RECENT JUDGMENTS

SUPREME COURT CASES

1. SC FR 351 – 362 / 2108 - RAJAVAROTHIAM SAMPANTHAN AND OTHERS VS. HON. ATTORNEY GENERAL AND OTHERS

A historic Judgment delivered by a full bench of the Supreme Court that His Excellency the President's proclamation dated 09th November 2018 to dissolve Parliament and hold new elections before the period specified in Article 70(1) was unconstitutional.

BEFORE: *H. N. J Perera, CJ, Buwaneka Aluwihare, PC, J., Sisira J. De Abrew, J. Priyantha jayawardena, PC, J. Prasanna Jayawardena, PC, J. Vijith. K. Malalgoda, PC, J. Murdu N. B. Fernando, PC, J.*

COUNSEL: *K. Kang-Isvaran, PC with M. A Sumanthiran, PC., Viran Corea, Ermiza Tegal, Niran Anketell, Junaita Arulnantham and J. Crosette Thambiah instructed by Mohan Balendra for the Petitioner in SC FR 351/ 2018*

Sanjeewa Jayawardena PC, with Rukshan Senadheera for the 1st Added Respondent in SC FR 351/ 2018

Manohara de Silva PC, with Samantha Rathwatte PC, with Canishka Witharana and Boopathy Kahathuduwa for the 2nd Added-Respondent in SC FR 351/ 2018 M.U.M. Ali Sabry PC, with Ruwantha Cooray, Naamiq Nafath, Ramzi Bacha and Hassan Hameed instructed by Athula de Silva for the 3rd Added-Respondent in SC FR 351/ 2018

Gamini Marapana PC, with Palitha Kumarasinghe PC, and Kushan D'Alwis PC, Ganesh Dharmawardana, Navin Marapana, Kaushalya Molligoda and Uchitha Wickremasinghe instructed by Sanath Wijewardana for the 4th AddedRespondent in SC FR 351/2018

Canishka Witharana with Chandana Botheju, Thissa Yapa, H. M. Thilakarathna instructed by Nilantha Wijesinghe for the 5th Added- Respondent in SC FR 351/ 2018

Thilak Marapana PC, with Ronald Perera PC, and Suren Fernando instructed by Vidanapathirana Associates for the Petitioners in SC FR 352/ 2018

Viran Corea with Bhavani Fonseka, Khyati Wickremenayake, and Inshira Faliq instructed by R.M Balendra for the Petitioners in SC FR 353/ 2018

Dr. Jayampathi Wickremarathne with Kanchana Yatunwala instructed by Vidanapathirana Associates for the Petitioner in SC FR 354/ 2018

A.Sumanthiran PC, with Niran Anketell instructed by M. Balendran for the Petitioner in SC FR 355/ 2018 J.C. Weliamuna PC, with Shantha Jayawardena, Pasindu Silva

and Thilini Vidanagamage for the Petitioners in SC FR 356/ 2018

Geoffrey Alagarathnam PC, with Lasantha Gamsinghe for the Petitioner in SC FR 358/ 2018

Suren Fernando with Shiloma David for the Petitioners in SC FR 359/ 2018

Ikram Mohomaed PC, with Thisath Wijaygunawardena PC, Nizam Karipper PC, A. M. A. Faaiz , M. S. A. Wadood , Roshaan Hettiaarachchi , Tamya Marjan , Milhan Ikram Mohomad, Nadeeka Galhena and Mariam Saadi Wadood for the Petitioners in SC FR 360/ 2018

Hejaaz Hizbullah with Muneer Thoufeek, M. Jegadeeswaran, Shifam Mahroof and M. Siddeque for the Petitioner in SC FR 361/ 2018

Jayantha Jayasuriya PC, Attorney General with Dappula de Livera PC, Solicitor General, Sanjay Rajaratnam, PC, Senior Additional Solicitor General, Indika Demuni de Silva, PC, Additional Solicitor General, Farzana Jameel PC, Additional Solicitor General, Nerin Pulle, Deputy Solicitor General, Shaheeda Barrie, Senior State Counsel, Kanishka de Silva Balapatabendi State Counsel and Manohara Jayasinghe State Counsel for the Attorney General and the 1st Respondent.

Judgement of H. N. J. Perera CJ. - affirmed by 5 others and affirming opinion by Sisira J. De Abrew J.:

Introduction

On **09th November 2018**, His Excellency, the President issued a Proclamation which was published in the **Extraordinary Gazette No. 2096/70** dated **09th November 2018** dissolving Parliament by virtue of the powers vested in him by **paragraph 5 of Article 70 of the Constitution of Sri Lanka read with Article 33 (2) (c) and Article 62(2) and in pursuance of Section 10 of the Parliamentary Elections Act No. 01 of 1981 called for a Parliamentary Election**.

Thereafter, On Monday, **12th November 2018**, the Petitioner in **SC FR 351/2018** filed his petitions praying for inter-alia a Declaration that the aforesaid Proclamation infringes the Petitioner's fundamental rights contained in **Article 12 (1) of the Constitution**; an Order quashing the aforesaid Proclamation, an Order declaring the Proclamation null, void ab initio and of no force or effect in Law, an Order quashing the decisions and/or directions contained in paragraphs (a), (b), (c) and (d) of the Proclamation and other related reliefs including interim reliefs suspending the operation of the Proclamation.

The Petitioner is a citizen of the Republic, a Member of the Eighth Parliament of Sri Lanka and the Leader of the Opposition in the Eighth Parliament.

The Hon. Attorney General is named as the 1st Respondent to the petition in the dual capacity, in terms of the **first proviso to Article 35 (1) of the Constitution** and also in his capacity as the **Hon. Attorney General as required**, inter alia, by **Article 134 (1) read with Articles 17 and 126 of the Constitution**.

The 2nd to 4th Respondents to the petition are the Chairman and Members of the Elections Commission.

The Petitioner contended that the dissolution of Parliament sought to be effected by the Proclamation is "**ex facie unlawful and in violation of the Constitution and nothing flows from the same**" for the reasons below:

1. That according to **Article 70(1) of the Constitution**, the President is **expressly prohibited by the Constitution from dissolving Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first** , and
2. The date appointed for the first meeting of the Eighth Parliament of Sri Lanka was **1st September 2015** as established by the Gazette Notification dated **26th August 2015**,
3. That thereby the Proclamation dissolving Parliament being issued on **09th November 2018** - i. e: **only three years and two months and eight days after the first meeting of the Eighth Parliament**,
4. Thus, the **period of four and half years specified in the proviso to Article 70 (1) had not passed when the said Proclamation was issued**,
5. The only exception provided by the Constitution to the above prohibition is where Parliament requests the President to dissolve Parliament by a resolution passed by not less than two-thirds of the whole number of Members (including those not present) voting in its favour." and "it is undisputed that no such resolution has been passed by Parliament requesting the President to dissolve Parliament."
6. That thus and otherwise, the purported dissolution of Parliament dated **9th November 2018** was inter-alia in violation of the express prohibition contained in the proviso to **Article 70(1) of the Constitution**, unreasonable, unlawful, ultra vires, an attack on parliament, violation of the sovereignity of the people and the rule of law, violation of the rights of the Petitioner and other members of Parliament and therefore null and void and of no force in law.
7. Further that the actions of the President constitute executive or administrative action within the meaning of **Article 17 read with Article 126 of the Constitution** and were done by His Excellency, the President "in his official capacity".

8. That the said impugned actions of "purporting to dissolve Parliament amounts to an infringement of the rights of the Petitioner recognized under and in terms of **Article 12 (1)** of the Constitution.
9. In this connection, the Petitioner states that the Petitioner and every member of Parliament were entitled by law to complete their respective terms in Parliament according to law and have been unlawfully denied that opportunity by the impugned actions of His Excellency, the President and further, that the said denial violates the rights of all their electors [of the Petitioner and every other member of Parliament] who are citizens of the Republic and are entitled to representation in Parliament according to the law.

On **12th November 2018** nine other broadly similar applications were filed, namely, **SC FR 352/2018 – 361/2018**. They were filed by other members of Parliament and interested parties alleging inter-alia that the impugned actions of the President referred to above violate the Petitioner's rights guaranteed by **Articles 10, 14(1) (a), 14 (1) (b) and 14 (1) (c) in addition to Article 12(1)**.

When the aforesaid applications were taken up by Court on **12th November 2018**, the Hon. Attorney General who is named as a Respondent in all the applications in his aforesaid dual capacity, appeared. Applications dated **12th November 2018** seeking to intervene and be added as parties were filed by the five Added Respondents - namely, Prof. Gamini Lakshman Pieris, Udaya Prabhath Gammanpila, Dr. W.J.S.S. De Silva, M.A.C.S. Jayasumana and P.C. Dolawatta.

On **12th and 13th November 2018**, the Court heard submissions made by the Counsel for the Petitioner in **SC FR 351/2018** and thereafter heard submissions made by the Hon. Attorney General and the counsel representing the aforesaid five Intervenient- Petitioners.

Having considered these submissions, the Court made and Order allowing the applications for intervention made by the aforesaid five intervenient- Petitioners, and thereafter, the Court made Order granting the Petitioners in all nine applications leave to proceed under **Article 12 (1) of the Constitution only**. In the circumstances of these cases, the Court also considered it

necessary to issue Interim Orders in all nine applications staying the operation of the Gazette Extraordinary No. 2096/70 dated 09th November 2018 until **07th December 2018**. Further, the Court issued Interim Orders in **SC FR 353/2018, SC FR 355/2018, SC FR 356/2018, SC FR 358/2018 and SC FR 361/2018 restraining the Chairman and members of the Elections Commission and/or their servants, subordinates and agents from acting in terms of the said Gazette Extraordinary No. 2096/70 dated 09th November 2018, until 07th December 2018**.

Thereafter, the matter was argued on **04th, 5th, 6th and 7th of December 2018.**

Preliminary Objections of the Hon. Attorney General in relation to Jurisdiction

The Hon. Attorney General took up two preliminary objections in relation to the Jurisdiction of the Supreme Court to hear these cases which are as follows;

a. That the Petitioners as members of Parliament cannot invoke the FR Jurisdiction of the Supreme Court against the impugned actions of the President as there is a specific remedy available to them in this regard provided by **Article 38(2) of the Constitution (Impeachment)**,
b. That the dissolution of Parliament does not constitute *"executive or administrative action"* falling within the purview of Article 126 of the Constitution.

The 1st objection was rejected by the Court inter-alia on the basis that it was a non-sequitor as no Parliament would exist after dissolution to exercise the said remedy under Article 38(2), and that the limited fact finding role of the Supreme Court in respect of inquiring into an impeachment resolution under Article 38(2) cannot deprive the Court of their foremost duty of safeguarding the Fundamental Rights of its Citizens under Article 4 (d) of the Constitution which is a cornerstone of the Sovereignty of the people. The 2nd objection was also rejected, on the basis that the President exercises the executive powers of the people under Article 4 (b) and by "executive powers" vested in him under Chapter VII of the Constitution, and thereby any acts done by the President in the color of his office falls under executive action.

Argument

The parties are all agreed that the Articles of the Constitution which are relevant to the question before Court are **Articles 33 (2) (c), Article 62 and Article 70**.

Submissions of the Petitioners

The Petitioners submit that these Articles mean and should be read and understood in the following way:

a) Article 33 (2) (c) only recognises the existence of a power of the President to summon, prorogue and dissolve Parliament and states that power is vested in the President. The Petitioners submit that this power vested in the President by Article 33 (2) (c) is nothing but a nude power" and the only manner in which the President can exercise that power to summon, prorogue and dissolve Parliament is set out and limited by the Provisions of Article 70.

b) Article 62 (1) specifies that Parliament shall consist of 225 members while Article 62 (2) specifies that a duly elected Parliament shall continue for five years from the date appointed for its first meeting and no longer, and shall stand dissolved at the end of that five year period. The Petitioners submit that Article 62(2) only recognizes the possibility that Parliament may be dissolved before the expiry of 5 years in situations where the President has issued a proclamation in terms of Article 70(1).

c) That Article 70 (1) which specifies that the only way the President may dissolve Parliament is by the issue of a Proclamation and the Proviso to Article 70 (1) which stipulates that no such Proclamation can be issued until the expiration of four and a half years from the date of the first meeting of that Parliament unless not less than two thirds of the Members

d) That there is no difference in the meaning of Article 62 (2) in the English language and the same Article in the Sinhala language and that Article 62(2) is in the passive sense and confers no power on the President to dissolve Parliament.

Submissions of the Hon. Attorney General and Added Respondents

The Hon. Attorney General and the added Respondents submit that **Articles 33 (2) (c), Article 62 and Article 70** should be read and understood in the following way:

a. **Article 33 (2) (c)** has been specifically included by the 19th Amendment as a new power vested in the President to summon prorogue and dissolve Parliament at his discretion and which can be exercised independent of the restraints set out in **Article 70(1)**. They highlight that **Article 33 (2) of the 1978 Constitution prior to the 19th Amendment** had no provision referring to the President's power to summon, prorogue and dissolve Parliament.

b. That **Article 33 (2) (c)** formulates and recognizes a sui generis and overarching "executive-driven" dissolution of Parliament by the President which is independent of the power of dissolution referred to in **Article 70 (1)** and is not subject to the limits and restraints specified by **Article 70 (1)**;

c. **Article 70 (1)** only applies to a "legislature driven" dissolution of Parliament in which the President may, at the request of Parliament made by a resolution passed by not less than two thirds of the Members of Parliament, dissolve Parliament during the first four and a half years of its life time and, dissolve Parliament at his discretion and without a request from Parliament at any time after the expiry of that period of four and a half years;

d. **Article 62 (2)** read with **Article 33 (2) (c)** vests in the President an independent and separate power to dissolve Parliament at any time under provisions of **Article 33 (2) (c)** without being circumscribed by **Article 70 (1).**

e. That **Article 62 (2)** in Sinhala is significantly different from **Article 62 (2)** in English and that the **Article 62 (2)** in Sinhala read with **Article 70 (5)** in Sinhala has the effect of granting the President an unrestricted power to dissolve Parliament outside the confines of Article 70 (1).

