

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

In the matter of an Appeal under and in terms of Article 154 (P) read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Appeal No. CA (PHC) 103/2012

Officer-in-Charge,
Police Station,
Alawwa.

Complainant

CA (PHC) 0103/2012

H.C. Kegalle No. 4172/Revision

M.C. Warakapola No. 62125/66

Vs.

Rev. Urulewatte Darma Keerthi

1st Party

K.S.M.Hemantha Sanjeewa Bandara

2nd Party

1. K.S.M.P.P. Adagala;
2. K.S.M.A. Bandara Adagala

Intervenient Parties

And

Rev. Urulewatte Darma Keerthi,
Rajamaha Viharaya,
Humbuluwa,
Alawwa.

1st Party-Petitioner

Vs.

1. K.S.M.Hemantha Sanjeewa Bandara
113, Kehelwala, Kiribathkumbura,
Peradeniya.

2nd Party-Respondent

2. K.S.M.P.P. Adagala,
Mathawa, Kohilagedara.
3. K.S.M.A. Bandara Adagala
343/14/1, Ihalawatta, Ambilmeegama,
Pilimathalawa.

Intervenient Parties-Respondents

And Now Between

1. K.S.M.Hemantha Sanjeewa Bandara
113, Kehelwala, Kiribathkumbura,
Peradeniya.

2nd Party-Respondent-Appellant

2. K.S.M.P.P. Adagala,
Mathawa, Kohilagedara.

3. K.S.M.A. Bandara Adagala
343/14/1, Ihalawatta, Ambilmeetama,
Pilimathalawa.

Intervenient Parties-Respondents-
Appellants

Vs.

Rev. Urulewatte Darma Keerthi,
Rajamaha Viharaya,
Humbuluwa,
Alawwa.

1st Party-Petitioner-Respondent

Appeal No. CA (PHC) 103/2012

Officer-in-Charge,
Police Station,
Alawwa.

Complainant

CA (PHC) 0170/2012

H.C. Kegalle No. 4469/Revision

M.C. Warakapola No. 62125/66

Vs.

Rev. Urulewatte Darma Keerthi

1st Party

K.S.M.Hemantha Sanjeewa Bandara

2nd Party

1. K.S.M.P.P. Adagala;
2. K.S.M.A. Bandara Adagala

Intervenient Parties

And

Rev. Urulewatte Darma Keerthi,
Rajamaha Viharaya,
Humbuluwa,
Alawwa.

1st Party-Petitioner

Vs.

1. K.S.M.Hemantha Sanjeeva Bandara
113, Kehelwala, Kiribathkumbura,
Peradeniya.

2nd Party-Respondent

2. K.S.M.P.P. Adagala
Mathawa, Kohilagedara.
3. K.S.M.A. Bandara Adagala
343/14/1, Ihalawatta, Ambilmeegama,
Pilimathalawa.

Intervenient Parties-Respondents

And Now Between

Rev. Urulewatte Darma Keerthi,
Rajamaha Viharaya,
Humbuluwa,

Alawwa.

1st Party-Petitioner-Appellant

Vs.

1.K.S.M.Hemantha Sanjeewa Bandara
113, Kehelwala, Kiribathkumbura,
Peradeniya.

2nd Party-Respondent-Respondent

2. K.S.M.P.P. Adagala,
Mathawa, Kohilagedara.
3. K.S.M.A. Bandara Adagala
343/4/1, Ihalawatta, Ambilmeegama,
Pilimathalawa.

**Intervenient Parties-Respondents-
Respondents**

BEFORE	:	Shiran Gooneratne J. & Dr. Ruwan Fernando J.
Appeal No. CA (PHC) 103/2012		
COUNSEL	:	Ikram Mohamed P.C. with Jagath Wickremayake P.C. for the 2 nd Party- Respondent-Appellant, and Interveneient Parties-Respondents-Appellants Manohara de Silva, P.C. with Hirosha Munasinghe for the 1 st Party Party Petitioner-Respondents

Appeal No. CA (PHC) 170/2012

COUNSEL : Manohara de Silva, P.C. with Hirosha Munasinghe for the 1st Party Party Petitioner-Appellant
Ikram Mohamed P.C. with Jagath Wickremayake P.C. for the 2nd Party- Respondent-Respondent and Interveneient Parties-Respondents- Respondents

ARGUED ON : 18.09.2020

WRITTEN SUBMISSIONS

: 22.09.2000 (the 2nd Party-Respondent- Appellant and Interveneient Parties- Respondents-Appellants in Appeal No. CA (PHC) 103/2012 & 2nd Party-Respondent-Respondent and Interveneient Parties-Respondents- Respondents in Appeal No. CA (PHC) 170/2012)

DECIDED ON : 23.11.2020

Dr. Ruwan Fernando, J.

Introduction

[1] These two connected appeals, CA (PHC) 103/2012 and CA (PHC) 170/2012 are from a judgment and an order made by the learned High Court Judge of Kegalle in two Revision Applications bearing No. PHC/4172/2012 Revision and PHC 4469/2012/Revision filed in the High

Court of Kegalle against two orders made by the learned Magistrate of Warakapola on 04.07.2011 and 27.08.2012 in M.C. Warakapola Case bearing No. 62125.

Background to Appeal bearing No. CA (PHC) 103/2012

[2] The Officer-in-Charge of the Alawwa Police Station filed an information in the Magistrate's Court of Warakapola on 09.12.2010 under the provisions of Section 66 of the Primary Courts' Procedure Act No. 44 of 1979 (hereinafter referred to as the Primary Courts' Procedure Act) to the effect that there was a dispute regarding the possession of a land called "Galbemmawatta" in extent of 18 acres between the 1st Party-Petitioner-Appellant (hereinafter referred to as the 1st Party-Appellant) and the 2nd Party-Respondent-Respondent, (hereinafter referred to as the 2nd Party-Respondent) and that due to this dispute, a serious breach of the peace is threatened or is likely to occur.

[3] On 21.02.2011, the Intervenient Parties-Respondents-Respondents (hereinafter referred to as the Intervenient Parties-Respondents) were allowed to be intervened into the application.

Order of the learned Magistrate of Warakapola dated 04.07.2011

[4] Upon the perusal of the affidavits, the documents and the written submissions of the parties, the learned Magistrate of Warakapola delivered the order 04.07.2011 and declared that the 2nd Party-Respondent and the Intervenient Parties-Respondents were entitled to the possession of the land in dispute and directed the parties to resolve their disputes by an order of a competent court.

Application by way of Revision in the High Court of Kegalle bearing No. 4172/Revision

[5] Being aggrieved of the said order of the learned Magistrate of Warakapola, the Appellant filed an application by way of revision bearing No. 4172/Revision in the High Court of Kegalle seeking to revise and set aside the order of the learned Magistrate of Warakapola dated 04.07.2011 and to obtain a declaration that the Appellant was entitled to the possession of the land in dispute.

Judgment of the High Court of Kegalle in Revision Application bearing No. 4172/Revision

[6] The learned High Court Judge of Kegalle by her judgment dated 23.07.2012 held that the order of the learned Magistrate of Warakapola declaring that the 2nd Party-Respondent and the Intervenient Parties-Respondents were entitled to the possession of the land in dispute is correct in law. The learned High Court Judge of Kegalle however, revised the order of the learned Magistrate of Warakapola dated 04.07.2011 and allowed the application in revision purely on the basis that the learned Magistrate had not recorded the efforts made by him to settle the matter between the parties.

