

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

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

SC Special Leave to Appeal

Application No.

**SC. Spl. L.A 32/2001**

**PLAINTIFF**

Court of Appeal

Application No: CALA: 255/2000

D.C. Colombo

Case No: 21819/MR

- 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**

*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**

**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

1. Gamini Lakshman Peiris,  
"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-**  
**RESPONDENTS**

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.**

On this 12<sup>th</sup> day of February 2001.

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 Plaintiff filed the abovestyled Action on 27.10.1998, against the 1<sup>st</sup> Defendant-Respondent (hereinafter referred to as the "**1<sup>st</sup> Defendant**"), *as a derivative action in law in the right and on behalf of 2<sup>nd</sup> Defendant-Respondent* (hereinafter referred to as the "**2<sup>nd</sup> Defendant**") for the reliefs prayed for therein, *in the interest and for the benefit of the 2<sup>nd</sup> 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 1<sup>st</sup> Defendant filed his Answer on 22.1.1999.
- b) The 2<sup>nd</sup> 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 1<sup>st</sup> & 2<sup>nd</sup> Defendants are annexed hereto marked "X2(a)" and "X2(b)" respectively and pleaded as part and parcel hereof.*

3. a) Having filed Answer, the 1<sup>st</sup> Defendant thereafter filed a purported 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) In the meantime, the Court heard oral submissions on the matter of the 1<sup>st</sup> Defendant's said Motion dated 16.2.1999 and after Written Submissions thereon, reserved Order for 13.5.1999.

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



4. a) On 28.4.1999, the Plaintiff made an Application under Section 94 (read with Section 95) of the CPC to serve Interrogatories on the 1<sup>st</sup> Defendant and the Court Ordered the 1<sup>st</sup> 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.

*A true copy of the said Interrogatories dated 28.4.1999 served on the 1<sup>st</sup> Defendant is annexed hereto marked "X4(a)" and pleaded as part and parcel hereof.*

- b) On the same day, the Plaintiff also made an Application under Section 102 of the CPC for Discovery of Documents and the Court Ordered the 1<sup>st</sup> Defendant to Discover by Affidavit.

*A true copy of the Notice dated 3.5.1999 of the Order of Court served on the 1<sup>st</sup> Defendant is annexed hereto marked "X4(b)" and pleaded as part and parcel hereof.*

- c) **The Court having made the aforesaid Orders on 29.4.1999 also postponed the Trial for 30.5.1999.**

*A true copy of a certified copy of the aforesaid Orders of Court dated 29.4.1999 is annexed hereto marked "X4(c)" and pleaded as part and parcel hereof.*

- d) The Plaintiff had also made an Application under Section 94 (read with Section 97) of the CPC to serve Interrogatories on the 2<sup>nd</sup> Defendant and the Court likewise on 5.5.1999 Ordered that they be answered by the 2<sup>nd</sup> Defendant's Chairman.

*True copies of the said Interrogatories dated 3.5.1999 served on the 2<sup>nd</sup> Defendant and certified copy of the said Order of Court dated 5.5.1999 are annexed hereto marked "X4(d)" and "X4(e)" respectively, and pleaded as part and parcel hereof.*

5. a) On 13.5.1999, the Court postponed the Order on the 1<sup>st</sup> Defendant's aforesaid Motion ("X3") to 17.5.1999, and on that date, Court made Order rejecting the 1<sup>st</sup> Defendant's Motion ("X3") holding that all matters set out in the said Motion have already been raised by the 1<sup>st</sup> Defendant in his Answer and should therefore be considered after the commencement of the Trial

*True copies of Certified copies of all Journal Entries Nos. 1 to 56 and Proceedings (i.e. up to 25.8.2000) and the aforesaid 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.*

- b) **The aforesaid Order dated 17.5.1999 was not challenged by way of Leave to Appeal or otherwise by the 1<sup>st</sup> Defendant or the 2<sup>nd</sup> Defendant.**

6. a) After the aforesaid Orders, the 1<sup>st</sup> Defendant filed Statements of Objections dated 21.5.1999 and 26.5.1999 respectively, to giving Discovery of Documents and Answering Interrogatories.

