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] 1 SRI L.R. - PART 5**

**PAGES 113 - 140**

**Consulting Editors** : HON J. A. N. De SILVA, Chief Justice

 (retired on 16.5.2011)

 HON. Dr. SHIRANI A. BANDARANAYAKE

 Chief Justice (appointed on 17.5.2011)

 HON. SATHYA HETTIGE, President,

 Court of Appeal (until 9.6.2011)

 HON S. SRISKANDARAJAH President, Court of Appeal

 (appointed on 24.6. 2011)

**Editor-in-Chief** : L. K. WIMALACHANDRA

**Additional Editor-in-Chief** : ROHAN SAHABANDU

**PUBLISHED BY THE MINISTRY OF JUSTICE**

**Printed at M. D. Gunasena & Company (Printers) Ltd.**

**Price: Rs. 25.00**

**D I G E S T**

 **Page**

**CUSTOMS ORDINANCE** - Section 47, Section 51, Section 52 - Willfully 113

failing to classify foods - Misdescription - Non declaration of

royalty - Is it undervaluation?

 **Utsch Lanka (Pvt) Ltd., And Another Vs. Deputy Director Of**

**Customs And Others**

 **(**Continue from Part 4)

**DONATION OF IMMOVABLE PROPERTY –** Revocation of gifts – Donation 124

given in contemplation of marriage – Impeaching the credit of a

witness, not cross – examined by the adverse party – Evidence

Ordinance – Section 164 – Using as evidence, of document,

production of which was refused on notice – Section 165 – Judges’

power to put questions or order production of any document or thing

 **Ariyawathie Meemaduma V. Jeewani Budhika Meemaduma**

**WRIT OF CERTIORARI -** Constitution Article 140 - Court of Appeal 135

(Appellate Procedure) Rules of 1990-91- Affdavit mandatory -

Defective affdavit- Is there a valid application for writ?- Buddhist nor

affrming - Oaths and Affrmation Ordinance 9 of 1985 Civil Procedure

Code - Section 438 - Judicial review available - Fair hearing

 **Multi Purpose Co-operative Society, Madawachchiya vs. Kirimudi-**

**yanse and others**

(Continued in Part 6)

*Utsch Lanka (Pvt) Ltd., And Another Vs. Deputy Director Of Customs And Others*

CA *(Srisandarajah, J.)* 113

*As presented the plates already bear several “Lion” water-*

*marks, as well as pre-engraved secret numbers. The national*

*emblem of the country of use is printed in the corner of the*

*plates. After importation, this information is supplemented by*

*the national license number plate of the corresponding motor*

*vehicle and the plate is issued to the owner.”*

*And sought advice: whether the product should be*

*classifed in heading 83.10 or in heading 76.16.*

*The Secretariat’s opinion: The article in question is an*

*aluminium plate which already contains preprinted security*

*information which determines its future use. On the basis of*

*its content and presentation Secretariat conclude that this*

*is a licence number plate presented unfnished but already*

*displaying the essential characteristics of a motor vehicle*

*licence number plate. This interpretation is supported by the*

*second paragraph of the explanatory note to this heading*

*which stipulates that “some plates. . . designed for the*

*subsequent insertion of details” belong in heading 83.10.*

The World Customs Organization has described the goods

in issue under heading 83.10 not because the blank plate

contains any letters, numbers or designs on them (Comments

made by the Sri Lanka Customs in advise No TC/99/177

dated 17.12.1999 that if the plates imported bear any letters,

Nos or designs they would fall under 8310.00) but because

the plate is designed for the subsequent insertion of details.

The above facts show that the Customs Department

itself had doubts as to whether the number plates containing

security features (such as lion water marks, pre-engraved

secret numbers and the national Emblem of Sri Lanka)

should be classifed in heading 83.10 or in heading 76.16. In

114 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

these circumstances the Petitioners’ claim that they relied on

the advice bearing No TC/99/177 dated 17.12.1999 that the

aluminium plate they imported with security features falls

under HS code 7616.99 and declared accordingly in the

CUSDEC cannot be said to have been done with the intention

of defrauding the Revenue. The Supreme Court in *Toyota*

*Lanka (Pvt) Limited v. Director General of Customs (supra)* held

that in the absence of stealth, to evade payment of customs

duties or dues that the forfeiture provided for in Section 47

would not apply to a situation of a disputed classifcation of

goods or an under payment of short levy of dues or duties.

But now an opinion has been obtained from the World

Customs Organization that the aluminium plate with the

security features is a licence number plate presented

unfnished but already displaying the essential characteris-

tics of a motor vehicle licence number plate. This interpreta-

tion is supported by the second paragraph of the explanatory

note to this heading which stipulates that “some plates . . .

designed for the subsequent insertion of details” belong in

heading 83.10. In view of this opinion all the consignments

of aluminum plates imported by the 1st Petitioner falls within

the classifcation of Hs Code 8310.00 in the circumstances

the duties short levied in the imports of the said 22 consign-

ments of the 1st Petitioner could be recovered as provided for

under Section 18 of the Customs Ordinance.

