MADAN MOHAN
V.
CARSON CUMBERBATCH & CO. LTD.

SUPREME COURT
TAMBIAH, J., L. H. DE ALWIS, J., SENEVIRATNE, J.,
H. A. G. DE SILVA, J., AND BANDARANAYAKE, J.
S.C. REFERENCE NO. 2/88.
D.C.COLOMBO 2828/Spl.
JULY 6, 7, 11, 12, 14, 15, 18 to 22, 1988.

Court sittings — Are sittings in Chambers sittings in Public? — Affidavits — Can affidavits under section 213(3) of the Companies Act No. 17 of 1982 be in the English Language? — Articles 106(1), 24(1) and 125 of the Constitution — Difference between English and Sinhala texts of the Constitution — Affidavits Act No. 73 of 1953.

The Additional District Judge referred the following questions under Article 125 of the Constitution to the Supreme Court:

(1) Was the interim order issued against the 2nd, 3rd and 7th respondents in a room which is not an open Court on 05.02.1988, a violation of Article 106 of the Constitution.

(2) Is the affidavit filed by the 2nd, 3rd and 7th respondents in accordance with the provisions of section 213(3) of the Companies Act of 1982, an affidavit that can be produced before a Court in accordance with Article 24(1) of the Constitution.

Under Article 106 the sittings of every court shall be held in public and all persons shall be entitled freely to attend such sittings.

Article 24(1) stipulates that the official language shall be the language of the courts throughout Sri Lanka, and accordingly their records and proceedings shall be in the official language and "record" (article 24(5)) includes pleadings, orders and other judicial and ministerial acts. The Official Language is Sinhala.

The Supreme Court is vested with sole and inclusive jurisdiction relating to the interpretation of the Constitution.

Held: (Seneviratne J. dissenting)

(1) The District Judge shall apply the provisions of Article 106 and decide the questions of whether the sittings were in public and all persons were entitled freely to attend such sittings.

(2) By virtue of the Affidavits Act No. 23 of 1953 an affidavit can be filed in the English Language and it does not violate the Constitution. The affidavit filed by the 2nd, 3rd and 7th respondents under section 213(3) of the Companies Act is a valid affidavit which could be tendered to Court.

Cases referred to

1. *Dilworth v.Commissioner of Stamps* [1899] A.C. 99, 105, 106
2. *Ludovici v.Nicholas Appu* 4 NLR 12, 15
3. *Shanmugam v. Commissioner for Registration of Indian and Pakistani Residents* 64 NLR 30, 33
4. *Tasmania v.Commonwealth* [1904] I C.L.R. 329
5. *Science House (Ceylon) Ltd. v.IPCA Laboratories Private Ltd.* [1987] 1 Sri L.R. 185, 200
6. *Mcpherson v.Mcpherson* [1936] A.C. 177
7. *Coomaraswamy v.Shanmugaratna Iyer* Vol. I Sri Kantha's Reports 159
8. *H. M. T. Wickremaratne v.Monetary Board of the Central Bank of Ceylon and another* S.C. Ref. No. 2/86 — S.C. Minutes of 06.12.1986

REFERENCE to the Supreme Court under Article 125(1) of the Constitution.

Faiz Mustapha P.C. with *T. Parathalingam, Daya Wettasinghe* and *Zainul Luthafi* for petitioner.

Dr. H. W. Jayewardene Q.C. with *H. L. de Silva P.C., K. N. Choksy P.C., K. Kanag-Iswaran P.C., Dinal Phillips, Nihal Fernando* and *Anil Tittawella* for 2nd, 3rd and 7th respondents.

Dr. Colvin R. de Silva with *Edward Deraniyagala, Lyn Amarasuriya, Lalantha de Silva* and *Kushan de Alwis,* for 4th respondent.

Romesh de Silva, P.C., with *Palitha Kumarasinghe* and *Miss S. Samarasekera* for the 5th respondent.

Rohan Jayatilleke, Deputy Solicitor-General with *Miss Kumudini Kumarasinghe, State Counsel* and *Miss. Lilanthi Jayawardena,* Assistant State Attorney for the Attorney-General as *amicus curiae.*

Cur. adv. vult.

August 03, 1988
Determination of the Court (Senaviratne J. dissenting)
TAMBIAH, J.

The petitioner made an application in terms of Sections 210 and 211 of the Companies Act, No. 17 of 1982, seeking, inter alia, reliefs against the 2nd, 3rd and 10th respondents and also the interim orders set out in the prayer to the petition. The Court by its order dated 28.01.1988 directed the issue of an order nisi in respect of the substantive reliefs sought for in the said petition, and also issued interim orders as prayed for in the said petition. The order nisi and interim orders were served on the abovenamed respondents.

On 02.02.1988, the 4th respondent made an application in terms of s.213(1) of the Companies Act seeking, inter alia, an interim order restraining the 2nd and 3rd respondents from functioning or acting as Directors or in any capacity whatsoever or in any manner howsoever of the 1st Respondent Company, pending the final orders of Court, in the said proceedings. This application came up in the District Court of Colombo, (Court No. 5) before Mr Leslie Abeysekara, Additional District Judge, who, according to the journalised entry, directed that this case be called before Mr Wimal Dassanayake, Additional District Judge. The reason being that Mr. Wimal Dassanayake had earlier made certain orders in this case.

According to the order dated 12.5.1988 delivered by Mr. Leslie Abeysekera, on 05.02.1988 "the application of the 4th respondent was supported before Additional District Judge Mr. Wimal Dassanayake in his official chambers. The said learned Judge made the order in issue also in chambers. As there are several Additional District Judges in Colombo District Court, more than the available Courts, certain Additional District Judges conduct their inquiries in their personal chambers." It was mentioned to us during the hearing that on 05.02.88, there were 9 Judges of the District Court of Colombo; but only 6 "Court Houses" or "Court Rooms". It was also agreed by all Counsel that on this day, the application of the 4th respondent came up for support before Mr. Wimal Dassanayake who was seated in a part of the chambers of Court No. 1 of the District

Court of Colombo, where he had his chambers.

