

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

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

PLAINTIFF

SC Special Leave to Appeal

Application No. 33/2001

Vs.

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

Court of Appeal

Application No. CALA: 254/2000

DEFENDANT

D.C. Colombo

Case No. 19849/MR

*In the matter of an Application for Leave to
Appeal in terms of Section 754 of the Civil
Procedure Code.*

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

PLAINTIFF-PETITIONER

Vs

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

DEFENDANT-RESPONDENT

AND NOW

*In the matter of an Application for
Special Leave to Appeal in terms of
Section 128 of the Constitution.*

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

**PLAINTIFF-PETITIONER-
PETITIONER**

Vs

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

**DEFENDANT-RESPONDENT-
RESPONDENT**

On this 12th day of February 2001.

To: His Lordship the Chief Justice and Their Lordships the other Honourable Judges of the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

The PETITION OF APPEAL of the Plaintiff-Petitioner-Petitioner abovenamed (hereinafter referred to as the "Plaintiff") 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 *chronology* of the proceedings pertaining to the abovestyled Action is as follows:

- a) i. Plaintiff filed Plaintiff on 21.7.1997.
- ii. Defendant-Respondent (hereinafter referred to as the "Defendant") filed Answer on 31.10.1997.
- iii. Trial was fixed for 16.3.1998.
- b) i. *In the circumstances of the averments in the Defendant's Answer being vague and evasive*, the Plaintiff served Interrogatories dated 23.2.1998 on the Defendant through Court on 24.2.1998 in terms of Section 94 (read with Section 95) of the Civil Procedure Code [CPC]. The Court Ordered the Defendant to Answer the said Interrogatories within 10 days of service of same – *vide J.E. No. 5*.
- ii. Defendant filed a purported Statement of Objections on 6.3.1998, without an Affidavit as required by law and **did not answer any of the Interrogatories as specifically required by law in that regard**.
- iii. Plaintiff on 9.3.1998 in the aforesaid circumstances moved Court to reject the said purported Statement of Objections.
- iv. Plaintiff thereafter on 11.3.1998 made an Application under Section 100 of the CPC for an Order to compel the Defendant to answer the Interrogatories by viva voce examination or by Affidavit.
- v. The Court fixed the above matter for Inquiry on 16.3.1998 and the Defendant moved to file Objections to Plaintiff's Application under Section 100 of the CPC. The Court also made Order that the Trial cannot commence, when there is an Application made under Section 100 of the CPC. – vide J.E. No. 13 and Proceedings of 16.3.1998.
- vi. Defendant on 3.4.1998 filed his Statement of Objections to the Plaintiff's Application under Section 100 on the matter of the Interrogatories.
- vii. The above matter was fixed for Inquiry on 4.6.1998, and parties were directed to file Written Submissions.
- viii. In the absence of any valid ground in law objecting to answering each of the respective Interrogatories, the Plaintiff was entitled to an Order in his favour under Section 100 of the CPC, compelling the Defendant to answer each and every Interrogatory.**
- c) i. Plaintiff had also on 5.3.1998 made an Application under Section 102 of the CPC for Discovery of Documents and Court made Order on 9.3.1998, directing the Defendant to declare by Affidavit all documents which are or have been in his possession or power relating to any matter in question in this Action.
- ii. Defendant on 17.3.1998 filed his Statement of Objections stating, *inter-alia*, that the documents referred to are documents not in his possession in his personal capacity and that they are privileged.

- iii. Plaintiff thereupon on 7.5.1998 made an Application under Section 109(1) of the CPC to strike out the Defence of the Defendant for non-compliance of Order made for Discovery of Documents under Section 102 of the CPC., and upon support on 15.5.1998, the Court reserved Order for 4.6.1998, which was also the date fixed for the Inquiry into the Plaintiff's Application under Section 100 of the CPC.
- iv. On 4.6.1998, the Court directed parties to file Written Submissions on the matter of the Plaintiff's Application to have the Defence struck out under Section 109 (1) of the CPC as well.
- v. Accordingly, both parties on 3.7.1998 filed Written Submission on the matter of the Plaintiff's Applications under Sections 100 and 109(1) of the CPC, in respect of the Interrogatories and of having the Defence struck out for non-compliance of Order made for Discovery of Documents under Section 102 of the CPC.