Appeal to the Court of Appeal in case bearing No. CA (PHC) 103/2012

[7] Being aggrieved by the said judgment of the learned High Court Judge of Kegalle dated 23.07.2012, the 2nd Party-Respondent appealed to this Court in case bearing No. CA (PHC) 103/2012.

Appeal bearing No. CA (PHC) 170/2012

[8] In the meantime, the Appellant filed an application to execute the Writ of Possession in the Magistrates' Court of Warakapola and the learned Magistrate of Warakapola by order dated 27.08.2012 refused the said application. The Appellant filed an Application by way of Revision in the

High Court of Kegalle against the said order and the learned High Court Judge of Kegalle by order dated 09.11.2012 refused to issue notices on the Respondents. The Appellant appealed to the Court of Appeal against the said order in case bearing No. CA (PHC) 170/2012.

[9] On 18.09.2020, we heard both Counsel on both appeals and both parties agreed to abide by one judgment in both appeals. I shall now proceed to consider both appeals separately in this judgment.

Appeal bearing No. CA (PHC) 103/2012 filed by the 2nd Party-Respondent and the Intervenient-Parties-Respondents

[10] At the hearing of this Appeal, Mr. Ikram Mohamed, the learned President's Counsel for the 2nd Party-Respondent and the Intervenient Parties-Respondents in case bearing No. CA (PHC) 103/2012 submitted that the learned High Court Judge of Kegalle in her judgment dated 23.07.2012 examined the findings of the learned Magistrate of Warakapola and concluded that the order of the learned Magistrate of Warakapola dated 04.07.2011 is correct in law, but revised the said order purely on a purported procedural irregularity that the learned Magistrate had not recorded the efforts made by him to settle the matter between the parties, which is absolutely erroneous in law and facts.

[11] A perusal of the order of the learned Magistrate of Warakapola 04.07.2011 reveals that he has considered the affidavits, the documents, the information filed by the Police, the statements made by the parties to the Police, the evidence of the witness from the Department of National Archives with regard to the documents marked 1V3 and the submissions of the parties. The learned Magistrate has clearly identified the nature of the dispute and decided that the dispute relates to the possession of a land and thus, the question whether the subject property is Sangika property or private property is only relevant to the determination of the title of the

parties, which plays no role under section 68 of the Primary Courts' Procedure Act.

[12] Accordingly, the learned Magistrate proceeded to consider the question as to who was in possession of the subject property on the date of the filing of the information as required by section 68 of the Primary Courts' Procedure Act and concluded that the 2nd Party-Respondent and the Intervenient Parties-Respondents were entitled to the possession of the land in dispute. In reaching this conclusion, he was satisfied with the documents produced by the 2nd Party-Respondent and the Intervenient Parties-Respondents in proof of their possession of the subject property. The learned Magistrate has further considered the admission made by the 1st Party Respondent in his statement made to the Police on 02.10.2010 and stated said that it further confirms that the 2nd Party-Respondent was in possession of the subject property 2 months before the date of the filing of the information under section 66 of the Primary Courts' Procedure Act.

[13] The learned High Court Judge in her judgment dated 23.07.2012 held that the findings of the learned Magistrate that the 2nd Party-Respondent and the Intervenient Parties-Respondents were in possession of the subject property were correct in law as follows:

ලේ අනුව පෙන්සම්කරුවන් සඳහන් කර සිටින්නේ ඉන් පසුව එම වගෙන්තරකාර පාර්ශවය විසින් එම ඉඩම නැවත වරක් විභාරස්ථානයට පවරා දී විභාරස්ථානය එය බුත්තිවින්ද බවය. එම ඉඩම විභාරස්ථානයට අයිති වුයේ සහ්නයකින් බවට පෙන්සම්කරුවන් විසින් දක්වා ඇත. නමුත් එහි වලංගුතාවය මහේස්ත්‍රාත්වරයාගේ තියෝගයට අනුව මහු විසින් ප්‍රතික්ෂේප කර ඇත. නමුත් පෙන්සම්කරුවන් තර්ක කර සිටින්නේ නිමිනමක් පැවැදු වී සිට වට සාංසික දේපලක් වෙනත් අයෙකුට බැහැර කිරීමට හැකි වුවද සිවුරු හැර ගිය පසුව වෙනත් පුද්ගලයින්ට සාංසික දේපල බැහැර කිරීමට නොහැකි බවය. ඒ බව “සොලමන් එරණිව සොලමන් කම්පනි ලිමිටඩ්” (1897 AC 22) හි සඳහන් බවට ඔවුන් දක්වා ඇත. නමුත් මෙහිදී නින්දුවේදී මහේස්ත්‍රාත්වරයා තිරණය කර සිටින්නේ මෙම අවස්ථාවේදී ඔහුට තිරණය කිරීමට නිඩි ඇත්තේ මෙය සාංසික

දේපලක් ද, එසේ නැත්හම් පුද්ගලික දේපලක් ද යන්න තොට එම තොරතුරු වාර්තාව ඉදිරිපත් කිරීමට මාස 02 කට පෙර එහි බ්‍රක්තියේ සිටියේ කවුරුණ්ද යන්න පිළිබඳව වේ. ඒ පිළිබඳ ව ඔහු නීරණයකට එළැඳූ ඇත්තේ එම විභාරස්ථානයේ ප්‍රධාන ස්වාමීන් වහන්සේ විසින් ම කරන ලද පොලිස් ප්‍රකාශය මත වේ.

ලේ අනුව මහේස්ත්‍රාත්වරයා නීරණය කර සිටින්නේ මෙම පෙන්සමේ වගුන්තරකරුවන් විසින් මෙහි බ්‍රක්තිය දරා ඇති බවය. එය නීතියට පටහැනී නොවේ.

[14] Thus, the learned High Court Judge has clearly held that the order of the learned Magistrate declaring that the 2nd Party-Respondent and the Intervenient Parties-Respondents were entitled to possession of the subject property is lawful. The 1st Party-Appellant did not challenge the above-mentioned findings of the learned High Court Judge of Kegalle.

Judgment of the High Court revising the order learned Magistrate of Warakapola dated 04.07.2011

[15] Having already said that the order of the learned Magistrate declaring that the 2nd Party-Respondent and the Intervenient Parties-Respondents were in possession of the subject property is correct, the learned High Court Judge nevertheless revised the very same order of the learned Magistrate of Warakapola purely on the basis that the learned Magistrate has not recorded the efforts made by him to settle the matter between the parties as required by Section 66(6) and 66(7) of the Primary Courts' Procedure Act. Her findings at page 5 of the order reads as follows:

නමුත් පෙන්සම්කරුවන් සඳහන් කර ඇති පරිදි ප්‍රාථමික නඩු විධාන සංග්‍රහයේ 66 - 6,7 උපවගන්තින් හි සඳහන් පරිදි මහේස්ත්‍රාත්වරයා විසින් මෙම දෙපාර්වය අතර සමරියක් ඇති කිරීමට ගෙන ඇති ප්‍රයත්තයන් සම්බන්ධව කිසිදු සටහනක් කර නැත. එම නිසා මහේස්ත්‍රාත්වරයා විසින් එකී පනතට අනුව බ්‍රක්තිය පිළිබඳ ව නීරණයක් ගැනීමට පෙර අනුමතනය කළ යුතු නීතිම ත්‍රිය මාර්ගය ගෙන තොමැති බැඳින් ප්‍රතිශේෂනය කිරීමට තරම් නීතියට පටහැනී වූ කරණුක් ඇති බවට මෙම අධිකරණයට පෙනී යන නිසා මෙම පෙන්සමට ඉඩ

දෙමින් මහේස්වාත්වරයා විසින් කර ඇති 2011.07.04 දින දරණ නියෝගය ප්‍රතිශේධනය කර සිටී.

