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

In the matter of an application under and in terms Article 138 of the Constitution read with Article 154(P)(6) thereof.

Court of Appeal Case No: CA/PHC/0125/2015

High Court of the Central Province Case No: REV 145/2013

Nawalapitiya Magistrate Court Case No: 67087

J. M. C. Priyadharshani,
The Competent Authority,
Plantation Management
Monitoring Division,
Ministry of Plantation Industries,
55/75, Vauxhall Lane,
Colombo 02.

Plaintiff

Vs.

Kadirawel Narayan,
Galoya Division,
Imbulpitiya,
Nawalapitiya.

Accused

AND THEN BETWEEN

Kadirawel Narayan,
Galoya Division,
Imbulpitiya,
Nawalapitiya.

Accused-Petitioner

Vs.

1. **J. M. C. Priyadharshani**,

The Competent Authority,
Plantation Management
Monitoring Division,
Ministry of Plantation Industries,
55/75 Vauxhall Lane
Colombo 02.

Plaintiff-Respondent

2. **Janatha Estates Development Board**,
   55/75 Vauxhall Lane,
   Colombo 02.

3. **The Attorney-General**,
   Attorney General's Department,
   Colombo-12.

Respondents

AND NOW BETWEEN

Kadirawel Narayan,
Galoya Division,
Imbulpitiya,
Nawalapitiya.

Accused-Petitioner-Appellant

Vs.

1. **J. M. C. Priyadharshani**,
   The Competent Authority,
   Plantation Management
   Monitoring Division,
   Ministry of Plantation Industries,
   55/75 Vauxhall Lane
   Colombo 02.

Plaintiff-Respondent-Respondent

2. **Janatha Estate Development Board**,
55/75 Vauxhall Lane,
Colombo 02.

3. **The Attorney-General**,
Attorney General's Department,
Colombo-12.

Respondents-Respondents

Before: **D. THOTAWATTA, J.**
K. M. S. DISSANAYAKE, J.

Counsel	:	Ershan Ariaratnam for the Accused-Petitioner-Appellant. Anuruddha Dharmaratne with Chaminda Seneviratne for the Plaintiff-Respondent-Respondent instructed by Dulmini Kulathilaka. 2nd and 3rd Respondents-Respondents are absent and unrepresented.
Argued on	:	06.06.2025
Written Submissions of the Accused-Petitioner-Appellant tendered on	:	10.12.2018
Written Submissions of the Plaintiff-Respondent-Respondent tendered on	:	11.12.2018
Written Submissions of the 2nd and 3rd Respondents-Respondents tendered on	:	10.01.2019
Decided on	:	26.09.2025

K. M. S. DISSANAYAKE, J.

The instant appeal arises from an order of the learned High Court Judge of the Central Province holden in Kandy dated 22.09.2015 (hereinafter called and referred to as 'the order') whereby, the learned High Court Judge had dismissed the application in revision filed before it by the Accused-Petitioner-Appellant (hereinafter called and referred to as 'the Appellant') against the order of the learned Magistrate of Nawalapitiya dated 29.11.2013 whereby, the learned Magistrate had having rejected the showing cause of the Appellant, directed him to be evicted from the State Land as morefully described in the schedule to the application for ejectment made to it by the Plaintiff-Respondent-Respondent being the Competent Authority (hereinafter called and referred to as 'the Plaintiff') under and in terms of section 5 of the State Land (Recovery of Possession) Act No. 7 of 1979 (as amended) (hereinafter called and referred to as 'the Act'). The sole reason adduced in the order by the learned High Court Judge for the dismissal of the application in revision filed before it being non-appearance of both the Appellant as well as the Attorney-At-Law for the Appellant in Court on the day when this matter had come up before it on 22.09.2015.

The Appellant in the averments in paragraphs 11, 12, 7(I) and (II) of his petition of appeal (both the paragraphs 7(I) and (II) of his petition of appeal were so numbered after paragraph 12 of the petition of appeal) sets out the facts and circumstances which according to him, led him to have preferred this appeal to this Court from the order of the learned High Court Judge in that it was averred that the aforesaid revision application submitted to the High Court of the Central Provincial was called on 02.09.2015 in Court for the purpose of ascertaining whether there is any settlement in the application; and that since, the 1st Respondent had informed the Court that there was no settlement, it was then, orally, announced in open Court by the learned High Court Judge that application in revision would be called on 22.10.2015 for the objections of the 2nd and 3rd Respondents, however, the Court had entered a different date in the

case record as the next date, namely; 22.09.2015, to that of the one that had been orally, announced by Court on that day on 02.09.2015 as the next date namely; 22.10.2015 thereby, causing grave prejudice to the Appellant by dismissing the instant application for non-appearance of both the Appellant as well as the Attorney-At-Law in Court on a day on 22.09.2015 other than the day that had been so orally, announced by Court in open Court as the next day of the case, namely; 22.10.2015.

