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 6**

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**PUBLISHED BY THE MINISTRY OF JUSTICE**

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

**Price: Rs. 25.00**

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In *De Silva and Others Vs. L.B.Finance Ltd (supra)* the

impugned affdavit at the commencement or in the recital

contained the following words “being a Buddhist do hereby

solemnly sincerely and truly declare and affrm”. The jurat

of the said affdavit contained the words “within named affr-

ment” instead of the transitive verb ‘affrmed’. Thus the word

affrms was wanting only in the jurat but was present in the

recital. In that case His Lordship Justice G.P.S. De Silva held

that the fair meaning that could be given to those words is

that the deponent had affrmed to the contents of the affda-

vit, before the Justice of the peace.

In other words his Lordship held that it was not neces-

sary to mention the word affrms in the jurat if that word

was found in the body of the affdavit such as the recital to

the affdavit. His Lordship endeavoured in that case to give a

constructive meaning to the words contained in the affdavit

even in the absence of the precise word affrm in the jurat. It

is true that in that case the word affrms was at least found in

the recital of the affdavit. In the instant case the word affrm

is found nowhere neither in the recital nor in the jurat.

I fnd that there is no magic in the word affrm. It means

according to the Oxford Advanced Learner’s Dictionary “ to

state frmly or publicly that sth is true or that you support

sth strongly.” The impugned affdavit at the commencement

and in its recital states fn!oaOd.ñlhl= jYfhka wjxlj;a" i;H

f,i;a" .dïNSr;d mQ¾jlj;a - m%;s× § m%ldY lr isák j.kï

Translated into English it means “being a Buddhist I

solemnly sincerely and truly declare and state.” Neither the

Jurat nor the body of the affdavit contains the word affrm.

The Jurat of the impugned affdavit contained the date and

the place of attestation and the fact that the deponent is

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signing the same having read and understood the contents

of the affdavit. What is wanting in the affdavit is the precise

word ‘affrm’.”

On a consideration of the impugned affdavit I fnd that

the provisions 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 was duly

signed by the deponent after having read and understood the

contents. The contention that the affdavit is invalid is based

on the absence of the word affrm in the jurat or in the body

of the affdavit.

On the other hand if a Catholic does not swear an

affdavit that might be a different kettle of fsh altogether

because swearing becomes very important and most signif-

cant to a Catholic who believes in Almighty God. i.e. I swear

by the Almighty God that I will tell the truth. A mere assertion

statement or affrmation may not suffce for the purpose of

executing a valid affdavit as far as a Catholic, Christian or a Jew

is concerned. *(Edussuriya, J. in Clifford Ratwatte V Thilanga*

*Sumathipala and Others)(supra)* But in the case of a deponent

being a Buddhist this question does not arise.

I cannot understand why a Buddhist cannot believe in

God or Gods. Perera, J. in *Rustomjee Vs Khan*(6) at 123 held

that the use of the word “may” in the Oaths Ordinance of

1895, instead of “shall”, must be regarded as deliberate; with

the consequences, non-Christians who believe in God would

have the option to swear or to affrm.

Buddhism is a philosophy and a religion. In any case

where a deponent solemnly sincerely and truly state some-

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thing in his affdavit with responsibility, a particular word

should not be allowed to play tricks or stand in the way of

justice and fair play. A particular word should not be allowed

to vitiate or invalidate an affdavit which is otherwise regular

on the face of it. The words solemnly sincerely and truly

connotes that the deponent is publicly admitting the truth of

the contents in the most responsible manner. The absence of

a particular word namely the 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 mean-

ingful construction instead of trying to split hairs on techni-

calities. (*Mohamed Vs Jayaratne and Others*(7))

The rationale in the above quoted judgments 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 obliga-

tion. Therefore the substitution of an oath for an affrmation

or vice versa will not invalidate an affdavit or on the other

hand by reading the affdavit as a whole if a fair meaning

could be given to the words used in the affdavit that the

deponent has affrmed to the contents of the affdavit before

the Justice of the Peace then it could be construed that there

is suffcient compliance with the requirement of an affdavit.

(*H/L Hon. S. Srikandarajah, J. in Kalutanthrige Don John Pat-*

*ric vs Kaluthanthrige Dona Mercy*(8))

For the reasons stated I hold that there is no merit

in the frst ground of Appeal taken by the 2nd Respondent

Appellant, namely that there was no valid Writ application

before the Provincial High Court, accordingly the frst ground

of appeal is hereby rejected.

With regard to the third and fourth grounds of appeal I

fnd that there is no substance or merit in those arguments.

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In addition the submissions did not sound convincing and

those two grounds were not prosecuted with much conviction

or vehemence.

**Second ground of appeal - undue delay**

The counsel for the appellant contended that there was

undue delay in presenting the writ application to the High

Court. He cited the following authorities in support of his

case. (*Issadeen V The Commissioner of National Housing and*

*others*(9) *Lanka Diamond (Pvt) Ltd V Wilfred Vanells and Two*

*Others*(10))

In order to decide whether there was undue delay in

presenting the application for writ it becomes necessary to

deal with the facts pertaining to the case. The Petitioner

Respondent joined the frst Respondent society on 04 of

February 1971 as a general manager. The Petitioner was

appointed as a curator of the stores on 26 of June 1973.

