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

[2011] 2 SRI L.R. - PART 15

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DIGEST

(*b*) *The petitioner, while he was the Commander of the Army had convened a General Court Martial to try Major Anuruddha Perera on several charges including one of providing intelligence to the LTTE to assassinate the 4th respondent who as a Brigadier, was then the overall Operations Commander Colombo. The said Court Martial found the said accused officer guilty of the said charge and passed a death sentence on him. The said sentence was confirmed by the petitioner as the convening officer but was later commuted to life imprisonment by the President of the Republic. These respondents file herewith, marked 2R16 and 2R17 respectively the charge sheet served on the said Major Anuruddha Perera and the findings. sentence and the commutation thereof by the President of the Republic and plead the same as part and parcel hereof.*

(c) While the 4th respondent was out of the island following a course at the Philippines at the time the petitioner is alleged to have received the information on which he based his aforesaid allegation, the Petitioner most significantly took no action whatsoever to recall the 4th respondent and/ or to take further action against him which he would have done if he himself attached any credence to the information which he received.

(d) ***In the circumstance aforesaid, it is most evident that the Petitioner has misrepresented material facts to Your Lordships' Court and suppressed material facts from Your Lordships' Court in order to mislead and / or deceive Your Lordships' Court*** *(emphasis added).*

Paragraph 35 not reproduced.

36. These Respondents deny the averments in paragraph 42 of the petition and state further as follows:-

(a) The 2nd Respondent who was the General Officer Commanding 22nd Division at Trincomalee was sent to India on the recommendation of the Petitioner to follow a course at the National Defence College in New Delhi in December 2007. Accordingly, from the date he proceeded to India he ceased to hold the office of the General Officer Commanding the said Division in Trincomalee. On his return to Sri Lanka, he was appointed the Commander/ Vice Chancellor of the Kotelawala Defence University and was hence, at all times material, in the "command stream".

(b) The 3rd Respondent was the General Officer Commanding Division II at Panagoda at the time of his appointment as a Military Liaison Officer at the Ministry of Defence by the Petitioner after which he was appointed the General Officer Commanding Division 21 at Vavuniya by the Petitioner. Accordingly, the 3rd Respondent was at all times, material, in the command stream of the Army. These Respondents file herewith, and plead as part and parcel hereof marked 2R18 and 2R19 respectively, the appointment of the 3rd Respondent as the officiating General Officer Commanding II Division dated 29th March 2006, the appointment of the 3rd Respondent as the officiating General Officer Commanding 21 Division dated the 26th October 2007 and the appointment of the 3rd Respondent the General Officer Commanding II Division by the Petitioner on or about the 11th January 2008 respectively, and the attachment of the 3rd Respondent to the Ministry of Defence made by the Petitioner on or about the 5th April 2006 has been pleaded above and marked 2R14.

(c) The 3rd Respondent was appointed the Major General on 10th January 2008 on the recommendation of the Petitioner who was the then Commander of the Army.

(d) The 4th Respondent was appointed the Overall Operations Commander Colombo while still a Brigadier and the Commander of the Artillery Brigade which played a key role in the was against the LTTE. Both said appointments were made by the Petitioner and these Respondents file herewith marked 2R20 and 2R21 respectively and plead as part and parcel hereof true copies of the appointment dated 31st January 2008 of the 4th Respondent as the Overall Operations Commander of Colombo and the appointment made by the Petitioner on or about 28th Mach 2007 of the 4th Respondent as the Commander of the Artillery Brigade with effect from the 9th April 2007. It is evident from the said document that prior to his appointment, the 4th Respondent was the Commander of 112 Brigade and hence manifestly a person who was at all times material in the command stream of the Army.

(e) The 4th Respondent was promoted as Major General on or about the 21st January 2009 on the recommendation of the Petitioner and is now the Security Force Commander at Jaffna.

(f) In the circumstances aforesaid, ***these respondents plead that the Petitioner, has once more, uttered falsehood to Your Lordships" Court, misrepresented facts to Your Lordships' Court and suppressed material facts from Your Lordships' Court and committed every one of such acts with a view to misleading and/or deceiving Your Lordships" Court*** (emphasis added).

The identical averments were made in the objections filed for the 4th respondent.

Should not the petitioner counter the strong allegations of suppression of material facts and misrepresentations? How does the petitioner respond to the 2nd to 4th respondents? The petitioner chose not to respond at all which is found in paragraphs 6 and 7 of the counter affidavit/objections.

