



THE

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

[2009] 2 SRI L.R. - PART 7

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HON J. A. N. De SILVA, Chief Justice from 08.06.2009
HON. Dr. SHIRANI BANDARANAYAKE Judge of the
Supreme Court
HON. SATHYA HETTIGE, P. C. President,
Court of Appeal

Editor-in-Chief : L. K. WIMALACHANDRA

Additional Editor-in-Chief : ROHAN SAHABANDU

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written submissions thereto along with the documents were tendered on the Twenty First of February 2007. Thereafter final notice dated Thirtieth April 2007 was issued (P 11) by the second respondent. Instant application of the petitioner is to quash P 11.

The whole dispute revolves around the nature of employment of the fourth respondent. Hence on the material available before this Court, we have to identify whether the fourth respondent is an independent contractor. If he is found to be an independent contractor providing accounting services, then he is not eligible for EPF, and the second respondent has issued P. 11 lacking any evidential basis to do so.

According to the EPF payments made by the petitioner (i. e. the C forms) and the Attendance Registers, it is obvious that the maximum number of employees who worked under the petitioner company cannot exceed more than four persons at any given time. Therefore it is also obvious that the Petitioner Company, i. e. M/s JNP Engineering – cannot be a large scale business enterprise as it had only three or four workers under them. It is my belief that a firm of this magnitude does not require the services of a permanent accountant and that it is not financially viable for them to get the services of a permanent accountant.

Petitioner has produced the attendance registers from April 2003 up to December 2006. Fourth respondent has not placed his signature in any of those. If the fourth respondent is a permanent employee, he can not work in other places and he must report for work regularly and must obey the regulations of the management, by signing the attendance register. Continuous absence of his signature in the attendance registry proves that the fourth respondent is not a permanent employee.

Perusal of documents X 146, X 147, X 148 and X 149 proves that the fourth respondent had been working in other places also. Paragraph 17 of the petitioner's affidavit states that the fourth respondent had in the course of the inquiry before the third respondent admitted to having provided his services to other firms. First to third respondents in paragraph 3 of their objections clearly admitted the averments in paragraph 17 of the petitioner's affidavit. Therefore it does not require any further proof. I can safely conclude that the fourth respondent had been providing his services to other firms as well.

According to the letters of appointment issued to other employees (from X 86 – X 89) it is clear that an employee has to be present at JNP Engineering from 8.30 am to 5.00 pm during week days and from 9.00 am to 1.30 pm on Saturdays and to offer his services to other establishments during the remainder of the week. This fact also strengthens the position taken up by the petitioner. If the fourth respondent was a permanent employee of JNP Engineering then he could not have provided services to other firms. On the other hand if he provided his services to other firms he could not have worked as a permanent employee of JNP Engineering.

As I stated earlier the first to third respondents, in their objections, have admitted the fact that the fourth respondent had provided his services to other firms (fourth respondent, though he was present in Court on 28/10/2008 has not even filed objections). Therefore it is well settled that the fourth respondent had been providing his services to other establishments as an independent contractor and hence he could not have worked on a permanent basis at JNP Engineering.

On the other hand JNP Engineering is a firm which has been paying EPF dues regularly since June 2001 and therefore there could not be any reason for the petitioner not to

pay EPF in respect of the fourth respondent if the fourth respondent was a permanent employee.

In conclusion I hold that the fourth respondent is only an independent contractor providing accounting services and he is not entitled to EPF benefits. Therefore it is manifestly apparent that the second respondent has issued P 11 without any evidence or material to justify his decision. Since he had issued P 11 without any evidence or material the second respondent has erred in law and there is an error on the face of the record. Hence this court quashes the said determination marked P 11.

In view of the above findings the applications for writs of *Certiorari* and Prohibition are allowed without costs.

SRISKANDRAJAH, J. – I agree.

application allowed.

STASSEN EXPORTS LTD. V. LIPTON LTD. AND ANOTHER

SUPREME COURT

DR. SHIRANI A. BANDARANAYAKE, J.,

MARSOOF, P. C., J. AND

BALAPATABENDI, J.

S. C. (CHC) APPEAL NO. 51/2006

S.C. L. A. APPLICATION NO. 57/2005

H. C. (CIVIL) NO. 8/2003(3)

NOVEMBER 13TH, 2008

NOVEMBER 27TH, 2008

Doctrine of res judicata – Applicability of the doctrine to a person who is not a party before the Court – Stare decisis – Legal Maxims – Interest reipublicae ut sit finis litium and nemo debet bis vexari pro una et eadem causa – Judicial precedent – Estoppel – Code of Intellectual Property Act.

The High Court of the Western Province holden in Colombo and exercising civil jurisdiction by judgment dated 20.07.2005 affirmed the order of the Assistant Director of Intellectual Property for and on behalf of the Director of Intellectual Property (2nd respondent) and dismissed the appeal of the plaintiff-appellant. The appellant filed an application to the Supreme Court against the order of the High Court and leave to appeal was granted on the following questions.

