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

**[2009] 2 SRI L.R. - PART 9**

**PAGES 225-252**



**PUBLISHED BY THE MINISTRY OF JUSTICE**
**Printed at M. D. Gunasena & Co. Printers (Private) Ltd.**

**Price: Rs. 25.00**

# DIGEST

**Section 78 of the Primary Court Procedure Act is as follows;**

*"If any matter should arise for which no provision is made in this Act, the provisions in the Code of Criminal Procedure Act governing a like matter where the case or proceeding is a criminal prosecution or proceeding and the provisions of the Civil Procedure Code governing a like matter where the case is a civil action or proceeding shall with such suitable adaptations as the justice of the case may require be adopted and applied."*

Counsel for the Respondent contended that if a stay of the order of the High Court is required it is for the aggrieved party to move the Court of Appeal to get a stay of the order of the High Court. The mere filing of an appeal does not *ipso facto* stay the execution of the judgment or order. He contended further that in civil maters, the decided cases, the rules of the Supreme Court and the statutes clearly lay down the principle that the execution of the decree is the rule and the stay of execution is the exception and for a stay order to be obtained specific provision must be provided for in the Act.

The provisions of chapter LV 111 of the Civil Procedure Code dealing with appeals do not contain any provisions for stay of execution of the judgment. Sections 761 and 763 in chapter L1V are the only provisions that deal with stay of execution of orders, judgments or decrees. But it has to be borne in mind that none of these provisions are applicable to the instant case as part V11 of the Primary Court Procedure Act does not provide for an appeal against an order. Not only does it not provide for an appeal but also specifically debars an appeal.

**Section 74 (2) of the Primary Court Procedure Act**

*"An appeal shall not lie against any determination or order under this Act."*

By an amendment to the Civil Procedure Code provisions were made for stay orders in Leave to Appeal matters. Section 757(2) as amended by Act No.38 of 1998 has provided for stay orders, interim injunctions and other relief, unlike section 754 of the Civil Procedure Code dealing with appeals.

*Section 757(2)*

*"Upon an application for leave to appeal being filed, in the registry of the Court of Appeal the Registrar shall number such application and shall forthwith sent notice of such application by registered post, to each of the respondents named therein, together with copies of the petition, affidavit and annexure, if any. The notice shall state that the respondent shall be heard in opposition to the application on a date to be specified in such notice. An application for leave to appeal may include a prayer for* ***a stay order,*** *interim injunction or other relief". (Emphasis added)*

By contract the provisions of Section 754 dealing with appeals are silent with regard to stay orders. Even the Supreme Court rules dealing with appeals do not provide for stay of execution. But the Supreme Court rules provide for stay orders in application such as revision application and leave to appeal applications.

The Civil Procedure Code contains specific provisions with regard to the staying of execution of the decree pending appeal. If no application to stay execution is made the judgment creditor is entitled to apply for execution of the decree. Such application cannot be made before the expiry of the time prescribed for tendering the notice of appeal. The stay of execution of decree will not be made unless the judgment debtor can establish that substantial loss will be caused to him if the judgment is executed pending appeal. The Judicature Act too contains specific provisions with regard to stay

of execution of judgment pending appeal. Thus it is seen that under the Civil Procedure Code the rule is to execute the judgment and the exception is to stay the execution pending appeal on proof of substantial loss. In this regard I would like to quote the following provisions of the Civil Procedure Code and the Judicature Act.

Section 763(2) of the Civil Procedure Code.

The Court may order execution to be stayed upon such terms and conditions as it may deem fit, where.

*(a) the Judgment debtor satisfies the Court that substantial loss may result to the Judgment debtor unless an order for stay of execution is made, and*

*(b) security given by the Judgment debtor for the due performance of such decree or order as may ultimately be binding upon him.*

In *Sokkalal Ram v. Nadar*[4] it was held that stay of execution pending appeal is granted only where the proceedings would cause irreparable injury to the appellant and where the damages suffered by the appellant by execution of decree, would be substantial.

**Section 23 of the Judicature Act No. 2 of 1978.**

*Any party who shall be dissatisfied with any judgment, decree, or order pronounced by the District Court may (except where such right is expressly disallowed) appeal to the Court of Appeal against any such judgment, decree or order for any error in law or in fact committed by such Court, but no such appeal shall have the effect of staying the execution of such Judgment, decree or order unless the District Judge shall see fit to make an order to that effect, in which case the party*

*appellant shall enter into a bond, with or without sureties as the District Judge shall consider necessary, to appear when required and abide the Judgment of the Court of Appeal upon the appeal.*

In *Charlotte Perera vs. Thambiah*(5) at 352 it was held that the mere filing of an appeal does not stay the execution of the decree appealed against. The Court may stay the execution if an application is made for stay of execution on the grounds mentioned in Section 761.

In *Brooke Bond (Ceylon) Ltd v. Gunasekara*(6) it was held in that Section 761 should not be construed in such a way as not to lightly interfere with the decree holders rights to reap the fruits of his victory as expeditiously as possible.