Paragraphs 6 and 7 of the petitioner's counter affidavit/objections

6. *The petitioner states that, whilst denying each and every allegation leveled against him by the Respondents,* ***it is not part of the petitioner's case to make counter allegations against each and every averment*** *and/or allegation already leveled against him by these respondents and convert thee proceedings into a battleground of personal allegations.*

7. *For that reason and in that spirit, the petitioner states, whilst denying each and every allegation/averment in the objections, that* ***the petitioner will not deal specifically with each averment in turn*** *and states this should not be construed as an admission to any such averments.*

Thus it is clear to what extent the petitioner wished to meet the defence case. Did the petitioner lie to court deliberately in the petition, especially in paragraphs 40 a, b & c. In that event the petitioner should know that when the truth is revealed the petitioner would lose. In the written submissions tendered on behalf of the 2nd to 4th respondents, out of 24 pages, 11 pages had been devoted to write in detail with regard to the suppression of material facts. It is dealt with

under the heading Suppression and Misrepresentation from page 6 to 16 of the written submissions.

The petitioner in the written submissions tendered on 10.5.2011 does not refer to the matters dealt with by the 2nd to the 4th respondents in paragraphs 34 a - e and fi - iii and paragraphs 36a - f of the objections. The petitioner meets the detailed written submissions of the counsel for the 2nd and 3rd respondents with two sentences in the written submissions tendered on 19.5.2011 which are as follows:-

9. The alleged misrepresentation/ suppressions are misconceived in fact and in law.

10. The alleged misrepresentation/ suppressions are irrelevant to the matters to be determined by court.

Oral submissions

In the oral submissions the learned President's Counsel for the petitioner did refrain from addressing court with regard to the allegation of suppression of material facts. The learned counsel also refrained from addressing court with regard to any mis-directions or non directions on the part of the 5th respondent. Learned counsel for the 2nd and 3rd respondents addressed court in great detail taking most of his time (three of the four days) on the suppression of material facts. The learned counsel in his submissions referred to the specific allegations made against the 2nd to 4th respondents. In reply the learned President's Counsel for the petitioner addressed court for three and a half days. However the learned counsel again refrained from addressing court with regard to the allegation of suppression of material facts adverted

to by the learned counsel for the 2nd and 3rd respondents. The learned President's Counsel for the petitioner maintained a deafening silence with regard to the suppression of material facts and also with regard to the mis-directions or non directions of the 5th respondent.

Hence the attention of the learned President's Counsel for the petitioner was drawn by me to the allegations made in paragraphs 40 a, b and c and 65 "u" and "v" of the petition and to the reply by the 2nd to 4th respondents in paragraphs 34 and 36 of the objections. In reply the learned Presidents Counsel submitted that one is required to disclose everything and the principle of *uberrima fides* apply only in an *exparte* application. He submitted that it does not apply to *inter parte* Application. The learned President's Counsel also submitted in court that his case is that the 2nd to 4th respondent were biased as they were removed by the petitioner from the command stream to the common stream. He submitted that he stands by this story and therefore thought it un-necessary to reply to the complaint of suppression of material facts.

It was the position of the 2nd to 4th respondent that at all times they were in the **command stream.** It was submitted by the learned counsel for the 2nd to 4th respondents that no evidence either oral or documentary was produced or even adverted to prove that the petitioner had removed any of the 2nd to 4th respondents from the command stream and relegated them to the common stream. The learned counsel submitted that a large number of documents have been filed to satisfy court the 2nd to 4th respondents have been in the command stream throughout and none of these documents have been challenged.

The learned President's Counsel for the petitioner in the written submission filed on 3.10.2011 took a surprise move by withdrawing bias as a ground to support for a writ.

Written submission filed on 3.10.2001 for the petitioner at pages 26 and 27 from paragraphs 243-248 and 253-255

*(243) It is crucial to note that all of the alleged "suppression" goes **ONLY** to the ground of bias.*

(244) In other words, the allegations (even if suppressed) would be relevant when court considers whether the Military Tribunal was biased or not.

*(245) However, **bias was not one of the main grounds urged at the hearing. In fact, it was not even argued that the application for writ should be granted on the ground of bias.***

*(246) The petitioner's case before Your Lordships in **this application does not depend upon bias of the 2nd, 3rd and 4th respondents.***

*(247) **The petitioner's case before Your Lordship's Court did not depend on the bias.***

(248) In the circumstances BIAS IS NOT A ground material to this application.

At Page 27

*(253) **Thus clearly the argument of the petitioner centered around the question of Conviction and sentence and the question of bias did not feature in such submissions** (emphasis added).*

*(254) In the circumstances, it is submitted that misrepresentation/ suppression of facts that relate **ONLY** to bias is not **material** or even relevant to the main thrust of the petitioner's case.*

(255) Thus, in any event it is not a suppression of a material fact.

