

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

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

PLAINTIFF

Vs

Court of Appeal

Application No: CALA: 255/2000

D.C. Colombo

Case No: 21819/MR

1. Gamini Lakshman Peiris
of "Visumpaya", Staples Street
Colombo 2, and also of
37 Kirula Place, Colombo 5.
2. Hotel Developers (Lanka) Ltd.
C/o Colombo Hilton Sports Complex
Echelon Square,
Lotus Road, Colombo 1.

DEFENDANTS

*And now 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

1. Gamini Lakshman Peiris
of "Visumpaya", Staples Street
Colombo 2, and also of
37 Kirula Place, Colombo 5.
2. Hotel Developers (Lanka) Ltd.
C/o Colombo Hilton Sports Complex
Echelon Square,
Lotus Road, Colombo 1.

DEFENDANTS-RESPONDENTS

On this ^{and} 3rd day of September 2000.

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

The PETITION OF APPEAL of the Plaintiff-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 Plaintiff filed the abovestyled Action on 27.10.1998, against the 1st Defendant-Respondent (hereinafter referred to as the "**1st Defendant**"), *as a derivative action in law in the right and on behalf of 2nd Defendant-Respondent* (hereinafter referred to as the "**2nd Defendant**") for the reliefs prayed for therein, *in the interest and for the benefit of the 2nd Defendant*, in the circumstances disclosed in the *Plaint*, *more particularly in paragraphs 27 and 28 thereof.*

*A true copy of the **Plaint** is annexed hereto marked "X1" and pleaded as part and parcel hereof.*

2. a) The 1st Defendant filed his Answer on 22.1.1999.
- b) The 2nd Defendant filed its Answer on 21.1.1999.
- c) The Case was fixed to be called on 5.2.1999 and again on 19.2.1999 to be fixed for Trial.

True copies of the Answers of the 1st & 2nd Defendants are annexed hereto marked "X2(a)" and "X2(b)" respectively and pleaded as part and parcel hereof.

3. a) Having filed Answer, the 1st Defendant thereafter, *without any provision therefor in the Civil Procedure Code [CPC]*, filed Motion dated 16.2.1999 stating that the *Plaint* had been accepted *per incuriam* and moved that the *Plaint* be rejected and/or the Plaintiff's Action be dismissed
- b) On 19.2.1999 the Court directed the said Motion be supported on 24.2.1999 and fixed the Case for Trial for 17.5.1999.
- c) Consequently, the Court having heard oral submissions on 16.3.1999 on the matter of the 1st Defendant's said Motion dated 16.2.1999, ordered written submissions thereon for 19.4.1999 and reserved Order for 13.5.1999.

A true copy of the 1st Defendant's said Motion dated 16.2.1999 is annexed hereto marked "X3" and pleaded as part and parcel hereof.

4. a) In the meantime, pending the said Order, on 28.4.1999 the Plaintiff also made an Application under Section 94 (read with Section 95) of the CPC to serve Interrogatories on the **1st Defendant** and the Court having considered the matter and **having been satisfied therewith**, made Order on 29.4.1999 directing the 1st Defendant to answer the said Interrogatories under and in terms of Section 99 of the CPC, i.e. by Affidavit within 10 days from the service thereof.
- b) On 28.4.1999 the Plaintiff also made an Application under Section 102 of the CPC for Discovery of Documents and the Court having considered the same made Order on 29.4.1999 directing the 1st Defendant to declare by Affidavit within 7 days of service of Notice, all Documents in files bearing reference No. EA/05/26 maintained by and kept at the Ministry of Finance/Treasury under the 1st Defendant's supervision and/or control and/or authority, as the Deputy Minister of Finance, and accordingly, which are in his possession or power, relating to all matters in question in this Action.
- c) The Court having made the aforesaid Orders on 29.4.1999 *ex mero motu* re-fixed the Case for Trial for 30.5.1999.
- d) On 3.5.1999 the Plaintiff also made an Application under Section 94 (read with Section 97) of the CPC to serve Interrogatories on the **2nd Defendant** to be answered by its Chairman, D.Y. Liyanage and the Court having considered the matter and **having been satisfied therewith**, made Order on 5.5.1999 directing the 2nd Defendant's Chairman, D.Y. Liyanage to answer the said Interrogatories under and in terms of Section 99 of the CPC within 10 days from the service thereof.