[16] Before I examine the correctness of the said order, it is pertinent to consider the requirement of the operation of sections 66 (6) and 66 (7) of the Primary Courts' Procedure Act. The relevant sections read as follows:

"66(6) On the date fixed for filing affidavits and documents, where no application has been made for filing counter-affidavits, or on the date fixed for filing counter affidavits, whether or not such affidavits and documents have been filed, the court shall before fixing the case for inquiry make every effort to induce the parties and the person interested (if any) to arrive at a settlement of the dispute and if the parties and persons interested agree to a settlement, the settlement shall be recorded and signed by the parties and persons interested and an order made in accordance with the terms as settled.

66 (7) Where the parties and persons interested (if any) do not arrive at a settlement, the court shall fix the case for inquiry on a date which shall not be later than two weeks from the date on which the case was called for the filing of affidavits and documents or counter-affidavits and documents, as the case may be".

[17] The learned High Court Judge appears to have taken the view that requirement of Section 66(6) and 66(7) of the Primary Courts' Procedure is a condition precedent to be satisfied before the jurisdiction of the Primary Court is exercised and thus, the learned Magistrate had acted without jurisdiction in proceeding to determine the question of possession apparently relying on the decision of the Court of Appeal in *Ali v. Abdeen* 2001 (1) Sri LR 413.

[18] In *Ali v. Abdeen* (supra), His Lordship Gunawardena J., took the view *inter alia*, that:

1. The Primary Court Judge was under a peremptory duty to encourage or make every effort to facilitate dispute settlement before

assuming jurisdiction to hold an inquiry into the matter of possession and impose on the parties a settlement by means of Court order;

2. *It was obligatory on the Primary Court Judge as a condition-precedent to holding an inquiry, to have made a conscious endeavour to have composed or ironed out the differences between the parties-a duty which, in this instance, had been neglected;*
3. *The making of an endeavour by the court to settle amicably is a condition precedent which had to be satisfied before the function of the Primary Court under section 66 (7) began, that is, to consider who had been in possession;*
4. *Since the Primary Court had acted without jurisdiction in proceeding to determine the question of possession, its decision is, in fact, of no force or avail in law;*
5. *The fact that the Primary Court had not made an endeavour to persuade parties to arrive at an amicable settlement fundamentally affects the capacity or deprives the Primary Court of competence to hold an inquiry into the question of possession.*

[19] The decision in *Ali v. Abdeen* that the Primary Court Judge does not assume jurisdiction to hear the case if he fails to act under section 66 (6) of the Act was not followed by their Lordships of the Court of Appeal in *Abdul Wahaab Mohamed Nizam v. Subasinghe Nishshanka Justin Dias* C.A. (PHC) 16/2007 decided on 26.05.2011. In *Abdul Wahaab Mohamed Nizam v. Subasinghe Nishshanka Justin Dias* (supra), Sisira de Abrew J. took the view that:

“It cannot be said that the failure on the part of the Primary Court Judge to comply with section 66 (6) of the Act deprives him of the

jurisdiction to hear the case. In my view if the parties do not suggest a settlement in a case of this nature, it is assumed that there is no settlement among the parties. In such a situation there is no obligation on the Primary Court Judge to act under section 66 (6) of the Act".

[20] His Lordship Chitrasiri J., having endorsed the views of His Lordship Sisira de Abrew J., further observed that the assumption of jurisdiction by the Primary Court Judge commences immediately after the filing of information under Section 66(1)(a) or 66(1)(b) of the Act. Chitrasiri J., referred to numerous steps to be taken by the Primary Court Judge in an application under section 66 of the Primary Courts' Procedure Act, such as the affixing notices on the land in dispute, filing of affidavits and counter-affidavits etc. and observed that the making of an effort to induce the parties for a settlement by the Judge is merely another step that should be adhered to, before the case is fixed for inquiry.

[21] While holding that the requirement in section 66 (6) is not a mandatory requirement that should be adhered to by a Primary Court Judge, His Lordship Chitrasiri J., observed however, that the Primary Court Judge should always be mindful of the contents of section 66 (6) and take every effort to settle the dispute before them, not only at the stage mentioned in section 66(6) but at any stage of the action.

[22] First, the learned High Court Judge in the present case, was in error in holding that the Primary Court Judge does not assume jurisdiction to hear the case for the failure on the part of the Primary Court Judge to comply with section 66 (6) of the Act. Secondly, the issue of jurisdiction on the basis that the Primary Court Judge had not complied with the requirement in section 66(6) had not been raised in the Primary Court and the issue of jurisdiction for non-compliance with section 66 (6) and 66(7) had been taken

up for the first time in the High Court Revision Application after the 1st Party- Respondent lost the case in the Primary Court.

[23] It is settled law that an objection to jurisdiction must be taken at the earliest opportunity and if no objection is taken and the matter is within the plenary jurisdiction of the court (*Navaratnasingham v Arumugam* 1980 (2) Sri LR 1) & *David Appuhamy v Yassasi Thero* (1987) 1 Sri LR 253)

[24] Thirdly, in any event, the learned High Court Judge has erroneously held that the learned Magistrate had failed to record the effort made by him to settle the matter between the parties as required by section 66(6), when the journal entry dated 03.05.2011 clearly confirms that the learned Magistrate had recorded that the **Parties informed him that there is no settlement**. The relevant journal entry dated 03.05.2011 (Vide- page 140 of the brief) reads as follows:

2011.05.03

1. පාර්/යු.ධර්මකිරීති හිම
2. පාර්/කේ.එස්.එම්. හේමන්ත සංපීට බණ්ඩාර
මැ/පා - 1. කේ.එස්.එම්. පමුදිනි ප්‍රයෝගිකා ආදාගල
2 කේ.එස්.එම්. අමිත බණ්ඩාර ආදාගල
{.....}

සමරයක් නැති බව පාර්/ දුන්වා සිටි.

[25] It is absolutely clear that the the learned Magistrate of Warakapola had recorded that the parties have informed him that there is no settlement between the parties and thus, the learned HighCourt Judge was in error in revising the order of the learned Magistrate on the assumption that there was a failure to comply with section 66(6) of the Primary Courts' Procedure Act.

[26] For those reasons, I am of the view that the order of the learned High Court Judge dated 23.07.2012 in revising the order of the learned Magistrate of Warakapola is erroneous and shall be set aside.

Preliminary Objections raised on behalf of the 1st Party-Respondent

[27] The learned Counsel for the 1st Party-Respondent raised two preliminary objections for the first time during the course of his submissions without any notice to the Court and the opposite party. He submitted that the Primary Court Judge had no jurisdiction to decide the matter under section 66 of the Primary Courts' Procedure Act for the following reasons:

1. The property which is the subject of this application is a Trust Property and the application filed in the Primary Court relates to a breach of trust as subject property had been granted to Maha Sanga by way of a Sannasa and therefore, it is an excluded subject from the jurisdiction of the Primary Court in terms of item (11) of the 4th Schedule to the Judicature Act;
2. The Primary Court had no jurisdiction to entertain the application as the information had been filed by the Police in the Primary Court after a lapse of 2 months from the date of the dispute arose between the parties in violation of Section 66 (1) (a) (i) of the Primary Courts Procedure Act.