Due to a leakage of goods to the value of Rs. 8146.76, the

Petitioner was dismissed from service without any enquiry

whatsoever. The Petitioner states that by letter dated 13 of

August 1976, he was dismissed from service with immediate

effect without following any procedure. The Petitioner further

states that the dismissal was totally and completely against

the principles of natural justice, that thereafter the Petition-

er submitted several appeals to the Respondents including

the Respondent Appellant and after four years that is on 8

of August 1979 a charge sheet was issued on the Petitioner

containing three charges but a disciplinary inquiry was not

held to go into the charges framed against him based on that

charge sheet. Thereafter nearly 21 years later another charge

sheet was issued against the Petitioner. The second charge

sheet was issued on 15th of November 1997. At the time of

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issuing the second charge sheet the dismissal made on 13th of

August 1976, prior to the issuance of the two charge sheets,

was not cancelled and was in existence.

The inquiry that followed the second charge sheet

commenced on 25th of February 1998 and was completed on

the sixth of April 1998. It is alleged by the Petitioner that

the disciplinary inquiry was concluded without granting the

Petitioner the opportunity to meet his case properly and

effectively.

It was submitted on behalf of the petitioner that the

1st Respondent informed the petitioner that he had been

convicted of all the charges leveled against him and that

he appealed to the 1st Respondent but was informed that

the 1st Respondent cannot intervene in the matter. The

Petitioner had thereafter submitted a second appeal dated

15th of July 1999, to the, 1st Respondent by stating his

grievance but once again, by the letter dated 30th of August

1999 the 1st Respondent informed the Petitioner that there was

no reason to interfere with the decision. Thereafter the

Petitioner had submitted two more appeals to the 1st Respon-

dent but was informed that his request cannot be considered.

On 5th of January 2001 the Petitioner submitted a further

appeal to the 1st Respondent. As a result of that appeal the

Petitioner was asked to appear before the 1st Respondent

but was informed that there was no reason to change the

decision and it was thereafter that the Petitioner fled the

writ application in the High Court of Anuradhapura on 18

December 2002.

On the facts it is crystal clear that there had been

untoward and inexcusable delay on the part of the

Appellant in holding a proper disciplinary inquiry against the

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Petitioner. He had been dismissed summarily without holding

any inquiry or even serving a charge sheet on him. Thereafter

it took several years to frame charges against the Petitioner

and there too the authorities failed to prosecute or to hold an

inquiry on the charge sheet issued against him and subse-

quently after 21 years a second charge sheet was served on

him. It is only thereafter a purported inquiry was held and

even at that inquiry, on the evidence it is clear that the Peti-

tioner was not afforded a fair inquiry. He was not permitted

to lead evidence at the inquiry held and thus was deprived

of a fair inquiry. Delay / laches of a party does not bestow

a right or privilege on the other to indulge in delay / laches

but is it 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 long years, for

more than 21 years, in framing charges and proceeding

against the Petitioner. On the other hand in view of the bra-

zen facts I am of the opinion that even if there was a delay in

fling the application for writ that delay is certainly excusable

and pardonable in the light of and in the face of the glaring

injustice, the glaring prejudice that has been caused to the

Petitioner by the conduct of the frst 1st respondent and the

2nd Respondent Appellant.

**Tenability of the Learned High Court Judges order**

The Appellant has questioned the capacity of the Peti-

tioner to maintain or invoke the writ jurisdiction of the High

Court. The Appellant was a statutory body vested with statu-

tory rights and obligations created by statute. The Petitioner

was an employee but it was not a simple and pure master

and servant contract there was a lot of rights and obligations

governed by and emanating from statutes, especially so when

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it comes to disciplinary matters, dismissal, inquiry, appeals

etc.

The remedy of judicial review is available where an

issue of public law is involved. The expression public law

and private law whilst convenient for descriptive purposes

must be used with caution. It is not correct to assume that

there is no public law element in an ordinary relationship of

master and servant and that accordingly in such a case

judicial review would not be available. Even in a master and

servant relationship where conditions of employment or

disciplinary matters are regulated to some degree by statu-

tory provisions or a statutory scheme, such actions attract

public law remedies.

Employment by public authorities does not per se

inject any elements of public law nor does the fact that the

employees in the higher grade or is an offcer. This only makes

it more likely that there will be special statutory restrictions

on dismissal or other underpinning of his employment. It is

this underpinning and not the seniority which injects any

element of public law. The ordinary employer is free to act in

breach of its contracts of employment and if he does so his

employee will acquire certain private law rights and remedies

in damages for wrongful dismissal, compensation for un-

fair dismissal, an order for reinstatement or re-engagement

and so on. 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 and at least making him a potential

candidate for administrative law remedies. (Vide. *Malloch*

*V. Aberdeen Corporation*(11) Per Sriskandarajah, J.