The Counsel for the Respondent in support of his case has cited two cases. In *Nayar v. Thaseek Ameen*(7) the District Court held with the plaintiff, aggrieved by the judgment, the defendant appealed to the Court of Appeal but the appeal was dismissed by the Court of Appeal. The defendant filed a motion stating that he intended to appeal to the Supreme Court and moved for a stay of execution of the Judgment. The Supreme Court held that the Court of Appeal has no power to stay proceedings and the jurisdiction is with the Supreme Court. In fact in that case leave to appeal to the Supreme Court was granted by the Court of Appeal, yet the Court of Appeal did not have the jurisdiction to grant a stay order.

It is discernible from the said Judgment that once the Court of Appeal or the High Court gives its Judgment the proceedings are not automatically stayed in the High Court, the Court of Appeal or the Supreme Court, as the case may be, should be moved, to obtain a stay order. In the earlier case referred to above it is the Supreme Court which had the

power to grant a stay order, staying the execution of the order of the Court of Appeal. By the same token and by parity or reasoning it is only the Court of Appeal that can grant a stay order against an order of the High Court and the mere loading of an appeal does not automatically stay the execution of the Judgment or Order of the High Court. This is yet another aspect that their Lordships had failed to consider by an oversight in Kanthilatha's case (supra).

The second case cited by the Counsel for the respondent is *Kulatunga v. Peiris*[8]. This case deals with interim restraining orders as distinct from stay orders staying the execution of a judgments or orders. An average interim order should be distinguished from an interim order in the nature of a stay order especially the stay orders that tend to stay the execution of judgments or orders. Their Lordships in the above case held that the Court of Appeal has the inherent power to restrain a party from destroying the subject matter of the action and also to authorize a party to take necessary steps (subject to such terms and conditions as the Court may prescribe) to preserve the subject matter of the action, his Lordship Justice Mark Fernando observed I quote; "However such inherent jurisdiction can be invoked only by way of a proper application supported by an affidavit and giving the opposite party an opportunity of being heard before making an order."

The Supreme Court further held in that case that the tenant had the right to do so in the exercise of his rights under;

(a) the tenancy agreement,

(b) in the discharge of his duty to mitigate loss and damage which he would otherwise suffer,

(c) or in the fulfillment of his mutual obligations,

(d) or to avoid criminal liability.

Therefore I find that the decision in *Kalutunga v. Peiris (supra)* would not be directly relevant to a decision of this Court in the instant case. But from the decision of that case we can derive some support to augment that the mere lodging of an appeal does not *ipso facto* stay the execution of the Judgment or the order appealed against. Even to obtain an interim order from the Court of Appeal there ought to be a proper application.

Nowhere in the Civil Procedure Code it is stated that lodging of an appeal will stay the writ of execution of the decree. Something more has to be done by the aggrieved party and something more has to be shown, to stay the execution of the decree. It is not automatic. When an appeal is taken against a final order of a High Court Judge made in the exercise of its revisionary jurisdiction, the Supreme Court Rules do not provide for a stay of execution of that order whereas in application for revision, in application for leave to appeal and also in applications for special leave to appeal, although there is no automatic stay, the Supreme Court rules provide for applications for stay of execution pending such applications but this is not so in appeals. Therefore a party, who wishes to have the execution of the impugned order stayed pending appeal, could file a revision application to obtain a stay of execution of the impugned order.

Prior to the 13th Amendment and the High Court of the Provinces Special Provisions Act No. 19 of 1990 which conferred upon the High Courts the jurisdiction to entertain applications for revision, a person aggrieved by an order made by a Primary Court Judge or a Magistrate had to move the Court of Appeal in revision. If any person was dissatisfied with the order of the Court of Appeal he had to seek special leave to appeal From the Supreme Court within 42 days. (*Vide* Rule 42 of the Supreme Court Rules). The

Supreme Court Rules of 1990 provides for stay of proceedings. Where special leave is granted, if a party wants a suspension of the Judgment of the Court of Appeal, he has to make an application to the Supreme Court and thus it would be seen that the mere lodging of an application for special leave to appeal to the Supreme Court does not *ipso facto* stay the order of the Court of Appeal. Generally such stay orders are given *ex parte* by the Supreme Court and such stay orders remain in force for a period of 14 days which fact is indicative of the fact that stay of execution is the exception and execution of the Judgment is the rule. According to rule 43 (3) if an interim stay is granted and if special leave is granted subsequently the Petitioner has to make yet another application to get a stay of the execution of Judgment pending the final determination of the appeal. These matters have not been considered by their Lordships who decided *Kanthilaths's case (supra)*.

Unlike in applications for special leave to appeal to the Supreme Court where the Supreme Court Rules provide for stay orders, (*vide* 43(3)) Article 154 P or the High Court of the Provinces Special Provisions Act, or the Supreme Court Rules do not provide for stay orders in appeals.

**The modern trend in some of the recently enacted legislations Industrial Disputes**

The Industrial Disputes (amendment) Act No. 32 of 1990 contains provisions dealing with security that has to be deposited in case an appeal is to be taken against an order, by an aggrieved party. The purpose of deposit of security is to ensure satisfaction of the Labour Tribunal order. Thus there is a guarantee of satisfaction of the order of the Labour Tribunal in case the appeal is not successful. In terms of the provisions of the Industrial Disputes Act, the order

of the Labour Tribunal will not be implemented during the pendency of the appeal provided that sufficient funds have been deposited as security to satisfy the order of the Labour Tribunal in case the appeal is unsuccessful.

