent to terminate such activities by its letter of 30th April 2004.

The petitioners contended that the 1st petitioner has obtained all the necessary approvals in terms of the letter of the respondent dated 12th November 2003 including the Environmental Impact Assessment Report in these circumstances the petitioners contended that the respondent under Section 8(1) of the Urban Development Authority Act has a duty to enter into a lease agreement with the 1st petitioner on terms and conditions contained in the letter dated 12.11.2003 and the petitioner sought in this application a *writ of mandamus* to this effect.

In this application the Respondent's objection was not accepted by court as it was not filed within the time granted by court.

Section 8 of the Urban Development Authority Act deals with the powers and functions of the Authority and it does not cast any duty in respect of those matters on the Authority. The petitioner to seek a *writ of mandamus* must show that there resides in him a legal right to the performance of a legal duty by the party against whom the *mandamus* is sought. Therefore that a *mandamus* may be issued to compel something to be done under a statute and it must be shown that the statute imposes a legal duty. In *Ratnayake and Others* v *C.D. Perera and Others*[1] at 456 Sharvananda, J. with Victor Perera, J. and Colin-Thome, J. agreeing held;

> *"The general rule of mandamus is that its function is to compel a public authority to do its duty. The essence of mandamus is that it is a command issued by the Superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest."*

In *Credit Information Bureau of Sri Lanka* v *Messrs Jafferjee & Jafferjee (Pvt) Ltd.*[2] at 93 the Supreme Court held:

> *"There is rich and profuse case law on mandamus on the conditions to be satisfied by the applicant. Some of the conditions precedent to the issue of mandamus appear to be:*
>
> (a) The applicant must have a legal right to the performance of a legal duty by the parties against whom the *mandamus* is sought (*R.* v *Barnstaple Justices exp. Carder*[3]. The foundation of *mandamus* is the existence of a legal right (*Napier ex parte*[4]).
>
> (b) The right to be enforced must be a "Public Right" and the duty sought to be enforced must be of a public nature.
>
> (c) The legal right to compel must reside in the applicant himself (*R.* v *Lewisham Union*[5])
>
> (d) The application must be made in good faith and not for an indirect purpose.
>
> (e) The application must be preceded by a distinct demand for the performance of the duty.
>
> (f) The person or body to whom the writ is directed must be subject to the jurisdiction of the court issuing the writ.
>
> (g) The Court will as a general rule and in the exercise of its discretion refuse writ of mandamus when there is another special remedy available which is not less convenient, beneficial and effective.
>
> (h) The conduct of the applicant may disentitle him to the remedy, (i) It would not be issued if the writ would be futile in its result.
>
> (j) Writ will not be issued where the respondent has no power to perform the act sought to be mandated.

The above principles governing the issue of a *writ of mandamus* were also discussed at length in *P.K. Benarji* v *H.J. Simonds*[6]. Whether the facts show the existence of any or all pre-requisites to the granting of the writ is a question of law in each case to be decided not in any rigid or technical view of the question, but

according to a sound and reasonable interpretation. **The court will not grant a mandamus to enforce a right not of a legal but of a purely equitable nature however extreme the inconvenience to which the applicant might be put.**" (Emphases added).

In the instant case the petitioner has failed to show that the respondent has a legal duty to enter into a lease agreement with the petitioners and it is not sufficient to show that the respondent has the power to enter into a lease agreement with the petitioners. On the other hand the petitioners have also not shown that they have a legal right to enter into a lease agreement with the respondent. For these reasons the petitioners application for a *writ of mandamus* is dismissed without costs.

Application dismissed.

UNION BANK OF COLOMBO LTD.
v
WIJAYAWARDANE AND ANOTHER

COURT OF APPEAL
WIMALACHANDRA, J.
CA (REV). 1245/06
DC COLOMBO 969/DR
AUGUST 31, 2006
SEPTEMBER 25, 2006

Debt Recovery (Special Provisions) Act 2 of 1980 amended by Act 9 of 1994 – Section 7 matter adjusted or compromised in the Supreme Court – Case remitted to District Court – Supreme Court granting time to file answer – Contrary to Section 7 of the Act? – Can the correctness of an order given by the Apex Court be decided by an inferior Court?

In the action filed under the Debt Recovery Act (DR Act), the defendant sought leave to appear and defend– District Court granted leave upon depositing a sum of Rs. 17 million as security. The Court of Appeal set aside the said order and granted unconditional leave to appear and show cause. In the Supreme Court the matter was adjusted, with the defendants agreeing to deposit Rs. 6 million, the District Court was directed to grant time to the defendants to file answer, if the security was deposited. When the defendants sought to file

answer in the District Court the plaintiff objected on the ground that the defendants are not entitled to file answer in terms of Section 7 of Debt Recovery Act. This objection was overruled by the District Court.

The plaintiff moved in revision.

Held:

(1) The Supreme Court is the apex Court, it is not open to the District Court to disregard the directions given by the Supreme Court.

(2) When the Supreme Court has made order or has given a direction to a judge of an inferior Court it is not for a suit or a Counsel to challenge such an order on the basis that it is irregular or void or is an invalid order. It will remain valid until it is set aside by the apex Court.

Per Wimalachandra, J.

"The said order was made by the Supreme Court with the agreement of parties and the learned President's Counsel who was present did not object to the said directions being made by the Supreme Court – the District Court has no power to review the order of the Supreme Court or to reject the defendant's answer.

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

Cases referred to:

1. *Jeyraj Fernandopulle* v *Premachandra de Silva and Others 1996 1 Sri LR 70 at 94.*
2. *Hadkinson v Hadkinson* 1952 2 All ER 567 at 569.
3. *Chuck v Cremer* 1846 1 Coop. Hmp. Cott 342.
4. *Isaacs v Robertson* 1984 3 All ER 140.

Nigel Hatch PC with *Ms. K. Geekiyanage* for plaintiff-petitioner.

Nihal Fernando PC for 1st defendant-respondent.

A.R. Surendran PC with *K.V.S. Ganesharajah* for 2nd defendant-respondent.

March 2, 2007

WIMALACHANDRA, J.

The plaintiff-petitioner (plaintiff) has filed this application in revision from the order of the learned Additional District Judge of Colombo dated 18.7.2005. The facts relevant to this application are as follows:

The plaintiff instituted action in the District Court of Colombo bearing No. 969/DR against the 1st and 2nd defendant-

respondents (defendants) under the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 to recover a sum of Rs. 50,763,293/66 jointly and severally together with interest thereon at the rate of 20% per annum from 18.07.2002. In the first instance the learned Judge entered a *decree nisi* and called upon the 1st and 2nd defendants to show cause against the said *decree nisi*. The defendants filed petition and affidavit and sought leave to appear and defend. After an inquiry the learned Additional District Judge made an order on 23.1.2004 granting the 1st and 2nd defendants leave to appear and defend upon depositing a sum of Rs. 17 million as security. Being aggrieved by the said order the 1st and 2nd defendants filed two separate applications bearing No. CALA 48/2004 and 49/2004 in the Court of Appeal. The Court of Appeal by order dated 14.6.2004 allowed the applications made by the 1st and 2nd defendants and granted unconditional leave to appear and show cause. Against that order the plaintiff preferred an application for special leave to appeal to the Supreme Court bearing No. SC (Spl.) LA 179/2004.