The effect of the averments contained in paragraphs 11, 12, 7(I) and (II) of the petition of appeal (both the paragraphs 7(I) and (II) of his petition of appeal were so numbered after paragraph 12 of the petition of appeal) would be to totally, contradict the record of the High Court of Kandy. It is clearly, laid down in a number of decisions of the appellate Courts in Sri Lanka that, if a party wishes to contradict the record, he ought to file the necessary papers before the Court or Tribunal of first instance, institute an inquiry before such Court or Tribunal, obtain an order and thereafter, if aggrieved by that order canvas the matter in the appropriate proceedings before the Court of Appeal.

It was *inter-alia* held by Court in ***Vannakar and 6 Others v. Urhumalebbe*** **[1996] 2 Sri L.R 73** that, ".....Justice Dias in King v Jayawardena has considered the earlier line of decisions laying down the *cursus curiae* with regard to the legality of filing convenient and self-serving affidavits in appeal to vary and contradict the record or with a view to purge a default which had taken place before the Court of first instance. After a review of these decisions he held that no party ought to be permitted to file a belated self-serving and convenient affidavit to contradict the record, to vary the record or to purge a default where they have not taken proper steps to file such affidavits before the Judge or President of the Court of first instance or tribunal respectively. Vide also the judgment of Justice Canekeratne in Gunewardena v Kelaart. If a party had taken such steps to file papers before the presiding officer of Court of first instance, then an inquiry would be held by him and the self serving statements

and averments could be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry. If such a procedure was adopted the Court of Appeal would have the benefit of the recorded evidence which has been subjected to cross examination and the benefit of the findings of the judge of the Court of first instance. When such procedure is not adopted, Justice Dias ruled that the Court of Appeal could not take into consideration self-serving and convenient averments in the affidavits to contradict and vary the record or to purge a default committed before the Court of first instance. In the courts of first instance I have respectfully followed such prudent observations made by judges with considerable experience in the actual working of the Magistrate and of the District Courts. In the circumstances this Court refuses to take into consideration the self-serving and convenient oral assertions on the facts made by the learned counsel for the Appellant for the first time at the hearing of this appeal. These matters ought to have been placed before the inquiring Officer to enable him to conduct a proper investigation or inquiry into the matters which are now sought to be adduced for the first time in appeal."

So also was it *inter-alia* held in ***Shell Gas Company v. All Ceylon Commercial and Industrial Workers' Union*** **[1998] 1 Sri LR 118 at Page 120** that "Our courts have constantly drawn the attention of learned counsel that it is not open to a petitioner to file a convenient and self-serving affidavit for the first time before the Court of Appeal and thereby seek to contradict a judicial or a quasi-judicial record and that if a litigant wishes to contradict the record, he ought to file the necessary papers before the court or tribunal of first instance, initiate an inquiry before such authority, obtain an order from the deciding authority of first instance and thereafter raise the matter in appropriate proceedings before the Appeal Court so that the appellate court would be in a position on the material before it to make an appropriate adjudication with the benefit of the order of the deciding authority in the first instance. Vide Jayaweera v. Assistant Commissioner, Agrarian Services, Ratnapura; Vannakar v. Urhuma Lebbe; King v. Jayawardena at 503 ;

Gunawardena v. Kelaart. It is irregular and improper for a petitioner to file a convenient and self-serving affidavit in the Court of Appeal seeking to add to the record and to amplify the record or to contradict the record. Justice Dias in King v. Jayawardena (supra) after a review of a series of decisions, held that no party ought to be permitted to file a self-serving and convenient affidavits to contradict or to vary the record. In Vannakar's case, (supra) the Court of Appeal Judge observed : "If the party had taken such steps to file papers before the presiding officer of the court of first instance, then an inquiry would be held by him and the self serving statements and averments would be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry. If such a procedure was adopted the Court of Appeal would have the benefit of the recorded evidence which has been subjected to cross-examination and the benefit of the findings of the judge of the court of first instance. When such a procedure is not adopted, Justice Dias ruled that the Court of Appeal could not take into consideration self-serving and convenient averments in the affidavit to contradict or vary the record"."

Furthermore, it was *inter-alia* held in ***Malani V. Somapala and Another*** **[2000] 2 Sri LR 196** that "The effect of the above averments contained in paragraph 11 of the affidavit of the petitioner would be to totally contradict the record. It is clearly laid down in a number of decisions of the Appellate Courts in Sri Lanka that if a party wishes to contradict the record he ought to file the necessary papers before the court or Tribunal of first instance, institute an inquiry before such Court or Tribunal, obtain an order and thereafter if aggrieved by that order canvass the matter in the appropriate proceedings before the Court of Appeal. Vide the decision of Justice F. N. D. Jayasuriya in *Shell Gas Company vs All Ceylon Commercial and Industrial Workers' Union* at 120; it was further held in the above case that it is not open to a petitioner to tender convenient and self serving affidavits, sworn to by him for the first time before the Court of appeal."