[28] The first preliminary objection is based on the jurisdiction of the Primary Court to determine the application filed under section 66 of the Primary Courts' Procedure Act. Item (11) of the 4th schedule provides that any action relating to a trust is excluded from the jurisdiction of the Primary Courts' Procedure Act. A perusal of section 23 of the Judicature (Amendment) Act No. 16 of 1989 however, reveals that the 4th schedule of the principal enactment had been repealed.

[29] In any event, a perusal of the information filed by the Police on 09.12.2010 reveals that the dispute between the parties related to the right

to the possession of a land in extent of 18 acres (මෙම ආරවුල සම්බන්ධයෙන් දෙපාර්ශවය ම පොලිස් ස්ථානයට ගෙන්වා සිවිල් අධිකරණයක් මගින් විසඳා ගැනීමට කිහිප අවස්ථාවකදී ම උපදෙස් දී යවා ඇතන් මුවන් එම ක්‍රියා මාර්ගය බැහැර වී නැවත නැවතන් මෙම ඉඩම සම්බන්ධයෙන් ආරවුල් ඇතිකර ගනී. කරුණු මෙසේ නිඩියා දෙපාර්ශවය ම නැවතන් එකිනෙකාගේ අනිමතය පරිදි තුක්තිවිදීමට සූදානම් වන බවට මා වෙත තොරතුරා ලැබේ ඇති අතර මේ සම්බන්ධයෙන් උරුලුවන්තේ ධම්මදස්සි නිමියන් ද 2010.12.08 වන දින මා වෙත දුරකථන පත්‍රිකයක් ලබා දෙමින් හේමන්ත ආදාගල යන අය නැවතන් මෙම ඉඩමේ දේපල තුක්තිවිදීමට සූදානම් වන බවට පැමිණිලි ලැබේ ඇත.).

[30] Thus, the learned Magistrate has correctly held that the dispute related to a right to possession of the land in extent of 18 acres and thus, question whether the land is a Snagika property or private property is not relevant in the determination of the present dispute under section 68 of the Primary Courts' Procedure Act. Accordingly, there is no merit in the first preliminary objection raised by the learned Counsel for the 1st Party-Respondent.

[31] The second preliminary objection is based on the failure to comply with section 66 (1) (a) (I) of the Primary Court, which provides that the Police Officer inquiring into the dispute shall with the least possible delay file an information regarding the dispute in the Primary Court.

[32] A perusal of the information filed by the Police reveals that upon receiving a complaint on 18.09.2010 with regard to a dispute related to possession of the land, the Officer-in-Charge of the Police Station had made an effort to settle the matter and instructed the parties to file a civil action. Again, on 08.12.2010, he received another complaint with regard to the same dispute between the parties and a breach of the peace is threatened or likely due to this dispute and thus, he had filed the information in Court on 09.12.2010.

[33] In the instant case, on 09.12.2010, the Officer-in-Charge of the Police Station had filed the information under section 66 of the Act without any delay and the Primary Court was thereby vested with the necessary jurisdiction to inquire into and make a determination in terms of subsection 2 of section 66 (2) (Vie *David Appuhamy v. Yassassi Thero* (supra) 253, 257). Hence, there is no merit in the second preliminary objection raised by the learned Counsel for the 1st Party-Respondent.

[34] It is significant that these two preliminary objections to jurisdiction had not been raised by the 1st Party-Respondent in the Primary Court or in the High Court until the matter was argued before us on 18.09.2020. [35] The 1st Party-Respondent has taken up the issue of jurisdiction only in the Court of Appeal and that too, without raising it at the earliest opportunity and without notice to the opposite party. As noted, if the 1st Party-Respondent wished to raise the issue of jurisdiction, he should have raised it at the earliest opportunity. In *Navaratnasingham v. Arumugam and Another* 1980 (2) 1 at page 5, Soza, J. held that:

“An objection to jurisdiction must be taken as early as possible and the failure to take such objection when the matter was being inquired into must be treated as a waiver on the part of the petitioner. Where a matter is within the plenary jurisdiction of the Court, if no objection is taken, the Court will then have jurisdiction to proceed and make a valid order. In the present case, the objection to jurisdiction was raised for the first time when the matter was being argued in the Court of Appeal and the objection had not even been taken in the petition filed before that Court”.

[35] The same principle was followed in *David Appuhamy v. Yassassi Thero* (supra) wherein His Lordship Wijetunga J., reiterated the position that an objection to jurisdiction must be taken at the earliest opportunity and if no objection is taken and the matter is within the plenary jurisdiction

of the Court and thus, the Court will have jurisdiction to proceed with the matter and make a valid order.

[36] A perusal of the order of the learned Magistrate of Warakapola reveals that the only jurisdictional objection raised by the 2nd Party-Respondent was that in view of the pending District Court proceedings in the District Court Land case which relates to the same land in dispute, the Primary Court had no jurisdiction. In the instant case, the preliminary objections raised for the first time before us had not been raised in the Magistrate's Court or in the High Court and thus, the 1st Party-Respondent cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence. For those reasons too, both preliminary objections raised for the first time in appeal are rejected.

Conclusion 1

[37] For those reasons, I hold that the judgment of the learned High Court Judge of Kegalle dated 23.07.2012 revising the order of the learned Magistrate of Warakapola dated 04.07.2011 is erroneous and shall be set aside.

Appeal bearing No. CA (PHC) 170-2012 filed by the 1st Party-Respondent

Introduction

[38] The Appeal bearing No. CA (PHC) 170/2012 is from the order of the learned High Court Judge of Kegalle dated 09.11.2012 refusing to issue notices on the Respondent in Revision Application filed by the 1st Party-Petitioner against the order dated 26.08.2012 made by the learned Magistrate of Warakapola refusing to execute the Writ of Possession relying on the above-mentioned judgment of the learned High Court Judge of Kegalle dated 23.07.2012.

Background to the Appeal bearing No. CA (PHC) 170/2012

Application of the 1st Party-Respondent to Execute the Writ of Possession in the Magistrate's Court of Warakapola in Case bearing No. 62125/66

[39] As noted, the 1st Party-Respondent filed an Application in the Magistrate's Court of Warakapola seeking to execute the Writ of Possession of the land in dispute relying on the said judgment of the learned High Court Judge of Kegalle dated 23.07.2012.

Order of the learned Magistrate of Warakapola

[40] The learned Magistrate of Warakapola by order dated 26.08.2012 refused to execute the Writ of Possession on the ground that although the learned High Court Judge had ordered to revise the order of the learned Magistrate of Warakapola dated 04.07.2012 as prayed for in paragraph (a) of the Petition, the learned High Court Judge had not made any order to hand over the possession of the said property to the 1st Party-Respondent as prayed for in prayer (b) of the Petition.

Revision Application filed in the High Court of Kegalle and the order of the High Court

[41] The learned High Court Judge of Kegalle by order dated 09.11.2012 refused to issue notices on the Respondents on the ground that there is no illegality in the order and that there are no exceptional circumstances that warrant the exercise of the revisionary jurisdiction of the High Court to revise the said order of the learned Magistrate of Warakapola.