When the matter was taken up in the Supreme Court on 20.09.2004 it appears that the parties had agreed to have the matter adjusted or comprised and the Supreme Court, accordingly made the following order which reads as follows:

> "*It is agreed that the two defendants would be permitted to appear and defend the action in the District Court provided that they deposit as security jointly sum of Rs. 6 million composed of Rs. 3 million in cash and Rs. 3 million by an acceptable guarantee or guarantees, on or before 01.11.2004. The order of the District Court is amended accordingly. In the event of such security being deposited, the District Court is directed to grant time to file answer, in default steps would be taken according to law in the proceedings.*"

After the Supreme Court made the said order the parties went back to the District Court. Upon providing the security as ordered by the Supreme Court, the defendants filed their answer as per the aforesaid consent order of the Supreme Court. The plaintiff objected to the same being accepted by the learned District Judge on the ground that the defendants were not entitled to file answer in this case in terms of Section 7 of the Debt Recovery (Special

Provisions) Act as amended. However, the learned District Judge by his order dated 18.7.2005 accepted the answers filed by the defendants. The District Judge held that as the Supreme Court had directed the Court to accept the answer upon the defendants depositing the security as stated in the order of the Supreme Court, the District Court has no power to override the direction given by the Supreme Court. The present application in revision has been made against this order of the learned Additional District Judge of Colombo.

It is the position of the learned President's Counsel for the plaintiff that the Debt Recovery (Special Provisions) Act No. 2 of 1990 (as amended) does not permit the filing of an answer. The learned Counsel contended that if the Court grants the defendants leave to appear and defend, the provisions in Sections. 384 to 389 will apply and there is no provision in the Act for a defendant to file answer.

The Supreme Court made the said order upon a compromise or after an adjustment of the dispute between the parties, and the Supreme Court accordingly directed the learned District Judge to accept the answers, provided the defendants deposit a sum of Rs. 6 million. It is to be noted that when the Supreme Court made the said order the Counsel for both parties were present in Court and Mr. Nigel Hatch himself was present in Court. It appears that the learned President's Counsel had without any demur accepted the order.

In my view as the Supreme Court is the apex Court, it is not open to the District Court to disregard the directions given by the Supreme Court.

In the case of *Jeyaraj Fernandopulle* v *Premachandra de Silva and Others*[1] at 94 it was held that when the Supreme Court has decided the matter is at an end, and there is no occasion for other judges to be called upon to review or revise the matter.

It was the contention of the learned President's Counsel for the plaintiff that the said order made by the Supreme Court is contrary to the provisions of the Debt Recovery (Special Provisions) Act, as there is no provision in the Act to file answer. I am unable to agree with the submissions of the learned Counsel for the plaintiff as the

said order was made by the Supreme Court with the agreement of the parties and the learned President's Counsel who was present, did not object to the said directions being made by the Supreme Court.

When the Supreme Court has made an order or has given a direction to a Judge of an inferior Court, it is not for a suit or a Counsel to challenge such an order on the basis that it is irregular or void or is an invalid order.

In the English case of *Hadkinson* v *Hadkinson*[2] at 569 it was held that, it is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void in *Chuck* v *Cremer*[3], Lord Cottenham, L.C., said:

> *"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ..... it would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed".*

The correctness of an order given by the apex Court cannot be decided by an inferior Court. It will remain valid until it is set aside by the apex Court. It is the obligation of every person against or in respect of, whom an order is made by a Court with competent jurisdiction to obey it unless and until that order is discharged.

In the Privy Council case of *Isaacs* v *Robertson*[4] Lord Diplock held that the orders made by a Court of unlimited jurisdiction in the Course of contentious litigation are either regular or irregular. If an order is regular it can only be set aside by an appellate court; if it is irregular it can be set aside by the Court that made it on application

being made to that Court either under rules of Court dealing expressly with setting aside orders for irregularity or *ex debito justitiae* if the circumstances warrant. In this case the Lord Diplock approved the *dictum* of Romer L.J. in *Hadkinson* v *Hadkinson (supra).*

In the instant case, the Supreme Court adjusted the matter by agreement or compromise in the presence of the Counsel on both sides and in terms of the compromise arrived at between the parties made the aforesaid order giving the directions to the District Judge. In the case of *Jeyaraj Fernandopulle* v *Premachandra de Silva and Others (supra)* the Supreme Court held that a Court has power to vary its own orders in such a way as to carry out its own meaning and where the language is doubtful to make it plain or to amend it. Accordingly, in the instant case if the plaintiff is of the view that the aforesaid order made by the Supreme Court is irregular he must apply to the Supreme Court which is entitled to vary the same. The District Judge is bound to carry out the directions given by the Supreme Court and in this instance the Additional District Judge cannot be blamed or faulted for complying with the directions given by the Supreme Court.

In any event I am of the strong view that the order made by the Supreme Court is in accordance with law. The Supreme Court made order that in the event the defendants deposit security, the District Court is directed to grant time to file their answer, and in default steps to be taken according to law. In my view this order must be sensibly interpreted. If the defendants deposit the security the defendants must be allowed to show cause why the *decree nisi* should not be made absolute. They can show cause by filing an answer supported by an affidavit. Moreover, the plaintiff cannot challenge the said order of the Supreme Court in these proceedings when the plaintiff's Counsel who appeared in the Supreme Court did not object to the directions given by the Supreme Court. He has filed this revision application against the order of the learned Additional District Judge. The District Court has no power to review the order of the Supreme Court or to reject the defendants' answers. Accordingly, the District Court was right in accepting the defendants' answers. If the order made by the Supreme Court needs clarification, the plaintiff should have made

an application to the Supreme Court for any such clarifications.

It is my further view that the order of the learned District Judge is correct as the learned Judge had complied with the directions given by the Supreme Court. It is not the function of this Court to review the orders of the Supreme Court and it has no power to do so.

For the reasons stated above, I dismiss this application with costs.

Application dismissed.

PANDIWELA
v
ASHOKA AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
SARATH DE ABREW, J.
CALA 550/2002 (LG)
DC KULIYAPITIYA 12091/P
JULY 10. 2006
DECEMBER 15, 2006

Partition Law – Section 30, Section 48(1) – Section 48(4)(c) – Section 48 (4)(d) – Applicability – Procedure – Mandatory? Failure – Is it fatal? Evidence Ordinance - Section 33

It was contended that the failure on the part of Court to comply with (a) Section 48(4)(c) – to consider granting special leave upon such terms and conditions, (b) Section 48(4)(d) – after granting special leave to settle in the form of issues the questions of fact and law arising from the pleadings and failure to thereafter appoint a date for the trial and the determination of issues – and not giving reasons – has occasioned a failure of justice.

