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

[2008] 1 SRI L.R. – PARTS 11 & 12

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Consulting Editors : HON. S. N. SILVA, Chief Justice
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: HON. SATHYA HETTIGE, President, Court of Appeal. (from 31.10.2008)

Editor-in-Chief : L.K. WIMALACHANDRA

Additional Editor-in-Chief : ROHAN SAHABANDU

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It is clear therefore that proceedings of this nature are not fettered by rigid rules and that it is open to this Court to adopt a procedure which is fair and just in the circumstances. This matter is unique in that the impugned conduct was in a proceeding in Court itself. Transgressions within Court are rare and Attorneys-at-Law know where to draw the line and restrain themselves to keep within an acceptable norm. The impugned conduct transcends the norm by far. The Rule sets out in fair detail the circumstances and the impugned conduct. The respondent has had an ample opportunity to offer an explanation. Instead of offering an explanation he has raised preliminary objections and pleaded forgetfulness. The contents of the Rule of which the respondent was given ample notice; the repeated opportunities to offer an explanation and the right to be represented by counsel, in my view establish that the procedure adopted is fair and reasonable.

Section 42(3) of the Judicature Act only requires that a notice be served with a copy of the charges and an opportunity be afforded to show cause. The rule that has been issued and the procedure adopted is fully compliant with this requirement. In the circumstances I overrule the second objection raised by the respondent.

The **third objection** raised by the respondent relates to the participation of Hon. Justice Marsoof as a member of this Bench. The objection is that since Justice Marsoof was a member of the Bench that heard the Supreme Court Application No. S.C.F.R. 108/06, he was privy to what took place in Court and that he should not participate in this matter.

I have to note at the outset that neither proceedings in SC(FR) 108/06, nor this Rule could in any way be construed as personal matters between any of the Judges and the respondent. If the respondent has thus conceived the proceedings, it is a misconception only to his detriment. Justice Marsoof was functioning as a Judge of this Court in SC(FR) 108/06 and the merits of that case have no bearing on these proceedings. What is in issue is the impugned conduct of the respondent in making his submissions. I am of the view that it was open to the very Bench hearing S.C.F.R. 108/06 to take appropriate action against the respondent. It has to be noted that the respondent has on more

than one occasion instituted proceedings against Honourable Judges of this Court and of the Court of Appeal and on other occasions objected to Judges hearing his cases. In S.C.F.R. 108/06 when the matter came up on 22.3.2006 the respondent objected to the Presiding Judge hearing the matter, commenting that the Judge is biased. The ground of bias alleged is that applications filed by him purporting to appear in person have been dismissed by the said Judge. When it was pointed out to him that these applications had been filed several years ago and that in some cases in which the respondent appeared there had been judgments in his favour delivered by the same Judge, he has stated that the allegation of bias was only his belief, which might be right or wrong.

He had followed up by saying that although he had no facts to support his allegation, the Judge's body language had conveyed to him an impression of partiality.

I have to emphasize that an objection to the participation of a Judge should be only on firm foundation. Any frivolous objection that is taken would only impede the due administration of justice, which may even amount to contempt of Court. The respondent's objection to the participation of a Judge without offering an explanation of the impugned conduct is frivolous. I have to note at this point that although repeated opportunities have been afforded he has been evasive. He has neither admitted nor denied the impugned conduct in Court. In paragraph 38 of the affidavit he has virtually pleaded amnesia by stating " I cannot at this distance of time (more than an year later) recall what exactly was said." Hence I overrule the final objection of the respondent.

The impugned conduct of :

i) disobedience of orders of Court;
ii) contemptuous disregard of the request of Court to clarify questions of law and the rude response that if the Judges wanted any clarification of the law, they could look it up themselves;
iii) the use of intemperate language and making of gesticulations to bring the proceedings of this Court to ridicule and contempt;

constitute in my view unprecedented acts of discourtesy.

There are no reported instances of such deplorable conduct in our legal literature. The Bench that heard the matter has shown the highest leniency towards the respondent.

As regards discourtesy to Court I wish to cite the following passage from the Judgment of this Court in *Daniel* v *Chandradeva*(2) page 1–

> *"It comes as a surprise that the word "only" was used and repeated for emphasis as if discourtesy was of little or no significance in the matter of professional conduct. Discourtesy to the court is a very serious matter. The rough and rude conduct of an uncouthed attorney unaccustomed to following the usual ways of members of the profession who are of good repute is always shocking and repellent and deplorable although it may not amount to professional misconduct warranting disciplinary action. However, discourtesy to court is much more than a matter of good manners. It is axiomatic that every attorney must encourage respect for the administration of justice by treating the courts and tribunals of the country not only with candour and fairness but also with respect and courtesy. An attorney who is discourteous to Court acts in a manner prejudicial to the administration of justice in that he undermines the work of the Court. He renders himself unfit to be an officer of the court. As an officer of the Court and as a privileged member of the community who has been conditionally allowed to practice his profession to assist in the administration of justice every attorney must act with courtesy to Court. It is a duty recognized by Rule 15 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988."*

Malpractice that was alleged in that case was the failure to appear in Court, having accepted a retainer; Counsel for the respondent in that case had tendered written submissions suggesting that the failure of the respondent to appear in Court "only amounts to discourtesy to Court." It is this submission which drew the aforesaid observation of this Court. In comparison, the conduct that is alleged against the respondent transcends by far any conceivable level of discourtesy.

The need for deterrent action against the respondent is brought forth in another case – S.C.F.R. 232/2006,[3] which came up before Court nearly 3 months after the incident on the basis of which the Rule has been issued. That case had been filed by 2 persons purportedly in the public interest against 5 Judges of the Superior Courts, the Speaker, Prime Minister, Leader of the Opposition and so on. The respondent as Attorney-at-Law for the petitioners made submissions which caused the Court to make the following order on 30.6.2006.

> *"Mr. Elmore Perera, Counsel for the petitioner in the course of his submissions stated that he is not only addressing Court but also the people of this country. It seems to Court that this application has been filed for frivolous and vexatious considerations and also for collateral purposes.*
>
> *Court directs Attorney-General to consider whether any action is warranted against the petitioner for wasting the time of Court and also abuse of process."*

It is to be noted that S.C.F.R. 232/2006 was heard by three Judges, none of whom were members of the Bench which heard the matter in respect of which the Rule has been issued. It is thus seen that the respondent by his sheer discourtesy, disrespect, disobedience and insolence brought the Judges of this Court to a point of exasperation.

For the reasons stated above, I affirm the Rule and hold that the respondent is guilty of malpractice. The respondent is suspended from practicing as an Attorney-at-Law for a period of 7 years commencing from today.

AMARATUNGA, J. – I agree.

MARSOOF, J. – I agree.

Affirmed the Rule issued in terms of Section 42(2) of the Judicature Act No. 2 of 1978.

MAHINDA KATUGAHA
v
MINISTER OF LANDS AND LAND DEVELOPMENT AND OTHERS

SUPREME COURT
S.N. SILVA, C.J.
AMARATUNGA, J. AND
SOMAWANSA, J.
S.C. APPEAL NO. 68/2007
S.C. (SPL.) L.A. No. 11/2007
C.A. (WRIT) APPLICATION 522/2002
NOVEMBER 11, 2007.

Land Acquisition Act – Sections as amended – 2, 4, 5, 38, 39A, 44, 49, 50 – Acquisition proceedings – Non utilization of the land for public purpose for more than 10 years – Is it liable to be quashed by a Writ of Certiorari?

The Appellant filed an application in the Court of Appeal seeking inter-alia – orders in the nature of *Writ of Certiorari* to quash the entire acquisition proceedings commencing from the notice in terms of Section 2 of the Land Acquisition Act and in the alternative for an order in the nature of *mandamus* to compel the 1st respondent in terms of Section 39A of the Land Acquisition Act to divest the land which originally belonged to the appellant and was later vested in the State and restore the said land to the possession of the appellant.

The Court of Appeal by its judgment dismissed the application on the following grounds:

(1) Undue delay on the part of the petitioner.
(2) On the principle that the Minister's decision that a land is required for a public purpose cannot be questioned in a Court.
(3) As the land had been handed over to the UDA under Section 44 of the Land Acquisition Act which had drawn plans and the land was developed, the petitioner cannot claim that the land acquired was not for a public purpose.

Held:

(1) The Minister's decision to acquire a land can be challenged in a Court of Law.

(2) A Minister does not have the unfettered right to acquire land without specifying a public purpose. Nor does a Minister have a right to acquire land and utilize it for purposes other than a public purpose.

(3) The notice given under section 2 of the Land Acquisition Act in respect of the appellant's land *ex-facie* reveals that no public purpose has been specified and the failure to specify a public purpose is fatal to the acquisition proceedings and the subsequent vesting of the land in the Urban Development Authority does not cure the defect in the notice given under Section 2 of the Land Acquisition Act.

(4) The subsequent vesting of the land in the Urban Development Authority by the State under Section 44 of the Land Acquisition act is wrongful and bad in law and as such the Urban Development Authority does not become entitled to any rights in respect of the land so vested.

(5) The appellant realized that the land acquired from him was not used for a public purpose only in 2002 when the 4th respondent put up its name board on the said land. Accordingly, the appellant adequately explained his delay in instituting the application in the Court of Appeal.

per Andrew Somawansa, J. –

"It is patently clear that the land was not acquired under the Land Acquisition Act for the 5th respondent but was vested in the 5th respondent in order to enable the 5th respondent to lease it to the 4th respondent, a private entity."

per Andrew Somawansa, J. –

"No improvements have taken place on the land and the filling up of the land by the 4th respondent for a purpose other than a public purpose cannot be described as improvements for the purpose of section 39A(2)(C)".

Cases referred to:

(1) *Hewawasam Gamage* v *Minister of Agriculture and Lands* 78 NLR 25.
(2) *Gunasinghe* v *Dissanayake and Others* 1994 2 Sri LR 132.
(3) *Gunasekera* v *Minister of Lands and Agriculture* 65 NLR 119.
(4) *Fernandopulle* v *Minister of Lands and Agriculture* 79(2) NLR 116.
(5) *Manel Fernando and Another* v *D.M. Jayaratne, Minister of Agriculture and Lands and others* 2000 1 Sri LR 112.
(6) *De Silva* v *Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* 1993 1 Sri LR 282.

APPEAL from the judgment of the Court of Appeal.

Romesh de Silva, P.C. with *Lilanthi de Silva* for the appellant.
Mrs. M.N.B. Fernando, D.S.G. for the 1st respondent.
Nihal Jayamanne, P.C. with *Uditha Collure* for the 4th respondent.
Shibly Aziz, P.C. with *A.P. Niles* for the 5th respondents

Cur.adv.vult.

July 23, 2008

ANDREW SOMAWANSA, J.

The petitioner-petitioner-appellant hereinafter called the appellant was granted special leave to appeal from the judgment of the Court of Appeal dated 27.11.2006 on the questions of law as stated in paragraph 8 of the petition which reads as follows:

(8)(a)(i) Are acquisition proceedings under the Land Acquisition Act incapable in law to be initiated or proceeded with, without the public purpose being specified in the notice under section 2 of the Land Acquisition Act?

(ii) If so, did the Court of Appeal make a serious error of law in failing to issue the writ of *certiorari* prayed for by the petitioner?

(b)(i) Is an order under proviso (a) to section 38 of the Land Acquisition Act made in 1990 in respect of land which is thereafter not utilized for any public purpose for more than 10 years liable to be quashed by a writ of *certiorari*?

(ii) Was the petitioner's land not utilized for any public purpose"

(iii) If so, did the Court of Appeal make a serious error in law in failing to issue the writ of *certiorari* prayed for by the petitioner?

(c)(i) Is the allocation of the land acquired from the petitioner to the 4th respondent not a public purpose?

(ii) Did the petitioner realize that the land acquired from the petitioner was not used for a public purpose only in 2002 when the 4th respondent put up its name board on the said land?

(iii) In the circumstances did the petitioner adequately explain his delay in instituting the application in the Court of Appeal?

(iv) If so, did the Court of Appeal err in law in concluding that the delay of the petitioner is ground for refusing the petitioner's application?

(d) Did the Court of Appeal err in law in concluding that the Minister's decision to acquire a land can never be challenged in a Court of Law?

(e)(i) Was the land acquired from the petitioner not used for a public purpose and/or the public purpose for which it was acquired?

