PREMAWARDENA

v.

INDRAKUMAR

SUPREME COURT
DHEERARATNE, J.,
WADUGODAPITIYA, J. AND
GUNASEKARA J
SC APPEAL NO 80/98
COURT OF APPEAL NO 44/93 (F)
DC COLOMBO NO 6908/RE
6TH OCTOBER, 1999

Landlord and tenant - Section 22(2)(d) of the Rent Act - Nuisance as a ground of ejectment - Mens rea or intention - Prescription of action

The landlord filed action in the District Court against the appellant (the tenant) in 1987 for ejectment from the premises in dispute No 137 1/1, an upstair flat occupied by the tenant. The ground of ejectment was section 22(2)(d) of the Rent Act, namely, that the tenant was guilty of conduct which was a nuisance to adjoining occupiers. Below the premises No 137 1/1 was the ground floor flat No 139 occupied by another tenant who does not figure in this case. The adjoining ground floor flat No 137 was occupied by the landlord, his wife, daughter and son-in-law. Flat No 137 1/2 which was the upstairs of flat 137 was occupied by the landlord's son . The four flats were situated 30 feet from the road; and a common staircase running up the centre of the building provided access to the upstair flats.

In 1975-1976 the tenant advertised in the newspapers certain goods for sale giving his address as No 137, the landlord's residence or No. "137 upstairs", landlord's son's residence. This resulted in considerable inconvenience and annoyance to the landlord and his son by reason of prospective buyers visiting their flats. The tenant had also given the same flat numbers in letters written by him. Consequently letters addressed to the tenant were delivered at the landlord's residence or that of his son; and the tenant found fault with the landlord for accepting such letters. In the 1987 Telephone Directory the tenant had given his address as No 137. He had also given numbers 137 or 137 1/2 to the Registrar of Motor Vehicles for registration of several motor vehicles; and No 137 had been given to the Electricity Department as the tenant's address. The same address had been given for the purposes of his pension. The tenant had

in 1983 constructed an unauthorized water connection to his premises which adversely affected the water supply to the landlord's son. He also used to dump used motor spares and old chairs on the common stair case causing obstruction to the premises of the landlord's son. Despite a written request by the landlord, the tenant continued with such conduct particularly causing much annoyance to the landlord from visitors and the delivery of letters at the residences of the landlord and his son. This conduct was continued even after the institution of the action.

Held :

1. Taken as a whole the acts complained of constitute a nuisance as contemplated by section 22(2)(d) of the Rent Act.
2. The word "guilty" in section 22(2)(d) only means that the acts were knowingly done. The tenant's intention in doing them is irrelevant. The lack of mens rea in the sense that the said acts were not intentionally done is not a defence.
3. The cause of action was not prescribed in that the plaintiff relied on the whole course of conduct over a long period of time which constituted a nuisance at the time of filing the action, in 1987. In any event, prescription was not pleaded by way of a defence although the defendant raised other legal defences in the answer. As such the court would ignore the Prescription Ordinance.

Cases referred to :

1. *Lakshman de Silva v. Vivekandan* (1994) 3 Sri LR 335
2. *Thamotheram Pillai v. Govindasamy* 47 NLR 197
3. *Mallika Pillai v. Ahamdu Marikkar* 53 NLR 161
4. *Perera and Sons Ltd. v. Pate* 56 NLR 334
5. *Brampy Appuhamy v. Gunasekera* 50 NLR 253
6. *Talwatte v. Somasunderam* (1997) 2 Sri LR 109; B.A.L.J. 1996 Vol. VI Part II Pg. 14
7. *Silva v. Silva* (1858) 2 Lor 28 (F.B.)

APPEAL from the judgment of the Court of Appeal.

E. D. Wickremanayake with *Lalanth de Silva and Ravi Algama* for appellant.

P. A. D. Samarasekera P.C. with *T. B. Dillimuni and G. Jayakumar* for substituted - respondent.

Cur. adv. vult

January 28, 2000
Wadugodapitiya, J.