2.a) The District Court made its Order on the Written Submissions of the parties on 30.7.1998

b) The Court had to make Orders in respect of,

- i. the Plaintiff's Application under Section 100 of the CPC in respect of the Interrogatories, and
- ii. the Plaintiff's Application to have the Defendant's Defence struck out under and in terms of Section 109(i) for failing to comply with the Order made under Section 102 of the CPC to give Discovery of Documents

c) However, the Court made one Order in respect of both the above matters and

- i. struck out the Defendant's Answer for not complying with the Order made under Section 102 of the CPC for declaration of documents and fixed the Action for ex-parte Trial on 3.9.1998.
- ii. failed to make an Order under Section 100 of the CPC

The correct Order the Court ought to have made under Section 100 of the CPC, is to have directed the Defendant to Answer the Interrogatories

A certified copy of the said District Court Order dated 30.7.1998 and a sworn translation thereof in English are annexed hereto marked "X1a" and "X1b" respectively and pleaded as part and parcel hereof.

3.a) Being aggrieved by the Order the Defendant on 5.8.1998 made Revision Application No. 775/98 [with connected Leave to Appeal Application No. 189/98] to the Court of Appeal and therein stated at Paragraph 27(n) in his Revision Application [Paragraph 28(n) of his Leave to Appeal Application] as follows,

"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 Interrogatories)".

b) Thus it was common ground among both parties that no Order under Section 100 had been made.

4. a) The matter of the Defendant's Revision Application [*along with his Leave to Appeal Application*] was heard before Their Lordships J.A.N. de Silva J. and T.B. Weerasuriya J., who upon conclusion made Order on 11.2.1999, setting aside the Order of the Learned District Judge dated 30.7.1998, holding that;

"For the foregoing reasons, it seems to me that the District Judge was manifestly in error when he made order to strike out the answer of the Defendant-Petitioner and to have the trial ex-parte. This order has occasioned a miscarriage of justice which demands intervention by this Court. In the circumstances, I set aside the order of the District Judge dated 30.07.1998."

- b) In Their Order Their Lordships recognised the fact that,

"Chapter XVI of the Civil Procedure Code relates to pre-trial proceedings encompassing provisions for interrogatories, discovery of documents, notice to admit genuineness of documents and inspection of documents. However, the procedure relating to discovery is different from procedure to secure Interrogatories, admit genuineness of documents and inspection of documents."

A certified copy of the Court of Appeal Order dated 11.2.1999 is annexed hereto marked "X2" and pleaded as part and parcel hereof.

5. Being aggrieved with the same Order of the Learned District Judge dated 30.7.1998 the Plaintiff also made an Application for Leave to Appeal No. 192/98 to the Court of Appeal on 11.8.1998, moving, *inter-alia*, to set aside the aforesaid erroneous Order made by the Learned District Judge in his Order dated 30.7.1998 in relation to Plaintiff's Application under Section 100 of the CPC, **which error the Defendant also had concurred with as aforesaid**, as referred to at paragraph No. 3 hereinabove.

A true copy of Plaintiff's Leave to Appeal Application No. 192/98 dated 11.8.1998, is annexed hereto marked "X3", together with true copies of the following Documents that had been annexed thereto marked therein as, :