(ii) If so, did the Court of Appeal err in law in failing to issue a writ of *mandamus* prayed for by the petitioner?

(f) Did the Court of Appeal err in law in failing to conclude that the land of the petitioner could not have been acquired without a decision by the 1st respondent under Section 4 of the Land Acquisition Act?

(g) Did the Court of Appeal err in law in failing to conclude that there was no urgent public purpose in relation to the acquisition of the petitioner's lands?

(h) Did the Court of Appeal err in law in failing to conclude that the acquisition of the petitioners lands was *ultra vires* the powers of the 1st respondent?

(i) Did the Court of Appeal err in law in failing to conclude that the purported vesting of the petitioners land in the 5th respondent was *ultra vires*?

(j) Did the Court of Appeal err in law in failing to grant the relief prayed for by the petitioner?

The relevant facts are that by Deeds Nos. 4411 and 263 the appellant became the owner of certain lands in extent about 0.597 hectares in Kandy. A notice dated 21.09.1989 under the Land Acquisition Act was published for the acquisition of the land claimed by the appellant and of several other lands in the vicinity stating that the said lands are needed for a public purpose but did not set out the nature of the public purpose, subsequently identified and described in the vesting order made under proviso (a) to section 38 of the Land Acquisition Act. A letter addressed to the appellant by the 3rd respondent stated that the acquisition was for development of necessary public utilities in the vicinity of the new Getambe Kandy Road and the appellant was directed to vacate, hand over vacant possession of the land was duly handed over by the

appellant acting through his agent as the appellant was out of the country.

The appellant contends that the provisions of Section 5 of the Land Acquisition Act has not been complied with and no Section 5 notice has been published. However, it is to be seen that the Section 5 notice has been published on 01.03.91. The appellant further contends that he being out of the country since 1981 for employment was represented at the inquiry before the 3rd respondent the District Secretary by his Attorney and the appellant's Attorney being unaware of the illegality of the acquisition and the true market value of the land at the date of acquisition had claimed compensation for the land acquired at Rs. 25,000/- per perch and the 3rd respondent has not accepted the said claim and that the appellant has so far not been paid any compensation under the Land Acquisition Act in respect of the aforesaid land.

The appellant's main contention is that the land belonging to him and which was acquired has not been used for any public purpose although possession of the same was taken by the 3rd respondent in December 1990 on the ground of urgency. That in or about January 2002 he discovered that the 4th respondent has been placed in possession of about 3 acres in extent including the said portion of the land which belongs to the appellant and that the 4th respondent was placed in possession by the Urban Development Authority the 5th respondent and that the 4th respondent was taking steps to construct a private hospital and resort thereon. The appellant contends that having taken possession of the property as far back as 1990 on the grounds of an alleged urgent public purpose and having not developed the property and having failed to specify the public purpose for which the said lands were purported to be acquired a third party was filling portions thereof which had been handed over to the 4th respondent for its private purpose.

The appellant by his letter dated 22.01.2002 brought the aforesaid matters to the notice of the 1st respondent and requested him to divest the land in terms of section 39A of the Land Acquisition Act which was copied to 2nd and 3rd respondents to which there was no response. He further contended that although the land has been purportedly vested in the 5th respondent in terms of Section 44 of the Land Acquisition Act no document specifying that the said land was

required for the purpose of the 5th respondent at the time the Section 02 notice was published or section 38 proviso (2) order was made has been produced.

In the circumstances, the appellant filed an application in the Court of Appeal in March 2002 seeking *inter-alia* – orders in the nature of writ of *certiorari* quashing the entire acquisition proceedings commencing from the notice in terms of Section 2 of the Land Acquisition Act and in the alternative for an order in the nature of *mandamus* to compel the 1st respondent in terms of Section 39A of the Land Acquisition Act to divest the land which belonged to the appellant and was vested in the State and restore the said land to the possession of the appellant.

The Court of Appeal by its judgment dated 27.11.2006 dismissed the application of the appellant on the following grounds:

1) Undue delay on the part of the petitioner.
2) On the principle that the Minister's decision that a land is required for a public purpose cannot be questioned in a Court.
3) As the land had been handed over to the UDA under Section 44 of the Land Acquisition Act which had drawn plans and the land was developed the petitioner cannot claim that the land acquired was not for a public purpose.

At the hearing of this application parties agreed that this application be restricted to lots 3 to 8 in the order under Section 7 of the Land Acquisition Act published in Gazette Extraordinary No. 784/6 dated 14.09.1993 marked 'H' and lots 01 to 11 in the order under Section 7 of the Land Acquisition Act published in Gazette Extraordinary No. 699/16 dated 20.01.1992 marked 'I'.

It is contended by Counsel for the 4th respondent that the question whether any land should or should not be acquired is one of policy to be determined by the Minister and therefore it cannot be challenged in a Court of Law. In fact this was the view taken by the Court of Appeal following the decision in *Hewawasam Gamage* v *Minister of Agriculture and Lands*(1). Counsel for the 4th respondent also cited *Gunasinghe* v *Dissanayake and others*(2), *Gunasekera* v *Minister of Lands and Agriculture*(3), *Fernandopulle v Minister of Lands and Agriculture*(4) for the proposition that the Court cannot

interfere in the policy decision of the Minister unless it is illegal. Counsel for the respondent also contends that Section 5 notice has been published which in turn is a written declaration by the Minister that the land to be acquired is for a public purpose. In the circumstances, the fact that the subject matter of this appeal, the lands claimed by the appellant are required for a public purpose is conclusively evidenced as being required or needed for a public purpose. However, it is common ground that the section 2 notice did not specify or set out the nature of the public purpose for which the land was being acquired. Though counsel for the respondent contends that the provisions of the Land Acquisition Act does not require to specify the public purpose in the relevant notices and that Section 5 notice makes it conclusive evidence that the land is needed for a public purpose, I am unable to agree with the aforesaid contention in view of the decision in *Manel Fernando and Another* v *D.M. Jayaratne, Minister of Agriculture and Lands and others*(5) wherein the Supreme Court came to the conclusion that a Section 2 notice must state the public purpose – although exceptions may perhaps be implied in regard to purpose involving national security and the like. At 125 *per* Fernando J.

> "The first question is whether the public purpose should be disclosed in the Section 2 and Section 4 notices.
>
> The Minister cannot order the issue of a section 2 notice unless he has a public purpose in mind. Is there any valid reason why he should withhold this from the owners who may be affected?
>
> Section 2(2) required the notice to state that one or more acts may be done "in order to investigate the suitability of that land for that public purpose"; obviously "that" public purpose cannot be an undisclosed one. This implies that the purpose must be disclosed. From a practical point of view, if an officer acting under section 2(3)(f) does not know the public purpose, he cannot fulfill his duty of ascertaining whether any particular land is suitable for that purpose.
>
> Likewise, the object of section 4(3) is to enable the owner to submit his objections: which would legitimately include an objection that his land is not suitable for the public purpose which the state has in mind, or that there are other and more

suitable lands. That object would be defeated, and there would be no meaningful inquiry into objections, unless the public purpose is disclosed. If the purpose has to be disclosed at that stage, there is no valid reason why it should not be revealed at the section 2 stage.

In my view, the scheme of the Act requires a disclosure of the public purpose, and its objects cannot be fully achieved without such disclosure. A section 2 notice must state the public purpose – although exceptions may perhaps be implied in regard to purposes involving national security and the like."

In the circumstances, it appears that the failure to specify the public purpose in Section 02 notice in respect of the appellant's lands is fatal to the acquisition proceedings. I am also unable to agree with the contention that the Minister's decision to acquire a land can never be challenged in a Court of Law. A Minister does not have the unfettered right to acquire land without specifying a public purpose. Nor does a Minister have a right to acquire land and utilize it for purposes other than a public purpose. The appellant's land was taken possession of allegedly on the ground of urgent public purpose as far back as 1990. The whole of it was unutilized until the year 2000 and in 2000 the land was vested in the 5th respondent the Urban Development Authority. The 5th respondent in the year 2001 wrongly granted part of the land to the 4th respondent a private entity for a private purpose and a part of the appellant's land remains unutilized to date. This *per se* indicates that there was no public purpose urgent or otherwise at the time the Section 2 notice was made and indeed at the time the purported order under the proviso (a) to section 38 was gazetted.

It is contended by counsel for the 4th respondent that after the acquisition, the land was vested by State in terms of Section 44 of the Land Acquisition Act in the Urban Development Authority. In the circumstances the public purpose for which this land was acquired was fulfilled by the State by vesting of the land in the Urban Development Authority under Section 44 of the Land Acquisition Act and therefore the appellant cannot and could not have made an application to the Court of Appeal to divest the land as against the 1st respondent Minister as the State had already vested the land in the Urban Development Authority and the 1st respondent cannot divest

the land or portion of it as it is no longer vested in the State but in the Urban Development Authority. In the circumstances, the reliefs prayed for seeking a writ of *certiorari* to quash the acquisition or an order in the nature of a writ of *mandamus* as against the 1st respondent to divest the land to the appellant cannot be granted. Respondent's counsel further contends that in any event though the Urban Development Authority was added as the 5th respondent still no specific relief or orders are sought against the Urban Development Authority in whom the land is now vested and was vested at the time the application was filed in the Court of Appeal and the State or that 1st respondent cannot be called upon to divest the property as the State has no right to the land anymore. Thus the action of the appellant is baseless and misconceived.

Counsel for the respondent also brings to the attention of Court the 1st paragraph of the letter written by the appellant to the 1st respondent marked 'k' wherein the appellant admits that the land including the lots claimed by him were acquired for the state public purpose of constructing the Getambe-Kandy road and development of amenities adjacent to the Getambe-Kandy road. Counsel for the respondent contends that thus the appellant has admitted that the land was acquired for a public purpose and that the State vested it in the Urban Development Authority under Section 44 of the Land Acquisition Act to carry out the public purpose. Here again, I am unable to agree with the aforesaid submission of the respondent.

It is to be seen that according to the respondents the appellant's land has been acquired and vested in the Urban Development Authority under Section 44(1) of the Land Acquisition Act which is a special procedure that is available to acquire land required for the purpose of any local authority or any other person or body of persons. The relevant section provides as follows:

> *"Where any land which is required for the purpose of any local authority or of any other person or body of persons is, in pursuance of this Act or any other written law, acquired under this Act for such purposes, the acquiring officer of the district in which that land is situated shall, after possession of that land has been taken for and on behalf of the State, by a certificate issued under his hand, vest that land in such local authority or*

such person or body of persons, as the case may be, subject to such conditions or restrictions as may be specified in the certificate".

Thus section 44(1) specifically requires that lands vested in terms of this Section is to be acquired for a purpose of the body in whom it is vested. The appellant's land has been vested in the Urban Development Authority, the 5th respondent. However, there is absolutely no evidence whatsoever not even an averment that it was acquired for the purpose of the 5th respondent. On the contrary, the land taken possession of for an urgent public purpose in the year 1990 has been purportedly vested in the Urban Development Authority only on 28.08.2000. It is patently clear that the land was not acquired under the Land Acquisition Act for the 5th respondent but was vested in the 5th respondent in order to enable the 5th respondent to lease it to the 4th respondent a private entity.

In any event, the land has been purportedly vested in the 5th respondent subject to the following conditions:

a) the land to be used exclusively for development of public utilities adjacent to the Getambe-Kandy road.

b) the land or any part thereof not required for the 5th respondent should be handed back to the State.

Here again it is common ground that a part of the appellant's land has been handed over to the 4th respondent and that the 4th respondent is a private company and no hospital has been constructed on this land even by the year 2007. Thus it cannot be contended that a private profit making venture which has not utilized that land for over 07 years for the alleged purpose for which it was given to them can be construed as development of public utilities. In any event, as stated above the scheme of the Act requires a disclosure of the public purpose and its objects cannot be fully achieved without such disclosure. A Section 2 notice must state the public purpose although exceptions may be implied if the purpose involves national security and the like. The section 2 notice in respect of the appellant's land *ex-facie* reveals that no public purpose has been specified and the failure to specify a public purpose is fatal to the acquisition proceedings and the subsequent vesting of the land in the Urban Development Authority does not cure the defect in the

Section 2 notice. Thus the subsequent vesting of the land in the Urban Development Authority by the State under Section 44 of the Land Acquisition Act is wrongful and bad in law and as such the Urban Development Authority does not become entitled to any rights in respect of the land so vested.