The reason according to the petitioner for the removal of the 2nd respondent from the command stream to the common stream was that the 2nd respondent made a false statement at a court of inquiry convened by the petitioner and was found to be untrustworthy and lacking integrity. This was the allegation referred to in paragraph 40a of the petition. Paragraphs 40 b and c are concerning 3rd and the 4th respondents. Therefore these matters are of paramount importance and are very material to the case.

The learned President's Counsel for the petitioner takes a different stance in the written submissions filed on 10.5.2011 under the heading **Grounds for challenge** (of the conviction and the sentence) at Page 2 paragraph 8 where he relied on bias as a ground for the issue of writ.

Paragraph 8 of the written submissions of 10.5.2011 is as follows:-

(8) The following are the grounds for challenge (out of sub-paragraphs "a" to "o" I will reproduce only sub-paragraphs "b" and "c".

*(b) the **bias of the members of the military tribunal***

*(c) the **bias of the Judge Advocate***

It is clear that the petitioner got the court to issue notice on the 2nd to 4th respondents on an ex parte application. One of the grounds the petitioner alleged was bias on the part of the 2nd to 4th respondents. The heading to paragraphs 39 to 49 of the petition is **Bias and objections to President/ Member of Court Martial II**. The 2nd to 4th respondents filed objections countering the allegation of bias to which the petitioner did not respond. The petitioner in the written submissions filed thereafter reiterated the ground with regard to the bias of the 2nd to 4th respondents who were the members of the Court Martial.

The petitioner filed CA Application No. 350/2010 and in that too the petitioner relied on bias as a ground. In paragraphs 42, 71 and 73 a – e of the petition in CA Writ 350/2010 the petitioner had alleged bias on the part of the 2nd to 4th respondents. This case was dismissed by the Court of Appeal on 29.6.2010. However the petitioner maintained that this order is incorrect and an appeal was filed in the Supreme Court on 29.10.2010 in SC (Spl) LA Application No. 141/2010 to reverse the judgment of the Court of Appeal. The petitioner mentioned this fact in this application (CA 679/2010) in order to further strengthen the fact that the 2nd to 4th respondents were biased towards the petitioner. Thus one can see to what extent the petitioner has relied on bias as a ground to get a writ of certiorari issued. It is by averring these grounds that the petitioner was able to get notice issued by this court on the respondents. The appeal filed in the Supreme Court was not supported for more than a year and was thereafter withdrawn. It had taken more than one year for the petitioner to realize that he was not relying on bias of the 2nd to 4th respondents.

The 2nd to 4th respondents in their objections (paragraphs 34 and 36 of the objections), in the written submissions and oral submissions by learned counsel strongly disputed the allegation of bias that was leveled against them by the petitioner. The petitioner should have met those facts and explained as to why the petitioner made allegations against the 2nd to 4th respondents in the petition particularly in paragraph 40 a, b and c. Without meeting the argument what the learned President's Counsel for the petitioner did was to conveniently withdraw the issue saying that he does not rely on bias any longer.

Then the question arises as to why the learned counsel relied to this ground at the time of moving for notice. Throughout, the petitioner's case was that the 2nd to 4th respondents who were the President and the Members of the military tribunal had an animosity towards the petitioner for having removed them from the command stream to the common stream. The petitioner had explained specifically, in paragraphs 40 a, b and c of the petition, the reason for the removal. The respondents replied to these allegations in detail in the objections filed and later on in the written submissions and in the oral submissions. Now the petitioner cannot say that he is no longer relying on that ground.

The petitioner cannot escape without clearing the issue relating to bias with a sweeping statement that it is not relevant. Now the learned President's Counsel submits that he is no longer relying on bias as a ground to support for a writ. Bias as a ground was completely abandoned. The question is, why did the learned counsel abandon the ground of bias in his written submissions tendered on 3.10.2011?

Was this because the petitioner found it difficult to meet the allegation of suppression of material facts?

The learned Present's Counsel for the petitioner took another unprecedented move in the written submissions filed on 3.10.2011 (after oral submissions). The learned President's Counsel in the written submissions so filed, from pages 45-51 dealt with the summing up of the 5th respondent (made before the Court MRTIl II). Prior to this, the only other instance where any reference was made to the summing up was in the petition in paragraph 65 "U" and "V". The 5th respondent denied the allegations made in paragraphs 65 "u" and "v" in the objections. The petitioner did not mention the summing up in the counter objections or in the written submissions filed thereafter on 10.5.2011.

Thus the 5th respondent in the written submissions filed on 10.5. 2011 referred to mis-directions and non directions under the heading ***No Misdirection or non direction on the part of the 5th Respondent:*** It states thus that *"the pleadings filed before this court does not disclose any specific averment pertaining to any misdirection and/ or non direction on the part of the 5th Respondent"* (as pg 44 of the written submissions).