**Undervaluation by non declaration of royalty**

The principal agreement dated 11th of October 1999

for the manufacture, supply and delivery of retro-refective

number plates with embossed number and security sticker

for windscreen was between Erich Utsch AG and the

Commissioner of Motor Traffc. The principal contractor by

his letter dated 13th January 200 informed the Commissioner

*Utsch Lanka (Pvt) Ltd., And Another Vs. Deputy Director Of Customs And Others*

CA *(Srisandarajah, J.)* 115

of Motor Traffc that for the purpose of having a local contract

with the Department of Motor Traffc and as it is easier for

the project implementation and monitoring with a local team,

the contractual obligation of Erich Utsch AG was assigned to

Utsch Lanka (Pvt) Ltd the 1st Petitioner, a Company incor-

porated in Sri Lanka under the terms and conditions agreed

upon between these two parties. One of the terms of the said

agreement is that the Licensor pay the Licensee a royalty fee

for the provision of technology, expertise and training for the

project by the Licensor. The payment related to the royal-

ty was embodied in an agreement between Erich Utsch AG

and the 1st Petitioner dated 21st March 2000 (P5). One of the

conditions of the said agreement is the payment of Royalty

Fee of ten per cent (10%) per annum of the total turnover of

the 1st Petitioner as per the audited accounts.

The charge against the Petitioner is that it has failed

in all the instances to declare the royalty payments to the

Customs in order to determine the value of the goods

imported. As such the Petitioner has undervalued the goods

imported and defrauded the revenue by not paying the

correct customs duty.

The above charge is in relation to the Customs valuation

of the goods imported by the 1st Petitioner. For the purpose

of customs duty the value of the goods has to be determined

at the time of importation. As provided by Section 51 of the

Customs Ordinance it is the duty of the importer or his agent

to state the value of the article imported in the ‘Sri Lanka

Customs - Value Declaration Form’ together with the descrip-

tion and quantity of the same. Such value shall be deter-

mined in accordance with the provisions of Schedule E, of

the Customs Ordinance and duties shall be paid on a value

so determined.

116 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

The said form in Column 16 requests the declaration of

the following particulars:

16. Declare any of the following costs & services and not included

in the invoice value in terms of Article 8(1) and 8 (2) of Schedule

E for the Customs Ordinance.

(a) Brokerage and Commission : N/A (b) Cost of Containers: N/A

(c) Packing Costs: N/A (d) Cost of goods and services

 supplied by the buyer: N/A

(e) Royalities and license fees: N//A (f) Value of Proceeds which

 accrue to sellers: N/A

(g) Loading, Unloading, Handing (h) Insurance EURO 606:12

Charges: N/A

(In the country of exportation)

(i) Feight N/A (j) Others payments, if any: N/A

The Petitioner in the said Value Declaration form declared

against the Column Royalties and license fees - N/A (not

applicable). On the value declared by the Petitioner in the

Value Declaration Form value was determined and the

customs duties were paid by the Petitioner.

The Respondents submitted that according to the license

agreement between Erich Utsch AG and the 1st Petitioner

dated 21st March 200 P5 a payment of 10% royalty for the

provision of technology, expertise and training for the

project has to be paid to Erich Utsch AG per annum of the

total turnover of the 1st Petitioner as per the audited accounts.

Hence the 1st Petitioner should have declared in the Value

Declaration Form the payment of royalty. Whether a payment

of royalty is applicable to customs valuation purpose or not

is a matter for customs to decide upon accurate informa-

tion in consultation with each other. Therefore the failure to

*Utsch Lanka (Pvt) Ltd., And Another Vs. Deputy Director Of Customs And Others*

CA *(Srisandarajah, J.)* 117

declare the royalty payments has clearly deprived customs of

that opportunity and has helped the Petitioner to evade due

payment of customs duty.

The question is whether the royalty payment of the

Petitioner for the provision of technology expertise and

training for the project has to be added to the value of the

goods imported? If not is it necessary to declare the payment

of royalty in the Value Declaration Form?

As observed above the determination of the value of

the goods imported is for the purpose of determining the

customs duty. According to Section 51 the value of the goods

imported has to be determined in accordance with Schedule

E of the Customs (Amendment) Act No. 2 of 2003. Article 1 of

Schedule E states: the customs value of any imported goods

shall be the transaction value, that is the price actually paid

or payable for the goods when sold for export to Sri Lanka as

adjusted with the provisions of Article 8. Article 8(1) of the

said schedule states;

In determining the customs value under the provisions

of Article 1, there shall be added to the price actually paid or

payable for the imported goods:

 (a). .

 (b)...

 (c) Royalties and license fees related to the goods being

valued that the buyer must pay, either directly or

indirectly, as a condition of sale of the goods being

valued to the extent that such royalties and fees are

not included in the price actually paid or payable.

......

118 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

There is no issue as to the declaration of the price

actually paid to the imported goods. It is admitted that the

royalty is not included in the price actually paid. The issue

is whether the royalty that has to be paid by the Petitioner

for the provision of technology, expertise and training for the

project be added to the prices actually paid for the imported

goods for the purpose of determining the customs value of the

goods in order to determine the customs duty.

It is important to note that the duties of customs shall

be levied and paid upon all goods and merchandise imported

into or exported from Sri Lanka under Section 10 of the

Customs Ordinance at the time of importation or exportation.

Therefore the price of the goods has to be determined at the

time of importation to facilitate the payment of customs duty

at the time of importation. Article 1 of Schedule E states: the

customs value of any imported goods shall be the transaction

value, that is the price actually paid or payable for the goods

when sold for export to Sri Lanka as adjusted with the

provisions of Article 8. The price of the goods at the time

of importation is :- price actually paid with royalty paid or

payable **to the goods imported**.

For example if the goods are imported under a foreign

trade mark, the value of the right to use the patent, pro-

tected design or trade mark, shall be added to the normal

price. It is admitted that the goods imported are rectangular

aluminum plates of various dimensions, with rounded

corners and raised edges, covered with a refective foil with

several lion water marks, pre-engraved secret numbers and the

national emblem of Sri Lanka. It is also admitted that no

royalty is paid or payable to the technology used in the

manufacture of the said blank aluminium plates or for the

inscription of lion water marks, pre-engraved secret numbers

*Utsch Lanka (Pvt) Ltd., And Another Vs. Deputy Director Of Customs And Others*

CA *(Srisandarajah, J.)* 119

and the national emblem of Sri Lanka. Therefore it is evident

that the royalty is not paid or payable to anything done or

contained in the said plate at the time of importation.

