

THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

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

**PAGES 393 - 420**

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**(**Continued from Part 14)

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(*b) The petitioner, while he was the Commander of the Army*

*had convened a General Court Martial to try Major Anurud-*

*dha Perera on several charges including one of providing*

*intelligence to the LTTE to assassinate the 4th respondent*

*who as a Brigadier, was then the overall Operations Com-*

*mander Colombo. The said Court Martial found the said*

*accused offcer guilty of the said charge and passed a*

*death sentence on him. The said sentence was confrmed*

*by the petitioner as the convening offcer but was later*

*commuted to life imprisonment by the President of the*

*Republic. These respondents fle herewith, marked 2R16*

*and 2R17 respectively the charge sheet served on the said*

*Major Anuruddha Perera and the fndings. sentence and*

*the commutation thereof by the President of the Republic*

*and plead the same as part and parcel hereof.*

*(c) While the 4th respondent was out of the island following*

*a course at the Philippines at the time the petitioner is*

*alleged to have received the information on which he based*

*his aforesaid allegation, the Petitioner most signifcantly*

*took no action whatsoever to recall the 4th respondent and/*

*or to take further action against him which he would have*

*done if he himself attached any credence to the informa-*

*tion which he received.*

*(d)* ***In the circumstance aforesaid, it is most evident that***

***the Petitioner has misrepresented material facts to***

***Your Lordships’ Court and suppressed material facts***

***from Your Lordships’ Court in order to mislead and /***

***or deceive Your Lordships’ Court*** *(emphasis added).*

Paragraph 35 not reproduced.

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*36. These Respondents deny the averments in paragraph*

*42 of the petition and state further as follows:-*

*(a) The 2nd Respondent who was the General Offcer Com-*

*manding 22nd Division at Trincomalee was sent to India*

*on the recommendation of the Petitioner to follow a course*

*at the National Defence College in New Delhi in December*

*2007. Accordingly, from the date he proceeded to India he*

*ceased to hold the offce of the General Offcer Command-*

*ing the said Division in Trincomalee. On his return to Sri*

*Lanka, he was appointed the Commander/Vice Chancellor*

*of the Kotelawala Defence University and was hence, at all*

*times material, in the “command stream”.*

*(b) The 3rd Respondent was the General Offcer Commanding*

*Division II at Panagoda at the time of his appointment*

*as a Military Liaison Offcer at the Ministry of Defence by*

*the Petitioner after which he was appointed the General*

*Offcer Commanding Division 21 at Vavuniya by the*

*Petitioner. Accordingly, the 3rd Respondent was at all*

*times, material, in the command stream of the Army. These*

*Respondents fle herewith, and plead as part and parcel*

*hereof marked 2R18 and 2R19 respectively, the appoint-*

*ment of the 3rdRespondent as the offciating General Offcer*

*Commanding II Division dated 29th March 2006, the*

*appointment of the 3rd Respondent as the offciating*

*General Offcer Commanding 21 Division dated the 26th*

*October 2007 and the appointment of the 3rd Respondent*

*the General Offcer Commanding II Division by the Peti-*

*tioner on or about the 11th January 2008 respectively, and*

*the attachment of the 3rd Respondent to the Ministry of*

*Defence made by the Petitioner on or about the 5th April*

*2006 has been pleaded above and marked 2R14.*

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*(c) The 3rd Respondent was appointed the Major General on*

*10th January 2008 on the recommendation of the Petitioner*

*who was the then Commander of the Army.*

*(d) The 4th Respondent was appointed the Overall Opera-*

*tions Commander Colombo while still a Brigadier and the*

*Commander of the Artillery Brigade which played a key*

*role in the was against the LTTE. Both said appointments*

*were made by the Petitioner and these Respondents fle*

*herewith marked 2R20 and 2R21 respectively and plead*

*as part and parcel hereof true copies of the appointment*

*dated 31st January 2008 of the 4th Respondent as the*

*Overall Operations Commander of Colombo and the*

*appointment made by the Petitioner on or about 28th Mach*

*2007 of the 4th Respondent as the Commander of the Ar-*

*tillery Brigade with effect from the 9th April 2007. It is evi-*

*dent from the said document that prior to his appointment,*

*the 4th Respondent was the Commander of 112 Brigade*

*and hence manifestly a person who was at all times mate-*

*rial in the command stream of the Army.*

*(e) The 4th Respondent was promoted as Major General on or*

*about the 21st January 2009 on the recommendation of the*

*Petitioner and is now the Security Force Commander at*

*Jaffna.*

*(f) In the circumstances aforesaid,* ***these respondents plead***

***that the Petitioner, has once more, uttered falsehood***

***to Your Lordships” Court, misrepresented facts to***

***Your Lordships’ Court and suppressed material facts***

***from Your Lordships’ Court and committed every one***

***of such acts with a view to misleading and/or deceiv-***

***ing Your Lordships” Court*** (emphasis added).

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The identical averments were made in the objections fled

for the 4th respondent.

Should not the petitioner counter the strong allegations of

suppression of material facts and misrepresentations? How

does the petitioner respond to the 2nd to 4th respondents? The

petitioner chose not to respond at all which is found in para-

graphs 6 and 7 of the counter affdavit/objections.