The petitioner filed a written submission on 19.5.2011 in reply and not a word was mentioned of the summing up. The learned President's Counsel in his lengthy oral submissions and the submission in reply did not mention a word about the summing up. Although the learned President's Counsel was reminded about not addressing court on the summing up with regard to its mis-directions and non directions the learned counsel did not respond and it was understood that there was nothing to complain about the summing up.

Written submissions tendered after argument is optional. Such submissions should contain only a synopsis of the oral submissions together with any authorities to support. It should not deal with matters outside the oral submissions. Written submissions tendered on matter not dealt with in the oral submissions, and at a time where the opponents do not have the opportunity to answer is unprecedented and should not be encouraged.

It is perfectly settled that a person who makes an ex parte application to court is under an obligation to make that fullest possible disclosure of all material facts within his knowledge **and if he does not make that fullest possible disclosure, then he cannot obtain any advantage which he may have already obtained by him. This is perfectly plain and requires no authority to justify it"** (*R vs. Kensington Income Tax Commissioner*[3] Kay J. Held in *Republic of Peru vs. Driefius Brother and com* [4] at 803 that "it is most important to maintain most strictly the rule that in ex-parte applications the utmost good faith must be observed. If there is an important misstatement, I have never hesitated and never shall hesitate until the rule is altered to discharge the order at once, so as to impress upon all persons who are suitors in the courts the importance of dealing in good faith with the court when ex-parte applications are made". **If there is anything like deception practiced on the courts, the court ought not to go into the merits of the case, but simply say, "we will not listen to your application because of what you have done"** (*Daglish vs. Jarvie* [5])

In *Alphonso Appuhamy vs. Hettiarachchi*[6] Pathirana J said that when an application for a prerogative writ, or an

injunction is made, it is the duty of the petitioner to place before court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts and the petitioner must act with *uberrima fides*. Pathirana J. observed that had the petitioner made a full disclosure of all material facts and appraised the courts, the courts may not have issued notice in the first instance.

"The necessity of a full and fair disclosure of all material facts to be placed before the Court when an application for a writ or injunction is made and the process of the Court is invoked is laid down in the case of *King vs. The General Commissioner for the purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmond de Poignc (supra)*. Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application.

The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit an therefore it was justified in refusing a writ of prohibition without going in to the merits of the case. **In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go in to the merits of the application, but will dismiss it without further examination**. (*Athula Ratnayake vs. Lt. Col. Jayasinghe*[7] *Laub vs. Attorney General and Another*[8] *Walker Sons & Co. Ltd., vs. Wijayasena*[9]

In *Sarath Hulangamuwa vs. Siriwardene, Principal, Vishaka Vidyalaya, Colombo 5*[10] at 282 Siva Selliah J

expressed his agreement with the submission of the learned Deputy Solicitor – General that all these facts pertaining to residence at Dehiwala proved by 1R5 were withheld from this Court in the petitioner's application for writ which is thus lacking in *uberiima fides* and that on this ground too the application must fail. **"A petitioner who seeks relief by writ which is an extraordinary remedy must in fairness to this Court, bare every material fact so that the discretion of this Court is not wrongly invoked or exercised.** In the instant case the fact that the petitioner had a residence at Dehiwala is indeed a material fact which has an important bearing on the question of the genuineness of the residence of the petitioner at the annexe and on whether this Court should exercise its discretion to quash the order complained of as unjust and discriminatory. On this ground too the application must be dismissed for lack of *uberrima fides*".

The application of the petitioner thus having failed on the above grounds, it is hardly necessary to consider the alleged ground of discrimination against the petitioner's child on the ground that after the refusal of his application some other children with less qualification have gained admission. Discrimination and denial of equal rights cannot be agitated in an application for Writ of Certiorari and must form the subject of an action for fundamental rights which cannot be canvassed in this court. I see no merit in this application for Writ of Certiorari for the reasons set out and dismiss this application with costs fixed at Rs. 315".

In *Hotel Galary vs. Mercantile Hotel Ltd*[11] it was decided that the misstatement/misrepresentation of the true facts by the plaintiff which put an entirely different complexion on the

case as presented by him when the injunction was applied for ex-parte, would amount to mis representation or **suppression of material facts warranting its dissolution without going in to the merits**.

Marsoof J in Dahanayake vs. Sri Lanka Insurance Corporation Ltd (12) at 77 held that " the 1st respondent has also taken up a preliminary objection on the basis that the petitioners have suppressed or misrepresented material facts. This by itself is a serious obstacle for the maintenance of the petitioners' case. Our courts have time and again emphasized the importance of full disclosure of all material facts at the time a petitioner seeks to invoke the jurisdiction of this court, by way of writ of certiorari, mandamus or any other remedies referred to in Article 140 of the Constitution.