Judgment

The following principles of statutory interpretation, rules and reasoning were used by Court to give effect to the conclusion reached. They are as follows;

a. First principle of statutory interpretation - that the words of a statute must be given their plain and ordinary meaning and that the clear and unequivocal language of a statute must be enforced.
b. The rule that provisions in the Constitution must be harmoniously read and applied so that the scheme of the Constitution can be made effective without rendering any provision superfluous or redundant, is complied with.
c. To ensure that the words in the relevant provisions are not strained or twisted in an attempt to reach a conclusion which is not justified by the provisions themselves.
d. To safeguard the duty cast on this Court to read and give effect to the provisions in the Constitution so as to uphold democracy, the Rule of Law and the separation of powers and ensure that no unqualified and unfettered powers are vested in any public authority.

Accordingly, based on the analysis of the nature, effect and meaning of **Articles 33 (2) (c), 62 (2) and 70** set out above, it was concluded by the Court that:

1. The enumeration of the President's powers in **Article 33 (2)** include and specify the power vested in the President to summon, prorogue and dissolve Parliament;
2. The President may exercise that power only within the terms of the Constitution and by acting in accordance with the procedure specified in **Article 70** and subject to the limitations specified in **Article 70**;
3. Any dissolution of Parliament by the President can only be effected by way of a Proclamation issued under and in terms of the first paragraph of **Article 70 (1)**;

4. By operation of the second paragraph of **Article 70 (1)**, the President cannot dissolve Parliament during the first four and a half years of its term unless he has been requested to do so by a resolution passed by not less than two thirds of the Members of Parliament [including those not present]. Even upon receipt of such a resolution, the President retains the discretion to decide whether or not he should act upon such a request;
5. After the expiry of four and a half years of Parliament‘s term, the President is entitled, at his own discretion, to dissolve Parliament by issue of a Proclamation;
6. Upon the expiry of five years from the date of its first meeting, Parliament will dissolve `automatically‘ and without any intervention of the President by operation of **Article 62 (2)**;
7. Upon such dissolution at the end of the five year term, the President must act under **Article 70 (5) (b)** and forthwith issue a Proclamation fixing a date for the General Election and summoning the new Parliament to meet within three months of that Proclamation.
8. For the reasons set out above, it was held that the Petitioners' rights guaranteed under **Article 12 (1) of the Constitution** have been violated by the issue of the Proclamation filed with the petitions in **SC FR 351-361/2018** and made an order quashing the said Proclamation (P1) and declaring the said Proclamation marked —P1 null, void ab initio and without force or effect in law.

2. SC FR 141/2015 - RAVINDRA GUNAWARDENA KARIYAWASAM VS. CENTRAL ENVIRONMENT AUTHORITY AND OTHERS

In a Landmark Judgment the Supreme Court ordered Northern Power Company, which operated a thermal power station in Chunnakam that polluted ground water in the Chunnakam area and made ground water unfit for human use, to pay Rs. 20 million to offset a part of the substantial loss, harm and damage to the residents for the contamination of ground water and soil in the vicinity of its thermal power station.

BEFORE: *Priyantha Jayawardena, PC, J. Prasanna Jayawardena, PC, J. L.T.B. Dehideniya, J.*
COUNSEL: *Nuwan Bopage with Chathura Weththasinghe for the Petitioner,*
Dr. Avanti Perera, SSC for the 1st to 4th, 9th, 10th and 11th Respondents.
Dr. K. Kanag-Isvaran, PC with L. Jeyakumar instructed by M/S Sinnadurai Sundaralingam and Balendra for the 5th Respondent.
Dinal Phillips,PC with Nalin Dissanayake and Pulasthi Hewamanne instructed by Ms. C.D.Amarasekera for the 8th Respondent.
K.V.S.Ganesharajah with Ms. Deepiga Yogarajah, Ms. Suppiah Sugandhini and Ms. A.Gayathry instructed by Ms. Sarah George for the Intervenient Petitioners-Added Respondents.

Decided on: 04th April 2019

Judgment of Prasanna Jayawardena J. – affirmed by others:

Introduction

In this application, the petitioner, complained that the 8th respondent company (Northern Power Company Pvt. Ltd.) has operated a thermal power station in Chunnakam, a town about 10km north of Jaffna, in a manner which has polluted groundwater in the Chunnakam area and made groundwater unfit for human use. The petitioner accused the Central Environmental Authority ["CEA"] , the Ceylon Electricity Board ["CEB"], the Provincial and Local Authorities, the Board of Investment of Sri Lanka ["BOI"] and the National Water Supply and Drainage Board ["NWSDB"], who are named as the 1st to 7th respondents and 10th and 11th added respondents, of having failed to enforce the law against the 8th respondent and of having failed to stop the 8th respondent polluting groundwater and having failed in their duty to act in the best interests of the public. The petitioner states that, thereby, the respondents have violated the fundamental

rights guaranteed to the petitioner and to the residents of the Chunnakam area by Articles 12 (1) of the Constitution.

The case for the Petitioner is as follows;

I. That no Initial Environmental Examination Report ["**IEER**"] or Environmental Impact Assessment Report ["**EIAR**"] was prepared prior to the 8th respondent commencing its project in 2007 to construct a thermal power station in Chunnakam.

II. That the 8th respondent had increased the power generation capacity of its thermal power station to 24MW in 2010 but that no EIAR was prepared even at that stage.

III. that the 8th respondent's thermal power station uses "heavy oil" to fire its generator sets and complains that "the disposal of petroleum wastage" from the 8th respondent's thermal power station has caused "massive environmental pollution" by the oil contamination of groundwater and wells and other water sources in the Chunnakam area, including the water intake well used by the NWSDB to supply pipe-borne water in the area.

IV. The petitioner plead that, in 2013 and 2014, the NWSDB had tested groundwater obtained from wells within the Chunnakam area and detected that the Oil and Grease content of well water in the Chunnakam area was "considerably above the permissible level" in an area up to 1.5 kilometres around the 8th respondent's thermal power station.

V. The petitioner accused the respondents of having "failed to take effective steps to resolve the [aforesaid] issues" and also accuses the CEA of colluding with the 8th respondent and permitting the 8th respondent's thermal power station to operate until 09th October 2014 without an Environmental Protection License ["EPL].

VI. On the aforesaid basis, the petitioner pleaded that the respondents have violated the fundamental rights guaranteed by Articles 12 (1) and 12 (2) of the Constitution to citizens of this country who reside in the Jaffna Peninsula and the petitioner.

Thereafter this Court granted the petitioner leave to proceed under Article 12(1) of the Constitution and directed the 8th respondent to stop the function of generating electrical power at its thermal power station until the conclusion of this application.

The case for the Respondents

The Respondents denied the said charges, and severally and jointly stated inter-alia as follows;

I. That electricity services in the Jaffna peninsula had been disrupted during the war and that, while the war was underway, the 8th respondent commenced constructing its thermal power station in **2007**, in order to provide electricity to the residents of the Jaffna peninsula,

II. That the 8th Respondent's thermal power station generated only 15 MW and, consequently, there was no requirement for an IEER or an EIAR to be conducted under Part IV C of the National Environmental Act prior to the 8th respondent commencing its project in **2007**,

III. That the 8th respondent had operated its thermal power station in Chunnakam with the necessary approvals and Environment Protection Licenses.

IV. That the 8th respondent applied for an EPL in **2009** and that the CEA inspected the 8th respondent's thermal power station on **27th October 2009** and issued an EPL for the period from **20th May 2010** to **19th May 2011**.

V. That subsequent EPLs were issued by the BOI since the 8th respondent's project was approved by the BOI and the BOI is statutorily empowered to issue EPLs with the concurrence of the CEA. Thus, the BOI has issued the EPL marked "10R5" for the period from **15th September 2011** to **14th September 2012**, the EPL marked "10R10" for the period from **17th April 2013** to **16th April 2014** and the EPL marked "P23" for the period from **20th September 2014** to **29th September 2015**.

VI. That the CEA and other relevant institutions "continuously conducted inspections pertaining to alleged oil contamination of water in the Chunnakam area" and that EPLs were issued to the 8th respondent "since it has been found by such inspections

that any contamination cannot be definitively traced to the activities of the 8th Respondent."

VII. Further, Several environmental pollution reports were marked by the 8th Respondent in support of its denial of polluting the area in question, including reports by the Industrial Technical Institute dated **24th July 2015**, Norwegian Geotechnical Institute for the National Building Research Organization dated **23rd June 2015** and Water Resources Board dated **September 2015**.

VIII. The respondents state that they have duly performed their duties and responsibilities.

IX. That the 8th respondent cannot be held solely responsible for any pollution of groundwater which may have occurred in the past, details of which have been suppressed by the Petitioner,

X. That, on **30th September 2014**, the CEA imposed a condition that the 8th respondent must obtain a Scheduled Waste Management License

Issues decided by this Court

1. **Whether the 1st to 7th respondents [or any of them] were required to obtain and consider an IEER or EIAR prior to the 8th respondent commencing the project to construct a thermal power station in 2007 or at some time thereafter during the operation of the thermal power station and, if so, whether the 1st to 7th respondents [or any of them] have failed to perform their statutory and regulatory duties in that regard?**

Firstly, it was undisputed among parties that the Chunnakam Power Project was a prescribed project, which requires approval under **Part IV of the Act** as well as **Regulations No. 1 of 1993**.

Part IV C of the **National Environmental Act** as well as the procedure set out in **National Environmental (procedure for approval of projects) Regulations No. 1 of**

1993 stipulate that the submission and consideration of an IEER or EIAR is only necessary for prescribed projects listed in the said Regulation No.1 of 1993, which require the approval of the "project approving agency".

Section 23 BB (I) in Part IV C of the said Act stipulates that the "project approving agency", in this case, the CEA/BOI must require a project proponent to submit an IEER or an EIAR, and which type of report required in the first instance. According to Regulation No. 1 of 1993, the approving agency in consultation with the CEA can decide whether it is an IEER or an EIAR depending on the project.

Further, **Section 33 of the Act** stipulates that an IEER is a written report assessing whether a prescribed project has a significant impact on the Environment. If the impact is significant, then the preparation of a more detailed EIAR is required which is a comprehensive report which provides a cost-benefit analysis.

According to Section 23 BB (2) to (5) in Part IV C, once an EIAR is submitted, the Public is notified and given an opportunity to inspect the said EIAR and have their views and comments heard. Thereafter the notice of approval is published. If the project requires an IEER only, then the IEER is treated as a public document.

The Court held that the above provisions establish that an IEER/EIAR is **essential** for a project approving agency to consider granting approval and as per the said Regulations should be submitted as early as possible.

Thereafter, Court analysed Item **No. 9 of Regulation No. 1 of 1993**, and surmised that only construction of thermal power plants having capacity exceeding 25 MW or a capacity addition to existing plants which increases their overall capacity to over 25 MW are regarded as prescribed projects. Perusal of the documents tendered to court by the various parties revealed that although the said power plant operated at 15 MW at inception and didn't require a IEER/EIAR, the 8th Respondent made **capacity additions on or about late 2013** which took its power generation capacity over 25 MW which made it a "prescribed project". At this point an IEER/EIAR submission and subsequent

approval was required, which hadn't been sought by the 8th Respondent. In addition, it was revealed that neither the CEA and/or BOI had taken any action against the 8th Respondent despite this glaring violation on its part.

In the said circumstances, Court concluded the 8th Respondent was required to submit an IEER/EIAR and obtain approval from the CEA/BOI subsequent to the capacity addition to its Power Plant which it didn't, and that the CEA/BOI thereby failed to perform its duties in this regard

2. **Whether the 8th respondent was prohibited by law, from operating its thermal power station without the authority of an EPL and, if so, whether the 1st to 7th respondents [or any of them] have failed to perform their statutory and regulatory duties in that regard?**

   Section 23A (2) of Part IV A of the Act stipulates that no person shall carry out a prescribed activity without obtaining an EPL from the CEA.

   Further, **Item 73 in Part A of Regulation No. 1 of 2008** sets out the revised list of 'prescribed activities' for which an EPL is required under **23A of the Act**, and declares that **"Electric Power generating utilities except standby generators, wind power and solar power are prescribed activities"**. Therefore it is clear that the 8th Respondent was prohibited from operating its thermal power station without obtaining an EPL either from the **CEA as per the National Environmental Act or the BOI in consultation with the CEA as per Board of Investment of Sri Lanka Law No. 4 of 1978**.

   Further, **Clause 2 in part I of Regulation No. 1 of 2008 and Clause 14** both stipulate that an EPL has to be obtained prior to commencing any activity.

