

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

Court of Appeal
Application No: CA775/98
District Court Colombo
Case No: 19849/MR.

Nihal Sri Ameresekere
167/4, Sri Vipulasena Mawatha
Colombo 10.

PLAINTIFF

Vs.

Gamini Lakshman Peiris
"Visumpaya"
Staples Street
Colombo 02 and also of
37, Kirula Place
Colombo 05.

DEFENDANT

*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
"Visumpaya"
Staples Street
Colombo 02 and also of
37, Kirula Place
Colombo 05.

DEFENDANT-PETITIONER

Vs.

Nihal Sri Ameresekere
167/4, Sri Vipulasena Mawatha
Colombo 10.

PLAINTIFF- RESPONDENT

On this 14th day of August 1998.

To: His Lordship the President and Their Lordships the other Honourable Judges of the
Court of Appeal of the Democratic Republic of Sri Lanka.

The Statement of Objections of the Plaintiff-Respondent (hereinafter referred to as the Plaintiff) abovenamed appearing by J W D Perera practising under the name and style of 'DE SILVA & PERERA, his Attorney at Law states as follows:

1. The Plaintiff filed the abovestyled action on 21st July 1997 for the reliefs prayed for in the Plaint. Defendant-Petitioner (hereinafter referred to as the Defendant) filed his Answer on 31st October 1997. The matter was fixed for trial on 16th March 1998.
2. On 23rd February 1998 the Plaintiff made an application to serve interrogatories on the Defendant and Court made Order on 24th February 1998 directing the Defendant to answer the Interrogatories within ten days of receipt thereof.
3. The Defendant filed a purported Statement of Objections together with a Motion on 6th March 1998, without an Affidavit as required by law, stating that he was not obliged in law to answer the said Interrogatories, without specifying any valid ground for objecting to answer any particular Interrogatory.
4. The Plaintiff moved Court to reject the said Statement of Objections as the Defendant had not answered the Interrogatories by Affidavit as required by law by Motion dated 9th March 1998.
5. The Plaintiff thereafter made an Application under Section 100 of the Civil Procedure Code by Petition dated 11th March 1998 for an Order to compel the Defendant to answer the Interrogatories *viva voce* or by Affidavit. The Court fixed the matter for inquiry on 16th March 1998.
6. On 16th March 1998, the Defendant moved to file his Statement of Objections to the Plaintiff's application under Section 100, the Court granted the Defendant time for same until 3rd April 1998.
7. On 3rd April 1998, the Defendant filed his Statement of Objections to the Plaintiff's application under Section 100 and the matter was fixed for Inquiry on 4th June 1998, at which parties were directed to file Written Submissions.
8. In the meanwhile, on 5th March 1998, the Plaintiff made an application by way of a Motion under Section 102 of the Civil Procedure Code. The said application was entertained by Court the next day i.e. the 6th March 1998, as there was a bomb explosion at Maradana on the 5th march 1998 and the Court Office closed early. The Plaintiff annexed the form of Notice to be served on the Defendant marked "B" to the said Motion and moved that the same be served on the Defendant through his registered Attorneys at Law.

True copies of the said Motion and Notice annexed thereto are annexed hereto marked "A1" and pleaded as part and parcel hereof.

9. On 9th March 1998, when the matter came up in open Court, Counsel for the Plaintiff supported the aforesaid Motion and Court accordingly made Order issuing the Notice under Section 102 which directed the Defendant to declare by affidavit all documents in files maintained and kept at the Ministry of Finance / Treasury under the Defendant's supervision and / or control and / or authority as Deputy Minister of Finance, which are or have been in his possession or power relating to all matters in question in the action.

Certified copy of the proceedings of 9th March 1998 along with the Order made that day are annexed hereto marked "A2" and pleaded as part and parcel hereof.