In this context, the failure of the petitioners to tender with the petition and joint affidavit filed by them a copy of the Arbitral Award dated 28th January 1998 (R 10) to which the 1st, 2nd, 3rd, 8th, 11th and 35th petitioners were parties is extremely significant. It is important to note that the impugned order of the 2nd respondent marked P11, which the petitioners seek to have quashed by way of a writ of certiorari specifically refers to the said Arbitral Award marked R10. In fact one of the primary considerations in the order sought to be quashed (P11) is the fact that the complaint of the petitioners in regard to their claim for arrears at the enhanced rate, had already been considered and determined in the said award marked as R10 made in 1998. I am therefore of the view that the petitioners were bound to produce with their application a copy of this Arbitral Award, more so as the 2nd respondent had cited and relied upon the said award in his

order marked P11. The petitioners have omitted to annex to their petition and affidavit a copy of this Award which has comprehensively analysed the claim of the petitioners" and proceed to reject the same.

Marsoof J. cites with approval the case of Blanca Diamonds (Pvt) Ltd v. Wilfred Van Else & Others[13] where Jayasuriya J emphasized the duty a party owes to Court for a full and frank disclosure when initiating writ proceedings. Jayasuriya J held thus " in filing the present application for discretionary relief in the Court of Appeal Registry, the petitioner company was under a duty to disclose *uberrima fides* and disclose all material facts to this Court for the purpose of this Court arriving at a correct adjudication of the issues arising upon this application. In the decision in *Alponso Appuhamy v. Hettiarachchi (supra)* Justice Pathirana in an erudite judgment, considered the landmark decisions on this province in English Law and cited the decisions which laid down the principle that when a party is seeking discretionary relief from the court upon an application for a writ of certiorari, he enters in to a contractual obligation with the Court when he files an application in the Registry and in terms of that contractual obligation he is required to disclose *uberrima fides* and disclose all material facts fully and frankly to this court."

Marsoof J thus held that the petitioners were in breach of this solemn covenant and are therefore not entitled to any relief.

Having carefully considered the above authorities together with the facts of this case I am of the view that the petitioner is guilty of non disclosure and therefore not entitled to a discretionary remedy. Hence this application is dismissed

in limine. In view of the fact that the petitioner is serving a sentence of imprisonment I make no order for costs.

UPALY ABEYRATNE J – I agree.

Application dismissed.

ABDUS SALAM, J.

I have had the benefit of perusing in draft, the judgment of my brother Eric Basnayake, J and respectfully concur with him both in regard to his analytical approach towards the commonly known *R v. Kensington Income Tax Commissioner's, exp p Princess Edmund De Polignack (Supra)* principle and its applicability to the facts of the instant application. Since the decision of my brother judge is self explanatory and exhaustive as regards factual matters, it is unnecessary for me to recapitulate them or deal with them at length save those which are extremely necessary. Hence, my exercise is limited only to elaborate on the decision, with the addition of few words, mainly on the legal position.

As far as the stance of the petitioner is concerned the issue relating to BIAS loomed large both in the pleadings and the submissions. However, quite surprisingly, the petitioner has attempted to maintain at one stage of the case that the ground of "bias" is not material to the application though it had been admittedly pleaded. A perusal of the petition reveals that one of the grounds alleged therein and continued to be relied upon when supporting the application for notice was the motivation followed by actual or apparent bias attributed to the 2nd to 5th respondents. The exact details of the alleged bias have been elucidated in the petition setting apart 27 paragraphs out of 70 paragraphs. This works out to almost 40 per centum of the entire petition. Bias, which is in the forefront of the petitioner's case both in this application

and also in CA 350/2010, has been set out under a separate title "BIAS AND OBJECTIONS TO PRESIDENT/MEMBERS OF COURT MARTIAL II". Having given the issue of bias such great prominence in the petition and placed reliance so heavily on it to obtain notice, in my view the petitioner cannot be permitted to resile now from that position, particularly when the respondents argued the question of suppression. In effect that would amount to condoning act of blowing hot and cold which is totally inconsistent with the rules of equity.

It is important to recall at this stage that one important ground considered by my two brothers who initially heard this matter, was the reliance placed by the petitioner on that ground before issuing notice. In the circumstances, the element of bias as pleaded by the petitioner has continued to be part and parcel of the case of the petitioner.

A maxim known almost during the whole of last century and having its origin in equity courts is that one must approach the court with clean hands. The maxim has been so indoctrinated in the legal system that almost all our courts, loath to entertain claims that are tainted with non-disclosure of **material facts**. It is particularly so when the benefit of the maxim is invoked by the respondent or raised by court *ex mero motu.* (Emphasis is mine).