True copies of Interrogatories dated 28.4.1999 served on the 1st Defendant, Notice dated 3.5.1999 in terms of Section 102 of the CPC served on the 1st Defendant, Interrogatories dated 3.5.1999 served on the 2nd Defendant's Chairman, D.Y. Liyanage, and certified copies of the said District Court Orders dated 29.4.1999 and 5.5.1999 are annexed hereto marked "X4(a)", "X4(b)", "X4(c)", "X4(d)" and "X4(e)" respectively, and pleaded as part and parcel hereof.

5. a) On 13.5.1999, the date on which the Order was due on the 1st Defendant's aforesaid Motion dated 16.2.1999 to have the Action dismissed, the Court postponed the Order to 17.5.1999, and **directed that the Case be taken off the Trial Roll.**
- b) On 17.5.1999, Court made Order rejecting the 1st Defendant's aforesaid Motion dated 16.2.1999, observing that the matters averred in the 1st Defendant's said Motion could be considered **after the commencement of the Trial.**
- c) The *chronology* of the proceedings in relation to Interrogatories and Discovery of Documents in this Case upto 15.6.1999 was as follows:
- i. 27.10.1998 - Plaintiff filed this Action.
 - ii. 22.1.1999 - Defendants' Answers having been filed, the Case was fixed to be called on 5.2.1999 to fix date for Trial.

- iii. 5.2.1999 - Counsel for the Defendants moved that the Case be re-called on 19.2.1999 to fix the date of Trial.
- iv. 19.2.1999 - 1st Defendant filed the Motion dated 16.2.1999 moving to support on the same day i.e. 19.2.1999.
- v. 19.2.1999 - The Court fixed date for support of aforesaid Motion for 24.2.1999 and date for Trial as 17.5.1999.
- vi. 29.4.1999 - Upon the Court making Orders directing the 1st Defendant to Answer Interrogatories in terms of Section 99 of the CPC, and give Discovery of Documents in terms of Section 102 of the CPC, the Court re-fixed the Case for Trial for 30.5.1999.
- vii. 5.5.1999 - Court made Order directing the 2nd Defendant's Chairman, D.Y. Liyanage to answer Interrogatories in terms of Section 99 of the CPC.
- viii. 7.5.1999 - 1st Defendant moved Court for 2-weeks time to answer Interrogatories and give Discovery of Documents.
- ix. 12.5.1999 - 2nd Defendant's Chairman moved Court for 2-weeks time to answer Interrogatories.
- x. 13.5.1999 - Order on 1st Defendant's Motion dated 16.2.1999 was postponed to 17.5.1999 and Order was made to take the Case off the Trial Roll.
- xi. 17.5.1999 - Order delivered rejecting the 1st Defendant's Application made by his Motion dated 16.2.1999. The Case was fixed for Trial on 9.6.1999.
- xii. 21.5.1999 - 1st Defendant filed Statement of Objections to giving Discovery of Documents.
- xiii. 26.5.1999 - 1st Defendant filed Statement of Objections to answering Interrogatories *without complying with Section 99 of the CPC.*
- xiv. 31.5.1999 - 2nd Defendant's Chairman, D.Y. Liyanage filed Statement of Objections to answering Interrogatories, *without complying with Section 99 of the CPC.*
- xv. 1.6.1999 - Plaintiff filed Application under Section 100 of the CPC against the 1st Defendant for non-compliance with the Order made by Court on 29.4.1999, *to compel the 1st Defendant to Answer the Interrogatories, and notice was issued on the 1st Defendant.*