Appeal to the Court of Appeal

[42] Being aggrieved by the said order of the learned High Court Judge of Kegalle, the 1st Party-Respondent appealed to the Court of Appeal in case bearing No. CA (PHC) 170/2012 and the order of the learned Magistrate of Warakapola dated 26.08.2012..

Preliminary Objection

[43] When this Appeal (CA (PHC) 170/2012) was taken up for hearing on 18.09.2020 together with Appeal bearing No. CA (PHC) 103/2012, the learned President's Counsel for the 2nd Party-Respondent and the Intervenient Parties-Respondents supported the preliminary objection already raised in his written submissions and submitted that the order refusing notices by the learned High Court Judge of Kegalle is only an interlocutory order and thus, no appeal lies to the Court of Appeal against such an interlocutory order in terms of Article 154P(6) of the Constitution.

[44] The contention of Mr. Ikram Mohamed was that the Legislature has deliberately limited the right of appeal to the matters specified in Article 154P (6) of the Constitution, namely to 'final orders, judgments and sentences' and the order refusing notices is only an interlocutory order and not a 'final order' or 'judgment' within the meaning of Article 154P (6) of the Constitution. He submitted that accordingly, no appeal could have been filed by the 1st Party-Appellant against such an interlocutory order under Article 154P (6) of the Constitution and invited us to reject the present Appeal bearig No. CA (PHC) 170/2012 filed by the 1st Party-Appellant *in limine*.

Right of Appeal to the Court of Appeal from High Court in the exercise of its Revisionary Jurisdiction under Article 154 (3) (b) of the Constitution

[45] The vital question for consideration by this Court is whether the order made by the learned High Court Judge of Kegalle refusing notices on the Respondents is a 'final order' or 'judgment' within the meaning of Article 154P (6) of the Constitution.

[46] Article 154P (6) of the Constitution provides that, **subject to the provisions of the Constitution and any law**, any person aggrieved by a final

order, judgment or sentence of any such Court in the exercise of its jurisdiction under Article 154P (3) (b) or 3 (c) or (4), may appeal to the Court of Appeal in accordance with article 138. It reads as follows:

"Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgment or sentence of any such Court, in the exercise of its jurisdiction under paragraphs (3) (b) or 3 (c) or (4), may appeal therefrom to the Court of Appeal in accordance with Article 138."

[47] Article 154P (6) of the Constitution has granted a right of appeal to a person who is aggrieved by any final order, judgment or sentence of the High Court in the exercise of its jurisdiction under paragraphs (3) (b) or (3) (c) or (4) of Article 154P. It is, however, subject to the provisions of the Constitution and any law and in accordance with Article 138. It is significant, therefore, to consider whether the words "subject to the provisions of the Constitution and any law" and "in accordance with Article 138" referred to in Article 154P (6) could be construed to mean that Article 154P (6) is subject to limitations in the Constitution, various Legislative Enactments and the Procedural Laws, which had also created a right of appeal to the Court of Appeal.

[48] Article 138 of the Constitution is only an enabling provision which, subject to the provisions of the Constitution or of any law, creates and grants jurisdiction to the Court of Appeal to hear appeals *inter alia*, from the High Court, Courts of First Instance, Tribunals and other Institutions. However, Article 138 "does not, nor indeed does it seek to, create or grant rights to individuals viz-a-viz appeals. It only deals with the jurisdiction of the Court of Appeal and its limits and its limitations and nothing more. It does not expressly nor by implication create or grant any rights in respect of individuals" (*Martin v. Wijewardena* (1989] 2 Sri LR 409, 413).

[49] The words “subject to the provisions of the Constitution or of any Law” in Article 138 of the Constitution are only limitations on the powers of the Court of Appeal, but they do not constitute a limitation on the rights of an Appellant (*Martin v. Wijewardena* (supra, p. 414)). One such limitation placed on the powers of the Court of Appeal is to be seen in the proviso to Article 138 (supra).

[50] Article 138 of the Constitution enables the Court of Appeal to receive and entertain, hear and dispose of appeals from the High Courts, Courts of First Instance, Tribunals and other Institutions. Sections 13 (3), 14, 15 and 16 of the Judicature Act have, however, created a **right of appeal** to the Court of Appeal in **admiralty cases and criminal cases** either directly or with the leave of the Court first had and obtained, from the Judgments and orders respectively of the High Court subject to certain limitations.

[51] Sections 14, 15 and 16 of the Judicature Act have created a right of appeal with limitations and designated the persons who are entitled to appeal to the Court of Appeal from any judgment, conviction, sentence or order of the High Court in the exercise of its original criminal jurisdiction under Article 154P (3) (a) of the Constitution. The **right of appeal** to the Court of Appeal from the High Court in the exercise of the original criminal jurisdiction conferred by Article 154P (3) (a) has been expressly created by section 14, 15 and 16 of the Judicature Act with limitations.

[52] Further, section 9 (b) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 has provided that subject to the provisions of the Act No. 19 of 1990 or any other law, any person aggrieved by a final order, judgment or sentence of a High Court in the exercise of its jurisdiction conferred on it by **Article 154P (3) (a)** or **Article 154P (4)**, may appeal therefrom to the Court of Appeal.

[53] It is settled law that an Appeal is a Statutory Right and must be expressly created and granted by statute and it cannot be implied (*Bakmeewewa v. Raja* (1989) 1 Sri LR 231 (SC), *Martin v. Wijewardena* (supra), *Gamhewa v. Maggie Nona* (1989) 2 Sri LR 250) and *Mudiyanse v. Bandara* (SC Appeal 8/89 S.C. minutes of 15.03.1991). The right to avail of or take advantage of that jurisdiction is governed by several statutory provisions in various Legislative Enactments (e.g. Judicature Act) and the Procedural Laws pertaining to those Courts (*Martin v. Wijewardena* (supra, p. 419).

Right of Appeal under the Procedural Law- The Court of Appeal (Procedure for Appeals from High Courts) Rules

[54] At the hearing Mr. Ikram Mohamed referred to Rule 2(1) of the Court of Appeal (Procedure for Appeals from High Courts) Rules and submitted that an appeal to the Court of Appeal is limited to any judgment or final order or sentence pronounced by a High Court in the exercise of the appellate or revisionary jurisdiction vested in it by Article 154P(3)(b) of the Constitution and thus, the order appealed being an interlocutory appeal does not fall within the scope of Article 154P(6) of the Constitution.

[55] Rule 2 (1) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988 published in the Gazette Extraordinary No. 549/6 dated 13.03.1989 clearly refers to appeals from orders made by a High Court in the exercise of its jurisdiction under Article 154P (3) (b) of the Constitution. It is significant to note that the marginal note to Article 138 reads “**Right of Appeal**”. Rule 2 reads as follows:

“2 (1) Any person who shall be dissatisfied with any judgment or final order or sentence pronounced by a High Court in the exercise of the appellate or revisionary jurisdiction vested in it by Article 154P

(3) (b) of the Constitution may prefer an appeal to the Court of Appeal against such judgment for any error in law or in fact-

- (a) by lodging within fourteen days from the time of such judgment or order being passed or made with such High Court, a petition of appeal addressed to the Court of Appeal; or*
- (b) by stating within the time aforesaid to the Registrar of such court or to the jailer of the prison in which he is for the time being*

(2) The Attorney-General may prefer an appeal to the Court of Appeal against any judgment or final order pronounced by the High Court in the exercise of the appellate or revisionary jurisdiction vested in it by Article 154P (3) (b) of the Constitution, and where he so appeals, or where he sanctions an appeal, the time within which the petition of appeal must be preferred shall be twenty eight days.”