Paragraphs 6 and 7 of the petitioner’s counter affdavit/ob-

jections

*6. The petitioner states that, whilst denying each and every*

*allegation leveled against him by the Respondents,* ***it is***

***not part of the petitioner’s case to make counter al-***

***legations against each and every averment*** *and/or al-*

*legation already leveled against him by these respondents*

*and convert thee proceedings into a battleground of per-*

*sonal allegations.*

*7. For that reason and in that spirit, the petitioner states,*

*whilst denying each and every allegation/averment in the*

*objections, that* ***the petitioner will not deal specifcal-***

***ly with each averment in turn*** *and states this should*

*not be construed as an admission to any such averments.*

Thus it is clear to what extent the petitioner wished to

meet the defence case. Did the petitioner lie to court delib-

erately in the petition, especially in paragraphs 40 a, b & c.

In that event the petitioner should know that when the truth

is revealed the petitioner would lose. In the written submis-

sions tendered on behalf of the 2nd to 4th respondents, out of

24 pages, 11 pages had been devoted to write in detail with

regard to the suppression of material facts. It is dealt with

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under the heading Suppression and Misrepresentation from

page 6 to 16 of the written submissions.

The petitioner in the written submissions tendered on

10.5.2011 does not refer to the matters dealt with by the 2nd

to the 4th respondents in paragraphs 34 a - e and f - iii and

paragraphs 36a - f of the objections. The petitioner meets the

detailed written submissions of the counsel for the 2nd and 3rd

respondents with two sentences in the written submissions

tendered on 19.5.2011 which are as follows:-

*9. The alleged misrepresentation/ suppressions are miscon-*

*ceived in fact and in law.*

*10. The alleged misrepresentation/suppressions are irrelevant*

*to the matters to be determined by court.*

**Oral submissions**

In the oral submissions the learned President’s Coun-

sel for the petitioner did refrain from addressing court with

regard to the allegation of suppression of material facts. The

learned counsel also refrained from addressing court with

regard to any mis-directions or non directions on the part

of the 5th respondent. Learned counsel for the 2nd and 3rd

respondents addressed court in great detail taking most

of his time (three of the four days) on the suppression of

material facts. The learned counsel in his submissions

referred to the specifc allegations made against the 2nd to 4th

respondents. In reply the learned President’s Counsel for the

petitioner addressed court for three and a half days. However

the learned counsel again refrained from addressing court with

regard to the allegation of suppression of material facts adverted

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to by the learned counsel for the 2nd and 3rd respondents. The

learned President’s Counsel for the petitioner maintained a

deafening silence with regard to the suppression of material

facts and also with regard to the mis-directions or non

directions of the 5th respondent.

Hence the attention of the learned President’s Counsel

for the petitioner was drawn by me to the allegations made in

paragraphs 40 a, b and c and 65 “u” and “v” of the petition

and to the reply by the 2nd to 4th respondents in paragraphs

34 and 36 of the objections. In reply the learned Presidents

Counsel submitted that one is required to disclose everything

and the principle of *uberrima fdes* apply only in an *exparte*

application. He submitted that it does not apply to *inter parte*

Application. The learned President’s Counsel also submitted

in court that his case is that the 2nd to 4th respondent were

biased as they were removed by the petitioner from the com-

mand stream to the common stream. He submitted that he

stands by this story and therefore thought it un-necessary to

reply to the complaint of suppression of material facts.

It was the position of the 2nd to 4th respondent that

at all times they were in the **command stream.** It was sub-

mitted by the learned counsel for the 2nd to 4th respondents

that no evidence either oral or documentary was produced or

even adverted to prove that the petitioner had removed any

of the 2nd to 4th respondents from the command stream and

relegated them to the common stream. The learned counsel

submitted that a large number of documents have been fled

to satisfy court the 2nd to 4th respondents have been in the

command stream throughout and none of these documents

have been challenged.

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**The learned President’s Counsel for the petitioner in the**

**written submission fled on 3.10.2011 took a surprise**

**move by withdrawing bias as a ground to support for a**

**writ.**

Written submission fled on 3.10.2001 for the petitioner at

pages 26 and 27 from paragraphs 243-248 and 253-255

*(243) It is crucial to note that all of the alleged “suppression”*

*goes* ***ONLY*** *to the ground of bias.*

*(244) In other words, the allegations (even if suppressed) would*

*be relevant when court considers whether the Military*

*Tribunal was biased or not.*

*(245) However,* ***bias was not one of the main grounds urged***

***at the hearing. In fact, it was not even argued that***

***the application for writ should be granted on the***

***ground of bias.***

*(246) The petitioner’s case before Your Lordships in* ***this***

***application does not depend upon bias of the 2nd,***

***3rd and 4th respondents.***

*(247)* ***The petitioner’s case before Your Lordship’s Court***

***did not depend on the bias.***

*(248) In the circumstances BIAS IS NOT A ground material to*

*this application.*

*At Page 27*

*(253)* ***Thus clearly the argument of the petitioner***

***centered around the question of Conviction and***

***sentence and the question of bias did not feature***

***in such submissions*** *(emphasis added).*

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*(254) In the circumstances, it is submitted that misrepresen-*

*tation/suppression of facts that relate* ***ONLY*** *to bias is*

*not* ***material*** *or even relevant to the main thrust of the*

*petitioner’s case.*

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

*fact.*

The reason according to the petitioner for the removal

of the 2nd respondent from the command stream to the com-

mon stream was that the 2nd respondent made a false state-

ment at a court of inquiry convened by the petitioner and was

found to be untrustworthy and lacking integrity. This was the

allegation referred to in paragraph 40a of the petition. Para-

graphs 40 b and c are concerning 3rd and the 4th respondents.