**Maintenance Matters**

**Section 14 (1) of the Maintenance Act No. 37 of 1999 is as follows;**

*Any person who shall be dissatisfied with any order made by the Magistrate under Section 2 or Section 11 may prefer an appeal to the relevant High Court established by Article 154 P of the Constitution in the like manner as if the order was a final order pronounced by a Magistrate's Court in criminal cases or matters, and Section 320 and 330 both, inclusive of Section 357 and 358 of the Code of Criminal Procedure Act No. 15 of 1979 shall mutatis mutandis apply to such appeal.*

*Provided however, not withstanding anything to the contrary in Section 323 of the Criminal Procedure Code Act No. 15 of 1979 such order under Section 2 shall not be stayed by reason of such appeal, unless the High Court directs otherwise for reasons to be recorded.*

It is evident from the above provisions that even under the new Maintenance Act the rule is not to stay the execution of the order unless the High court directs otherwise for reasons to be recorded.

*Section 14 (2) states that, any person dissatisfied with an order of the High Court may lodge an appeal to the Supreme Court on a question of law with the leave of the High Court and where such leave is refused, with the special leave of the Supreme Court, first had and obtained.*

Then the question arises, whether the order of the High Court is *ipso facto* stayed the High Court grants leave to Appeal to the Supreme Court. To answer this question one must look at rule 42 of the Supreme Court Rules, wherein it is stated that, if the Court of Appeal grants leave the party seeking to stay the execution of the judgment or final order, should obtain such relief from the Supreme Court. In the same way, when the High Court grants leave to appeal to the Supreme Court, the order is not automatically stayed. The party will have to move the Supreme Court to obtain a stay.

According to the old Criminal Procedure Code when a person is convicted in the Magistrate's Court the Magistrate has no discretion but to grant bail on the accused. If the accused was condemned to undergo hard labour he shall be detained in custody without hard labour until the Judgment of the Court of Appeal is made known to the Superintendent of the prison. If an accused is convicted for murder, by the High Court, the sentence of death will not be carried out and the execution of the Judgment will be stayed during the pendency of the appeal. This position of the law was changed/ altered by Section 19 and 20 of the Bail Act No. 30 of 1997. Under the current law the Magistrate has the discretion to grant or refuse bail pending appeal. It is significant to note that even after a conviction in the Magistate's Court if the sentence is not hard labour the punishment will not be stayed unless the Magistrate decides to grant bail on the accused; it is only hard labour that is automatically stayed. This position is not the same in the High Court as the High Court Judge has the discretion to either release the accused on bail or keep him in custody pending appeal whether the sentence is hard labour or otherwise. But if an accused is sentenced to death the execution is stayed pending appeal.

**Criminal cases – Magistrate's Court**

**Section 323 (1) of the Criminal Procedure Code**

*(When an appeal has been preferred the Court from which the appeal is preferred shall order the appellant if in custody to be released on his entering into a recognizance in such sum with or without a surety or sureties as such Court may direct conditioned to abide the judgment of the Court of Appeal and to pay such costs as may be ordered. (emphasis added)*

**Section 323 (4) of the Criminal Procedure Code**

*When a person sentenced to a term of rigorous imprisonment has preferred an appeal, but is unable to give the required recognizance or other security he shall be detained in custody* ***without hard labour*** *until the Judgment of the Court of Appeal is made known to the Superintendent of the prison.*

**Section 19 of the Bail Act is as follows;**

*Where an appeal has been preferred from a conviction in the Magistrate's Court the Court from which the appeal is preferred may having taken into consideration the gravity of the offence and the antecedents of the accused, refuse to release the appellant on bail.*

**Bail Act Section 19(6)**

*When a person sentenced to a term of rigorous imprisonment has preferred an appeal, but is unable to give the required recognizance or other security he shall be detained in custody* ***without hard labour*** *until the Judgment of the Court is made known to the Superintendent of the prison.*

According to this Section it is only hard labour that is *ipso facto* stayed.

**Criminal cases – High Court**

**Section 333(1) of the Criminal Procedure Code Act No.15 of 1979**

*Upon the appeal being accepted all further proceedings in such case shall be stayed (not the law anymore) and the said appeal together with the record of the case and eight copies thereof and the notes of evidence taken by the Judge shall be forwarded as speedily as possible to the Court of Appeal.*

**Section 333 (2) Criminal Procedure Code**

*When an appeal against a conviction is lodged, the High Court may subject to subsection (4) admit the appellant to bail pending the determination of his appeal. An appellant who is not admitted to bail shall pending the determination of the appeal be treated in such manner as may be prescribed by rules made under the Prisons Ordinance.*

**Section 20 (2) of the Bail Act is as follows;**

*"When an appeal against a conviction by a High Court is preferred, the High Court may subject to subsection (3) release the appellant on bail pending the determination of his appeal.* ***An appellant who is not released on bail shall, pending the determination of the appeal be treated in such manner as may be prescribed by the rules made under the Prisons Ordinance.***

As far as the High Court is concerned the position has now changed. The law that prevailed prior to the Bail Act to the effect that " *Upon the appeal being accepted all further proceedings in such case shall be stayed"* is not the law any more. The High Court Judge has the discretion to either grant or refuse to grant bail. If bail is refused the appellant will be

treated in such manner as may be prescribed by rules made under the Prisons Ordinance. According to Section 20 (3) of the Bail Act it is only the death sentence that is automatically stayed pending appeal.