It is also contended by counsel for the respondents that the appellant cannot have and maintain this application and or is entitled to any relief prayed for in the petition inasmuch as the appellant has been guilty of delay and or laches as the appellant has failed to take appropriate action against an acquisition effected in 1990. For even though he was said to be out of the country in 1990, it is admitted that his affairs in the country specially with regard to the subject matter of this action had been looked after by his attorney. Thus the appellant has failed to explain the delays and in any event the appellant's explanation of delay is not acceptable. The appellant contends that his land was taken possession of in 1990 allegedly on the ground of urgency. The whole of it was unutilized until the year 2000. In the year 2000 the land was wrongfully vested in the Urban Development Authority the 5th respondent and in the year 2001 the 5th respondent wrongfully granted a part of the land to a private entity the 4th respondent for a private purpose. Thus he became aware of it only when the 4th respondent put up a notice on the land in the year 2002 and the appellant filed the instant application in the Court of Appeal on 14th March 2002. Thus he contends that there was no delay on his part as he could not have been aware of the *ultra vires* transaction until 2002. I am inclined to accept the explanation given by the appellant as being reasonable, sufficient and acceptable, for the appellant could not have been aware of the purported lease to the 4th respondent by the 5th respondent until the 4th respondent put up the notice marked X. In this respect, the Court of Appeal observed on page 4 of its judgment,

> *"The procedure laid down in the Land Acquisition Act was properly followed and there is no illegality in the acquisition process. The petitioner could only challenge the order of acquisition on the ground that there is no urgency. The petitioner cannot challenge the said order of acquisition on the ground that there is no urgency after lapse of 12 years and after participating in the compensation inquiry".*

Though Counsel cited several decisions wherein it was held that delay vitiates a remedy by way of writ if there is no illegality, I am unable to agree with the aforesaid reasoning for acquisition proceedings commenced with a Section 2 notice which did not set out the nature of the public purpose for which the said notice was published. Thereafter by a notice purportedly in terms of proviso (a) to section 38 the 1st respondent directed the immediate possession of the said lands be taken for and on behalf of the State on the ground of a purported urgency. It is to be seen that none of the notices published in pursuance of acquisition of the land of the appellant specify the nature of the public purpose for which the land is being acquired. Without such disclosure can an owner submit his objection which would legitimately include an objection that his land is not suitable for the public purpose which the State has in mind or that there are other and more suitable lands available in the vicinity. The only intimation the appellant has as to the nature of the public purpose for which the land was acquired was by the caption to the letter addressed to him by the 3rd respondent requesting to hand over vacant possession of his land which reads as follows: "Acquisition of land for development of necessary public utilities in the vicinity of the new Getambe-Kandy road." Accordingly the petitioner handed over his land through his agent. Thus the petitioner's land was taken possession of allegedly on the ground of an urgent public purpose as far back as 1990. A portion of the land so acquired for an alleged urgent public purpose has been handed over to a private company in the year 2001 more than 10 years after the order under proviso (a) to Section 38 of the Land Acquisition Act.

Thus the appellant could not have been aware that the 5th respondent had leased out a portion of the appellant's land to the 4th respondent until the 4th respondent put up the notice on the land in 2002 and the appellant has come to Court on 14.03.2002. In the circumstances, the Court of Appeal has erred in law in refusing to grant relief to the appellant on the basis of delay.

Respondent contends that part of the appellant's land and the lands of several others had been used for the Getambe-Kandy road. However, it is apparent as contended by counsel for the appellant that no part of the appellant's land has been used for the construction of the Getambe-Kandy road nor has any part of the appellant's land

been used for development of any public utility. Counsel for the 5th respondent contends that the appellant's land and surrounding lands were vested with the 5th respondent in terms of Section 44 of the Land Acquisition Act and that it has endeavoured to allocate the said lands for large scale development with the intention of inducing investors from the private sector to participate in the planned development of the city of Kandy. However, it is to be seen as is contended by counsel for the appellant that while some lands acquired for a public purpose were in fact made use of for a pubic purpose of constructing Getambe-Kandy road, such lands are situated on the western bank of the Meda Ela and the lands claimed by the appellant are lands situated in the eastern bank of Meda Ela which were not used for a public purpose and remained unutilized until the said lands were allocated to the 4th respondent to construct a private hospital, the first large scale private hospital in the whole of the Central Province as claimed by the 5th respondent. The respondent also claims that the said Aloka Hospital project is a large scale project that will infuse capital of Rs. 60 million and create employment opportunities for a number of persons, whilst providing modern medical facilities for people in the whole of the Central Province.

The 4th respondent further claimed that the private hospital they were going to construct was unique in that it was a two-tier hospital in that it reserves part of the wards to give free treatment to the public. The non-paying facility for the public includes free OPD service and a ward with 15 beds free of charge for non-paying patients. Undoubtedly, the balance facility would be for private profit making venture which would be the hidden agenda. This certainly is not a purpose for which the provisions of the Land Acquisition Act could be made use of.

Counsel for the appellant points out that the conveyance of the lands to the 5th respondent was made subject to the condition that the land be used only for the purpose of developing the requisite public utilities adjacent to the Getambe-Kandy new road and that if any portion of the land was not required for the 5th respondent it should be handed back to the State. He also submits that the 5th respondent handed over some lands to the Diabetic Association of Sri Lanka which had returned the said lands. In any event, the new

Getambe-Kandy road does not run through any portion of the appellant's land and no portion of the appellant's land has been used to provide public utilities or any other development activity.

The lease of the said land was granted to the 4th respondent in the year 2001 for an initial period of 50 years. The 4th respondent has filled up a portion of the appellant's land and there is no other development. In any event, it is common ground that no hospital of whatsoever nature has been constructed on the appellant's land even by 2007 and one cannot claim that a private profit making venture which has not utilised the land for 7 years for the alleged purpose for which it was given to them can be construed as a development of public utilities. It is interesting to note that the lease of the land was granted to the 4th respondent in the year 2001 for an initial period of 50 years. The extent of the land to be utilized for the said project is approximately 2.5 acres. The 4th respondent has filled up a portion of the appellant's land only and there is no other development. The 4th respondent is getting very valuable land valued at Rs. 30 million when the 4th respondent has according to the indenture of lease only to pay rental at Rs. 600,000.00 a year from 2001 to 2005 and thereafter Rs. 1,200,000 for the next 20 years and Rs. 600,000.00 in 2028. Thus it could be seen the 5th respondent Urban Development Authority as well as the 4th respondent has been unjustly enriched at the expense of the appellant. It is my considered view that before the 5th respondent leased the appellant's lands to the 4th respondent for a purported private hospital and resort project which is a profit making venture of a commercial nature the 5th respondent should have offered the appellant's land to the appellant himself to develop the land for the public purpose, for development of public utilities. In fact the appellant had submitted an affidavit with his counter objections in the Court of Appeal wherein he and several persons who claimed to be owners of the land acquired and leased to the 4th respondent had stated that they can develop the land for a public purpose and that they have the money to do so. Though counsel for the 4th respondent contends that this proposal is unacceptable on the face of it as no mention is made of what the project is or how the financing is to be had, it appears to me that it would have been just and fair if the appellant was given the opportunity to place before the 5th respondent the proposal for development of public utility

before leasing out the appellant's land to a profit making private venture of a commercial nature.

Counsel for the 4th respondent contends that conditions precedent contained in Section 39A(2) before a divesting order can be made are as follows:

a) no compensation had been paid.
b) the land has not been used for a public purpose.
c) no improvements have been made.
d) the person interested in the land has consented to take possession of the land.

Counsel for the respondent submits that it is clear from the facts submitted to Court that elements (b)and (c) are not fulfilled.

i) as the land has been subsequently vested in the Urban Development Authority for the purpose of providing necessary facilities and amenities along side the main road.
ii) a part of the land has been used as a reservation for a stream or waterway.
iii) the remaining portion of the land is being used for a private hospital which is a public need in Kandy and based on a policy of the UDA the said hospital will have a free OPD service and a ward of 15 beds free which will benefit the public.
iv) appellant himself has admitted that improvements have been made.
v) the appellant's land is only a part of the land acquired and therefore cannot claim that his land was not used for a public purpose since the question is whether the entire lands acquired was used for a public purpose.

I am unable to agree with the aforesaid contention of counsel for the respondent.

As stated above, the appellant's land was taken possession of in the year 1990 on the ground of an alleged urgent public purpose the whole of it was unutilized until the year 2000 and then in the year 2000 the land was vested on the 5th respondent though there is no evidence produced that it was acquired for the purpose of the 5th respondent. The 5th respondent in 2001 wrongly granted a part of the land to a private entity the 4th respondent for a profit making venture of a commercial nature. A part of the appellant's land

remains unutilised even as at today. In the circumstances, no part of the appellant's land has been used for a public purpose. No improvements have taken place on the land and the filling up of the land by the 4th respondent for a purpose other than a public purpose cannot be described as improvements for the purpose of Section 39(A)(2)(c). However, the Court of Appeal too has come to the conclusion that conditions set out in Section 49(A)(2)(b) and (c) have not been fulfilled.

In the case of *De Silva* v *Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*(6) the question of when can the Minister divest an acquired land was discussed at length with reference to Section 39(1)(A) and (2) of the Land Acquisition Act as amended by Act No. 8 of 1979. In that case Court came to the conclusion that:

(1) The purpose of the Land Acquisition Act was to enable the State to take private land, in the exercise of its right of eminent domain, to be used for a public purpose, for the common good; not to enable the State or State functionaries to take over private land for personal benefit or private revenge. Where the element of public benefit faded away at some stage of the acquisition proceedings, the policy of the Act was that the proceedings should terminate and the title of the former owner restored; section 39 and section 50.

(2)(a) Where the public purpose was so urgent as to require immediate possession, necessitating a section 38 proviso (a) order, the land could not be restored if the public purpose was found to have evaporated after possession was taken. An improper acquisition could not be put right by executive action. So it was the amending Act No. 8 of 1979 was enacted to enable relief to be granted even where possession was taken. The Act contemplates a continuing state of things and does not refer only to the time of initial acquisition. It is sufficient if the lack of justification appears at any subsequent point of time.

(b) The Minister shall make a divesting order after satisfying himself of four conditions:

(i) no compensation has been paid:

(ii) the land has not been used for a public purpose after

possession was taken under Section 40(a) of the Land Acquisition Act.

(iii) no improvements have been effected after the Order of possession under section 40(a);

(iv) the person or persons interested in the land have consented in writing to take possession of the land after the divesting order is published in the Gazette.

(c) The purpose and the policy of the amendment (Act No. 8 of 1979) is to enable the justification for the original acquisition, as well as for the continued retention of acquired lands, to be reviewed. If the four conditions are satisfied the Minister is empowered to divest. Even in such a case it would be legitimate for the Minister to decline to divest if there is good reason – for instance that there is now a new public purpose for which the land is required.

(3) The executive discretion vested in the Minister is not unfettered or absolute. He must in the exercise of his discretion do not what he likes but what he ought.

(4) The true intent and meaning of the amending Act was to empower the Minister to restore to the original owner land for the acquisition (or retention) of which there was originally (or subsequently) no adequate justification, upon the fulfillment of the stipulated conditions. It is a power conferred solely to be used for the public good, and not for his personal benefit; it is held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.

At 292 *per* Fernando, J.

"So it was the amending Act was enacted in 1979 to enable relief to be granted even where possession had taken place. The long title of the Act refers to land acquired "without adequate justification". The learned Deputy Solicitor-General contended that this referred only to the point of time at which the land was initially acquired. I cannot agree. The Act contemplates a continuing state of things; it is sufficient if the lack of justification appears at any subsequent point of time; this is clear from paragraph (b) of section 39A(2): if the land has not

been used for a public purpose after possession has been taken, there is then an insufficiency of justification; and the greater the lapse of time, the less the justification for the acquisition".

Considering the material placed before this Court, I would hold that the Court of Appeal erred in law in refusing to issue a writ of mandamus on the basis that conditions set out in Section 39A(2)(b) and (c) have not been fulfilled.

In passing I might also refer to a false and material misrepresentation of facts by the 4th respondent contained in paragraph 3 of page 10 of the written submissions tendered by the 4th respondent dated 28.12.2007 which reads as follows:

"It is respectfully submitted that the 4th respondent company is now owned by the Asiri Hospitals which has done yeomen service to the people of this country".