Therefore these matters are of paramount importance and

are very material to the case.

The learned President’s Counsel for the petitioner takes a

different stance in the written submissions fled on 10.5.2011

under the heading **Grounds for challenge** (of the conviction

and the sentence) at Page 2 paragraph 8 where he relied on

bias as a ground for the issue of writ.

Paragraph 8 of the written submissions of 10.5.2011 is as

follows:-

(8) The following are the grounds for challenge (out of sub-

paragraphs “a” to “o” I will reproduce only sub-paragraphs

“b” and “c”.

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

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

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It is clear that the petitioner got the court to issue notice

on the 2nd to 4th respondents on an ex parte application. One

of the grounds the petitioner alleged was bias on the part of

the 2nd to 4th respondents. The heading to paragraphs 39

to 49 of the petition is **Bias and objections to President/**

**Member of Court Martial II**. The 2nd to 4th respondents fled

objections countering the allegation of bias to which the

petitioner did not respond. The petitioner in the written sub-

missions fled thereafter reiterated the ground with regard to

the bias of the 2nd to 4th respondents who were the members

of the Court Martial.

The petitioner fled CA Application No. 350/2010 and in

that too the petitioner relied on bias as a ground. In para-

graphs 42, 71 and 73 a – e of the petition in CA Writ 350/2010

the petitioner had alleged bias on the part of the 2nd to 4th

respondents. This case was dismissed by the Court of Appeal

on 29.6.2010. However the petitioner maintained that this

order is incorrect and an appeal was fled in the Supreme

Court on 29.10.2010 in SC (Spl) LA Application No. 141/2010

to reverse the judgment of the Court of Appeal. The petition-

er mentioned this fact in this application (CA 679/2010) in

order to further strengthen the fact that the 2nd to 4th respon-

dents were biased towards the petitioner. Thus one can see

to what extent the petitioner has relied on bias as a ground to

get a writ of certiorari issued. It is by averring these grounds

that the petitioner was able to get notice issued by this court

on the respondents. The appeal fled in the Supreme Court

was not supported for more than a year and was thereafter

withdrawn. It had taken more than one year for the petitioner

to realize that he was not relying on bias of the 2nd to 4th

respondents.

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The 2nd to 4th respondents in their objections (paragraphs

34 and 36 of the objections), in the written submissions and

oral submissions by learned counsel strongly disputed the

allegation of bias that was leveled against them by the

petitioner. The petitioner should have met those facts and

explained as to why the petitioner made allegations against

the 2nd to 4th respondents in the petition particularly in para-

graph 40 a, b and c. Without meeting the argument what

the learned President’s Counsel for the petitioner did was to

conveniently withdraw the issue saying that he does not rely

on bias any longer.

Then the question arises as to why the learned counsel

relied to this ground at the time of moving for notice.

Throughout, the petitioner’s case was that the 2nd to 4th

respondents who were the President and the Members of the

military tribunal had an animosity towards the petitioner

for having removed them from the command stream to the

common stream. The petitioner had explained specifcally, in

paragraphs 40 a, b and c of the petition, the reason for the

removal. The respondents replied to these allegations in

detail in the objections fled and later on in the written sub-

missions and in the oral submissions. Now the petitioner

cannot say that he is no longer relying on that ground.

The petitioner cannot escape without clearing the is-

sue relating to bias with a sweeping statement that it is not

relevant. Now the learned President’s Counsel submits that

he is no longer relying on bias as a ground to support for a

writ. Bias as a ground was completely abandoned. The ques-

tion is, why did the learned counsel abandon the ground

of bias in his written submissions tendered on 3.10.2011?

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Was this because the petitioner found it diffcult to meet the

allegation of suppression of material facts?

The learned Present’s Counsel for the petitioner took

another unprecedented move in the written submissions fled

on 3.10.2011 (after oral submissions). The learned President’s

Counsel in the written submissions so fled, from pages 45-51

dealt with the summing up of the 5th respondent (made be-

fore the Court MRTIl II). Prior to this, the only other instance

where any reference was made to the summing up was in the

petition in paragraph 65 “U” and “V”. The 5th respondent de-

nied the allegations made in paragraphs 65 “u” and “v” in the

objections. The petitioner did not mention the summing up

in the counter objections or in the written submissions fled

thereafter on 10.5.2011.

Thus the 5th respondent in the written submissions fled

on 10.5. 2011 referred to mis-directions and non directions

under the heading ***No Misdirection or non direction on***

***the part of the 5th Respondent:*** It states thus that *“the*

*pleadings fled before this court does not disclose any specifc*

*averment pertaining to any misdirection and/ or non direction*

*on the part of the 5th Respondent”* (as pg 44 of the written

submissions).

The petitioner fled a written submission on 19.5.2011 in

reply and not a word was mentioned of the summing up. The

learned President’s Counsel in his lengthy oral submissions

and the submission in reply did not mention a word about

the summing up. Although the learned President’s Counsel

was reminded about not addressing court on the summing

up with regard to its mis-directions and non directions the

learned counsel did not respond and it was understood that

there was nothing to complain about the summing up.