The recorded proceedings of this date show that the 4th and 5th respondents were present, that 4 Counsel with the instructing attorney appeared for the 4th respondent; that 3 Counsel appeared for the 5th respondent; that the proceedings were recorded by a Stenographer and an Interpreter was present to assist the Court; and that submissions were made by Senior Counsel for the 4th and 5th respondents in support of the application and questions were asked by Mr. Wimal Dassanayake in clarification of certain matters before he made the order that is being questioned now.

After hearing Counsel, Mr. Wimal Dassanayake, ADJ., issued the interim order asked for ex-parte, against the 2nd and 3rd respondents.

Thereafter, the 2nd, 3rd and 7th respondents made an application under s. 213(3) read with s. 213 (2) of the Companies Act and sought the vacation of the said interim order, on the grounds, inter alia, that the sittings and proceedings held on 05th February, 1988, in chambers were illegal and null and void by reason of contravention of Article 106(1) of the Constitution of Sri Lanka. This application was made by a joint petition in the Sinhala Language, supported by a joint affidavit in the English Language. To this application, a counter affidavit was filed by the 4th respondents. At the inquiry had before Mr. Leslie Abeysekera, ADJ. the 5th respondent who filed no counter-affidavit took the objection that there was no valid affidavit in support of the application as it was not in the Sinhala language as required by Article 24(1) of the Constitution and therefore there was no valid application to vacate the said interim order.

The learned Judge in his order dated 12.5.1988 sets out the rival contentions of parties and states why it has become necessary for this Court to interpret Articles 106(1) and 24(1) of the Constitution.

(1) Learned Counsel for the 2nd and 3rd respondents argued that every Judge exercising judicial functions should do so

in open Court in terms of Article 106(1). If a trial is held in chambers, all are not permitted to freely enter such a place. The order made in chambers is a violation of a provision in the Constitution.

Counsel for the other parties argued that no person is prohibited from entering the chambers, and on that occasion any person could enter the chambers. In the Colombo District Court and in other Courts, Judges very often conduct trials in rooms which are not Courts. There is no violation of Article 106(1). "Therefore, it has become necessary to interpret Article 106(1) of the Constitution."

Further, there is a discrepancy between the English and Sinhala versions of Article 106. It is very important that the Supreme Court should consider the difference of meaning in the 2 versions.

(2) An interpretation of the Constitution is necessary regarding the question whether an affidavit in English could be produced in respect of an application under s. 213(3) of the Companies Act.

Here too there is a discrepancy between the English and Sinhala versions of Article 24(1) and "therefore it is necessary that s. 24(1) be interpreted."

On 7.6.1988, the learned Judge, referred 2 questions to this Court for interpretation in terms of Article 125(1) of the Constitution:

(1) "Was the interim order issued against the 2nd and 3rd respondents in a room which is not an open Court, on 5.2.88, a violation of Article 106 of the Constitution?"

(2) "Is the affidavit filed by the 2nd, 3rd and 7th respondents in accordance with the provisions of s. 213 (3) of the Companies Act of 1982, an affidavit that can be produced before a Court in accordance with Article 24(1) of the Constitution?"

All Counsel who appeared before us have stated that this Court could proceed on the basis that there is no discrepancy between the English and Sinhala versions of Articles 106(1) of the Constitution.

Article 106 reads:

(1) The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.

(2) A Judge or presiding officer of any such court, tribunal or other institution may, in his discretion, whenever he considers it desirable—

(a) in proceedings relating to family relations,

(b) in proceedings relating to sexual matters,

(c) in the interests of national security or public safety, or

(d) in the interests of order and security within the precincts of such court, tribunal or other institution,

exclude therefrom such persons as are not directly interested in the proceedings therein.

All Counsel agree that it is for the learned Judge to apply the provisions of Article 106 and decide the first question that has been referred to us for our determination. We, therefore, return the first issue formulated by the learned Judge, to be decided by him.

We come to the second question that has been referred to us for our determination.

Article 18 of the Constitution reads: "The official language of Sri Lanka shall be Sinhala." Article 24 (1) reads: "The official language shall be the language of the Courts throughout Sri Lanka and accordingly their records and proceedings shall be in the official language." Article 24(5) defines the term "Record": 'Record' includes pleadings, judgments, orders and other judicial and ministerial acts." The 13th Amendment to the Constitution amended Article 18 of the Constitution and made Tamil also an official language and gave English the status of a "Link Language".

While Mr. Romesh de Silva, P.C., contended that there is a discrepancy between the English and Sinhala versions of Article 24 (1), Dr. Jayewardene, Q.C., on the other hand, contended there is no such discrepancy. Mr. Faiz Mustapha, P.C., for the petitioner, however, stated in answer to Court that the Tamil version of Article 24(1) is identical with the English version. One has, therefore, to proceed on the basis that the English version is a correct version.

S. 213 (3) read with sub-section (2) of the Companies Act. No. 17 of 1982, requires that an application to revoke or vary an interim order "shall be made by petition supported by affidavit." Accordingly, the 2nd, 3rd and 7th respondents filed a joint petition in Sinhala and a joint affidavit in English to set aside the interim order made on 5th February, 1988. The 2nd and 7th respondents are Tamils and the 3rd respondent is a Burgher. When the matter came up for inquiry the learned District Judge directed the parties to file written submissions and all parties filed written submissions in the English Language. Along with their written submissions, the 2nd, 3rd and 7th respondents annexed a Sinhala translation of their original affidavit which was in the English language.

The definition of " Record" in Article 24 (5) uses the word "includes". Lord Watson observed in *Dilwarth v. Commissioner of Stamps* (1) ..... 'include' is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used these words and phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also things which the interpretation clause declares that they should include." Similarly, Bonser, C.J., observed in *Ludovici v. Nicholas Appu (2),* "Now, as I had occasion to remark before, the words 'shall include" in a definition clause mean 'shall have the following meaning in addition to their popular meaning'." We agree with the submission of Dr. Jayewardene, QC., that by the use of the word "includes" in Article 24 (5), the Constitution gave the term "Record" an extended meaning, in addition to its ordinary meaning that a "Record" is a document kept by Court in terms of s.92 of the Civil Procedure Code.