It would be useful to set the stage before getting on to the facts of this case. The events which gave rise to the cause of action, and which will be narrated later, occurred in a two storied building on Ananda Rajakaruna Mawatha, Colombo 10, which was situated 30 feet from the road, and which consisted of four flats. The common staircase running up the centre of the building divided it into two halves; each half consisting of two flats, one above the other. Thus, as one faced the building, the left hand side of it consisted of a downstair flat bearing assessment No. *137*, which was occupied by the original Respondent (hereinafter referred to as the landlord), and an upstair flat immediately above it, bearing Assessment No. *137 1/2*, occupied by the landlord's *son*, who is the present substituted Respondent. The right hand side of the building also consisted of two similar flats, one above the other, with the ground floor flat, bearing assessment No. 139, occupied by a tenant who does not figure in this case, and the flat immediately above it, bearing assessment No. *137 1/1*, occupied by the Appellant (hereinafter referred to as the tenant). What is important to note, is the juxtaposition of the landlord's flat (No. 137) and that of the tenant (No. 137 1/1). They were on either side of the staircase, diagonally across each other, with the landlord on the ground floor and the tenant on the upper floor. The said flat, No. 137 was occupied by the landlord, his wife, daughter and son-in-law.

The landlord, who had purchased this building from the Methodist Mission in 1965, instituted action in the District Court of Colombo, for the ejectment of the tenant, (who had been a teacher at Wesley College, Colombo) from premises No. 137 1/1, on the ground that the tenant was guilty of conduct amounting to a nuisance to the adjoining occupiers including the landlord, as set out in section 22(2)(d) of the Rent Act. He also asked for damages at Rs. 124/18 per month from 1. 10. 87.

The Learned District Judge held in favour of the tenant, but on appeal, the Court of Appeal set that judgement aside, and held in favour of the landlord. Hence, this appeal.

Section 22(2) (d) of the Rent Act No. 7 of 1972 which applies to the premises in question, (as its rent is over Rs. 100/ - per month), states as follows :

22(2) "Notwithstanding anything in any other law, no action or proceeding for the ejectment of the tenant of -

(i) any residential premises the standard rent (determined under Section 4) of which for a month exceeds one hundred rupees, ... shall be instituted in or entertained by any Court, unless where - . . . .

(d) *the tenant* or any person residing or lodging with him or being his subtenant *has, in the opinion of the court, been guilty of conduct which is a nuisance to adjoining occupiers* . . ." (emphasis mine).

The tenancy is admitted, and there could be no question that the premises are so situated, that the landlord is an "*adjoining* occupier." As Megarry points out (The Rent Acts, 11th Ed, p.405), the word "adjoining" is wider than "contiguous" and all that is required is that the premises of the adjoining occupiers should be near enough to be affected by the tenant's conduct. The relevant premises must be sufficiently close or related so that the behaviour or conduct of the tenant affects the occupation or enjoyment of the adjoining occupiers. Further, Megarry says that as an adjoining occupier, a landlord may claim on the footing of nuisance to him even if he is the only person who has suffered.

Thus, what is left to be decided here is whether the acts complained of amount to a nuisance within the ambit of section 22(2)(d) of the Rent Act. This is reflected in the key issue raised by the landlord: "Did the Defendant (the tenant) by his conduct referred to in paragraph 5 of the plaint cause a nuisance to the plaintiff (landlord) as well as to the adjoining occupiers?". The Learned District Judge answered this issue in favour of the landlord, but held against him on other grounds. (This will be referred to later).

As may be expected, no attempt has been made in the Rent Act, to actually define or set out the meaning of the word "nuisance", and so, one must, in the first instance, discover the ordinary meaning of the word "nuisance."

The 20th Century Chambers Dictionary gives its meaning as "that which annoys or hurts, especially if there be some legal remedy; that which is offensive to the senses; a person or thing that is troublesome or obstrusive in some way."

Then again, as Megarry rightly points out (ibid. p.404), ". . . . . the term "nuisance" must be construed in the normal way, i.e., according to plain and sober and simple notions among the English people, and not as covering anything merely 'fanciful' or a matter of mere delicacy or fastidiousness' . . ." Megarry adds that the word 'guilty' (which also occurs in our section 22(2)(d), ". . . . . means no more than that the acts were knowingly done; the tenant's intention in doing them is irrelevant."

Megarry even goes so far as to say (ibid. p.406) that :

> "Although the landlord must establish that there has been a nuisance to the adjoining occupiers, upon proof of conduct capable of having this effect, the Court is entitled to infer that it had that effect, even if there is no positive evidence that it did."