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Written submissions tendered after argument is optional.

Such submissions should contain only a synopsis of the

oral submissions together with any authorities to support. It

should not deal with matters outside the oral submissions.

Written submissions tendered on matter not dealt with in the

oral submissions, and at a time where the opponents do not

have the opportunity to answer is unprecedented and should

not be encouraged.

It is perfectly settled that a person who makes an ex parte

application to court is under an obligation to make that full-

est possible disclosure of all material facts within his knowl-

edge **and if he does not make that fullest possible disclo-**

**sure, then he cannot obtain any advantage which he may**

**have already obtained by him. This is perfectly plain and**

**requires no authority to justify it”** (*R vs. Kensington Income*

*Tax Commissioner*(3) Kay J. Held in *Republic of Peru vs. Driefus*

*Brother and com* (4) at 803 that “it is most important to main-

tain most strictly the rule that in ex-parte applications the

utmost good faith must be observed. If there is an important

misstatement, I have never hesitated and never shall hesitate

until the rule is altered to discharge the order at once, so as

to impress upon all persons who are suitors in the courts

the importance of dealing in good faith with the court when

ex-parte applications are made”. **If there is anything like**

**deception practiced on the courts, the court ought not**

**to go into the merits of the case, but simply say, “we will**

**not listen to your application because of what you have**

**done”** (*Daglish vs. Jarvie* (5))

In *Alphonso Appuhamy vs. Hettiarachchi*(6) Pathirana J

said that when an application for a prerogative writ, or an

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injunction is made, it is the duty of the petitioner to place

before court, before it issues notice in the frst instance, a

full and truthful disclosure of all the material facts and the

petitioner must act with *uberrima fdes*. Pathirana J. observed

that had the petitioner made a full disclosure of all mate-

rial facts and appraised the courts, the courts may not have

issued notice in the frst instance.

“The necessity of a full and fair disclosure of all mate-

rial facts to be placed before the Court when an application

for a writ or injunction is made and the process of the Court

is invoked is laid down in the case of *King vs. The General*

*Commissioner for the purpose of the Income Tax Acts for the*

*District of Kensington-Ex-parte Princess Edmond de Poignc*

*(supra)*. Although this case deals with a writ of prohibition

the principles enunciated are applicable to all cases of writs

or injunctions. In this case a Divisional Court without deal-

ing with the merits of the case discharged the rule on the

ground that the applicant had suppressed or misrepresented

the facts material to her application.

The Court of Appeal affrmed the decision of the Division-

al Court that there had been a suppression of material facts

by the applicant in her affdavit an therefore it was justifed

in refusing a writ of prohibition without going in to the merits

of the case. **In other words, so rigorous is the necessity for**

**a full and truthful disclosure of all material facts that the**

**Court would not go in to the merits of the application,**

**but will dismiss it without further examination**. (*Athula*

*Ratnayake vs. Lt. Col. Jayasinghe*(7) *Laub vs. Attorney General*

*and Another*(8) *Walker Sons & Co. Ltd., vs. Wijayasena*(9)

In *Sarath Hulangamuwa vs. Siriwardene, Principal,*

*Vishaka Vidyalaya, Colombo 5*(10) at 282 Siva Selliah J

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expressed his agreement with the submission of the learned

Deputy Solicitor – General that all these facts pertaining to

residence at Dehiwala proved by 1R5 were withheld from this

Court in the petitioner’s application for writ which is thus

lacking in *uberiima fdes* and that on this ground too the

application must fail. **“A petitioner who seeks relief by**

**writ which is an extraordinary remedy must in fairness**

**to this Court, bare every material fact so that the discre-**

**tion of this Court is not wrongly invoked or exercised.** In

the instant case the fact that the petitioner had a residence

at Dehiwala is indeed a material fact which has an important

bearing on the question of the genuineness of the residence

of the petitioner at the annexe and on whether this Court

should exercise its discretion to quash the order complained

of as unjust and discriminatory. On this ground too the

application must be dismissed for lack of *uberrima fdes*”.

The application of the petitioner thus having failed on

the above grounds, it is hardly necessary to consider the al-

leged ground of discrimination against the petitioner’s child

on the ground that after the refusal of his application some

other children with less qualifcation have gained admission.

Discrimination and denial of equal rights cannot be agitated

in an application for Writ of Certiorari and must form the

subject of an action for fundamental rights which cannot be

canvassed in this court. I see no merit in this application for

Writ of Certiorari for the reasons set out and dismiss this

application with costs fxed at Rs. 315”.

In *Hotel Galary vs. Mercantile Hotel Ltd*(11) it was decided

that the misstatement/misrepresentation of the true facts by

the plaintiff which put an entirely different complexion on the

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case as presented by him when the injunction was applied

for ex-parte, would amount to mis representation or **suppres-**

**sion of material facts warranting its dissolution without**

**going in to the merits**.

*Marsoof J in Dahanayake vs. Sri Lanka Insurance*

*Corporation Ltd* (12) at 77 held that “ the 1st respondent has

also taken up a preliminary objection on the basis that the

petitioners have suppressed or misrepresented material facts.