Held:

(1) The learned District Judge has amalgamated the inquiry and the trial envisaged in Section 48(4)(c) and (d) of the Partition Law into one proceeding and delivered an order turning a blind eye to the statutory important requirements contained in Section 48(4)(a)(d). If issues had been raised and a proper trial on a given future date had been held, it

would have afforded the petitioners an opportunity to call evidence and challenge the position taken up by the plaintiff which tantamount to a miscarriage of justice.

Per Sarath de Abrew, J.
"The Partition Law is a specialised law seeking to award rights, title and interests in the land in suit to the parties concerned against all other suitors and against the world at large. The very finality of the interlocutory *decree* and the final *decree* envisaged in Section 48(4) demands that the mandatory statutory procedure laid down by the legislature in all its wisdom should be followed to the very letter."

APPLICATION for leave to appeal from an order of the District Court of Kuliyapitiya, with leave being granted.

Case referred to:

(1) *Abeygoonesekera* v *Wijesekera* 2002 2 Sri LR 269.

Dr. Sunil Cooray with *D.H. Siriwardane* for 9th and 11th defendant-respondent-petitioners.

Upul Kumarapperuma with *Suranga Munasinghe* for 3rd defendant-petitioner-respondent.

March 23, 2007

SARATH DE ABREW, J.

This is an application for leave to appeal from the order of the learned District Judge of Kuliyapitiya dated 04.12.2002. By that order the learned Judge allowed the application made by the 3rd defendant-petitioner-respondent (hereinafter sometimes referred to as the respondent) under Section 48(4) of the Partition Law and while holding that the respondent was entitled to an undivided 1/2 share of the *corpus* for partition, made order that the respondent is permitted to have the Interlocutory Decree dated 14.06.2006 amended accordingly at his expense. Being aggrieved of the above impugned order, the 9th and 11th defendant-respondent-petitioners (hereinafter sometimes referred to as the petitioners) have filed this leave to appeal application in this Court. The Court of Appeal has granted leave on 20.05.2003.

Briefly, the relevant facts are as follows. The plaintiff in the District Court case filed action on 06.01.1999 before the District

Court of Kuliyapitiya seeking to partition the land described in the schedule to the plaint, in extent three acres. The plaint disclosed 1st to 8th defendants as parties, whereas 9th to 11th defendants intervened in the action. Only the 2nd, 9th, 10th and 11th defendants filed a joint statement of claim while no other defendant filed a statement of claim.

By their joint statement of claim, the 2nd, 9th, 10th and 11th defendants pleaded, *inter alia*, that although the 2nd defendant gifted his 1/2 share to the 3rd defendant (respondent) by deed of gift No. 2234 dated 04.06.1982, subject to his life interest, the 2nd defendant thereafter by deed No. 3884 dated 15.09.1991 had revoked the said deed of gift No. 2234 and subsequently thereafter by deed No. 377 dated 03.07.1998, had gifted this 1/2 share to the 9th, 10th and 11th defendants, reserving life interest to the 2nd defendant. Accordingly the 9th, 10th and 11th defendants claimed the said 1/2 share, namely an undivided 1/6 of the *corpus*, subject to the life-interest of the 2nd defendant. At the trial, there had been no contest and the plaintiff alone had given evidence which was not subjected to cross-examination. On the strength of the oral and documentary evidence produced, the learned District Judge had accordingly entered judgment on 14.06.2002 for partitioning of the land in suit, and the interlocutory *decree* had been entered accordingly. The following parties were declared entitled to the following interests in the *corpus*.

Plaintiff	:	to an undivided 1/2 share less 1 acre.
1st defendant	:	to 1 acre
2nd defendant	:	to the life-interests over the shares of the 9th, 10th and 11th defendants.
9th, 10th and 11th defendants	:	to an undivided 1/6th share each.

Accordingly the final commission for partition had been duly issued, executed and returned and thereafter the matter had been fixed for 08.12.2002 for consideration of the final partition plan.

At this juncture, the 3rd defendant-petitioner, who had not so far participated in the proceedings, had sought to intervene by petition and affidavit dated 07.10.2002 and documents marked 3 Pe 1 to 3 Pe 10, by making an application under Section 48 (4) of

the Partition Law, as amended by Act No. 17 of 1997, to which application the other parties to the action were made respondents. The contention of the 3rd defendant-respondent was that, as the judgment in the *ex-parte* trial in D.C. Kuliyapitiya case No. 11903/L had annulled and declared invalid on the basis of forgery the purported deed of revocation of gift (Deed No: 3884) executed by the 2nd defendant to revoke gift (Deed No: 2234) given to the 3rd defendant, the aforesaid deed of gift bearing No. 2234 was valid and therefore the 03rd defendant was entitled to an undivided 1/2 share of the *corpus*.

After the 9th, 10th and 11th defendant-petitioners had filed their statement of objections to the aforesaid application of the 3rd defendant, the learned trial Judge had taken up the matter for inquiry on the preliminary question whether the aforesaid application was time-barred, and having considered the written submissions tendered by both parties, had delivered order on 04.12.2002 that the aforesaid application was not time-barred and was maintainable. The inquiry into the application itself was taken up on the same day, and having considered the evidence of the 3rd defendant and the documents produced, the learned trial Judge had made order as follows:

a) that the 3rd defendant had proved that he had no notice of this partition action prior to the interlocutory *decree*.

b) That as it had been held in DC Kuliyapitiya Case No: 11903/L that deed No. 3884 was invalid, the said decision operated as *res judicata*, and therefore the 9th, 10th and 11th defendants were not entitled to any interest in the *corpus*.

c) And that instead, the 3rd defendant was entitled to the undivided 1/2 share of the *corpus* for partition, and therefore the 3rd defendant was permitted to have the interlocutory *decree* amended accordingly at this expense.

It is the above impugned order that the 9th and 11th defendant-respondent-petitioners are aggrieved of. The main contention of the petitioners as stated in paragraph 16 of the petition *inter alia* and sub-paragraph (d) to the prayer in the petition was that the application of the 3rd defendant (respondent)

be dismissed with costs, or in the alternative, that the District Court be directed to comply with Section 48(4)(c) and Section 48(4)(d) and settle issues and proceed to trial in order to determine the issues and thereafter to proceed according to law.

In the oral submissions made during the course of the argument and in their written submissions the following contentions were promulgated by the petitioners.

1) The failure on the part of the learned trial Judge to comply with the mandatory provisions of the law set out in Section 48(4)(c) of the Partition Law – namely to consider granting Special Leave upon such terms and conditions Court may impose.

2) The failure on the part of the learned trial Judge to comply with the mandatory provisions set out in Section 48(4)(d) of the Partition Law – namely after granting Special Leave, failure to settle in the form of issues the questions of fact and law arising from the pleadings and failure to thereafter appoint a date for the trial and determination of issues.

3) The learned District Judge had manifestly erred in law in holding that the judgment in D.C. Kuliyapitiya Case No. 11903/L operated as *res judicata* and was binding on the 9th, 10 and 11th defendants who were not parties in the said action.