The appellant by motion dated 12.01.2008 has tendered a letter issued by the Asiri Hospitals PLC under the hand of Dr. Manjula Karunaratne the Director/Chief Operating Officer of Asiri Hospitals PLC stating that neither Asiri Hospitals PLC nor any of the Asiri Group of Companies have purchased nor have any interest in Aloka Hospitals Resorts Kandy (Pvt) Ltd.

It is apparent the aforesaid false and material misrepresentation of facts made by the 4th respondent is to overcome the allegations leveled against the 4th respondent by the appellant *inter alia* that it is a fraudulent company, that it has no assets to invest such a large sum of money, that it has no money to pay its contractors, that contractors have initiated two cases against the 4th respondent to recover a sum of 16 million etc. Though the 4th respondent vehemently denied these allegations it appears that in view of the aforesaid false statement of fact the credibility and integrity of the 4th respondent company is questionable and so is the motive and purpose of the 4th respondent company in obtaining the lease of the land.

For the foregoing reasons, I would answer the question of law Nos. c(i) to (iv), d,e (i) and (ii) and g dealing with the issue of a mandate in the nature of a writ of *mandamus* in the affirmative in

favour of the appellant. Accordingly I would set aside the judgment of the Court of Appeal insofar as it dismissed the appellant's prayer for *mandamus* and issue a mandate in the nature of a writ of *mandamus* to the 1st respondent directing him to make a divesting order under Section 39A(1) of the Land Acquisition Act in respect of the land which belongs to the appellant and was vested in the State and restore the said land to the possession of the appellant. The appellant would be entitled to costs of these proceedings.

S.N. SILVA, C.J. – I agree.
AMARATUNGA, J. – I agree.

Appeal allowed with costs.

WESTERN PROVINCE TECHNOLOGICAL OFFICERS (CIVIL) UNION
v
NIMAL KARUNARATNE AND OTHERS

SUPREME COURT.
SHIRANEE TILAKAWARDANA, J.
SALEEM MARSOOF, J. AND
ANDREW SOMAWANSA, J.
S.C. APPEAL NO. 07/2005
S.C. (SPL.) L.A. NO. 175/2004
C.A. (WRIT) 1144/2000
SEPTEMBER 27, 2007

Writ of Certiorari – Provincial Councils Act of 1987– Section 32(1) – The decision to classify technical officers of the Sri Lanka Technological Services (SLTS) according to their specialization into the 'buildings' and 'irrigation' categories – Supreme Court Rules – Rule 30 and or Rule 34 – Failure to file written submissions, sanction – Deprivation of the right to be heard – Whether appeal ought to be dismissed? – Constitution – Article 154, Article 154(C), Article 154(F)1, 154(G), Article 154(H) – Thirteenth Amendment – Reserved – Provincial – Concurrent lists – 1972 Constitution – Section 27(1).

The Intervenient-respondent-petitioner, which is the Western Province Technological Officers (Civil) Union (Appellant) sought special leave to appeal from the decision of the Court of Appeal, quashing by way of Certiorari the decision to classify technical officers of the Sri Lanka Technological Services (SLTS) according to their specialization into the 'buildings' and 'irrigation'

categories. The original writ application was filed in the Court of Appeal by the 1st to 33rd petitioners-respondents. The Court of Appeal allowed the appellant union to intervene and oppose the application of the petitioners-respondents.

The Supreme Court granted Special Leave to Appeal against the judgment of the Court of Appeal.

Held:

(1) Where there is a failure to file written submissions in terms of Rule 30, the sanction is simply a deprivation of the right to be heard. However, sanction becomes ineffective in a case where the parties in default have in fact been heard without any objection being raised at the hearing.

per Saleem Marsoof, J.

"The conduct of the parties in not taking up any objections at the hearing to each other's defaults and the absence of prejudice to the parties as a result of these possible defaults, I am of the opinion that the discretion of Court ought to be exercised in favour of the appellant."

(2) Failure to include a necessary party is a fatal irregularity which warrants the rejection of the writ petition *in limine*.

(3) *The opening words of Section 32(1) of the Provincial Councils Act of 1987, viz "Subject to provisions of any other law...."* highlight the need to understand the said provision in the context of other provisions of law which include the provisions of the Constitution with the view to devolving legislative and executive power to the Provinces without parting with its supremacy or its powers to the Provincial Councils.

(4) It is clear from Article 154 F(1) of the Constitution that while the Provincial Board of Ministers are Constitutionally charged with the responsibility of aiding and advising the Governor in the exercise of his functions, the Governor is bound in law in the exercise of his functions, as a general rule to "act in accordance with such advice, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion."

(5) The position of the Governor is similar to that of the President under the 1972 Constitution of Sri Lanka, who by section 27(1) thereof was bound to act on the advice of the Prime MInister. The Governor is required by law to act on the advice of the Board of Ministers. Accordingly, the failure to cite the members of the Board of Ministers as respondents to the writ petition was a fatal irregularity.

Held further:

(6) No immunity from judicial review is conferred by the Constitution on the Board of Ministers or the Governor, except to the limited extent that Article 154 (F(2) of the Constitution, which requires the Governor himself to decide whether in a given situation he will have to act on advice or in his discretion, and provides that "The decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called

in question in any Court on the ground that he ought or ought not have acted on his discretion."

(7) As far as decisions and actions of the Provincial Ministers are concerned, it is trite law that the extent of their amenability to *certiorari* and other writs is similar to that of Ministers appointed under Chapter VIII of the Constitution, and neither they nor their decisions or actions enjoy any immunity from judicial review. Hence, Courts are not inhibited from exercising supervisory jurisdiction over the decisions or actions of Ministers, whether appointed under Chapter VIII or Chapter XVIIA of the Constitution, and granting mandates in the nature of the Writ of *Certiorari* whenever appropriate.

(8) The term jurisdiction has become synonymous with 'power' and the ambit of *Certiorari* has expanded to embrace decisions and actions of various bodies or persons exercising powers or functions of a *public nature*; the writ does not lie if circumstances necessary for the grant of certiorari do not exist.

Held further:

(9) 1st to 33rd respondents and the members of the petitioners union were absorbed into the SLTS of the Western Province from different Departments and they professed expertise and specialization in different fields, which justified the categorization of officers in the SLTS into 'buildings' and 'irrigation'.

(10) The division of the SLTS into 'buildings' and 'irrigation' is neither arbitrary nor unreasonable and is also consistent with the SLTS minutes as well as SLES where posts are grouped according to expertise.

Cases referred to:

1) *A.C. Muthappan Chettiar* v *M.R. Karunanayake and Another* 2005 BLR 4.
2) *Mohamed Khairas* v *Chairman, Pradeshiya Sabha, Karandeniya and three Others* 2006 BLR 36.
3) *Samarawickrema v Attorney-General* 1983 2 Sri LR 162.
4) *Hatton National Bank Ltd.* v *Casimir Kiran Atapattu and Another* 2007 BLR 78.
5) *Kiriwanthe and Another* v *Navaratne* 1990 2 Sri LR 393.
6) *Ramasamy* v *Ceylon State Mortgage Bank* 78 NLR 510.
7) *Karunaratne* v *Commissioner of Co-operative Development* 1978-79 2 Sri LR 510.
8) *Gnanasambanthan* v *Rear Admiral Perera* 1983 2 Sri LR 169.
9) *Abeyadeera* v *Dr. Stanley Wijesundera* 1983 2 Sri LR 267.
10) *Farook* v *Siriwardena, Election Officer* 1997 1 Sri LR 145.
10a) In *Re Thirteenth Amendment* 1987 2 Sri LR 312 at 323
11) *Parameswary Jayathevan* v *Attorney-General and Others* 1992 2 Sri LR 356.
12) *Premachandra* v *Major Montague Jayawickrema and Another* (Provincial Governor's case) 1994 2 Sri LR 90.

13) *Maithripala Senanayake, Governor of the North-Central Province and Another* v *Gamage Don Mahindasoma and Others* 1998 2 Sri LR 333.
14) *Mudiyanse* v *Christie Silva, Government Agent, Hambantota* 1985 2 Sri LR 52.
15) *T.N. Fernando, Assistant Commissioner of Excise, Kalutara* v *Nelum Gamage, Bribery Commissioner and Another* 1994 3 Sri LR at 194.
16) *G.P.A. Silva and others* v *Sadique and Others* 1978-79-80 1 Sri LR 166.
17) *Waas Gunawardena* v *Perera and Another* 1997 2 Sri LR 222.

APPEAL from the judgment of the Court of Appeal.

Kuvera de Zoysa with *Senaka de Saram* for the intervenient-petitioner
Mohan Peiris, P.C. with *Kamran Aziz* for the 1st to 33rd petitioners-respondents.
Rajiv Gunatilake, S.C. for the 1 to 6th respondents-respondents.

Cur.adv.vult.

September 11, 2008

SALEEM MARSOOF, J.

The Intervenient-Respondent-Petitioner, which is the Western Province Technological Officers (Civil) Union (hereinafter referred to as 'the Appellant'), sought special leave to appeal from the decision of the Court of Appeal dated 1st June 2004, quashing by way of *certiorari* the decision to classify technical officers of the Sri Lanka Technological Service (SLTS) according to their specialization into the 'buildings' and 'irrigation' categories. The original writ application was filed in the Court of Appeal by the 1st to 33rd petitioners-respondents, who were employees of the Western Province Provincial Council holding positions in Class II B, Class II A,Class I and Special Class of the SLTS, who had been absorbed into the service of the said Council around 1990 from the Agrarian Services Department. The said petitioners had cited the Chief Secretary of the Provincial Public Service Commission, the Governor and the Deputy Chief Secretary (Engineering) all of the Western Province, along with the Secretary to the Ministry of Public Administration, Home Affairs and Plantation Industries, and the Attorney-General as respectively the 1st to 6th respondents to their application. The appellant union had been permitted by the Court of Appeal to intervene and oppose the application of the petitioners-respondents.

On 7th February 2005, this Court granted special leave to appeal against the Judgment of the Court of Appeal specially on the following questions:

"(a) Did the Court of Appeal err in failing to consider that the members of the Board of Ministers of the Western Province, have not been cited as respondents to the application of the petitioners-respondents though they are necessary parties?

(b) Did the Court of Appeal err in failing to consider that the said decision of the Board of Ministers of the Western Province, which has been subsequently approved by the Governor of the Western Province, is not subject to judicial review?

(c) Did the Court of Appeal fail to consider that there are no grounds existing to exercise judicial review against the said decision?

(d) Did the Court of Appeal fail to consider that the 1st to 33rd respondents and the members of the Petitioner Union were absorbed to the SLTS of the Western Province from different Departments and they professed expertise and specialization in different fields?

(e) Did the Court of Appeal fail to consider that in terms of Clause 4(i) of the Engineering Service Circular No. 31, which was amended by Engineering Service Circular No. 31 (1), the SLTS officers in the Western Provincial Council have to be grouped according to their specialization on the same grouping as the Engineers in the SLES minutes?"

Failure to file Written Submission

Before considering the questions on which special leave has been granted, it is necessary to deal with a preliminary objection taken by learned President's Counsel for the 1st to 33rd petitioners-respondents in his written submissions dated 24th October 2007. It is the contention of the learned President's Counsel, that the Appellant has failed to tender its Written Submissions within six weeks of the granting of special leave to appeal by this Court in compliance with the mandatory provisions of Rules 30(1) and 30(6) of the Supreme Court Rules, and that the appeal should therefore be dismissed *in limine* for failure to diligently prosecute the same as contemplated by Rule 34 of the said rules.

Learned President's Counsel for the 1st to 33rd petitioners-respondents relies on the judgment of this Court in *A.C. Muthappan Chettiar* v *M.R. Karunanayake and Another*[1]. In that case, the appeal

was dismissed for non-compliance with Rule 34, and in an exhaustive judgment Shirani A. Bandaranayake, J, (with Raja Fernando, J. and N.G. Amaratunga, J. concurring) refers to the previous judgments of this court in which appeals have similarly been dismissed for failure to diligently prosecute them. The decision in *Muthappan Chettiar* has subsequently been followed in *Mohamed Khairas* v *Chairman, Pradeshiya Sabha, Karandeniya and Three Others*(2). In all these cases, the preliminary objection had been taken up at the hearing and the Court had heard submissions on the specific issue of non-compliance with Rule 34 before deciding that it was appropriate in the circumstances of those cases to dismiss the appeals in *limine*, obviating the need to go into the merits.