Dr. Colvin R. de Silva and Mr. Romesh de Silva, P.C., contended that s. 213 (3) requires an application "by petition supported by affidavit", and, therefore, the petition and affidavit is one pleading document and is one package; that Article 24(1) demands that a pleading shall be in the official language and not in the English language. Mr. Romesh de Silva, P.C., further contended that a pleading is a part of "proceedings". Dr. Jayewardene, Q.C.; and Mr. H. L. de Silva, P.C., on the other hand, contended that the petition is the pleading and that the affidavit is a document which supports the averments in the pleading; that an affidavit is written evidence on oath and is supporting evidence and not part of the pleading and therefore does not attract the provisions of Article 24(1). Both learned Counsel further submitted that 'proceeding' is what takes place in a Court; that an affidavit is a document prepared and sworn or affirmed outside Court and tendered to Court, and is, therefore, not part of "proceeding" in Court.

It is unnecessary for us to consider the validity of the rival submissions of learned Counsel by reason of the view we have formed in regard to the continued operation of the Affidavits Act, No. 23 of 1953, (C. L. E. Vol. 1. Cap. 18). Nor is it necessary for us to consider the reasoning of Samerawickreme, J. (with whom 4 other Judges agreed) in Election Petition Appeals, Nos. 2 of 1977 (Medawachchiya), 3 of 1977 (Kotmale), and 2 of 1978 (Anamaduwa) — (S. C. Minutes of 9.8.1978), which reasoning was adopted by Soza, J., in S.C. Appeal Nos. 10 of 1981-13/81 (S. C. Minutes of 3.9.1982) and also adopted by Sharvananda, C.J. in S.C.2 of 1986 (S.C. Minutes of 1.12.1986), and see whether the reasoning could equally be applied to affidavits.

S. 2(1) of the Affidavits Act states: "Notwithstanding anything to the contrary in any other written law, an affidavit required for any purpose whatsoever may be written, and sworn or affirmed in the Sinhala or Tamil or English Language."

Article 168 of the Constitution states —

(1) Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the

commencement of the Constitution, shall, mutatis mutandis, and except as otherwise expressly provided in the Constitution, continue in force.

(3) Wherever the Constitution provides that any law, written law or unwritten law or any provision of the Constitution shall continue in force until or unless Parliament otherwise provides, any law enacted by Parliament so providing may be passed by a majority of the Members present and voting.

Article 170 defines "existing law" and "existing written law" to mean "any law and written law, respectively, in force immediately before the commencement of the Constitution which under the Constitution continue in force."

Dr. Colvin R. de Silva submitted that the Affidavits Act was enacted in 1953 when English was the language of the Courts; that when Article 11(1) of the 1972 Constitution enacted that "the language of the Courts shall be Sinhala throughout Sri Lanka" the English language ceased to be a language of the Courts; that when the present Constitution commenced in 1978, the Affidavits Act which permitted an affidavit to be written and sworn or affirmed in the English language ceased to be part of the existing law, by reason of Article 11(1) of the 1972 Constitution; that the 2nd, 3rd and 7th respondents cannot avail themselves of the provisions of s. 2(1) of the Affidavits Act.

With this submission, we cannot agree. A Constitution must be read as a whole, and the whole Constitution has to be examined without giving undue weight to any part. The 1972 Constitution contained a provision similar to Article 168 (1) and (3) of the 1978 Constitution, viz. Article 12 which reads:

12 (1) Unless the National State Assembly otherwise provides, all laws, written and unwritten, in force immediately before the commencement of the Constitution, except such as are specified in Schedule 'A' shall, mutatis mutandis, and except as otherwise

expressly provided in the Constitution, continue in force. The laws so continuing in force are referred to in the Constitution as "existing law".

(3) Wherever the Constitution provides that any provision of any existing written law or of the Constitution shall continue in force until or unless the National State Assembly otherwise provides, any law of the National State Assembly so providing may be passed by a majority of the members present and voting.

Schedule 'A' of the 1972 Constitution mentioned the Ceylon (Constitution and Independence) Order-in-Council, 1946 and 1947, the Royal Titles Act and contain sections of the Royal Powers and Seals Act, and these were therefore expressly repealed.

> "Express repeal of a Statute is usually made by stating that the earlier Statute or a particular provision therein is thereby repealed. Usually enactments repealed are mentioned in a Schedule attached to the repealing Statute. Sometimes the expressions used in the later Statute for such purposes runs:
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> > 'All provisions inconsistent with the Act are repealed, or All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, or All laws and parts of law in conflict herewith are expressly rejected'."

(Bindra on *"Interpretation of Statutes, 7th Edn, page 902).*

> " 'Express provision' is provision the applicability of which does not arise by inference." *(Per* Lord Radcliffe in *Shanmugam v. Commissioner for Registration of Indian and Pakistani Residents (3)*

On a reading of the provisions of Article 168 of the present Constitution it seems to us that the scheme or thinking of the draftsman was that existing laws continue in force unless (1) the Constitution itself expressly repeals or alters an existing law. There can be no implied repeal, (2) the Parliament, in the future,

by a simple majority enacts a law, repealing or altering an existing law. As a case of express repeal, we refer to Article 169(1) and (2) of the present Constitution, where there is a direct reference to the Administration of Justice Law, No. 44 of 1973, and the Article expressly provides that the provisions of Law No. 44 of 1973, which are inconsistent with the Constitution are deemed to be repealed, and that the Supreme Court established under that law will cease to exist and any reference in any written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal.

An "existing law" has to be expressly repealed if it has to be effaced or its existence wiped out by a specific law enacted by Parliament. Otherwise it subsists and continues to remain law. The 1972 Constitution did not contain any express provision repealing or in any way altering the Affidavits Act. Nor did the National State Assembly enact any law repealing or changing the Affidavits Act. The Act therefore, was in force immediately before the commencement of the 1978 Constitution. The latter Constitution too contained no express provision repealing or altering the Affidavits Act. Nor has the present Parliament enacted a law to repeal or effect changes in the Act. Both Constitutions and both Legislatures have kept the Affidavits Act alive. The Act continues to be in operation and is "existing law" within the meaning of Article 168(1) read with Article 170 of the Constitution. The 2nd, 3rd and 7th respondents were, therefore, entitled to tender to Court an affidavit in the English Language.