**Section 20(3) of the Bail Act**

*Where the accused is sentenced to death, execution shall be stayed and he shall be kept on remand in prison pending the determination of the appeal.*

It is discernible from the contents of these provisions in the Bail Act that the trend now is not to stay the execution of the Judgments unless the sentence is one of hard labour imposed by the Magistrate's Court or a sentence of death imposed by a High Court. Therefore it is seen that even in criminal matters stay of execution pending appeal is limited in scope. Automatic stay of execution operates only when the sentence is one of hard labour or death sentence.

Section 68 or 69 of the Primary Court Procedure Act does not provide for an appeal against an order made by a Primary Court Judge. If at all the only remedy against such an order or determination is to move the High Court of the province in revision under Article 154 P of the High Court of the Provinces Special Provisions Law Act No.19 of 1990, or to move the Court of Appeal in revision under Article 138 of the Constitution. The intention of the legislature is not to provide an appeal against such orders because proceedings under the particular chapter are meant to be disposed of expeditiously as possible in order to prevent a breach of the peace. On the other hand orders under the Primary Court Procedure Act are temporary in nature subject to a final decision of a competent Court of civil jurisdiction. Legislature has deliberately

refrained from granting the relief of appeal against such orders because the parties have an alternative remedy which is more effective and also which will finally and conclusively determine the rights of the parties. If an appeal is provided against such an Order, this process will be delayed and litigation will continue for a long period of time like in a civil suit. This is the mischief the legislature intended to avoid. The only inference that one could draw is that these provisions are meant to prevent a breach of the peace by obtaining an appropriate order as speedily as possible from the Primary Court Judge, after an inquiry held, and thereafter, if necessary, for the parties to have recourse to a properly constituted civil suit, in the relevant District Court, to have the matter fully and finally adjudicated. On the other hand although not specifically provided for, an aggrieved party can move in revision under Article 154 P of the High Court of the Provinces Special Provisions Act, against an order of a Primary Court Judge made under the particular chapter. In an application for revision, what could be decided is whether the decision is legal or illegal and not whether the decision is right or wrong. Therefore in an application for revision there is no question of a rehearing or the re-evaluation of evidence in order to arrive at a decision. In an application for revision the task of the High Court is to decide, not whether, the decision is right or wrong but simply whether the decision is legal or illegal. Revision applications could be disposed of easily and quickly unlike appeals, where the parties are allowed to re-agitate the entire matter. It is for this reason that the legislature has in its wisdom devised this stratagem to prevent inordinate and undue delay. Parties should not be allowed to achieve indirectly by resorting to devious or indirect methods, the very thing that the legislature directly

intended to deprive them of. When an order of a Primary Court Judge made under this chapter is challenged by way of revision in the High Court the High Court Judge can examine only the legality of that order and not the correctness of that order. The High Court may be able to prevent a breach of the peace by issuing interim stay orders or by allowing an interim order made by the Primary Court Judge to remain in force. But what is the position when a person aggrieved by such an order made in revision by the High Court is also appealed against to the Court of Appeal. Is the Court of Appeal vested with the power to re-hear or allow the parties to re-agitate the main case by reading and evaluating the evidence led in the case in the Primary Court or is it that the Court of Appeal is restricted in its scope and really have the power only to examine the propriety or the legality of the order made by the learned High Court judge in the exercise of its revisionary jurisdiction. I hold that it is the only sensible interpretation or the logical interpretation that could be given otherwise the Court of Appeal in the exercise of its appellate jurisdiction may be performing a function the legislature, primarily and strictly intended to avoid. **For the reasons I have adumbrated I am of the opinion that this particular right of appeal in the circumstances should not be taken as an appeal in the true sense but in fact an application to examine the correctness, legality or the propriety of the order made by the learned High Court Judge in the exercise of its revisionary powers.** The Court of Appeal should not, under the guise of an appeal attempt to re-hear or re-evaluate the evidence led in the main case and decide on the facts which are entirely and exclusively matters falling within the domain of the jurisdiction of the Primary Court Judge. For the reasons I have stated I hold that orders given by Primary Court

Judge under this chapter should be executed or implemented expeditiously as possible without undue delay. Unless there is a stay order currently in operation, there should be no automatic stay of proceedings for whatever the reason, otherwise that would negate and frustrate the very purpose for which these provisions were enacted, The Primary Court Procedure Act is an act promulgated by the legislature in recent times. Although there were similar provisions in the Indian Criminal Procedure Code, we in Sri Lanka, did not have such provision till the enactment of the Administration of Justice Law No. 44 of 1973 (Section 62) and later by the Primary Court Procedure Act. General laws, concepts and general principles whether they have been there from time immemorial should not be applied mechanically to new situations which were never in contemplation, when those laws, principles or concepts came into being. Extraordinary situations demand extraordinary remedies. It is the duty of a Court of law to give effect to the laws to meet new situations, by brushing aside technicalities, the so-called rules and concepts which cannot be reconciled should not be allowed to stand in the way of the administration of justice, causing hindrance impeding the very relief the legislature wanted to enact.