- xvi. 1.6.1999 - Plaintiff filed Application to reject the 1st Defendant's Statement of Objections to giving Discovery of Documents, in that it was not in conformity with Section 108 of the CPC and *notice was issued on the 1st Defendant.*
- xvii. 2.6.1999 - Plaintiff filed Application under Section 100 of the CPC against the 2nd Defendant for non-compliance with the Order made by Court on 5.5.1999, *to compel the 2nd Defendant's Chairman, D.Y. Liyanage to answer the Interrogatories and notice was issued on the 2nd Defendant.*
- xviii. 9.6.1999 - District Judge was absent and the Case was fixed to be called on 15.6.1999.
- ix. 15.6.1999 - **Order made that the Orders on the Applications made by the Plaintiff under Sections 100 and 102 of the CPC will be completed before Trial and Trial was fixed for 13.9.1999, subject to such condition, and the Case was fixed to be called on 1.7.1999 for steps to be taken in regard to the Plaintiff's Applications made under Sections 100 and 102 of the CPC.**

d) It is quite clear from the above chronology that the Trial had been postponed as aforesaid to 30.5.1999 and later to 9.6.1999 in the light of the Orders made on 29.4.1999 and 5.5.1999 *directing the 1st and 2nd Defendants to answer Interrogatories in terms of Section 99 of the CPC and the 1st Defendant to give Discovery of Documents in terms of Section 102 of the CPC.*

The 1st and 2nd Defendants having obtained an extension of time filed purported Statements of Objections dated 21.5.1999, 26.5.1999 and 31.5.1999, *to Answering Interrogatories and giving Discovery of Documents* as aforesaid, which resulted in the Plaintiff, as he lawfully might, making Applications under Sections 100 and 102 of the CPC for non-compliance by the 1st and 2nd Defendants of the Orders that had been made by Court on 29.4.1999 and 5.5.1999.

It is in this background that the Court made its Order of 15.6.1999, holding that the Orders on the Applications of the Plaintiff under Sections 100 and 102 of the CPC for non-compliance, would be made prior to the commencement of the Trial.

Certified copies of all Journal Entries Nos. 1 to 56 i.e. up to 25.8.2000 and relevant Proceedings, District Court Order dated 17.5.1999 and a certified translation thereof are annexed hereto marked "X5(a)", "X5(b)" and "X5(c)" respectively, and pleaded as part and parcel hereof.

True Copies of the 1st Defendant's said Statement of Objections dated 26.5.1999 and the Plaintiff's said Application dated 1.6.1999 under Section 100 of the CPC are annexed hereto marked "X6(a)" and "X6(b)", respectively, and pleaded part and parcel hereof.

True Copies of the 2nd Defendant's Chairman's said Statement of Objections dated 31.5.1999 and the Plaintiff's said Application dated 2.6.1999 under Section 100 of the CPC are annexed hereto marked "X7(a)" and "X7(b)", respectively, and pleaded part and parcel hereof.

True Copies of the 1st Defendant's said Statement of Objections dated 21.5.1999 and the Plaintiff's said Application dated 1.6.1999 to reject the said Statement of Objections of the 1st Defendant are annexed hereto marked "X8(a)" and "X8(b)", respectively, and pleaded part and parcel hereof.

6. a) **On 15.6.1999**, the 1st and 2nd Defendants' Counsel having intimated in Court that copies of the aforesaid Applications made by the Plaintiff under Sections 100 and 102 of the CPC had not been received by them, and further copies thereof having been promptly served, was confirmed by the Plaintiff's Attorneys-at-Law filing a Motion dated 16.6.1999 in that behalf.

b) **On 15.6.1999** Court observing that,

- i. the Plaintiff had moved for two Orders against the 1st Defendant under Sections 100 and 102 of the CPC, and
- ii. the Plaintiff had moved for an Order under Section 100 of the CPC against the 2nd Defendant,

made Order taking the Case off the Trial Roll.

c) The Court also made further Order fixing the Case for Trial for 13.9.1999, **subject to the understanding** that the Court would make Order on the Applications made by the Plaintiff under Sections 100 and 102 of the CPC **prior to the Trial** – quote:

"I fix the Case for Trial subject to the understanding that an attempt would be made to make an Order prior to the next date on the Applications made under Sections 100 and 102 by the Plaintiff against the 1st and 2nd Defendants."