Accordingly, our determination is that the affidavit filed by the 2nd, 3rd and 7th respondents under s. 213(3) of the Companies Act is a valid affidavit which could be tendered to Court, and does not contravene the provisions of Article 24(1) of the Constitution. Our answer to the 2nd question posed to this Court is therefore in the affirmative.

The Record is returned to the District Court. We make no order for costs.

L.H. DE ALWIS, J. I agree
H. A. G. DE SILVA, J. I agree
BANDARANAYAKE, J. I agree

August 03, 1988
SENEVIRATNE, J.

The petitioner made a complaint to the District Court, Colombo in terms of Sections 210 & 211 of the Companies Act No. 17 of 1982 that the affairs of the 1st Respondent-Company are being conducted in a manner prejudicial to the interests of the Company. On this application the District Court made certain orders.

The 4th Respondent-Petitioner made an application to the District Court on 5.2.1988 in terms of Section 213(1), (2) & (3) of the Companies Act praying for certain interim orders restraining the 2nd and 3rd respondents from functioning as acting Directors or in any other capacity in respect of this Company or its Subsidiaries and Associate Companies. At a later stage the 5th respondent supported this application of the 4th Respondent-Petitioner. The 7th respondent later joined the 2nd and 3rd respondents in objecting to the above application of the 4th Respondent-Petitioner.

The application made by the 4th Respondent-Petitioner came up on 5.2.1988 in the District Court of Colombo (Court No. 5) before Leslie Abeysekera, Additional District Judge. He has minuted that this case be called before the Additional District Judge Wimal Dassanayaka. The reason for this it is said was that Dassanayaka, Additional District Judge had earlier made certain orders in this case. One must at this stage take into account how the above minute would have operated. For this, one has to rely on the practice in the courts. Leslie Abeysekera, Additional District Judge would have announced the contents of his minute to the lawyers who appeared in this application before him, and the interpreter would have announced in the court room that the case is being sent before Dassanayaka, Additional District Judge. However, an accepted fact by both parties is that shortly after that the case was called before Dassanayaka, Additional District Judge. The most important factor in this reference, as admitted by all parties, is that at this time Wimal Dassanayaka, Additional District Judge had no court room for his use, for the sittings. He was sharing a part of the, [I should say an inner room]

Chambers of the District Judge Colombo (Court No. 1), along with another Additional District Judge Jayasena. Both Dassanayaka, Additional District Judge and Jayasena, Additional District Judge sat in this inner room or part of the Chambers of the District Judge on this date. In fact it is revealed, that at the time Dassanayaka, Additional District Judge took up this matter referred to him, Jayasena, Additional District Judge had also taken up a matter for hearing. The part of the Chambers of the District Judge Colombo (called an inner room) used on this day by Dassanayaka, Additional District Judge and Jayasena Additional District Judge was within the Chambers of the District Judge and had access to it through that part of the Chambers used by the District Judge. It is admitted that one means of entry to the Chambers of the District Judge was through the door of the Chambers which opened to the District Judge's Court room, i.e. (Court No. 1). There is reference to another entrance from a corridor, but that is not necessary for this purpose.

The application referred to Dassanayaka, Additional District Judge was taken up by him in the room which I have described above. The proceedings show that a Stenographer was present and recorded the proceedings. The interpreter must have been necessarily present. The 4th and 5th Respondents-Petitioners were present. The 4th Respondent produced the documents with which the application was supported. Two Queens Counsel and several other lawyers had appeared for the 4th Respondent-Petitioner. A President's Counsel with Mr. Romesh de. Silva P.C and another Attorney-at-law appeared for the 5th respondent. Some papers filed also indicate that about half an hour later counsel for the petitioner also appeared and took part in the proceedings. The proceedings show that Mr. Navaratnaraja, Q.C., has made some lengthy submissions in support of the application. The Court has asked questions from the learned Queen's Counsel. Then the Additional District Judge has made the interim order praved for and issued notice for 4.3.1988.

The 2nd, 3rd and 7th respondents filed objections to this application dated 9.2.1988 in terms of section 213(3) of the

Companies Act No. 17 of 1982. As required by this section the petition containing the objections was "supported by an affidavit". This affidavit by the 2nd, 3rd and 7th respondents was filed in the English Language. The main objection taken by these respondents to the application was that "the application made by the 4th respondent was supported in Chambers of the District Court No. 1 (and not in open court) before the Additional District Judge Wimal Dassanayaka". (Paragraph 5). The consequential objection taken in paragraph 8(a) is as follows:—.

> "The proceedings and the order made on 5.2.1988 were illegal and null and void and by reason of the contravention of Article 106(1) of the Constitution of Sri Lanka in as much as the proceedings of 5.2.1988 were not held in public".

8(b) — "The Chambers of the District Judge of Colombo are not a place where the public and all persons are entitled to have access or attend"

Due to this and other grounds the Respondent-Petitioners prayed that the "proceedings and order made on 5.2.1988 in the Chambers of the District Court of Colombo be set aside and/or revoked and/or declared null and void and of no force or effect in law".

When this matter came up for inquiry before Leslie Abeysekera, Additional District Judge the parties have been requested to file written submissions. In the written submissions the 2nd, 3rd and 7th respondents urged that the proceedings on 5.2.1988 were invalid as it violated Article 106 of the Constitution. The 5th respondent raised the objections that the affidavit filed by the 2nd, 3rd and 7th respondents violated Article 24 of the Constitution as an affidavit filed in the English Language was not an affidavit that could be accepted by the Court. Leslie Abeysekera, the learned Additional District Judge having considered the written submissions by his order dated 12.5.1988 decided to make reference to this Court under Article

125 of the Constitution as follows:—

(1) Was the interim order issued against the 2nd, 3rd, and 7th respondents in a room which is not an open Court on 5.2.1988, a violation of the Article 106 of the Constitution,

(2) Is the affidavit filed by the 2nd, 3rd and 7th respondents in accordance with the provisions of section 213(3) of the Companies Act of 1982, an affidavit that can be produced before a Court in accordance with Article 24(1) of the Constitution?.