Material facts are those which are material for the judge to know in dealing with the application as made; materiality is to be decided by court and not by the assessment of the applicant or his legal advisers; see *Rex v. Kensington Income Tax Commissioner, per Lord Cozens –Hardy M. R. (supra)* at p. 504, citing *Dalglish v. Jarvie (1850) (supra)*, and Browne – Wilkinson J. in *Thermax Ltd. V. Schott Industrial Glass Ltd.*(14). It was held in the case of *Bank Mellat v. Nikpour*(15) and

cited with approval in *Brink's-MAT* [16] that one must make proper inquiries before making an application for a discretionary remedy and his duty to disclose all material facts and refrain from misrepresenting like facts, therefore, applies not only to material facts known to him but also to any additional facts while he would have come by his knowledge had he made proper inquiries.

If material non-disclosure is established, "the court will be astute to ensure that a plaintiff who obtains notice exparte without full disclosure is deprived of any advantage **he may have derived by that breach of duty:"** see per Donaldson L.J. in *Bank Mellat v. Nikpour (supra)* at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners' case (supra)* (No emphasis is made in the judgment as reported)

Whether the facts not disclosed are of sufficient materiality to justify or require immediate discharge of the order without consideration of the merits, depend on the importance of the facts to the issues which are to be decided by court. The answer to the question whether the non-disclosed, is an important consideration. However, it is not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case presented. I do not propose to delve into the question as to the extent of non-disclosure in the instant matter since it has already been exhaustively dealt in the main decision.

Be that as it may, for purpose of completencess, I feel obliged to re-echo the warning sounded by Lord Denning M.R. in *Bank Mellat v. Nikpour [supra]* against the rule being put into effect in respect of every omission, to automatically discharge the injunction. His Lordship therefore suggested that a *locus poenitentiae* may sometimes be afforded, *Locus*

poenitentiae is a Latin phrase associated in contractual law and means an opportunity to withdraw from a contract or obligation before it is completed.

Undoubtedly, the petitioner in this matter claims to have exercised the statutory right conferred on him by section 79 of the Army Act. In order to challenge the decision of the Court Martial he has placed other significant grounds to avoid the impugned decision. These grounds include the application of *ejusdem generis* rule to the charges preferred against the petitioner and the question whether the procurement guidelines in terms of Article 33(f) of the Constitution of the Republic of Sri Lanka can be construed as LAW within the meaning of the Constitution. Even though the decision on those issues may be of public importance, the fact that the petitioner is guilty of not being frank with Court on the other grounds, demands that we refrain from looking at the merits of the application for the present purpose.

This is a clear instance of this Court having been placed under the daunting task of determining, as it happens frequently, not to look at the merits of the petitioner's case, for which eventuality he has to blame himself. No doubt, by reason of the decision reached in this application, the petitioner had missed a perfect opportunity to involve the Court in the interpretation of the law on the two issues referred to earlier, as there are no direct authorities on those points. However, in passing it may not be inappropriate to have it placed on record that the application of the petitioner is dismissed *in-limine* and therefore this judgment is entered *nunc pro tunc.*

I am therefore in total agreement with the reasoning adopted in the main judgment and hence endorse the same without any hesitation.

Application dismissed.

ROSALIN HAMI V. HEWAGE HAMI AND 8 OTHERS

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.
AMARATUNGA, J AND
IMAM, J.
S.C APPEAL NO. 15/2008
S.C (SPL.) L. A. NO. 01/2008
C. A. APPLICATION NO. 362/1995
D. C. TANGALLE NO. 215/L
OCTOBER 28TH 2010

Possessory action – Possession must be continuous, and peaceful and for a certain period – Possession disturbed by acts which prevent the possessor from enjoying the free and full use the land – Interrupted – If the continuity of possession is broken? Exllna ordina - Section 114 (d).

At the commencement of the trial, the parties agreed that the only two matters for determination was whether possession had been handed over to the Plaintiff by the Fiscal of the District Court of Tangalle in Case L/882 and whether there is evidence to prove exclusive and uninterrupted possession of the disputed corpus by the 2nd Defendant –Appellant – Petitioner.

Case bearing No. L/ 882 of District Court Tangalle was filed by the Respondent to obtain a declaration of title and possession by evicting the 1st Defendant who was in occupation of this land and who was the spouse of the present Appellant. The Appellant claimed that though judgment had been entered in favour of the Respondent in that case, the writ for possession was never executed and that the possession of the land had not been delivered to the Respondent, a fact that was strongly challenged by the Respondent.

However, it transpired after careful perusal by the court, writ was executed on 23.7.1962 and there is an explicit endorsement that the possession of the land had been delivered to the Respondent. Upon perusal of all relevant documents the District Court came to the finding that the possession had been duly handed over to the Respondent by the Fiscal who executed the writ of delivery of property.