"Call for steps to be taken in regard to the Applications made by the Plaintiff under Sections 100 and 102."

"Call 1.7.1999 and Trial 13.9.1999"

Accordingly, the Court directed that the Case be called on 1.7.1999 to take steps in regard to the Plaintiff's said Applications under Sections 100 and 102 of the CPC against the 1st & 2nd Defendants.

d) The 1st & 2nd Defendants have not sought to challenge the aforesaid Order made by the District Court on 15.6.1999. **Thus the aforesaid Order made by the District Court on 15.6.1999 stood and stands binding between the parties.**

A true copy of the Plaintiff's said Motion dated 16.6.1999, certified copy of the said District Court Order dated 15.6.1999, and a certified translation thereof are annexed hereto marked "X9(a)", "X9(b)" and "X9(c)" respectively, and pleaded as part and parcel hereof.

7. a) In accordance with the said Order, the **1st Defendant** filed a Statement of Objections dated 15.7.1999 in respect of the Plaintiff's Application under Section 100 of the CPC dated 1.6.1999 to compel the 1st Defendant to Answer the Interrogatories dated 28.4.1999 and Ordered by Court on 29.4.1999 to be Answered in terms of Section 99 of the CPC
- b) In accordance with the said Order, the **2nd Defendant** also filed a Statement of Objections dated 14.7.1999 in respect of the Plaintiff's Application under Section 100 of the CPC dated 2.6.1999 to compel the 2nd Defendant's Chairman, D.Y. Liyanage to answer the aforesaid Interrogatories dated 3.5.1999 and Ordered by Court on 29.4.1999 to be Answered in terms of Section 99 of the CPC
- c) In accordance with the said Order, the **1st Defendant** also filed a further Statement of Objections dated 15.7.1999 to Plaintiff's Application dated 1.6.1999 under Section 102 of the CPC for Discovery of Documents and Ordered by Court on 29.4.1999 to be declared by Affidavit.
- d) The Court consequently on 15.7.1999 fixed Inquiry into the aforesaid pre-Trial matters for 13.9.1999; the said matters for Inquiry being the matter of non-compliance with the aforesaid Orders that had been made by Court under provisions in Chapter XVI of the CPC.

True copies of the 1st Defendant's said two Statements of Objections both dated 15.7.1999 and the 2nd Defendant's Chairman, D.Y. Liyanage's said Statement of Objections dated 14.7.1999 are annexed hereto marked "X10(a)", "X10(b)" and "X10(c)" respectively, and pleaded as part and parcel hereof.

8. a) However, on 13.9.1999, when the aforesaid pre-Trial matters came up for Inquiry, the Counsel for 1st Defendant, **re-agitated** that the Case be taken up for Trial first and preliminary issues be determined prior to Inquiry into the Plaintiff's Applications under Section 100 and 102 of the CPC, contrary to the Order of 15.6.1999, which had not been challenged by the 1st Defendant and hence binding upon him.
- b) The Counsel for the 2nd Defendant **followed suit**, contrary to the Order of 15.6.1999, which had not been challenged by the 2nd Defendant and hence binding upon it.
- c) Both parties having been required to file Written Submissions on the said matter, Written Submissions were duly filed.

True copies of the Written Submissions filed by the Plaintiff, 1st and 2nd Defendants are annexed marked "X11(a)", "X11(b)" and "X11(c)" respectively, and pleaded as part and parcel hereof.