What happened in the instant case is quite different. Special leave to appeal was granted in this case on 7th February 2005 and the case was listed for hearing on 13th June 2005. On 28th February 2005, the Attorney-at-Law for the Appellant union filed a motion with which he tendered an additional affidavit adverting to certain facts, and it appears from the docket that with a subsequent motion dated 3rd March 2005, *he filed the written submissions of the appellant union well within the time of 6 weeks specified in Rule 30(6).* However, although a copy of the written submissions is available in the docket, my earnest endeavours of tracing the original motion to verify whether the written submissions were filed with notice to the other parties, have not proven fruitful. There is nothing in the docket to show that the Appellant union complied with the latter part of Rule 30(6) which required him (or it, as in this case) at the time of lodging the written submissions in the Registry to *"forthwith give notice thereof to each respondent by serving on him a copy of such submissions."* In fact, the chronology of events in this case, suggests that there has been a failure to give notice of the filing of the written submissions by the appellant. The docket shows that as the learned President's Counsel who then appeared for the appellant was in a personal difficulty, the appeal was not taken up for hearing on 13th June 2005, and was thereafter re-fixed for hearing on several dates, namely, 3rd October 2005, 7th February 2006, 12th June 2006, 2nd October 2006, 9th February 2007 and 8th June 2007, on which dates the hearing was postponed for one reason or another. It appears from the docket that when the case came up for hearing on 8th June 2007, it was moved out on behalf of the learned Counsel for the appellant, and the Court

has specifically recorded that the learned Counsel for the 1st to 33rd petitioners-respondents submitted that the appellant has not filed written submissions "and therefore this matter cannot be argued today". Unfortunately, on that occasion, the attention of Court had not been drawn to the fact that the written submissions of the Appellant had in fact been filed on 3rd March 2005. The question of failure to give notice of filing of written submissions could have been resolved on that date if it had been raised by learned Counsel for the 1st to 33rd petitioners-respondents at that stage.

The case was ultimately taken up for argument on 27th September 2007, and submissions were made by Counsel on the merits without any preliminary objection being taken up on the basis that there has been a failure to comply with Rule 30 and / or Rule 34. On that day, after hearing arguments of Counsel on the merits of the appeal, the parties were permitted to file further written submissions within one month from that date. This, the appellant and the 1st to 33rd petitioners-respondents, did in time. The preliminary objection to the maintainability of the appeal was in fact raised in the written submissions of the 1st to 33rd petitioners-respondents dated 24th October 2007. Not surprisingly, the written submissions of the appellant dated 27th October 2007 are confined to the merits of the case and do not deal with the issue of the alleged non-compliance of the appellant with the Supreme Court Rules. It is likely that Counsel for the appellant was not aware of the preliminary objection taken up in the written submissions of the 1st to 33rd petitioners-respondents and had no opportunity of responding to the same in the written submissions filed by him.

Where there is a failure to file written submissions in terms of Rule 30, the sanction is simply a deprivation of the right to be heard. It is expressly provided in Rule 30(1) that-

> "No party to an appeal *shall be entitled to be heard*, unless he has previously lodged five copies of his written submissions (hereinafter referred to as "submissions", complying with the provisions of this rule." (Emphasis added).

This sanction becomes ineffective in a case such as the present where the parties in default have in fact been heard without any objection being raised at the hearing. Of course, the Court has a

discretionary power under Rule 34 to decide whether the appeal ought to be dismissed for failure to prosecute the appeal with due diligence, and the failure to file written submissions in time or to give proper notice thereof may become relevant for this purpose. I have been able to trace only one case, viz, the decision of this Court in *Samarawickrema* v *Attorney-General*[3] in which an appeal was dismissed for the failure on the part of the appellant to give notice of the filing of written submissions to the respondent. This was a decision based on the corresponding provisions of Rule 35(e) of the previous Supreme Court Rules of 1978, and it appears from the report that while the appellant had no means of proving that a copy of the written submissions alleged to have been filed on his behalf had been served on the Attorney-General, there was also no record of the receipt at the office of the Attorney-General of the written submissions which Counsel for the appellant stated had been handed over. In a very brief judgment, the Court held that compliance with this provision was "imperative," and in all the circumstances of that case (which were not explained in the judgment) considered it appropriate to dismiss the appeal. On the other side of the line is the recent decision of this Court in *Hatton National Bank Ltd.* v *Casimir Kiran Atapattu and Another*[4], in which the appellant had filed written submissions in time but had failed to give notice thereof to the respondent. The court exercised its discretion in favour of the party in default, and granted further time to serve on the other party a copy of the written submissions. In this context it is important to bear in mind the words of M.D.H. Fernando, J., who in *Kiriwanthe and Another* v *Navaratne*,[5] at 404 observed that-

> "The weight of authority ... favours the view that while all these Rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) *is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation therefore, in the context of the object of the particular rule."* (Emphasis added).

In the instant case, the Appellant union in fact has filed the written submissions in time but it is uncertain whether notice thereof was given

to the other parties. It appears from the minutes of proceedings of 8th June 2007 that the learned Counsel for the 1st to 33rd petitioners-respondents did to have the written submissions of the appellant probably because the same had not been served on him at the time of filing. However, the fact that no preliminary objection was taken at the hearing of the appeal on 27th September 2007 to the appellant being heard by Court, clearly shows that the other parties had condoned the omission. This may very well be because the learned Counsel for the 1st to 33rd petitioner-respondents wisely chose not to throw stones from a glass house, as the 1st to 33rd petitioners-respondents were themselves at default, due to the unexplained delay in filing their written submissions. The written submissions of those petitioners-respondents were filed only on 4th August 2006, *very much outside the time limit of twelve weeks set out in Rule 30(7),* which is reproduced below:

> "The respondent shall within six weeks of the receipt of notice of the lodging of the appellant's submissions, lodge his submissions at the Registry, and shall forthwith give notice thereof to the appellant and to every other respondent, by serving on each of them a copy of such submissions. *Where the appellant has failed to lodge his submissions as required by sub-rule (6), the respondent shall lodge his submissions within twelve weeks of the grant of special leave to appeal, or leave to appeal, as the case may be giving notice in the manner."* (Emphasis added).

In all the circumstances of this case, considering that there is some doubt as to whether the appellant in fact contravened the rules, and the greater certainty that the 1st to 33rd petitioners-respondents themselves had defaulted in filing their written submissions on time, the conduct of the parties in not taking up any objections at the hearing to each others' possible defaults and the absence of prejudice to the parties as a result of these possible defaults, I am of the opinion that the discretion of Court ought to be exercised in favour of the appellant. The preliminary objection is therefore overruled.

Failure to cite the Board of Ministers

The learned Counsel for the appellant union strongly contends that the Court of Appeal has erred in failing to consider that the members of the Board of Ministers of the Western Provincial Council, who allegedly took the impugned decision, have not been cited as

respondents to the application of the petitioners-respondents though they are necessary parties. He submits that the failure to add the said MInisters as parties to the writ petition in the Court of Appeal even after the filing of the Objections of the State which included an affidavit from the 4th respondent-respondent dated 25th September 2001 disclosing the role played by the Board of Ministers, is fatal to the writ application as the proper parties were not before court as required by law. He has invited the attention of Court to the decisions in *Ramasamy* v *Ceylon State Mortgage Bank*(6), *Karunaratne* v *Commissioner of Co-operative Development*(7), *Gnanasambanthan* v *Rear Admiral Perera*(8), *Abayadeera* v *Dr. Stanley Wijesundara*(9) and *Farook* v *Siriwardena Election Officer*(10), which clearly set out the legal proposition that the failure to implead a necessary party is a fatal irregularity which warrants the rejection of the writ petition in *limine*.

Learned President's Counsel for the 1st to 33rd petitioners-respondents does not contest the correctness of the said proposition of law, but submits that the members of the Board of MInisters were not necessary parties to the writ application. It therefore becomes necessary to carefully examine the writ petition filed by the 1st to 33rd petitioners-respondents in the Court of Appeal and the other pleadings in the case to ascertain whether the Board of MInisters of the Western Province had any role to play in the process by which the impugned decision was made.

Although in the petition filed by the 1st to 33rd petitioners-respondents in the Court of Appeal it has been stated that the decision to classify officers in the SLTS into the categories of 'buildings' and 'irrigation' was made by the 1st to 4th respondents-respondents (paragraph 16), and it was sought to be implemented by the 1st respondent-respondent, who is the Chief Secretary for the Western Province (paragraph 17), no document embodying the decision was produced with the petition by which a writ of *certiorari* was sought to quash the said decision. It is, however, clear from paragraph 12(c) of the affidavit dated 25th September 2001 filed by the 4th respondent-respondent and the Memorandum marked 4R5(a) and the Decision of the Board of Ministers marked 4R5(b) that the impugned decision to categorize the SLTS as aforesaid was in fact placed before the Board of Ministers of the Western Province by the Chief Minister of the Province, who was also *inter alia* the Minister for Provincial

Administration, and was approved by the said Board on 17th August 2000. It is evidenced by the document marked 4R5(c) that the decision was thereafter approved by the Governor of the Western Province, on whom the power of making appointments to the Provincial Public Service is vested by section 32(1) of the Provincial Councils Act No. 42 of 1987. This Section provides that-

> *"Subject to the provisions of any other law* the appointment, transfer, dismissal and disciplinary control of officers of the Provincial Public Service of each Province is thereby vested in the Governor of that Province." (Emphasis added).

It is relevant to note that in terms of section 32(3) of the Provincial Councils Act, the Governor has the power and responsibility of providing for, and determining, "all matters relating to officers of the Provincial Public Service, including the formulation of schemes of recruitment and codes of conduct for such officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of such officers." It is further provided that in formulating such schemes of recruitment and codes of conduct "the Governor shall, as far as practicable, follow the schemes of recruitment prescribed for corresponding offices in the public service and the codes of conduct prescribed for officers holding corresponding offices in the public service."

In this backdrop, learned President's Counsel contends that there was neither a necessity nor a requirement to cite the members of the Board of Ministers as respondents to the petition before the Court of Appeal, as the final decision was made by the Governor of the Province who is a party to these proceedings. He submits that the Board of Ministers had merely adopted the Central Government Circular No. 31 dated 5th August 1997 (P12), which was subsequently amended by Engineering Service Circular No. 31(1) dated 5th September 2000 (X3), in order to absorb individuals in the SLTS of the Western Province into the Sri Lanka Engineering Service (SLES). He submits that the Board of Ministers of the Western Provincial Council, had no power to decide on the adoption of Central Government Circulars, and further submits that the power to approve and implement such Circulars in terms of Section 32 is vested exclusively in the Governor concerned. He also submits that the Board of Ministers

of the Western Provincial Council was neither empowered nor obliged to approve the impugned decision, although in fact it had sought to do so. He emphasized that as the power to make all decisions relating to the provincial public service is vested exclusively in the Governor of the Province, and since he was cited as the 3rd respondent-respondent to these proceedings, there was no necessity to cite the members of the Board of Ministers of the Western Province as respondents to the writ petition.

I am unable to agree with the submissions of the learned President's Counsel for the 1st to 33rd petitioners-respondents as they overlook the important opening words of Section 32(1) of the Provincial Councils Act of 1987, *viz., "Subject to the provisions of any other law .....*" These words highlight the need to understand the said provision in the context of other provisions of law, which undoubtedly include the provisions of the Constitution of the Democratic Socialist Republic of Sri Lanka. In 1987, Parliament enacted the Provincial Councils Act along with the Thirteenth Amendment to the Constitution with the view to devolving legislative and executive power to the Provinces without parting with "its supremacy or its powers to the Provincial Councils" *(see, In Re the Thirteenth Amendment to the Constitution*[10a] at 323). By this Amendment, while reserving to itself as stated in Article 154G(7) of the Constitution, exclusive *legislative* power with respect to all matters set out in List II (Reserved List) to the Ninth Schedule, which included the 'National Public Services' (item (n) of List II), it vested in Provincial Councils by Article 154G(1) the power to make statutes with respect to matters set out in List I (Provincial Councils List) without any consultation with Parliament, and by Article 154G(5)(b) the power to make statutes with respect to matters set out in List III (Concurrent List) "after such consultation with Parliament as it may consider appropriate in the circumstances of each case." Express reference is made in List I (Provincial Councils List) to the Provincial Public Service in Appendix III item 3, and the Provincial Councils Act was enacted by Parliament, as contemplated by Article 154Q(d) of the Constitution and as explicitly stated in the preamble to the Act, "to provide for the procedure to be followed in Provincial Councils; for matters relating to the Provincial Public service; and for matters connected therewith or incidental thereto." The devolution of *executive* power to the Provinces is dealt with in Article 154C of the Constitution, which provides that-

> "Executive power extending to the matters with respect to which a Provincial Council has power to make statutes shall be exercised *by the Governor* of the Province for which that Provincial Council is established, *either directly or through Ministers of the Board of Ministers, or through officers subordinate to him,* in accordance with Article 154F." (Emphasis added).