1. Should the Director – General have taken into consideration the judgment of the District Court in D. C. Colombo Case No. 2765/Spl. and of the Court of Appeal in the appeal therefrom in determining whether the propounded mark should be registered or not?
2. Were the said judgments binding on the Director-General?
3. Were the said judgments final as between the parties on the question whether the use of the propounded mark was an act of unfair competition? If so, does the failure of the Director-General to consider the said judgments vitiate the order?
4. Was the Director-General entitled in law to independently arrive at the conclusion whether the propounded mark should be registered or not in terms of the applicable law without reference to the said judgments?

The learned High Court Judge had taken the position that since the 2nd respondent was not a party to the matter before the District Court and the Court of Appeal, the doctrine of *res judicata* would not be applicable and the 2nd respondent was free to follow the decisions of the Supreme Court.

Held:

- (1) Where a final judicial decision has been pronounced by a Court which had jurisdiction over the issue before it, any party to such litigation as against the other party would be estopped from disputing such decision on the merits whether it be used as the foundation of an action or as bar to any claim.
- (2) The doctrine of *res judicata* has found justification in two fundamental principles. The first principle, which is *public in nature*, is based on the maxim *interest reipublicae ut sit finis litium* (in the interest of the state that there be an end to litigation) and the second, on the footing of a maxim, *private in nature*, *nemo debet bis vexari pro una et eadem causa* (that no person should be proceeded against twice for the same cause).
- (3) The decision of the Court of Appeal, which affirmed the decision of the District Court would act as a bar against the respondents in claiming that the 2nd respondent had the authority to hear and determine the matter that had been already decided by a higher Court.
- (4) *Judicial precedent*, which is part of the law of this country, is to be applied not only to Courts but also to other Tribunals and Authorities, which have the power to make orders affecting the rights of other parties.
- (5) As the dispute between the appellant and the 1st respondent was fully decided before the Court of Appeal on the identical questions, which later came up before the 2nd respondent, the latter was bound by the decision given by the District Court and the Court of Appeal and there was no possibility or a necessity for the 2nd respondent to have been a party before the District Court or the Court of Appeal
- (6) As the plea of *res judicata* by way of estoppel was raised by the appellant, the latter would have to show that the parties to the latter litigation were parties to the earlier litigation.

Case referred to:-

1. *Duchess of Kingston's case* - (1776) 2 Smith L. C. 13th edition, 644
2. *Hoystead v. Commissioner of Taxation* - [1926] A. C. 155
3. *Henderson v. Henderson* - (1843) 3 Hare, 114
4. *Carl Zeiss* (No. 2) 1967 (1) A. C. 853
5. *Bader Bee v. Habib Mericen Noordin* [1909] A. C. 615.
6. *R. v. Middlesex Justices, Ex parte Bond* - [1933] 2 K. B. 1
7. *Mendis v. Himmappooa* - Ramanathan Reports (1843-1855) 88
8. *Cassim v. Maricar* - (1900) 12 NLR 184
9. *Palaniappa Chetty v. Gomes* - 4 Balasingham Reports, 21
10. *Herath v. The Attorney - General* - (1958) 60 NLR 193
11. *K. R. Chinnakrishna Setty and others v. Sri Ambal and Co., Madras* - A.I.R. 1973 Mysore 74
12. *In the matter of an Application by the Massachusetts Saw Works to register a Trade Mark* - (1918) 35 R. P. C. 137
13. *Raj Lakshmi Dasi v. Banamali Sen* - A.I.R. 1953 S. C. 33
14. *Municipal Council of Colombo v. Munasinghe* - (1968) 71 NLR 223
15. *New Brunswick Railway, Co. v. British and French Trust Corporation Ltd.* - [1939] A. C. 1
16. *The Sennar* - [1985] 2 A. E. R. 104

APPEAL from the High Court of the Western Province, holden in Colombo, exercising Civil Jurisdiction (Commercial High Court).

S. L. Gunasekera with *Priyantha Jayawardane* for Plaintiff-Appellant.

K. Kanag-Iswaran, P. C., with *Dinal Phillips, Ranil Premathilake, Lakshman Jayakumar* and *Shivan Kanag-Iswaran* for 1st Defendant-Respondent.

Cur.adv.vult.

November 19, 2009

DR. SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of the Western Province, holden in Colombo and exercising civil jurisdiction dated 20.07.2005. By that judgment learned Judge of the High Court affirmed the order of the Assistant Director of Intellectual Property for and on behalf of the Director of Intellectual Property (hereinafter referred to as the 2nd respondent) and dismissed the appeal of the plaintiff-appellant (hereinafter referred to as the appellant). The appellant filed an application for leave to appeal before this Court on which leave to appeal was granted on the following questions.

