

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

Nihal Sri Amarasekera
of 167/4, Sri Vipulasena
Mawatha,
Colombo 10.

Plaintiff

Vs.

Gamini Lakshman Peiris,
of "Visumpaya", Staples
Street, Colombo 2 and also
of 37, Kirula Place, Colombo 5.

Defendant

Court of Appeal

Revision Application No: 775/98

DC Colombo Case No. 19849/MR

And

In the matter of an application
for Revision in terms of the
Constitution of the Democratic
Socialist Republic of Sri Lanka
read with the Civil Procedure
Code from an order of the
District Court of Colombo dated
30th July 1998 in Case
No.19849/MR

Gamini Lakshman Peiris,
of "Visumpaya", Staples
Street, Colombo 2 and also
of 37, Kirula Place, Colombo 5.

Defendant Petitioner

Vs.

Nihal Sri Amarasekera
of 167/4, Sri Vipulasena
Mawatha,
Colombo 10.

Plaintiff Respondent

TO HIS LORDSHIP THE PRESIDENT AND THE OTHER HONOURABLE
JUDGES OF THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

On this the 5^K day of August 1998

The Petition of the Defendant Petitioner above named appearing by James Henry Paul Ratnayeke, Uswatteliyanage Sudath Nilupul Prasansa Perera and Punyakanthi Navaratne, Attorneys-at-Law of the Honourable Supreme Court of the Democratic Socialist Republic of Sri Lanka, carrying on business under the name, style and firm of **PAUL RATNAYEKE ASSOCIATES** and their assistants Shalindri Jayasinghe, Indralogini Rajagopalan, Chandrani Suriyaarachchi, Kolitha Susantha Bandara Wijeratne, Amali Deepani Alawwa, Ruchira Anthony, Prasanna de Silva and Sureni Wirasinha his registered Attorneys-at-Law states as follows:

1. The Plaintiff Respondent (hereinafter referred to as the Plaintiff) instituted the above styled action against the Defendant Petitioner (hereinafter referred to as the Defendant) seeking judgement in a sum of Rs. 300,000,000/- allegedly on the ground of defamation.
2. The Plaintiff instituted action on 21st July 1997 and summons was served on the Defendant returnable on 31st October 1997.
3. The Defendant filed answer on the summons returnable date in view of the anxiety of the Defendant to have the matter heard and determined at the earliest possible opportunity.
4. (a) The Defendant states that the Defendant is advised that filing answer on the summons returnable date is an exception to the rule.

(b) The case was thereafter called on 17.11.97 and 24.11.97 to be fixed for trial, and on 24.11.97 was fixed for trial on 16.3.98.
5. Shortly before trial, the Plaintiff filed an application for interrogatories, i.e., on or about the 23rd February 1998.
6. On the 16th of March 1998, the Defendant objected to a postponement of the trial on the ground of the application for interrogatories being made or on any other grounds for the reason that the Defendant wanted the trial to proceed. The Defendant wanted the true matters in the action to be determined at an early date.
7. The Defendant states that the steps as morefully set out hereinafter were taken -
 - (i) 21.07. 1997 - action filed.
 - (ii) 31.10.1997 - summons returnable
 - (iii) 31.10. 1997 - answer filed
 - (iv) 17.11.1997 - called to fix for trial
 - (v) 24.11.1997 - called to fix for trial
 - (vi) 16.03.98 - fixed for trial
 - (vii) 23.02.1998 - application for interrogatories filed.

8. In the circumstances, the Defendant contended that the application for interrogatories was made merely to postpone the trial and had not been made bona fide. Notwithstanding the Defendant's strenuous objections, the Court postponed the trial and permitted the application of the Plaintiff that the matter of the interrogatories to be heard and determined.
9. The Court thereafter made order that the Defendant file objections to the application for interrogatories and stated that the trial would be taken up thereafter.
10. Thus, the trial fixed for 16.03. 1998 was postponed.

The Defendant files herewith marked "A", "B", "C", "D" and "E" respectively true copies of the plaint and annexures, answer, application for interrogatories, application under Section 100, objections to the said application, and pleads the same as part and parcel of this Petition.

The Defendant files herewith marked "F", "G", "H", "I", "J", "K", "L(i)", "L(ii)", "L(iii)" and "L(iv)", application for discovery of documents, proceedings on the application under Section 100 being supported, the order, the notice served on the Defendant, objections of the Defendant, application under Section 109 together with Petition, written submissions of the Defendant with respect to discovery of documents, written submissions of the Plaintiff with respect to discovery of documents, written submissions of the Defendant with respect to interrogatories, written submissions of the Plaintiff with respect to the interrogatories filed and pleads the same as part and parcel of this Petition.

11. On or about the 6th March 1998, (before the date of trial) the Plaintiff also made an application by way of a motion which was supported ex parte on which the court made the following order :

" ඒ අනුව පැමිණිලිකරුගේ තරුටුව අදාළ සහ විත්තිකරු ඔහුගේ විත්තිවෘත්තය සම්බන්ධයෙන් විශ්ලේෂණය කරන ලියවිලි ඉදිරිපත් කරන ලෙසද, විත්තිකරුගේ ලේඛණයන් නිතිඥ මහතාට තොර්ස් තිබුණ කිරීමට නියම කළේ " .