4) The learned District Judge had erred in law in not giving reasons as to how the Court arrived at the finding that the 3rd defendant-respondent was unaware of the partition action until the interlocutory *decree* was entered. The respondent in his oral submissions argued that:

Under Section 33 of the Evidence Ordinance, the decision in D.C. Kuliyapitiya Case No. 11903/L was relevant, and the action of the learned District Judge in admitting same was in accordance with the law.

b) Under the provisions of Section 30 of the Partition Law the 3rd defendant-respondent should have received due notice of the partition action well in time.

Further, the respondent in his written submissions raised the

contention that, notwithstanding the provisions of Section 48(4)(c) and 48(4)(d) of the Partition Law, the only issue before Court was that whether the deeds on which the petitioners were relying on were forged or not, which question was satisfactory answered at the inquiry, and therefore it was not necessary to embark on a fresh inquiry again to check the authenticity of the said deeds.

Having considered the totality of the material placed before court I now proceed to consider the sustainability of the main contention of the petitioners. Their main contention was that instead of following the mandatory statutory provisions laid down in Section 48(4)(c) and 48(4)(d) of the Partition Law and by adopting a procedure manifestly erroneous, the learned District Judge had effectively denied the opportunity for the petitioners to contest the position raised by the 3rd defendant-respondent regarding the invalidity of deed No. 3884 and establishing that there was a subsequent deed executed prior to this action by which the 2nd defendant had revoked the said deed No. 2224 in which the 3rd defendant-respondent claimed title.

The statutory provisions in question may be examined as follows. Section 48(4)(c) and 48(4)(d) of the Partition Law are quoted below.

Section 48(4)(c)

"If upon inquiry into such application, after prior notice to the parties to the action deriving any interest under the interlocutory decree, the Court is satisfied:

(i) that the party affected had no notice whatsoever of the said partition action prior to the date of the interlocutory decree or having duly filed his statement of claim registered his address, failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and

(ii) that such party had a prima facie right, title or interest to or in the said land, and

(iii)that right, title or interest has been extinguished or such party has been otherwise prejudicially affected by the said interlocutory decree, the Court shall upon such terms and conditions as the Court in its discretion may impose, which

may include an order for payment of costs as well as an order for security for costs, grant special leave to the applicant."

Section 48(4)(d)

"Where the Court grants special leave as herein-before provided the Court shall forthwith settle in the form of issues the questions of fact and law arising from the pleadings and any further pleadings which are relevant to the claim set up in the petition only, the Court shall appoint a date for trial and determination of the issues.

The applicant, unless the Court otherwise orders, shall cause notice of such date to be given to all parties whose rights under the interlocutory decree are likely to be affected or to their registered attorney in such manner as the Court shall specify. The Court shall thereafter proceed to hear and determine the matters in issue in accordance with the procedure applicable to the trial of a partition action."

On an examination of the above mandatory provisions of the law, on an application by the 3rd defendant-respondent to intervene by applying for special leave to establish any right, title or interest of such party as against an interlocutory *decree* already entered, the following salient points have to be fulfilled.

1) The respondent should make the application on or before the date fixed for consideration of the scheme of partition.

2) The respondent upon inquiry should satisfy Court that he had no notice whatsoever of the said partition action prior to the date of the interlocutory decree.

3) On Court after inquiry being satisfied of the above matters, Court shall grant special leave to the applicant on such terms and conditions Court may deem fit which may include an order for payments of costs or for deposit of security for costs.

4) Thereafter Court shall frame issues on questions of facts and law that arises for determination from the pleadings.

5) Finally, the Court shall fix a date for trial and determination of

the issues and proceed to trial in accordance with the procedure applicable to a partition action.

In the light of the above mandatory requirements of the law, I now proceed to examine procedure adopted by the learned District Judge in making the impugned order dated 04.12.2002 marked and produced as 1. The application of the respondent (E) had been supported on 08.10.2002 on the day fixed for consideration of the final scheme of partition. After notice to the parties concerned, 9th, 10th and 11th defendants had filed objections supported by written submissions later. Thereafter, the learned District Judge, after inquiry, had over-ruled the preliminary objection that the application is not time-barred and made order accordingly on 04.12.2002. However, the learned Judge at this juncture had not gone into the question whether the 3rd defendant had satisfied Court that he has no notice of the partition action prior to the date of the interlocutory decree. The learned Judge has arrived at this finding, without giving reasons, only after the subsequent inquiry held thereafter after the evidence of the 3rd defendant had been led before Court, in making his final order with regard to the application. Neither special leave to try the application has been granted nor issues framed and a date fixed for trial. In plain language, the learned District Judge had amalgamated the inquiry and the trial envisaged in Sections 48(4)(c) and (d) of the Partition Law into one proceeding and delivered order turning a blind eye to the statutory imperative requirements contained in the above provisions of the Partition Law.

If issues had been raised and a proper trial on a given future date had been held, it would have afforded the petitioners an opportunity to call evidence and challenge the position taken up by the respondent, which tantamount to a miscarriage of justice.

On the other hand in *Abeygoonesekera* v *Wijesekera*[1] it has been held by Somawansa, J. that express statutory provisions cannot be completely disregarded in the guise of invoking inherent power of Court under Section 839 of the Civil Procedure Code. The Partition Law is a specialised law seeking to award rights, title and interests in the land in suit to the parties concerned against all other suitors and against the world at large.

The very finality of the interlocutory *decree* and the final decree envisaged in Section 48(1) of the Partition Law demands that the mandatory statutory procedure laid down by the legislature in all its wisdom should be followed to the very letter.

In the case in hand, for the foregoing reasons, I am firmly of the view that the failure on the part of the learned trial Judge to adhere to the mandatory statutory provisions laid down in Section 48(4)(c) and 48(4)(d) of the Partition Law has occasioned a failure of justice, and therefore the main contention of the petitioners should succeed. In view of the above finding I do not propose to examine the merits of the other two contentions put forward by the petitioners.

I therefore make order setting aside the impugned order dated 04.12.2002 of the learned District Judge of Kuliyapitiya and direct that the case record be forwarded back to the District Court of Kuliyapitiya with the direction that the present learned District Judge of Kuliyapitiya should hold a fresh inquiry into the application of the 3rd defendant-respondent in strict compliance with the provisions of Section 48(4)(c) and 48(4)(d) of the Partition Law as amended by Act No. 17 of 1997. Taking into consideration all the circumstances of this case, I make no order with regard to costs.

Appeal is allowed accordingly.

EKANAYAKE, J. - I agree.

Appeal allowed.

RAJADHEERA AND OTHERS
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
CA 178/2003
HC NEGOMBO 138/2001
MARCH 26, 2007

Common intention – Failure to consider the principles of law relating to the common intention – Fatal – Criminal Procedure Code – Section 334 – Constitution Article 138.

The appellants were convicted of the offence of attempt to commit murder of one D. It was contended by the appellant that the learned trial Judge had failed to consider the principles of law relating to common intention and that he has not considered his evidence against each appellant separately.

Held:

(1) When accused persons are charged on the basis of common intention trial Judge or Jury must be mindful of the principles of law relating to the common intention:-

(1) Case of each prisoner must be considered separately.