The Respondent had been in occupation until the possession was disturbed by the Appellant on 18.10.1962.

Held:

(1) There was no error in law in the judgment of the Court of Appeal where it concluded that the possession was handed over to the Respondent and the legality of the Fiscal's Report has not been assailed.

(2) The Appellant has not proved prescription and she has also failed to prove that she was in an undisturbed possession adverse to the interest of the Respondent for a continuous period of 10 years. Furtheremore, as the land is an undivided portion of the land which was co-owned the Appellant has not proved ouster or adverse possession against the Respondent.

Cases referred to:

(1) Hariette v. Pathmasiri (1996) 1 Sri L.R. 858

(2) Sura v. Fernando 1 ACR 95

(3) Simon Appu v. Christian Appu (1896) 1 NLR 288

(4) Ettana v. Naide (1878) 1 SCC 11

APPEAL from the judgment of the Court of Appeal

Faiz Musthapa, P.C. with *Amarasiri Panditharatne* for the 2nd Defendant – Appellant – Petitioner

D. M. G. Dissanayake for the substituted plaintiff – Respondent - Respondents.

Cur.adv.vult

December 03, 2010

MS. SHIRANEE TILAKAWARDANE, J.

Special Leave to Appeal was granted on the Application of the 2nd Defendant-Appellant-Petitioner (hereinafter

referred to as the Appellant) on the questions of law set out in paragraph 8 (a) – (g) of the Petition dated 01.01. 2008.

However at the commencement of the arguments Counsel agreed that the only two matters for determination was whether possession had been handed over to the Plaintiff by the Fiscal in District Court Tangalle Case No. L.882 and whether there is evidence to prove exclusive and uninterrupted possession of the disputed corpus by the 2nd Defendant-Appellant-Petitioner

An earlier action was instituted in District Court Tangalle Case bearing No. L.882 by the Plaintiff-Respondent-Respondents in relation to the same land that is presently in dispute, between the parties who were in occupation of the land at that time, and the Appellant at the time of the institution of the said action was not a party, but was the spouse of the 1st Defendant in that case. The Appellant did not seek to intervene in the said action.

The Plaintiff-Respondent (hereinafter referred to as the Respondent) who had instituted action in this case relied on the pedigree set up by him and on the chain of title depicted in Deeds P1 to P5 and submitted that he had purchased the land in 1954 from Kirigoris by a Deed of Sale dated 19.09.1954 bearing No. 1944 (marked P6) attested by D. B. Karunanayake, Notary Public.

The parties in the present case admitted the identity of the corpus. It was also further admitted that the corpus had been correctly depicted in plan No. 137 (marked P10) prepared by T. Weerasinghe, Licensed Surveyor which was 1R 22P in extent, and which was prepared through a Court Commission issued in District Court Tangalle Case bearing No. L.882.

Case bearing No. L/882 of District Court Tangalle was filed by the Respondent, to obtain a declaration of title and possession through eviction of the 1st Defendant, who was at the time, in occupation of this land, and who is the spouse of the present Appellant. The Respondent had obtained Judgment in his favour, and obtained an Order of eviction against the 1st Defendant in that case. The Appellant at that time was not a party to the case and had made no Application to intervene. It is evident that her purported claim on Deed bearing No. 3829 dated 03.10.1961, was prior to the possession being handed over to the Respondent by the Fiscal 17.09.1962, but at the time she did neither sought to challenge the execution of the said writ in Court nor intervened in the case.

The Counsel for the Appellant claimed that though the Judgment had been entered in favour of the Respondent in District Court of Tangalle case No. L/882, the writ for possession was never executed and that possession of the land had not been delivered to the Respondent, a fact that was strongly challenged by the Respondent.

In this context, this court has carefully perused the writ of delivery of immovable property issued by the Learned District Court Judge. This was executed on 23.07.1962. In terms of the Fiscal Report pertaining to the execution of this writ and the affidavit dated 17.09.1962 of D. de S. Abeyweera the Fiscal Officer, there is an explicit endorsement that the possession of the land had been delivered to the Respondent. (The Plaintiff in Case No. L.882 referred to above) This was marked as P11 and produced as evidence in the present case. In this context, this Court rules on a statutory presumption in favour of the execution, in terms of Section 114 (d) of the Evidence Ordinance. This Section reads as follows;

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the com-

mon course of natural events, human conduct, and public and private business in their relation to the facts of the particular case – that judicial and official acts have been regularly performed."

This evidence contained in the affidavit has not been challenged either by raising an issue on this matter or calling the Fiscal officer who executed the writ and eliciting the fact that possession had not been handed over as claimed by the Appellant. No independent evidence was led to rebut this presumption.