This by itself is a serious obstacle for the maintenance of the

petitioners’ case. Our courts have time and again emphasized

the importance of full disclosure of all material facts at the

time a petitioner seeks to invoke the jurisdiction of this court,

by way of writ of certiorari, mandamus or any other remedies

referred to in Article 140 of the Constitution.

In this context, the failure of the petitioners to tender

with the petition and joint affdavit fled by them a copy of

the Arbitral Award dated 28th January 1998 (R 10) to which

the 1st, 2nd, 3rd, 8th, 11th and 35th petitioners were parties is

extremely signifcant. It is important to note that the

impugned order of the 2nd respondent marked P11, which the

petitioners seek to have quashed by way of a writ of certiorari

specifcally refers to the said Arbitral Award marked R10. In

fact one of the primary considerations in the order sought to

be quashed (P11) is the fact that the complaint of the peti-

tioners in regard to their claim for arrears at the enhanced

rate, had already been considered and determined in the said

award marked as R10 made in 1998. I am therefore of the

view that the petitioners were bound to produce with their

application a copy of this Arbitral Award, more so as the 2nd

respondent had cited and relied upon the said award in his

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order marked P11. The petitioners have omitted to annex to

their petition and affdavit a copy of this Award which has

comprehensively analysed the claim of the petitioners” and

proceed to reject the same.

*Marsoof J. cites with approval the case of Blanca Diamonds*

*(Pvt) Ltd v. Wilfred Van Else & Others*(13) where Jayasuriya J

emphasized the duty a party owes to Court for a full and

frank disclosure when initiating writ proceedings. Jayasuriya

J held thus “ in fling the present application for discretionary

relief in the Court of Appeal Registry, the petitioner compa-

ny was under a duty to disclose *uberrima fdes* and disclose

all material facts to this Court for the purpose of this Court

arriving at a correct adjudication of the issues arising upon

this application. In the decision in *Alponso Appuhamy v.*

*Hettiarachchi (supra)* Justice Pathirana in an erudite judg-

ment, considered the landmark decisions on this province in

English Law and cited the decisions which laid down the prin-

ciple that when a party is seeking discretionary relief from the

court upon an application for a writ of certiorari, he enters

in to a contractual obligation with the Court when he fles an

application in the Registry and in terms of that contractual

obligation he is required to disclose *uberrima fdes* and dis-

close all material facts fully and frankly to this court.”

Marsoof J thus held that the petitioners were in breach

of this solemn covenant and are therefore not entitled to any

relief.

Having carefully considered the above authorities togeth-

er with the facts of this case I am of the view that the peti-

tioner is guilty of non disclosure and therefore not entitled to

a discretionary remedy. Hence this application is dismissed

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*in limine.* In view of the fact that the petitioner is serving a

sentence of imprisonment I make no order for costs.

**UPaly aBeyraTne J** – I agree.

*Application dismissed.*

**aBdUs salaM, J.**

I have had the beneft of perusing in draft, the judgment

of my brother Eric Basnayake, J and respectfully concur with

him both in regard to his analytical approach towards the

commonly known *R v. Kensington Income Tax Commissioner’s,*

*exp p Princess Edmund De Polignack (Supra)* principle and its

applicability to the facts of the instant application. Since the

decision of my brother judge is self explanatory and exhaus-

tive as regards factual matters, it is unnecessary for me to

recapitulate them or deal with them at length save those

which are extremely necessary. Hence, my exercise is limited

only to elaborate on the decision, with the addition of few

words, mainly on the legal position.

As far as the stance of the petitioner is concerned the is-

sue relating to BIAS loomed large both in the pleadings and

the submissions. However, quite surprisingly, the petitioner

has attempted to maintain at one stage of the case that the

ground of “bias” is not material to the application though

it had been admittedly pleaded. A perusal of the petition

reveals that one of the grounds alleged therein and continued

to be relied upon when supporting the application for

notice was the motivation followed by actual or apparent bias

attributed to the 2nd to 5th respondents. The exact details of

the alleged bias have been elucidated in the petition setting

apart 27 paragraphs out of 70 paragraphs. This works out to

almost 40 per centum of the entire petition. Bias, which is in

the forefront of the petitioner’s case both in this application

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and also in CA 350/2010, has been set out under a separate

title “BIAS AND OBJECTIONS TO PRESIDENT/MEMBERS

OF COURT MARTIAL II”. Having given the issue of bias such

great prominence in the petition and placed reliance so heav-

ily on it to obtain notice, in my view the petitioner cannot be

permitted to resile now from that position, particularly when

the respondents argued the question of suppression. In effect

that would amount to condoning act of blowing hot and cold

which is totally inconsistent with the rules of equity.

It is important to recall at this stage that one important

ground considered by my two brothers who initially heard

this matter, was the reliance placed by the petitioner on that

ground before issuing notice. In the circumstances, the ele-

ment of bias as pleaded by the petitioner has continued to be

part and parcel of the case of the petitioner.

A maxim known almost during the whole of last century

and having its origin in equity courts is that one must

approach the court with clean hands. The maxim has been so

indoctrinated in the legal system that almost all our courts,

loath to entertain claims that are tainted with non-disclosure

of **material facts**. It is particularly so when the beneft of the

maxim is invoked by the respondent or raised by court *ex*

*mero motu.* (Emphasis is mine).