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With regard to the dismissal of the Petitioner I fnd that

it had been done haphazardly without serving a charge sheet

or without holding a proper inquiry. A charge sheet had been

served on the Petitioner after a couple of years and thereaf-

ter a second charge sheet was fled after 21 years and it is

only thereafter that any form of an investigation has been

held. On top of this brazen violation of fundamental norms

and the rights of the Petitioner, even at the investigations

held on the second charge sheet the Petitioner had not been

afforded a fair hearing. The Appellant has not observed the

principles of natural justice. In fact P 13 reveals that the

Petitioner was not allowed to place his case properly, effec-

tively and to the best of his ability. The investigation team

determined that it was not necessary for the Petitioner to lead

evidence and thereafter had prevented him from leading any

evidence, in fact has ruled that they really would not permit the

Petitioner to lead evidence. This is a blatant violation of the

Petitioner’s right to a fair hearing. The Appellant has not

followed a fair procedure in keeping with the rule *audi alteram*

*partem* in conducting their investigations against the

Petitioner. (vide. *Koralagamage Vs The Commander of the*

*Army*(12)*, Ratnayake Vs Ekanayake Commissioner General*

*of Excise and others*(13) *Lanka Loha Holdings (Pvt) Ltd Vs The*

*Attorney General*(14).

For the reasons adumbrated on the facts and the law

I am of the view that there is no merit in this appeal and

accordingly I dismiss this appeal with costs fxed at

Rs. 5000/= to be paid to the petitioner Respondent by the 2nd

Respondent appellant.

**LeCamwaSam, J.** - I agree.

*Appeal dismissed.*

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**SAMARAKOON V. GUNASEKERA AND ANOTHER**

SuPREmE COuRT

AmARATuNGA, J.,

RATNAyAkE, J. AND

EkANAyAkE, J.

S. C. APPEAL NO. 84/2010

S.C. (H.C) CALA APPLICATION NO. 75/2010

NCP/HCCA/ARP 303/2007

D. C. ANuRADHAPuRA 17234/L

mAy 26TH, 2011

***Evidence Ordinance – Section 68 – Proof of execution of docu-***

***ments required by law to be attested – Manner of proving such***

***documents – Prevention of Frauds Ordinance – Section 2 and***

***Section 4 – Deeds affecting immovable property to be executed***

***before a notary and two witnesses.***

In order to prove the Plaintiff’s title to the property which is the subject

matter of the action, he produced at the trial the notarially executed

deeds marked P3 to P6 which were marked subject to proof. No wit-

nesses were called at the trial on behalf of the Plaintiff to prove the said

deeds. At the end of the Plaintiff’s case, when the Plaintiff’s Counsel

read in evidence the deeds produced in evidence marked P3 to P6, the

defence had made an application to Court to exclude those documents

which were not properly proved. The learned District Judge held that

the documents P3 to P6 had not been properly proved and accordingly,

that the Plaintiff had failed to prove his title to the land in question.

The Plaintiff appealed against the decision of the District Judge to the

High Court. The High Court reversed the District Judge’s fnding on the

basis that when a deed had been duly signed and executed it must be

presumed that it had been properly executed.

**Held:**

(1) The High Court in total disregard of the specifc and stringent

provisions of Section 68 of the Evidence Ordinance had relied on

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an *obiter dictum* made in a case where due execution was chal-

lenged, to reverse the decision of the District Judge.

(2) In terms of Section 2 of the Prevention of Frauds Ordinance a

sale or transfer of land has to be in writing signed by two or more

witnesses before a notary, duly attested by the notary and the

witnesses. If this is not done the document and its contents

cannot be used in evidence.

Per Amaratunga, J.

(3) “When a document is admitted subject to proof, the party ten-

dering it in evidence is obliged to formally prove it by calling the

evidence necessary to prove the document according to law. If

such evidence is not called and if No objection is taken to the

document when it is read in evidence at the time of closing the

case of the party who tendered the document it becomes evidence

in the case.

(4) On the other hand if the document is objected to at the time when

it is read in evidence before closing the case of the party who

tendered the document in evidence, the document cannot be used

as evidence for the party tendering it.”

Per Gamini Amaratunga, J. –

 “This Court is not inclined to order a re-trial in the absence of any

miscarriage of justice resulting from a wrong decision made by a

Court. The Plaintiff’s plight is due to the failure of his Attorney-at-

Law to adduce evidence necessary to prove the Plaintiff’s title. This

Court is not inclined to order a re-trial to facilitate an Attorney–at

–Law to rectify the mistake he had made in handling his client’s

case.”

**Cases referred to:**

*Sangarakkita Thero v. Buddarakkita Thero* – (1951) 53 NLR 457

**appeaL** against the judgment of the High Court of the North Central

Province (exercising Civil Appellate jurisdiction)

*M. Yoosuf Nassar* for the Appellant

*K. G. Jinasena* for the Respondent.

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Septembe 22nd 2011

**Gamini amaraTunGa J.**

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

Court, against the judgment of the High Court of the North

Central Province exercising Civil Appellate jurisdiction, allow-

ing the appeal fled by the plaintiff-respondent (hereinafter

called the plaintiff) in that Court against the judgment of the

District Court of Anuradhapura, dated 24.6.2005, dismissing

the plaintiff’s action.