1. Should the Director-General have taken into consideration the judgment of the District Court in D.C. Colombo Case No.2765/Spl. and of the Court of Appeal in the appeal therefrom in determining whether the propounded mark should be registered or not?
2. Were the said judgments binding on the Director-General?
3. Were the said judgments final as between the parties on the question whether the use of the propounded mark was an act of unfair competition? If so, does the failure of the Director-General to consider the said judgments vitiate the order?
4. Was the Director-General entitled in law to independently arrive at the conclusion whether the propounded mark should be registered or not in terms of the applicable law without reference to the said judgments?

The first three (3) questions were raised by the learned Counsel for the appellant, whereas question No. 4 was raised by learned President's Counsel for the 1st defendant- respondent (hereinafter referred to as the 1st respondent).

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The appellant is a Company of limited liability duly incorporated in Sri Lanka and is engaged in the business of blending, packeting, selling, exporting and distributing manufactured tea in and from Sri Lanka and is one of the leading Sri Lankan Tea exporters. The 1st respondent is a Company of limited liability duly incorporated in the United Kingdom, which is also engaged in the business of blending, packeting, selling and distributing manufactured tea, which business is transacted for the 1st respondent by the 1st respondent's wholly owned subsidiary in Sri Lanka, *viz.*, Lipton (Ceylon) Limited.

On 15.08.1985 the appellant had made an application to the 2nd respondent for the registration of its Trade Mark, SEL STASSEN – PURE CEYLON TEA – Packeted in Sri Lanka. The said application was accepted by the 2nd respondent, which was numbered as 49819 and advertised in the Government Gazette No. 536 dated 09.12.1988 (A₁). Thereafter certain errors in the said advertisement were corrected by a notification in the Government Gazette No.605 dated 06.04.1990 (A₁A). For several years prior to making the said application, the appellant had successfully exported, marketed, distributed and sold substantial quantities of 'Ceylon Tea' in packets and in boxes using the propounded Mark.

The 1st respondent had filed a Notice of Opposition to the said application on 06.06.1989 (A₂). The said opposition

was in terms of Section 99(1)(f) and/or Section 100(1)(a) and/or Section 100(1)(e) and / or Section 142 of the now repealed Code of Intellectual Property Act. The opposition of the 1st respondent was based on the similarity between the propounded Trade Mark numbered as 49819 of the appellant and the 1st respondent's registered Trade Mark No. 41620 and the unregistered Trade Mark No.43958 the application for the registration of which is pending.

The appellant filed its observations on the 1st respondent's opposition on 15.1.1991(A₄)

In the meantime the 1st respondent had instituted action in the District Court of Colombo on 24.07.1987 seeking *inter alia*, injunctive relief restraining the appellant from using the propounded Trade Mark or any colourable imitation of the 1st respondent's registered Trade Mark No.41620 and of its unregistered Trade Mark No.43958 (A₅). On 20.01.1988, the appellant filed Answer praying *inter alia* for the dismissal of the said action (A₆). After the trial, learned District Judge delivered the judgment on 31.03.1992, dismissing the 1st respondent's action (A₇).

The 1st respondent filed an application by way of an appeal to the Court of Appeal and by its judgment dated 08.10.1996, the Court of Appeal had dismissed the said appeal (A₈).

The appellant during the pendency of the aforementioned matters, filed an affidavit of its Managing Director dated 29.09.1994 and a further affidavit on 10.03.1997 before the 2nd respondent. Along with these two affidavits the appellant had filed copies of the aforementioned judgments of the District Court (A₇) and the Court of Appeal(A₈). Accordingly the said judgments of the District Court and the Court of Appeal were before the 2nd respon-

dent prior to the conclusion of the inquiry into the appellant's application for the registration of its Trade Mark. The 1st respondent had also filed an affidavit of one Harshana Jayanetti, a Director of Lipton Ceylon Limited(A₁₁)

The 2nd respondent had made order thereafter on 12.11.2001, upholding the objections of the 1st respondent to the registration of the propounded Trade Mark and refusing the appellant's foresaid application (A₁₂).

Having been aggrieved by the said order of the 2nd respondent, the appellant filed an appeal against the said order in terms of Section 182 of the Code of Intellectual Property Act to the High Court of the Western Province holden in Colombo.

Learned Judge of the High Court delivered his order on 20.07.2005 (A₂₁) refusing to grant relief to the appellant and affirming the order of the 2nd respondent (A₁₂). Thereafter the appellant had come before the Supreme Court by way of Leave to Appeal.

Having stated the facts of the appeal let me now turn to consider the questions on which leave to appeal was granted by this Court.