Referring to the above quoted provision, Kulatunga, J., observed in *Parameswary Jayathevan* v *Attorney-General and Others*[11] at 360-361 that -

> "At the level of a Provincial Council, Article 154C provides that executive power extending to matters with respect to which a Provincial Council has the power to make statutes shall be exercised by the Governor of the Province directly or through the Board of Ministers, or through officers subordinate to him, in accordance with Article 154F. Article 154F establishes a Board of Ministers and provides, *inter alia*, that the *Governor shall, in the exercise of his functions, act in accordance with the advice of the Board of Ministers,* except in so far as he is by or under the Constitution required to exercise his functions in his discretion." (Emphasis added).

It is therefore clear from Article 154F(1) of the Constitution that while the Provincial Board of Ministers is constitutionally charged with the responsibility of aiding and advising the Governor in the exercise of his functions, the Governor is bound in law in the exercise of his functions, as a general rule to "act in accordance with such advice, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion." The position of the Governor is similar to that of the President under the 1972 Constitution of Sri Lanka, who by Section 27(1) thereof was bound to act on the advice of the Prime MInister, which is reminiscent of the position of the Crown in the modern Westminster system.

It is important to bear in mind that Article 154F(1) recognizes that there may be exceptional situations in which the Governor is constitutionally required to act in his discretion. However, the decisions of the Supreme Court have been careful not to interpret the term "except" as used in that provision too widely. Thus in *Premachandra* v

Major Montague Jayawickrema and Another[12] *(Provincial Governors' Case)*, one of the questions referred to the Supreme Court for interpretation was, whether the exercise of the power vested in the Governor of a Province under Article 154F (4) of the Constitution, to appoint as Chief Minister, the member of the Provincial Council who "in his opinion, is best able to command the support of a majority of the members of that Council," is solely a matter for his subjective assessment and judgment. G.P.S. de Silva, C.J. (with Bandaranayake, J., and Fernando, J., concurring) answered the question in the negative. His Lordship sought to justify his decision by reference to two fundamental principles of our Constitution, namely, the Rule of Law and the concept that "Statutory power conferred for public purposes is conferred as it were upon trust, ... that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended." *(at 102-103)*. His Lordship stressed that there are no absolute or unfettered discretions in public law and that discretions are conferred on public functionaries "in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted." (at 105) Considering the purpose for which by Article 154F(4) the Constitution gave the Governor a discretion, His Lordship observed at 105 that -

> "By the exercise of the franchise the people of each Province elect their representatives, for the purpose of administering their affairs. The Governor is given a discretion in order to enable him to select as Chief Minister the representative best able to command the confidence of the Council, and thereby to give effect to the wishes of the people of the Province. That discretion is not given for any other purpose, personal or political."

The decision of this Court in *Maithripala Senanayake, Governor of the North-Central Province and Another* v *Gamage Don Mahindasoma and Others*[13] involved the power of the Provincial Governor to dissolve the Provincial Council in terms of Article 154B of the Constitution which was required by Article 154B (8)(d) to be exercised "in accordance with the advice of the Chief Minister, so long as the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the Provincial Council." The

Supreme Court considered the duty to act in accordance with the advice of the Chief Minister mandatory, and therefore the exercise of power by the Governor to dissolve the Provincial Council as not discretionary.

It is clear from the affidavit of the 4th respondent-respondent dated 25th September 2001 and the documents marked 4R5(a), 4R5(b) and 4R5(c) that the Governor of the Western Province, who is the 3rd respondent-respondent to this appeal had clearly acted on the advice of the Board of Ministers, as he is required by law so to do. I am therefore of the opinion that the failure to cite the members of the Board of Ministers as respondents to the writ petition was a fatal irregularity. A decision in point is that of *Mudiyanse* v *Christie Silva, Government Agent, Hambantota*(14), cited by learned President's Counsel for the 1st to 33rd petitioners-respondents himself, which arose from an application for *certiorari* to quash a decision taken by the Government Agent to refuse a license sought under Section 28A (1) of the Excise Ordinance as amended by Excise (Amendment) Law No. 24 of 1977. The Section empowered the Minister of Finance to direct the Government Agent to refuse or cancel a license, and the latter was obliged to give effect to such direction. The Minister was not cited as respondent to the writ petition, and the Court held that insofar as the refusal to the license was not one made by the Government Agent on his own volition in the exercise or purported exercise of the powers vested in him but one made in pursuance of the direction given by the Minister of Finance, the application for *certiorari* should have been made against the Minister and not against the respondent. In my opinion, the Court of Appeal has in the instant case, erred in quashing the decision taken by the relevant Governor on the advice of the Board of Ministers, in proceedings in which the members of the Board have not been cited as respondents and without giving them a hearing, despite the fact that the Governor was obliged in law to follow such advice. I therefore hold that the writ application should have been dismissed by the Court of Appeal in *limine*, and in the circumstances, the decision of the Court of Appeal dated 1st June 2004 which sought to quash the impugned decision without hearing the Board of Ministers who made the decision, should be set aside.

Judicial Review of Decisions of Provincial Boards of Ministers

In view of the finding that the Court of Appeal erred in quashing the impugned decision in proceedings in which the members of the Board of Ministers were not parties and without hearing them, it is strictly not necessary to go into the other questions on which special leave to appeal had been granted by this Court. However, as Counsel had in their oral and written submissions addressed some of these issues, I wish to set out herein very briefly, my views in regard to these matters as well.

Although this Court had granted special leave to appeal on question (b), namely whether the Court of Appeal had erred in failing to consider that the impugned decision of the Board of Ministers of the Western Province, which has been subsequently approved by the Governor of the Western Province, was not subject to judicial review, learned Counsel for the appellant, quite rightly, did not press this line of argument at the oral hearing and in his written submissions. No immunity from judicial review is conferred by our Constitution on the Board of Ministers or the Governor, except to the limited extent that Article 154F(2) of the Constitution, which requires the Governor himself to decide whether in a given situation he will act on advice or in his discretion, and provides that "the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question in any Court on the ground that he ought or ought not have acted on his discretion. " In *Premachandra* v *Major Montague Jayawickrema and Another (supra)*, the Supreme Court considered this provision in depth and held that the ouster of jurisdiction of court applies only to the Governor's decision as to whether he should act on advice or in his discretion, and does not apply to the appointment of a Chief Minister under Article 154F (4). The court availed itself of the opportunity of examining the ambit of the power of judicial review with respect to the exercise of powers by a Provincial Governor, and observed at page 116, that-

> "The exercise of the powers vested in the Governor of a Province under Article 154F(4) excluding the proviso, is not solely a matter for his subjective assessment and judgment; it is subject to judicial review by the Court of Appeal. In application for *Quo Warranto, Certiorari* and *Mandamus*, the Court Appeal has power to review the appointment, *inter alia,* for unreasonableness, or if

made in bad faith, or in disregard of the relevant evidence, or on irrelevant considerations, or without evidence."

The above dictum is equally applicable to the exercise of powers by a Provincial Board of Ministers, although the grounds of review mentioned therein are not exhaustive. As far as decisions and actions of the Provincial Ministers are concerned, it is trite law that the extent of their amenability to *certiorari* and other writs is similar to that of Ministers appointed under Chapter VIII of the Constitution, and neither they nor their decisions or actions enjoy any immunity from judicial review. Our Courts have not been inhibited from exercising supervisory jurisdiction over the decisions or actions of Ministers, whether appointed under Chapter VIII or Chapter XVIIA of the Constitution, and granting mandates in the nature of the writ of certiorari whenever appropriate. I therefore, hold that question (b) on which special leave was granted should be answered in the negative.

It is however, vital to bear in mind that as observed by Kulatunga, J. in *T.N. Fernando, Assistant Commissioner of Excise, Kalutara* v *Nelum Gamage, Bribery Commissioner and Another*(15), *certiorari* "is a remedy whereby decisions and orders of inferior tribunals are examined to determine whether they are within their jurisdiction or powers." Although in modern times, the term 'jurisdiction; has become synonymous with 'power' and the ambit of *certiorari* has expanded to embrace decisions and actions of various bodies or persons exercising powers or functions of a public nature, the writ does not lie if circumstances necessary for the grant of *certiorari* do not exist (See, *G.P.A. Silva and Others* v *Sadique and Others*(16) and *Waas Gunawardena* v *Perera and Another*(17). In particular it is important to remember that unlike a Court exercising appellate powers, a writ court does not get into the shoes of the authority whose action it is competent to review, it being concerned only with the question of the legality or validity of the impugned action as opposed to its correctness. As Wade observes -

"The system of judicial review is radically different from the system of appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review the Court is concerned with its legality. On an appeal the question is

"right or wrong?" On review the question is "lawful or unlawful?" (H.W.R. Wade and C.F. Forsyth, Administrative Law (Ninth Ed.) page 33).

The question therefore is whether there existed any grounds which vitiated the decision taken by the Governor of the Western Province on the advice of the relevant Board of Ministers to divide the SLTS of the Western Province into the categories of 'buildings' and 'irrigation', or as formulated by this Court for granting special leave to appeal, did the Court of Appeal fail to consider that there are no grounds existing to exercise judicial review against the said decision?

The Court of Appeal sought to quash the impugned decision mainly on the basis that the decision to subdivide the SLTS into 'buildings' and 'irrigation' is arbitrary, unreasonable and ultra vires the Sri Lanka Technological Service Minutes (SLTS Minutes) published in the Gazette Extraordinary No. 1094/2 dated 23rd August 1999, marked P2, which came into force retrospectively with effect from 1st July 1994. It is common ground that at the time when they invoked the writ jurisdiction of the Court of Appeal, the 1st to 33rd petitioners-respondents as well as the members of the appellant union held positions in several classes in the Sri Lanka Technological Service (SLTS) and were in the employ of the Western Provincial Council. The 1st to 33rd petitioners-respondents were absorbed into the service of the Western Province from the Agrarian Services Department in 1990 or thereafter, while the members of the appellant union were absorbed into the said service from other Departments such as the Building Department, the Housing Department, the Land Development Department, the Animal Production and Health Department and the Education Department. The said SLTS Minutes specifically provided for the SLTS to be administered by a 'Board' which was responsible for the management of the service, the training and deployment of its personnel and inter-department transfers under the supervision of the Public Service Commission, where relevant.

It appears that for a considerable period of time after being absorbed into the service of the Western Provincial Council, the 1st to 33rd petitioners-respondents and the members of the appellant union have been grouped together as members of a unified and

common service, and it is apparent from letters such as the letter dated 15th November 1994 marked P22(a) (page 73 of the brief), issued to the 32nd petitioner-respondent at the time of his absorption into the SLTS of the Western Province, that this arrangement was made pending the adoption of a regular service structure in the Engineering Organization of the Western Province. The obstacle to treating all technical officers in the service of the Western Provincial Council as a unified service was the fact that the officers absorbed from Departments such as Irrigation and Agrarian Services generally had no qualifications or experience in building work, and those absorbed into the service from the other departments did not have competence in irrigation work.