   In addition, **Clause 7 of the said Regulation** states that an EPL should be issued only if CEA is satisfied that the 8th Respondent will not contravene the provisions of the Act and any regulations made thereunder; that is, the CEA has to make sure that no irreversible

damage or hazard to the environment or any person occurs and adequate steps have been taken for the protection of the environment in accordance with the law.

The above provisions make it clear that obtaining an EPL is an essential prerequisite when carrying out any prescribed activity.

Thereafter, examination of documents tendered to court by the various parties inter-alia revealed the following;

I. That the 8th Respondent's power plant was first issued a EPL by CEA on **20th May 2010**, and subsequent EPLs were issued by the BOI,

II. That the 8th Respondent had commenced and operated the power plant for over 5 months without an EPL between **10th December 2009 – 20th May 2010**,

III. That thereafter, the 8th Respondent operated the said plant without a valid EPL on several occasions,

IV. That the CEA and BOI had done nothing to prevent this violation of the law, and had not looked into several complaints made by residents in proximity to the said power plant,

V. That the CEA and BOI only required the 8th Respondent to obtain a Scheduled Wastes Management License for the power plant in 2014, nearly 5 years after commencing its operations.

In the said circumstances, the court held that the 8th Respondent had operated its power plant without a valid EPL in violation of the law on several occasions, with the CEA and BOI failing to perform their statutory and regulatory duties.

3. **Whether wastewater and petroleum waste products discharged from the 8th respondent"s thermal power station has caused oil contamination and pollution of groundwater and soil in the area?**

In answering issue III, the Court observed from the reports and other documents tendered to Court that it is clear and establishes that, from 2008 to 2012, the 8th respondents'

thermal power station had been discharging oil contaminated wastewater onto an adjoining land and has, thereby, caused oil contamination of groundwater in a large area of land around the Chunnakam Power Station Complex and also caused oil contamination of soil in the vicinity of the 8th respondents' thermal power station. Further, during this period, the waste management system, procedures and practices in the 8th respondents' thermal power station have been inadequate and there was a likelihood that leakages of oil from machinery and inadvertent spillages of oil within the 8th respondents' thermal power station would have been washed out on to adjoining lands via the drainage system and also permeated into the soil within the 8th respondents' premises and, thereby, caused further oil contamination of groundwater and soil in the area.

The material before the Court in the reports marked "P21", "2R9"," "2R14","8R5","8R6" and "10R7" indicated that, the operations of the CEB's Chunnakam Power Station has been a significant cause of oil contamination of groundwater and soil in the Chunnakam area until that thermal power station was decommissioned in or about 2012-2013. The operations of Aggreko's thermal power station also appear to have caused some extent of oil contamination of the surrounding environs. The very large quantity of fuel oil/diesel which flowed out of the two oil tanks damaged in 1990-1991 and the oil kulam which formed on the land near the CEB"s Chunnakam Power Station were also significant causes of oil contamination of groundwater and soil in the Chunnakam area.

Consequently, court held that the 8th respondent is certainly not the sole cause of oil contamination of groundwater and soil in the Chunnakam area. There were several actors and causes for that pollution.

But, quite obviously, where there was clear evidence to establish that the 8th respondent caused oil contamination of groundwater and soil, the fact that there were other polluters who did the same, did not give the 8th respondent the license to pollute and does not absolve 8th respondent from being held accountable for the pollution it caused. Similarly, fact that there were other polluters did not entitle the CEA and the CEB to fail to perform

their statutory duties and responsibilities with regard to enforcing the law in respect of the operations of the 8th respondents' thermal power station.

4. **Whether such failure on the part of the 1st to 7th respondents [or any of them] to perform their statutory and regulatory duties in respect of the matters referred to in the aforesaid three issues has violated the fundamental rights guaranteed to the residents of the Chunnakam area and the petitioner by Article 12 (1) of the Constitution?**

   As per the Act, the CEA has the power, function, duty and responsibility to, inter alia, require: the submission of proposals for new projects and changes in existing projects for the purpose of evaluating their impact on the environment; to regulate, maintain and control sources of pollution of the environment; to coordinate all regulatory activities relating to the discharge of waste and pollutants into the environment; and to protect and improve the quality of the environment. When the BOI acts under the provisions of the Board of Investment of Sri Lanka No. 4 of 1978, as amended, and exercises and performs powers, duties and functions conferred on or assigned to the CEA by the National Environmental Act, the BOI has the same powers, functions, duties and responsibilities. None of the other respondents have such duties and responsibilities vested in them.

   Further, as mentioned above, it is already established that the CEA and BOI failed to fulfill their statutory and regulatory duties with regards ensuring that the 8th Respondent had submitted an IEER/EIAR before increasing its power generating capacity to over 25 MW in 2012, for failing to ensure that the 8th Respondent had a valid EPL several times during its operation of the said power plant and for their belated realization that the nature of the said power plant required a Scheduled Waste Management License.

   The Court cited the judgment of *Amerasinghe J*. in **Bulankulama vs. Ministry of Industrial Development 2000 3 SLR 243** which highlighted the purpose of Environmental Impact Assessment in sustainable development, and went on state the

importance of an EIAR to both the "Prevention Principle" and "Precautionary Principle", two important doctrines of Environmental Law.

The Court thereafter referred to several principles of the **Rio Declaration of Environment and Development of 1992**, namely **Principle 10** which highlights the importance of public participation at all levels when environmental issues are handled, **Principles 1 & 4** which enshrine sustainable development as the most equitable means of achieving economic development and **Principle 17** which enshrines the EIAR as a national instrument when it comes to development as well as the Doctrine of Public Trust and relevant case law to illustrate the nature and scope of the environmental pollution and the damage done to the lives of the residents of Chunakkam by the failure of the CEA and BOI to discharge their statutory and regulatory duties and obligations in this instance. The Court was of the view that although these principles are soft law, their relevance and importance should be recognized.

Further, this court also cited the judgment of *Tilakawardena J.* in **Wijebanda vs. Conservator General of Forests** where it was held that a right to a clean environment and principle of inter-generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading **of Article 12(1) of the Constitution**, and further added that **Article 12(1) should also be read together with Article 27(14) of the Constitution** which vests in the citizens of Sri Lanka a fundamental right to be **free from unlawful, arbitrary or unreasonable executive or administrative acts or omissions which cause or permit the causing of pollution or degradation of the environment**.

In light of these observations, court decreed that the failure of the CEA and BOI to perform their statutory duties and obligations towards the residents of Chunnakam spanning several years amounts to a breach of Public Trust reposed in them, and directly contributed to the significant pollution of the groundwater in the Chunnakam area due to the activities of the 8th Respondent's power plant, and that thereby the actions and

omissions of the CEA and BOI **have violated the fundamental rights guaranteed to the residents of the Chunnakam area and the petitioner by Article 12 (1) of the Constitution.**

5. **Whether the continued operation of the 8th respondent‟s thermal power station will cause further oil contamination and pollution of groundwater and soil in the area?**

   In answering this issue, it was found that the level of oil contamination of groundwater in the Chunnakam area has shown a trend of declining from **2012** onwards. In these circumstances, it was reasonably concluded that the resumption of operations of the 8th respondents' thermal power station [which have been suspended from **27th January 2015 onwards**] is unlikely to cause further contamination or pollution of the surrounding environs provided it is ensured that the laws and regulations described herein are complied with at all times in the future.

Orders

A declaration to the effect that the CEA and BOI have violated the fundamental rights guaranteed by **Article 12(1) of the Constitution** to the residents of the Chunnakam area and the Petitioner was made, but the 8th Respondent's thermal power station was allowed to resume operations under strict conditions for the first two years and thereafter, as per the prevailing law, especially in light of the prevailing need for additional electrical power generating capacity in the region. Further, the Court applied the principle of environmental law of "**Polluter Pays**", which is also reflected in **Principle 16 of the Rio Declaration**, and has been oft cited and applied in several cases such as **VELLORE CITIZENS WELFARE FORUM vs. UNION OF INDIA**, and several later cases such as **S. JAGANATH vs. UNION OF INDIA [AIR 1997 SC 811]**, **M.C. MEHTA vs. KAMALNATH [1997 1 SCC 388]** and **RAMJI PATEL vs. ANGRIK UPBHOKTA MARG DHARSHAK MANCH [2000 3 SCC 29]** where the Indian Supreme directed the polluter to pay compensation, and Sri Lankan cases such as **WIJEBANDA vs. CONSERVATOR GENERAL OF**

FORESTS and **BULANKULAMA vs. MINISTRY OF INDUSTRIAL DEVELOPMENT** where the same principle was applied, and in terms of **Article 126(4) of the Constitution**, directed that the 8th respondent pay compensation in a sum **of Rs. 20 million (Up to Rs. 40,000 paid to the chief householder of affected families depending on the level of contamination of ground water)** through the setting up of a special fund to offset at least a part of the substantial loss, harm and damage caused to the residents of the Chunnakam area by the contamination of groundwater in the Chunnakam area and of soil in the vicinity of the 8th respondent's thermal power station.

3. SC APPEAL 196/2011 – SAMPATH BANK PLC VS. KALUARACHCHI S. PALITHA

In this case, the Supreme Court held that acknowledgment of debt does not have to be unqualified to come under the purview of Section 12 of the Prescription Ordinance, and further, attempts answer with question of law as to when the prescriptive period in relation to overdraft facilities commence – Last overdrawn Theory – Demand Theory

Before: Buwaneka Aluwihare PC. J. L.T.B. Dehideniya. J. and Murdu N.B.Fernando, PC. J.
Counsel: Chandaka Jayasundera PC with Vishmi Fernando instructed by P. Wickremasekara for the Plaintiff-Respondent-Appellant.
Rohan Sahabandu PC with Ms. Hasitha Amarasinghe for the DefendantAppellant-Respondent.
Decided on: 09.09.2019

Judgment of Murdu N.B. Fernando, PC. J – Affirmed by others:

Introduction

The Plaintiff-Respondent-Appellant (Plaintiff), Sampath Bank PLC came before the Supreme Court in this matter being aggrieved by the Judgment of the Civil Appellate of HC Kandy dated **04.10.2011** setting aside the judgment of the District Court of Kandy dated **14-09-2009** wherein the relief claimed by the plaintiff was granted.

Previously, the Plaintiff had instituted action against the Defendant, Kaluarachchi Sasitha Palitha on **26.02.2004** in the District Court of Kandy claiming a sum of **Rs. 1,426,433.93/- plus interest** on an overdraft facility granted by the Plaintiff to the Defendant. The Defendant pleaded that the claim of the Plaintiff is prescribed under Section 7 of the Prescription Ordinance as the plaint to recover the debt was filed after 3 years and 1 month which is 1 month over the prescriptive period as per the said section. Nevertheless, the Defendant in his answer had acknowledged obtaining the said overdraft through a letter addressed to Manager of Sampath Bank Kandy dated **25.12.2002** (P5) in response to the Letter of Demand sent by the Bank dated **12.12.2002**.

In the said circumstances, the District Court of Kandy gave a judgment dated **14-09-2009** in the Plaintiff's favour stating that as the Defendant acknowledged the debt, he is thereafter estopped from claiming prescription.

The Defendant appealed the said judgment in the Civil Appellate HC Kandy, and the CA HC Judge set aside the DC Kandy judgment dated **04.10.2011** stating that prescription begins from Letter of demand and the letter of acknowledgement (P5) in this instance cannot be treated as unqualified acknowledgment of debt – CA HC Judge relied on **Hoare and Co. vs Rajaratnam 34 NLR 219**, and further stated through P5, the defendant not only acknowledged the debt, asked the Plaintiff to reschedule the sum as a loan. That therefore the said acknowledgement is not unqualified.

The Plaintiff thereafter appealed the judgment of CA HC Kandy and came before the Supreme Court, where special leave was granted by the Supreme Court dated **08.12.2011** on two questions of law;

1. **Where a bank has granted an overdraft facility when does the prescriptive period commence?**
   (a) From demand or
   (b) From the date of the grant of the last overdraft facility
2. **Does the conditional acknowledgement of the debt come within the purview of Section 12 of the Prescription Ordinance?**

<u>The Plaintiff's position</u>

The Plaintiff's position was that Prescription begins on demand, and the Plaintiff relied on Paget's Law of Banking and the COA Judgment of **Wigneswaran J. in Gunawardena vs. Indian Overseas Bank 2001 2 SLR 43** to buttress his case.

The Defendant's Position

The Defendant on the other hand was of the view that Prescription begins from the date of grant of the last overdraft facility. The Defendant relied on the Supreme Court Judgment of **Hatton National Bank Ltd. vs. Helenluc Garments 1999 2 SLR 365**, and Weeramantry on Law of Contracts as well as Chitty on Law of Contracts. The Defendant stressed that Gunawardena vs. Indian Overseas Bank was decided a few months after the decision in Helenluc, and thereby was decided per incuriam.

The SC in its Judgment first answered the 2nd Question of law as follows;

Firstly the Court considered whether an acknowledgement of debt comes under **Section 12 of the Prescription Ordinance**.

Section 12 is very clear – if an acknowledgment is made or contained in writing signed by the party chargeable, it shall be deemed evidence of a new or continuing contract. This would take the case out of the prescriptive period under **Sections 6, 7, 8, 10 or 11**.

This case falls under **Section 7** as it is an overdraft facility with no formal documents; thereby **Section 7 read with Section 12** takes this case out of the prescriptive period.