On a careful consideration of the four (4) questions on which leave to appeal had been granted by this Court and the submissions made by both learned Counsel in Court at the hearings it is apparent that the question that has to be considered by this Court would be whether the 2nd respondent should have considered the judgments of the District Court and the Court of Appeal in determining whether the propounded Mark should be registered or not. It is also to be examined as to whether the decisions of the District Court

and the Court of Appeal were binding on the 2nd respondent and whether he could independently arrive at the conclusion as to whether the propounded Mark should be registered or not in terms of the applicable law without reference to the aforesaid two judgments.

Learned President's Counsel for the 1st respondent contended that when a Mark is propounded by an applicant for registration, the Director-General is mandated to consider whether the Mark is inadmissible on objective grounds and/or by reason of third party rights. He further contended that, in arriving at such a decision, the Director-General is guided purely by the provisions of the law and there is no necessity in determining the question *inter parties* as a Court would do in an action before Court. It was further submitted that the Director-General after hearing, would determine the issue on evidence placed before him and for that purpose he is guided by the relevant provisions of the Code and is free to follow judgments, whether local or foreign which would assist him in carrying out his statutory duties. The contention accordingly was that, the Director-General is not bound by the decision of a Court in the manner an inferior Court is bound by the decision of a Superior Court under the doctrine of *stare decisis* nor will he be estopped by reason of the doctrine of *res judicata*. The submission therefore was that the Director-General is an independent statutory authority and although an appellate court is subsequently authorized on appeal to review this decision, it would not change the role he was mandated to perform under the Code of Intellectual Property Act.

In substantiating his contention, learned President's Counsel for the 1st respondent, in his written submissions, referring to the statutory obligation of the 2nd respondent had clearly stated that,

“... in the performance of the statutorily mandated role of the Registrar in applying the provisions of the Code with regard to the admissibility of Marks as tested against the objective grounds and third party rights, the Registrar **was free to apply accepted principles of interpretation** evidenced by case law, both local and foreign, and **was free to choose the decision** which the Registrar in her understanding of the law thought best... **to determine the issues of fact and law** involved in a particular case and on a case by case basis.”

It was also stated by the learned President’s Counsel for the 1st respondent that,

“... *stare decisis* has no application to the Registrar as she is not an inferior court and the Registrar was free to ignore any decision which she thought was **palpably erroneous**” (emphasis added).

Accordingly the contention of the learned President’s Counsel for the 1st respondent was that, irrespective of the fact that there were decisions taken by the District Court and the Court of Appeal on the same issue, which was before the 2nd respondent, the said Assistant Director was correct in ignoring the said decisions as ‘**in her view** the decisions of the District Court and the Court of Appeal were **palpably erroneous**’. Further, it also appears that the reason for ignoring the decisions of the District Court and the Court of Appeal had been due to the fact that the Assistant Director was of the view that those decisions were **palpably erroneous**.

As referred to at the outset, after the appellant had made its initial application to the 2nd respondent for the registration of its Trade Mark ‘SEL STASSEN –PURE CEYLON TEA packed in Sri Lanka’, the 1st respondent had filed a Notice

of Opposition and had instituted action in the District Court of Colombo in July 1987, seeking *inter alia*, injunctive relief restraining the appellant from using the propounded Mark or any colourable imitation of the 1st respondent's registered Trade Mark No. 41620 and of its unregistered Trade Mark No.43958 (A₅).

In the plaint filed by the 1st respondent in the District Court he had stated that the packet or carton used by the appellant for the purpose of exporting tea to the Middle-East closely resembled his registered Trade Mark, calculatedly used to deceive or cause confusion and likely to mislead the purchasing public and the trade and thereby the appellant was infringing the 1st respondent's Trade Mark (paragraphs 16,17,18 of the plaint filed in the District Court of Colombo by the 1st respondent).

On an examination of the plaint filed in the District Court, it is evident that the action before the District Court was to secure declaratory and injunctive relief and the application before the 2nd respondent was to secure the registration of the appellant's propounded Mark No. 49819. However, in both matters the issue was whether the appellant's Trade Mark No. 49819 resembles the 1st respondent's registration Trade Mark No.41620 and its unregistered Trade Mark No.43958 and therefore whether the appellant was entitled to obtain the registration.

Considering the documents filed and the submissions made before the District Court, learned District Judge had stated in his judgment that the question that he had to decide was as to whether it is likely that an ordinary person looking for a packet of tea of the 1st respondent in a market shelf would be misled in buying a packet of tea of the appellant.

There had been a long and protracted trial before the District Court, where witnesses had given evidence orally and were cross-examined.