The facts relevant to this appeal are briefy as follows:

The plaintiff fled action in the District Court praying for a

declaration of his title to the land described in the sched-

ule to his plaint, an order for ejectment of the 1st to 3rd

defendants (hereinafter called the appellant and the 2nd and

3rd respondents) and for damages for their unlawful occupa-

tion of the land in suit. The defendants fled answer denying

the plaintiff’s claim that they were in occupation of his land

and claiming a declaration of title in their favour, on the

basis of long continued prescriptive possession, of the land

described in the schedule to the answer. The case proceeded

to trial on 24 issues based on the respective claims of the

parties.

The land described in the schedule to the plaint was lot

No. 16 of the fnal plan No. 437 in partition action No. P 66

of the District Court of Anuradhapura. The said lot No. 16

had been allotted in common to the plaintiff and four others.

The plaintiff’s position was that he had bought the shares of

the others and had become the sole owner of the entire lot

No.16. In order to prove his title he produced at the trial the

notarially executed deeds marked P3, P4, P5 and P6 subject

to proof. However no witnesses were called at the trial on

behalf of the plaintiff to prove those deeds in accordance with

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the provisions of section 68 of the Evidence Ordinance. At the

end of the plaintiff’s case, when the plaintiff’s counsel read in

evidence the deeds marked P3 to P6 the defence had made

an application to Court to exclude those documents which

were not properly proved. The defendants have then adduced

evidence in support of their prescriptive title.

The learned trial Judge had held that documents P3,

P5 and P6 had not been properly proved and accordingly

the plaintiff had failed to properly prove his title to the land

in question. On that basis he had dismissed the plaintiff’s

action. The counter claim of the defendants was also

dismissed for want of evidence to establish their prescriptive

title.

The plaintiff appealed to the Civil Appellate High Court

against the dismissal of his action. The learned High Court

Judges have reversed the fnding of the learned trial Judge

that documents P3, P5 and P6 had not been properly proved.

Their reasoning was that the deeds marked P3, P5 and P6

were originals which had been referred to in the plaint; that

the defendants had not contested the genuineness of those

deeds or had raised any issue relating to their genuineness

and as such when a deed had been duly executed and signed

it must be presumed that it had been properly executed. On

that basis the learned High Court Judge had set aside the

learned District Judge’s fnding that in view of the failure

of the plaintiff to duly prove the deeds P3, P5 and P6 the

plaintiff had not properly proved his title. Accordingly the

High Court allowed the appeal of the plaintiff in relation to

the declaration of his title. For their conclusion that when a

deed had been duly signed and executed it must be presumed

that it had been properly executed, the learned Judges have

relied on the decision in *Sangarakkita Thero vs. Buddarak-*

*kita Thero*

*Samarakoon v. Gunasekera and Another*

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On an application by the 1st defendant respondent, this

Court has granted leave to appeal against the judgment of the

Civil Appellate High Court on the following question of law:

(a) Whether the plaintiff-respondent discharged his burden

as required in a vindication action (sic.)

(b) Did the honourable judge of the High Court of Civil Appeal

err in law by holding that the plaintiff-respondent had

identifed the land in question in the circumstances of

the case?

(c) Whether the plaintiff respondent has proved his claim on

a balance of probability?

At the hearing of the appeal both parties made sub-

missions on the correctness of the reasoning of the Civil

Appellate High Court on the issue whether document P3, P5

and P6 had been properly proved.

Documents P3, P5 and P6 are notarially executed deeds.

The plaintiff by producing those deeds in evidence sought to

prove that the rights of the others who become co-owners

of lot No. 16 in plan No. 437 of the partition action P66 had

lawfully transferred their title to Lot No. 16 to him, making

him the lawful owner of their shares.

In terms of section 2 of the Prevention of Frauds

Ordinance a sale or transfer of land has to be in writing signed

by two or more witnesses before a notary and duly attested

by the notary and the witnesses. Thus the deeds marked P3,

P5 and P6 being documents for the sale and transfer of an

interest in the land are documents required by law to be

attested. When such a document is to be used in evidence,

the manner of proving it is set out in section 68 of the

Evidence Ordinance which reads as follows:

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 *“If a document is required by law to be attested, it shall*

*not be used as evidence until one attesting witness*

*at least has been called for the purpose of proving its*

*execution, if there be an attesting witness alive and*

*subject to the process of court and capable of giving*

*evidence.”*

In the course of giving evidence, if a witness refers to a

document which he proposes to use as evidence, it shall be

marked in evidence. If the party against whom such docu-

ment is sought to be used as evidence, does not object to it

being received in evidence, and if the document is not one

forbidden by law to be received in evidence, the document

and its contents become evidence in the case, On the other

hand if the opposing party objects to the document being

used as evidence, it is to be admitted subject to proof. When

a document is admitted subject to proof, the party tender-

ing it in evidence is obliged to formally prove it by calling

the evidence necessary to prove the document according to

law. If such evidence is not called and if no objection is tak-

en to the document when it is read in evidence at the time

of closing the case of the party who tendered the document

it becomes evidence in the case. On the other hand if the

document is objected to at the time when it is read in evidence

before closing the case of the party who tendered the

document in evidence, the document cannot be used as

evidence for the party tendering it.