The royalty is paid for the provision of technology,

expertise and training for the embossing and printing of

motor vehicle number (with two letters, four numbers across

the plate separated by a dash with a provincial identifca-

tion (two) letters) on the aluminium plate imported. Number

of imported aluminium plates (goods) used for embossing

is independent of the quantity of the goods imported. The

payment of royalty is defned under Article 8 of Schedule E,

accordingly the royalty and license fees should be related to

the goods being valued, and royalty and license fees should

be a condition of sale of the goods being valued.

Is royalty related to the goods being valued? The

Petitioners’ contended that the goods imported are raw

materials and consumables required for the manufacture

and supply of number plates. The royalty paid under the said

license agreement does not relate to the said imported goods

as they are not imported pursuant to the license agreements

(P5). The royalty that is paid is not in respect of imported

goods but in relation to the necessary technology, expertise

and training used in the process of manufacturing of number

plates and the sale of number plate takes place in Sri Lanka

to the Department of Motor Vehicle. The contention of the

Respondents is that the technology cannot be used by the

importer on any product except the product imported from

the exporter. Thus the royalty is clearly related to the goods.

A similar position was taken by the Revenue of India in

*Commissioner of Customs (Port), vs. M/S Toyata Kirloskar*

*Motor Pvt Appeal (Civil)*(3) “The payments of royalty, according

to the Revenue, have a direct nexus to the imported goods

120 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

as the same go into the manufacture of the licensed

vehicles and spare parts. The Court observed: “The basic

principle of levy of customs duty, in view of the aforementioned

provisions, is that the values of the imported goods has to be

determined at the time and place of importation. The value to be

determined for the imported goods would be the payment

required to be made as a condition of sale. Assessment of

customs duty must have a direct nexus with the value of

goods which was payable at the time of importation. If any

amount is to be paid after the importation of the goods is

completed, inter alia by way of transfer of license or technical

know how for the purpose of setting up of a plant from the

machinery imported or running thereof, the same would not

be computed for the said purpose. Any amount paid for post

importation service or activity, would not, therefore, come

within the purview of the determination of assessable value

of the imported goods so as to enable the authorities to levy

customs duty or otherwise.”

The goods valued are the ‘Rectangular Blank Aluminum

Plates’ (with rounded corners and raised edges, covered with

a refective foil with several lion water marks, pre-engraved

secret numbers and the national emblem of Sri Lanka) and

not the fnished number plates. There is no royalty payment

attached to the imported ‘Rectangular Blank Aluminum

Plates’ at the time of valuation or at any later stage. But the

royalty would accrue if and when the numbers are embossed

on the plates and sold. The royalty have a direct nexus to the

fnished product but it does not have a direct nexus to the

imported goods.

Is royalty payment a condition of sale? The Petitioner

contended that under the license agreement P5 the royalty

is paid on the total annual turnover as per the audited

*Utsch Lanka (Pvt) Ltd., And Another Vs. Deputy Director Of Customs And Others*

CA *(Srisandarajah, J.)* 121

accounts of the 1st Petitioner hence it cannot be said that

the royalty is paid as a condition of sale of the goods being

valued. The entire transaction between the parties establishes

that the payment of royalty is not a pre condition for the

sale of raw materials. The submission of the Respondents is

that the agreement between the Petitioner and Erich Utsch

AG is for the complete transaction as such the importation,

embossing and sale are linked together and the failure on the

part of the Petitioner to pay the royalty would amount to the

refusal of future sale of the aluminum plates. The Respondent

further contended that the ‘condition of sale’ should not be

read as ‘a condition of contract of sale’ *Chief Executive Offcer*

*of the New Zealand Customs Service v. Nike New Zealand*(4).

The Respondents submitted that in the given circumstances

the royalty payment is a condition of sale. In *Commissioner*

*for the South African Revenue Service v. Delta Motors Corpo-*

*ration (Property) Limited*(5) the Court considered the payment

of royalty in relation to the customs duty. The Respondent

Company was a motor vehicle manufacturer and distributor.

It imported vehicle parts completely knocked down (CKD)

from Opeal Germany. Four years it paid customs duty

calculated on the invoice amount per kit which invoiced

amount included not only the purchase price but also an

unspecifed charge by Opeal for engineering, styling and tool-

ing (EST). The company requested refund of customs duty on

the ground that the EST charge paid to Opal and included in

the invoiced amount was not part of the price payable for CKD

but instead a non-dutyable royalty. The court held “In the

present matter the sale of kits to the respondent is regulated by

the supply agreement. Nothing in that agreement makes

the charges now in dispute payable as a condition of sale.

The engineering and styling charges constitute the royalty

122 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

payable, not in terms of the supply agreement but the A and D

agreement. As for the tooling charges (assuming they amount

to royalty or license fees) they too are not payable pursuant to

anything contained in the supply agreement. The ETS charg-

es are consequently not payable ‘as a condition of sale’. On

the contrary, in so far as the supply agreement does apply to

these charges it makes them payable even if no kits are sold

(so long, of course, as assembled vehicles are sold). It follows

further from what has been said already that the EST charges

are paid in respect of “assembled vehicles sold and not”

in respect of imported kits. The terms of Section 67(1) (c)

are accordingly inapplicable and in consequence the EST

“charges were not dutiable”.