This is the reference that has been heard before this Divisional Bench of five Judges. The hearing began on 6.7.1988 and continued till 22.7.1988 (except one day on which the Court did not sit). Before the hearing commenced Dr. Colvin R. de Silva for the 4th respondent submitted that he will raise a preliminary matter i.e. that the question of interpretation of the Constitution did not arise in respect of item No. 1. referred to this court by the Additional District Judge. Mr. Faiz Mustapha for petitioner agreed with Dr. de Silva on this submission. The learned Queen's Counsel for the 2nd, 3rd and 7th respondents did not agree with this preliminary submissions made by Dr. de Silva. As such the hearing commenced on the basis that Dr. de Silva will be heard on this preliminary submission at the stage at which he will address court.

After the hearing commenced the court suggested that a reference be made to the Additional District Judge. Wimal Dassanayaka for his observations and invited the counsel to make their own suggestions on which matters such reference ought to be made. All parties filed written submissions on which matters reference should be made to the said Additional District Judge for his observations. The court having considered these suggestions on 7.7.1988 referred these two matters for the observations by the Additional District Judge Wimal Dassanayaka, to wit:—

(1) Were the members of the public entitled to freely attend the proceedings in D.C. Colombo Case No. 2828/Spl. on

5th February, 1988, held by Mr. Wimal Dassanayaka, ADJ., Colombo, in part of the Chambers of Court No. (1) of the District Court of Colombo.

(2) Could the members of the public have been reasonably aware that they were entitled to freely attend the said proceedings of that date.

The learned Additional District Judge by his letter 8.7.1988 sent his observations. I will refer to the observations later.

After the observations were received and submissions were made for a few more days the learned Queen's Counsel for the 2nd, 3rd and 7th respondents also agreed that item No. 1 referred to this court by the learned Additional District Judge Leslie Abeysekera was not a matter that needed interpretation by this court, i.e. Article 106 of the Constitution. Later the learned Queen's Counsel for the 2nd, 3rd and 7th respondents also submitted that the answers to the queries made by this court from the learned Additional District Judge were his mere observations and this court should not act on such observations as it was not evidence in this Reference. The learned counsel for the 4th respondent submitted that the court had called for the observations from the learned Additional District Judge and that the court must and has a right to take into account these observations and act on such observations. I must observe that it is a long standing practice of the Superior Courts to call for observations of the Judges of first instance on matters within their own knowledge or on matters of record on which clarifications are required, and when the court receives such observations and clarifications it is a long standing practice of such Courts to act on such observations and clarifications. I hold that this Court has the power and the right to take into account the observations made by the learned Additional District Judge Wimal Dassanayaka and act on them and I will do so.

Item No. 1. has been referred to this Court for interpretation by the learned Additional District Judge due to a difficulty, in interpreting that article, i.e. a difficulty in interpreting the two limbs of Article 106:—

(1) "The sittings of every court . . . . . shall be held in public.

(2) and all persons shall be entitled freely to attend such sittings".

This difficulty is made obvious by the fact that learned Queen's Counsel for 2nd, 3rd and 7th respondents addressed this court on the interpretation of these words for nearly 10 days and cited authorities from Alberta in Canada to England. Article 125 of our Constitution is as follows:—

> "The Supreme Court shall have sole and exclusive jurisdiction . . . . . relating to the interpretation of the Constitution".

What is interpretation?

Our Interpretation Ordinance No. 21 of 1901 calls it an ordinance "for defining the meaning of certain terms". The Interpretation Act of 1889 of England calls it "an Act . . . . . relating to the Construction of Acts of Parliament". Maxwell on the Interpretation of Statutes, 11th Ed. states as follows:—

> "The object of all interpretation of a statute is to determine what intention is conveyed, either expressly or impliedly, by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it". (Page 2).

Craies on Statute Law, 6th Ed. states as follows:—

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves". Note 7 —"*In Tasmania v. Commonwealth* (4) on a question as to the meaning of the Constitution of the Australian Commonwealth, O'Conner J. said (at page 358):" I do not think that it can be too strongly stated that our duty in interpreting a statute is to declare and administer the law according to the intention expressed in the statute itself. In

this respect the Constitution differs in no way from any Act of the Commonwealth or of a State". (Page 66).

am of the view that Article 106 of the Constitution needs interpretation as set out in Article 125 of the Constitution.

REFERENCE NO: 1 — Article 106(1) —

"The sittings of every Court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings".

The limb "shall subject to the provisions of the Constitution" is explanatory in Article 102(2) — sittings under this condition is described as sittings "in Camera". In this matter the court is concerned with Article 106(1) only. According to the order made by the Judge, it appears that he has addressed this Court for the interpretation of the limbs —

(1) "The sittings of every Court shall be held in public,

(2) And all persons shall be entitled freely to attend such sittings".

According to his Reference the learned Additional District Judge has consulted the text of the Constitution in the Official Language — Sinhala and has found a difference in the phrases in the Sinhala text of Article 106(1) and the English text of Article 106(1). It is also for this reason that the Judge has referred to this Court the interpretation of this Article.

In this context Article 23(1) of the Constitution is relevant—

"all laws shall be made in both National Languages with a translation in the English Language", and further states that "in the event of any inconsistency between any two texts, the text in the Official Language shall prevail".

As regards the interpretation of the phrase "be held in

public" numerous authorities were cited explaining what is meant by "sitting in public", and also that it is a fundamental requirement that the court should "sit in public".

Before discussing Article 106(1), it is necessary to refer to the definition of the word "court" in legislation. The term "court" has been defined in the following Enactments—

(1) Courts Ordinance No. 1 of 1889, Section 2.

(2) Civil Procedure Code No. 29 of 1889, Section 5.

(3) Administration of Justice (Amendment) Law of 25 of 1975. Section 674(2).

(4) Civil Procedure Code (Amendments up to 1977) Chap. 101 Section 5.

The definition of the word "Court" in all the above enactments is identical. I shall only refer to the definition of the term "Court" in the Civil Procedure Code (Amendments up to 1977) Chap. 101.

Court means — "a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially".

The other matter that has to be referred to are the provisions of law as to where the court will be held or sit. These provisions are found in the following Enactments —

(1) Courts Ordinance, Sections 52 & 53.