A deed for the sale or transfer of land, being a document

which is required by law to be attested, has to be proved

in the manner set out in section 68 of the Evidence Ordi-

nance by proof that the maker (the vendor) of that document

signed it in the presence of witnesses and the notary. If this

is not done the document and its contents cannot be used in

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evidence. The plaintiff in this case had not called the

witnesses necessary to prove deeds P3, P5 and P6 in

accordance with section 68 of the Evidence Ordinance.

The learned High Court Judges in their judgment have

not referred to section 68 at all. Instead, they have based

their conclusion on the obiter dictum contained in the

judgment in *Sangarakkita Thero vs. Buddharakkita Thero*

*(supra)*. That was a case where a deed, executed when the

executant was warded in a hospital, appointing an incum-

bent of a temple, was challenged on the ground that it had

not been executed in accordance with the provisions of sec-

tion 4 of the Prevention of Frauds Ordinance relating to the

executions of wills. The ground of challenge was that the deed

had not been executed in accordance with the manner pro-

vided in section 4. On the evidence available the Supreme

Court had held that the will had been duly executed in con-

formity with the requirements of section 4 of the Prevention

of Frauds Ordinance.

Having come to that conclusion, Rose C.J. by way of

obiter had made the following statement.

 “But even if that were not so, and if the correct view is

that there is some small omission in the chain of evi-

dence, I would not be disposed to say in the light of

the emphasis which was placed on the various issues

in the Court below that such small omission was fatal

to the respondent’s position. There is of course, a pre-

sumption that a deed which on its face appears to be in

order has been duly executed, and it seems to me that the

mere framing of an issue as to due execution of the deed

followed in due course by a perfunctory question or two

on the matter of execution without specifying in detail the

omissions and illegalities which are relied upon, is insuf-

fcient to rebut that presumption” (at 459)

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What the learned Chief Justice said in the above passage

was that although there are small omissions in the chain of

evidence in a situation where due execution according to law

is being challenged, a small omission in the chain of evidence

may be cured by the presumption that a deed which on its face

appears to be in order has been duly executed. The framing

of an issue as to due execution and a perfunctory question or

two on the general matter of execution, without specifying in

detail the omissions or illegalities regarding execution, would

be insuffcient to rebut the presumption of due execution

despite small omissions in the chain of evidence regarding

due execution.

In the present case, the defendants had not challenged

the due execution of deeds P3, P5 and P6. When they

objected to those documents at the time the same were

marked in evidence what they did was to challenge the plaintiff

to prove those documents in the proper way in which a docu-

ment required by law to be attested has to be proved if it is

to be used as evidence. The plaintiff thus had notice that he

had to prove P3, P5 and P6 in the manner provided in section

68 of the Evidence Ordinance. He had failed to lead the

evidence necessary to prove those documents in accordance

with the provisions of section 68. At the close of the plaintiff’s

case when the documents marked were read in evidence the

defendants have stated that documents not proved should be

excluded. This was a reference to documents marked subject

to proof and proved in accordance with the law. In view of

the failure of the plaintiff to prove documents P3, P5 and P6

on which the title claimed by him depended, the learned trial

Judge had rightly excluded those documents and had held

that the plaintiff had failed to prove his title.

The learned High Court Judge in total disregard of the

specifc and stringent provisions of section 68 of the Evidence

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Ordinance have relied on an obiter dictum made in a case

where due execution itself was challenged, to reverse the

decision of the learned trial judge. The basis upon which they

reversed the trial judge’s conclusion was totally erroneous. If

the view taken by the learned High Court Judges was correct

it would make the provisions of section 68 of the Evidence

Ordinance a dead letter. The erroneous legal basis on which

the trial Judge’s decision was reversed vitiates the judgment

of the High Court entered in favour of the plaintiff. I therefore

answer the question of law set out in question No. (a) and

(c) in the negative and allow the appeal and set aside the

judgment of the High Court dated 11.2.2010 and affrm the

judgment of the learned trial judge dismissing the plaintiff’s

action.

The learned counsel for the plaintiff respondent invited

this court to send the case back to the District Court for re-

trial. This Court is not inclined to order a re-trial in the ab-

sence of any miscarriage of justice resulting from a wrong

decision made by a court. The plaintiff’s plight is due to the

failure of his attorney at law to adduce the evidence neces-

sary to prove the plaintiff’s title. This Court is not inclined to

order a re-trial to facilitate an attorney-at-law to rectify the

mistakes he had made in handling his client’s case. I make

no order for costs.

**raTnayake J** - I agree.

**ekanayake J.** – I agree.

*Appeal allowed. Judgment of High Court dated 11.2.2010 set*

*aside and the judgment of the District Judge dismissing the*

*Plaintiffs action affrmed.*

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**GEETHIKA AND TWO OTHERS V. DISSANAYAKA AND FIVE**

**OTHERS**

SuPREmE COuRT

mARSOOF.J,

EkANAyAkA, J .