After considering applicable provisions in the Code of Intellectual Property Act and the decided cases, the learned District Judge had determined that there was no likelihood of the public being misled by the use of the appellant's Trade Mark No.49819. When the matter was taken up before the Court of Appeal, on an appeal instituted by the 1st respondent, it was contended on behalf of the 1st respondent that the learned District Judge had erred in law in determining that there was no infringement of the appellant's Trade Mark. Having considered the questions at issue at length learned Judges of the Court of appeal had affirmed the judgment of the District Court and dismissed the appeal with costs. In its judgment, the Court of Appeal had held, *inter alia*, that there is no striking similarity between the shield devices in the respective Marks and the overall impression of the appellant's product could not confuse the ordinary purchaser or or user or a likelihood of confusion. As submitted by both learned Counsel for the appellant and the 1st respondent there was no appeal from the judgment of the Court of Appeal to the Supreme Court. It is thus apparent that the 1st respondent had accepted the decision of the District Court, which was affirmed by the Court of Appeal, and thereby the judgment of the Court of Appeal became the final decision on the issue regarding the registration of appellant's Trade Mark No. 49819.

Learned Judge of the High Court had considered the judgments of the District Court and the Court of Appeal on the basis of *res judicata* and the doctrine of judicial precedent and had come to the conclusion that as the 2nd respondent

was not a party to the dispute before the District Court and the Court of Appeal, the appellant cannot raise *res judicata* against the 2nd respondent. With regard to the applicability of the doctrine of judicial precedent, learned Judge of the High Court had stated that the 2nd respondent was bound and obliged to follow the judgments of the Supreme Court with regard to the determination of the issue before him in preference to the judgments of the Court of Appeal on the same matter.’

Accordingly, learned Judge of the High Court had held that,

“ . . . judicial precedent binds an inferior court or tribunal or any other person, whereas *res judicata* binds only the parties to the case with regard to the law that is applicable in relation to a particular issue. In the circumstances, it would be seen that the Director-General of Intellectual Property, was bound to follow the judgments of the Supreme Court with regard to the determination of the issues before him in preference to the judgments of the Court of Appeal, on the same matter.”

It is therefore quite clear that the learned Judge of the High Court had taken the position that, since the 2nd respondent was not a party to the matter before the District Court and the Court of Appeal, that the doctrine of *res judicata* would not be applicable and that the 2nd respondent was free to follow the decisions of the Supreme Court.

It would also be pertinent to refer to the contention of the learned President’s Counsel for the 1st respondent at this juncture since he too had supported the view taken by the High Court and had contended that *res judicata* is applicable

and would be raised only in legal proceedings in a Court of law, as it is based upon the maxim *interest rei publicae sit finis litium* and the proceedings before the 2nd respondent under the Code of Intellectual Property Act cannot be treated as litigation.

Since all the said arguments were based on the doctrine of *res judicata* and thereby the applicability of the decision in the District Court and the Court of Appeal, let me now turn to consider the said doctrine of *res judicata* and its applicability to this appeal.

The doctrine of *res judicata*, as commonly known, means that the final judgment of a competent Court may not be disputed by the parties or their successors or any third parties in any subsequent legal proceeding (R. W. M. Dias, *Jutisprudence*, 5th edition, pg. 126).

The doctrine of *res judicata* dates back to the decision taken in 1776, where it was considered in the *Duchess of Kingston's* case ⁽¹⁾. The doctrine was later discussed in several other decisions and the rule was clearly stated in *Hoystead v. Commissioner of Taxation* ⁽²⁾, by Lord Shaw, with reference to the statement made by Wigram V-C in *Henderson v. Henderson* ⁽³⁾, which was in the following terms:

“I believe, I state the rule of the Court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the

subject in contest, but which was not brought forward only because they have, from negligence, inadvertence or even accident, omitted part of their case. **The plea of *res judicata* applies, . . . not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time**" (emphasis added).

Considering the views expressed on the doctrine of *res judicata*, it is apparent that where a final judicial decision has been pronounced by a Court which had jurisdiction over the issue before it, any party to such litigation as against the other party would be estopped in any subsequent litigation from disputing such decision on the merits whether it be used as the foundation of an action or as a bar to any claim (**Carl Zeiss**⁽⁴⁾). The purpose of the doctrine is thus clear that it enables to dispose finally and conclusively of the matters in controversy (*Badar Bee v. Habib Mericen Noordin*⁽⁵⁾ *R v. Middlesex Justices, ex. P. Bond* ⁽⁶⁾ and **other than on appeal** that particular subject matter cannot be re-litigated between the same parties.

The doctrine therefore has found justification in two fundamental principles. The first principle, which is public in nature, is based on the maxim *interest rei publicae ut sit finis litium* (in the interest of the state that there be an end to litigation) and secondly on the footing of a maxim, private in nature, namely, *nemo debet bis vexari pro un at eadem causa* (that no person should be proceeded against twice for the same cause).

Accordingly the theory pronounced on the basis of the doctrine of *res judicata* is that if an action is being brought and the merits of the matter had been decided by a Court with a final judgment being delivered, such a question cannot be canvassed by the same parties in another action.