(2) Administration of Justice Law No. 44 of 1973, Section 16.

(3) Judicature Act No. 2 of 1978, Section 5(3) and Proviso.

These laws are also to the same effect. The Judicature Act Section 5(3) states that the court may be held at a convenient place within the judicial district as the Minister by regulations shall appoint. By Gazette No. 43/4 of July 2nd 1979 the Minister has by regulation determined that the District Court of Colombo may sit at Hulftsdorp. It will be noted that only the place of sitting is determined, the buildings or its location have not

been determined, i.e. to be more explicit it is not determined by regulation that the District Court shall sit in Court rooms 1 — 6 situated at Hulftsdorp. In fact the proviso to Section 5(3) provides for the Judge — "to hold court at any convenient place within his territorial jurisdiction". In addition to the above provisions in the interests of justice the law has provided that the sittings of courts "be held in public". The contents of Article 106 is not a new concept brought in by the (1978 Constitution), but it is a concept which has always found its place in our relevant laws. Public sittings of the courts have been provided for in —

(1) Courts Ordinance No. 1 of 1889, Section 85.

(2) Administration of Justice Law No. 44 of 1973, Section 7.

(3) (1978) Constitution, Article 106.

Thus to constitute the sitting of a court three factors are necessary:—

(1) a Judge empowered by law to act judicially,

(2) the court must sit in a determined place — within a District, Division or Zone,

(3) the sittings of the court must be public sittings.

Article 106 of the Constitution deals with "public sittings". All authorities, both local and foreign show that the meaning of the limb "shall . . . be held in public" means that the sittings of the court should be open court sittings, so that any member of the public can attend a court sitting. The next limb "and all persons shall be entitled freely to at such sittings", further emphasises the requirement that the sitting of a court "shall be held in public". "Shall be held in public" further means that any person constituting the public whether he has a particular or special interest in the case or not, or not directly interested in the case, can attend court when the court is sitting. "Shall be entitled to freely at such sittings" further means that there can be no restriction or impediments to any person attending a court sitting except factors such as the accommodation available in the court, or when due to factors set out in Article 106(2) of the Constitution the court excludes people not directly interested in

the proceedings. The opposite of this concept is that the court cannot usually sit "in camera", i.e. without the public being permitted to attend court except in the instances permitted by the law. The question that has arisen for interpretation in this Reference No. 1 is whether in this instance Wimal Dassanayake, Additional District Judge, held sittings which complied with Article 106(1). I will deal with this matter later.

The learned Additional District Judge Leslie Abeysekera has stated that there is a "difference in meaning" in the English text and the Sinhala text. As pointed out earlier "in the event of such an inconsistency" the text in the Official Language must prevail. Is there such an inconsistency? The learned Additional District Judge has particularly drawn attention to the English text "sittings of every court . . . . . shall be held in public" and the Sinhala text ". . . . සෑම අධිකරණයකම නඩු විභාග .... ප්‍රසිද්ධියේ පැවැත්විය යුත්තේය.

There is no difference in the rendering set out in the two texts. "Sittings of every court" is the idiomatic rendering in English used to describe the holding of a court to hear trials, inquiries, and applications etc., That idiom "Sittings of every court" has been rendered in the Sinhala text as "නඩුවිභාග", which literally means hearing of trials. The learned Additional District Judge has misconstrued this phrase and commented as follows:— "According to the English version what should be held in public is sittings of every court as stated in the Sinhala version of the Constitution is "trials of cases". . . . . On 5.2.88 in Chambers was a sitting of court but that day there was no trial of a case. That day though a judicial function was exercised ordinarily as stated by us there was no trial what happened was supporting of an application exparte and issuing an order in respect of same. I believe that it is very important that the Supreme Court should consider the difference of meaning in the English Constitution and the Sinhala Constitution". The learned Additional District Judge has fallen into an error in these observations, in that the Sinhala text "නඩු විභාග" has been literarily translated by the learned Additional District Judge as "trials of cases". I have earlier mentioned the English idiomatic meaning "of sittings of every court". The Sinhala idiom for "sittings of court" is

expressed as "නඩුවියහ". This idiom is an all embracing one. The expression "නඩුවියහ" includes hearing of trial cases, inquiries and hearing of applications etc. The Sinhala version has not used the words "විමසීම්" (inquiries), "ඉල්ලීම්" (Applications), but used what I call and all embracing phrase "නඩුවියහ". So that actually there is no difference in the Sinhala text and the English text. In other instances in this Constitution the Sinhala text uses a different phrase to express the English phrase "sittings of the Court". See Article 132 Sinhala. Article 132 of the Sinhala text is as follows:— "ශ්‍රේෂ්ඨාධිකරණය පැවැත්වීම්". (sittings of the Supreme Court) — (Marginal Note 132). The S.C. Rules Part 5, Rule 62(1) deals with "suspension of sittings of Courts". Rule 62(1) states as follows:—

"The sittings of the Supreme Court . . . . . will be suspended". The Sinhala text of Rule 62(1) is as follows:— ශ්‍රේෂ්ඨාධිකරණයේ රැස්වීම් වර . . . . . අත්හිටවනු ලැබේ". It will be noted that the phrase "sittings of the Supreme Court" is rendered in the Sinhala text in the above instances as "රැස්වීම් වර" and "පැවැත්වීම්". It appears that Sinhala text of Article 106(1) "sittings of every court" has been expressed in the literal sense as "නඩුවියහ" — hearing of cases or trials of cases. I have set out above the determination, relating to the interpretation of the Constitution", Article 106(1) —Reference Item No. 1. The learned Additional District Judge will have to relate the facts and circumstances pertaining to the sittings of the court held by Dassanayake Additional District Judge on 5.2.88 to the interpretation of Article 106(1) which has been rendered by me above.

REFERENCE NO: 2 — Affidavit filed in English — Article 124 of the Constitution.

The 5th respondent has taken the objection that the affidavit dated 9.2.88 filed by the 2nd, 3rd and 7th respondents in the English Language is violative of Article 24(1) of the Constitution, and as such should be rejected.

Article 24(1) is as follows:—

> "The Official Language shall be the language of the courts throughout Sri Lanka, and accordingly their records and proceedings shall be in the Official Language".