SuRESH CHANDRA J.

S.C.F.R. APPLICATION NO. 35/2011

mAy 31ST , 2011

***Constitution – Infringement of fundamental rights - Article 12[1] –***

***Right to equality – Article 126 – Fundamental rights jurisdiction***

***and its exercise***

The Petitioners made an application in terms of Article 126 of the

Constitution for the alleged violation of their fundamental rights

guaranteed under Article 12(1) of the Constitution as a consequence

of the 3rd Petitioner not being selected for admission to Grade 1 of

D. S. Senanayake College.

The application for admission for the year 2011 had been submitted

under the category of ‘children of the residents at close proximity to the

school.’ The main thrust of the Petitioners’ application was that on the

basis of residence, they are entitled to have their child (3rd Petitioner)

admitted to the school.

**Held:**

1. A consideration of Clause 6.1 of the Circular No. 2010/21 dated

31.5.2010 shows that the main consideration for selection of

children under the category of “children of those who are residing

close to the school” would be the Applicant’s place of residence.

Per Suresh Chandra, J.

 “ . . . interview panels should consider all the documents that are

submitted by a prospective applicant and assess them carefully

and see whether the cumulative effect of such documents would

establish the genuine residence of such applicant.”

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2. The interview panel failed to evaluate the documents that were

submitted by the Petitioners in support of their application to

admit the child to the school and appear to have acted arbitrarily.

The panel appears to have considered the concept of residence in

a very abstract manner and has failed to consider the totality of

the documents that were submitted which clearly establish the

residence of the Petitioners.

3. Petitioners have established the fact of violation of their funda-

mental rights in terms of Article 12(1) of the Constitution.

**Cases referred to –**

 *Haputhantirige and others v. Attorney General –* (2007) 1 Sri L.R.

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**appLiCaTion** made in terms of Article 126 of the Constitution

*Kanishka Witharana* for Petitioners

*Ms. Barrie*, State Counsel for the Attorney General

*Cur.adv.vult.*

July 12th 2011

**SureSH CHandra J.**

The Petitioners made an application in terms of

Article 126 of the Constitution for the alleged violation of their

fundamental rights guaranteed under Article 12(1) of the

Constitution as a consequence of the 3rd Petitioner not

being selected for admission to Grade 1 of D. S. Senanayake

College.

The Petitioners in their application have stated that the

1st and 2nd Petitioners are the parents of the 3rd Petitioner

for whose admission to D. S. Senanayake College they made

an application for the year 2011. The application had been

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submitted under the category of “Children of the residents

at close proximity to the School” which category is dealt with

under Clauses 6.1 (I-IV) of the circular No. 2010/21 dated

31.5.2010 issued by the ministry of Education regarding

admission of children to Grade 1 of Government Schools

marked P5. The Petitioners stated that they submitted docu-

ments P8 to P17 along with their application and tendered

documents marked P19A to P19T at the interview held on

7th September 2010 and that they were informed by the

Panel who held the interview that they had received 57

marks. They were surprised to see that the name of the 3rd

Petitioner was not in the list of children selected for admis-

sion which was displayed by the school. The 1st Petitioner had

submitted an appeal in terms of the said circular and had

given further grounds to substantiate her entitlement to

have her child selected to the said School. Thereafter the 1st

Petitioner had been required to attend an inquiry before the

Appeals Board and she had submitted a further document

(P22) from the National Housing Development Authority

regarding the house that they were residing. According to

the matters indicated by the 2nd Respondent at the appeal

inquiry, the 1st Petitioner had been given the impression

that she would be given a further 25 marks on distance and

4 marks for title documents by treating same as a lease,

entitling them to earn 86 marks. However, when the fnal list

was displayed in the School the name of the 3rd Petitioner

was not included in the list either among those who were

selected or those who were on the waiting list. The waiting list

consisted of those who had received between 55 and 60

marks. The Petitioners had thereafter made the present

application to this Court.

The Respondents fled objections by fling an affdavit

from the 1st Respondent, who stated that the petitioner’s

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assertion that they had earned 57 marks at the interview was

false and that they had been awarded only 37 marks as per

document marked R2, and that there was no alteration of the

said marks at the Appeals Board, and that the 3rd Petitioner

did not qualify for selection on the marks obtained by the

Petitioners. The 1st Respondent has further stated that the

Petitioners could not be awarded any marks under Clause

6.1 (II) as they had not produced any of the documents set

out in the circular, and that no marks could be allocated

under Clause 6.1 (IV) as the Petitioners could not be

considered to have established the requirement of residence.

The 1st Respondent further stated that the cut off mark for

selection was 61 marks and that those who had obtained

over 55 marks had been placed in the waiting list. The 1st

Respondent in the said circumstances denied violating the

fundamental rights of the Petitioners as alleged.

The application requires a consideration of the provisions

of the circular P5(R1) which lays down the criteria for

admission to Grade 1 of Government Schools specially

regarding the matters pertaining to residence. The main

thrust of the Petitioners application is that on the basis of

residence they are entitled to have the 3rd Petitioner admitted

to the school.