Now, what are the specific acts of nuisance complained of? According to the landlord, they are as follows. It is noteworthy that none of them is denied by the tenant.

i. The tenant had, after his return from Zambia, started advertising a variety of house-hold items for sale in the newspapers, giving his address as "No. 137" or that of his son, "137 upstairs." Some of the advertisements called for a response after 1.00 p.m. on Sundays. This resulted in callers arriving from about 9 O'clock in the morning and in the afternoons. They would park their cars opposite the landlord's flat (No. 137) and press his bell, and when the landlord inquired as to the reason for their visit, he would be told that it was in response to the advertisements, which are then shown to him in proof. Unnecessary

explanations and arguments have to be entered into, with the callers insisting, and the landlord denying that he had advertised goods for sale.

The advertisements in question appeared in the Observer newspaper of 7. 12. 75, 29. 2. 76, 7. 3. 76, 13. 6. 76, 20. 6. 76 and 10. 7. 76, (marked p1 to p6) through which the tenant offered a variety of imported goods (which were very scarce at that time), for sale. E.g., a Sony radio, a cassette recorder, a camping tent, a Pentak Spotmatic 35 mm. enlarger, a tripod, a Kenwood chefette, a waffle maker, a filter, a Necchi sewing machine, a floor polisher and a Datsun motor car, in respect of which there were repeated advertisements.

The tenant admitted all these acts, and also, that he persisted in giving a misleading address despite the objections of the landlord. The tenant said he did not give importance to separate numbers!

ii. The tenant had been giving as his address, either the flat number of the landlord (No. 137) or that of the landlord's son ("137 upstairs") in letters written by him, resulting in the replies to those letters being delivered at the landlord's flat. The landlord had then to collect them and hand them over to his tenant, and when he did so, the tenant would pick a quarrel with him.

iii. The tenant had given, for insertion in the Telephone Directory for 1987 (P9 and P9(a)) his address as No. 137, which is the address of the landlord. There had been such instances before 1987 as well. This resulted in many pressing the landlord's door-bell, who for convenience, had consulted the Telephone Directory for the tenant's address. This was admitted by the tenant.

iv. The tenant had given the landlord's address (No. 137) to the Registrar of Motor Vehicles, for insertion in the Certificates of Registration of the tenant's vehicles. E.g, P10 re car No. 4 Sri 7638, P11 re. car No. EY 6321 and P12 re. car No. 3 Sri 2674. In P13 (re. car No. 6 Sri 7731), the tenant had given the address of the landlord's son, viz:, No. 137 1/2. As a consequence, correspondence from the

Registrar of Motor Vehicles came to be delivered at the residences of both the landlord and his son. This was also admitted by the tenant.

v. The tenant had also given his address as No. 137, to the Electricity Department for the purpose of his electricity connection (P24).

vi. The tenant, being a pensioner, had, in addition, given his address as No. 137 for the purposes of his *pension returns.*

vii. The tenant had in 1983, without the consent of the landlord, and without the authority of either the Water Resources Board or the Colombo Municipal Council, constructed an unauthorised water connection from the main pipe-line to his flat No. 137 1/1. This resulted in a reduction of the water supply to the flat occupied by the landlord's son. Further, the landlord ran the risk of being held responsible for this unauthorised act done by the tenant. This was also admitted by the tenant.

viii. The tenant had, from about 1982, dumped used motor car tyres and old chairs on the landing of the staircase leading to the upstair flats in a space 5 ft by 5 ft. These were covered with dust and obstructed the entrance to flat No. 137 1/2 occupied by the landlord's son. This too was admitted by the tenant.

Whilst on this point concerning the several acts of nuisance, it is necessary to refer to two very important documents, P7 and P8. Document P7 is a letter dated 27. 10. 75 addressed to the wife of the landlord by the tenant, and reads as follows :

"Dear Mrs. Gnananathan,

Thank you for the seven letters you sent me now - 8.30 a.m. It is a very serious matter for you to take over my letters and *not* deliver them while they were handed over to you last week.

Please make sure that you *never accept* any letter sent in the name of any of my household in future."

(emphasis by the tenant).