The doctrine of *res judicata*, had been accepted and applied in Sri Lanka, as far back as in 1847 by Stark, J. in *Mendis v Himmappooa* ⁽⁷⁾ well before the Civil Procedure Code came into existence. Since then the doctrine had been considered in many judgments (*Cassim v. Maricar* ⁽⁸⁾ *Palaniappa Chetty v. Gomes* ⁽⁹⁾, *Herath v. The Attorney-General* ⁽¹⁰⁾, which was later amplified and statutorily recognized in terms of the Civil Procedure Code.

The constituent elements of *res judicata* estoppel is clearly described by Spencer Bower (The Doctrine of *Res Judicata*, supra, pg. 10), where he has stated thus:

“A party setting up *res judicata* by way of estoppel as bar to his opponent’s claim, or as the foundation of his own, must establish the constituent elements, namely:

- i. the decision was judicial in the relevant sense;
- ii. it was in fact pronounced;
- iii. the tribunal had jurisdiction over the parties and the subject matter;
- iv. the decision was –
 - (a) final and
 - (b) on the merits;
- v. it determined the same question as that raised in the later litigation; and

- vi. **the parties to the later litigation were either parties to the earlier litigation or their privies** or the earlier decision was *in rem*” (emphasis added).

This would clearly emphasize the fact that the purpose of the doctrine of *res judicata* is to confer the finality of a final determination of a dispute and considering the facts and circumstances of the present appeal it is evident that the judgment of the Court of Appeal dated 08.10.1996 had decided the matter in question that there is **no such confusing similarity finally between the parties.**

The description given by Spencer Bower (Supra) regarding the constituent elements of *res judicata* estoppel also clearly indicates that if the parties to later litigation were either parties to the earlier litigation or their privies, the question as to whether the earlier decision was *in rem* would not arise.

The order of the Assistant Director of Intellectual Property for and on behalf of the 2nd respondent was given on 12.11.2001 refusing the registration of the propounded Trade Mark of the appellant. At the time the said order was given, it was not disputed that both the District Court and the Court of Appeal had delivered their judgments. In such circumstances considering the doctrine of *res judicata* it would not be possible for the 2nd respondent to ignore the fact that there had been two decisions that had considered substantially the same point which had come before the 2nd respondent by way of an application for the purpose of registration.

Learned Counsel for the appellant cited several decisions in support of his contention that the judgments of the District Court and the Court of Appeal, were binding on the 2nd respondent.

In *K. R. Chinnakrishna Setty and others v. Sri Ambal and Co., Madras*⁽¹¹⁾, the question arose as to whether a decision given in an earlier proceeding between the same parties with regard to the registration of a Trade Mark, operates as *res judicata* in a proceeding in terms of Section 105 of the Trade and Merchandise Marks Act, 1958. Considering the fact that earlier the parties had taken up the matter before the Supreme Court in appeal, the Court had decided that,

“ . . . if a decision is given in an earlier proceeding between the same parties there is little reason for holding that the said decision would not operate as *res judicata* in a proceeding. . . in which the same question arises for consideration.”

A similar view was taken in, *In the matter of an Application by the Massachusetts Saw Works to register a Trade Mark*⁽¹²⁾.

On a consideration of the facts of this appeal it is apparent that the former application of the parties had been heard by the District Court and the Court of Appeal which are admittedly competent Courts to hear and determine an application regarding an application of a Trade Mark. In *Raj Lakshmi Dasi v. Banamali Sen*⁽¹³⁾, the Supreme Court of India, having considered the conditions regarding the competency of a former Court to try the subsequent suit had clearly stated that,

“When a plea of *res judicata* is founded on general principles of law, all that it necessary to establish is that **the Court that heard and decided the former case was a Court of competent jurisdiction**” (emphasis added).

Considering the facts and circumstances of this application it is extremely clear that the earlier decision of the Court of Appeal, which affirmed the decision of the District Court would act as a bar against the respondents in claiming that the 2nd respondent had the authority to hear and determine the matter that had been already decided by a higher Court.

The applicability of the provisions of the Indian Code of Civil Procedure dealing with *res judicata* in matters coming under the Trade Marks Act was also considered by the Indian Supreme Court in *Chinnakrishna Setty and others v. Sri Ambaland Co.*, (*supra*). Referring to the Supreme Court decision in *Raj Lakshmi Dasi v. Banamili Sen (Supra)* it was stated in *Chinnakrishna Setty and others (supra)* that,

“ . . . if a decision is given in an earlier proceeding between the same parties there is little reason for holding that the said decision would not operate as *res judicata* in a proceeding. . . in which the same question arises for consideration. . . . If the case can be brought within the scope of the general rule of *res judicata*, the decision in the earlier proceeding can still be used as a bar in a subsequent proceeding notwithstanding the fact that the earlier decision does not satisfy all the requirements of Section 11 of the Civil Procedure Code.”