*True Copies of the 1<sup>st</sup> Defendant's said Statements of Objections are annexed hereto marked "X6(a)" and "X6(b)", respectively, and pleaded as part and parcel hereof.*

- b) Similarly on 31.5.1999 the 2<sup>nd</sup> Defendant also filed a Statement of Objections to Answering Interrogatories.

*True Copy of the 2<sup>nd</sup> Defendant's said Statement of Objections is annexed hereto marked "X6(c)" and pleaded as part and parcel hereof.*



- c) Consequently, on 1.6.1999 the Plaintiff made two Applications under and in terms of Sections 100 and 102 of the CPC against the 1<sup>st</sup> Defendant for non-compliance of the aforesaid Orders of Court - *vide* ("X4(c)").

*True Copies of the Plaintiff's said two Applications are annexed hereto marked "X6(d)" and "X6(e)" respectively, and pleaded as part and parcel hereof.*

- d) Likewise, on 2.6.1999 the Plaintiff made an Application under and in terms of Section 100 of the CPC against the 2<sup>nd</sup> Defendant for non-compliance of the aforesaid Order of Court - *vide* ("X4(e)").

*True Copy of the Plaintiff's said Application is annexed hereto marked "X6(f)" and pleaded as part and parcel hereof.*

- e) The Court on 3.6.1999 (*vide* - J.E. 39 and Proceedings), issued Notice of the Plaintiff's aforesaid Applications for 9.6.1999 and the Learned District Judge being absent on that day, the Case was directed to be called on 15.6.1999.

7. a) On 15.6.1999, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counsel claiming in Court that copies of the Plaintiff's aforesaid Applications made under and in terms of Sections 100 and 102 of the CPC had not been received by them, *additional copies thereof* were promptly served; whilst the Learned District Judge A.W.A. Salam Esqr., made Order on 15.6.1999 as follows:

**"The Petitioner Party in this Case has moved for two Orders against the 1<sup>st</sup> Defendant. These Orders have been sought under Sections 100 and 102 of the Civil Procedure Code. The Plaintiff Party undertakes to serve on the 1<sup>st</sup> Defendant's Registered Attorneys, copies of the Motion, Petition and Affidavit by which these two Orders were sought."**

**"The Plaintiff has also sought an Order under Section 100 of the Civil Procedure Code against the 2<sup>nd</sup> Defendant and the said Application has been journalised under Journal Entry (39). Plaintiff agrees to deliver the Motion, Petition and Affidavit relevant to the said Application to the Registered Attorney of the 2<sup>nd</sup> Defendant. As per such agreement I take the Case off the Trial Roll. The Defendants reserve their right to make Application on the manner in which they should pursue action after service of the relevant documents."**

**"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 1<sup>st</sup> and 2<sup>nd</sup> 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"**

- b) The aforesaid Order dated 15.6.1999 was not challenged by way of Leave to Appeal or otherwise by the 1<sup>st</sup> Defendant or the 2<sup>nd</sup> Defendant.

*A true copy of the Plaintiff's Motion dated 16.6.1999 confirming service of the Additional copies aforesaid, certified copy of the said District Court Order dated 15.6.1999, and a certified translation thereof are annexed hereto marked "X7(a)", "X7(b)" and "X7(c)" respectively, and pleaded as part and parcel hereof.*

8. a) Pursuant to the said Order of 15.6.1999, the 1<sup>st</sup> Defendant filed two Statements of Objections both dated 15.7.1999 to the Plaintiff's aforesaid Applications under and in terms of Sections 100 and 102 of the CPC.