Document P8 is in reply thereto, which was dated the same day (27. 10. 75) and sent by the landlord to the tenant. It reads as follows :

"Dear Mr. Premawardhana,

> Thank you for your short note of 27. 10. 75. It is not our business to take over your letters and deliver. The Post-man had left your letters referred to on the window last Saturday. As a matter of courtesy the letters were sent through your servant instead of returning them to the dead-letter office with the endorsement that there are no such persons by these names in premises No. 137, Ananda Rajakaruna Mawatha. I presume the mistake is on your part for not giving the correct number of the flat rented out to you, in your outgoing letters. In all your letters, the number of the house is mentioned as 137, Ananda Rajakaruna Mawatha, where as the correct number of the unit you occupied by you is 137 1/1. I also wish to point out that you had given the wrong number 137, in the Telephone Directory. Please make sure to remedy this error even at this stage without causing confusion to the Post-man and nuisance to others."

This correspondence, whilst being self-explanatory, is very revealing. For one thing, it gives a clear picture of what was actually going on; revealing at the same time, the state of the tenant's mind and the consequences of his acts upon the landlord.

The vital question to my mind is, whether the tenant persisted in his acts even after he received the landlord's reply P8 on 27. 10. 75.

It is not disputed that the tenant, even after receiving the letter P8, persisted in his course of action and continued to use the landlord's address (137). For example, all the advertisements in the Observer newspaper (P1 to P6) were, as set out above, placed by the tenant after the letter P8 was sent to him on 27. 10. 75. The landlord's evidence was to the effect that *the other acts complained of were also continued after the letter* P8 was sent to the tenant. Furthermore, it is seen that the

landlord's evidence was to the effect that the acts complained of, especially the use of the landlord's address by the tenant, continued even after the institution of the present action by the landlord in the District Court in 1987.

In my opinion, at the very lowest, the tenant ought to have desisted after he received the letter P8 from the landlord. Not only did he not desist, but he persisted in his several acts.

In fact, Learned President's Counsel for the landlord rightly submitted that the acts complained of constituted a persistent course of conduct on the part of the tenant over a long period of time, and were certainly not mere isolated incidents. That is to say, the nuisance was not this incident or that, but a continuing course of conduct forming a whole. The specific acts mentioned were merely items constituting the course of conduct amounting to nuisance. In such a situation the nuisance would arise out of the cumulative effect of the several acts that took place. This was recognised by G. P. S. de Silva, C. J., in the case of *Lakshman de Silva vs Vivekanandan*[1].

At the conclusion of the trial, although the Learned District Judge answered the issue on nuisance in favour of the landlord, and held that action on the grounds that the said acts were not intentionally done by the tenant, and also for the reason that no other occupier had complained of any nuisance. The landlord thereupon appealed to the Court of Appeal, which set aside the judgement of the Learned District Judge and allowed the appeal, holding inter alia, "that the Learned District Judge erred and misdirected himself factually in the evaluation of the evidence in regard to whether the acts complained of were a nuisance, and having erred in his understanding of them, proceeded to err in law by misdirecting his mind to relate it to contain a concept of mens rea or intention, as the word 'guilty' is used in section 22(2)(d)."

Learned Counsel for the tenant nevertheless submitted before us that even though all these acts are admitted, they would not amount to a nuisance within the meaning of section 2(2)(d) of the Rent Act. He submitted that the acts may amount to *annoyance*, but would not amount to nuisance. He further

submitted, having referred to what Megarry had to say about what might normally constitute a nuisance (vide supra), that the test to be applied was an objective one, subject to the qualification that the standard to be applied was not that of the "Englishman on the Clapham omnibus", but that of the "common man at the Maradana junction." The question he suggested, was whether the latter would be annoyed and troubled by the acts enumerated above. The answer he said, was in the negative. He added that the acts complained of do not constitute a nuisance under the Rent Act. He said that the four flats in question were originally owned by the Methodist Mission and were occupied by teachers of Wesley College of whom the tenant was one, at which time the entire building (consisting of the four flats) had only one assessment number, viz No. 137, and that the Landlord had bought the building from the Methodist Mission in 1965 and that it was at that time that the four separate assessment numbers were given. The evidence shows that the Deed (P20) on which the property was bought by the landlord sets out the four separate assessment numbers for the four flats. It also appears that the tenant was an unsuccessful contender for the purchase.