Material facts are those which are material for the judge

to know in dealing with the application as made; materiality

is to be decided by court and not by the assessment of the

applicant or his legal advisers; see *Rex v. Kensington Income*

*Tax Commissioner, per Lord Cozens –Hardy M. R. (supra)* at

p. 504, citing *Dalglish v. Jarvie (1850) (supra)*, and Browne

– Wilkinson J. in *Thermax Ltd. V. Schott Industrial Glass*

*Ltd.*(14). It was held in the case of *Bank Mellat v. Nikpour* (15) and

*Fonseka vs. Lt. General Jagath Jayasuriya and fve others*

CA *(Abdus Salam J..)* 411

cited with approval in *Brink’s-MAT* (16) that one must make

proper inquiries before making an application for a discre-

tionary remedy and his duty to disclose all material facts and

refrain from misrepresenting like facts, therefore, applies not

only to material facts known to him but also to any additional

facts while he would have come by his knowledge had he

made proper inquiries.

If material non-disclosure is established, “the court will

be astute to ensure that a plaintiff who obtains notice exparte

without full disclosure is deprived of any advantage **he may**

**have derived by that breach of duty:”** see per Donaldson

L.J. in *Bank Mellat v. Nikpour (supra)* at p. 91, citing War-

rington L.J. in the *Kensington Income Tax Commissioners’*

*case (supra)* (No emphasis is made in the judgment as

reported)

Whether the facts not disclosed are of suffcient mate-

riality to justify or require immediate discharge of the order

without consideration of the merits, depend on the impor-

tance of the facts to the issues which are to be decided by

court. The answer to the question whether the non-disclosed,

is an important consideration. However, it is not decisive by

reason of the duty on the applicant to make all proper inqui-

ries and to give careful consideration to the case presented.

I do not propose to delve into the question as to the extent of

non-disclosure in the instant matter since it has already been

exhaustively dealt in the main decision.

Be that as it may, for purpose of completencess, I feel

obliged to re-echo the warning sounded by Lord Denning

M.R. in *Bank Mellat v. Nikpour [supra]* against the rule being

put into effect in respect of every omission, to automatically

discharge the injunction. His Lordship therefore suggested

that a *locus poenitentiae* may sometimes be afforded, *Locus*

*Peiris v Celltel Lanka Limited*

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*poenitentiae* is a Latin phrase associated in contractual law

and means an opportunity to withdraw from a contract or

obligation before it is completed.

Undoubtedly, the petitioner in this matter claims to have

exercised the statutory right conferred on him by section 79 of

the Army Act. In order to challenge the decision of the Court

Martial he has placed other signifcant grounds to avoid the

impugned decision. These grounds include the application

of *ejusdem generis* rule to the charges preferred against the

petitioner and the question whether the procurement guide-

lines in terms of Article 33(f) of the Constitution of the Repub-

lic of Sri Lanka can be construed as LAW within the meaning

of the Constitution. Even though the decision on those issues

may be of public importance, the fact that the petitioner is

guilty of not being frank with Court on the other grounds,

demands that we refrain from looking at the merits of the

application for the present purpose.

This is a clear instance of this Court having been placed

under the daunting task of determining, as it happens fre-

quently, not to look at the merits of the petitioner’s case, for

which eventuality he has to blame himself. No doubt, by rea-

son of the decision reached in this application, the petitioner

had missed a perfect opportunity to involve the Court in the

interpretation of the law on the two issues referred to earlier,

as there are no direct authorities on those points. However,

in passing it may not be inappropriate to have it placed on

record that the application of the petitioner is dismissed *in-*

*limine* and therefore this judgment is entered *nunc pro tunc.*

I am therefore in total agreement with the reasoning ad-

opted in the main judgment and hence endorse the same

without any hesitation.

*Application dismissed.*

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**ROSALIN HAMI v. HEWAGE HAMI AND 8 OTHERS**

SUPREME COURT

ShIRANEE TILAkAWARDANE, J.

AMARATuNgA, J AND

IMAM, J.

S.C APPEAL NO. 15/2008

S.C (SPL.) L. A. NO. 01/2008

C. A. APPLICATION NO. 362/1995

D. C. TANgALLE NO. 215/L

OCTOBER 28TH 2010

**Possessory action – Possession must be continuous, and peaceful**

**and for a certain period – Possession disturbed by acts which pre-**

**vent the possessor from enjoying the free and full use the land**

**– Interrupted – If the continuity of possession is broken? Exllna**

**ordina - Section 114 (d).**

At the commencement of the trial, the parties agreed that the only two

matters for determination was whether possession had been handed

over to the Plaintiff by the Fiscal of the District Court of Tangalle in

Case L/882 and whether there is evidence to prove exclusive and un-

interrupted possession of the disputed corpus by the 2nd Defendant

–Appellant – Petitioner.

Case bearing No. L/ 882 of District Court Tangalle was fled by the

Respondent to obtain a declaration of title and possession by evicting

the 1st Defendant who was in occupation of this land and who was the

spouse of the present Appellant. The Appellant claimed that though

judgment had been entered in favour of the Respondent in that case,

the writ for possession was never executed and that the possession

of the land had not been delivered to the Respondent, a fact that was

strongly challenged by the Respondent.