(2) Jury must be satisfied beyond reasonable doubt that he was actuated by a common intention with the doer of the criminal act at the time the alleged offence was committed.

(3) They must be told that the benefit of any reasonable doubt in this matter must be given to the prisoner concerned.

(4) Jury must be warned to be careful not to confuse "same or similar intention entertained independently of each other 'with' common intention.

(5) Inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

(6) Jury should be told that in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence direct or 'circumstantial either of pre-arrangement or a pre-arranged plan or a declaration showing common intention or some other significant fact at the time of the commission of the offence to enable them to say that a co-accused had a common intention entertained independently of each other.

(7) Jury should be directed that if there is no evidence of any common intention actuating the co-accused or any particular co-accused or if there is any reasonable doubt on that point, then the charge cannot lie against any one other than the actual doer of the criminal act.

(8) In such a case such co-accused would be liable only for such criminal acts which they themselves committed.

(9) Jury should be also directed that the mere fact that the co-accused were present when the doer did the criminal act does not per se constitute common intention, unless there is other evidence which justifies them in so holding.

(10) Judge should endeavour to assist the jury by examining the case against each of the co-accused in the light *of those principles.*

(2) The trial Judge totally failed to consider the concept of common intention but proceeded to convict all the accused on the basis of common intention – failure to give adequate reasons as to why he convicted all the accused on the basis of common intention and the failure to consider the concept of common intention – have resulted in a miscarriage of justice – Section 334 of the Code and *proviso* to Article 138 cannot be applied.

APPEAL from the judgment of the High Court of Negombo.

Cases referred to:

(1) *King* v *Assappu* -50 NLR 324.

(2) King v Ranasinghe - 47 NLR 375.

(3) Mah bub sha v Emperor - 1945 PC 118.

(4) King v Piyadasa - 48 NLR 295.

(5) King v M.H.Arnolis - 44 NLR 370.

(6) King v Croos - 46 NLR 135.

(7) King v Sathasivam - 46 NLR 468, 476.

(8) King v K.W.Jayanhamy. - 45 NLR 510.

Dr. Ranjit Fernando for appellant.

Mohan Seneviratne SSC for the Attorney-General.

May 23, 2007

SISIRA DE ABREW, J.

The appellants were convicted of the offence of attempt to commit murder of a man named Dhanushka and each was sentenced to three years rigorous (RI) imprisonment. A fine of Rs. 1500/- carrying a default sentence of three months RI was also imposed on each appellant. This appeal is against the said convictions and the sentences.

The prosecution case can be quiet briefly summarized as follows:

On the day of the incident around 1.30 p.m. Dhanushka who was on his way home from a nearby boutique went to the front yard of the house of the 4th appellant as he motioned Dhanushka to come. When Dhanushka went to the door-step of the 4th appellant, he was attacked by a person named Ananda and the appellants. All of them were armed with clubs and swords.The 1st appellant attacked him with an iron club and the 2nd appellant with a sword. He did not describe the region of the body where the blows alighted. At one stage he said he lost his consciousness after the 1st blow. Again he said that the attack went on for about twenty minutes.

The complaint of the learned Counsel for the appellants was that the learned trial Judge failed to consider the principles of law relating to the common intention. I have gone through the judgment of the learned trial Judge and in my view, he has failed to consider the principles of law relating to the common intention. He has not considered the evidence against each appellant separately. The words 'common intention' were not even found in the judgment. Although it is not strictly necessary for the learned trial Judge who has a trained legal mind to state all the principles of law relating to common intention, it must be apparent from the judgment that he had directed his mind to the relevant principles of law because especially in a case of murder he should be mindful that he was dealing with liberty of a person. When accused persons are charged on the basis of common intention trial judge or the jury as the case may be must be mindful of the principles laid down in *King* v *Assappu*[1]. If the accused is tried by a judge he must bear in mind the following principles or if the accused is tried by a jury trial judge

must direct the jury on the following principles. I will reproduce below the principles laid down in *Assappu* case (*supra*) *(a)* the case of each prisoner must be considered separately; *(b)* that the Jury must be satisfied beyond reasonable doubt that he was actuated by a common intention with the doer of the criminal act at the time the alleged offence was committed; *(c)* they must be told that the benefit of any reasonable doubt on this matter must be given to the prisoner concerned, King v. Ranasinghe[2] at 375; *(d)* the Jury must be warned to be careful not to confuse "Same or similar intention entertained independently of each other" with "Common intention"; *(e)* that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case Mah bub sha v. Emperor [3]; *(f)* the Jury should be told that in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence, direct or circumstantial, either of pre-arrangement, or a pre-arranged plan, or a declaration showing common intention, or some other significant fact at the time of the commission of the offence, to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other, King v. Jayasinghe (supra) [4]; *(g)* the Jury should also be directed that if there is no evidence of any common intention actuating the co-accused or any particular co-accused, or if there is any reasonable doubt on that point, then the charge cannot lie against any one other than the actual doer of the criminal act, King vs Arnolis King v. Arnolis[5]: King v. Croos[6]; King v. Sathasivam[7]; *(h)* in such a case such co-accused would be liable only for such criminal acts which they themselves committed; *(i)* the Jury should also be directed that the mere fact that the co-accused were present when the doer did the criminal act does not *per se* constitute common intention, unless there is other evidence which justifies them in so holding, K vs Jayanhamy King v. K.W. Jayanhamy[8]; and *(j)* the Judge should endeavour to assist the Jury by examining the case against each of the co-accused in the light of these principles."

Learned trial judge should have been careful in this case in analyzing and accepting the evidence against each appellant since Dhanushka had said that he lost consciousness after he received the first blow. In my view the learned trial Judge totally failed to

consider the concept of common intention but proceeded to convict all the accused on the basis of common intention. Failure to give adequate reasons as to why he convicted all the accused on the basis of common intention and the failure to consider the concept of common intention, in my view, have resulted in a miscarriage of justice. Therefore we are unable to apply the *proviso* to Section 334 of the Criminal Procedure Code and *proviso* to Article 138 of the Constitution. Further if we are going to apply the *proviso* to Section 334 of the Criminal Procedure Code we have to rewrite the judgment which is not the function of the Court of Appeal.

For the reasons set out in my judgment, I set aside the convictions and the sentences imposed on the appellants. I am unable to acquit the appellants as the prosecution has led evidence against the appellants which should be considered at a retrial. No appeal has been lodged against the acquittal on the 1st and 2nd counts I, therefore, do not make order setting aside the acquittal on the 1st and 2nd counts. Considering the evidence led at the trial, I order a retrial on count No. 3 of the indictment.

RANJITH SILVA, J. - I agree.

Appeal allowed.

KAROLIS
v
AMARADASA AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 245/95
DC KEGALLE 1515/L
JULY 12, 2007

Servitudes – Rustic servitudes – Unsafe to act on mere assertions? Acquisition by prescription or by transfer of land and right to use the land – Footpath only?

Held:

(1) There is an absence of proof that the unallotted path had been acquired by the plaintiff by prescription or grant or by transfer of land and right to use

the land. Unless and until the plaintiff's legal entitlement with proof as the unallotted path is established there cannot be and one cannot urge any obstruction to that path or claim a right of way.