The Defendant pleads that the Defendant thereafter received a notice in the following form which is reproduced below for the ready reference of court:

" To the Defendant above named.
Take notice that you are hereby ordered to declare by affidavit within 7 days of service of this notice of the documents in files maintained and kept at the Ministry of Finance/Treasury under your supervision and/or control and/or authority as Deputy Minister of Finance accordingly, which are in your possession or power relating to all the matters in question in this action."

12. The Defendant filed objections supported by an affidavit to the said notice and stated clearly inter alia that -
 - (a) there are no documents in his possession and/or power relating to any matter in question in this action;
 - (b) the notice requiring the discovery of documents is vague and/or wide in scope.
13. In the circumstances, the Defendant states that the Defendant has clearly, unambiguously and categorically stated that there are no documents in his possession and/or power relating to any matter in question in this action.
14. In the circumstances, the Defendant pleads that no order under Section 109 of the Civil Procedure Code could have been made.
15. In any event, and without prejudice to the aforesaid, the Defendant stated that ex facie the said notice is wrong in law, in that -
 - (a) the documents in files maintained by and/or kept at the Ministry of Finance/Treasury are not under the control and/or possession of the Defendant in his personal capacity;
 - (b) they are in law "privileged".
16. The Defendant further pleads that no party to an action filed against another in his personal capacity can obtain an order under Section 102 of the Civil Procedure Code to have a declaration of documents which are in the control and possession of the Government.
17. In any event, the documents, if any and files maintained by and kept at the Ministry of Finance/Treasury is under the control of the Hon. Minister of Finance.
18. The Defendant specifically stated that -
 - (a) in any event, the documents, if any, as referred to in the notice served on the Defendant cannot be documents in his possession in his personal capacity; and
 - (b) no order can be made for their discovery in this action in that, in any event, they are "privileged" documents.
19. The Defendant further submitted that if this type of discovery is permitted any citizen can institute action against a Minister and can obtain by a declaration on oath documents kept in Ministries which may, inter alia, relate to defence and other matters of confidentiality.
20. In the aforesaid circumstances, the Defendant prayed that the application of the Plaintiff purportedly made under Section 102 of the Civil Procedure Code be dismissed and/or disallowed.

21. (a) At the inquiry, parties agreed to tender written submissions with regard to the Plaintiff's application for interrogatories as well as for discovery. Accordingly, court directed the parties to file written submissions on 3/7/1998 and reserved the order for 30th July 1998.
- (b) Court thereafter delivered its order on 30th July 1998.
22. By the said order, the Court made order under Section 109 of the Civil Procedure Code striking out the Defendant's defence on the basis of non-compliance of Section 102 of the Civil Procedure Code and fixed the matter for ex parte trial notwithstanding the Defendant's position that -
- (a) the Defendant has no documents in his possession and/or power relating to any matter in question in this case;
 - (b) the notice requiring discovery of documents was vague and/or wide in scope;
 - (c) the notice issued has been issued "per incuriam";
 - (d) in any event, the documents referred to are not documents in the possession of the Defendant in his personal capacity;
 - (e) the documents referred to are in the Ministry of Finance/Treasury and cannot be the subject matter of an order for discovery in this case;
 - (f) the documents are in any event in the possession of the Hon. Minister of Finance;
 - (g) the said documents, if any are "privileged".
23. The Court however, by the same order dismissed the Plaintiff's application for interrogatories.
24. The Defendant states that the said order striking out the Defendant's defence and fixing the matter for exparte trial is -
- (a) contrary to law;
 - (b) against the basic principles of law and justice practised in this country;
 - (c) against the basic norms of law;
 - (d) against the rules of natural justice.
25. The Defendant states that at all times material the Defendant has taken steps to defend the action and has shown a keenness to have the action heard and determined as early as possible.
26. In the circumstances, the Defendant states that it is wrong in law and/or is unjust and/or is against the rules of natural justice that his answer should be struck off particularly when the Plaintiff sought to have access to documents if any, maintained at the Ministry of Finance/Treasury.