Learned Counsel for the tenant also made reference to Learned President's Counsel's submission on behalf of the landlord, that the acts complained of constituted a persistent course of conduct on the part of the tenant and were not isolated incidents of nuisance, and replied that as far as the tenant was concerned, it was wrong to draw such a conclusion. He said that isolated incidents may well be examples of continuing conduct, but to draw that conclusion, the incidents must be consistent, of the same nature or intensity and occasioned under the same situation.

Learned Counsel for the tenant next submitted that though the acts complained of commenced in 1975 the action was brought 10 years later, and said that this should be construed as a waiver by the landlord of the nuisance, and that it was wrong for the Court of Appeal to say that, inasmuch as the tenant had not taken up the plea of prescription in his answer, he cannot be allowed to take up that plea thereafter. However, it is not disputed that in his answer, the tenant did not in fact, take up the plea of condonation or waiver; nor did he take up the plea of prescription.

Now, to take up the specific question on which Special Leave to Appeal was granted, viz, whether the acts complained of amounted to a nuisance as contemplated by section 22(2)(d) of the Rent Act, I have to point out that, as set out above, the Learned District Judge was of the opinion that the acts did amount to a nuisance and he even answered the issue on that question in favour of the landlord. Further, the Court of Appeal itself was firmly of the same view. For my part, I must say that upon a consideration of all the facts and circumstances of this case, I am in total agreement with this view that, taken as a whole, the acts complained of do constitute a nuisance, as contemplated by section 22(2)(d) of the Rent Act.

> If I may re-iterate, the operative words of that section are, "where . . . . the tenant . . . has, in the opinion of the court, been guilty of conduct which is a nuisance to adjoining occupiers . . . ."

Firstly, as I have set out earlier, Megarry points out that the word "guilty" only means that the acts were knowingly done; the tenant's intention in doing them being irrelevant. The Learned District Judge went wrong here, when he held that even through the acts amounted to a nuisance, the tenant had to be absolved for the reason that he did not have the necessary intention. This position was corrected by the Court of Appeal; with which position I agree. I therefore hold that the tenant's intention is not relevant. There can be no doubt whatsoever that the acts were knowingly done by the tenant.

Secondly, I agree with Learned Counsel for the tenant that the burden is on the landlord to establish that there has been a nuisance to the adjoining occupiers. In this context, it appears that Section 22(2)(d) of the Rent Act demands that the conduct must amount to a nuisance "in the opinion of the Court." It is my view that having regard to all the facts and circumstances of this case, the landlord has in fact discharged that burden and that, in my opinion, the acts do amount to a nuisance. I have already set out in detail the acts of nuisance complained of. I have also mentioned the fact that the tenant

does not deny any of them. On the contrary, Learned Counsel for the tenant contends that though they may amount to annoyance they do not amount to a nuisance. He arrived at this conclusion adopting as his standard, that of the "common man at the Maradana junction", who he said would not even be troubled or annoyed by the acts complained of. I do not think I can agree with this view, or with the other submissions of Learned Counsel for the tenant as set out earlier. As Learned President's Counsel for the landlord submitted, and I agree with him, the acts complained of taken as a whole, constitute a persistent course of conduct on the part of the tenant over a long period of time. They were certainly not mere isolated incidents; nor could they be "construed as covering anything merely 'fanciful' or a matter of mere delicacy or 'fastidiousness' . . ."

As Canekeratne J said in *Thamotheram Pillai vs Govindasamy* [2], "A tenant can be ejected from the premises let to him if he causes a substantial interference with the enjoyment of the adjoining room by the landlord." This was an instance where the tenant turned the premises let to him into a workshop where he repaired radio sets at night."

In *Mallika Pillai vs Ahamadu Marikkar* [3], the tenant was ejected because he permitted about 29 persons other than members of his own household to use the only bathroom and lavatory on the premises, thereby causing a nuisance to the landlord.

In *Perera and Sons Ltd., vs Pate* [4] the tenant was ejected for allowing its workmen to urinate in, and pollute the drains on both sides of the road just outside the room which was used as a rest room by the tenant Company's workmen. This was held to constitute a nuisance to a neighbouring occupier who lived opposite the premises. In this instance, repeated complaints fell on deaf ears. Sansoni J., went so far as to say, "I do not think it was necessary that evidence should have been given by the Plaintiff herself, that she considered the conduct complained of a nuisance. Upon proof of conduct capable of having this effect, the Court is entitled to infer that it had that

effect, even if there is no positive evidence that it did. The Court is entitled to presume that the adjoining occupiers are reasonable people to whom the conduct in question would be a nuisance."

