

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

**CASE No.CA/566/00 (F)**  
**DC. Kalutara Case No.4706/L**

Sister Bernard Vass  
No.28  
"Shanthi"  
1<sup>st</sup> Lane  
Welisarawatte  
Mahabage  
Ragama.

**PLAINTIFF**

- Vs -

1. J.M.Somasiri  
Chairman  
Pradeshiya Sabhawa  
Kalutara.
2. Kalutara Pradeshiya Sabhawa  
Kalutara.

**DEFENDANTS**

**AND NOW BETWEEN**

1. J.M.Somasiri  
Chairman  
Pradeshiya Sabhawa  
Kalutara.
1. Kalutara Pradeshiya Sabhawa  
Kalutara and 12 others.

**1<sup>st</sup> And 2<sup>nd</sup> DEFENDANT-PETITIONERS**

**-Vs-**

Sister Bernard Vass  
No.28  
"Shanthi"  
1<sup>st</sup> Lane  
Welisarawatte  
Mahabage  
Ragama (Deceased)

**PLAINTIFF-RESPONDENT**

**AND**

1. J.M.Somasiri  
Chairman  
Pradeshiya Sabhawa  
Kalutara.
2. Kalutara Pradeshiya Sabhawa  
Kalutara and 12 others.

**1<sup>st</sup> And 2<sup>nd</sup> DEFENDANT-PETITIONER-  
APPELLANTS**

**Vs.**

Sister Bernard Vass  
No.28  
"Shanthi"  
1<sup>st</sup> Lane  
Welisarawatte  
Mahabage  
Ragama (Deceased)

**PLAINTIFF-RESPONDENT-RESPONDENT**

3. Kulahitiya Vithanage Gunasena  
No.658, Gold View Watte  
Korosduwa, Wadduwa.
4. W.M.K. Rita Ranjanie Fernando  
658B, Gold View Watte  
Korosduwa, Wadduwa.
5. M.K. Vinifreda Fernando  
659B, Gold View Watte  
Korosduwa, Wadduwa.
6. D.C. Manel  
658B, Gold View Watte  
Korosduwa, Wadduwa.
7. Noel Perera  
Gold View Watte  
Korosduwa, Wadduwa.

8. Soloman Rasaiah  
Gold View Watte  
Korosduwa  
Wadduwa,
9. Sunil Chandraratna Dehipawala  
Gold View Watte  
Korosduwa  
Wadduwa.
10. Weerapperumage Karunadasa  
Gold View Watte  
Korosduwa  
Wadduwa.
11. M. Vincent Wimalasiri Fernando  
Gold View Watte  
Korosduwa, Wadduwa.
12. W.T. Douglas Francis Fernando  
Gold View Watte  
Korosduwa, Wadduwa.

**DEFENDANT-RESPONDENTS**

An application for substitution on behalf  
of the deceased Plaintiff-Respondent.

1. J.M.Somasiri  
Chairman  
Pradeshiya Sabhawa  
Kalutara.
2. Kalutara Pradeshiya Sabhawa  
Kalutara and 12 others.

**1<sup>st</sup> AND 2<sup>nd</sup> DEFENDANT-PETITIONER-  
APPELLANT-PETITIONERS**

**Vs.**

1. Malimage Lakmini Dilrukshi Fernando of  
No.658A, Gold View Land, Korosduwa,  
Wadduwa.

2. Manthiri Vitharana Patabendi  
Arachchige Priyanka Silva  
Of Gold View Land, Korosduwa,  
Wadduwa.
3. Lakmal Roshan Perera of  
Gold View Land, Korosduwa, Wadduwa.
4. Francis Anthony Kingsley
5. Dorothy Marian Kennedy
6. Chaturika Harshani Kennedy  
Of Gold View Land, Korosduwa,  
Wadduwa.
7. Weerapperumage Sriyakanthi of  
Gold View Land, Korosduwa, Wadduwa.
8. Dehipawala Maneesha Chaturani and
9. Dehipawala Nimesha Sewwandi of Gold  
View Land, Korosduwa, Wadduwa.
10. Rasiah Angela Shyamali and
11. Rasiah Dishan Vinoj of Gold View Land,  
Korosduwa, Wadduwa.
12. Hettiyakandage Yohan Peiris and
13. Hettiyakandage Nayomi Peiris of Gold  
View Land, Korosduwa, Wadduwa.
14. Thalapitiya Vithanage Varnika Deshani  
and
15. Thalapitiya Vithanage Chatura Hasantha  
of Gold View Land, Korosduwa,  
Wadduwa.
16. Munhenegge Sureka Priyadharshani  
Fernando  
Of No.659/A/1, Gold View Land,  
Korosduwa, Wadduwa.
17. Wattoruthantrige Suren Priyamal  
Fernando, of No.659/1, Gold View Land,  
Korosduwa, Wadduwa.

#### **RESPONDENTS**

**Before: Janak De Silva J.**  
**&**  
**N. Bandula Karunarathna J.**

**Counsel:** Ranjan Suwandarathne PF for 1<sup>st</sup> & 2<sup>nd</sup> Defendant-Appellant  
Aroosha de Silva for Substituted –Plaintiff-Respondent.