(2) A person who has a right of way for using a footpath over the intervening land cannot claim to have a right for lands over the adjoining field.

(3) In the absence of cogent evidence and evidence uncorroborated to establish a servitude the defendant should not be made to suffer and enable the plaintiff to use a right of way for his convenience. It would be unsafe to act on mere assertions to especially when servitude is claimed.

APPEAL from the judgment of the District Court of Kegalle.

Cases referred to:

1. *Coranelis Singho* v *Perera* 63 NLR 48.
2. *Karunaratne* v *Gabrial Appuhamy* 15 NLR 257.
3. *Hendrick* v *Samelis* 41 NLR 519.
4. *Thambapillai* v *Nagammapillai* 52 NLR 225.
5. *Rajentheram* v *Sivarajah* 66 NLR 324.
6. *Muthaliph* v *Mansoor* 39 NLR 316.
7. *Samarasekera* v *Ramanathan Chetty* 10 CLW 169.
8. *Thamboo* v *Annammah* 36 NLR 330.

Champaka Ladduwahetty for 1A defendant-appellant.
L.K.I. Perera for plaintiff-respondent.

October 15, 2007
GOONERATNE, J.

This was an action filed in the District Court of Kegalle to obtain a declaration of title to the encroached portion of land as in prayer (a) and (b) to the amended plaint and for recovery of possession-removal of obstruction (as in prayer 'c' & 'd') and damages. The proceedings in the District Court indicate that parties had raised 16 issues which were accepted, by court. At the hearing of this appeal the learned Counsel for the defendant-appellant conceded that he has no dispute regarding issue No. 1, and invited this Court to consider issue No. 8 as being the crucial issue in this case. Perusal of same would indicate that the entire case in the Trial Court and in this appeal would relate to the matters connected to the said issue along with issue Nos. 6, 7, and 12, which would also decide this appeal. The learned Counsel for the defendant-appellant also contended that only a final *decree* (P4) would create rights and not a final plan and that he would rely to a

great extent on P4 (final *decree*).

Learned Counsel for the respondent conceded that based on the final decree he cannot claim a right of way and that his position was that his claim is based on prescription beginning from the year 1960.

Counsel for the defendant-appellant also submitted to this Court that the question of prescription was not put in issue at the trial court.

However it is important to ascertain as to how title devolved on each party, by reference to the earlier final decree. (P4-Case No. 2444) dated 7.6.1946. According to the said decree the extent of land is 3 Roods 31 Perches as shown in plan 560 B of 1945. Schedule to P4 refer to lot 1, 1A, 2 and 2A. Lot 1 and 1A had been allotted to one Sanchiya plaintiff in that case, and lot 2 to 3rd defendant (present defendant) plaintiff in his evidence goes further and admit that lot 1 and 1A had been allotted to Sanchiya and lot 2 and 2A allotted to the defendant in terms of the earlier partition case. The dispute seems to be the obstruction caused to plaintiff by the defendant as shown as 'X' in plan P1, Issue No. 8 had been raised, I believe to invite Court to decide on same. In P4, (*decree*) plaintiff in the earlier case had been given a right of foot path 3 feet width by the edge of the southern boundary of lot 2 and 2A for the High Road.

In the petition of appeal filed in this case the appellant *inter alia* pleads that:

(a) The previous partition case 2444 the appellant was allotted lots 2 and 2A in plan 5606/1964 and had entered into possession after final decree of 1946 and is in possession of the said lots for over 40 years. Any encroachment would have taken place 40 years ago and had acquired prescriptive title to same.

(b) Date of encroachment as suggested by plaintiff-respondent was 10th November 1970. In cross-examination of plaintiff the date admitted was a date in 1971. Surveyor Kurukulasooriya who surveyed the land on 4.1.1968 refer to encroachment. If any encroachment took place as indicated, in 1968 by the Surveyor, defendant-appellant had possessed the alleged encroachment for over 18 years. In any event it had to be a date prior to 10th November 1970.

(c) Learned District Judge had been misdirected on the right of

foot path allowed by partition decree No. 2444 of 1946, on the southern boundary of lots 2 and 2A which was allotted to the plaintiff-respondent. The alleged obstruction pointed out by plaintiff is far away from the foot path as shown in the plan. Evidence on obstruction not corroborated other than by the evidence of plaintiff.

It would be prudent to identify and ascertain plaintiff's and defendant's soil rights which needs to be traced from the earlier partition *decree* 2444. The defendant was allotted lots 2 and 2A in plan No. 560/B according to partition *decree* 2444. The plaintiff in that case (2444) Sanchiya had been allotted lots 1 and 1A in the said plan. There is no dispute on this division. It is also decreed that the plaintiff sanchiya be given a right of foot path – 3 feet width by the edge of the southern boundary of lots 2 and 2A. P3 and P4 are plan 560B and *decree* in Case No. 2444 respectively. On perusing P3 1 find that lots 1 and 2 are both adjacent to the main road. (Udugoda to Kegalle) Lots 1A and 2A are situated close to the Ela shown in that plan. It would not be incorrect to observe that both Sanchiya and the defendant in the present case who was the 3rd defendant in case 2444 have access to the main road according to P3. Sanchiya had a right of foot path not across lot 2 and 2A but at the edge of those lots to the south.

Sanchiya named above had transferred the property as in the amended plaint paragraphs 2 - 5 to the persons named therein and finally to the plaintiff. Therefore the plaintiff could only own and possess what was decreed to sanchiya in case No. 2444. As such plaintiff would be entitled to lots 1 and 1A, and to the right of foot path as decreed above. Plaintiff had purchased the land in question on or about 1967. (paragraph 5 of the Amended plaint). By the time the plaintiff purchased the property the defendant was already in possession of lots 2 and 2A in terms of the decree in case No. 2444. (about 23 years).

Issue Nos. 6 and 7 refer to a right of way shown in plan No. 560/1943 filed in Case No. 2444 and the obstruction caused by Defendant shown as 'x' in plan No. 801. decree in case No. 2444, only a right of foot path was given to the Plaintiff's predecessors in title and not a right of way (road). The point 'x' in plan 801 seems to be the middle of the land in dispute, where as the decree permitted

a foot path at the edge of lots 2 and 2a. A foot path would be a small path to enable people to walk by foot and not big enough for a vehicle or cart to be driven on same. If issue Nos. 6 and 7 are to be answered in favour of the plaintiff the point of time plaintiff acquired a right of way and the basis of his claim to that would have to be established in order to negate what was decreed in Case No. 2444. It would be necessary to examine the evidence led at the trial before any view could be expressed on the judgment of the District Court.

I would at this point refer to the following authority on servitudes as it would be necessary to understand it's nature, right and ownership before proceeding to examine the evidence led in this case.

The laws of Ceylon Cecil Walter Perera 2nd Edition pg. 487 Chapter III.