The Appellant submitted that evidence of Wijemuni Arachchige Peiris should be relied upon to prove that possession had never been handed over as alleged, but his evidence was inconsistent in so much as under cross examination, he admitted that he was not there at the time the Fiscal came to execute the writ and in the circumstances, it can be determined that he is not in a position to testify that the Fiscal has not handed over the possession. Under these circumstances, this Court comes to a finding that the possession had been duly handed over on 17. 09. 1962 to the Respondent by the Fiscal executing the Writ of delivery of property.

In the circumstances this court holds that there was no error in law in the Judgment of the Court of Appeal where it concluded that the possession was handed over to the Respondent by the Fiscal in Case No. L/882, and this court further holds that the legality of the Fiscal's Report has not been assailed.

Therefore, the claim by the Appellant that the possession of the disputed land had never been handed over to the Respondent is untenable and is not based on the facts of this case.

The next matter urged by Counsel for the Appellant was whether there is evidence to prove exclusive and uninterrupted

possession of the corpus by the Appellant. It is relevant to mention that the Appellant also produced Deed bearing No. 3829 dated 03.10.1961 attested by Lionel Amaraweera (marked 2V4) had been produced to purportedly prove her title. This Deed explicitly stated that it was an undivided portion of the land and that her purported claim on the Deed was only for 5/90 of the said corpus, less than what is now being claimed by the Appellant.

In the case of *Hariette vs. Pathmasiri* (1) (SC) the Plaintiff produced title Deeds to undivided shares in the land but her action being one for declaration of title to the entirety she cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and acquisition of prescriptive title by ouster. Our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land because the owner of the undivided share has an interest in every part and portion of the entire land. But such was not the case formulated by the Plaintiff.

As it was held in the case of *Sura vs. Fernando*(2) a co-owner was allowed to maintain an action of *rei vindicatio* in respect of his share of his property in dispute where the whole property was claimed by the defendant, and where it was found possible to decide the action without interfering with or endangering the right of any other co-owners.

In considering the present case, it is pertinent to note that an action bearing No. 25101 (marked 2V3) dated 09.08.1963 had been instituted in the Magistrates Court of Walasmulla by the Respondent alleging that the Appellants had committed criminal trespass by forcibly entering the land on 18.10.1962. The case was dismissed on the grounds that the Respondent was absent in court on 10.07.1966. On 15.07.1966, the Respondent instituted a fresh action bearing

No. 2844 in the Magistrate's Court of Walasmulla (marked 2V2) on the same basis against the Appellant, her spouse (the 1st Defendant in L/882) and his mother. It was admitted by the parties that this case was still pending in the Court. Indeed, a further complaint was lodged by the Respondent to the Grama Sevaka on 20.07.1978 (marked P12) that the Appellant was continually disturbing the possession of the Respondent in this case.

When one considers the fact that having obtained the possession, the Respondent had been in occupation until the possession was disturbed by the Appellant on 18.10.1962, and that litigation is continuing, the Appellant has not proved that she was in undisturbed and uninterrupted possession adverse to the Appellant as pending suits, even when they become dormant, stop prescription.

In the full bench decision of *Siman Appu vs. Christian Appu*[3] it was stated that, "Possession" of a land must be continuous, and peaceful, and for a certain period. It is "interrupted" if the continuity of possession is broken either by the disputed legitimacy putting the possessor out of the land and keeping him out of it for certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party preventing it is not in occupation.

And possession is "disturbed" either by an action intended to remove the possessor form the land, or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user.

In *Ettana vs. Naide,*[4] the Plaintiff sued the Defendant for the recovery of certain lands. The answer was filed nearly 12 years after the date of the libel and set up a right to hold

the land sued for by prescription. The defendant admittedly held possession of the land during the whole of the interval between the date of the filing of his answer, and that of filing the libel and during some period antecedent thereto, but he failed to prove that the period of possession far previous to the suit extended back so far as ten years.

It was held that the possession contemplated by the Prescription Ordinance is a possession of ten years previous to the institution of the suit, and that the possession of the defendant since the institution of this suit, though such possession should exceed the term of ten years, could not give him a title by prescription.

Indeed, even the title Deed (marked 2V4) which was referred to above which was relied upon by the Appellant refers to an undivided land where the boundaries do not tally with the plan which admittedly referred to the corpus in this case and which was marked as P10.

Under these circumstances, this Court finds that the Appellant has not proved prescription and that she has also failed to prove that she was in an undisturbed possession adverse to the interest of the Respondent for a continuous period of 10 years.

Furthermore, as the land is an undivided portion of the land which was co-owned the Appellant has not proved ouster or adverse possession against the Respondent in this case.

Accordingly for the above reasons the Appeal of the Appellant is dismissed. No costs.

AMARATUNGA, J. – I agree.

IMAM, J. – I agree.

Appeal dismissed.