Clause 6.1 sets out that 50% would be admitted on

the basis of “Children of residents in Close Proximity to the

School”. The said Clause 6.1 comprises four sub-clauses I, II,

III and IV. under I – “Titled residence”, the electoral lists are

taken into account and a maximum of 35 marks is allocat-

ed on the basis of 7 marks per year from the year prior to

admission and the previous continuous fve years.

under Sub-Clause II – “Documents establishing residence”

a maximum of 10 marks is given if the Ownership Deed is in

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the name of the Applicant or the spouse and within brackets

it is stated as Transfer/Gift. If the Deed (Transfer/Gift) is in

the name of the Applicant’s or spouses father or mother, 6

marks are allotted.

It also stated that documents under the Buddhist

Temporalities Ordinance can be accepted according to the

area, and further that Folios and Duplicates can also be

considered.

Registered lease deeds and Government Offcial Quarters

Documents would be allotted 4 marks and unregistered lease

deeds would be allotted 2 marks.

under Sub - Clause III – “ Other Documents establishing

residence” – A maximum of 5 marks is allotted on the basis

of 1 mark for each document for documents such as National

Identity card, Electricity bills, Water bills, Telephone bills,

marriage certifcates, etc.

under Sub-Clause IV – “Proximity to School from

Residence” – under this a maximum of 50 marks is allotted on

the basis that if there are no other government schools having

primary sections between the residence and the school that

the child is sought to be admitted. If there are other schools

in between where the child could be admitted, 5 marks to be

deducted for each school.

The Respondents have produced document R2 along

with their objections, which is a copy of the document which

had been used by the School at the Interview which sets out

the manner in which marks have been allotted. The said

document is divided into four cages according to Clause 6.1

I to IV of the aforesaid Circular.

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According to the said document R2, 35 marks have been

allocated under Clause 6.1 – I for the electoral Lists that had

been produced as the names of the Petitioners have been

registered at the address given by them as their residence for

the years 2005 to 2009 continuously. It is also signifcant to

note that the names of the 1st and 2nd Petitioners as well as

the name of “kariyawasam uluwita Gamage kusumalatha”

the mother of the 1st Respondent is also included as being at

the same address.

No marks have been allocated under 6.1 – II regarding

documents relating to the residence. In this cage, the neces-

sary documents are listed as 1,2, 3 and 4. In the category 2,

which is “In the name of the Applicant’s mother or father”

for which 6 marks can be given, in the column set apart for

“maximum marks” a “?” mark has been put, and the word

“mother” has been underlined.

under Sub-Clause 6.1 – III, 02 marks have been given

on the basis of other documents establishing the residence.

It is not quite clear as to the documents for which the 02

marks have been allocated, and it appears that out of the fve

documents stated in R2, namely, National Identity card, Tele-

phone bills, Water bills, marriage certifcate, driving license

or other, only water bills have been ticked off.

under Sub-Clause 6.1 – IV, regarding proximity to school

from the residence, the fgures “06” have been put within

the cage stating this category and under the marks allotted

column the fgures “20” within brackets have been written

and struck off with an oblique stroke of a pen and on the side

it is written in Sinhala as follows:” Since there is no deed no

marks can be given regarding schools.”

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An examination of the said document shows that below

the cage setting out the above mentioned particulars regard-

ing the residence and marks, there is a legend “Full marks

obtained:” and alongside that the following “…….. (in words).

There is no entry alongside “Full marks Obtained” nor is

there anything written in words. However, at the right edge of

the document which is below the cage set out for marks the

fgures “37” is written.

A further observation regarding Document R2 is that on

the left hand margin of the document the word “kusumal-

atha” is written in Sinhala in ink, which is the name of the

Applicant’s mother as has been revealed in the petition and

the documents produced. Further it is also stated in Sinhala

in that margin in Sinhala that “there is no deed” and also the

words “National” and “Documents” in Sinhala.

A consideration of Clause 6.1 of the Circular (R1) shows

that the main consideration for selection of children under

the category of “Children of those who are residing close to

the School”. Would be the Applicant’s place of residence. The

relevant indices or criteria that are to be taken into account

regarding the establishing of same are set out in 6.1 – I – IV

referred to above.

The main thread which runs through all four categories

is the concept of “residence”.

The ordinary meaning that is given to “residence” is “the

place where an individual eats, drinks, and sleeps or where

his family or his servants eat, drink and sleep. (Wharton’s

Law Lexicon).

Residence as envisaged by the said Circular would imply

a permanent abode which has been used for a continuous

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period. The manner in which 35 marks have been allotted

would indicate that the continuity in such residence should

be at least for a period of 5 years. Such residence does not

necessarily connote ownership as the circular speaks of

leases whether registered or unregistered being acceptable

for the purpose of establishing residence. Credence is also

given to the acceptability of other documents such as utility

bills, employment letters, bank documents, letters received

etc which would all serve as items establishing the genuine-

ness of the residence. Such documents if available for a long

period of time would indicate that they have been obtained

for the purpose of getting a residential qualifcation. Procure-

ment of such documents is sometimes referred to as “manu-

facturing” of documents. Care has to be taken in identifying

such “manufactured” documents from genuine documents.