Further the court held that the case of Hoare and Co. vs. Rajaratnam (supra) relied on by the CA High Court of Kandy to state that there was no unqualified acknowledgment of debt was a case where the facts were different to this case. In Hoare, an extension to pay the debt was sought, which was refused. It was held that the party which refused the said extension could not thereafter rely on it to claim an acknowledgement of debt. In the said circumstances, the Supreme Court concluded that P5 was a clear acknowledgment of debt and comes within the purview of **Section 1**2 of the Prescription Ordinance.

Further, it held that **Section 12** only speaks of "acknowledgment of debt", and doesn't speak of "unqualified" or "unconditional", and held that the High Court Judge had been erroneous when he went beyond mere acknowledgment. The Court relied on several judgments given below in support of the same;

i. **Perera vs. Wickremaratne 43 NLR 141 – Letter of acknowledgment sufficient, and the dicta in this case stated that acknowledgment need not be unqualified or unconditional, can be qualified and conditional**

ii. **Rampala and others vs. Moosajees Ltd. and another 1983 2 SLR 441 – same as above**

iii. **Peoples Bank vs. Lokuge International Garments Ltd. 2010 BLR 261 – In this matter the prescription was renewed when the liability was admitted.**

iv. **Saparamadu vs. Peoples Bank 2002 2 SLR 15 – In this case, part payment or acceptance of sum due renewed the prescription.**

The Court answered the 1st question of law as follows;

This Court in attempting to answer the 1st question of law, analysed the judgments in both Hatton National Bank Ltd. vs. Helenluc Garments (supra) and Gunawardena vs. Indian Overseas Bank (supra)

This Court stated that both High Court and District Court Judgments has relied on the Helenluc case, but had come to different findings.

Hatton National Bank vs. Helenluc Garments (Supra)

In the abovementioned case, Helenluc Garments had obtained an overdraft from Dubai Bank in 1982. The said OD facility was secured by a hypothecary band and a guarantee by the directors of Helenluc. In May 1996, Dubai Bank's assignee, Hatton National Bank instituted action against Helenluc based on a Letter of Demand 6 days prior. The Court held in appeal that although the prescriptive period of the Hypothecary Bond had lapsed, action could proceed against the directors as guarantee bond had an express term not to plead prescription.

Further, the said judgment quoted Weeramanthry's Laws of Contract as well as Chitty's Laws of Contract and held that in instances such as overdrafts, the contract comes into effect on acceptance by the Bank, and that other factors such as acknowledgment, part payment, re-scheduling, novation, cancellation would act to change the character or relationship between

the parties. In such circumstances, it held that matter such as this depend on the facts and circumstances of each case. Thereby the judgment concluded by stating that in the absence of formal documents pertaining to granting of the overdraft facility, prescription runs from the date of granting of final facility.

Gunawardena vs. Indian Overseas Bank (supra)

In the abovementioned case, a business named AMK agency (5 partners) had been issued trust receipts and overdraft facilities, and it was held by Wigneswaran J. in this case that a question of prescription doesn't arise as there is an acknowledgment of debt. It was only in the Dicta of the case that Wigneswaran J. had mentioned the demand theory as opposed to the last overdrawn theory.

Conclusion

In the said circumstances, the Supreme Court in the current case stated that both High Court and District Court Judgments has relied on the Helenluc case, but had come to different findings. The trial judge had followed Helenluc, but decided the matter on acknowledgment of debt, while the Civil Appellate Judge had reversed the judgment of the trial judge on two grounds, namely, erroneously holding that the trial Judge failed to follow the Judgment Helenluc, and by also erroneously holding that the letter P5 was not an unconditional acknowledgment of Debt.

The Supreme Court further held that Helenluc and Gunawardena Judgments don't conflict as the former was decided on the last overdrawn theory, while the latter was decided on an acknowledgment of debt.

The Court further stated that although the law in Sri Lanka (Prescription Ordinance) and related case law favour the last overdrawn theory, modern banking practices such as continuing guarantees require updated laws based on the demand theory, but that it is a matter for the Legislature.

Finally the Court held that as there is a clear acknowledgment of debt as per the 2nd Question of law, the Court doesn't need to decide to any finality on the 1st Question of law. It further stated that any decision on the 1st question of law in future cases of this nature would depend on the facts and circumstances of each case.

Thereby the Judgment of the Civil Appellate High Court of Kandy was set aside and the Judgment of the trial Judge in the District Court was affirmed.

4. SC APPEAL 171/2015 – SRI LANKA SAVINGS BANK LTD. VS. GLOBAL TEA LANKA PVT. LTD. AND 2 OTHERS

Law of Civil Procedure - list of witness, Sec.121 - 'date of trial' - Sec. 80 of the CPC – In this matter the Supreme Court held that a party can take steps to comply with the provisions of Section 121 only after Section 80 is complied with by Court.

Before: *Sisira J. De Abrew j, Vijith K. Malalgoda PC J and P. Padman Surasena J.*
Counsel: *M U M Ali Sabry PC with Shehani Alwis for the Plaintiff - Appellant.*
S A Parathalingam PC with Riad Ameen for the Defendant – Respondent
Decided on: 12th June 2019

Judgment by P. Padman Surasena J – affirmed by others:

Introduction

The Plaintiff - Appellant (hereinafter sometimes referred to as the Plaintiff) filed in the Provincial High Court of Western Province holden in Colombo, a plaint seeking to recover a sum of money mentioned in the said plaint form the Defendant - Respondents (hereinafter sometimes referred to as the Defendants).

The Defendants filed their answer on **01-11-2011**. Thereafter, the case was fixed for Plaintiff to file its replication, and fixed the case for trial for **08-05-2012**. The Appellant complying with the said order had filed the replication together with a motion on **03-02-2012**. In the said motion, an application was made to court to have the already fixed trial date changed due to a personal difficulty of the counsel for the Appellant.

The case was called in open court on **24-02-2012** to enable the learned counsel for the Appellant to support the said motion. Thereafter, the Court with the concurrence of the parties ordered the case to stand out of the list of trials scheduled for **08-05-2012** and re fixed the trial of the case for **08-06-2012**.

The appellant filed its list of witnesses on **22-05-2012** and also filed two additional lists of witnesses on **28-05-2012** and **04-07-2012**. When the case was taken up for trial on **08-06-2012**,

the Court had ordered the parties to file written issues within four weeks and postponed the trial for **20-09-2012**.

Subsequently, when the case was taken up on **20-09-2012** parties had moved for a postponement to explore the possibility of a settlement. The Court had then granted the requested postponement. However, as the parties had not been able to arrive at a settlement the court had thereafter fixed the case for trial for **29-07-2013**.

When this case was taken up for trial on **29-07-2013**, the Defendants had raised an objection to the production of the documents annexed to the affidavit dated **25-11-2012**. The Plaintiff was seeking to file the said affidavit along with documents as his evidence in chief. The objection raised by the Defendants was on the premise that the Plaintiff has failed to comply with the provisions in section 121 of the Civil Procedure Code. It was the position of the Defendants that the Plaintiff had failed to file the list of witnesses fifteen days prior to the first date of trial. The Learned High Court Judge having considered the matter had delivered his order dated **11-07-2014** upholding the said objection raised by the Defendants. It is the said order that the Plaintiff seeks to canvass before this Court in this appeal.

Issues

This Court by its order dated **09-10-2015** has granted leave to appeal in respect of the following questions of law;

I. Is the order dated **11-07-2014** pronounced by the learned Provincial High Court Judge (produced marked "P-11") contrary to the legal provisions contained in **Section 121 of the Civil Procedure Code**?

II. Has the learned Provincial High Court Judge failed to consider the fact that the Court had taken the case off the list of trials scheduled for **08.05.2012** and re-fixed the trial for **08.06.2012**?

III. Has the learned Provincial High Court Judge misdirected himself in law when he considered the date **08.05.2012** as the first date fixed for trial despite the learned High Court Judge had

taken the case out of the list of trials scheduled for that date and re-fixed the trial date to be **08.06.2012**?

Plaintiff's and Defendant's Positions

The Defendant's position is that the date of trial first fixed in this case is **08-05-2012.** However, the Plaintiff argues that the date of trial first fixed in this instance must be taken as **08-06-2012.** It is therefore the position of the Plaintiff that it has duly filed its list of witnesses fifteen days before that date (**i.e. 08-06-2012**). It is on that basis that the Plaintiff argues that he has complied with **Section 121 of the Civil Procedure Code**.

Order

This court first analyzed **Section 121 of the Civil Procedure Code**, which does not refer to any "date of trial first fixed" or "first date of trial" but only refer to "the date fixed for the trial of an action". Thus, the task of this Court in this case would be to decide whether 'the date fixed for the trial of this action' in the light of the aforesaid circumstances is **08-05-2012** or **08-06-2012** for the purpose of calculating fifteen days referred to in **Section 121(2) of the Civil Procedure Code**.

The Court states "***Section 121(1)*** *is a provision made available to enable the parties to obtain summonses to persons whose attendance is required either to give evidence or to produce documents at the hearing. If a list of witnesses or a list of documents were not filed in Court then no party would be able to invoke the provision in* ***Section 121(1)****. Hence, it is necessary to specify a time limit for filing any list of witnesses or any list of documents in Court. That is what* ***Section 121(2) of the Civil Procedure Code*** *has done.*"

"*Thus, the sole purpose of this section is to provide for a framework upon which the Court will be able to commence the trial on the previously fixed date without any hindrance. Therefore, if the Court is in a position to proceed with the trial without any hindrance when it takes up the case for the trial on 'the date fixed for the trial of the action' with the list of witnesses or a list of documents being filed*

in Court fifteen days before the said 'date fixed for the trial of the action' then the purpose of ***Section 121(2)*** *is achieved."*

Further, Court also considered the provisions of **Section 80 of the Civil Procedure Code** to ascertain under what circumstances a court could fix a case for trial. **Section 80** is reproduced below;

Section 80

"On the date fixed for the filing of the answer of the defendant or where replication is permitted, on the date fixed for the filing of such replication, and whether the same is filed or not, the court shall appoint a date for the trial of the action, and shall give notice thereof, in writing by registered post to all parties who have furnished a registered address and tendered the cost of service of such notice, as provided by sub section (2) of section 55."

Thus, it can be seen that no specified trial date could exist before the Court appoints a date for the trial of the action in terms of **Section 80**. Therefore, it is clear that a party will have to necessarily take steps to comply with **Section 121(2)** after the Court completes appointing a date for the trial of the action as per **Section 80**.

Moreover, it is important to observe that the date fixed for the Plaintiff to file its replication was **18-01-2012.** Thereafter, the Court having granted the Plaintiff further one week for the filing of its replication with notice to the Defendants, had proceeded at the same time to appoint the date **08-05-2012** for the trial of the action. Thus, it is obvious that neither party was in a position to invoke the provisions of **Section 121(1)** until the filing of the replication by the Plaintiff.

The Plaintiff as per the above order indeed filed its replication together with a motion on **03-02-2012.** It was in the said motion, that the Plaintiff had moved court to have the already fixed trial date **(08-05-2012)** changed due to a personal difficulty of the counsel for the Appellant. Thus, it is clear that neither party could have reasonably thought that the already appointed trial date **(08-05-2012)** would continue to be the date appointed for the trial of the action. Further, it is clear that both parties agreed on **24-02-2012** for **08-06-2012** to be the date of trial, and

thereafter court struck this case off the list of trials scheduled for **08-05-2012.** In the said circumstances, it is clear that the date of trial is **08-06-2012**, and the appellant had clearly filed its list of witnesses on **22-05-2012** and also filed two additional lists of witnesses on **22-05-2012** and **04-07-2012** not less than fifteen days before he date appointed for the trial of the action. Therefore court held that there is no basis to hold that the appellant had violated the time limits specified in the **Section 121(1) of the Civil Procedure Code**.

Conclusion

In these circumstances and for the foregoing reasons, this Court held that the learned Provincial High Court Judge has erred when he had decided to uphold the objection raised by the Defendants. Therefore, this Court answers in the affirmative all three questions of law in respect of which this Court had granted leave to appeal.

5. SC WRIT NO. 01/2011 – ANOMA POLWATTE VS. DIRECTOR GENERAL OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF BRIBERY OR CORRUPTION AND OTHERS

In this matter it was held by the Supreme Court that powers of the bribery commission can be exercised by one member, functions of the commission can only be exercised by the full complement of members. Thereby it was held that a Section 11 directive to file proceedings need to be signed by the full complement.

Before: *B.P. Aluwihare PC J, H. Nalin J. Perera J and Vijith K. Malalgoda PC J*
Counsel: *Sanjeewa Jayawardane PC with Rajiv Amarasooriya for the Petitioner*
Dilan Ratnayake DSG, with Ms. Thusitha Jayanetti for Respondents

Judgment on: 26.07.2018

Judgment by Vijith K. Malalgoda PC J- affirmed by others:

Introduction

The Petitioner filed the present application before this court, seeking mandates in the nature of Writs of Certiorari, Prohibition and Mandamus as against the Respondents acting in terms of **Article 140 of the Constitution** read with **Section 24 (1) of the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994** and consequential interim orders referred to in the prayer to the application. The matter was supported for leave on **29th March 2011**, and the court decided to grant leave but no interim relief was granted as prayed for by the Petitioner, since the learned State Counsel who represented the Respondents had given an undertaking that no further action will be taken with regard to the matter until the court made a ruling.