The Constitution by the Thirteenth Amendment has now enforced two Official Languages.

Article 24(5) of the Constitution defines "record" as follows:—

> "Record" includes pleadings, orders and other judicial and ministerial acts".

Submissions have been made by the learned President's Counsel for the 5th respondent that this was an application made by the 4th respondent under section 213(2) of the Companies Act No. 17 of 1982, and as such the 4th respondent had filed a petition "supported by affidavit". Section 213(3) — of the Companies Act No. 17 of 1982, requires the same procedure to be followed in filing objections. As such these respondents have filed objections "supported by affidavit". The learned President's Counsel strenuously submitted that the petition supported by affidavit are the pleadings by which the jurisdiction of the court is invoked — the same principle applied to the invocation of the jurisdiction of the court by the objector. The petition and affidavit so filed thus become pleadings by which the jurisdiction of the court is invoked. The petition and affidavit constitute one indivisible or inseparable pleading. The learned President's Counsel in support of this submission relied on the dicta of Bandaranayaka J — in the case of *Science House (Ceylon) Ltd. V. IPCA Laboratories Private Ltd.(5)*. In this case Bandaranayaka. J. dealt with the function or I should say the status of an affidavit filed in terms of Section 705 Civil Procedure Code — Chapter L III, of Summary Procedure On Liquid Claims, and held as follows:— "but the plaint must be accompanied by an affidavit. Section 705 requires that both must co-exist. So a person cannot have the plaint, he presents accepted under Chap. 53 Procedure unless an affidavit is also presented together with the plaint verifying the claim . . . . . The two sections (Section 703 and 705) are therefore co-related. They are inseparable and must co-exist: They either exists together or not at all . . . . . This is doubtless because the affidavit is the foundation of the action". The filing of the petition alone will not be sufficient compliance with the relevant section 213 Companies Act and will not invoke the jurisdiction of the court. The learned

President's Counsel submitted that the affidavit of 9.2.88 filed by these objecting respondents is covered by Article 24(1), in that it was both the record and proceedings in the case for the following reasons:—

(a) It is a part of the pleadings by which the jurisdiction of the court is invoked.

(b) The affidavit was the proceedings because it is taken cognisance by the Judge. Even evidence on oath such as the affidavit which the court considers as evidence comes within the term "proceedings".

(c) As such the affidavit becomes a part of the record, whether as pleadings or as a document of evidence.

Due to these reasons the affidavit filed had to be in the Sinhala Language. The Affidavits Act No. 23 of 1953 on which the 2nd, 3rd and 7th respondents based their right to file their affidavit in the English Language was only an "act to enable the affidavits required for any purpose whatsoever to be filed in the Sinhalese or Tamil Language". This enabling Act was necessary because prior to this Act an affidavit could be filed only in the English Language. He submitted that this Act however does not enable the respondents to file affidavit in the English Language which is not the Language of the court. I will deal with this submission later.

Dr. Colvin R. de Silva for the 4th respondent also supported the contention that the affidavit in question comes within Articles 24(1) and (5) of the Constitution, and as such is a part of the record and proceedings, and as such it must be in the Official Language, Sinhala.

Dr. H. W. Jayewardene Q.C., for the 2nd, 3rd and 7th respondents contended that the affidavit cannot be considered a part of the record and proceedings in terms of Articles 24(1) and (5) of the Constitution. His submission was that the affidavit was not a part of the pleadings. It is in fact documentary evidence prepared outside court and filed in the Court. Both H. L. de Silva P.C and Dr. Jayewardene Q.C. submitted that the function of the

pleadings was to invoke the jurisdiction of the court. H. L. de Silva P.C further submitted that the affidavit filed is neither a pleading nor a document as contemplated in Article 24(2). Halsbury, Laws of England — 4th Ed. Volume 36, Part I, Page 3 is as follows:—1. "Meaning of Pleading" — the term "pleading" is used in civil cases to denote a document in which a party to proceedings in a court of first instance is required by law to formulate in writing his case or part of his case in preparation for the hearing".

Dr. Jayewardene Q.C., and H. L. de Silva P.C relied heavily on the submissions that by virtue of the Affidavits Act. No. 23 of 1953, an affidavit can be filed in the English Language and it does not violate the Constitution. The contention was that firstly Section 12(2) of the (1972) Constitution and later Article 168(1) of the present Constitution kept alive the Affidavits Act as the Parliament has not otherwise provided.

This argument was countered by Dr. Colvin R. de Silva, and Romesh de Silva P.C. These learned Counsel submitted that when Article 12(2) of the (1972) Constitution made Sinhala the Language of the Courts, the Affidavits Act which permitted an affidavit to be filed in court in the English Language was to that extent repealed and revoked. Section 24(1) of the (1978) Constitution which made Sinhala the Language of the Courts had the same effect. As the (1978) Constitution is the "supreme law", that part of the Affidavits Act must be considered to be directly repealed by the provision for the Language of the Courts to be Sinhala. If not directly so repealed at least it must be considered to have been repealed by implication. The Legislature which provided in Article 24(1) (1978) Constitution "that the Official Language shall be the Language of courts throughout Sri Lanka", i.e. Sinhala, cannot be said to have also intended to leave a gap for affidavits alone to be filed in the English Language. After a careful consideration I entirely agree with the submission that the provision of the Affidavits Act, enabling to file an affidavit in English, has no effect whatever in respect of the Language of Courts. The derogation of Article 24(1) of the (1978) Constitution which is a part of the "supreme law" of the land cannot be permitted by an insignificant act called the Affidavits

Act. All affidavits filed in court have to comply with Article 24(1) of the Constitution and must be filed in the Official Language. Section 439 of the Civil Procedure Code provides for the manner in which a person illiterate in the Sinhala Language can make an affidavit in the Sinhala Language. In fact the 2nd respondent has filed a subsequent affidavit in these proceedings in the Sinhala Language complying with Section 439.

The determination in respect of item 2 of the Reference is that the affidavit filed in the English Language by the 2nd, 3rd and 7th respondents cannot "be produced before the court in accordance with Article 24(1) of the Constitution," as it is violative of this Article.