*True copies of the 1<sup>st</sup> Defendant's said two Statements of Objections both dated 15.7.1999 are annexed hereto marked "X8(a)" and "X8(b)" respectively, and pleaded as part and parcel hereof.*

- b) Likewise, pursuant to the said Order of 15.6.1999, the 2<sup>nd</sup> Defendant filed its Statement of Objections dated 14.7.1999 to the Plaintiff's said Application under and in terms of Section 100 of the CPC.

*True copy of the 2<sup>nd</sup> Defendant's said Statement of Objections dated 14.7.1999 is annexed hereto marked "X8(c)" and pleaded as part and parcel hereof.*

9. On 15.7.1999, the Learned District Judge A.W.A. Salam Esqr., fixed Inquiry for 13.9.1999 into the aforesaid **pre-Trial** matters of the Plaintiff's aforesaid Applications made on 1.6.1999 and 2.6.1999 **on the matter of non-compliance by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the aforesaid Orders of Court – vide ("X4(c)") and ("X4(e)")**, in relation to answering Interrogatories and giving Discovery of Documents.

10. In the meantime, Learned District Judge A.W.A. Salam Esqr., having been appointed Secretary to the Judicial Service Commission, the matter came up before the Learned District Judge Kumar Ekaratne Esqr., who transferred the same to be heard in Court No. 2 and thus the **Inquiry** into the aforesaid **pre-Trial** matters of *non-compliance by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the aforesaid Orders of Court in answering Interrogatories and giving Discovery of Documents* came before the Learned Addl. District Judge Thilak Thabrew Esqr.,

11. a) On 13.9.1999, when the aforesaid **pre-Trial** matters came up for **Inquiry before the Learned Addl. District Judge Thilak Thabrew Esqr.**, Counsel for the 1<sup>st</sup> Defendant, supported by Counsel for the 2<sup>nd</sup> Defendant, **re-agitated** that the matters in the 1<sup>st</sup> Defendant's aforesaid Motion dated 16.2.1999 ("X3") be taken up first, prior to the Inquiry into the Plaintiff's aforesaid Applications under and in terms of Sections 100 and 102 of the CPC relating to the non-compliance by the 1<sup>st</sup> Defendant of the Orders of Court that had been made to answer Interrogatories and give Discovery of Documents and the non-compliance by the 2<sup>nd</sup> Defendant of the Order of Court that had been made to answer Interrogatories, and the parties consequently were directed to file Written Submissions.

*True copies of the Written Submissions filed by the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants are annexed marked "X9(a)", "X9(b)" and "X9(c)" respectively, and pleaded as part and parcel hereof.*

- b) In the Written Submissions of the Plaintiff it was, *inter-alia*, pointed out:

- i. that the said Motion dated 16.2.1999 ("X3") of the 1<sup>st</sup> Defendant had already been rejected by the District Court by its Order of 17.5.1999 (*vide* - "X5(b)"/("X5(c)")) and that there had been no Appeal thereon by the 1<sup>st</sup> Defendant or the 2<sup>nd</sup> Defendant.



- ii. that the Court by the aforesaid Order had directed that the matters raised by the 1<sup>st</sup> Defendant in his said Motion dated 16.2.1999 (“X3”) having been pleaded in his Answer, can only be considered *after the commencement of the Trial*.
- iii. that the Court had already Ordered on 15.6.1999 (*vide* – (“X7(b)”/ (“X7(c)”)) that the Inquiry, into the questions of non-compliance by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the aforesaid Orders of Court that had been made for answering Interrogatories and giving Discovery of Documents (*vide* – (“X4(c)” and (“X4(e)”)), is to be taken up first *prior to the commencement of Trial*; and that there was no Appeal by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from this Order too.
- iv. that therefore, it was not competent for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to seek to re-agitate the aforesaid same matter or for the Court to re-consider the same matter and that the Court must now make Orders on the questions of non-compliance by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with Orders of Court that had been made as aforesaid requiring the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to answer Interrogatories and for the 1<sup>st</sup> Defendant to give Discovery of Documents.