**Written Submissions:** for the Substituted-Plaintiff-Respondent on 25.11.2019..

**Argued on:** 27/09/2019

**Judgment on:** 16/11/2020

**N. Bandula Karunarathna J.**

The now deceased Plaintiff (hereinafter sometimes referred to as Plaintiff), filed the original case in the District Court of Kalutara against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant – Appellants (hereinafter sometimes referred to as Defendants) praying *inter alia*,

- (A) a judgment and decree granting a permanent injunction permanently prohibiting the Appellants from forcibly removing the structures
- (B) a Directive Order, directing the Appellants to grant approvals in terms of the Recommendation as stated in the plaint.

At the first instant the District Court issued Notices of Interim Injunction against the Defendants. In response, the Defendants filed their Proxy and moved for a date to file their Objections to issuance of Interim Injunction against them. Despite obtaining two dates to file Objections to the said issuance of Interim Injunction against the Defendants, owing to the lack of legal representation on behalf of the Defendants, the District Court issued the Interim Injunction against the Defendants as prayed by the Plaintiff.

Pertaining to the aforesaid failure to file their Answer on the very first day they appear before the Court, fixed the case for ex-parte Trial against them on 30-09-1998. Thereafter an ex-parte decree was entered against the Defendants and was duly served on the Defendants.

In response to the aforementioned ex-parte trial, the Appellants, on 29-11-1999, filed a purported Application under sec. 86 (2) of the Civil Procedure Code to vacate the same. The said purported Application comprised of a Petition and an Affidavit by the Secretary of the 2<sup>nd</sup> Defendant – Appellant.

In the said application, the grounds upon which the Defendants based their case were;

1. Summons were tendered with the Plaint AND summons were not served on the Defendants.
2. The Court has no power to issue a permanent injunction against them to deprive them from exercising their powers vested with the Pradeshiya Sabha Act No: 15 of 1987.

However, the Defendants filed a motion purportedly dated 02-12-1999 through which, the Defendants informed the Court that "by an oversight, the Defendants could not file the affidavit in support of the said Petition under sec. 86 (2) of the Civil Procedure Code and therefore the Affidavit with receipt pertaining to the stamp duty being paid is filed hereby."

The deceased Plaintiff filed her Objections to the said Application of the Defendants mainly on two grounds

- (a) The Defendants have filed their Application out of time for the reason of no valid and stamp duty paid to the Petition and Affidavit that was filed within 14 days
- (b) That there is no need of summons to be served as the Defendants any way came to Court by filing a proxy.

The Learned District Judge on 17-08-2000, dismissed the said application of the Defendants, after having considered both of the grounds taken up by the Defendants.

The Defendants preferred this Final Appeal against the said Order. In the said Final Appeal as well, the Defendants raised the aforesaid grounds.

The defence taken up by the now deceased Plaintiff was that, by way of a motion dated 16.10.2000, he informed the District Court that this Final Appeal, under sec.86 (2) of the Civil Procedure Code the application was filed not within 14 days (including Sundays and all public holidays) from the service of the said ex-parte decree entered, which was on 15-11-1999. Even though the said purported Application was comprised with a Petition and an Affidavit by the Secretary of the 2<sup>nd</sup> Defendant-Appellant, both purportedly dated 26-11-1999, as admitted by the Defendants themselves, the said documents were not stamp duty paid. Since as admitted by the Defendants themselves, there was no valid stamp duty paid Petition and Affidavit, the Defendants were forced to file a fresh Affidavit with stamp duty paid. The said subsequent Affidavit, *this time by the 1<sup>st</sup> Defendant-Appellant* was tendered to the Court on 02.12.1999.

Consequently, even though the Defendants might have filed a Petition and Affidavit without stamp duty being paid within 14 days from the date of the service of the said ex-parte decree, the subsequent affidavit with stamp duty paid, was filed 17 days after the service of the said ex-parte decree.

Therefore, it is very clear that the Learned District Judge was correct in deciding the Application of the Defendants is time barred.

It is my view that Even though the Defendants maintained that summons were tendered with the Plaintiff, it is evident from the case record itself that the summons were tendered at the time of filing of the Plaintiff. It is my observation that there shall not be other evidence remaining in the

case record to support the fact of 'tendering summons with the Plaint', as the said summons tendered have been duly served on the Defendants.

Therefore, the alleged claim by the Defendants that summons were not tendered is baseless.

It is also my observation that this Final Appeal is also filed out time, stipulated as this Final Appeal had been lodged on 16.10.2000. The said date is the 61<sup>st</sup> day from the date of judgement as the calculation of the 60 days has to be done without any exclusion of days including the date of the Order and the date of the tendering of the Appeal.

Therefore, this appeal should be dismissed with costs and that the judgment of the Learned District Court Judge is affirmed.

**Judge of the Court of Appeal**

**Janak De Silva , J**

**I agree.**

**Judge of the Court of Appeal**