However, it transpired after careful perusal by the court, writ was ex-

ecuted on 23.7.1962 and there is an explicit endorsement that the pos-

session of the land had been delivered to the Respondent. Upon perusal

of all relevant documents the District Court came to the fnding that the

possession had been duly handed over to the Respondent by the Fiscal

who executed the writ of delivery of property.

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The Respondent had been in occupation until the possession was

disturbed by the Appellant on 18.10.1962.

**Held:**

(1) There was no error in law in the judgment of the Court of Appeal

where it concluded that the possession was handed over to the

Respondent and the legality of the Fiscal’s Report has not been

assailed.

(2) The Appellant has not proved prescription and she has also failed

to prove that she was in an undisturbed possession adverse to the

interest of the Respondent for a continuous period of 10 years.

Furtheremore, as the land is an undivided portion of the land

which was co-owned the Appellant has not proved ouster or ad-

verse possession against the Respondent.

**Cases referred to:**

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

*(2) Sura v. Fernando* 1 ACR 95

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

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

**aPPeal** from the judgment of the Court of Appeal

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

– Appellant – Petitioner

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

Respondents.

*Cur.adv.vult*

December 03, 2010

**Ms. sHIranee TIlakawardane, J.**

Special Leave to Appeal was granted on the Applica-

tion of the 2nd Defendant-Appellant-Petitioner (hereinafter

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referred to as the Appellant) on the questions of law set out in

paragraph 8 (a) – (g) of the Petition dated 01.01. 2008.

However at the commencement of the arguments Coun-

sel agreed that the only two matters for determination was

whether possession had been handed over to the Plaintiff

by the Fiscal in District Court Tangalle Case No. L.882 and

whether there is evidence to prove exclusive and uninterrupt-

ed possession of the disputed corpus by the 2nd Defendant-

Appellant-Petitioner

An earlier action was instituted in District Court Tangalle

Case bearing No. L.882 by the Plaintiff-Respondent-Respon-

dents in relation to the same land that is presently in dispute,

between the parties who were in occupation of the land at

that time, and the Appellant at the time of the institution of

the said action was not a party, but was the spouse of the 1st

Defendant in that case. The Appellant did not seek to inter-

vene in the said action.

The Plaintiff-Respondent (hereinafter referred to as the

Respondent) who had instituted action in this case relied

on the pedigree set up by him and on the chain of title de-

picted in Deeds P1 to P5 and submitted that he had pur-

chased the land in 1954 from Kirigoris by a Deed of Sale

dated 19.09.1954 bearing No. 1944 (marked P6) attested by

D. B. karunanayake, Notary Public.

The parties in the present case admitted the identity

of the corpus. It was also further admitted that the corpus

had been correctly depicted in plan No. 137 (marked P10)

prepared by T. Weerasinghe, Licensed Surveyor which was

1R 22P in extent, and which was prepared through a Court

Commission issued in District Court Tangalle Case bearing

No. L.882.

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Case bearing No. L/882 of District Court Tangalle was

fled by the Respondent, to obtain a declaration of title and

possession through eviction of the 1st Defendant, who was at

the time, in occupation of this land, and who is the spouse of

the present Appellant. The Respondent had obtained Judg-

ment in his favour, and obtained an Order of eviction against

the 1st Defendant in that case. The Appellant at that time was

not a party to the case and had made no Application to in-

tervene. It is evident that her purported claim on Deed bear-

ing No. 3829 dated 03.10.1961, was prior to the possession

being handed over to the Respondent by the Fiscal 17.09.1962,

but at the time she did neither sought to challenge the execu-

tion of the said writ in Court nor intervened in the case.

The Counsel for the Appellant claimed that though the

Judgment had been entered in favour of the Respondent in

District Court of Tangalle case No. L/882, the writ for posses-

sion was never executed and that possession of the land had

not been delivered to the Respondent, a fact that was strongly

challenged by the Respondent.

In this context, this court has carefully perused the writ

of delivery of immovable property issued by the Learned Dis-

trict Court Judge. This was executed on 23.07.1962. In terms

of the Fiscal Report pertaining to the execution of this writ

and the affdavit dated 17.09.1962 of D. de S. Abeyweera the

Fiscal Offcer, there is an explicit endorsement that the pos-

session of the land had been delivered to the Respondent.

(The Plaintiff in Case No. L.882 referred to above) This was

marked as P11 and produced as evidence in the present case.

In this context, this Court rules on a statutory presumption

in favour of the execution, in terms of Section 114 (d) of the

Evidence Ordinance. This Section reads as follows;

*“The Court may presume the existence of any fact which it*

*thinks likely to have happened, regard being had to the com-*

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*mon course of natural events, human conduct, and public and*

*private business in their relation to the facts of the particular*

*case – that judicial and offcial acts have been regularly*

*performed.”*

This evidence contained in the affdavit has not been

challenged either by raising an issue on this matter or call-

ing the Fiscal offcer who executed the writ and eliciting the

fact that possession had not been handed over as claimed by

the Appellant. No independent evidence was led to rebut this

presumption.

The Appellant submitted that evidence of Wijemuni

Arachchige Peiris should be relied upon to prove that posses-

sion had never been handed over as alleged, but his evidence

was inconsistent in so much as under cross examination, he

admitted that he was not there at the time the Fiscal came

to execute the writ and in the circumstances, it can be deter-

mined that he is not in a position to testify that the Fiscal has

not handed over the possession. Under these circumstances,

this Court comes to a fnding that the possession had been

duly handed over on 17. 09. 1962 to the Respondent by the

Fiscal executing the Writ of delivery of property.