SERVITUDES

THE right of servitude according to Van de Linden is a sort of real right whereby an inheritance, whether it be a house or land, is bound or subject to the use or convenience of a neighbouring house or land. The servitude or use may, he says, be also of the thing to a person (m). Van Leeuwen defines it as a species of imperfect property and a right less extensive than usufruct. He says it is the right of prohibiting something or doing something to or in the house of another or upon his land for our own benefit and above our ordinary legal right (n). Grotius thus explains the nature of the right-Ownership is either full or qualified. Qualified ownership is that property in a thing to which there is something wanting which prevents the owner from doing with it whatever he pleases although not forbidden by the common law. Where there is qualified ownership, whatever is wanting to one belongs to another, who consequently has also a qualified ownership; for instance, a person who has a right of footpath over land has no full ownership. for he may not sell the land or claim the fruits thereof, both of which are included in full ownership, while the person who has to allow the footpath has not the full ownership either, for he may not prohibit the other from coming on to his land, a right which is a part of ownership.

For the sake of distinction the term "ownership' is confined to the rights of the person who has the larger share in the ownership he being the one who may sell and let the land, and the lesser share is called a

privilege, such as the right of footpath for instance.

It was the evidence of Surveyor Kurukulasooriya that he visited the land in question and has in his plan No. 801 show the extent possessed by the plaintiff. Plan 801 is marked as P1 and the report as P2. Plaintiff occupies lots 1 and 4 in plan P1. P1 has superimposed plan 560 B/1945 relating to case No. 2444. Superimposition is shown in red in plan P1. Plan P1 shows lot 1A of plan 560 B/1945 as lots 1 & 3 and lot 1 of 560 B/1945 as lots 5 and 4. Obstruction shown as XI which obstruction is placed before entering plaintiff's land. In cross-examination Surveyor states that superimposition is not correct but is acceptable to be reliable. (Pg. 108 of the brief). Surveyor admits the following in cross-examination.

(a) Difference in extent of the 2 plans (p1 and 560B) is about .25 perches.

(b) lot 2A in earlier case had been allotted to the defendant without any encumbrances.

(c) Road shown in lot 2A in earlier plan is a part of the said lot 2A.

(d) Lot 2A not fully superimposed on plan P1, only half had been superimposed.

(e) Cannot see any changes in plaintiff's lots and defendant's lots.

(f) Plaintiff's lot would not be a paddy field.

(g) Unable to state whether lot 2A in the present day situation had increased or decreased in extent with reference to P3.

(h) In terms of the decree the road shown in the plan is unallotted. (It seems to be the road way shown in the middle and going across lot 2A).

In the report of the Surveyor (P2) lot 3 and 5 of P1 is shown as an encroachment.

On the above evidence of the Surveyor, the District Judge expressed her views on the evidence led at the trial and narrates the evidence of Surveyor Kurukulasooriya, and states that plaintiff confirms the evidence of Surveyor as regards the obstruction shown as 'x' and the encroachment depicted as lots 3 and 5 in P1. Further the difference in extent shown in both earlier plan and P1 is only .25 perches which is negligible and as such P1 is reliable. (The extent

should read as .25 perches and not 2.5 perches as District Judge narrates the evidence of Surveyor Kurukulasooriya).

The Grama Sevaka has also given evidence. This evidence seems to be supporting the defendant's more than the plaintiff though he was called by the plaintiff one cannot rely on his evidence to be cogent evidence to establish a right of way and demonstrate any obstruction across such right of way. This Court cannot give any benefit to the plaintiff for relying on the evidence of the Grama Sevaka as it is apparent that the witness had not been able to support the plaintiff's version.

It is the position of the defendant that since 1945, defendant possessed lots 2 and 2A in plan P3 and that if there was any encroachment as suggested by the plaintiff, possession by the defendant of the land in dispute had been since 1945. Other than the evidence of the defendant, on this aspect I cannot find any evidence to negate the position of the defendant. Decree in Case No. 2444 would only give the plaintiff a right of footpath on the southern boundary of lots 2 and 2A and not across lots 2 A in plan P3. Therefore the plaintiff should establish by clear evidence that he and his predecessors in title used the right of way shown in plan P3. (across lot 2A). By P4 plaintiff's predecessors in title was never given a right of way across lots 2A, although P3 indicates a path (shown in dotted red colour lines). The evidence on this point as stated by the Surveyor is that the path remains unallotted. Nor does P4 refer to this path other than the foot path allotted to plaintiff's predecessors in title.

It is plaintiff's evidence that he purchased lots 1 and 1A the land in question by deed P7 (No. 163 of 13.11.1967) and thereafter came into possession. (There is no mention of a specific date). He also testify that the defendant had fenced the southern side of lot A and caused an obstruction to the foot path. He also testify about the encroachment shown as lots 3 and 5 in P1. Encroachment was in 1970. He stated that the right of way had been in use for generation, and that he had been using this road. It is 3 1/2 feet in width. In cross examination plaintiff admits the following:

(1) His grand-father was a party in the earlier partition Case No. 2444 but had not been allotted any share/right.

(2) He has been litigating with the defendant since purchase of the

land and also filed action against one Bodiratne for fencing the Northern Province of the land in dispute.

(3) Thereafter in 1971 defendant obstructed and fenced.

(4) Amended plaint dated 10.12.1987.

(5) Bodhiratne's case terminated on 16.3.1971 (D5).

(6) Up to 1970 undisturbed possession of land.

(7) Lot 3 in plan P1 encroached in 1973.

(8) Disputed Lot 1 and 1A 1970 and 1973.

Though the *decree* in case No. 2444 had been entered over 60 years ago the rights of both plaintiff and defendant needs to be traced to the said *decree*, and the right of footpath recognised at that point of time cannot be ignored. Plaintiff came into possession of the land in dispute only after 1967. Defendant had been in possession since 1946. A period of about 22 years between date of *decree* and transfer of lots 1 and 1A to plaintiff is a period where only defendant's version is available to Court. In the absence of the plaintiff during this period and lack of material to establish another right of way in the manner pleaded by plaintiff from a witness who could testify about the past situation to support plaintiff or his predecessors in title makes the plaintiff's case a weak case especially when one seeks to enforce a right of way. Legally only the footpath recognised in *decree* 2444 could be enforced, unless the right of way suggested by plaintiff was acquired by prescription or grant or by reservation when owner transfers land.

At this juncture I would refer to another authority to ascertain the nature of Rustic Servitudes to include footpath. *Principles of Ceylon Law - H.W. Tambiah Q.C. - pg. 292/293.*

Where a footpath goes through several lands, it is very common in the rural areas of Ceylon to have stiles along the footpath in places where such paths cross the lands. The presence of such stiles do not in any way nullify the right of a dominant owner to have a servitude of footpath over another man's land (*Cornelis Singho* v *Perera*)[1].

In Ceylon a right of way is mainly acquired by grant or by a reservation when an owner transfers his land to another or by prescription. In any event it has to be a defined tract (Karunaratne

v Gabriel Appuhamy[2]. Where a right of way is given in general terms without assigning a defined path the selection of the path rests with the owner of the dominant land. But he may change its location if it can be done without damage to the owner of the servient tenement (Hahlo and Kahn, p604).