- A1 - Complaint dated 21.7.1997 with Documents annexed thereto marked A1a to A9
- A2 - Defendant's Answer dated 31.10.1997.
- A3a,b - Motion for Interrogatories and the Interrogatories dated 23.2.1998
- A4a,b - Motion and Statement of Objections dated 6.3.1998 of the Defendant refusing to Answer Interrogatories
- A5 - Plaintiff's Motion dated 9.3.1998 to reject the Defendant's above Statement of Objections.
- A6a,b,c - Plaintiff's Motion, Application and Affidavit under Section 100 of the CPC dated 11.3.1998.
- A7a,b - D.C. Proceedings and Order dated 16.3.1998 and translation thereof
- A8a,b - Defendant's Statement of Objections dated 3.4.1998 to Plaintiff's Application under Section 100 of the CPC.
- A9 - Plaintiff's Written Submissions re Inquiry under Section 100 of the CPC
- A10 - Defendant's Written Submissions re Inquiry under Section 100 of the CPC
- A11a,b - District Court Order dated 30.7.1998 and translation
- A12 - Defendant's Leave to Appeal Application No. 189/98 dated 5.8.1998
- A13 - Defendant's Revision Application No. 775/98 dated 5.8.1998
- A14 - District Court Journal Entries Nos. 1 to 20 *i.e. up to 30.7.1998* and proceedings of 4.6.1998 with translations thereof.

and pleaded as part and parcel hereof, for the purpose of full disclosure of the requisite Documents necessary for supporting this Petition

- 6.a) The Plaintiff's said Application No. 192/98 for Leave to Appeal from the Learned District Judge's Order of 30th July 1998 came up for support on 29.3.1999, before the same Bench, namely Their Lordships J.A.N. de Silva J. and T.B. Weerasuriya J., who had earlier on the 11th February 1999 already vacated and set aside the aforesaid Order of 30th July 1998 of the Learned District Judge, **in toto**.
- b) In this background, Counsel for the Defendant objected to the Plaintiff's Application for Leave to Appeal **on the basis that there was nothing left in the Order of the Learned District Judge of 30.7.1998 as it had already been set aside.**
- c) Consequently, Their Lordships J.A.N. de Silva J. and T.B. Weerasuriya J., having reserved their Order delivered same on 27th April 1999 holding, inter-alia,

"Counsel for the respondent (i.e. Defendant) submitted that the order made by the District Judge has been set aside by this Court and therefore there is no basis for this application to be continued in this way. He further submitted that the Order of the District Judge dated 30th July 1998 is no longer in existence and that this Court cannot review an Order which has been set aside by the same court."

"We agree with the contention that in view of the Order made by this court dated 11.02.1999 there is nothing further left in the order of the District Judge dated 30th July 1998. We refuse Leave to Appeal and dismiss the application without costs."

A certified copy of the said Court of Appeal Order dated 27.4.1999 is annexed hereto marked "X4" and pleaded as part and parcel hereof.

- d) In the aforesaid circumstances, the Special Leave to Appeal Application No. 77/99 dated 24.3.1999 that the Plaintiff had filed in the Your Lordships' Court challenging the Order of the Court of Appeal dated 11.2.1999, was also withdrawn on 3.6.1999.
- e) The Defendant did not Appeal to the Supreme Court challenging the aforesaid Order of the Court of Appeal dated 27.4.1999. **Hence, the said Order dated 27.4.1999 of the Court of Appeal remains valid and binding.**
- 7.a) The Learned District Judge in his Order dated 30.7.1998, **had held that the Defendant is not bound to answer the Interrogatories served on him.**
- b) However, **in view of the Court of Appeal vacating and setting aside in toto the said Order dated 30.7.1998** of the Learned District Judge as aforesaid, the Defendant as a matter of law stood *bound in terms of Section 100 of the CPC to answer the aforesaid Interrogatories dated 23.2.1998, that had been served on him by Court and Ordered to -be Answered - vide J.E. No. 5*
- c) Accordingly, **after the aforesaid Court of Appeal Order dated 27.4.1999** the Plaintiff as he lawfully might, by Motion dated 12.5.1999, moved the District Court *to direct the Defendant to answer by viva voce examination or by Affidavit, the aforesaid Interrogatories dated 23.2.1998 that had been served on him by Court on 24.2.1998, and ordered to be answered.*
- d) Copies of the Court of Appeal Orders dated 27.4.1999 and 11.2.1999 were annexed to the Plaintiff's said Motion dated 12.5.1999
- e) The Defendant filed Objections dated 15.7.1999 to Plaintiff's Motion dated 12.5.1999

True copies of the Plaintiff's Motion dated 12.5.1999 and the Defendant's Objections dated 15.7.1999 are annexed hereto marked "X5(a)" and "X5(b)", respectively, and pleaded as part and parcel hereof.