In the light of the principle enunciated by Court in the decisions as referred to, and cited above, it is well settled law that, **if a party wishes to contradict the record, he ought to file the necessary papers before the Court or Tribunal of first instance, institute an inquiry before such Court or Tribunal, obtain an order and thereafter, if aggrieved by that order canvas the matter in the appropriate proceedings before the Court of Appeal.** [Emphasis is mine]

However, it is significant to observe that in this matter no such effort was made by the Appellant and its legal advisers to file an application with affidavits before the High Court of Kandy and to seek to contradict or vary the record of proceedings held by it on 02.09.2015.

Hence, it is abundantly, clear that in the instant case the Appellant had totally, failed to comply with the proper procedure laid down in the decisions referred to, and cited above. Where no such procedure is adopted, Justice Dias in *King vs Jayawardene* at 503 laid down that the Court of Appeal should not take into consideration self serving and convenient averments in an affidavit to contradict or vary the record, and in this regard, Jayawardena, J. did not have any reservations when he said in *Jamal Vs. Aponso*-2 Times Law Reports 215, "I do not think that the record can be contradicted or impeached by affidavits".

In the light of the above decisions, I am of the considered view that in the instant appeal, the Appellant should not be allowed to contradict the record of proceedings kept by the High Court of Kandy for the first time before this Court for; if, the Appellant wishes to contradict the record, he ought to file the necessary papers before the High Court of Kandy in the first instance, institute an inquiry before it, obtain an order and thereafter if aggrieved by that order, canvass the matter in the appropriate proceedings before the Court of Appeal, in as much as it is not open to the Appellant to contradict the record of proceedings before the High Court of Kandy for the first time before the Court of Appeal.

I would therefore, hold that the preliminary legal objection so raised by the Respondents as to the maintainability of the instant appeal, is entitled to succeed both in fact and law and as such, instant appeal should be dismissed *in-limine.*

There is a further reason why this appeal cannot succeed both in fact and law and it has in my opinion, a direct link with the preliminary legal objection so raised by the Respondents as to the maintainability of the instant appeal and it may now, be examined.

It becomes manifestly, clear that the Appellant seeks in the instant appeal, to directly, canvas before this Court its legal validity and/or the legal propriety of the order made by the learned High Court Judge dismissing the application in revision filed before it by the Appellant for non-appearance of both the Appellant as well as the Attorney-At-Law for the Appellant in Court on 22.09.2015 without first, purging his default in the court of first instance, namely; the Provincial High Court of Kandy. Since, it appears to me to go to the root of the appeal, which would if upheld, tend to dismiss the instant appeal *in-limine*, I would now, propose to deal with it.

It is trite law that in the event of a Court making an order dismissing an action for want of appearance of a party on a day appointed by it, it is open to any party prejudiced to move the Court in an attempt to have it vacated and such order may be vacated by Court on such terms as may be determined by it, if, an application is made within a reasonable period of time and good causes shown therefor.

However, it is significant to observe that the Appellant or his legal advisors had not resorted to this ordinary method of rectification before the High Court of Kandy.

Hence, It is my considered view that in the instant appeal, the Appellant should not be allowed to canvas the order of the learned High Court Judge of

Kandy made by it dismissing the application in revision filed before it by the Appellant for non appearance of both the Appellant as well as his Attorney-At-Law on the day appointed by Court, namely; 22.09.2015 for the first time before the Court of Appeal without first, purging his default before the High Court of Kandy for; if, the Appellant wishes to have the order set aside, he ought to file the necessary papers before the High Court of Kandy in the first instance, institute an inquiry before it, obtain an order and thereafter if aggrieved by that order, canvass the matter in the appropriate proceedings before the Court of Appeal, in as much as it is not open to the Appellant to canvas an order made by a High Court for his non appearance before it for the first time before the Court of Appeal without first, purging his default before the Court of first instance, which made the order sought to be impugned and which dismissed the application in revision for his non appearance-as done by the High Court of Kandy in this case.

I would therefore, hold that on the ground enumerated above, the instant appeal, is not entitled to succeed both in fact and law and as such, the instant appeal should be dismissed *in-limine.*

In view of the foregoing, I would hold that, the instant appeal is not entitled to succeed both in fact and law.

Hence, I would proceed to dismiss the instant appeal with costs of this court and the courts below.

JUDGE OF THE COURT OF APPEAL

D. THOTAWATTA, J.

I agree.

JUDGE OF THE COURT OF APPEAL