[56] It seems to me that in addition to Article 154P (6) of the Constitution, the procedural law that is contained in the Court of Appeal (Procedure for Appeals from High Courts) Rules also governs the right of a person to appeal to the Court of Appeal, aggrieved by any **final order, judgment or sentence** pronounced by a High Court in the exercise of the appellate or revisionary jurisdiction vested in the High Court by Article 154P(3)(b) of the Constitution.

Appeals to the Court of Appeal from High Court under the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

[57] It is significant to note that the marginal note to section 11 of the High Court of the (Special Provisions) Act reads “**Appeal to Court of Appeal**” and thus, section 11 has granted jurisdiction to the Court of Appeal (forum jurisdiction) to hear certain appeals from the High Court. Section 11 of the High Court of the Provinces (Special Provisions) Act reads as follows:

1. The Court of Appeal shall have and exercise, subject to the provisions of this Act or any other law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed

*by any High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3) (a), or (4) of Article 154P of the Constitution **and** sole and exclusive cognizance by way of appeal, revision and restitutio in integrum of all causes, suits, actions, prosecutions, matters and things of which such High Court may have taken cognizance:*

Provided that, no judgment, decree or order of any such High Court, shall be reversed or varied on account of any error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

2. *The Court of Appeal may in the exercise of its jurisdiction, affirm, reverse, correct or modify any order, judgment, decree or sentence according to law or it may give directions to any High Court established by Article 154P of the Constitution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit;*
3. *The Court of Appeal may farther receive and admit new evidence additional to, or supplementary of, the evidence already taken in any High Court established by Article 154P of the Constitution touching the matters at issue in any original case, suit, prosecution or action, as the justice of the case may require.*

[58] Thus, under section 11 (1) of the Act No. 19 of 1990, the Court of Appeal shall have and exercise, subject to the provisions of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 or any other law:

1. An appellate jurisdiction for the correction of all errors committed by the High Court established by Article 154P in the exercise of its jurisdiction under Article 154P (3) (a) or Article 154P (4) of the Constitution; and
2. Sole and exclusive cognizance by way of appeal, revision and restitutio in integrum of all causes, suits, actions, prosecutions, matters and things of which such High Court may have taken cognizance;

[59] The first part of section 11 enables the Court of Appeal to receive and exercise, subject to the provisions of the Act or any other law, **an appellate jurisdiction** for the correction of errors in fact or in law which shall be committed by any High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3)(a) or (4) of Article 154P. This section has created and granted **jurisdiction** to the Court of Appeal to hear appeals from the High Court established by Article 154P in the exercise of its jurisdiction under paragraphs **(3)(a) and or (4)** of Article 154P of the Constitution.

[60] The first part of section 11 (1) however, does not expressly or by implication grant a **right of appeal** to any individual aggrieved by any error committed by the High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3) (b) of Article 154P of the Constitution. It has only granted appellate jurisdiction to the Court of Appeal in respect of errors committed by the High Court in the exercise of its jurisdiction under paragraph (3) (a) or (4) of Article 154P of the Constitution.

[61] The second part of section 11 (1) also gives the Court of Appeal “sole and exclusive cognizance by way of appeal, revision and *restitutio in integrum* of all causes, suits, actions, prosecutions, matters and things of which such High Court may have taken cognizance”. However, the second part is complementary to the first part and proceeds to give the Court of Appeal sole and exclusive cognizance over all the matters referred to in section 11 (1).

[62] It further spells out the manner of the exercise of the appellate jurisdiction of the Court of Appeal (by way of appeals or revisions or *restitution integrum*) in respect of all those matters referred to in section 11

(1) (see the interpretation of the second part of Article 138 by Kulatunga J. in *Abeygunasekera v. Setunga and others* (1997) 1 Sri LR 62).

[63] However, the first part of section 11 (1) is limited to paragraph (3) (a) or (4) of Article 154P and paragraph (3) (b) of Article 154P is excluded from the exercise of the jurisdiction of the Court of Appeal under section 11 (1) of the Act.

Powers of Court of Appeal under Section 11 (2) of the Act No. 19 of 1990

[64] Subsection (2) and (3) of section 11 of the Act No. 19 of 1990 only refers to the **powers of the Court of Appeal** in the exercise of its jurisdiction (whether by way of appeals or revisions or restitutio in integrum). It does not expressly or by implication grant a **right of appeal** to any individual aggrieved by any error committed by the High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3) (b) of Article 154P.

[65] In terms of subsection (2) of section 11, the Court of Appeal has power, in the exercise of its jurisdiction under section 11 (1) to affirm, reverse, correct or modify any order, judgment, decree or sentence according to law and give directions referred to in subsection (2) to the High Court established by Article 154P or exercise any other power referred to in subsection 3.

[66] In my view, the words in section 11 (2) cannot be read in isolation and therefore, it should be read with the words in section 11 (1) of the Act. The powers of the Court of Appeal under section 11 (2) are limited to the matters referred to in section 11 (1) in the exercise of its jurisdiction- whether appellate or revisionary, under paragraph (3) (a) or (4) of Article 154P of the Constitution. Section 11 cannot be dissected into two parts and construed that in addition to subsection (1) of section 11, subsection (2) of section 11 has further created a separate jurisdiction to the Court of Appeal

for the correction of ‘any order’ made by the High Court in the exercise of its appellate or revisionary jurisdiction under Article 154P (3) (b).

[67] Section 11 of the Act No. 19 of 1990 in any event, has not expressly or by implication granted a right of appeal to the Court of Appeal in respect of ‘any order’ made by the High Court in the exercise of its revisionary or appellate jurisdiction under Article 154P (3) (b) of the Constitution.

[68] In the result, the powers of the Court of Appeal to affirm, reverse or modify any order, judgment, decree or sentence of a High Court under section 11 (2) of the High Court of the Provisions (Special Provisions) Act should be read in the context of any order, judgment, decree or sentence entered or imposed by the High Court in the exercise of its jurisdiction under paragraph (3) (a) or (4) of Article 154P of the Constitution.

[69] In the result, the right of appeal against a final order, judgment or sentence made by the High Court in the exercise of its revisionary jurisdiction under paragraph (3) (b) of Article 154P of the Constitution is governed by Article 154P (6) of the Constitution. I hold that it is Article 154P (6) of the Constitution that has granted a right of appeal to any person aggrieved by any final order or judgment or sentence of the High Court in the exercise of its jurisdiction under paragraphs (3) (b) or (3) (c) or (4) of Article 154P of the Constitution. Thus, any person aggrieved by any final order or judgment or sentence of any High Court, made in the exercise of its jurisdiction under Article 154P (3) (b) is entitled to appeal to the Court of Appeal against such final order or judgment or sentence.

Is the order refusing notice a “final order or judgment” within the meaning of Article 154P (6) of the Constitution?