9. Upon the Written Submissions tendered the District Court made an Order on 25.8.2000, inter-alia, holding that: -

- i. there was no Order made in respect of the Plaintiff's Applications for Interrogatories and Disclosure of Documents before Court made Order 17.5.1999 in respect of the 1st Defendant's Motion dated 16.2.1999
- ii. the Court on 15.6.1999, whilst directing that further steps be taken in respect of the Plaintiff's Applications for Interrogatories and Disclosure of Documents, the Trial has been postponed for 13.9.1999
- iii. the Court according to the Order given on the 17.5.1999 rejecting the 1st Defendant's Motion dated 16.2.1999 had stated that the matters mentioned therein would be considered after the commencement of Trial
- iv. there is no provision in the CPC that Application for Interrogatories and Disclosure of Documents should be considered before consideration of issues in a Case.
- v. according to the provisions of Section 108 of the CPC, the Court may Order that the issue or question be determined first, and reserve the question as to the discovery or inspection.
- vi. in terms of the provisions of the aforesaid Section 108 before making a decision in respect of a question regarding Interrogatories or Disclosure of Documents, preliminary issues could be decided upon first.
- vii. since the legal issues mentioned in the 1st Defendant's aforesaid Motion dated 16.2.1999 have been submitted as preliminary issues and based upon which the Case might end, before considering the Application made by the Plaintiff for Interrogatories and Disclosure of Documents, it is suitable to make Order on the preliminary issues.

A certified copy of the said District Court Order dated 25.8.1998 and a sworn translation thereof in English are annexed hereto marked "X12(a)" and "X12(b)" respectively, and pleaded as part and parcel hereof.

10. The Plaintiff respectfully states that the Learned District Judge has gravely misdirected himself and had erred in fact and law in making the aforesaid Order.

11. Being aggrieved with the said Order of the District Court dated 25.8.2000, the Plaintiff respectfully begs 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 Learned District Judge in holding that no Orders had been made by the then Learned District Judge on the Plaintiff's Applications for Interrogatories and Discovery of Documents has failed to appreciate that Orders in fact had been made in that regard by the then Learned District Judge A.W.A. Salam Esqr., on 29.4.1999 and by Learned Addl. District Judge Sunil Rajapakse Esqr., on 5.5.1999 and this is a grievous non-direction amounting in law to a misdirection
- b) Consequently the Learned District Judge has failed to appreciate that the matter before him for determination was the matter of non-compliance by the 1st and 2nd Defendants of the Orders made under Chapter XVI of the CPC relative to pre-Trial proceedings by the then Learned District Judge A.W.A. Salam Esqr., on 29.4.1999 and by the then Addl. District Judge Sunil Rajapakse Esqr., on 5.5.1999 directing compliance therewith.
- c) The Learned District Judge has failed to take cognisance of the fact that the then Learned District Judge A.W.A. Salam Esqr., had already made Order on 15.6.1999 that Orders into Plaintiff's Applications under Sections 100 and 102 of the CPC for non-compliance of Orders of Court will be taken up first and Orders made in that regard prior to the commencement of Trial and that the 1st and 2nd Defendants having not challenged the said Order, had participated in the Inquiries into Plaintiff's said Applications. This is a grievous non-direction amounting in law to a misdirection.
- d) Consequently, the Learned District Judge has failed to appreciate that he had no jurisdiction to make another Order on the same matter
- e) The Learned District Judge has failed to appreciate that the 1st Defendant had by his Motion dated 16.2.1999 moved that the Plaint be rejected and/or Action dismissed on the purported grounds that,
 - i. the Plaint does not disclose a cause of action
 - ii. the Action is prescribed
 - iii. no claim/relief is available against the Defendant in his personal capacity
- f) The Learned District Judge has failed to appreciate that whilst rejecting the aforesaid Motion dated 16.2.1999 of the 1st Defendant, the then Learned District Judge A.W.A. Salam Esqr., had also held that the matters in the Motion can be raised after the commencement of the Trial.