It is significant to note that although the 4th respondent-respondent has produced marked 4R1 an organizational chart which somewhat differs from the chart produced by the 1st to 33rd petitioners-respondents marked P1, a common feature of both these charts is that the officers of the SLTS who came under Deputy Chief Secretary (Engineering) of the Western Province functioned under two Directors who are designated respectively Director-Buildings and Director-Irrigation, and this position is also evidenced by the fact that by the letter dated 6th January 1997 (which is found along with P22(a) at page 74 of the brief) the 32nd petitioner-respondent was transferred with effect from 1st February 1997 to the Irrigation Division of the Western Province Engineering Organization coming under the Director-Irrigation. Although it is stated in paragraph 6(c) of the Counter Objections of the 1st to 33rd petitioners-respondents that a majority of them "have served for longer periods under the Director-Buildings than under the Director-Irrigation," it is clear from this averment that the functional division of SLTS into 'buildings' and 'irrigation' had existed long prior to the making of the impugned decision dated 22nd September 2000 marked 4R5(c) by the 3rd respondent-respondent Governor. It is noteworthy that the said decision was made after a fair amount of discussions between the concerned officers and representatives of the appellant union, minutes of which have been tendered to Court marked 4R4(a), 4R4(b) and 4R4(c), upon the advice of the Board of Ministers of the Western Province as evidenced by the Memorandum dated 9th August 2000 marked 4R5(a) and the

Approval of the Board of Ministers dated 17th August 2000 marked 4R5(b).

The 1st to 33rd petitioners-respondents challenged the impugned decision on the basis that their promotional prospects would be adversely affected by the said decision as it allocated 199 out of the total cadre of 238 in Class I, Class II A and Class II B, and 43 out of the total cadre of 52 in the Special Class of the SLTS to the Buildings Division, leaving a mere 39 and 9 of the cadre vacancies in the respective classes to the Irrigation Division. However, I am of the opinion that since Class I, Class II A and Class II B of the SLTS have a combined cadre without a cadre ratio, the promotional prospects of those in these classes would not be adversely affected by the said categorization as they do not need cadre vacancies in order to be promoted to Class I. Furthermore, as pointed out by learned State Counsel for the 1st to 6th respondents-respondents, in view of the decision reflected in the minutes of the meeting held on 2nd August 2000 marked 4R4(c), even promotional prospects to the Special Class will not be adversely affected. In any event, it is expressly provided in Clause 5.1 of the SLTS Minutes that "the number of posts which should be in the Special Grade shall be recommended by the Sri Lanka Technological Services Board taking into account the requirements of each department and requirements of promotion, subject to the provisions of Section I of Chapter II of the Establishments Code". According to Clause 3:2 of the Minutes of the Sri Lanka Engineering Service (SLES Minutes published in the Gazette Extraordinary bearing No. 509/7 dated 7th June 1988 marked P23), read with its Schedule, posts in the Engineering Service are grouped into *inter alia* Civil Group I – Buildings, Civil Group 2 – Highways, and Civil Group 3 – Water & Land Resources Development, which includes Irrigation. It is clear that the function of division of the SLTS of the Western Province into the categories of 'buildings' and 'irrigation' was effected as provided in Clause 5.1 of the SLTS Minutes, which in fact falls in line with Clause 3:2 of the SLES Minutes. It is significant to note that the Engineering Services Circular No. 31 dated 3rd August 1997 marked P12 provides for officers in the SLTS to be promoted to certain classes of the SLES where posts are grouped according to expertise as noted above.

In the circumstances, it is abundantly clear that the division of the SLTS into 'buildings' and 'Irrigation' is neither arbitrary nor unreasonable and is also consistent with the SLTS Minutes as well as the SLES Minutes and other applicable circulars. Clause 4(i) of the aforesaid Engineering Services Circular No. 31 (P12) expressly requires the technical officers of the SLTS attached to Provincial Councils to be classified "according to their specialization on the same grouping as the Engineers as specified in the SLES Minutes," and in fact by the Engineering Services Circular No. 31(1) dated 5th September 2000 marked X3, the earlier Circular marked P12 has been amended, to enable an officer in SLTS who has passes in Hydraulics and Irrigation subjects to be eligible for promotion to the Engineering Grade in the SLES. None of these circulars have been challenged in these proceedings. I am therefore of the opinion that there were no grounds for the exercise of judicial review by the Court of Appeal in this case, and that the Court of Appeal has in fact failed to consider that the 1st to 33rd respondents and the members of the Petitioner Union were absorbed to the SLTS of the Western Province from different Departments and they professed expertise and specialization in different fields, which justified the categorization of officers in the SLTS into 'buildings' and 'Irrigation'. The Court of Appeal has also failed to take into consideration the effect of the aforesaid Engineering Service circulars which has facilitated the promotion of officers from SLTS to SLES.

For the foregoing reasons, I allow the appeal, set aside the decision of the Court of Appeal dated 1st June 2004 and make order dismissing the application filed by the 1st to 33rd petitioners-respondents in the Court of Appeal. In all the circumstances of this case, I make no order as to costs.

TILAKAWARDANE, J.- I agree.

SOMAWANSA, J. - I agree.

Appeal allowed. Judgment of the Court of Appeal set aside.

VASANTHA KUMARA
v
SKYSPAN ASIA (PVT.) LTD.

SUPREME COURT.
DR. SHIRANI BANDARANAYAKE, J.
AMARATUNGA, J. AND
BALAPATABENDI, J.
S.C. APPEAL NO. 14/2006
S.C. (SPL.) LA NO. 237/2005
H.C. GAMPAHA NO. 59/2003
L.T NO. 24/916/2000
MARCH 12th, 2008

Industrial Disputes Act – Section 31(B), Section 31C(1) – Duties and powers of a Labour Tribunal – Common law principles – Applicability in employer and employee relationship.

The appellant who was an employee of the respondent company had joined the company on 2.6.1997 and was promoted as a Head Supervisor on 5.11.1998. In July 2000, the appellant was served with a charge sheet dated 26.7.2000 containing five charges. The appellant was interdicted and after a domestic inquiry his services were terminated by letter dated 25.10.2000. The appellant sought re-instatement with back wages and compensation for wrongful termination before the Labour Tribunal. After inquiry the Labour Tribunal made its order on 30.6.2003 and by that order held that the termination was unjustified and ordered re-instatement with full back wages; the respondent appealed to the High Court, which allowed the appeal and set aside the order of the Labour Tribunal. Against that order the appellant preferred an application to the Supreme Court for which special leave to appeal was granted.

Held:

(1) The paramount consideration by a Labour Tribunal is the need for a just and equitable solution and for this purpose what is necessary is to do justice between the parties to the application.

(2) The concept of common law that gave prominence to the rights and duties of the employees under their contractual terms, which were taken into consideration by the High Court Judge in deciding the appeal, are no longer applicable in Sri Lanka with regard to labour disputes.

per Dr. Shirani Bandaranayake, J.

> "Although the position under the common law, where either party was entitled to terminate the contract of employment in accordance with its provisions without any consequential effect, the introduction of Labour Laws had modified this position. Through the establishment of the Labour Tribunals, the common law concepts dealing with labour relations were changed and the Industrial Disputes Act came into being and Labour Tribunals were established under and in terms of the said Act and expressly provided for the Labour Tribunal to take action, notwithstanding anything to the contrary in any contract of service between an employer and his employee."

Cases referred to:

(1) *Urban Council, Panadura* v *Cooray* 1971 75 NLR 236.
(2) *United Engineering Workers' Union* v *Devanayagam* 1967 69 NLR 289.

APPEAL from the judgment of the High Court.

Rohan Sahabandu for employee-applicant-respondent-appellant.
Chandana Liyanapatabendi with *Ranjika Pilapitiya* for employer-respondent-appellant-respondent.

Cur.adv.vult.

December 16, 2008

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of the Western Province holden in Gampaha dated 20.09.2005. By that judgment, learned Judge of the High Court set aside the order made by the Labour Tribunal, Gampaha and allowed the appeal preferred by the employer-respondent-appellant-respondent (hereinafter referred to as respondent). The employee-applicant-respondent-appellant (hereinafter referred to as the appellant) thereafter preferred an application to this Court for which Special Leave to Appeal was granted.

At the hearing, it was agreed that this appeal could be argued on the basis of the following questions:

1. Did the learned High Court Judge consider the evidence led in this case in the correct perspective, taking into consideration that the learned President of the Labour Tribunal is only expected to make a just and equitable order?

2. Is the approach to the matters in dispute by the learned High Court Judge erroneous?

The facts of this appeal, as submitted by the learned Counsel for the appellant, *albeit* brief, are as follows:

At the time material to this appeal, the appellant was a Head Supervisor of the respondent Company on a salary of Rs. 10,500/- per month. He had joined the respondent Company as a Section Leader on 02.06.1997 and was promoted as a Head Supervisor on 05.11.1998.

In July 2000, the appellant was served with a charge sheet dated 26.07.2000 containing five (5) charges, which were as follows (R1):

1. that being a Head Supervisor of the hand welding section had conducted training sessions for all sections of the production department from June 21, 2000 to July 4, 2000 whereas the instructions given for Supervisors were to conduct training for their respective sections;

2. that he had addressed certain grievances of the workers during the said training sessions, and tried to give a bad impression of the Company to the workers;

3. that he had criticized the management and the Managers of the Company indicating various weaknesses and lapses;

4. that he had informed the workers that those who fail in the written test that would be conducted after the workshop would be dismissed; and

5. that he had represented the management informally where he had no authority to do so in the circumstances.

The appellant was interdicted with effect from 27.07.2000 and after a domestic inquiry his services were terminated by letter dated 25.10.2000 with effect from 27.07.2000. The appellant sought re-instatement with back wages and compensation for wrongful termination before the Labour Tribunal.

Learned President of the Labour Tribunal, by his order dated 30.06.2003, held that the termination was unjustified and ordered re-instatement with full back wages with effect from 27.07.2000. The respondent appealed to the High Court, which allowed the appeal and set aside the order of the Labour Tribunal.

Learned Counsel for the appellant submitted that the learned Judge of the High Court had failed to appreciate that over the years, Labour Laws have developed on the basis of social legislation, which had been the approach taken by the learned President of the Labour Tribunal and that the learned Judge of the High Court had considered the matter in question under the concepts of Common Law. Learned Counsel for the appellant also contended that the learned President of the Labour Tribunal had carefully considered the documents marked as R3 and R4, whereas the learned Judge of the High Court, only on a mere perusal of these two documents, had come to the conclusion that the Labour Tribunal was in error in its evaluation of the said documents marked as R3 and R4. Learned Counsel for the appellant also contended that the High Court had erred in law and has not appreciated the fact that the Labour Tribunal was empowered by statute to give a just and equitable order. Referring to the award made by the Labour Tribunal, learned Counsel for the appellant submitted that the appellant should be entitled to be reinstated with full back wages.

Learned Counsel for the respondent, on the other hand, contended that the learned President of the Labour Tribunal had failed to evaluate the material placed before the Tribunal and especially, there had been no proper examination of the two documents marked as R3 and R4. It was also submitted that in terms of section 31C of the Industrial Disputes Act, the evidence that was led at the Tribunal was sufficient to establish the nature and the seriousness of the misconduct involved. In these

circumstances learned Counsel for the respondent contended that the termination of the appellant could be justified as correctly held by the learned Judge of the High Court.

Having stated the submissions of both learned Counsel, let me now turn to examine those in the light of the two questions set out at the outset of this judgment.

It is common ground that the appellant was interdicted with effect from 27.07.2000 and that his services were terminated by letter dated 25.10.2000. At the Labour Tribunal the respondent had admitted the termination of the appellant and the employer had given evidence. In addition to the employer, Keerthi Vithanage, the Quality Control Engineer and Shanthilal Fernando, the Human Resources Manager had also given evidence whereas the appellant had given evidence on his behalf. Having considered the submissions and the relevant documents, learned President of the Labour Tribunal, on 30.06.2003 had ordered re-instatement with full back wages for the period the appellant was out of employment, viz. from 27.07.2000 to 01.07.2003. Accordingly, the Tribunal ordered the payment of Rs. 369,250/- to the appellant.

Learned Judge of the High Court thereafter had considered the appeal of the respondent and whilst allowing the said appeal, had taken the view that the order of the learned President of the Labour Tribunal cannot stand, for the following reasons:

1. Clause 13 of the letter of appointment issued to the appellant, clearly had given the authority to the respondent to terminate services of the respondent. Further the respondent had conducted a domestic inquiry, prior to its decision to terminate the services of the appellant and accordingly the respondent's action in such termination could be justified.

   Accordingly learned President of the Labour Tribunal had not addressed his mind to clause 13 of the letter of appointment issued to the appellant.

2. Since the respondent is a private Company, the provisions of the Evidence Ordinance would not be applicable and it would not be necessary to prove a fact in terms of the

Evidence Ordinance. Accordingly even hearsay evidence would be sufficient for the purpose of terminating the services of an employee.