[70] Mr. Ikram Mohamed referred to the ‘order approach’ adopted by the Supreme Court in *Siriwardana v. Air Ceylon Ltd* (1984) 1 Sri LR 286,

‘application approach’ adopted by the Supreme Court in *Ranjit v. Kusumawathie and others* (1998) 3 Sri LR 232 and *S. Rajendra Chettiar and others v. S. Narayanan Chettiar and others* (2011) 2 Sri LR 70 to determine what constitutes a final order or judgment. He further relied on the decision of the Bench of Seven Judges of the Supreme Court in *Dona Padma Priyanthi v. H.G. Chamika Jayantha and two others* S.C Appeal 41/2015 S.C. Minutes of 04.08.2017 which has refused to depart from the judgment in *S. Rajendra Chettai and others v. S. Narayanan Chettiar and others* (supra).

[71] His submission was that the Supreme Court had followed the decisions of the English Courts to determine what constitutes a “final order” or “judgment” and on the basis of those judgments, the impugned order of the High Court of Kegalle did not result in the determination of the rights of the parties and thus, it is not a final order under Article 154P (6) of the Constitution.

[72] The first question that calls for a decision is as to what constitutes a “final order” for the purpose of Article 154P (6) of the Constitution and then, whether the order of the High Court of Kegalle refusing notice amounts a “final order” within the meaning of Article 154P (6) of the Constitution.

[73] The expression "final order" is obviously used in Article 154P (6) as opposed to the expression "interlocutory order". The expression "interlocutory order" is used only in the proviso to section 9 of the High Court of the Provinces (Special provisions) Act No. 19 of 1990 in relation to a special leave to appeal to the Supreme Court. The crucial question that arises is: what is the test for determining whether an order is a “final order” within the meaning of Article 154P (6) of the Constitution.

[74] Section 754 (5) of the Civil Procedure Code provides “Notwithstanding anything to the contrary in this Ordinance, for the purposes of this chapter-

“judgment” means any judgment or order having the effect of a final judgment made by any civil court; and

“order” means the final expression of any decision in any civil action, proceeding or matter which is not a “judgment”.

[75] A perusal of the above-mentioned judgments pronounced by the Supreme Court reveals that the English cases have not determined what constitutes a “judgment” or an “interlocutory order” under the Civil Procedure Code of Sri Lanka. However, it is absolutely clear that our Supreme Court has consistently followed English cases and judgments of the Privy Council as a guiding light in determining what constitutes a “judgment” and an “interlocutory order” under section 754 (5) of the Civil Procedure Code.

[76] In *Siriwardana v. Air Ceylon Ltd* (supra), the Supreme Court, in particular, had referred to the well-known English decisions in *Salaman v. Warner* (1891) 1 Q.B. 734, (C.A) and *Bozson v. Altringham Urban District Council* (1903) 1 K.B. 547 (C.A). The Supreme Court in *Siriwardana v. Air Ceylon Ltd* (supra) laid down the following guidelines which would help in determining whether a particular order has the effect of a final judgment under section 754 (5) of the Civil Procedure Code by the application of the ‘order approach’ adopted in *Bozson v. Altringham Urban District Council* (supra).

- (1) It must be an order finally disposing of the rights of the parties;
- (2) The order cannot be treated to be a final order if the suit or action is still left a live suit or action for the purpose of

determining the rights and liabilities of the parties in the ordinary way;

- (3) The finality of the order must be determined in relation to the suit;
- (4) The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order, a final one.

[77] In *Ranjit Kusumawathie and others* (supra), Dheeratne J. also referred to the ‘order approach’ adopted in *Bozson v. Altrincham Urban District Council* (supra) which was adopted by Sharvananda J. (as he then was) in *Siriwardene v. Air Ceylon Ltd* (supra). His Lordship Dheeraratne J., however, adopted the ‘application approach’ on the basis of the views expressed by Lord Esher, MR in *Salaman v. Warner & others* (supra). Dheeratne J. held that the final order is one made on such application or proceeding that, for whichever side the order was given, it will, if it stands, finally determine the matter in litigation.

[78] In *S. Rajendra Chettiar and others v. S. Narayanan Chettiar and others* (supra), the Supreme Court referred to the ‘order approach’ adopted in *Shubrook v. Tufnell* (1882) 9 Q.B.D. 621] and *Bozson v Altrincham Urban District Council* (supra) and the ‘application approach’ adopted in *Salaman v. Warner* (supra). Having considered these English authorities, their Lordships of the Supreme Court followed the decision of Denning, MR. in *Salter Rex and Co. V. Ghosh* (1971 2 AER 865) which has held that in determining whether an application is final or interlocutory, regard must be had to the **nature of the application** and not to the **nature of the order** which the Court eventually makes. Thus, the Court held that an application for a new trial if granted would clearly be interlocutory and where it is refused, it is still interlocutory.

[79] In *Dona Padma Priyanthi v. H.G. Chamika Jayantha and two others* (supra), the two issues that were considered by a bench comprising seven Judges of the Supreme Court were (i) whether the judgment in *Rajendran Chettiar v. Narayan Chettiar* relied on by the Court of Appeal was wrongly decided; and (ii) whether the decision enunciated in *Chettiar v. Chettiar* that the ‘application approach’ test should be preferred over the ‘order approach’ test in deciding whether an order is a final or interlocutory order in civil proceedings should be revisited in this appeal.

[80] In the said case, a preliminary issue was raised by the Defendants that the Plaintiff had failed to comply with section 40 (d) of the Civil Procedure Code when he failed to state in the Plaintiff as to where and when the cause of action arose. The District Judge Court upheld the preliminary issue raised by the Defendants and dismissed the Plaintiff’s action. His Lordship the Chief Justice Dep, having referred to ‘order approach’ adopted in *Shubrook v. Tufnell* (supra) and *Bozson v. Altrincham Urban District Council* (supra) and the ‘application approach’ adopted in *Salaman v. Warner & others* (supra), followed the ‘application approach’ adopted by Lord Ester in *Salaman v. Warner & others* (supra). His Lordship the Chief Justice Dep stated:

“In order to decide whether an order is a final judgment or not. It is my considered view that the proper approach is the approach adopted by Lord Esher in Salaman vs. Warner (supra) which was cited with approval by Lord Denning in Salter Rex vs Gosh (1971) 2 ALL ER 865 and 866. It stated:

“If their decision, whichever way it is given, will if it stands finally dispose of the matter in dispute, I think that for the purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory”.

[81] His Lordship the Chief Justice Dep thus, held that (i) if the preliminary objections were rejected, the cases would have proceeded to trial and as such, in both cases, at the time of dismissal, the rights of the parties were not determined; (ii) orders given in both cases are interlocutory orders and the proper course of action is to file leave to appeal application under section 754 (2) and not preferring an appeal under section 754 (1) of the Civil Procedure Code.

[82] A perusal of the aforementioned English authorities reveals that the English Courts had interpreted the expressions, “judgment” or “final order” for the purpose appeals to the Court of Appeal exercising appellate jurisdiction. The Supreme Court of Sri Lanka has repeatedly adopted English cases, while interpreting the expressions “judgment” or “interlocutory order” for the purpose of appeals to the Court of Appeal or the Civil Appeal High Court.

[83] In the circumstances, it would be apt to examine the rationale of the application approach adopted by the Privy Council in *Salaman v. Warner* (supra), *Bozson v. Altrincham District Council* (supra) and *Salter Rex v. Gosh* (supra) to determine what constitutes a “final order” under Article 154P (6) of the Constitution.