In *Lakshman de Silva vs Vivekanandan* (supra), the evidence disclosed that the Appellant had been in the habit of parking cars and vans, thus obstructing access to the Respondent's residence and keeping machinery which he moved about and fitted as in a workshop. The evidence also showed that the Appellant abused the Respondent; assaulted the latter's brother-in-law who was an Attorney-in-Law; continuously harassed the landlord by pounding the ceiling and wall of the premises, breaking parts thereof: threw lighted crackers on the landlord's dogs, and generally used threatening and insulting language on the landlord. G. P. S. de Silva, C. J., said "In a well considered judgement, the trial Judge has carefully evaluated the evidence, both oral and documentary, and rightly reached the finding that the cumulative effect of the acts complained of constitutes a nuisance which would ground an action for ejectment. The evidence clearly establishes that the parking of cars and vans which obstruct access to the Plaintiff's residence and the abuse and intimidation directed at the Plaintiff are certainly not isolated incidents. This has taken place during a period of about three months inevitably causing *considerable inconvenience* and *discomfort to the Plaintiff*. I accordingly hold that the claim for ejectment from the premises is well founded."

For the reasons set out above, I myself have no difficulty in holding that the acts complained of did amount to a nuisance as contemplated by Section 22(2)(d) of the Rent Act.

I now pass on to the other question of law on which Special Leave to Appeal was granted, viz., whether the Court of Appeal erred in law when it held that the tenant could not have raised the plea of prescription when he had not specifically pleaded it as a defence in his answer.

Admittedly the answer did not set out the defence that the cause of action was prescribed in law, but Court allowed an

issue on this plea to be raised, and for the first time this defence was permitted at the trial after evidence commenced. The Learned Judge of the Court of Appeal held that this situation should not be permitted and cited the case of *Brampy Appuhamy vs Gunasekera*[5], where Basnayake C. J. held :

> "Where the effect of the Prescription Ordinance is merely to limit the time limit within which an action may brought, the Court will not take the statute into account unless it is expressly pleaded by way of defence."

The Learned Judge of the Court of Appeal also cited the judgement of the Chief Justice G. P. S. de Silva in *Talwatte vs Somasunderam*[6], which held that a new contention involving a question of mixed fact and law cannot be raised for the first time in appeal and that a party cannot be permitted to present in appeal a case materially different from the case presented before the trial Court. The Court held that in this connection one should bear in mind the provisions of Explanation 2 to Section 150 of the Civil Procedure Code.

I would agree with the view taken by the Learned Judge of the Court of Appeal that a party cannot be permitted to present before a trial Court a case *materially* different from the case set out in his pleadings.

Learned President's Counsel for the landlord submitted further, that in any event he would argue that the landlord was certainly not relying on any single act to say it constituted a nuisance. If he did so, then prescription might be said to run as from the date of the commission of that act. Contra, what he relies on is the whole course of conduct over a long period of time which constituted a nuisance at the time of filing action in 1987, and continued even thereafter. He submitted that being the case, no specific dates need be mentioned as insisted upon by Learned Counsel for the tenant. In any event as Learned President's Counsel submitted, the dictum of Basnayake C. J., in *Brampy Appuhamy vs Gunasekera* (Supra) clearly indicated that where the effect of the Prescription Ordinance was only to limit the time within which an action

may be brought, it must be expressly pleaded by way of a defence. Otherwise it will be ignored. See also, *Silva vs Silva*[7]. It may be noted that in the instant case, although the tenant raised other legal defences in his answer, he omitted to plead prescription as a defence. Instead, he raised an issue based on prescription only at the trial. I am therefore of the view that the Learned Judge of the Court of Appeal was not in error. Even if the plea of prescription was properly pleaded in the answer, and an issue raised thereon at the proper stage, I am of the view that in the circumstance of this case, no trial Judge could have answered that issue in the affirmative.

Therefore, for the reasons set out above, I dismiss the appeal. I enter judgement for the Substituted Plaintiff-Respondent in terms of the prayer to the plaint. The Substituted Plaintiff-Respondent will be entitled to a sum of Rs. 10,000/- as costs.

DHEERARATNE, J. - I agree.

GUNASEKERA, J. - I agree.

Appeal dismissed.