Therefore interview panels should consider all the documents

that are submitted by a prospective applicant and assess

them carefully and see whether the cumulative effect of such

documents would establish the genuine residence of such

applicant.

According to Clause 6.1, 35 marks are given for the

electoral register Extracts which would seem to be the basic

and most important criterion and that the other documents

referred to in Sub-Clause 6.1 – II and III substantiate or

confrm the residence given in the electoral register extract.

Therefore, if the electoral register extracts have been accepted

and the entitlement of full marks (35) have been given, there

is no reason as to why such an applicant cannot get marks

under Sub-Clause 6.1 – IV which is 50 marks less 5 marks

for each school from the residence to the school applied.

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In R2 the interview sheet, under the category for

other schools, the fgure “6” being entered is signifcant,

which would mean that there are six other schools between

the residence and the relevant school for which 30 marks

would be deducted and the applicant would be entitled to 20

marks. This is apparently the reason why the fgures “20”

have been entered in R2 within brackets and for some reason

best known to the Interview Panel has been struck off with

an oblique stroke and with the note “not entitled to marks as

there is no valid deed”.

It is my view that, once marks are given under Clause

6.1 for the Electoral Register Extracts which satisfed the

criterion of “residence”, then such an applicant is entitled to

marks under Clause 6.1 – IV. Therefore accepting the fact

that 20 marks could have been given as is seen in R2, to

deprive the petitioner of such marks is incorrect and they are

entitled to 20 marks on that score.

The Petitioners had also submitted several other

documents, among which the relevant documents were the

National Identity Cards and Telephone Bills which were in

the name of the 2nd Petitioner, Child Health Development

Record, Bank statements, documents regarding employ-

ment which refer to the residence of the petitioner etc. The

other utility bills such as electricity and water were in the

name of the mother of the 1st Petitioner, kusumalatha. The

documents that can be considered under Clause 6.1-III are

not confned to the fve documents listed therein, it refers to

other documents without mentioning the type of documents.

It is left to the interview Panel to consider other relevant

documents. They cannot rule out those documents just

because they are not listed in the relevant Clause. What is

necessary to be seen is as to whether such documents can

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be considered to confrm the residence of the Applicants.

In such circumstances important documents such as the

child’s health development record, and the letters regard-

ing their employment should have been considered. Only 2

marks had been given under this category whereas according

to the documents produced, even if the other documents are

disregarded, for the two national identity card, the telephone

bill and the health record marks should have been given. I

am of the view that at least 4 marks should have been given

under this category.

The other matter that requires consideration is the

documents produced as P17 which is a document issued

by the National Housing Development Authority on 1st June

2004 in favour of “k. u. P. kusumalatha”, which states that

the said premises has been conveyed to her. According to the

Affdavit tendered as P16 she is the mother of the 1st

Petitioner. According to Clause 6.1, the documents listed

are Transfer deeds, Gift deeds, Leases both registered and

unregistered and government quarters documents. Would it

mean that the document P17 cannot be considered to satisfy

the criterion of residence, just because it is a letter and not

a deed? From the documents that are to be considered in

the circular, what is important is the establishing of the

“residence” and not ownership. In effect the writing of the

name “kusumalatha” in R2 is indicative of the fact that the

Interview Panel’s attention had been drawn to P17.

On the face of it, P17 is not a deed which confers

ownership of a premises. However, it is a document issued by

the National Housing Development Authority relating to the

particular residence wherein the petitioner’s mother

kusumalatha is residing. If the deed of a parent of an

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applicant, and if a registered or unregistered lease docu-

ment can be considered in favour of an applicant to establish

residence, I see no reason as to why P17 cannot be consid-

ered, a reading of which clearly indicated that kusumalatha

would be given the said premises, which certainly goes to

establish her residence at the said address, as well as its

legitimacy. When the appeal was considered, the Petitioners

had submitted P22 which was a confrmation of P17 issued

by the National Housing Development Authority. In the said

circumstances the Petitioners are entitled to get marks for

P 17 and since it is in the name of the mother of the Petitioner

it should entitle the petitioner to get 6 marks.

In *Haputhantirige and others v. Attorney General,* the

question of residence and ownership was looked into by

this Court in relation to a previous circular by the minis-

try of Education and it went on to note certain instances

where there have been large amounts of “manufactured

deeds” shown as evidence of ownership when entering chil-

dren into government schools. It was further noted that

in circumstances such as where a property was inherited

from a parent who had died and testamentary proceedings

were not concluded or where instances of co-ownership or

prescriptive possession could not be proven by title deeds

people in such circumstances who would be considered

owners of the property would not be allocated marks

according to the marking scheme. It is clear that the interview

panel should always have to look at the establishment of

evidence to prove residence and consider the totality of what

has been put forward as evidence by a parent to establish

evidence rather than only carrying out an exercise of ticking the

relevant box in relation to the specifed documents mentioned

in the circular alone. It has to be noted that such arbitrary