Article 8 (C) of Schedule E of the Customs (Amendment)

Act No. 2 of 2003 contain similar provisions of that of

Section 67(1) (c) of the Customs and Excise Act 91 of 1964 of

the South African Act. In the instant case too, the royalty is

paid on the fnished product and not on the aluminum plate

imported. Even though the fnished products were made out

of the aluminum plates sold it does not mean that the sale of

the aluminum plates has a direct link to the manufacture of

the fnished product. As I have observed above the number of

aluminum plates sold to the licensor need not be equal to the

manufacture of the number plates, taking in to consideration

the stock in trade, waste and damages etc. The sale of the

aluminum plates with security features to the 1st Petitioner

was under the terms and conditions of the principal Agreement

dated 11th of October 1999 and by the assignment of the

contractual obligation of Erich Utsch AG to Utsch Lanka

(Pvt) Ltd the 1st Petitioner, by letter dated 13th January

2000. The payment of royalty is not included in any of these

agreements. The royalty is paid in relation to an agreement

*Utsch Lanka (Pvt) Ltd., And Another Vs. Deputy Director Of Customs And Others*

CA *(Srisandarajah, J.)* 123

entered between Erich Utsch AG and the 1st Petitioner on 21st

March 2000 (P5) and the royalty is paid not on a fxed rate or

based on the purchase price but on the sale of the completed

number plates. As such the royalty payment depends on

the rate of manufacture of the vehicle number plate. There

is nothing to prevent the 1st Petitioner to purchase large

quantities of aluminum plates from Erich Utsch AG and after

having a substantial stock with it, to start manufacture of

the number plates. There is no merit in the submission of the

Respondents that the sale of the aluminium plates depends

on the payment of royalty.

When considering all the facts and circumstances of this

case it is clear that the royalty payment is not related to the

imported goods or it is a condition of sale of the imported

goods (aluminium plates) therefore the royalty payment need

not be added to the price actually paid. Hence the failure to

enter the payment of royalty in the Custom Value Declara-

tion Form will not amount to a false declaration to charge the

Petitioners under Section 52 of the Customs Ordinance.

In the above circumstances this court issue a writ of

certiorari to quash the order of the 1st Respondent dated

16.01.2007 marked P18 (f). Application for a writ of certiorari

is allowed as prayed for in prayer (d) of the Petitioner without

costs.

*Application partly allowed.*

124 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

**ARIYAWATHIE MEEMADUMA V.**

**JEEWANI BUDHIKA MEEMADUMA**

SUPREME COURT

AMARATHNGA, J.,

RATNAYAKE, J. AND

EKANAYAKE, J.

S.C.APPEAL NO. 68/2010

W.P./HCCA/COL. 98/2006

D.C. COLOMBO 7402/SPL

OCTOBER 21ST, 2010

***Donation of immovable property – Revocation of gifts – Donation***

***given in contemplation of marriage – Impeaching the credit***

***of a witness, not cross – examined by the adverse party – Evi-***

***dence Ordinance – Section 164 – Using as evidence, of document,***

***production of which was refused on notice – Section 165 – Judges’***

***power to put questions or order production of any document or***

***thing***

The District Judge dismissed the Plaintiff Appellant’s action on the basis

that the Appellant has failed to establish any ground on which donor is

entitled to in law to revoke a deed of gift. The appeal fled by the

Appellant against the judgment of the District Court too was dismissed

by the Civil Appellate High Court. The learned High Court Judge agreed

with the view of the learned District Judge that the deed of gift sought

to be revoked had been given in contemplation of the Defendant’s

Respondent's marriage, and had stated, that a donation given in con-

templation of the marriage is not revocable, if the contemplated mar-

riage had in fact taken place.

**Held:**

(1) A deed of gift is absolute and irrevocable. There are however

certain exceptions to the rule of irrevocability.

Per Gamini Amaratunga, J., -

 “”A deed of gift is absolute and irrevocable”. That is the rule.

However, the law has recognized certain exceptions to the rule of

*Ariyawathie Meemaduma V. Jeewani Budhika Meemaduma*

SC *(Gamini Amaratunga J.)* 125

irrevocability. A party applying to Court to invoke the exceptions

in his favour has to satisfy Court, by cogent evidence, that the

Court would be justifed in invoking the exception in favour of the

party applying for the same.”

 “A mere *ipse dixit* like, ‘he threatened to kill me’ is not suffcient to

discharge that burden.”

(2) On the evidence available, no reasonable Judge, properly directed

on the law relating to the burden of proof which rested on the

Appellant, could have given a decision in favour of the Appellant.

The conclusion of the trial Judge and the Civil Appellate Court

that the Appellant has failed to establish her case is therefore

correct in law.

(3) The Appellant’s case had been dismissed not on the basis that the

deed of gift is irrevocable but on the basis that the Appellant had

failed to prove the grounds relied upon by her to revoke the deed

of gift.

(4) Sections 164 and 165 of the Civil Procedure Code and Section 165

of the Evidence Ordinance do not require a Judge to step in to fll

the gaps of a case presented by a party.

**Cases referred to:**

1. *Dona Podinona Ranaweera Menike V. Rohini Senanayake* – (1992)

2 Sri L.R. 180

**APPEAL** from the High Court of the Western Province exercising Civil

Appellate Jurisdiction.