Thus I hold that their Lordships decision arrived at in *R.A. Kusum Kanthilatha and Others v. Indrani Wimalaratne and Two Others, (supra)* placing reliance on the dictum in *Edward v. De Silva (supra)* as authority for the proposition that once an appeal is taken against a judgment or a final order pronounced by a High Court in the exercise of its revisionary Jurisdiction *ipso facto* stays the execution of that judgment or order, is clearly erroneous. Lodging of an appeal does not *ipso facto* stay execution. Something more has to be done by

the aggrieved party and something more has to be shown, to stay the execution of the judgment or order. It is not automatic.

For the reasons adumbrated I hold that there is no merit in this application for revision and dismiss the same without costs.

**SALAM, J. -** I agree.

*appeal dismissed.*

# SRI CO-OPERATIVE INDUSTRIES FEDERATION LTD V. KOTALAWALA

SUPREME COURT
TILAKAWARDANE. J.
AMARATUNGA. J
MARSOOF. PC. J.
SC 2/2005
CA 1173/2002
DC COLOMBO 24742/MR
OCTOBER 23, 2008

*Burden of proof- Hearsay evidence- Findings of fact by trial Court- Overruling decision of trial Court on a question of fact-Should not be lightly interfered with? Right of a party to challenge a finding if no appeal is taken- Res Judicata*

The appellant called for tenders for the installation of the electrical system for its factory. The plaintiff-respondent's tender was accepted as it was the lowest. The appellant withheld a certain sum claimed on the basis that the transformer was supplied and installed by a third party company and that the respondent had no part to play in the installation of the transformer. The respondent instituted action claiming a certain sum with interest from the date on which the work was completed to the date of filing action. The District Court held that the transformer was supplied and affixed to the ground by the third party company, but the installation was by the respondent, and awarded part of the sum claimed. The Court of Appeal affirmed the decision. The question arose whether there was sufficient evidence for the appellant to disclaim liability for the payment and whether the appellant was liable to pay the sum decreed.

**Held**

(1) The Appeal Court will not depart from the rule that it has laid down that, it will not overrule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created wrong impression.

(2) Relying on the truth of the contents in documents P5 and P6 is clearly contrary to the hearsay rule, but it is legitimate for the respondent to rely on P5 and P6 to show that the engineer had in fact recommended payment without relying on the truth of any assertion made by him in either of their documents. Such use would not offend the hearsay rule.

The burden is always on the plaintiff to prove his case and the reception in evidence of the letters P5 and P6 would not per se relieve the respondent from establishing that he had in fact performed his work, contemplated.

Per Saleem Marsoof, P.C. J.

" As the respondent has not appealed against the decision of the trial Judge with respect to one item, it is not possible to reagitate this matter in the course of this appeal as the doctrine of *res judicata* would clearly preclude such a course."

**APPEAL** from a judgment of the Court of Appeal.

**Cases referred to:**

1. *Eliyatamby v. Eliyatamby* 27 NLR 396
2. *Sheila Seneviratne v. Shereen Dharmaratne- 1997*- 1 Sri LR 76
3. *Subramaniam v. Public Prosecutor*- 1956 1 WLR 965 at 970
4. *Powell and Wife v. Streatham Manor Nurshing Home* - 1935 Al 243 at 248
5. *The Sri Robert Peel* – 4 Asp. M.L.C. at 321
6. *Munasinghe v. Widanage - 69 NLR 97*
7. *Watt v. Thomas* – 1947- 1 AII ER 582 at 513
8. *Attorney General v. Gnanapragasam* 68 NLR 49
9. *Ben Max v. Austin Motor Co. Ltd 1955* - AI 370

*T. M. S. Nanayakkara* for Appellant

*Champaka Ladduwahetty* for Respondent.

*Cur.adv.vult*

April 03, 2009
**SALEEM MARSOOF, PC. J.**

This Court has granted the Defendant-Appellant-Appellant (hereinafter referred to as the "Appellant") special leave to appeal on the questions of law stated in paragraph 16 of his Petition dated 17th November 2004. Which are set out below:

(a) Is there sufficient evidence for the Appellant to disclaim liability for the payment under item No.01.01.of P4?

(b) In all the circumstances, is the Appellant not liable to pay the sum decreed by the District Court and the Court of Appeal?

It appears from the Appeal Brief that in 1997, the Appellant a society registered under the Co-operative Societies Law No.5 of 1972, called for tenders for the installation of the electrical system for its new Ceyesta factory in Navinna, Maharagama. The Tender Document issued by the Appellant marked P2 expressly described the *work* involved in the following manner:-

> "The work covered by these tenders include the supply of all equipment and materials and erection at site and the provision of all plant, labour, documents,drawings, services in connection with the work described in these specifications and the tender drawings, all in strict accordance with the conditions set out in this contract Document and as required for handing over the complete Electrical Installation (400/230v) which shall be fully operational in every respect and intent."