A right of way is also acquired by prescription (Section 5 Prescription Ordinance). in order that a person may acquire a servitude by prescription, there should be adverse user for a period of more than ten years over a defined path. Mere straying over parts of land which was allowed for the purpose of convenience is not sufficient to acquire a servitude by prescription (*Karunaratne* v *Gabrial Appuhamy) (supra).* Under the law of Ceylon where a right has been acquired for a path by prescription, it could only be exchanged by a national grant. A servitude over a new path may also be acquired by using another defined path and by abandoning the old one (*Hendrick* v *Sarnelis*)[3]. *Thambapillai* v *Nagamanipillai*[4].

Very often when a piece of land is divided among co-owners by cross-conveyances, a narrow portion is left to be used as a path. In such a case the narrow strip is co-owned land which is intended to be used as a path, and a co-owner who uses it as a path does not possess the right of a servitude but of a common ownership (see *dictum* of Tambiah, J. in *Rajentheram* v *Sivarajan*[5]; *Muthaliph* v *Mansoor*[6]. Servitudes acquired by prescription must be continous and must be of the same nature. Thus, a person who has a right of way for using a footpath over an intervening land cannot claim to have a right for carts over the adjoining fields (*Samarasekera* v *Ramanathan Chetty*[7]. When a person has the right of way, not only he but his servants, guest, visitors and labourers can also use it. Since servitudes are onerous in nature, one co-owner cannot grant one without the concurrence and consent of all the co-owners (*Thamboo* v *Annammah*)[8].

The original plaint in this case had been filed in 1977. Amended plaint filed in 1987 (10 years later) and parties proceeded to trial on the amended pleadings. The District Judge has failed to consider the long possession of the defendant. Since 1946, which had not been contradicted by the plaintiff, and proceeded to give judgment in favour of the plaintiff stating that the action was filed in 1977 and as such defendant had not prescribed to the land for the reason that the

10 year requirement of undisturbed and independent possession had not been proved. It is my view that the Trial Court Judge has not properly examined the evidence on prescription of the land to the portion possessed by the defendant. The documents relied by plaintiff marked P8 and P9 relate to disputes concerning paddy fields and not obstruction as urged by plaintiff, to a right of way. Although the Surveyor had in evidence suggested an encroachment the District Judge had not considered the question of long possession of the defendant to the area shown as lots 3 and 5 in plan P1, which the defendant possessed since 1946. The District Judge had been misdirected on the question of right of way and failed to consider the previous partition decree in case No. 2444, which permitted a right of foot path on a defined tract. Instead, the trial Court Judge had thought it fit to answer issue Nos 6 - 8 in favour of the plaintiff which related to an unallotted path. There is an absence of proof that the unallotted path had been acquired by the plaintiff by prescription or grant or by transfer of land and right to use the land. Unless and until plaintiff's legal entitlement with proof as above to the unallotted path is established there cannot be and one cannot urge any obstruction to that path or claim a right of way. Further the unallotted path seems to be going across lot 2A (allotted to the defendant). In the absence of cogent evidence and evidence uncorroborated to establish a servitude the defendant should not be made to suffer and enable plaintiff to use a right of way for his convenience. It would be unsafe to act on mere assertions especially when servitude is claimed.

In the above circumstances I set aside the judgment of the District Court and hold that issue Nos. 4 to 8 and 9 to 13 should be answered in favour of the defendant and that the plaintiff's action should be dismissed. This appeal is allowed with costs fixed at Rs. 10,000/-.

EKANAYAKE J. - I agree.

Appeal allowed.

KARIYAWASAM
v
RAJASURIYA

COURT OF APPEAL
EKANAYAKE, J.
CALA 226/2002 (LG)
DC COLOMBO 18678/99/L
MAY 5, 2006
JULY 7, 18, 2006

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

Held:

(1) Answer reveals that the defendant had jointly and severally denied all the other averments in the plaint except those that are specifically admitted.

Per Chandra Ekanayake, J.

"In the light of the above I am unable to hold the view that any specific mention about the averments with regard to the other paragraphs of the plaint would be necessary or that would be a mandatory requirement".

(2) What has been made mandatory in Section 75 (d) is that an answer should contain a statement admitting or denying the several averments in the plaint. In the answer in paragraph 1, it has been specifically averred that the rest of the averments of the plaint are denied jointly and severally except what is specifically admitted therein The Civil Procedure Code does not provide any other requirement that should be complied with when denying averments of a plaint, except when disputing the averments in the plaint as to the jurisdiction of the Court (Section 76).

(3) As regards to a specific Sinhala formula to be used – Sections embodied in Chapter IX of the Code re-filling answer are self explanatory.

APPLICATION for leave to appeal from an order of the District Court of Colombo with leave being granted.

Cases referred to:

(1) *Hassan* v *Iqbal* 2001 3 Sri LR 147.

(2) *Fernando* v *The Ceylon Tea Corporation* 3 SCR 35.

G.R.D. Obeysekera for defendant-petitioner.
Rohan Sahabandu for plaintiff-respondent.

May 9, 2007

CHANDRA EKANAYAKE, J.

The defendant-petitioner (hereinafter sometimes referred to as the defendant) by his petition dated 14.06.2002 had sought *inter-alia* leave to appeal against the order of the learned District Judge of Colombo dated 30.05.2002 (X) made in D.C. Colombo Case No. 18678/L.

The plaintiff-respondent (hereinafter sometimes referred to as the plaintiff) by plaint dated 04.09.1999 had sought *inter alia* declaration of title to the property morefully described in the 4th scheduled thereto, ejectment of the defendant and all those holding under her there from and for restoration of possession thereof and damages as prayed for in sub-paragraphs (ඍ) of the prayer to the plaint marked P2. The defendant by his answer (P1) whilst opposing the claims of the plaintiff had prayed for a dismissal of the plaintiff's action more particularly on the grounds averred in paragraph (7) thereof namely: by virtue of having acquired prescriptive title due to uninterrupted and continuous possession of the subject matter by herself, husband and father-in-law for over 50 years had acquired prescriptive title to the same.

When the case was taken up for trial on 3.05.2002 after recording 2 admissions application had been made by the plaintiff's Counsel as paragraphs 21, 23-26 and 29-32 were neither denied nor accepted in compliance with the provisions of Section 75(d) of the Civil Procedure Code the averments contained in paragraphs 21, 23-26 and 29-32 should be recorded as admissions. This application being opposed to by the Counsel for the defendant, the learned trial Judge after hearing submissions made by both parties had ordered that the averments contained in the aforesaid paragraphs of the plaint should be recorded as admissions. This is the order this leave to appeal application had been preferred from.

By the order of this Court dated 30.11.2004 leave to appeal had been granted on the following questions:

(i) Whether there is any specific Sinhala formula to be used in an answer of a defendant when the defendant intends to deny any or all the averments set out in the plaint?

(ii) When the answer is read as a whole, if it is clear that the defendant disputes the truth of the averments set out in the plaint, is a trial Judge justified in recording admissions as the trial Judge in this case has done?