*Nishantha Sirimanne* for the Plaintiff-Appellant

Defendent-Respondent absent and unrepresented

*Cur. adv. vult*

July 26th 2011

**GAmini AmArAtUnGA J.**

This is an appeal, with leave granted by this Court,

against the judgment of the High Court of the Western Province

exercising civil appellate jurisdiction dismissing the plaintiff

126 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

appellant’s appeal to the High Court against the judgment of

the District Court dismissing the plaintiff appellant’s action

fled against the defendant respondent.

The defendant-respondent is the youngest daughter of

the Plaintiff-appellant (hereinafter called the appellant). On

11.3.1999, by a Deed of Gift the appellant gifted premises No.

11A, Mahasen Mawatha, Thimbirigasyaya Road, Colombo 5

to the defendant. That is the house where the appellant lived

with her husband and the defendant. This gift is subject to

the life interest of the appellant and her husband to that

property. On 12.3.1999, the day after the execution of the

deed of gift, the defendant married one Sanjeewa Perera.

Thereafter the appellant, her husband and the couple

continued to live in that house.

On 28.09.2005, the appellant fled action bearing

No. 7402/Spl in the District Court of Colombo to revoke the

Deed of Gift execution in favour of the defendant on the basis

of gross ingratitude on the part of the donee, the defendant.

According to the plaint fled in the District Court, some

time after the marriage, the defendant’s conduct gradually

changed and she began to request the appellant to relinquish

the appellant’s and her husband’s life interest in the prop-

erty and demand that they should vacate the property giving

possession thereof to the defendant, The appellant, among

other reliefs, has prayed for judgment and decree revoking

the said Deed of Gift No. 2603 dated 11.3.1999.

The defendant who appeared in the District Court on

summons has obtained two dates to fle answer. When an

application was made for a further date to fle answer, the

learned District Judge has refused to grant further time for

*Ariyawathie Meemaduma V. Jeewani Budhika Meemaduma*

SC *(Gamini Amaratunga J.)* 127

the answer and fxed the case for ex parte trial, which took

place later on 20.02.2006. The appellant testifed at the trial

and marked and produced, among other documents, the Deed

of Gift P2, and certifed copies of two complaints made by her

husband to the Narahenpita Police, P4A and P4B. With her

evidence the plaintiff has closed her case.

The learned District Judge, after considering the evi-

dence given by the appellant and the documents produced by

her has come to the conclusion that the appellant has failed

to establish any ground on which a donor is entitled in law

to revoke a Deed of Gift. Accordingly he has dismissed the

appellant’s action.

A perusal of the judgment of the learned District Judge

indicates that he was aware of the grounds on which a

deed of gift could be revoked and that he had taken into

consideration the contents of the documents P4A and P4B

(certifed copies of complaints made to the Narahenpita

police by the appellant’s husband) in assessing the evidence

of the appellant. The learned trial Judge has also expressed

the view that the deed of gift had been given to the defendant

in contemplation of her marriage, but this was not a ground

upon which he has based his decision to dismiss the action

of the appellant.

The appeal fled by the plaintiff appellant against the

judgment of the District Court was dismissed by the Civil

Appellate High Court. The judgment of the High Court indicates

that it agreed with the view expressed by the trial judge that

the appellant had failed to establish any ground on which it

is permissible in law to revoke a deed of gift. The High Court

referring to the view expressed by the trial Judge that

the deed of gift sought to be revoked had been given in

128 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

contemplation of the defendant’s marriage, has stated, that a

donation given in contemplation of the marriage is not

revocable if the contemplated marriage had in fact taken

place.

After considering the application fled by the appellant

seeking leave to appeal against the judgment of the High

Court, this Court has granted leave to appeal to the appellant

on the following questions of law except question No. (b).

(a) Did the High Court err by failing to consider/appreciate

that the petitioner’s oral testimony in the District Court

of Colombo remained uncontroverted and undisputed?

(c) Did the High Court err by completely failing to consider/

appreciate that the reservation of the life interest of the

petitioner and her husband in the said property was a

condition attached to the gift and the breach or inter-

ference with the said condition was tantamount to gross

ingratitude?

(d) Did the High Court err by failing to appreciate that there

was suffcient documentary and oral evidence to substan-

tiate the petitioner’s claim of gross ingratitude on the part

of the respondent?

(e) Did the High Court err by failing to appreciate/consider

that when the life interest in a property is reserved, the

donation of that property cannot be in consideration of

marriage (donation propter nuptias)?

(f) Did the High Court err by misdirecting itself and/or

misconstruing and/or completely failing to consider

the judgment of Your Lordships’ Court in *Dona Podi-*

*Ariyawathie Meemaduma V. Jeewani Budhika Meemaduma*

SC *(Gamini Amaratunga J.)* 129

*nona Ranaweera Menike v. Rohini Senanayake* (1) which

judgment the appellant relied on in support of her case?

(g) Did the Court err by failing to properly construe the

statements made by the petitioner’s husband to the

police and marked in evidence at the trial?

(h) Did the High Court err by failing to consider that the

respondent and her husband attempted on several

occasions to force the petitioner against her will to

renounce her life interest in the said property?

(i) Did the High Court err by failing to appreciate that the

conduct of the respondent (and her husband) towards the

petitioner, as demonstrated by the petitioner’s evidence,

constituted gross ingratitude?

(j) Did the High Court err by failing to appreciate/consider

that, if the learned trial Judge had any doubts with

regard to the truth or veracity of the testimony of the

petitioner, he could have clarifed the same from the

petitioner under and in terms of sections 164 and 165

of the Civil Procedure Code as well as under section

165 of the Evidence Ordinance, but chose not to do so

and therefore, cannot subsequently fnd fault with her

testimony?

(k) Did the High Court err by holding that the petitioner has

not demonstrated even a single act of gross ingratitude

on the part of the respondent?