The Petitioner who is a Class I officer of the Sri Lanka Administrative Service was charged before the Chief Magistrate's Court of Colombo on **16.11.2010** in respect of a Bribery case bearing **No. 60 147/01/ Bribery**. The said charges were based on an allegation of payment of compensation with regard to a land during the road expansion of the Katugastota-Kurunegala Highway.

Petitioner's position

In the Petition filed before this court, the Petitioner had averred several grounds in challenging the decision of the Commission to Investigate Allegations of Bribery and Corruption to prosecute the Petitioner under the provisions of the **Bribery Act; (under Section 70)** and the said grounds can be summarized as follows;

a) There is a clear issue of patent ultra vires on the part of the 1st Respondent in her decision to execute the directive of the Commission, at a time when the Commission had ceased to have a legal existence.

b) There is no provision for the continuance of any prosecution by the 1st Respondent in the absence of the Commission.

c) The Bribery Act and amendments there to clearly provides a prohibition against the entertainment of any prosecution which is unaccompanied by the distinct sanction required by law.

Respondents Position

The 1st and the 2nd Respondents took up the position that the Magistrate's Court action against the Petitioner had been lawfully instituted **under Section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994**. A true copy of the said directive, a photocopy of a journal entry which had been signed by a purported member of the commission dated **02.03.2010** was filed to court.

Order

In order to consider the validity of the said directive within the meaning of **Section 11 of the Act**, Court considered the provisions in **Section 2(8), Section 3 and Section 5 of the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994**. The relevant Sections are reproduced below;

Section 2 (8)

> **The members of the Commission may exercise the powers conferred on the Commission either sitting together or separately and where a member of the commission exercise any such power sitting separately, his acts shall be deemed to be the act of the Commission.**

Section 3

> **The Commission shall subject to the other provisions of this Act, (Functions of the Commission) investigate allegations, contained in communications made to it under section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No 1 of 1975, direct the institution of proceedings against such person for such offence in the appropriate court.**

Section 5

> **For the purpose of discharging the functions assigned to it by this (Powers of the Commission) Act, the Commission shall have the power – (a) to (l)…**

When looking at the provisions of the above three provisions of the Act it is clear that by the above provisions, a clear distinction had been made between the powers of the Commission and functions of the Commission.

As identified in Section 3 referred to above, when an offence is disclosed after an Investigation, Commission shall direct the institution of proceedings and the said conduct of the Commission had been identified within the Functions of the Commission. Whereas, the powers of the Commission has been identified under Section 5 of the Act and under Section 2 (8), and such powers of the Commission may be exercised by its members either sitting together or separately. Thus according to the Sections, it is clear that the members of the Commission can exercise ancillary powers on their own even though a full complement of the Commission is not available at one given time. But for exercising functions of the Commission such as giving a direction to

be given to the Director General to institute proceedings, a full complement of members is essential.

In the present matter, as the directive filed to court had been purportedly signed by only one member of the commission, the Court concluded that **there is no valid directive made under Section 11 of the Act** to institute criminal proceedings before the Magistrate's Court, with regard to the investigations carried out by the fraud Investigation Unit of the Commission to Investigate Bribery and Corruption as against the Petitioner to the present Application.

In the said circumstances, it was concluded that the said directive is patently ultra vires and attracts the ground of illegality and thereby the said directive was quashed through a mandate in the nature of a writ of Certiorari.

COURT OF APPEAL CASES

6. CA REVISION APN 29/2018 – GOTABHAYA RAJAPAKSE VS. DIRECTOR GENERAL, COMMISSION TO INVESTIGATE ALLEGATIONS OF BRIBERY AND CORRUPTION AND OTHERS

Criminal Law - Bribery Act, Sec.78 - interpretation of statues - Sec.135 of The CCPA - In this matter it was held by the Court of Appeal that obtaining the written sanction of the Commission to Investigate Allegations of Bribery or Corruption prior to institution of proceedings before the Magistrate's Court as per the provisions of Section 78 of the Bribery Act is a "mandatory requirement".

Before: Achala Wengappuli, J. & Arjuna Obeyesekere, J.
Counsel: Romesh de Silva PC with M.D.M. Ali Sabry PC, Sugath Caldera and Ruwantha Cooray for the Accused -Petitioner-Petitioner.
Janaka Bandara SSC with, Disna Gunasinghe (Assistant Director Legal) and Thushari Dayaratne of the Bribery Commission for the Complainant-Respondent-Respondent.
Decided on: 12th September 2019

Judgment by Achala Wengappuli J. – affirmed by Arjun Obeyesekera J:

Introduction

The 1st Accused Petitioner, Former Defence Secretary Mr. Gotabaya Rajapakse invoked the revisionary jurisdiction of the Court of Appeal seeking to set aside an order made by the Provincial High Court of Western Province Holden in Colombo dated **02.02.2018** in case bearing **HCRA/02/2018** where the Petitioner had filed an application challenging the validity of an order made by the **Magistrate's Court of Colombo bearing Case No. 59287/07/06**. The Petitioner had raised a preliminary objection in the said MC Colombo case as to the jurisdiction of the said court to hear his case as no written sanction had been obtained by the Respondent (Director General of Bribery Commission) from the Commission prior to the institution of proceedings as per **Section 78 of the Bribery Act as amended**.

The Magistrate's Court of Colombo had overruled the said objection on **17.11.2017** and the Petitioner had thereafter filed a Revision application in the Provincial High Court of Colombo bearing Case **No. HCRA 02/2018** which was refused without notice on **02.02.2018**. The Petitioner thereafter filed a revision application in the Court of Appeal bearing case no. **CA APN 29/2018** dated **02.02.2018** seeking to revise and the set aside the two impugned orders.

Petitioner's position

The case for the Petitioner in **CA Revision APN 29/2018** is as follows;

1. That the **written sanction** of the Commission to investigate allegations of Bribery or Corruption (CIABOC) is a "**mandatory requirement**" prior to the institution of proceedings under the Bribery Act as per **Section 78 of the Bribery Act as amended**,
2. That thereby the Magistrates' Court cannot entertain the prosecution for an offence under the said Act without written sanction,
3. That **Section 3 of the CIABOC Act** read with **Sections 11 and 12 of the same Act** reveal that the "Commission" and the "Director General of the Bribery Commission" are two separate and distinct bodies in terms of the Bribery Act,

4. That as per the above sections,
    a. The written sanction of the Commission is mandatory for the Director General to institute proceedings under the Bribery Act, and,
    b. The authority to institute prosecution is vested exclusively with the Director General and no one else,
    c. That therefore written sanction of the commission is a mandatory requirement.
5. That the above position was affirmed by the Supreme Court in **Senanayake vs Attorney General 2010 1 SLR 149 (Decided 06.12.2010)**,

6. That in the circumstances, the absence of a written sanction by the Commission makes the pending prosecution null and void as the preliminary objection was taken at the outset.
7. Further, the learned President's Counsel for the Petitioner also brought to the attention of the Court that the wording of the Sinhala text of **Section 78(1) of the Bribery Act** is defective after the amendment of the principle enactment by **amending Act No. 20 of 1994**, giving the amendment a totally different meaning to what is intended,
8. That therefore the order of the Provincial High Court is Ex-facie illegal, and as the said amendment has made the provision of **Section 78(1)** meaningless, the Court should revert back to the position that prevailed before the said amendment was enacted.

Respondent's position

The case for the Respondent is as follows;

1. That **Section 78 (1)** contains the words "except by or with written sanction of the Commission",
2. Therefore the reference by the Respondent in its plaint filed in the Magistrates Court that such proceedings instituted with "**directions of the Commission**" is enough,

3. The above position affirmed in **Rodrigo v. Commission to Investigate Allegations of Bribery or Corruption CA/PHC/57/99 (Decided on 10.11.2011)** – Written sanction superfluous as Commission has given directions to institute proceedings in relevant Court,
4. That the Magistrates Court is bound to follow abovementioned Judgment due to the legal principle of Stare Decisis,
5. Further, that only a purposive interpretation of the Sinhala text of **Section 78(1) of the Bribery Act as amended** can give effect to the true intention of the legislature.

Interpretation of the Sinhala text in Section 78(1) of the Bribery Act

The abovementioned Sinhala text after the amendment brought by No. 20 of 1994 to 78(1) read as follows;

"අල්ලස් කොමසාරිස්වරයා විසින් හෝ තත්කාර්ය සඳහා ඔහු විසින් බලය දෙනු ලැබූ නිලධාරියකු විසින් හෝ කොමිෂන් සභාවේ ලිඛිත අනුමතය ඇතිව හෝ හැර මේ පනත යටතේ වරදක් සම්බන්ධයෙන් යම් නඩු පැවරීමක් කිසිදු මහේස්ත්‍රාත් අධිකරණයක් විසින් භාර ගනු නොලැබිය යුතුය."

This Court after perusing various judgments and interpretation texts on the subject came to the conclusion that the purpose of the **Bribery (Amendment) Act. No. 20 of 1994** is to enact certain procedural provisions and to remove the references contained in the principle enactment to the Bribery Commissioner and substitute them with references to the Commission. This Court concluded that in view of the said intent, if the Sinhala text is construed on the lines the Petitioner suggests, it would lead to absurd results, defeating the purpose of the legislature. This Court thereby adopted an "**Exceptional Construction**" in interpreting the Sinhala text of the amendment and interpreted the said text as follows;

"කොමිෂන් සභාව විසින් හෝ කොමිෂන් සභවේ ලිඛිත අනුමතය ඇතිව හෝ මේ පනත යටතේ වූ වරදක් සම්බන්ධයෙන් යම් නඩු පැවරීමක් කිසිදු මහේස්ත්‍රාත් අධිකරණයක් විසින් භාර ගනු නොලැබිය යුතුය."

Conclusion

The Court thereafter considered the primary dispute between the parties, namely the question of sanction and delivered its judgment which is as follows;

1. That Rodrigo vs. Commission to Investigate allegations of Bribery or Corruption **CA/PHC 57/2019** was decided per incurium as **Section 3 read with Sections 11 and 12 of the CIABOC Act** reveal that it is a function of the Commission to give written sanction to the Director General to institute proceedings, but that the Commission itself cannot institute action and it is a power exclusively vested with the Director General,

2. That the Judgment of Senanayake vs. Attorney General supra was pronounced **26 days after** Rodrigo vs. CIABOC supra and thereby the Magistrates Court and High Court in question should have followed the said Judgment due to the principle of Stare Decisis,
3. That as per Senanayake vs. Attorney General supra, the words "by Commission" in **Section 78(1)** become obsolete, and as the Commission cannot institute action on its own, the only logical conclusion is that the proceedings have been instituted without mandatory sanction under **Section 78(1)**,
4. That the said written sanction is a question of jurisdiction which is a fundamental legal issue and not a mere irregularity or illegality and is therefore not curable,
5. That **Section 436 of the Code of Criminal Procedure Act No. 15 of 1979** as amended is not applicable in this instance,
6. That in the said circumstances, this Court set aside both impugned orders of the Magistrates Court and High Court for want of Juridisction and directed to discharge the Petitioner and others from **MC Colombo Case bearing 59287/10/16**,
7. This Court further stated that its determination herein does not act as a bar to initiate Criminal prosecution afresh.

7. CA PHC 51/2013 (HC HAMBANTOTA 19/2010/RE, MC WALASMULLA 10076/09) MALKA SIRIWEERA AND ONE OTHER VS. OIC SCDB TANGALLE

Code of Criminal Procedure - Sections 136(1), 456 - Time Bar - Right of Prosecution – fair trial – right of prosecution.

In this matter the Court of Appeal analysed Sections 115, 136(1) and 456 of the Criminal Procedure Act and held that it is only when action is filed under 136(1) that proceedings are instituted, and therefore the prosecution of the Appellants is time barred in terms of section 456 of the Code of Criminal Procedure Act.

Before: *K.K. Wickremasinghe J., Janak De Silva J.*
Counsel: *Jacob Joseph with Sandamali Wijesekera for the Accused-Petitioners-Appeliants*
Nayomi Wickremasekera SSC for the Complainant-Respondent-Respondent
Decided on: 28.10.2009
Judgment of Janak De Silva J. - affirmed by K.K. Wickremasinghe J:

Introduction

This case was an appeal against an order dated **14.05.2013** made by the learned HC Judge of the High Court of Hambantota holden in the Southern Province. The facts of the case are follows;

i. Virtual complainant, Pujitha Suraweera complained to the SCDB Tangalle on **03.10.2008** that a forged deed bearing **no. 5506** had been purportedly executed by his deceased mother in relation to her ancestral property.

ii. The said deed was executed dated **08.04.1989** and his mother had died prior to its execution on **12.10.1988**.

iii. Facts were reported to the Magistrates Court of Walasmulla under **Section 115 of the Code of Criminal Procedure Act (Code**) dated **06.03.2009** and further reports were filed on **06.04.2009.**

iv. Subsequently the Appellants (complainant's sisters) were arrested and produced on **04.05.2009**, and charges were thereafter filed under **Sections 454, 457 and 459** of the **Penal Code** on **12.10.2009**.

v. When the matter was taken up for trial on **10.05.2010**, the appellants took a preliminary objection that the charges preferred against them were time barred (**Section 456 of Code**).

vi. The Learned Magistrate of MC Walasmulla overruled the said objections, and the resulting revision application to the High Court of Hambantota was also dismissed.

vii. Thereafter the appellants appealed to this Court.

Analysis of Section 456 of the Code

Firstly this Court considered the provisions of **Section 456 of the Code**, which is reproduced below;

Period of prescription for crimes or offences.