3. It is not necessary to place all available evidence before the Labour Tribunal in order to justify the termination, since the Labour Tribunal should consider the evidence led before the domestic inquiry to arrive at a decision.

4. If an employer becomes aware that the employee is conducting himself in a manner detrimental to the employer, irrespective of the fact as to from where he obtains the information, the employer could terminate the service of the employee.

5. The employer should have the right to terminate the services of an employee, who disregards orders, and in this instance, the Labour Tribunal had not considered the letters of warning, marked as R3 and R4, issued to the appellant.

The allegations leveled against the appellant by the respondent were based on a preliminary investigation carried out by the respondent (R1). According to the respondent, the appellant functioned as a Head Supervisor of the hand welding section and was given instructions to conduct a training session for the workers in his section. In fact these instructions were given to all Head Supervisors and the allegation was that the appellant had conducted the said training session for all the sections of the Production Department from 21.06.2000 to 04.07.2000. Further it was said that the appellant had addressed certain grievances of the workers during the training sessions to create a bad impression of the respondent to its employees. In that respect the allegation was that the appellant had criticized the managers and the management of the respondent Company indicating various weaknesses and lapses on their part. Further it was stated that,

I. the appellant had informed the workers that a written test would be held soon and those workers, who fail in the said written test would be dismissed immediately;

II. that the appellant had represented the management informally, where he had no authority for such representation.

Learned President of the Labour Tribunal having considered the matter before him was of the view that, the respondent had not led any evidence to show as to how the appellant had criticised the management. Although the respondent had alleged that the appellant had been critical of the management, the respondent had not placed any material before the Labour Tribunal to substantiate this position. On perusal of the evidence that was led before the Labour Tribunal, it is evident that the respondent had not been successful in either leading or corroborating the evidence in order to substantiate its position.

The witness Keerthi Vithanage, who was the Quality Control Engineer, had stated that he had received complaints from workers that the appellant had been giving advice to persons not in his unit, and that he had been criticizing the management. However, no evidence had been led on this position. Vithanage had stated in his evidence that he had seen the appellant talking to others, but at that given time he had not been with the workers, but was inside his room, which was located some distance away.

The said Keerthi Vithanage had clearly stated in his evidence that,

"ප්‍ර: තමන්ගේ සාක්ෂියේ හැටියට තමන් දැක්ක ගමන් මේ සේවකයා පි.වි.සි. අංශයේ සේවකයෙක් නොවන වෙනත් සේවකයන්ට උපදෙස් දෙනව?

උ: ඔව්.

ප්‍ර: තමන් කොයි අවස්ථාවේද දැක්කේ?

උ: මම ඉන්නේ වීදුරු ආවරණ තියෙන කාමරේක. වැඩ මුරයට යන කොට දැක්ක."

Accordingly except for the fact that Keerthi Vithanage had seen the appellant being with a group of workers, he had not been able to state as to how and in what context the appellant had criticized the management with the workers. Further, although Vithanage had referred to complaints, none of those were produced before the Tribunal.

The other witness, who was from the Human Resources Department had not been able to state as to what he had heard or seen at the relevant time.

In the aforementioned circumstances, the Labour Tribunal had correctly come to the conclusion that on a consideration of the totality of the evidence led, the allegations, which are questions of fact, have been proved on a balance of probability. The High Court as stated earlier had gone on the basis that hearsay evidence is adequate and that there is no necessity to call for witnesses in terms of the Evidence Ordinance.

It is not disputed that a workman or a trade union on behalf of a workman, who is a member of that union, could make an application to a Labour Tribunal for relief or redress in respect of:

i. the termination of his services by his employer;
ii. the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits; and
iii. such other matters relating to the terms of employment or the conditions of labour, of a workman as may be prescribed. (Section 31B(1) of the Industrial Disputes Act)

Section 31C(1) of the Industrial Disputes Act deals with the duties and powers of a Labour Tribunal with regard to the applications in terms of Section 31B of the Industrial Disputes Act. The said Act clearly states that it shall be the duty of the Labour Tribunal to make all such inquiries into the specific application made and hear all such evidence and make such order, which is just and equitable. According to section 31C(1) of the Industrial Disputes Act,

> "Where an application under section 31B is made to a labour tribunal, it shall be the *duty of the tribunal to make all such inquiries into that application and hear all such evidence* as the tribunal may consider necessary, and *thereafter make such order as may appear to the tribunal to be just and equitable*" (emphasis added).

The need to hear all such evidence in order to properly inquire into the application made by a workman had been considered by Sirimane, J., in *Urban Council, Panadura* v *Cooray*[1], where it had been stated that, though an employee's application for relief before a Labour Tribunal should be heard with sympathy and understanding, yet the Tribunal must act judicially. More importantly it was held that the Labour Tribunal *should not shut its eyes to positive evidence*. Further in *United Engineering Workers' Union* v *Devanayagam*[2], it was clearly stated that the paramount consideration by a Labour Tribunal is the need for a just and equitable solution and for this purpose, what is necessary is to do justice between the parties to the application.

Learned Judge of the High Court referred to the documents marked as R3 and R4 and had held that by these documents the appellant had been primarily warned by the respondent and that the learned President of the Labour Tribunal had not paid any attention to the contents of these documents.

An examination of R3 clearly indicates that the position taken by the learned Judge of the High Court, is not correct. The said document (R3) dated 24.02.1999 is a letter issued not to the appellant directly, but to all the Supervisors, indicating steps they should take to avoid mistakes and to maintain good supervision. This document had been issued by the Chairman of the respondent Company. The document marked as R4 dated 30.06.2000 was issued to the appellant by the Human Resources Manager of the respondent Company regarding the 'Busbahnhuf Dingelstaedt Project' and had drawn the attention of the appellant to his obligations as a Supervisor to advice the work force in order to avoid mistakes. This letter indicates that the Company had issued certain guidelines for the Supervisors to follow regarding supervision in order to avoid mistakes and obtain a high yield from those projects they had undertaken. Therefore, a careful perusal of the order of the Labour Tribunal clearly shows that the position taken by the High Court in this regard is not correct. In fact the Labour Tribunal had considered the issue based on the documents marked R3 and R4 and had come to the conclusion that R3 is a document, which was a kind of a general circular issued to all the Supervisors and R4 also gave general instructions

based on the role of the appellant as a Supervisor. Accordingly, the Labour Tribunal had taken the view that on a balance of probability the respondent had not been able to prove past bad conduct of the appellant.

It is therefore apparent that whilst the learned President of the Labour Tribunal had considered the application after evaluating the evidence before him, the learned Judge of the High Court had been of the view that there is no necessity for the respondent to justify its decision to terminate the services of the appellant, since the latter had given his consent at the time of acceptance of his letter of appointment for such termination. The High Court had for this purpose, referred to clause 13 of the letter of appointment dated 30.05.1997 (R2). The said clause reads as follows:

> "**Termination**
>
> *Your employment with the Company after confirmation may be terminated by either party giving one month's notice or by paying an amount equivalent to one (01) month's remuneration. However, the employer reserves the right to terminate this contract of employment without such notice or payment or remuneration for reasons of insobriety, insubordination, gross neglect in the basic duty, misconduct or theft.*
>
> ....."

During the existence of *laissez-faire* state, the employer-employee relationship was based on the common law principles and it was an accepted fact that an employer could give effect to what the employer and employee had agreed upon at the commencement of their relationship. Referring to the applicability of common law concepts and its input on the contract of employment. S.R. de Silva (The Contract of Employment, monograph No. 4, 1983, pg. 2) states that,

> "There was a time when the common law regarded an employer as having a proprietary right in his servant with criminal sanctions attaching to breaches of contract by employees. It is this concept that made a stranger

> wrongly injuring a servant liable not only to the servant, but also to the master. Even though the common law has come a long way since that time, in the modern common law the contract of employment is still considered more or less conclusive in determining the rights of the parties and it implies rights and duties only in the absence of contractual terms. This attitude is based on the fundamental misconception of the common law that the contract of employment is a voluntary agreement entered into between parties of equal bargaining strength. The common law looks upon employment as a mere contractual relationship between two parties terminable at the will of either party, subject to the condition of notice in certain cases."

These concepts of common law that gave prominence to the rights and duties of employees under their contractual terms, which were taken into consideration by the learned Judge of the High Court in deciding this appeal, are no longer applicable in our legal system. Along with the collapse of the *laissez-faire* state and with the emergence of the modern welfare state, countries had taken steps to establish special systems of Courts for the purpose of granting just and equitable orders. In Sri Lanka, the Industrial Disputes Act came into being to provide for the prevention, investigation and settlement of industrial disputes and for matters connected therewith or incidental thereto. Labour Tribunals were established under and in terms of the said Act and Section 31B4 clearly states that,

> "Any relief or redress may be granted by a labour tribunal to a workman upon an application made under subsection (1) *notwithstanding anything to the contrary in any contract of service between him and his employer*" (emphasis added).

It is therefore quite clear that the common law principles stated earlier are no longer applicable in Sri Lanka with regard to labour disputes and as stated by Lord Devlin in *United Engineering Workers' Union* v *Devanayagam* (*supra*),

"The common law of master and servant has fallen into disuse."

The High Court however had quite contrary to the aforesaid position had gone on the basis that, in terms of clause 13 of the letter of appointment, the respondent could have terminated the services of the appellant.

"ඉහත සඳහන් කාරණය සම්බන්ධයෙන් සළකා බැලීමේදී ආර් 2 වශයෙන් ලකුණු කර ඇති පත්වීම් ලිපියේ අන්තර්ගත වූ සියළු කරුණු සේවා තත්ත්වය කෙරෙහි තිබිය යුතු යැයි ඉතා පැහැදිලිව සඳහන් වේ. එහි ඇති කොන්දේසි සළකා බැලීමේදී තරමක් දුරට ඒක පාර්ශික ස්වභාවයක් ගනු ලැබුවත්, වග උත්තරකරුගේ සේවා කොන්දේසි වලට වග උත්තරකාර සේවකයා එකඟව අත්සන් තබා ඇත. එම කොන්දේසි වල 13 වෙනි කොන්දේසිය ප්‍රකාරව වග උත්තරකාර අභියාචකයා සේවය අවසන් කළ හැකිව තිබුණු අතර....."

It is to be noted that although this position would have been correct under the common law, where either party was entitled to terminate the contract of employment in accordance with its provisions without any consequential effect, the introduction of Labour Laws had modified this position. Through the establishment of the Labour Tribunals, the common law concepts dealing with labour relations were changed, and the Industrial Disputes Act, as stated earlier, expressly provided for a Labour Tribunal to take action, notwithstanding anything to the contrary in the contract of service between an employer and his employee. In fact in the well known case of the *United Engineering Workers' Union* v *Devanayagam (supra)*, Lord Devlin, referring to Section 31B(4) of the Industrial Disputes Act empowering a Labour Tribunal to grant relief contrary to the terms of a contract of service had said that,

"Indeed in this sub-section the statute is doing no more than accepting and recognising the well known fact that the relations between an employer and his workman are no longer completely governed by the contract of service."

In these circumstances, it is apparent that the High Court had based its decision in terms of the common law applicable to employer-employee relationships and had failed to appreciate the changes that had taken place in the legal concepts dealing with labour disputes, since the introduction of the Industrial Disputes Act in this country.

Accordingly, on a careful consideration of the aforementioned, it is apparent that the approach taken by the High Court in deciding this application cannot be accepted.

For the reasons aforementioned, the questions, which were set out at the out set of this judgment are answered as follows:

1. Learned Judge of the High Court had not considered the evidence led in this case in the correct perspective, taking into consideration that the learned President of the Labour Tribunal is only expected to make a just and equitable order.

2. the approach to the matters in dispute by the learned Judge of the High Court is erroneous.

Accordingly I allow the appeal, set aside the judgment of the High Court dated 20.09.2005 and affirm the order of the Labour Tribunal dated 30.06.2003. The respondent is directed to reinstate the appellant with effect from 01.01.2009 with back wages, as directed by the Labour Tribunal from 27.07.2000 upto 01.01.2009, where his monthly salary was agreed upon Rs. 10,500/-

I make no order as to costs.

AMARATUNGA, J. - I agree
BALAPATABENDI, J. - I agree

Appeal allowed.