The learned counsel for the appellant has submitted

written submissions in support of the appeal with copies of

several judgments dealing with the subject of revocation of

deeds of gift.

130 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

The frst question of law on which leave to appeal was

granted is “Did the High Court err by failing to consider/

appreciate that the petitioner’s oral testimony in the District

Court of Colombo remained uncontroverted and undisputed?”

At the ex parte trial, there was no cross-examination of the

appellant. There was no other witness testifying at the trial

on behalf of the appellant. However it has to be borne in mind

that contradictions of the oral testimony of a single witness,

not cross examined by the adverse party can emerge even

from the contents of the documents produced by the sole

witness himself at the trial. In this case this Court has to

consider whether the appellant’s oral evidence in the District

Court remains uncontradicted when one considers the

contents of documents 4A and 4B produced by the appellant

herself when she gave evidence at the trial. In order to

consider that question I shall briefy set out the oral evidence

given by the appellant in the District Court.

In her oral testimony the appellant has stated that after

marriage her daughter’s (the defendant’s) conduct gradually

changed. The defendant very often troubled the appellant and

her husband requesting them to relinquish their life interest in

the property and vacate the house and hand over possession

of the property to her. The defendant neglected to look after

appellant and she (the appellant) sustained herself with her

own pension.

Thereafter the appellant was threatened through the

defendant’s husband. Even death threats were made to the

appellant by the defendant and her husband. The daugh-

ter and the son in law made such threats and asked them

to relinquish their rights to the property and hand it over

to the defendant. On 17.08.2005, the appellant’s husband

complained of this to the Narahenpita police. (A certifed copy

of that complaint was produced marked 4A)

*Ariyawathie Meemaduma V. Jeewani Budhika Meemaduma*

SC *(Gamini Amaratunga J.)* 131

The appellant has further stated that even thereafter

there were death threats to her and to her husband from the

defendant and her husband. Regarding those threats a

complaint had been made to the Narahenpita police on

28.08.2005. (a copy of the complaint was produced marked

4B) The appellant has concluded her evidence by saying

that her daughter did not look after them and had brought

pressure on them to relinquish their life interest and that

accordingly the defendant was guilty of gross ingratitude.

What is stated above was the evidence on which the

appellant claimed a decree revoking the deed of gift. In the

back ground of the evidence given by the appellant it is now

opportune to examine the contents of P4A and P4B, the

police complaints made by her husband.

In that statement, the husband of the appellant has

stated that in order to admit a son of their son to a school

they inquired from their daughter (the defendant) whether

she could re-convey the property (donated to her by the deed

of gift) and the daughter agreed to re-convey the property

to the appellant. However the daughter’s husband objected

to this and attempted to assault them. They said that the

house belonged to them and that they would not give it back.

The son in law threatened that he would kill the son of the

appellant and serve six years in jail and come out. They

demanded Rs. Five million to re-convey the property. After

this incident the daughter and the son in law left the house

on the following day. (i.e. 17.08.2005)

According to this statement of the appellant’s husband

the trouble commenced when they requested the daughter

to re-convey the property to them to enable them to facilitate

their son to admit his child to a school. In document 4A there

132 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

is no allegation whatsoever that the defendant on her own

initiative asked the parents to relinquish their life interest

in the property. Their alleged demand for Rs. fve million to

re-convey the property had been made only when the

appellant and her husband requested the daughter to

re-convey the property to the appellant. In the whole of the

statement P4A there is no allegation that the defendant

daughter ever threatened to kill her parents if the life interest

was not relinquished.

The contents of P4A completely cuts across the evidence

of the appellant who, in her evidence had tried to make out

that the troubles between her and her daughter arose as a

result of the daughter’s persistent requests that the parents

should relinquish their life interest in the property gifted to

her.

According to the police complaint marked P4B, on the

night of 25.8.2005 the appellant and her husband had

received three anonymous telephone calls threatening that

their son would be killed. The caller was not identifed. In

any event the death threat made by the phone was that the

appellant’s son would be killed. No threat was made regard-

ing the lives of the appellant and her husband.

The contents of document P4A completely cuts across

the appellant’s evidence given in the District Court and it

contradicts her evidence to the fullest possible extent. I do

not know why the appellant has produced document P4A

in evidence, but by producing it, the appellant has, perhaps

unconsciously, let the cat out of the bag!

In the light of the contents of P4A, no one can say

that the appellant’s evidence in the District Court stands

uncontradicted and uncontroverted. The learned District

*Ariyawathie Meemaduma V. Jeewani Budhika Meemaduma*

SC *(Gamini Amaratunga J.)* 133

Judge in his judgment has specifcally referred to the

different version given in document P4A with regard to the

manner in which the dispute between the parties arose. The

learned Judges of the Civil Appellate High Court have quoted

with approval the learned District Judge’s observations with

regard to the different version given in document P4A.

A deed of gift is absolute and irrevocable. That is the rule.

However the law has recognized certain exceptions to the

rule of irrevocability. A party applying to Court to invoke the

exceptions in his favour has to satisfy court, by cogent

evidence, that the court would be justifed in invoking the

exception in favour of the party applying for the same. In

this case even if the appellant’s evidence in the District Court

is considered alone (without any reference to the contents

of documents P4A and P4B) her evidence falls short of the

standard of proof required to invoke any recognized excep-

tion to defeat the rule of irrevocability. A mere ipse dixit like

“he threatened to kill me” is not suffcient to discharge that

burden.