There is another aspect that strengthens the contention put forward by the learned Counsel for the appellant. It is not a disputed fact that the doctrine of *stare decisis* (keep to what has been decided previously) is a maxim of practically universal application (Rupert Cross, *Precedent in English Law*, 3rd edition pg. 4). Considering the present day developments, Professor Cross was of the view that the doctrine of precedent is to some extent in a state of flux, but there are

three important features which still loom large (Rupert Cross, *supra*). They are as follows:

1. the respect paid to a single decision of a Superior Court,
2. the fact that a decision of such a Court is a persuasive precedent even so far as Courts above that from which it emanates are concerned, and
3. the fact that a single decision is always binding precedent as regards Courts below that from which it emanates.

Learned President's Counsel for the 1st respondent contended that the decision of the Court of Appeal was not binding on the 2nd respondent under the doctrine of judicial precedent as he is not an 'inferior Court'. Further it was submitted that he was 'free to follow any one or more of the applicable and relevant judicial decisions in his decision making process and an appellate Court called upon to review his decision will only address its mind to the question whether he has properly advised himself in the background of the applicable law'.

It is however to be borne in mind that, there is a vital factor which the 2nd respondent had not taken into consideration at the time he made the decision in refusing the registration of the propounded Mark of the appellant, viz., that previously the District Court as well as the Court of Appeal had considered the question of the alleged similarity between the Trade Marks of the appellant and the 1st respondent and both Courts had been of the view that there had been no such similarity of the Trade Marks in question. As stated earlier, it is common ground that the dispute had arisen between the appellant and the 1st respondent. Considering the decisions of the District Court, which was

affirmed by the Court of Appeal refusing the application made by the 1st respondent, what the 2nd respondent by his order dated 12.11.2001 had done was to reverse the decisions of the District Court and the Court of Appeal. Would it be possible for an authority such as the 2nd respondent to reverse a decision given by a District Court or the Court of Appeal? I do not think that there is even a necessity to explain why the 2nd respondent, which is only a statutory body, has no authority to reverse such decisions. Learned President's Counsel contended that the doctrine of *stare decisis* has no application to the Registrar as she is not an inferior Court. Does this mean that irrespective of the fact that a decision has been already given by two Courts, the 2nd respondent could ignore all what had been already given by two Courts, the 2nd respondent could ignore all what had been decided by two Courts including the Court of Appeal due to the mere fact that he is not functioning as a judicial officer? It is surprising to note that although the decisions of Superior Courts are binding upon all Courts, that the 2nd respondent had thought and decided that he could simply ignore the whole concept of judicial precedent. Referring to this position learned Counsel for the appellant had rightly referred to the dictum of H. N. G. Fernando, C. J. in *Municipal Council of Colombo v. Munasinghe* ⁽¹⁴⁾, where it had been stated that,

“I hold that when the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is ‘just and equitable, the legislature did not intend to confer on an Arbitrator the freedom of a wild horse.”

Therefore it is clear that the 2nd respondent could not have ignored the two decisions given in favour of the appellant by the District Court and the Court of Appeal.

A Careful study of the doctrine of *res judicata* clearly indicates that, if the parties are allowed to re-agitate a question, which has been settled before a higher Court finally, again before a quasi judicial tribunal to make order affecting the rights of parties, then the purpose of the doctrine of *res judicata* would become meaningless and there would never be any finality in any dispute. Considering such practical difficulties, P. Narayanan (Law of Trade Marks and Passing off, 5th Edition, 2000, pg.709) had stated that,

“ The words ‘court and ‘suit’ have been given a wide interpretation and the application of the rule of *res judicata* has been extended to proceedings before tribunals other than courts.”

Accordingly judicial precedent, which is part of the law of this country, is to be applied not only to Courts, but also to other Tribunals and authorities, which have the power to make orders affecting the rights of other parties. A decision of the 2nd respondent would be binding on parties only until a decision is taken by a Court of law and the doctrine of *res judicata*, which enables to ensure that there would be a finality in a final determination in a dispute before Court by prohibiting the re-agitation of such disputes would become meaningless and having no force, if the identical matter, which had earlier been considered by the District Court and the Court of Appeal is to be reviewed once again by the Director-General of Intellectual Property.

There is one other matter I wish to examine before I part with this judgment.

Learned Judge of the High Court having considered the fact that, prior to the consideration of the registration of the Trade Mark in question by the 2nd respondent

the question of the alleged similarity between the Trade Marks of the appellant and the 1st respondent had been examined by the District Court and the Court of Appeal, had gone on the basis that since the 2nd respondent was not a party to the applications before the District Court and the Court of Appeal, that he is not bound by these decisions.