- f) On 13.9.1999, when the aforesaid matter came up for Inquiry, both parties agreed that the matter before Court is the Plaintiff's Application under Section 100 of the CPC against the Defendant to compel the Defendant to answer the Interrogatories.

A certified copy of the proceedings dated 13.9.1999 is annexed hereto marked "X6" and pleaded as part and parcel hereof.

- g) Both parties having been required to file Written Submissions on the said matter, Written Submissions were duly filed..

True copies of the Written Submissions of the Plaintiff marked "X7(a)" and Written Submissions of the Defendant marked "X7(b)" are annexed hereto and pleaded as part and parcel hereof

Certified copies of all Journal Entries Nos. 1 to 39 i.e. up to 22.8.2000 are annexed hereto marked "X8" and pleaded as part and parcel hereof.

8. On 22.8.2000 the District Court made an Order on the aforesaid matter, *inter-alia*, holding that -

- i. the Order made by the District Court on 30.7.1998 in relation to the matter of Interrogatories has not been set aside by the Order dated 11.2.1999 of the Court of Appeal.
- ii. the Plaintiff's Leave to Appeal Application in relation to Interrogatories had been dismissed by the Court of Appeal on the ground that the District Court's Order dated 30.7.1998 had been already set aside by the Court of Appeal.
- iii. since the Order made by the District Court in relation to the matter of Interrogatories had not been set aside by the Court of Appeal, that the matter in relation to the Interrogatories still stands.
- iv. the Plaintiff has no right to seek an Order once again from the District Court to require the Defendant to Answer the said Interrogatories.

A certified copy of the said District Court Order dated 22.8.2000 and a sworn translation thereof in English are annexed hereto marked "X9(a)" and "X9(b)" respectively, and pleaded as part and parcel hereof.

9. The Learned Additional District Judge Mr.Thilak Thabrew had obviously misdirected himself and erred in fact and law in making the aforesaid Order.
10. The Plaintiff was consequently compelled to file an Application CALA No. 254/2000 for Leave to Appeal to the Court of Appeal on 5th September 2000, which was taken up for inquiry into the grant of Leave on 24th October 2001 and 15th November 2000, and the Order was reserved for 31.01.2001.
11. On 31.01.2001 Their Lordships delivered order dismissing the Appeal of the Plaintiff.

A True Copy of the Plaintiff's Petition of Appeal in CALA No. 254/2000 (to which had been annexed all Documents referred to hereinbefore, more particularly "X3" with Annexures A1 to A14) and a Certified Copy of the Order of the Court of Appeal dated 31.01.2001 is annexed hereto marked "X10(a)" and "X10(b)", respectively and pleaded as part and parcel hereof.

12. Being aggrieved with the said Order of the Court of Appeal dated 31.1.2001, the Plaintiff respectfully moves for Special Leave to Appeal therefrom to Your Lordships' Court, on the following, among other grounds, that may be urged by Counsel at the Hearing:

- a) the said order is contrary to law and Their Lordships' have gravely misdirected themselves and erred in fact and in law;
- b) Their Lordships', like the Learned Additional District Judge, have gravely misdirected themselves in ignoring the decision of De Silva and Weerasuriya JJ of 27th April 1999, whereby they set aside and vacated the Order of the Learned District Judge as aforesaid, holding:

“Counsel for the respondent (*i.e.* Defendant) submitted that the order made by the District Judge has been set aside by this Court and therefore there is no basis for this application to be continued in this way. He further submitted that the Order of the District Judge dated 30th July 1998 is no longer in existence and that this Court cannot review an Order which has been set aside by the same court.”

“We agree with the contention that in view of the Order made by this court dated 11.02.1999 there is nothing further left in the order of the District Judge dated 30th July 1998. We refuse Leave to Appeal and dismiss the application without costs.”