Clause 9 of the part headed " Instructions to Tenderers" in the said Tender Document obliged the successful tenderer to furnish with his tender " all relevant information with respect to all equipment and materials included in his offer in order to allow full and detailed evaluation of his tender."

and in the part headed " Specification of Work" it expressly provided in paragraph 0.2 that the contractor shall be responsible for *inter alia* "providing detail design, installation drawings, diagrams and schedules" and " completing the works to the satisfaction of Engineer and demonstrating both its satisfactory performance in accordance with the design intent and the accessibility of equipment, plant, wiring and accessories to facilitate maintenance work. " He was also responsible for "drawing the Engineer's attention to any discrepancies in documents, Drawings or instructions issued after the time of tender, immediately upon receipt of same and prior to the commencement of any part of the works affected thereby."

The Plaintiff – Respondent – Respondent (hereinafter referred to as the "Respondent") submitted a tender dated 18th September 1997 for the work described in greater detail in the Bill of Quantities marked P4. Though several other tenders were also received, the tender submitted by Respondent aggregating to a sum of Rs. 3,368,775.00. being the lowest, was accepted by the Appellant co-operative society by its letter dated 11th December 1997 marked P3. In the context of the questions on which special leave to appeal has been granted by this Court, it is instructive to refer to the Bill of Quantities marked P4, and in particular to items 01.01, 01.02 and 02.01 therefore, and the amounts tendered by the Respondent with respect to those items, which are quoted below:

| **Items No.** | **Description** | **Quantity** | **Unit** | **Rate** | **Amount** |
|---|---|---|---|---|---|
| 01.01 | Installation of 165 KVA Transformer | 01 | No. | 627,500.00 | |
| 01.02 | Supplying and laying of 4x185 Sq mm PVC X LPE CU | | | | |

Cable from Transformer Room to the Electrical Room
300 Meters
17,500.00

02.01 Supplying and installation of Main Switch Board consisting of the following, complete with internal wiring according to the IEE regulations: one 400 Amp Change Over Switch, three 400 AF/320 AT MCCB with UVT. One Indicator Lamps set, one Phase Failure Relay, one Earth Fault Relay, one Ammeter 0-400 Amp + Sel Sw, one Vold Meter + Sel Sw, one Poer Factor Meter, one 160 Amp MCCB, two 32 Amp MCCB, one 250 Amp MCCB and three 20 Amp MCCB 01 No. 932,850.00

I note that the Bill of Quantities (P4) is a computer print out on which specific sums of money have been entered in the " Amount "column using a type-writer. This suggests that the Respondent merely typed on the Bill of Quantities provided by the Appellant co-operative society, the specific amounts he quoted for each of the items set out therein, and submitted his tender in accordance with the Tender Document marked P2.

It is common ground that the work has been completed, and the Respondent has been paid all money lawfully payable to the Respondent upon the completion of the work, subject to two exceptions, It is admitted that the Appellant has withheld the sum of Rs. 627,500.00 claimed by the Respondent for the *installation of the transformer* (item 01.01 in the Bill of Quantities), on the basis that the said transformer was supplied and installed by Lanka Electricity Company (Pvt) Ltd. (hereinafter referred to as "LECO") and that the Respondent

had no part to play in the installation of the transformer supplied by LECO. It is also admitted that the Appellant has paid the Respondent only 10% of quoted amount of Rs.17,500.00 claimed by the Respondent under item 01.02 of the Bill of Quantities for *supplying and laying of 4 x 185 Sq mm copper cable* from the transformer to the electrical room of the factory, the balance 90% being withheld on the ground that the Respondent had to lay only 30 meters of cable.

The Respondent instituted action in the District Court of Colombo praying for Judgment in a sum of Rs. 643,250.10, with interest at 22% per annum from the date on which the work was completed to the date of filling of action, and further legal interest from the date of judgement until payment is made in full, on the basis that although the Respondents has completed the work contemplated by items 01.01 and 01.02 of the Bill of Quantities, the payment of the aforesaid sum has been unlawfully withheld by the Appellant despite the recommendation of the Consultant Engineer of the Appellant that the same should be paid. The main questions for the District Court to decide were whether the Respondent had installed the 165 KVA transformer as contemplated by item 01.01 of the Bill of Quantities and whether he had supplied and laid 300 meters of 4 x 185 Sq mm PVC cable which connected the transformer to the electrical room of the factory.

The District Court, after a brief trial held that though the transformer was supplied and *affixed* to the ground by the Lanka Electricity Company (Pvt) Ltd., (LECO), it was the Respondent who *installed* the transformer, laid the cable and provided the electrical connection. The District Court further held that the Respondent was therefore entitled to payment under item 01.01, but it disallowed the Respondent's claim

for payment under item 01.02 as the Respondent had, in fact only laid 30 meters of cable for which he had already been paid by the Appellant. Dissatisfied with the said judgement of the District Court, the Appellant appealed to the Court of Appeal. The Court of Appeal by its judgment dated 7th October 2004, affirmed the decision of the District Court. The Simple question that arises in this appeal is whether the Respondent is entitled for payment under item 01.01 for the installation of the 164KVA transformer at the Appellants factory in Maharagama.