456. The right of prosecution for murder or treason shall not be barred by any length of time, but the right of prosecution for any other crime or offence (save and except those as to which special provision is or shall be made by law) shall be barred by the lapse of twenty years from the time when the crime or offence shall have been committed.

According to the said section, apart from murder and treason, there is a time bar of 20 years for all other crimes or offences, which was a statutory restriction on the well founded common law principle of "**Nullus tempus occurit regi**" (time does not run against the King). The said maxim had been taken into consideration when drafting the corresponding **Sections in the Indian Code (S. 469 read with S. 473)** where the Courts are empowered to take cognizance of the facts and circumstances for the delay in each case and provide an extension of time in the interests of Justice. It is clear from the wording in **Section 456 of the Sri Lankan Code** that no such discretion is provided.

This Court further states the time limitation for crimes serve a dual purpose, namely, the interests of the State and society and the interests of the accused. The time bar ensures that the prosecution takes every effort to conclude its case early, and also ensures that the accused is not

kept in continuous apprehension. Further, as time goes by, the evidence of witnesses become uncertain and the margin for error increases, which is detrimental to the rights of the accused.

In the said circumstances, this Court stated that when interpreting **Section 456**, the Court should keep in mind **Article 13(3) of the Constitution** which guarantees any person a fair trial.

Additionally, when interpreting **Section 456**, this Court held that two issues arise, namely;

(1) What is meant by "right of prosecution"?

(2) What is the time when the crime or offence was committed?

In relation to **Issue (2)**, it was clear that the crime/offence was committed on **08.04.1989**, the date the purported deed was executed.

In answering **Issue (1)**, this Court referred to the decided case of **Queen vs. Don Louis [Ramanathan Law Reports 1863 – 1868 pg 97]**, where **Section 45 of Ordinance No. 15 of 1843**, a similar provision to **Section 456 of the current Code** was analyzed. It was held in that case that 'right to prosecution' must be taken to mean '**right to commence prosecution**'.

Further, this Court thereafter referred to the rule of interpretation which states, where there are statutes made in '**para materia**' (upon the same subject), whatever determined in the construction of one of them, is a sound rule of construction for the other. [***Craies on Statute Law, 7th Edition, page 189***]. This rule of interpretation was further affirmed in the case of **Crossley vs. Arkwright [1788 2 T.R. 603,608]**. In the said circumstances, this court held that '**right to prosecution**' in **Section 456 of the current Code** must mean '**the right to commence prosecution**'.

Thereafter, this Court referred to the decided case of **Tunnaya alias Gunapala vs. OIC Police Station Galewela (1993 1 SLR 61)** where it was held by **Bandaranayake J.** inter-alia as follows;

i. That producing a suspect to court under **Section 116(1) of the Code** is a step in the investigation process, and that the said Section is contained in part of the Code dealing with investigation of offences and powers of Police officers and inquirers to investigate,

ii. That thereafter the Magistrate can make an order for the detention of the said suspect until further investigations are carried out and a final report is filed under **Section 120(1) of the said Code**,

iii. That on the other hand when proceedings are instituted under **Chapter XIV**, the Magistrate takes cognisance of the accusation contained in the Police report or in a written complaint or upon the taking of evidence as the case may be in terms of **S. 136 (1)**,

iv. That all clauses in **Section 136** contemplates a person "**accused**" of an offence and not a mere "**suspect**",

v. That in the said circumstances, it is only when steps are taken in terms of **Section 136(1)** of the **Code of Criminal Procedure** that it can be said that proceedings have commenced, and not at the investigative stage.

Conclusion

Taking the above circumstances into account, Court held as follows;

I. That the impugned deed was executed on **08.04.1989**.

II. That the first complaint was made to the Police on **03.10.2008**, more than 6 months prior to the time bar,

III. But the report under section **136(1)(b) of the Code** was filed on **12.10.2009**, more than six months after the time bar,

IV. The contention of the learned Senior Counsel that the offence was concealed by the appellants until very close to the time bar cannot be accepted as that would be usurpation of the intention of the legislature as set out clearly in **Section 456**,

V. Therefore, this Court set aside the orders dated **14.05.2013** in **HC Hambanthota Case No. 19/2010/RE** made by the learned High Court Judge of the High Court of the Southern Province holden in Hambanthota, and the order dated **27 .09.2010** in **MC.**

Walasmulla Case No. 10076 made by the learned Magistrate and held that the prosecution of the Appellants is time barred in terms of **Section 456 of the Code**

VI. The appellants were thereby discharged

8. CASE NO. C. A. 1233/2000(F) [D.C. GALLE CASE NO. P/6865] – STEPHEN WIJETUNGA KARUNANAYAKE AND 1 OTHER VS. DADELLAGE PRIYANI JAYATHILAKE AND 43 OTHERS

In a Partition action where the Land concerned was smaller than Described in the Plaint, it was held that as per Administration of Justice Law-642(5) of the Administration of Justice Law No. 25 of 1975 - "A discrepancy between the description of the land surveyed and depicted in the preliminary plan and the description of the land set out in the schedule to the plaint shall not by itself affect the plaintiff's right to maintain the action."

Before: *Janak De Silva J.*
Counsel: *Lal Matarage with Prasad Morawaka for the Substituted 1st Defendant-Appellant*
S.C.B. Walgampaya P.C. with Upendra Walgampaya for the Substituted 1A and 1B Plaintiffs-Respondents
Decided on: 17.10.2019

Introduction

This is an appeal against the judgment of the learned Additional District Judge of Galle dated **08.03.2000**.

The Plaintiff-Respondent (Plaintiff) by original plaint dated **11.12.1975** sought to partition the land situated at Thalpe Pattuwe in the District of Galle about six acres in extent.

At the conclusion of the trial the learned Additional District Judge of Galle allotted the following shares to the Plaintiff and 1st Defendant amongst other parties to the action:

Plaintiff - 7015680/58060800

1st Defendant - 6041280/58060800

The 1st Defendant appeals on the following grounds:

(1) No proper identification of corpus

(2) No proper evaluation of the evidence regarding prescriptive right claimed by the 1st Defendant against the Plaintiff

This Court dismissed ground (2) averred to above for lack of evidence on the part of the 1st Defendant to prove his claim and proceeded to answer ground (1) as follows;

Identification of Corpus

Section 25(1) of the Partition Law No. 21 of 1977 as amended requires the court to examine the title of each party and hear and receive evidence in support thereof. It has been consistently held that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement *in rem. (property) as opposed to a judgment in personam (litigants)*. In *Gnanapandithen and another v. Balanayagam and another* [(1998) 1 Sri.L.R. 391 at 395] G.P.S. De Silva C.J. explained the duty cast on court by statute itself to investigate title and referred to the case of Mather v. Thamotharam Pillai decided in 1903 to where Layard CJ. Stated as follows; "Now, the question to be decided in a partition suit is not **merely matters between parties which may be decided in a civil action**; . . . The court has not only to decide the matters in which the parties are in dispute, **but to safeguard the interests of others who are not parties to the suit**, who will be bound by a decree for partition . . . "

Further it held, that an investigation of title is impossible unless and until the identity of the corpus is first established, as the identity of the corpus is fundamental to the investigation of title in a partition case. [*Wickremaratne v. Alpenis Perera* [1986] 1 Sri LR 190 at 199]. [*Sopinona v. Pitipanaarachchi and two others* (2010) 1 Sri.L.R. 87 at 105].

Case for the 1st Defendant is as follows;

a. The plaint identified the corpus to be six acres in extent
b. The Preliminary Plan No. 302 marked X identified the corpus as A.3 R.1 P. 23.4
c. In Plan No. 338 prepared by the same surveyor marked Y the extent of the corpus is identified as A. 3 R. 3 P. 10.2
d. In the Surveyor Report of Preliminary Plan (marked X1 at paragraph 53) the Surveyor states that it is difficult to decide whether the land surveyed is the land sought to be partitioned

Apart from the reasons averred to above, the 1st Defendant further submitted that even certain boundaries in the plaint and Preliminary Plan do not tally. In particular, the eastern boundary in terms of the plaint.

The learned counsel for the Substituted 1st Defendant-Appellant (Appellant) relied on the decisions in *Brampy Appuhamy v. Menis Appuhamy* (60 N.L.R. 337), *Richard and Another v. Seibel Nona and Others* [(2001) 2 Sri.L.R. 1] and *Sopaya Silva v. Magilin Silva* [(1989) 2 Sri.L.R. 105]. But in both *Richard and Another v. Seibel Nona and Others* (supra) and In *Sopaya Silva v. Magilin Silva* (supra), the land sought to be partitioned was larger than the land described in the plaint, and on the contrary in this case, while the land described in the plaint was about six acres in extent the land that was partitioned is A. 3 R. 3 P. 10.2 in extent. Therefore, the facts of this case are distinguishable from *Richard and Another v. Seibel Nona and Others* (supra) and *Sopya Silva v. Magilin Silva* (supra). Although this was the case in both said cases, court held that the parties seeking to partition the said land can still seek to do so after applying to court to correctly register a Lis Pendens to the said larger land and thereafter taking the necessary steps as per the relevant provisions of the Partition Law.

In *Brampy Appuhamy v. Menis Appuhamy* (supra) the surveyor surveyed a land of which two boundaries did not tally with the description of the land given in the schedule to the commission. It is in this context that court held that the surveyor has not duly executed his commission and went on to state that where the surveyor is unable to locate the land, he must report that fact to court and ask for its further directions. *Brampy Appuhamy v. Menis Appuhamy* (supra) was decided under the then Partition Act No. 16 of 1951.

In the present case Licensed Surveyor W. Ranasinghe executed two commissions to survey the corpus. Preliminary Plan No. 302 (X) was prepared in August 1976. That contained three lots of land identified as ‘w’, ‘wd’ and ‘we’ containing a total of A.3 R. 1 P. 23.4 in extent. The second survey took place in March 1977 which resulted in Survey Plan No. 338 (Y) which contained four lots of land identified as ‘w’, ‘wd’, ‘we’ and ‘wE’ containing a total of A.3 R. 3 P. 10.2 in extent. The learned Additional District Judge held that the corpus to be partitioned consists of

lots of land identified as ‘w’, ‘wd’ and ‘we’ in Preliminary Plan No. 302 (X) and lot ‘wE’ in Survey Plan No. 338 (Y), as the surveyor in his report of Plan (Y) had stated lots ‘w’, ‘wd’ and ‘we’ in Preliminary Plan No. 302 (X) is the same as lots ‘w’, ‘wd’ and ‘we’ in Plan No. 338 (Y). Thereafter, 1st Defendant filed his answer in November 1977 where he admitted ‘w’, ‘wd’ and ‘we’ while claiming ‘wE’be excluded from corpus, but nowhere did the 1st Defendant assert that a larger land should be part of the corpus sought to be partitioned.

In this context section 642 (1) of the Administration of Justice Law No. 25 of 1975 is relevant which states that **where a defendant in a partition action avers that the plan of the land surveyed does not correctly depict the land described in the plaint, he may apply to the Court to issue a commission to the surveyor to whom the commission for the preliminary survey was issued to survey the extent of land referred to by that defendant**. The 1st Defendant did exactly this, which was how the second survey (Y) was commissioned by Court. At this juncture, the 1st did not show the land that was excluded but now should be included, but only had pointed out that ‘wE’ in plan (Y) should be included and ‘we’ in (X) should be excluded, which wouldn’t have brought the corpus to 6 acres.

Thus Court surmized that the 1st Defendant has failed to act as required by section 642 (1) of the Administration of Justice Law No. 25 of 1975. In fact, even before commencement of trial (March 1978), the learned District Judge had directed the 1st Defendant to take steps if there was a discrepancy in the Corpus, but he had not done so.

Further, the Court observed that thereafter, the 1st Defendant hadn’t raised any contest to the corpus being smaller to that set out in the plaint and had accepted in contest Nos. 5 & 6 the corpus to be the four lots depicted in Plan No. 338 (Y). Additionally, Court referred to Section 642(5) of the Administration of Justice Law No. 25 of 1975 which states:

> **“642(5) A discrepancy between the description of the land surveyed and depicted in the preliminary plan and the description of the land set out in the schedule to the plaint shall not by itself affect the plaintiff’s right to maintain the action.”**

For the foregoing reasons, Court held that it is not open to the 1st Defendant now to claim that a larger portion of land should form the corpus sought to be partitioned and held to not interfere with the judgment of the learned Additional District Judge of Galle dated 08.03.2000.

9. BASIL ROHANA RAJAPAKSE VS. HONOURABLE ATTORNEY GENERAL - CASE NO - CA TRANSFER 20/17

Section 46 of Judicature Act - transfer of a case - bias on the part of the Judge - comments made by the Judge - applicable tests

Before: *A.L. Shiran Gooneratne J. & Mahinda Samayawardhena J.*
Counsel: *Gamini Marapana, PC for the Appellant. Thusith Mudalige, DSG and Sudharshana De Silva, DSG for the Respondent*
Decided on: 27th September 2019
Judgment by A.L. Shiran Gooneratne J – affirmed by Mahinda Samayawardhena J:

Introduction

The present case refers to a writ application made under and in terms of Section 46 of the Judicature Act to have an order transferring a case from a primary court. It establishes that in deciding the question of 'impartiality', two tests are to be applied, the first of which consists of trying to determine the personal conviction of a particular judge in a given case. (the subjective approach) and the second in asserting whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (the objective approach). Further it reiterates the precedent that impartiality of the judge is presumed, until there is proof to the contrary.