27. Being aggrieved by the said order the Defendant begs that Your Lordships Court be pleased to act in Revision and set aside and/or revise the said order on the following amongst other grounds that may be urged by Counsel at the hearing of this Petition:
- (a) the said order is contrary to law and to the rules of natural justice;
 - (b) it is respectfully submitted that the notice "styled" as a notice under Section 102 of the Civil Procedure Code is vague and the documents sought to be discovered are vague and wide in scope;
 - (c) it is respectfully submitted that in any event when the Defendant stated that he has no documents in his possession and/or power relating to any matter in question in this action, he has sufficiently answered in terms of the Civil Procedure Code and thus no order under Section 109 could have been made;
 - (d) in any event the Defendant states that the documents referred to in the said notice if available at all, are documents maintained by and kept at the Ministry of Finance/Treasury and are thus not under his possession and/or under his authority in that inter alia they are under the control and/or authority of the Hon. Minister of Finance;
 - (e) it is respectfully submitted that in any event the documents referred to in the said notice, if any, are not documents under his supervision and/or control and/or under his authority;
 - (f) in any event the said documents, if any, are privileged in law;
 - (g) it is respectfully submitted that, in any event the said documents, if any, cannot be the subject of an order under Section 102 of the Civil Procedure Code;
 - (h) it is respectfully submitted that in the circumstances of this case no sanction could have been imposed under Section 109.
 - (i) In any event, the Learned District Judge could not have made an order under Section 109 unless he came to a finding that there was a contumacious refusal to comply with an order under Section 102.
 - (j) it is respectfully submitted that in any event the Court has discretionary power under Section 109 and in the circumstances of this case the answer of the Defendant should not have been struck off and the Court should not have fixed the case for *ex parte* trial.
 - (k) it is respectfully submitted that it is against the basic principles of the laws of this country for cases to be fixed *ex parte*, and cases are fixed *ex parte* only in exceptional cases and in the circumstances of this case, the matter should not have been fixed *ex parte* trial;
 - (l) it is respectfully submitted that in any event the said notice served on the Defendant is not a notice under and in terms of Section 102 of the Civil Procedure Code.
 - (m) in any event it is respectfully submitted that the notice served on the Defendant is not in keeping with the order of the court;

(n) it is respectfully submitted that the Learned District Judge has failed to appreciate the provisions of Chapter XVI of the Civil Procedure Code in that the Learned District Judge has even wrongfully held that an order has been made under Section 100 of the Civil Procedure Code when in fact no order had been made(i.e., with regard to the question of the interrogatories).

(o) The Learned District Judge erred in law when he held that

" මේ අනුව පෙනී යන කරුණක් නම් විත්තිකරු එක් අතකින් නඩුවට අදාළ ලේඛන ඔහු නඩුව තරඟ කරන තත්වය මත ඔහුගේ සන්නතය ඇති බවට පවසන නමුත්

when in paragraph 3 of his affidavit he states inter alia as follows:

" වෙනත් හේතු අතර පැමිණිලිලත් මට විරුද්ධව නඩු කිවිත්තක් අනාවරණය නොවන නිසා මෙහි නඩුවේ කිසිදු ප්‍රශ්නාත්මක කාරණයකට අදාළව මිඳුන් සන්නතයේ සහ/සේ බලය යටතේ ලේඛන කිසිවක් නැති බවට ප්‍රකාශ කිරීම 'සඳහා මට උපදෙස් ලැබී ඇති බව මම කියා සිටිමි' %

28. The Defendant states that the case has been fixed for ex parte trial on 3rd September 1998.

29 (i) The Defendant states that unless the interim order as prayed for herein is granted

- (a) this application will be rendered nugatory;
- (b) the Defendant's right to defend the action may be adversely affected;
- (c) the Defendant's status will be undermined.

(ii) The Defendant pleads that in view of the order made by the Learned District Judge under Section 109 (1), he apprehends that action may be taken under Section 109 (2) in proceedings for contempt of court, and constitutes exceptional circumstances entitling the Defendant for a stay of the operation of the said order .

30. The Defendant states that in the aforesaid circumstances this is a fit and proper case for the exercise of the courts extraordinary powers in revision.

31. The Defendant further pleads inter alia that for the under mentioned reasons, the Court is entitled to exercise its powers in revision:

- (a) it is respectfully submitted that the order dated 30 July 1998 is palpably wrong;
- (b) it is respectfully submitted that the order is against the rules of natural justice and against the norms of the known laws of this country;
- (c) it is respectfully submitted that the said order would shock the conscience of Court;


(d) it is respectfully submitted that unless the said order is forthwith set aside grave injustice would be caused to the Defendant and the Defendant's rights would be adversely affected.

32. The Defendant states that the Defendant has not invoked the jurisdiction of Your Lordships in this matter save and except for an application to leave to appeal which the Defendant has filed.

The Defendant annexes hereto a true copy of the journal entries in the said case marked "M" , and order in the said case marked "N" and pleads the same as part and parcel of this Petition.


WHEREFORE, the Defendant Petitioner prays that Your Lordships Court be pleased to

- (a) Issue notice on the Plaintiff Respondent;
- (b) to act in revision and set aside and/or revise the order of the Learned District Judge dated 30th July 1998 striking out the defence of the Defendant and ordering the case be fixed for exparte trial;
- (c) to stay the operation of the order dated 30th July 1998 and to stay all further proceedings in DC Colombo Case No. 19849/MR till the hearing and final determination of this action;
- (d) for costs; and
- (e) for such other and further relief as to Your Lordships Court shall deem meet.


Registered Attorneys-at-Law for the
Defendant Petitioner

Documents annexed to the Petition

- 1. Proxy
- 2. Affidavit
- 3. Documents marked "A " to "N "


Registered Attorneys-at-Law
for the Defendant Petitioner

Settled by

- S. Harsha Amarasekera Attorney-at-Law
- J. Romesh de Silva Presidents Counsel
- H.L. De Silva President Counsel