12. Upon the Written Submissions tendered the **Learned Addl. District Judge Thilak Thabrew Esqr.**, made an Order on 25.8.2000, *inter-alia*, holding that: -

- i. **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.**
- ii. 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.
- iii. **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.**
- iv. since the legal issues mentioned in the 1<sup>st</sup> 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 true copy of a certified copy of the said District Court Order dated 25.8.1998 and a sworn translation thereof in English are annexed hereto marked “X10(a)” and “X10(b)” respectively, and pleaded as part and parcel hereof.*

13. Being aggrieved with the said Order, the Plaintiff filed an Application for Leave to Appeal CALA No. 255/2000 on 5.9.2000, which was taken up for Inquiry before Their Lordships C.N. Jayasinghe J and N.K. Udalagama J into the grant of Leave on 19.1.2001 and Their Lordships reserved Order for 8.2.2001.

*True Copy of the Plaintiff's **Petition of Appeal in CALA No. 255/2000** (to which had been annexed all Documents referred to hereinbefore) is annexed hereto marked "X11" and pleaded as part and parcel hereof.*

14. On 8.2.2001 Their Lordships delivered Order dismissing the Application of the Plaintiff.

*True Copy of a Certified Copy of the **Order of the Court of Appeal dated 08.02.2001** is annexed hereto marked "X12" and pleaded as part and parcel hereof.*

15. Their Lordships in Their Order dated 8.2.2001 have simply held;

- a) that Section 108 of the CPC (*dealing with discovery and inspection only*) provides ample discretion to the District Judge to control proceedings.
- b) that under Section 108 of the CPC, the District Judge is empowered to determine any issue or question prior to deciding upon discovery or inspection, if Court is satisfied that such discovery or inspection depends on the determination of any issue or question.
- c) and that therefore, the District Judge has the discretion to come to a finding that by deciding preliminary issues, in the first instance, that a determination on discovery and/or inspection may sometimes be even redundant.
- d) and that therefore, there is no reason to interfere with the finding of the District Judge to decide the preliminary issues submitted by the 1<sup>st</sup> Defendant, before considering the Applications of the Plaintiff for Interrogatories and Discovery of Documents.

16. Being aggrieved with the said Order of the Court of Appeal dated 8.2.2001, the Plaintiff respectfully moves for Special Leave to Appeal therefrom to Your Lordships' Court, on the following, among other grounds, as may be urged at the hearing:

- a) Their Lordships have erroneously non-directed themselves of the fact, that the so-called Motion dated 16.2.1999 ("X3") of the 1<sup>st</sup> Defendant had already been **rejected** by Order of Court on 17.5.1999 ("X5(b)"/("X5(c)")) and that it cannot be **resurrected** simply by reason of the *fortuitous circumstance that the Judge had changed*.
- b) It is respectfully submitted that Their Lordships had grievously misdirected themselves in failing to appreciate that the "**Issues**" that might arise at the stage of **pre-Trial** proceedings under Chapter 16 of the CPC in respect of questions relating to discovery and inspection are wholly different in scope and legal consequence to the "**Issues**" which arise under Chapter 19 of the CPC relative to Trials, which relate to upon what material propositions of fact or of law the parties are at variance, to be drawn from the allegations in the *Plaint or in the Answers to the Interrogatories delivered in the Action or upon contents of Documents produced by either party*.

- c) Their Lordships have failed and/or not directed their minds to the so-called “Preliminary Issues” of the 1<sup>st</sup> Defendant, raised in his Motion of 16.2.1999 (“X3”) and rejected by the Learned District Judge A.W.A. Salam Esqr., which had moved that,
- i. the Plaintiff 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

and that the Plaintiff be rejected and/or Action dismissed,

are **Issues** that can be raised only at the Trial in terms of Sections 146/147 of the CPC and not in **pre-Trial** proceedings.