When the appellant’s evidence given in the District Court

is viewed in the light of the contents of P4A, the position

is worse. The contents of P4A casts serious doubts on the

truthfulness of the evidence given by the appellant. On the

evidence available in this case, no reasonable judge, properly

directed on the law relating to the burden of proof which

rested on the appellant, could have given a decision in favour

of the appellant. The conclusion of the learned trial Judge and

the Civil Appellate High Court that the appellant has failed to

establish her case is therefore correct in law.

It appears to me that questions of law (a),(c),(d),(g),(h)

and (k) on which leave to appeal has been granted have

134 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

been framed on a misapprehension of the strength of the

appellant’s case presented to the District Court. I answer all

those questions in the negative.

With regard to questions No. (e) and (f) it is suffcient to

state that the appellant’s case had been dismissed not on the

basis that the deed of gift is irrevocable but on the basis that

the appellant has failed to prove the ground relied upon by

her to revoke the deed of gift.

With regard to question No(j), it is suffcient to state that

sections 164 and 165 of the Civil Procedure Code and section

165 of the Evidence Ordinance do not require a judge to step

in to fll the gaps of a case presented by a party. I accordingly

answer that question in the negative. In the result I dismiss

the appeal.

**rAtnAyAkE J. -** I agree.

**EkAnAyAkE J. -** I agree.

*Appeal dismissed.*

*Multi Purpose Co-operative Society, Madawachchiya vs. Kirimudiyanse and others*

CA 135

**MULTI PURPOSE CO-OPERATIVE SOCIETY,**

**MADAWACHCHIYA VS. KIRIMUDIYANSE AND OTHERS**

COURT OF APPEAL

RANJIT SILvA.J

LECAMWASAM.J

CA (PHC) 189/04

H.C. ANURADHAPURA 55/2002

NOVEMBER 4, 2010

DECEMBER 10, 2010

***Writ of Certiorari - Constitution Article 140 - Court of Appeal***

***(Appellate Procedure) Rules of 1990-91- Affdavit mandatory -***

***Defective affdavit - Is there a valid application for writ?-***

***Buddhist not affrming - Oaths and Affrmation Ordinance No. 9***

***of 1985 Civil Procedure Code - Section 438 - Judicial review***

***available - Fair hearing***

The Respondent-Petitioner fled a writ application in the High Court

seeking mandates in the nature of Certiorari/Mandamus to quash the

disciplinary fndings of the Co-operative Employees Commission and

the Society. The High Court granted the reliefs prayed for. The respon-

dents appealed to the Court of Appeal.

The appellant contended that there was no valid writ application before

the High Court as the deponent had not ‘affrmed’- (this was not raised

before the High Court). The appellant further contended that there was

undue delay in presenting the writ application to the High Court. It was

also contended that in any event no writ lies as it is a simple master

and servant contract.

**Held:**

Per Ranjith Silva.J

“On a consideration of the impugned affdavit I fnd that the provi-

sions of Section 438 of the Civil Procedure Code have been complied

with. The jurat expressly sets out the place and the date on which the

affdavit was signed. The affdavit has been signed before a Justice

of the Peace. There is specifc reference in the jurat that the affdavit

136 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

was duly signed by the deponent after having read and understood the

contents.”

(1) There is no magic in the word “affrm”. A particular word should

not be allowed to vitiate or invalidate an affdavit which is other-

wise regular on the face of it. The words solemnly sincerely and

truly connote that the deponent is publicly admitting the truth of

the contents in the most responsible manner. The absence of a

particular word “affrm” referred to in the statute cannot and

should not be allowed to stand in the way of justice. The words

must be given a purposive and meaningful construction instead of

trying to split hairs on technicalities.

Per Ranjith Silva. J:

 “The rationale is that the fundamental obligation of a deponent

is to tell the truth and the purpose of an oath or affrmation is to

enforce that obligation”.

(2) Delay/laches of a party does not bestow a right or privilege on the

other to indulge in delay/laches but it is not ethical, proper, just

or fair to allow the appellant to rely on the delay on the part of

the petitioner in fling the writ application, when they themselves

delayed for more that 21 years in framing charges and proceeding

against the respondent.

(3) Remedy of judicial review is available where an issue of public

law is involved. It is not correct to assume that there is no pub-

lic law element in an ordinary relationship of master and servant

and that accordingly in such a case judicial review would not be

available.

(4) Parliament can underpin the position of public authority employees

by directly restricting the freedom of the public authority to

dismiss, thus giving the employee public law rights at least

making him a potential candidate for administrative law remedies.

(5) The investigation team determined that it was not necessary for

the respondent to lead evidence and thereafter had prevented

him from leading any evidence - this is a blatant violation of the

Petitioner’s right to a fair hearing.

*Multi Purpose Co-operative Society, Madawachchiya vs. Kirimudiyanse and others*

CA *(Ranjith Silva, J.)* 137

**APPEAL** from the judgment of the High Court of Anuradhapura.

**Case referred to:-**

*1. Chandrawathie vs. Dharmaratne and others* 2001 BLR

*2. Ratwatte vs. Thilanga Sumathipala and others* 2001 1 Sri LR 55

*3. Imaya vs. Orix Leasing Co. Ltd* 1999 3 Sri LR 197

*4. Gamage Palitha Wickramasiri vs. Pathirannahalage Nandawathie*

*and another* CA 312/91 (F)

*5. De Silva vs. L.B. Finance Ltd* 1993 1 Sri LR 371 (distinguished)

