

**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  
30<sup>th</sup> 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**

**PAUL RATNAYEKE ASSOCIATES**

ATTORNEYS-AT-LAW  
COLOMBO

On this the 31<sup>st</sup> day of August 1998.

The Statement of Counter Objections 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 Defendant - Petitioner above named (hereinafter referred to as the Defendant) have perused the statement of objections and affidavit of the Plaintiff - Respondent above named (hereinafter referred to as the Plaintiff) dated 14.8.1998 and reply to the same as follows.
2. The Defendant denies the averments contained therein, save and except those which are admitted herein.
3. The Defendant states that the application dated 5<sup>th</sup> March 1998, which was purported to be made under Section 102 of the Civil Procedure Code, referred to in paragraph 8 of the Plaintiff's statement of objections and the corresponding paragraph of his affidavit was bad in law in that he did not specify the matter or matters in question in the action in relation to which the Plaintiff alleged the existence of documents in my possession or power and in respect of which an order was sought from court under that section.
4. The Defendant states that the Court was accordingly disabled from making any order thereon without first satisfying itself as to what "matters in question in the action" the documents sought to be discovered, were alleged to relate and accordingly the order purported to be made by court was not made upon a proper exercise of the judicial discretion vested in it by Section 102 of the Civil Procedure Code, but made as a matter of course.
5. The Defendant states that the application made to court contained only an unsworn statement made by the Plaintiff's Attorneys-at-Law to the effect that there were "matters attended to" by him and "actions taken" by him "in the course of (his) duties as Deputy Minister of Finance which said matters and/or actions have been recorded in certain files maintained by and kept at the Ministry of Finance/Treasury under (his) supervision and/or control and/or authority as the Deputy Minister of Finance".
6. The Defendant states that the aforesaid statements made on behalf of the Plaintiff by his Attorneys-at-Law are of a speculative nature and assumes the existence of a state of facts of which he could have no direct knowledge and are heresay statements which do not even aver the grounds for such a belief or assumption. Nor does the record disclose how the trial judge came to the conclusion that documents of this description in fact exist and/or how the cause of action pleaded in the plaint "had arisen from" the aforesaid "matters and/or actions" attributed to him.



7. The Defendant states that the statement in his affidavit that the documents referred to in the notice aforementioned are " in any event privileged" is in no way an admission that documents of this description in fact existed but is merely a plea in law that privilege may be claimed in respect of documents so described. The inference drawn by the trial judge is accordingly erroneous in law and in fact.
8. The Defendant states that documents in files maintained or kept in the Ministry of Finance/Treasury are not documents in his possession or power, as no power or duty pertaining to the subject of finance has been delegated to me under Article 46(2) of the Constitution by Notification published in the Gazette.
9. The Defendant states that the trial judge has in his order dated 9.3.98 contained in the record of proceedings requested the production of the documents referred to in the Plaintiff's application which is not an order he could have lawfully made under Section 102 of the Civil Procedure Code and that the notice of the order drafted by the Plaintiff's Attorneys-at-Law and signed by the Additional Registrar of the District Court is not in conformity with the order of the trial judge and is accordingly a nullity.
10. The Defendant respectfully state that the trial judge has erroneously concluded that he has not complied with the order made by him on the mistaken assumption that the documents referred to by the Plaintiff were in fact in his possession or power when there was no such evidence before him.
11. The Defendant states that he was not granted any opportunity of showing cause against any order being made under Section 109 striking out his answer in the case and fixing the case for ex parte trial and the order made by him was contrary to rules of natural justice and accordingly void.
12. The Defendant states that the trial judge could not have made an order under Section 109 of the Civil Procedure Code without a finding that such non-compliance with the order amounted to a wilful and contumacious refusal to comply with the order of court. There was no evidence on the record from which such an inference could ever have been drawn.
13. (a) The Defendant states that the documents marked " A6"-" A7" are not material to this application; in any event the Defendant pleads that the said documents were referred to by Counsel for the Plaintiff in Court on 10<sup>th</sup> August 1998.  
  
(b) The Defendant states that he has not wilfully suppressed or omitted any document material to this application and the documents inadvertently omitted were later furnished to court and the Plaintiff having notice of his Application in Revision the Court granted a stay of the proceedings of the District Court in proceedings before this Court which were not held ex parte but inter partes.

14. The Defendant states that by reason of the determination made under Section 109 (1) of the Civil Procedure Code that he has been guilty of non-compliance of an order of Court under Chapter XVI of the Civil Procedure Code, he is also deemed in law to be guilty of the offence of contempt of Court under Section 109 (2) and reasonably apprehend that steps may be taken against him under Chapter XVI of the Civil Procedure Code.
15. The Defendant states that he is advised that in the premises aforesaid that Your Lordship's Court may be pleased to set aside the order of the Learned Trial Judge dated 30<sup>th</sup> July 1998.
16. The Affidavit of the Defendant is annexed hereto in support of the averments contained herein.

**WHEREFORE** the Defendant-Petitioner prays that Your Lordship's Court be pleased to :

- a) grant the Defendant-Petitioner the reliefs morefully prayed for in his Petition dated 5<sup>th</sup> August 1998,
- b) for costs, and
- c) such other and further relief as to Your Lordships Court shall seem meet.

*Paul Ratnayeka Associates*  
Attorneys-at-Law for the Defendant  
Petitioner

Settled by

Aravinda Aturupane Esqr., Attorney-at-Law  
Harsha Amarasekera Esqr., Attorney-at-Law

Romesh de Silva Esqr., President's Counsel  
Faiz Mustapha Esqr., President's Counsel  
H.L de Silva Esqr., President's Counsel