In the circumstances this court holds that there was no

error in law in the Judgment of the Court of Appeal where it

concluded that the possession was handed over to the Re-

spondent by the Fiscal in Case No. L/882, and this court

further holds that the legality of the Fiscal’s Report has not

been assailed.

Therefore, the claim by the Appellant that the posses-

sion of the disputed land had never been handed over to the

Respondent is untenable and is not based on the facts of this

case.

The next matter urged by Counsel for the Appellant was

whether there is evidence to prove exclusive and uninterrupted

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possession of the corpus by the Appellant. It is relevant to

mention that the Appellant also produced Deed bearing

No. 3829 dated 03.10.1961 attested by Lionel Amaraweera

(marked 2V4) had been produced to purportedly prove her

title. This Deed explicitly stated that it was an undivided por-

tion of the land and that her purported claim on the Deed was

only for 5/90 of the said corpus, less than what is now being

claimed by the Appellant.

In the case of *Hariette vs. Pathmasiri* (1) (SC) the Plaintiff

produced title Deeds to undivided shares in the land but her

action being one for declaration of title to the entirety she can-

not stop at adducing evidence of paper title to an undivided

share. It was her burden to adduce evidence of exclusive pos-

session and acquisition of prescriptive title by ouster. Our law

recognizes the right of a co-owner to sue a trespasser to have

his title to an undivided share declared and for ejectment of

the trespasser from the whole land because the owner of the

undivided share has an interest in every part and portion of

the entire land. But such was not the case formulated by the

Plaintiff.

As it was held in the case of *Sura vs. Fernando*(2) a

co-owner was allowed to maintain an action of *rei vindicatio*

in respect of his share of his property in dispute where the

whole property was claimed by the defendant, and where it

was found possible to decide the action without interfering

with or endangering the right of any other co-owners.

In considering the present case, it is pertinent to note

that an action bearing No. 25101 (marked 2V3) dated

09.08.1963 had been instituted in the Magistrates Court of

Walasmulla by the Respondent alleging that the Appellants

had committed criminal trespass by forcibly entering the

land on 18.10.1962. The case was dismissed on the grounds

that the Respondent was absent in court on 10.07.1966. On

15.07.1966, the Respondent instituted a fresh action bearing

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No. 2844 in the Magistrate’s Court of Walasmulla (marked

2V2) on the same basis against the Appellant, her spouse

(the 1st Defendant in L/882) and his mother. It was admitted

by the parties that this case was still pending in the Court.

Indeed, a further complaint was lodged by the Respondent

to the Grama Sevaka on 20.07.1978 (marked P12) that the

Appellant was continually disturbing the possession of the

Respondent in this case.

When one considers the fact that having obtained the

possession, the Respondent had been in occupation until the

possession was disturbed by the Appellant on 18.10.1962,

and that litigation is continuing, the Appellant has not proved

that she was in undisturbed and uninterrupted possession

adverse to the Appellant as pending suits, even when they

become dormant, stop prescription.

In the full bench decision of *Siman Appu vs. Christian*

*Appu*(3) it was stated that, “Possession” of a land must be con-

tinuous, and peaceful, and for a certain period. It is “inter-

rupted” if the continuity of possession is broken either by the

disputed legitimacy putting the possessor out of the land and

keeping him out of it for certain time, if the possessor is oc-

cupying it; or by occupying it himself for a certain time and

using it for his own advantage, if the party preventing it is not

in occupation.

And possession is “disturbed” either by an action intend-

ed to remove the possessor form the land, or by acts which

prevent the possessor from enjoying the free and full use of

the land of which he is in the course of acquiring the domin-

ion, and which convert his continuous user into a discon-

nected and divided user.

In *Ettana vs. Naide,*(4) the Plaintiff sued the Defendant

for the recovery of certain lands. The answer was fled nearly

12 years after the date of the libel and set up a right to hold

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the land sued for by prescription. The defendant admittedly

held possession of the land during the whole of the interval

between the date of the fling of his answer, and that of fling

the libel and during some period antecedent thereto, but he

failed to prove that the period of possession far previous to

the suit extended back so far as ten years.

It was held that the possession contemplated by the Pre-

scription Ordinance is a possession of ten years previous

to the institution of the suit, and that the possession of the

defendant since the institution of this suit, though such

possession should exceed the term of ten years, could not

give him a title by prescription.

Indeed, even the title Deed (marked 2V4) which was

referred to above which was relied upon by the Appellant

refers to an undivided land where the boundaries do not tally

with the plan which admittedly referred to the corpus in this

case and which was marked as P10.

under these circumstances, this Court fnds that the

Appellant has not proved prescription and that she has also

failed to prove that she was in an undisturbed possession

adverse to the interest of the Respondent for a continuous

period of 10 years.

Furthermore, as the land is an undivided portion of the

land which was co-owned the Appellant has not proved ouster

or adverse possession against the Respondent in this case.

Accordingly for the above reasons the Appeal of the

Appellant is dismissed. No costs.

**aMaraTUnGa, J**. – I agree.

**IMaM, J.** – I agree.

*Appeal dismissed.*