(Vide- Order dated 27th April 1999)

- c) **it is only after the said Order of 27th April 1999**, that the Plaintiff went before the Learned District Judge by his Motion of 12th May 1999 and moved the District Court to direct the Defendant to answer the interrogatories served on him;
- d) it is curious that Their Lordships have only adverted to the earlier Order of De Silva and Weerasuriya JJ and **NOT to the latter Order of 27th April 1999**, where, *inter-partes*, they categorically declared that,

“in view of the Order made by this Court dated 11.2.1999 there is nothing further left in the Order of the District Judge dated 30th July 1998”

- e) this is a serious misdirection, which vitiates the aforesaid Order and has caused a miscarriage of justice.
- f) Their Lordships' have also misdirected themselves in overlooking the scope of the Inquiry before them and dismissing the 'Appeal' of the Plaintiff, when the question was whether Leave should be granted or not.
- g) **it is respectfully submitted, that until the said Interrogatories are answered by the Defendant, the same being pre-trial proceedings, the Action cannot be set down or proceed to Trial.**

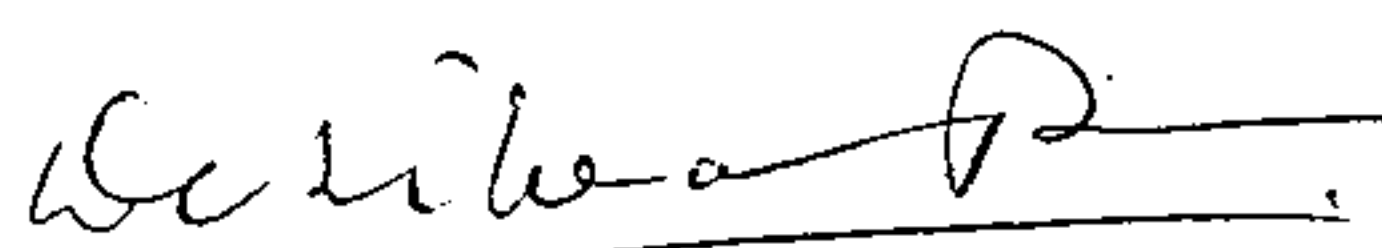
13. The Plaintiff respectfully states that thus and otherwise there exist substantial questions of law for the grant of Special Leave to Appeal by Your Lordships' Court. The Plaintiff further respectfully states that this matter is of great public and general importance and fit for review by Your Lordships' Court. The Plaintiff has not previously invoked Your Lordships' jurisdiction in respect of this matter of the said Court of Appeal Order dated 31.1.2001, except in Supreme Court Special Leave to Appeal No.77/99 which was in relation to the Court of Appeal Order dated 11.2. 1999, which was withdrawn consequent to the subsequent Court of Appeal Order dated 27.4.1999, as referred to at paragraph 6 (d) hereinabove.

14. The Plaintiff respectfully states further that if the Interim Order sought herein is not granted grave and irremediable mischief and irreparable loss and damage will be caused to the Plaintiff, in that, **this being a pre-Trial matter warranting determination upon prior to the commencement of the Trial, which is now fixed for 19th February 2001.**

15. The Affidavit of the Plaintiff is appended hereto in support of the averments contained herein.

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

- (a) issue notice on the Defendant-Respondent-Respondent;
- (b) issue an Interim Order staying further proceedings in the District Court of Colombo until the hearing and determination of this Application;
- (c) grant Special Leave to Appeal against the Order dated 31st January 2001 of the Court of Appeal;
- (d) set aside the Order dated 31st January 2001 of the Court of Appeal;
- (e) set aside the Order of the District Court dated 22nd August 2000;
- (f) make Order directing the Defendant to answer, by *viva voce* examination or by Affidavit in terms of Section 100 of the Civil Procedure Code, each and every Interrogatory dated 23.2.1998 that had been served on him through Court, he having been Ordered by the District Court on 23.2.1998 to Answer the said Interrogatories;
- (g) grant costs, and
- (h) such other and further relief as to Your Lordships' Court shall seem meet.



Attorney at Law for the Plaintiff-Petitioner-Petitioner

Settled by:
Nigel Bartholomuesz Esqr.,
M A Sumanthiran Esqr.,
Harsha Cabral Esqr.,
Attorneys-at-Law

K Kanag-Isvaran Esqr.,
Presidents Counsel