*6. Rustomjee vs. Khan -* (1914) 18 NLR 120 at 123

*7. Mohamed vs. Jayaratne and others* 2002 3 Sri LR 181

*8. Kaluthanthrige Don John Patric vs. Kaluthanthrige Dona Mercy*

CALA 290/2002

*9. Issadeen vs. Commissioner of National Housing and others* 2003 2

Sri LR 10

*10. Lanka Diamond (Pvt.) Ltd vs.Wilfred Vanell and two others* 1997 1

Sri LR 360

*11. Malloch vs. Aberdeen Corporation* 1971 1 WLR 1578

*12. Koralagamage vs. Commander of the Army* 2003 3 Sri LR 169

*13. Ratnayake vs. Ekanayake, Commissioner General of Excise and*

*others* 2002 2 Sri LR 299

*14. Lanka Loha Holdings (Pvt.) Ltd vs. Attorney General* 2002 3 Sri LR

29

*Pubudu Alwis* for 2nd respondent-appellant

*P.K. Prince Perera* for Petitioner-respondent

January 27th 2011

**rAnJitH SiLvA, J.**

The Petitioner Respondent hereinafter referred to as the

Petitioner fled a writ application in the Provincial High Court

of Anuradhapura seeking mandates in the nature of a Writ

of Certiorari and a Writ of Mandamus to quash the disci-

138 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

plinary fndings of the 1st Respondent and 2nd Respondent

Appellant, who shall hereinafter be referred to as the Appellant

and to compel the Appellant to pay his entitlements including

arrears of salary.

After arguments the Learned High Court Judge by his

Judgment dated 24th of March 2004 granted relief to the

Petitioner as prayed for in the petition. Being aggrieved by

the said judgment the Appellant has preferred this appeal to

this Court.

At the stage of arguments and in their written submis-

sions as well, the Appellant relied on several grounds of

appeal. Some of them are;

(1) that there was no valid writ application before the

Provincial High Court of Anuradhapura,

(2) that there was undue delay in fling the writ application

in the High Court,

(3) that there was suppression of facts,

(4) that the Petitioner had not acted with uberima fdes,

(5) that the Petitioner had no capacity to invoke writ jurisdic-

tion.

**no valid writ application before the Provincial High**

**Court**

This objection was not urged in the High Court when

the matter was argued in that court. For the frst time the

Appellant has put forward this argument in this court. In

their written submissions as well as oral submission the

Appellant contended that the Petitioner Respondent did

not comply with rule 3 (1) of the Court of Appeal (Appellate

*Multi Purpose Co-operative Society, Madawachchiya vs. Kirimudiyanse and others*

CA *(Ranjith Silva, J.)* 139

Procedure) Rules of 1990 made by the Supreme Court and

published in the government gazette number 645/4 dated

15th January 1991 wherein it is laid down that in order to

invoke the writ jurisdiction of the Court of Appeal granted

to it under article 140 and 141 of the Constitution the

application shall be by way of petition supported by an

affdavit.

Respondent contended that fling of an affdavit was

mandatory but the affdavit fled by the Respondent is

defective and therefore there was no valid affdavit in the eye

of the law and thus there was no valid application for writ in

the High Court. The contention of the Appellant is that the

Respondent being a Buddhist has not affrmed to, either in

the head/ recital of the affdavit or in the jurat, in other words

the affdavit fled of record has not been properly affrmed to

by the deponent (Petitioner) as required in terms of section

5 of the Oaths and Affrmations Ordinance No. 09 of 1895

according to which a Buddhist has to affrm to the contents

of an affdavit. In support of his contention the Appellant has

cited the following authorities.

In *Chandrawathie Vs Dharmaratne and Others*(1) the

Supreme Court held that if the affrmation is not in the head

of the affdavit or the jurat clause it is defective and is fatal.

In Clifford *Ratwatte Vs Thilanga Sumathipala and Others*(2)

it was held that if the deponent states that he is a Christian

and affrms the affdavit instead of swearing, the affdavit is

defective.

In *Inaya Vs Orix Leasing Co. Ltd*(3) in the affdavit before

court the defendant being a Muslim had failed to solemnly

and sincerely and truly declare and affrm the specifc

averments set out in the affdavit. The recital merely states

140 *Sri Lanka Law Reports* [2011] 1 SRI L.R.

that they make a declaration and in the jurat there is no

reference as to whether the purported affdavit was sworn to

or affrmed. It was held that although technicalities should

not be allowed to stand in the way of justice the basic require-

ments of the law must be fulflled.

It appears that the Counsel for the petitioner has

either been oblivious to this argument of the Appellant or had

conveniently avoided responding to the same. Of all the

grounds of appeal taken by the Appellant I am of the view that

this is the only substantial argument that has been taken by

the Appellant which deserves the attention of this court. The

rest of the grounds of appeal urged by the Appellant pose no

problem as they could be disposed of comfortably as I fnd no

merit in any of them. Yet I would be dealing with every one of

them succinctly in chapters to follow.

In *Gamage Palitha Wickramasiri Vs Pathirannahelage*

*Nandawathie and another*(4) Weerasuriya, J. having referred

to and discussed fully the relevant sections of the Civil

Procedure Code namely SS 168, 181, 182, 437 and 438 with

regard to the reception of evidence of witnesses professing

different religions held that the same shall apply to evidence

on affdavits as well. Further having referred to several

authorities including *De Silva vs L.B.Finance Ltd*(5) held that

there was a failure on the part of the deponent to comply

with the requirement in terms of section 168 of the Civil

Procedure Code as the deponent, being a Christian, had

affrmed to the matters in the affdavit. It is to be observed

that, in *De Silva vs L.B.Finance Ltd (supra)*, referred to

above, the affdavit was somewhat in line with the impugned

affdavit in the instant matter before us. With great respect

to those eminent judges I’m reluctantly compelled to disagree

with them for the following reasons.