Before dealing with the submissions made by learned Counsel at the hearing of this appeal, it is necessary to refer to the report of Mr. K. Jagathchandra. Chartered Electrical Engineer, dated 10th July 2006, which was tendered to Court by the Attorney-at-Law for the Appellant with a motion dated 22nd August 2006, with the following recital:-

> *"Whereas when this matter came up before the Supreme Court, the Court directed the Defendant-Appellant-Appellant to refer this matter to an independent person: and whereas the Defendant-Appellant-Appellant requested a retired Deputy General Manager of the Ceylon Electricity Board to go into the matter and report.*
>
> *The Defendant-Appellant-Appellant moves that permission be granted to file the said report and the same is filed herewith and move that Your Lordships' Court be pleased to accept the same."*

The report of Mr. Jagthchandra states that there was no necessity for the Respondent to carry out any part of the work contemplated by item 01.01 of the Bill of Quantities as the said work had to be carried out by the authority that supplied and installed the transformer, which in this case was the

Lanka Electricity Company (Pvt) Ltd., (LECO) which carried out the functions of the Ceylon Electricity Board (hereinafter referred to as " the CEB") in the relevant area, and hence no payment is due under that item to the Respondent. However, journal entries and orders made by this Court do not substantiate the position that the Court had referred this matter for a report by "an independent person" as set out in the said motion, nor do they disclose that the said motion has been supported or accepted by this Court. In fact, in paragraph 15 and 16 of the further written submission filed on behalf of the Respondent, objection has specifically been taken to the acceptance of this report, specifically on the ground that apart from the absence of a prior order of this Court calling for a report, the Respondent has not been consulted in the process of selection of this "independent person". Learned Counsel for the Respondent has submitted that this report is a self-serving document which is totally biased in favour of the Appellant, and should therefore be rejected. In the circumstance, in view of the fact that there is no indication in the docket of this appeal and journal entries thereof that such a report was ever solicited by this Court, I hold that it is not proper to take the opinion expressed by Mr. Jagathchandra into consideration.

At the hearing, learned Counsel for the Appellant submitted that it was only CEB and LECO, that had the authority to supply and install the 165 KVA transformer in question, and that the Respondent could not have done any work under item 01.01 of the Bill of Quantities. He further contended that the parties had in fact contracted on the "misunderstanding" that it was possible for the Respondent to install the transformer when it was supplied by CEB or LECO, but however, in fact it was LECO that installed the transformer which it supplied. Learned Counsel for the

Appellant further submitted that the installation of the transformer involes the supply and erection of a high tension spur line from the existing main line to the transformer, erection of supports, stays, cross arms, insulator, lightening arresters and a meter box with energy meters to measure the energy consumed by the transformer, none of which the Respondent was competent to perform, and which were in fact done by LECO. He invited the attention of Court to the quotation dated 21st April 1998 (D2) made by LECO and the receipt voucher dated 25th May 1998 (D3) issued by LECO showing that a sum of Rs. 596,322.00 was quoted by LECO for the "supply *and installation"* of the transformer and was paid for the said work by the Appellant.

Learned Counsel for the Respondent conceded that the Respondent could not have supplied the transformer which was necessary for the factory, and stressed that it was for that reason that item 01.01 only contemplated the "installation" of the transformer, whereas items 02.01, 03.01, 04.02, 05.01, 05.02, 07.01, 08.01, 08.08 of the Bill of Quantities provided for "supply and installation" of various other apparatus. He therefore submitted that it was intended that the Respondent should *install* the transformer that will be supplied by LECO, and that for this purpose the term "installation" should be given a liberal interpretation taking into consideration the fact that the Respondent was obliged on completion of the work to hand over to the Appellant a fully operational electrical installation in accordance with the specifications. It is relevant to note that at the trial before the District Court, the Respondent gave evidence in support of his case and closed the case marking in evidence the documents marked P1 to P13. He produced *inter alia* the relevant Tender Document containing instructions to tenderers, and other conditions marked P2, the Bill of Quantities filled up by the Respondent

with the tendered amounts for the various items marked P4, and the letter dated 11th December 1997 by which the tender was accepted by the Respondent marked P3.

In the course of his testimony, the Respondent referring to items 01.01 and 01.02. and testified (at page 67 of the Appeal Brief) as follows:-

"මේ සම්බන්ධයෙන් පොඩි ප්‍රශ්නයක් ඇතිවුණා. පැ. 4 හි තිබෙන ඉන්ස්ටලේෂන් ඔෆ් ට්‍රාන්ස්ෆෝමර් (installation of transformer) කියන එක විදුලි බල මණ්ඩලයෙන් තමයි සපයන්නේ. ඒක සවි කලාට පස්සේ කම්බි දාලා කර්මාන්ත ශාලාව ඇතුළට විදුලිය ගෙනියන්න රැහැන් ඇල්ලීමත් යන සියලු දේවල් සවි කරන්නේ අපි තමයි. විදුලි බල මණ්ඩලය කරන්නේ ට්‍රාන්ස්ෆෝමරය ගෙනත් දෙන එක පමණයි. ඊට අමතරව පොළව යටින් ඔක්කොම දාලා මේන් ස්විච් දාලා ඔක්කොම සවි කරන්න ඕන. ඒක මගෙන් ඉටු වෙන්න ඕන. my emphasis)

From the above extract of his testimony, it is clear that the work that was performed by the Respondent consisted of laying cables and wires and providing the electricity connection to the factory *after* the transformer was supplied and installed (සවි කළාට පස්සේ) by LECO. In fact, under cross-examination (at page 75 of the Appeal Brief), he was specifically asked about how he quoted for the installation of the transformer under item 01.01 in the Bill of Quantities marked P4, and his answers are quoted below:-

ප්‍ර: ගිවිසුමට අත්සන් කරන වෙලාවේ කියවලා බැලුවේ නැද්ද?