10. The Defendant filed a Statement of Objections to the Plaintiff's application under Section 102 on 17th March 1998 which is annexed to the Petition marked "J", stating *inter alia*:
 - (a) that the Notice requiring the discovery of documents is vague and or wide in scope, and
 - (b) that the documents referred to are documents not in his possession in his personal capacity and that they are privileged.
11. The Plaintiff respectfully states that from the above response it is manifestly clear that the Defendant understood the nature of the Notice under Section 102 served on him, and having identified the documents that were sought by the Plaintiff, took up the position that the said documents *were available* but not in his personal capacity.
12. The Plaintiff respectfully draws Your Lordships' attention to the offending news item on which the Plaintiff has sued the Defendant. There the Defendant has stated that neither the Minister nor the Deputy Minister of Finance participated at any discussion that preceded the Settlement Agreements. It is submitted with respect that the truth or otherwise of that statement will be established if one looks at the relevant files in the Ministry of Finance, more particularly at the Minutes (equivalent to the journal entries in a case record).
13. The Plaintiff respectfully states that the Defendant at paragraph 39 of his Answer has taken up the unambiguous position that at all material times he acted in his capacity as the Deputy Minister of Finance. The Plaintiff further states, that accordingly the documents that the Plaintiff required the Defendant to disclose was confined to those that were maintained at the Ministry of Finance / Treasury.
14. It is be noted with respect that the Defendant in his Answer has denied the averments contained in several paragraphs of the Plaint subject to the contents of documents. However, the List of Documents filed by the Defendant contains only one document.

The Lists of Witnesses and Documents filed by the Defendant is annexed hereto marked "A3" and pleaded as part and parcel hereof.

15. In the said circumstances, the Plaintiff made an application under Section 109(1) of the Civil Procedure Code on 7th May 1998 to strike out the Defence of the Defendant. The Court having directed the said application to be supported on 14th May 1998, due to lack of time on that day, took the matter up on 15th May 1998.

16. Upon the application being supported on 15th May 1998, the Court reserved its order for 4th June 1998, which was the date fixed for the inquiry under Section 100 as stated above.

A true copy of the said application under Section 109(1) and a certified copy of the proceedings of 15th May 1998 are annexed hereto marked "A4" and "A5" respectively and pleaded as part and parcel hereof.

17. On 4th June 1998, in the presence of Counsel for both parties, the learned District Judge indicated that the said Order was not ready and postponed same for 30th July 1998, and directed that if parties wished they could file written submissions on this matter as well. Accordingly both parties filed separate written submission on this matter on or before 3rd July 1998.

A certified copy of the proceedings of 4th June 1998 and the true copies of the written submissions filed by the Plaintiff and the Defendant are annexed hereto marked "A6", "A7", and "A8" respectively and pleaded as part and parcel hereof.

18. On 30th July 1998 the learned District Judge made one Order in respect of both the matters referred to above, i.e., the Section 100 inquiry relating to interrogatories and the Section 109(1) application relating to the Defendant's default in refusing to declare by affidavit documents in terms of Section 102.

A certified copy of the said Order dated 30th July 1998 and a sworn translation of same in English are annexed hereto marked "A9(a)" and "A9(b)" and pleaded as part and parcel hereof.

19. The Plaintiff respectfully states that the Order of the learned District Judge striking out the Answer of the Defendant and fixing the matter for *ex parte* trial on 3rd September 1998, consequent to the Defendant's default in refusing to comply with the provisions Section 102 was correctly made.

20. The Plaintiff denies all and singular the several averments contained in the Defendant's Petition and the corresponding averments in the supporting Affidavit in so far as they are inconsistent and/or at variance with the averments contained herein.

Certified copies of the journal entries of the case record are annexed hereto marked "A10" and pleaded as part and parcel hereof.