Facts in brief

The Petitioner in this case invoked the jurisdiction of Court of Appeal, inter alia, to have an order transferring **Case No. HC 8570/16** (sometimes referred to as the "impugned case") from High Court No. 06 to any High Court not presided over by the learned High Court Judge, who presided over the said case at the time material to this application. The application for transfer of the said case is made under and in terms of Section 46 of the Judicature Act.

The facts leading to this application can be briefly set out as follows, At the time of filing this application the Petitioner was indicted in 3 separate cases before the High Court of Colombo, that is, **HC 8546/ 16, HC 8222/ 16 and HC 8570/16**. All 3 cases were listed before the same judge presiding in High Court No. 06. On **02/02/2017**, when Case No. HC 8546116 was

mentioned before the said Court, the learned High Court Judge referred the said case to High Court No. 1 for reallocation on the basis that **Case No. HC 8222/ 16** pending against the same accused was already listed for trial before him, a fact disclosed by the learned judge. On **15/03 /2017**, when **Case No. 8222/ 16** was taken up, the learned Counsel for the Petitioner made an application to have this case heard before another High Court Judge, on the basis that the presiding judge has been arranged as the 3rd Respondent in **Writ Application No. CA/89/2017**. The said Writ Application was filed to challenge the mandate and proceedings in inquiry bearing **No. P.C.I. 549/2015** before the Presidential Commission of Inquiry to investigate and inquire into serious acts of fraud, corruption and abuse of power, state resources and privileges, commonly known as the PRECIFAC. The presiding judge was a member of the PRECIFAC. Having considered the said application, the learned High Court Judge, on **15/03/2017**, made order declining to hear the case and referred the case to High Court No.1 to be reallocated to be heard by another judge.

When **Case No. 8570116** was mentioned before the same judge, the learned Counsel for the Petitioner made the same application and drew the attention of Court to the said Writ Application **No. CA/89/2017**, and sought a transfer of the case to be heard by another High Court Judge. The learned High Court Judge having considered that notices had not been issued in the said case bearing Writ Application **No. 89/2017**, refused the application made by the Petitioner and declined to transfer the impugned case to be heard by another judge and proceeded to fix the case for trial.

The application for the transfer of the impugned case from the presiding judge to be heard by another judge was primarily based on two grounds, namely,

1. Hearing cases against the Petitioner during the pendency of case bearing No. **CA Writ 89/2017**, leads the Petitioner to reasonably apprehend that the learned High Court Judge is motivated by bias against the Petitioner and/or extraneous considerations.

2. Comments made by the learned Judge in **Case No. HC 8026/15** are capable of depriving the Petitioner of having a completely independent and an objective mind devoid of prejudice being brought to bear on the merits and the demerits of the impugned case.

Conclusion

Court of appeal in deciding the case on the above grounds held:

First that the pending writ application is the only reason given by the Petitioner to "reasonably apprehend" that the learned judge is motivated by bias and/or extraneous considerations against the Petitioner and that personal impartiality of the judge is presumed, until there is proof to the contrary.

Further in considering the second ground held that an opinion expressed in the course of a judicial finding, unrelated to the impugned case cannot be regarded as objectively justifying reasonable apprehension of bias on the part of the learned High Court Judge. It must be stated that when bias or extraneous considerations are not established, impartiality towards the Petitioner should be presumed.

Further the court held that the Petitioner has also not established that by being a close associate of the previous administration, the opinion expressed by the learned judge has given rise to a doubt as to the judge's ability to perform his judicial duties. Therefore the court decided, that the petitioner has failed to 'objectively justify' that the comments expressed by the learned judge in that case have influenced him of bias or extraneous considerations towards the Petitioner, when deciding on the impugned case, as alleged by the Petitioner. The court of appeal refused the application of the Petitioner and dismissed the application without costs.

HIGH COURT CASES

10. HCBA 862/2017

නියෝගය ප්‍රකාශිත දිනයඃ 2019-3-1
කොළඹ මහාධිකරණ විනිසුරු ගරු මංජුල තිලකරත්න මැතිතුමාගේ නියෝගයකි.
ස්වභාවය

විෂ වර්ග, අබිං සහ අන්තරාදායක ඖෂධ වර්ග ආඥා පනතේ 83 වන වගන්තිය ප්‍රකාරව ඇප ලබා ගැනීම සඳහා අවශ්‍ය වන සුවිශේෂී කරුණු.

<u>හැඳින්වීම</u>

විෂ වර්ග, අබිං සහ අන්තරාදායක ඖෂධ වර්ග ආඥා පනතේ 83 වන වගන්තිය ප්‍රකාරව එකී පනතේ 54(අ) වගන්තිය හෝ 54(ආ) වගන්තිය යටතේ සැකකරුවෙකු වන පුද්ගලයෙකු මහාධිකරණයක් විසින් සුවිශේෂී කරුණු පවතින්නේ නම් පමණක් ඇප මත මුදාහැරිය යුතු බවට දක්වා ඇති වුවත් එකී සුවිශේෂී කරුණු මොනවාද යන්න පනතේ කිසිදු ප්‍රතිපාදනයක දක්වා නොමැත. එසේ හෙයින් එකී සුවිශේෂී කරුණු මොනවාද යන්න සැලකීමේදී අනුගමනය කළ හැකි මාර්ගෝපදේශනයක් මෙම නඩුකරය මගින් ගරු උගත් මහාධිකරණ විනිසුරුතුමා විසින් හඳුන්වා දී ඇත.

<u>නඩුවේ කරුණු</u>

මෙම නඩුවේ සැකකරු විෂ වර්ග, අබිං සහ අන්තරාදායක ඖෂධ වර්ග ආඥා පනතේ 54(අ) වගන්තිය යටතේ දඩුවම් ලැබිය හැකි වරදක් සිදුකිරීම සම්බන්ධයෙන් 2017-10-2 දින අත්අඩංගුවට ගෙන රක්ෂිත බන්ධනාගාරගත කොට ඇත. 2017-12-29 දිනැති රජයේ රස පරීක්ෂක වාර්තාව අනුව ඔහු සන්තකයේ තිබී ඇති ශුද්ධ හෙරොයින් ප්‍රමාණය ග්‍රෑම් 2.13 කි.

මේ සම්බන්ධයෙන් සැකකරු වෙනුවෙන් ඇප ලබා ගැනීම සඳහා මෙම ඇප අයදුම්පත ගොනු කොට ඇති අතර, විමසීම අවස්ථාවේදී පෙත්සම්කරු වෙනුවෙන් පෙනී සිටි උගත් නීතිඥවරියගේ තර්කයේ හරය වී ඇත්තේ සැකකකරු අත්අඩංගුවට ගෙන මේ වන විට මාස 16 කට අධික කාලයක් ගත වී ඇති බවත්, මෙම නඩුවේ රස පරීක්ෂක වාර්තාව නිකුත් වී මේ වන විට මාස 14 කට අධික කාලයක් ගත වී ඇති බවත්, මේ දක්වා සැකකරුට එරෙහිව අධිචෝදනා පත්‍රයක් ඉදිරිපත් කර නොමැති බවත්, එම කරුණු ආඥා පනතේ 83 වන වගන්තියේ අර්ථානුකූලව සුවිශේෂී කරුණු ලෙස සැලකිය යුතු බවත්ය. මේ සම්බන්ධයෙන් උගත් නීතිඥවරිය 2012-6-14 දින ගරු අභියාචනාධිකරණ විසින් තීරණය කරන ලද මාලිම්බඩ පතිරණගේ ශ්‍රියානි දම්මිකා

එරෙහිව ස්ථානාධිපති පොලිස් ස්ථානය කොටහේන සහ තවත් අයෙක් නඩුවේ (අභියාචනාධිකරණ නඩු අංක C.A. (PHC) APN 16/12) ගරු සිසිල් ද ආබෘ විනිසුරුතුමාගේ සහ ගරු චිත්‍රසිරි විනිසුරුතුමාගේ නියෝගය කෙරෙහි මහාධිකරණයේ අවධානය යොමුකරන ලදි. එම නියෝගය මගින් සැකකරු ඇපමත මුදා හරින ලදි. එකී නියෝගයේ පහත කොටස උපුටා දක්වා ඇත.

"The Suspect has been on remand from 2010-12-10. Court notes that the suspect has been on remand for or period of one year after issuing the government analyst report without being indicted"

උගත් රජයේ අධිනීතිඥවරයා ඉහත කී තර්කය සමග එකග නොවී ඊට එරෙහිව කරුණු දක්වා ඇත.

මේ අවස්ථාවේදී ගරු උගත් මහාධිකරණ විනිසුරුතුමාගේ නියෝගය තුළින් පහත කරුණු දක්වා ඇත. "ආඥා පනතේ 83 වගන්තියේ සඳහන් විශේෂ අවස්ථා (Exceptional Circumstances) මොනවාදැයි යන්න ආඥා පනතේ සඳහන් කර නැත. අනෙක් අතට ඇප සම්බන්ධයෙන් අදාල වන විශේෂ අවස්ථා නැතහෝ සුවිශේෂී කරුණු මොනවාදැයි ව්‍යවස්ථාදායකය විසින් කිසිදු පනතක් මගින් හෝ උපරිමාධිකරණ විසින් කිසිදු නඩු තීන්දුවක් මගින් නිශ්චිතව අර්ථ නිරූපණය කර නැත. කිසියම් සැකකරුවෙකුට ඇප නියම කිරීම සඳහා සුවිශේෂී කරුණු ඉදිරිපත්වී තිබේදැයි අධිකරණයක් විසින් තීරණය කළ යුත්තේ එක් එක් නඩුවේ කරුණු සැලකිල්ලට ගනිමිනි. ඇත්තෙන්ම එය සම්පූර්ණයෙන්ම අධිකරණයේ අභිමතය මත තීරණය කල යුත්තකි.

මා ඉහත සඳහන් කළ ආකාරයට සුවිශේෂී කරුණු පිළිබඳ පැහැදිලි නිශ්චිත අර්ථ නිරූපණයක් හෝ මාර්ගෝපදේශ නොමැතිවීම හේතුකොට ගෙන මේ සම්බන්ධයෙන් ක්‍රියාකිරිමේදී ඒකාකාරීභාවයක් නොමැති බව පෙනේ. මේ සම්බන්ධයෙන් ක්‍රියා කිරීමේදී ප්‍රායෝගිකව හැකිතාක් දුරට ඒකාකාරී ප්‍රතිපත්තියක් අනුගමනය කළ හැකි නම් යුක්තිය පසිඳලීමේ ක්‍රියාවලිය කෙරෙහි සියලු පාර්ශවයන් තුළ විශ්වාසය වැඩිකරලීමට එය හේතුවක් වනු නොවනුමානයි. එබැවින් මේ සම්බන්ධයෙන් පැහැදිලි සහ නිශ්චිත මාර්ගෝපදේශ කිහිපයක් හෝ සකස් කර ගැනීම බෙහෙවින් වැදගත් වන බව මාගේ අදහසයි. එබැවින් මෙම නඩුවේදී මා විසින් තීරණය කළ යුතු කරුණට සෘජුවම අදාල නොවුනද මේ සම්බන්ධයෙන් මාර්ගෝපදේශ කිහිපයක් හඳුන්වාදීම සුදුසු බව මට පෙනේ."

මෙම තීන්දුව අනුව අපරාධ නඩුවකට මුහුණදෙන තැනැත්තා ප්‍රධාන වශයෙන් කොටස් 3 කට වර්ග කොට ඇත.

1 සැකකරුවන්

2 චුදිතයන්

3 වරදකරු කරන ලද චුදිත අභියාචකයින්

මෙහිදී සැකකරුවන් සහ චුදිතයන්, වරදකරුවන් කර නොමැති බැවින් ඔවුන් කෙරෙහි නිර්දෝශීභාවයේ පූර්ව නිගමනය පවතින බවත්, වරදකරු කරන ලද චුදිත අභියාචක කෙරෙහි නිර්දෝශීභාවයේ පූර්ව නිගමය බලනොපාන බවත්, එබැවින් වරදකරු කරන ලද චුදිත අභියාචකයින් කෙරෙහි සුවිශේෂී කරුණු ඔප්පු කල යුතු මට්ටම සැකකරුවන් හා චුදිතයින් කෙරෙහි සුවිශේෂී කරුණු ඔප්පු කළ යුතු මට්ටමට වඩා ඉහළ මට්ටමක් වන බවද දක්වා ඇත.

විෂ වර්ග, අබිං සහ අන්තරාදායක ඖෂධ වර්ග ආඥා පනතේ 83 වන වගන්තිය යටතේ ඇප පිළිබඳව ප්‍රතිපාදන සලසා ඇති බැවින් ඇප පනත අදාල නොවූවද ඇප ලබාදීම සදහා සුවිශේෂී කරුණු තීරණය කිරීමේදී යම් සැකකරුවෙක් රක්ෂිත බන්ධනාගාරගතව සිටි කාලය ඇප සම්බන්ධයෙන් නිගමනයකට එළඹීමේදී වැදගත් වන බව පෙන්වාදීමට පමණක් ඇප පනතේ 16 වන වගන්තිය සහ 17 වන වගන්තිය කෙරේ අවධානය යොමු කොට ඇත. එමෙන්ම 1991 අංක 8 දරණ රිමාන්ඩ්හාරයේ සිටින සැකකරුවන් මුදා හැරීමේ පනත සහ ශ්‍රී ලංකා ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 13 (4) ව්‍යවස්ථාව සහ 13(5) ව්‍යවස්ථා කෙරෙහිද අවධානය යොමු කරමින් විෂ වර්ග, අබිං සහ අන්තරාදායක ඖෂධ වර්ග ආඥා පනතේ 83 වන වගන්තිය යටතේ ඇප පිළිබඳව සලකා බැලීමේදී විශේෂ අවස්ථා නැතහොත් සුවිශේෂී කරුණු සම්බන්ධයෙන් හෙරොයින් වලට අදාලව පහත පරිදි මාර්ගෝපදේශයන් හඳුන්වා දී ඇත.