The plea of *res judicata* by way of estoppel was raised not by any other person, but by the appellant. In such a situation, as stated by Spencer Bower (*supra*), which was referred to earlier, the appellant would have to show that, the parties to the latter litigation were parties to the earlier litigation (*supra*). In the words of Lord Guest in *Carl-Zeiss (supra)*, referring to Spencer Bower (*Res Judicata, Supra* pg.3), ‘any party to such litigation as against any other party is estopped in any subsequent litigation from disputing or questioning such decision on the merits. In *New Brunswick Railway Co. v. British and French Trust Corporation Ltd.*⁽¹⁵⁾, Maugham, L.C., referring to the applicability of *res judicata* estoppel had stated that,

“The doctrine of estoppel is one founded on considerations of **justice and good sense**. If an issue has been distinctly raised and decided in an action, in which **both parties** are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them” (emphasis added).

It is common ground that the appellant and the 1st respondent had been disputing before the District Court, Court of Appeal and even **before the** 2nd respondent. In such circumstances, it would not be correct to say that the doctrine of *res judicata* is not applicable just because the 2nd respondent was not a party before the

District Court and the Court of Appeal. It is to be borne in mind clearly that the dispute was between the appellant and the 1st respondent and the said dispute had been reviewed and decided in two actions, where both appellant and 1st respondent were parties to such action. A plea of *res judicata* estoppel was taken up by the appellant before the 2nd respondent and it was the duty of the 2nd respondent to have given due consideration to the applicability of the said doctrine. As stated in *Carl Zeiss (Supra)* and in *The Sennar*⁽¹⁶⁾, the conditions for the application of the doctrine has been stated as being that,

- (a) the same question was decided in both proceedings;
- (b) the judicial decision said to create the estoppel was final; and
- (c) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

It is abundantly clear that the facts of this appeal has clearly shown that all the aforementioned conditions have been fulfilled as the dispute between the appellant and the 1st respondent was fully decided before the Court of Appeal on the identical questions, which later came up before the 2nd respondent. Therefore the 2nd respondent was bound by the decision given by the District Court and the Court of Appeal and there was no possibility or a necessity for the 2nd respondent to have been a party before the District Court or the Court of Appeal.

For the reasons aforesaid, I answer the questions on which Leave to Appeal was granted as follows:

1. Yes. The Director - General should have taken into consideration the judgment of the District Court in D.C.

Colombo Case No. 2765/Spl. and of the Court of Appeal in the appeal therefrom in determining whether the propounded Mark should be registered or not.

2. Yes. The said judgments were binding on the Director-General.
3. Yes. The said judgments were final as between the parties on the question whether the use of the propounded Mark was an act of unfair competition. The failure of the Director-General to consider the said judgments vitiates the order.
4. No. The Director-General was not entitled in law to independently arrive at the conclusion whether the propounded Mark should be registered or not in terms of the applicable law without reference to the said judgments.

Accordingly this appeal is allowed and the judgment of the High Court dated 20.07.2005 and the order made by the Assistant Director of Intellectual Property on behalf of the 2nd respondent dated 12.11.2001(A₁₂) are set aside. The appellant is entitled to proceed with its application to register Trade Mark No.49819. The the 2nd respondent is directed to consider the appellant's application to register his Trade Mark No.49819 in terms of the applicable law having in mind the plea of *res judicata* raised by the appellant on the basis of the judgments of the District Court dated 31.03.1992 and the Court of Appeal dated 08.10.1996.

On a consideration of all the circumstances of this appeal, I make no order as to costs.

MARSOOF, J. - I agree.

BALAPATABENDI, J. - I agree.

MARTIN AND ANOTHER V. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW, J.
BASNAYAKE, J.
CA 185/2003
HC RATNAPURA 81/99

Penal Code-Murder - Misdirections and non directions in the summing up – Plea of grave and sudden provocation withdrawn from jury – Applicability of Section 334 of the Criminal Procedure Code – Miscarriage of justice?

The accused-appellants were tried by a Jury and were convicted by the unanimous verdict of the Jury of the murder of one W and sentenced to death.

In appeal, it was contended that there were misdirections/non directions in the summing up, that the trial Judge had acted on facts regarding the grave and sudden provocation and as such consideration of the plea of grave and sudden provocation was withdrawn from the Jury the comments made by the trial Judge has prejudiced the minds of the Jury.

Held

- (1) The trial Judge explaining the offence of culpable homicide not amounting to murder told the Jury that in the offence of culpable homicide not amounting to murder the offender did not entertain the murderous intention – this gives the impression to the jury that the accused could not be convicted of the offence of culpable homicide not amounting to murder if he entertains murderous intention – this is a misdirection on law.
- (2) In discussing the facts relating to the plea of grave and sudden provocation telling the jury that he did not think that the accused would get provoked – created the impression in the minds of the jury that the accused in his opinion is not entitled to the plea of grave and sudden provocation – by doing this has withdrawn the plea of grave and sudden provocation from the consideration of the jury – this has to be decided by the jury. This direction is a misdirection.