- g) The Learned District Judge has failed to appreciate that the aforesaid Order was clearly on the basis that the matters set out in the 1st Defendant's Motion dated 16.2.1999 are Issues which can be raised at the Trial in terms of Section 146 of the CPC based on the Pleadings, in Answers to Interrogatories, contents of Documents produced and after examination of parties as may be necessary to ascertain upon what material propositions of fact or law the parties are at variance.
- h) It is therefore respectfully submitted that the Learned District Judge has grievously misdirected himself in holding that there is no provision in the CPC for consideration of Applications for Interrogatories and Discovery of Documents before the consideration of "Issues" in a Case
- i) The Learned District Judge has failed to appreciate that Interrogatories, Discovery, Inspection etc., are pre-Trial proceedings
- j) The Learned District Judge has misdirected himself in holding that Section 108 of the CPC required Issues or Questions to be determined first and reserve Questions as to Discovery or Inspection after such determination.
- k) The Learned District Judge has equated erroneously the word "Issue" in Section 108 of the CPC to the Issues to be raised under and in terms of Section 146 of the CPC and has grievously erred in holding that it is suitable to make an Order on the Preliminary Issues raised in the Defendant's Motion before considering Plaintiff's Applications under Sections 100 and 102 of the CPC for non-compliance of Orders of Court in relation to Interrogatories and Discovery of Documents, because the Case might end based upon the Preliminary Issues.
- l) The Learned District Judge has failed to address his mind to the fact that this Case is a derivative action in law, instituted by the Plaintiff in the right and on behalf of the 2nd Defendant, in its interest and for its benefit, and that such an Action has necessarily to be determined upon on mixed questions of fact and law at the Trial.
- m) The Learned District Judge has furthermore gravely misdirected himself in concluding that Section 108 of the CPC has reference to Interrogatories also
- n) The Learned District Judge has failed to address his mind to the fact that the District Court by its Order dated 15.6.1999, which remains unchallenged and binding between the parties, had directed the Inquiry into the Plaintiff's Applications under Sections 100 and 102 of the CPC be proceeded with before the commencement of the Trial, and that he had no Jurisdiction by a sidewind to set it a side by his interpretation of the meaning of the word "Issue" as appearing in Section 108 of the CPC and Section 146 of the CPC.

o) It is respectively submitted that until the said Interrogatories are answered by the 1st and 2nd Defendants and Discovery of Documents given by the 1st Defendant, these being pre-Trial proceedings the Action cannot be set down or proceed to Trial.

12. The Plaintiff respectfully states that thus and otherwise there exist fundamental grounds of law and fact for the grant of Leave to Appeal by Your Lordships' Court and that the Plaintiff has not previously invoked Your Lordships' jurisdiction in respect of this matter.

13. 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 2nd Defendant and to its Shareholders, *i.e. the government, the public, including the Plaintiff.*

14. The Affidavit of the Plaintiff is annexed hereto in support of the averments contained herein.

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

- a) issue notice on the 1st and 2nd Defendants-Respondents,
- b) issue an Interim Order staying further proceedings in the District Court of Colombo until the hearing and determination of this Application,
- c) grant Leave to Appeal against the District Court Order dated 25th August 2000,
- d) set aside the District Court Order dated 25th August 2000,
- e) make Order that the Orders into the Applications made by the Plaintiff under Sections 100 and 102 of the Civil Procedure Code should be determined before the commencement of the Trial in this Case, and the raising of issues in terms of Section 146 of the Civil Procedure Code.
- f) grant costs, and
- g) such other and further relief as to Your Lordships' Court shall seem meet.



Attorney at Law for the Plaintiff

Settled by:

M A Sumanthiran Esqr.,
Harsha Cabral Esqr.,
Attorneys-at-Law

K Kanag-Isvaran Esqr.,
Presidents Counsel