21. By way of preliminary objections in law the Plaintiff respectfully states that the Defendant is not entitled to have and maintain this application and / or obtain any reliefs in these proceedings in that:

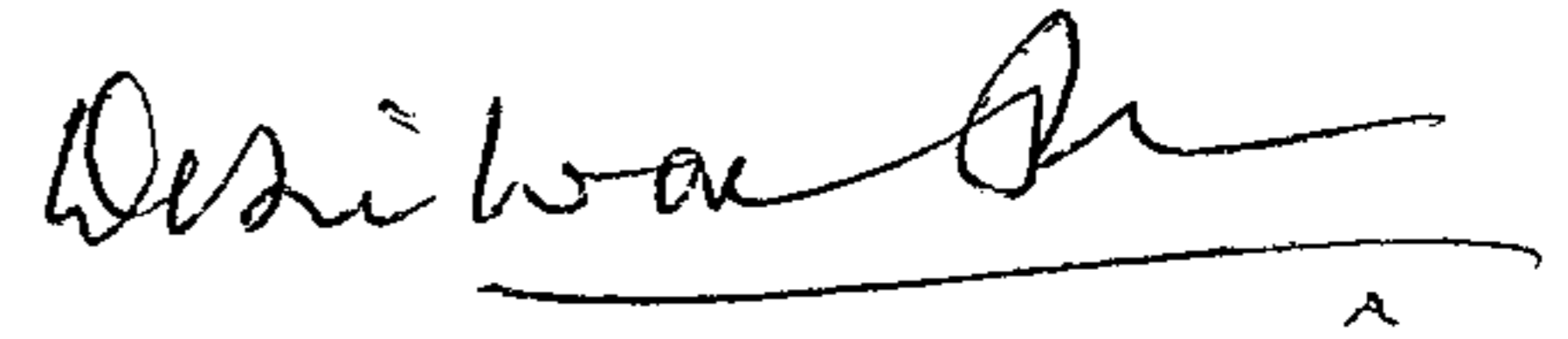
- (a) the Defendant has suppressed from Court the documents annexed hereto marked "A2", "A6", and "A7" and the Journal entry of 14th May 1998. These documents are vital for the Court to ascertain the true facts in relation to the application under Section 109(1);
 - (b) the failure of the Defendant to produce certified copies of relevant proceedings as aforesaid, and the Defendant's failure to seek leave of Court to produce same at a later date, amount to a willful non-compliance with Rule 3(1)(a), and 3(1)(b) of the Court of Appeal (Appellate Procedure) Rules 1990;
 - (c) the Defendant has with deliberate intent misled Court with glaring misstatements / misrepresentations *inter alia* by adding the crucial words "if any" and "if available at all" in the Petition at paragraphs 18(a), 27(d), 27(e), and 27(f) when in fact the said words do not appear in the Statement of Objections filed by the Defendant in the District Court annexed to the Petition marked "J";
 - (d) each one of the above factors is sufficient for Your Lordships' Court to refuse to exercise the discretionary powers in Revision;
 - (e) the Defendant has not pleaded any exceptional or extra-ordinary circumstance that justifies the invocation of the powers of Revision when an alternate remedy by way of Appeal is available to the Defendant and which the Defendant has resorted to in Court of Appeal Leave to Appeal Application CALA 189/98;
 - (f) the said Leave to Appeal Application contains the identical grounds and the identical reliefs as in this application;
 - (g) this application must be rejected *in limine* by Your Lordships' Court for the reasons set out in (e) and (f) above.
22. Without prejudice to the aforesaid the Plaintiff states that the Order of the Learned District Judge striking out the Defence of the Defendant is one made in accordance with the law and practice and the facts pertaining to this case.
23. The Plaintiff further respectfully states that the grounds upon which the Defendant seeks to challenge the Order of the Learned District Judge striking out the Defence of the Defendant are untenable in law.
24. The Affidavit of the Plaintiff is annexed hereto in support of the averments contained herein.

WHEREFORE the Plaintiff-Respondent prays that Your Lordships' Court be pleased to:

- (a) dismiss the Application for Revision of the Defendant-Petitioner;
- (b) set aside and dissolve the Interim Order issued by Your Lordships' Court;

(c) grant costs, and

(d) such other and further relief as to Your Lordships' Court shall seem meet.



Attorney at Law for the
Plaintiff-Respondent

Settled by:

Ms. Rishda Zarook,
Nigel Bartholomuesz Esqr.,
M A Sumanthiran Esqr.,
Harsha Cabral Esqr.,
Attorneys at Law

K Kanag-Isvaran Esqr.,
President's Counsel