Article 125 of the Constitution provides for the interpretation of the Constitution by this court and Article 125(2) of the Constitution enables this court to "make any such consequential order as the circumstances of the case may require".

I have given my anxious consideration as to whether I should make such consequential orders as will flow from the two determinations I have made. The consequential order if any in respect of Reference No. 1 — can be based only on questions of fact and law. A consequential order in respect of the determination on Reference No. 2 will be an order based purely on the legal consequences of the determination.

As regards the facts pertaining to Reference No. 1 i.e. whether there was a public sitting of the court of Dassanayaka, Additional District Judge on 5.2.88, I will record only the undisputed facts revealed in this Reference.

(1) The learned Additional District Judge Leslie Abeysekera in his reference dated 12.5.88 has made these following observations:—

(a) the order was not supported and issued in open Court but in the Official Chambers. (I have described earlier the situation of the Chambers used by Wimal Dassanayaka, Additional District Judge, based on the admissions made by the parties)

(b) as there are more Additional District Judges than the number of available court rooms certain Additional District Judges conduct their inquiries in Chambers.

Counsel submitted that this violated Article 106 of the Constitution as the proceedings were not in open Court.

The answers to the questions posed to Wimal Dassanayaka, Additional District Judge forwarded by him are as follows:—

(a) members of the public were entitled freely to attend the proceedings in the above case heard by me in part of the Chambers of Court No. 1 of the District Court of Colombo.

(b) because of the fact that Mr. Leslie Abeysekera who called this case in the open Court No. 5 on 5th February 1988 had mentioned that this case will be heard by me and directed the parties before me, the members of the public could have been reasonably aware that they were entitled to freely attend the said proceedings of that date".

I must also add another well known and accepted fact which has been mentioned in these proceedings. That is, that not only in Colombo, even in some outstation Courts there are more Judges sitting than the number of court rooms available. The Kandy courts is a fine example of this situation. Some court buildings have been burnt and Judges have to sit in improvised court rooms. In most of the courts there is only one court room as in the case of a Combined Court, two court rooms, where there is a District Court and a Magistrate Court. Due to the overload of the work in the Courts, Supernumerary Judges are attached to the Courts. The question of accommodation for court sittings also arises when a Judge who has gone on transfer comes back to the former station to hear part-heard cases. There are instances where both the District Judge and Magistrate who have gone on transfer have come back to the station on the same day to hear part-heard cases. It is most common and a regular occurrence for courts to sit in Chambers, in a verandah, or any enclosed partitioned room when more Judges than the number of court rooms available have to sit. From time immemorial this practice

has prevailed, and I must with some reservation state, that I have had this experience for nearly 17 years when I held a post of a District Judge or a Magistrate. When a court is held in an improvised Court-room, say the Chambers, all parties and lawyers representing them are present and who ever wishes to follow proceedings have a right to attend and they do attend. If a court is held in the Chambers, at that time temporarily or provisionally it becomes an open court room. Any interpretation of Article 106(1) must be made in this background, taking into account the situation and circumstances which prevail in this country, pertaining to the functioning of Courts. In this country Article 106 cannot operate on an utopian open court principle. Dr. Colvin R. de Silva made a submission which I fully approve. He submitted that "the circumstances must modify application of principles. A principle cannot be reduced to an absurdity".

The Additional District Judge Wimal Dassanayake who heard this application specifically states that members of the public were entitled freely to attend the proceedings. This does not necessarily mean that the public were present, but it necessarily means that there was no bar or impediment to the presence of the public meaning any person who wanted to be present when this application was taken up. In the case cited *Mcpherson v. Mcpherson*[6] it has been decided as follows:— "The actual presence of the public is never necessary; on some occasions there may be no members of the public available to attend; but the court must be open to any who may present themselves for admission". In this matter which is under Reference to this Court neither a party to this case, nor any person from the public has complained that he was kept away from the court sittings, i.e. that the court sittings were not open to him. This application in my view, is a devise by the 2nd, 3rd and 7th respondents to overcome the order made on 5.2.88. The above observations were made by me in the public interest and in the interests of the members of the original court judiciary who have to function often under miserable conditions.

In terms of Article 4(c) of the Constitution "the judicial power of the people shall be exercised by Parliament through courts . . . .". Courts have sat in this manner from time immemorial and

the "people" who created the courts both under the (1972) Constitution and under the (1978) Constitution have not made any complaint in any instance that the court sittings were not in public. A few Company Directors against whom an order has been made has thought it fit to make this complaint as a devise to overcome the adverse order of 5.2.88. All facts indicate that Dassanayaka Additional District Judge held the sittings of the court in public on 5.2.88.

As regards the question whether I should make a consequential order in terms of Article 125(2), there is precedent for such a course of action. Both precedents have been created by no less a person than the former Chief Justice when he was only Sharvananda, J. Sharvananda, J. made consequential orders after a determination under Article 125 — in the case of *Coomaraswamy v. Shanmugaratna Iyer.* (7) In this determination he held that pleadings can be filed in the Tamil Language in the District Court of Colombo and directed the Additional District Judge, to accept the pleadings. The case of *H. M. T. Wickremaratne v. Monetary Board of the Central Bank of Ceylon and another.* (8) was a Reference by the Court of Appeal to the Supreme Court under Article 125. Sharvananda, J. held that an application to the Labour Tribunal can be made in the English Language, and set aside the order of the President, Labour Tribunal rejecting an application made in the English Language. The consequential order made was as follows:—

"This court sees no useful purpose in remitting the case to the Court of Appeal. It makes the following consequential order. The order of Labour Tribunal is set aside and record remitted to Labour Tribunal with a direction to try the application early". Following these eminent precedence under Article 125(2) of the Constitution I make the following consequential orders.—

(1) I direct the District Judge Colombo to proceed to the hearing of the application made by the 2nd, 3rd and 7th respondents acting on the basis that Wimal Dassanayake, Additional District Judge, Colombo held the sittings of the Court in public and has made a valid order in open court on 5.2.88.

(2) To reject the affidavit filed in the English Language by the 2nd, 3rd and 7th respondents.

In the circumstances of this Reference no order is made for costs.

In making this order I have respectfully, but without regrets, dissented from the majority view of this Bench.