1 **<u>රජයේ රස පරීක්ෂක වාර්තාව අනුව ශුද්ධ හෙරොයින් ප්‍රමාණය ග්‍රෑම් 1 කට වඩා අඩු අවස්ථාවක</u>**

සැකකරු අත්අඩංගුවට ගත් දින සිට මාස 3 කට අධික කාලයක් ගතවන තෙක් අධිචෝදනා පත්‍රයක් ඉදිරිපත් නොවුවහොත් එම කරුණ සුවිශේෂ කරුණක් ලෙස සැලකිය යුතු බව මෙම අධිකරණයේ මතයයි.

එසේ වුවද සැකකරුට එරෙහිව පෙර වැරදි සහ / හෝ පවතින නඩු තිබීම හේතු කොටගෙන මෙම කරුණ සුවිශේෂ කරුණක් ලෙස නොසැලකීමට සිදුවිය හැක.

එවන් අවස්ථාවක සැකකරුට එරෙහිව ඇති පෙර වැරදි වල සහ / හෝ පවතින නඩු වල ස්වභාවය සැලකිල්ලට ගෙන අධිකරණය විසින් සුදුසු නිගමනයකට එළඹිය යුතුය.

2 **<u>රජයේ රස පරීක්ෂක වාර්තාව අනුව ශුද්ධ හෙරොයින් ප්‍රමාණය ග්‍රෑම් 1 සිට ග්‍රෑම් 2 දක්වා වූ අවස්ථාවක</u>**

සැකකැර අත්අඩංගුවට ගත් දින සිට මාස 6 කට අධික කාලයක් ගතවන තෙක් අධිචෝදනා පත්‍රයක් ඉදිරිපත් නොවුවහොත් එම කරුණ සුවිශේෂ කරුණක් ලෙස සැලකිය යුතු බව මෙම අධිකරණයේ මතයයි.

එසේ වුවද සැකකරුට එරෙහිව පෙර වැරදි සහ / හෝ පවතින නඩු තිබීම හේතු කොටගෙන මෙම කරුණ සුවිශේෂ කරුණක් ලෙස නොසැලකීමට සිදු විය හැක. එවන් අවස්ථාවක සැකකරුට එරෙහිව ඇති පෙර වැරදි වල සහ / හෝ පවතින නඩු වල ස්වභාවය සැලකිල්ලට ගෙන අධිකරණය විසින් සුදුසු නිගමනයකට එළඹිය යුතුය.

3 **<u>රජයේ රස පරීක්ෂක වාර්තාව අනුව ශුද්ධ හෙරොයින් ප්‍රමාණය ග්‍රෑම් 2 සිට ග්‍රෑම් 5 දක්වා වූ අවස්ථාවක</u>**

සැකකරු අත්අඩංගුවට ගත් දින සිට වසරකට අධික කාලයක් ගතවනතෙක් අධිචෝදනා පත්‍රයක් ඉදිරිපත් නොවුවහොත් එම කරුණ සුවිශේෂ කරුණක් ලෙස සැලකිය යුතු බව මහාධිකරණයේ මතයයි.

එසේ වුවද සැකකරුට එරෙහිව පෙර වැරදි සහ / හෝ පවතින නඩු තිබීම හේතු කොටගෙන මෙම කරුණ සුවිශේෂ කරුණක් ලෙස නොසැලකීමට සිදු විය හැක. එවන් අවස්ථාවක සැකකරුට එරෙහිව ඇති පෙර වැරදි වල සහ / හෝ පවතින නඩු වල ස්වභාවය සැලකිල්ලට ගෙන අධිකරණය විසින් සුදුසු නිගමනයකට එළඹිය යුතුය.

4 **<u>රජයේ රස පරීක්ෂක වාර්තාව අනුව ශුද්ධ හෙරොයින් ප්‍රමාණය ග්‍රෑම් 5 සිට ග්‍රෑම් 10 දක්වා වූ අවස්ථාවක</u>**

සැකකරු අත්අඩංගුවට ගත් දින සිට වසර 2 ට අධික කාලයක් ගතවන තෙක් අධිචෝදනා පත්‍රයක් ඉදිරිපත් නොවුවහොත් එම කරුණ සුවිශේෂ කරුණක් ලෙස සැලකිය යුතු බව මෙම අධිකරණයේ මතයයි.

එසේ වුවද සැකකරුට එරෙහිව පෙර වැරදි සහ / හෝ පවතින නඩු තිබීම හේතු කොටගෙන මෙම කරුණ සුවිශේෂ කරුණක් ලෙස නොසැලකීමට සිදු විය හැක. එවන් අවස්ථාවක සැකකරුට එරෙහිව ඇති පෙර වැරදි වල සහ / හෝ පවතින නඩු වල ස්වභාවය සැලකිල්ලට ගෙන අධිකරණය විසින් සුදුසු නිගමනයකට එළඹිය යුතුය.

5 **<u>රජයේ රස පරීක්ෂක වාර්තාව අනුව ශුද්ධ හෙරොයින් ප්‍රමාණය ග්‍රෑම් 10 සිට ග්‍රෑම් 15 දක්වා වූ අවස්ථාවක</u>**

සැකකරු අත්අඩංගුවට ගත් දින සිට වසර 3 කට අධික කාලයක් ගතවනතෙක් අධිචෝදනා පත්‍රයක් ඉදිරිපත් නොවුවහොත් එම කරුණ සුවිශේෂ කරුණක් ලෙස සැලකිය යුතු බව මෙම අධකරණයේ මතයයි.

එසේ වුවද සැකකරුට එරෙහිව පෙර වැරදි සහ / හෝ පවතින නඩු තිබීම හේතු කොටගෙන මෙම කරුණ සුවිශේෂ කරුණක් ලෙස නොසැලකීමට සිදු විය හැක. එවන් අවස්ථාවක සැකකරුට එරෙහිව ඇති පෙර වැරදි

වල සහ / හෝ පවතින නඩු වල ස්වභාවය සැලකිල්ලට ගෙන අධිකරණය විසින් සුදුසු නිගමනයකට එළඹිය යුතුය.

6 එක් සැකකරුවෙක් පමණක් සිටින නඩුවක, කිසියම් හෙරොයින් ප්‍රමාණයක් සැකකරුගේ ශරීරයේ යම් අවයවයක තිබී හෝ දැකකරු ඇද සිටි ඇදුමක තිබී හෝ සැකකරු පැලද සිටි යමක තිබී හෝ යමක බහාලන ලදුව සැකකරු විසින් රැගෙන යාමේදී විමර්ශන නිලධාරීන් විසින් සොයාගත්තේ යැයි කියන අවස්ථාවක, සැකකරුට එරෙහිව චෝදනා ඉදිරිපත් කිරීම සම්බන්ධයෙන් තීරණයක් ගැනීම සාපේක්ෂව පහසුය. මා මෙයින් අදහස් කරන්නේ සංකීර්ණ විමර්ශනයක ප්‍රතිඵල මත චෝදනා ඉදිරිපත් කිරීම සම්බන්ධයෙන් තීරණයක් ගැනීමට වඩා ඉහත කී තත්ත්වයන් යටතේ එවන් තීරනයක් ගැනීම පහසු බවයි. එබැවින් එවන් නඩු සඳහා පමණක් පහත සඳහන් පොදු මාර්ගෝපදේශය හඳුන්වා දෙමි.

එක් සැකකරුවෙක් පමණක් සිටින නඩුවක, කිසියම් හෙරොයින් ප්‍රමාණයක් සැකකරුගේ ශරීරයේ යම් අවයවයක තිබී හෝ සැකකරු ඇඳ සිටි ඇදුමක තිබී හෝ සැකකරු පැලද සිටි යමක තිබී හෝ යමක බහාලන ලදුව සැකකරු විසින් රැගෙන යාමේදී විමර්ශන නිලධාරීන් විසින් සොයාගත්තේ යැයි කියන අවස්ථාවක (වෙනත් වචන වලින් පවසන්නේ නම් සැකකරුගේම පෞද්ගලික සන්තකයේ තිබියදී කිසියම් හෙරොයින් ප්‍රමාණයක් සොයාගත්තේ යැයි කියන අවස්ථාවක) රජයේ රස පරීක්ෂක වාර්තාව නිකුත් වූ දින සිට වසර 2 කට අධික කාලයක් ගතවන තෙක් අධිචෝදනා පත්‍රයක් ඉදිරිපත් නොවුවහොත් එම කරුණ සුවිශේෂ කරුණක් ලෙස සැලකිය යුතු බව මෙම අධිකරණයේ මතයයි.

එසේ වුවදව සැකකරුට එරෙහිව පෙර වැරදි සහ / හෝ පවතින නඩු තිබීම හේතු කොටගෙන මෙම කරුණ සුවිශේෂී කරුණක් ලෙස නොසැලකීමට සිදු විය හැක. එවන් අවස්ථාවක සැකකරුට එරෙහිව ඇති පෙර වැරදි වල සහ / හෝ පවතින නඩු වල ස්වභාවය සැලකිල්ලට ගෙන අධිකරණය විසින් සුදුසු නිගමනයකට එළඹිය යුතුය.

මෙම මාර්ගෝපදේශ මේ සම්බන්ධයෙන් සර්ව සම්පූර්ණ මාර්ගෝපදේශ මාලාවක් ලෙස නොසැලකිය යුතුය. තවද මෙම මාර්ගෝපදේශ වල සඳහන් නොවන වෙනත් කරුණු ලෙස සලකා ක්‍රියා කිරීමේ අභිමතය අධිකරණය සතුව ඇත.

මෙම නියෝගය වඩාත් සම්පූර්ණ වීම පිණිස ආඥා පනතේ 83 වන වගන්තියේ අර්ථානුකූලව සුවිශේෂ කරුණු ලෙස සැලකිය නොහැකි කරුණු කිහිපයක් පිළිබඳව මෙම අධිකරණයේ මතය ප්‍රකාශ කිරීම සුදුසු බව මාගේ අදහසයි. ඒ අනුව පහත සඳහන් කරුනු සුවිශේෂ කරුණු ලෙස සැලකිය නොහැකි බව මෙම අධිකරණයේ මතයයි.

1 සැකකරු විවාහක බව සහ දරුවන් සිටින බව

2 සැකකරු පවුලේ එකම ආදායම් උපයන්නා වීම

3 දරුවන්ගේ අධ්‍යාපන කටයුතු සහ පවුලේ අනෙකුත් කටයුතු මගහැරී යාම

4 සැකකරු රැකියාවක නිරත වීම

5 සැකකරුට එරෙහිව පෙර වැරදි හෝ පවතින නඩු නොමැති වීම

6 සැකකරුගේ ඥාතීන්ගේ අයහපත් සෞඛ්‍ය තත්ත්වය

7 තවදුරටත් රක්ෂිත බන්ධනාගාරගතව සිටීම හේතුකොට ගෙන සැකකරුගේ ජීවිතය අන්තරාදායක තත්ත්වයට පත්වන ආකාරයේ රෝගී ත්ත්තවයකින් ඔහු පෙලෙන බව වෛද්‍ය සහතික මගින් නිසි පරිදි තහවුරු කර තිබෙන අවස්ථාවක හැර, සැකකරුගේ අයහපත් සෞඛ්‍ය තත්වය

8 අධිචෝදනා පත්‍රය ඉදිරිපත් කිරීමෙන් පසුව නඩු විභාගය අවසන් වීමට ගතවන කාලය

මෙම නඩුකරය මගින් විෂ වර්ග, අබිං සහ අන්තරාදායක ඖෂධ වර්ග ආඥා පනතේ 83 වන වගන්තිය ප්‍රකාරව ඇප ලබාගැනීම සඳහා අධිකරණයේ තහවුරු කළ යුතු සුවිශේෂී කරුණු පිළිබඳව සැකකරු රක්ෂිත බන්ධනාගාරගත කොට ඇති කාලය සැලකිල්ලට ගෙන මාර්ගෝපදේශයක් ඉහත ආකාරයෙන් හඳුන්වා දී ඇති අතර, සුවිශේෂී කරුණු රක්ෂිත බන්ධනාගාරගත කොට ඇති කාලයට අමතරව වෙනත් කරුණු මත වුවද තීරණය කළ හැකිය. තවද, මෙම නඩුතීන්දුව උපරිමාධිකරණයකින් ලබා දී ඇති නඩු තීන්දුවක් නොවන බැවින් අනුගම්‍ය පූර්ව නිදර්ශන න්‍යායට අනුව උපයෝගි කරගත නොහැකි වුවත් මාර්ගෝපදේශයක් ලෙස අනුනයන අධිකරණ බලය යටතේ යොදාගත හැක.