- d) Their Lordships like the Learned Addl. District Judge Thilak Thabrew Esqr. have fallen into the grave error in assuming,
- i. that Section 108 of the CPC has Application to **Interrogatories**, which it does not on a plain reading thereof.
  - ii. that the word “**Issue**” referred to in Section 108 of the CPC dealing with discovery and inspection only “and not Interrogatories” can be equated with the “Issues” referred to in Sections 146/147 of the CPC.
- e) It is respectfully submitted that neither the Addl. District Judge Thilak Thabrew Esqr., nor Their Lordships have the power or jurisdiction in law to confer upon themselves, a so-called discretion to try a “Preliminary Issue” under Sections 146/147 of the CPC at the stage of a **pre-Trial** hearing under Chapter 16 of the CPC, upon the fiction, that the word “**Issue**” also appears in such Chapter, example as in Section 108, solely relied upon by Their Lordships.

17. 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.

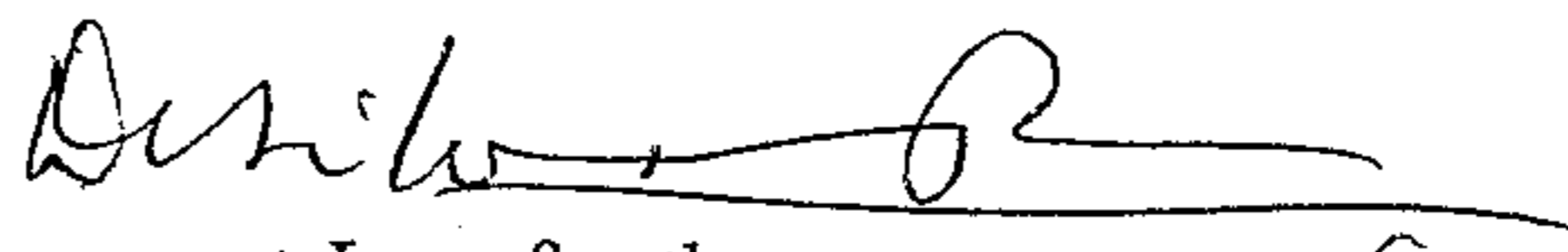
18. The Plaintiff states that in the aforesaid circumstances, unless an Interim Order is made staying further proceedings in the District Court in this Action, irremediable mischief and irreparable loss and damage would be caused to the 2<sup>nd</sup> Defendant and its Shareholders, including the Plaintiff, as any relief that Your Lordships' Court may grant upon this Petition to Your Lordships' Court would be rendered nugatory, if the Trial now fixed for 19.2.2001 in the District Court were to proceed, pending the hearing and determination of this Petition to Your Lordship's Court.

19. 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 an Interim Order staying further proceedings in the District Court of Colombo until the hearing and determination of this Application;
- (b) issue notice on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants-Respondents-Respondents;
- (c) grant Special Leave to Appeal against the Order dated 8<sup>th</sup> February 2001 of the Court of Appeal;
- (d) set aside the Order dated 8<sup>th</sup> February 2001 of the Court of Appeal;
- (e) set aside the Order of the District Court dated 25<sup>th</sup> August 2000;
- (f) make Order directing that the District Court proceed to Inquiry into the Plaintiff's both Applications made on 1.6.1999 (marked "X6(d)" and "X6(e)") under and in terms of Sections 100 and 102 of the CPC, respectively, against the 1<sup>st</sup> Defendant and the Plaintiff's Application made on 2.6.1999 (marked "X6(f)") under and in terms of Section 100 of the CPC against the 2<sup>nd</sup> Defendant;
- (g) grant costs, and
- (h) grant such other and further relief as to Your Lordships' Court shall seem meet.



Attorney-at-Law for the  
Plaintiff-Petitioner-Petitioner

Settled by:

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

K Kanag-Isvaran Esqr.,  
Presidents Counsel