උ: ගිවිසුමට අත්සන් කරනවා කියන්නේ ඒ ගොල්ලෝ ඉදිරියට කරපු ටෙන්ඩර් පත්‍රයට මිළ ගණන් දැමීමක් පමණයි අපි කළේ. ඒ අයිතමයන් සඳහා යන මිළ ගණන් කියන්න පමණයි අපට තිබෙන්නේ.

ප්‍ර: තමන්ගේ ගිවිසුමේ කොටසක්ද නැද්ද කියන එක පැහැදිලිව කියන්න? පැ. 4 ලේඛණයේ 01.01, 01.02 කියන කොටස් යටතේ විදුලි ට්‍රාන්ස්ෆෝමරයක් සවි කළාද?

උ: ට්‍රාන්ස්ෆෝමරය සවි කරන්න අපිට විදිහක් නැහැනේ.

ප්‍ර: සවි කළාද?

උ: සවි කළේ නැහැ.

It is clear from the answer to the last quoted question that the Respondent did not install the transformer, which admittedly was supplied by LECO. This is further evident from the following portion of his further cross-examination at page 80.

ප්‍ර: "මේකේ අයිතිය තිබෙන්නේ ගොඩනැගිල්ලේ අයිතිකරුට" ගොඩනැගිල්ලේ අයිතිකරු ට්‍රාන්ස්ෆෝමරය මිලදී ගත් බව තමා දන්නවාද? ඊට පස්සේ තමාට මේක දුන්නා?

උ: මිලදී ගත්තම මට දුන්නේ නැහැ, ගෙනල්ලා සවි කළා.

ප්‍ර: කවිද සවි කළේ?

උ: විදුලි බල සමාගමෙන්

ප්‍ර: තමා මෙම ට්‍රාන්ස්ෆෝමරය මිලදී ගත්තෙත් නැහැ, තමා සවි කළෙත් නැහැ?

උ: නැහැ.

In fact, it appears to be the position taken up by the Respondent, in his evidence that the work done by him was to connect the transformer to the electricity room of the factory by laying 4 x 185 Sq mm cables and supplying and installing the Main Switch, and doing the internal wiring. It has been stressed by learned Counsel for the Appellant that these items of work were in fact covered by items 01.02 and 02.01 of the Bill of Quantities, for which the Respondent, admittedly, has been paid in full.

The entire case of the Respondent was based on the letters dated 10th July 1998 (P6) and 21st October, 1998 (P5) which the Electrical Consultant of the Appellant co-operative

society. Rohan Jayasinghe, had sent to its General Manager after the dispute arose. It transpired in evidence that the said Rohan Jayasinghe (hereinafter referred to as the "Engineer") was engaged by the Appellant as the Engineer under whose supervision the work was performed by the Respondent, and that one of his functions was to measure and check the work periodically and recommend payment. When the Respondent claimed payment under item 01.01 and 01.02 of the Bill of Quantities (P4) and the Accountant of the Appellant raised certain queries, the Engineer wrote the letter dated 10th July 1998 (P6) addressed to the General Manager of the Appellant clarifying that item 01.01 of the Bill of Quantities (P4) did not contemplate the *supply* and was confined to the istallation of the transformer that was supplied by LECO. In P6, the Engineer merely stated that:-

> "ඉහත කර්මාන්තායතනයේ විදුලි ට්‍රාන්ස්ෆෝමරය සඳහා මිලගණන් කැඳවීමේ ඇස්තමේන්තු වාර්තාවේ ඇතුළත් කර ඇත්තේ ට්‍රාන්ස්ෆෝමරය සවිකිරීම සඳහා පමණක් බවත්, සැපයීම (විදුලි ට්‍රාන්ස්ෆෝමරය) එයට ඇතුළත් කර නොමැති බවත් දන්වන අතර දර්ශන ඉලෙක්ට්‍රිකල්ස් ආයතනය මගින් ටෙන්ඩර් මණ්ඩලය පිළිගන්නා ලද මුළු මුදලට ට්‍රාන්ස්ෆෝමරය සැපයීම සඳහා මුදලක් ඇතුළත් කර නොමැති බව දැන්වීමට කැමැත්තෙමි.

The gist of P6 is that the cost of the transformer has not been included in the quotation for the installation of the transformer made by the Respondent. It appears that the Appellant co-operative society was not satisfied with this clarification and had requested the Respondent to give a statement of the work he claimed the had done under items 01.01 and 01.02 of P4. This he did by his letter dated 26th August 1998, marked P7, addressed to the General Manager of the Appellant setting out the basis of his claim under these two items aggregating to Rs. 645,000.00. The said letter contained a list of work claimed by the Respondent to have been performed under items 01.01 and 01.02 of P4, which list is quoted below in full in view of its significance:-