A “final order” defined in three English Cases

[84] The term "final" is obviously used in Article 154P (6) as opposed to the term "interlocutory" and thus, the term "interlocutory order" is to be understood and taken to mean converse of the term "final order". The views expressed in the following English cases have been considered by our Supreme Court as guiding lights to determine what constitutes a "final order" or an "interlocutory order".

Salaman test-'Application Approach'-when whichever way it went, it would finally determine the rights of the parties

[85] In *Salaman v. Warner*, (supra), the question on appeal was whether the order dismissing the plaintiff's action on the basis that the statement of claim filed by the plaintiff did not disclose any cause of action was a final order or an interlocutory one. Lord Esher, M. R. laid down the test for determining the question as follows:

"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

[86] Fry, L. J. expounded the same test in the following words:

"I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined. Applying this test to the present case, it is obvious that the order here was made on an application of which the result would not in one event be final. Therefore, this is an 'interlocutory order.'

[87] Lopes, L. J. further enunciated the same test, thus:

"I think that a judgment or order would be final within the meaning of the rules, when whichever way it went, it would finally determine the rights of the parties."

Bozson Test-'Order Approach'-Order finally disposing of the rights of the parties

[88] In *Bozson v. Altrincham Urban District Council*, (1903) 1 KB 547, Lord Alverstone, C. J., proceeded to lay down the test in the following words:

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

***Salter Rex & Co. v. Ghosh*‘Application Approach’**

[89] Denning L.J in *Salter Rex & Co. v. Ghosh* (supra) having considered varying approaches finally adopted the ‘application approach’ and stated at page 866:

"There is a note in the Supreme Court Practice 1970 under RSC Ord. 59. R4, from which it appears that different tests have been stated from time to time as to what, is final and what is interlocutory..... In Standard Discount Co. v. La Grange 18773 CPD 67 and Salaman v. Warner (supra), Lord Esher, MR said that the test was the nature of the application to the court and not to the nature of the order which the court eventually made.....So I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory....."

[90] It may be noted at this stage that the Supreme Court of Sri Lanka in *S. Rajendra Chettiar and others v. S. Narayanan Chettiar and others* and *Dona Padma Priyanthi v. H.G. Chamika Jayantha and two others* (supra), had adopted the ‘application approach’ followed in *Salaman v. Warner* (supra) and *Salter Rex & Co. v. Ghosh* (supra). The approach adopted by our Supreme Court in these two cases was that “when whichever way the

order went, it would finally determine the rights of the parties, then, the order is final and if it would not, it is then, an interlocutory order”.

[91] It is also significant to refer to Atkin's Court Forms in Civil Proceedings, 2nd Edition Vol. 5 (1)), which distinguishes an interlocutory order from a final order at page 297 as follows:

“I refer in this regard to the decision of the Supreme Court in the case of Koranteng v. Amoako [2009] SCGLR, 185 at 194 where Georgina Wood CJ observed in the following words: In our view, a judgment or order which determines the principal matter in question is termed “final” whilst an “interlocutory” order has also been defined in Halsbury’s Laws of England (4th Ed) Vol. 26 paras 506 as “An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision; or (2) is made after judgment and merely directs how the declarations of right already given in final judgment are to be worked out, is termed “interlocutory”.

[92] It is to be noted that expressions identical to Article 154 (6) of the Sri Lankan Constitution are used in Article 133 of the Indian Constitution, which provides that an appeal shall lie to the Supreme Court from ‘any judgment, decree or final order’ in a civil proceeding of a High Court. Article 134 of the Indian Constitution provides that an appeal shall lie to the Supreme Court from any ‘judgment, final order or sentence’ in a criminal proceeding of a High Court. In interpreting the expressions in Article 133 (1), Chagla, C. J., held in the Indian Case of *Jamnadas v. Commr. of Income-tax*, AIR 1952 Bom 479 at p. 481:

“60-The expression ‘judgment, decree or final order’ used in Article 133 (1) are used in its technical English sense, which means a final declaration or determination of the rights of parties and it also means a decision given on the merits. Judgment, decree or final order’ is a compendious expression, and each one of the parts of this

expression bears the same connotation, viz. that there is an adjudication by the Court upon the rights of the parties who appear before it. 'Judgment' must not be read in this context in contradistinction to 'decree or final order'."

[93] In *Savitri Devi v. Rajul Devi and others* (AIR 1961 All 245), Mootham, C.J. having adopted the above-mentioned different tests adopted in the aforesaid three English Cases observed at 8 and 76:

"8..... Article 133 of the Constitution of India is the representative of Section 205 of the Courts Ordinance It was, therefore, a product of the draftsmanship of Jurists steeped in English law. The framers of Article 133 of the Constitution of India must have had the provisions of Section 205 of the Government of India Act, 1935, present before their eyes. The Courts in India have, therefore, freely drawn on English cases, while interpreting these provisions of law.....

76. The word 'judgment' having been used in Article 133 together with the words 'decree' and 'final order' it appears to be implied that some sort of finality must be present in the case of a "judgment" also if it is to be appealable under the Article. The order in question is not final in any sense. It cannot be considered to be "judgment" on the view which I expressed In 1960 All LJ 387: (AIR 1960 All 692) (FB). It cannot be a judgment, even according to the majority view in that case as it was passed not in a proceeding which was meant for rendering the final judgment in the case effective, but in one intended to bring the suit to an immediate end without being decided on merits.

[94] In the result, the order refusing notice, cannot be a "final order" according to the test laid down in *Salaman's* case, which was reaffirmed by Denning L.J in *Salter Rex & Co. v. Gosh* (supra), because although it went in favour of one of the parties, if the order was given in the other way, it would allow the application to go on rather than ending the application and finally disposing of the rights of the parties. The mere fact that a cardinal

point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make the order a final one.

[95] Our attention has been drawn by Mr. Ikram Mohamed to the recent decision of this Court in *S.L.M. Naim v. Mohammed Naina Marikkar Hasseb and Another* CA (PHC) 223.2006 decided on 28.02.2019 and *Jayasinghe Kodithuwakkulage Nuwan Pathirana v. Sujith Harshana Manamperi Goonewardena, Palm Garden Estate, Ratnapura and two others* CA (PHC) 15/2016 C. A. Minutes 14.07.2016). The question that arose in those cases was whether the order of the High Court refusing notice in a Revision Application filed in respect of an order made by a Primary Court Judge under Part VII of the Primary Courts Procedure Act was a “final order” or “interlocutory order” under Article 154P (6) of the Constitution.

[96] In *S.L.M. Naim v. Mohammed Naina Marikkar Hasseb and Another* (supra), Janak De Silva J. held that an order of a Provincial High Court refusing to issue notice is an interlocutory order and based on the ‘application test’, the refusal of issuance of notice has not finally determined the matter, and thus, such an interlocutory order does not fall within the scope of the jurisdiction stipulated in Article 154P of the Constitution.

[97] In *Jayasinghe Kodithuwakkulage Nuwan Pathirana v. Sujith Harshana Manamperi Goonewardena, Palm Garden Estate, Ratnapura and two others* (supra), Dehideniya J. having followed the decision of the Supreme Court in *S. Rajendra Chettiar and two others v S. Narayanan Chettiar and others* (supra) held:

“In the present case, the learned High Court Judge has refused to issue notice in a revision application. This appeal is against that

decision. If the Court decided to issue notice, it will not determine the case. The action/proceeding has to be proceeded. Therefore, according to the principle of the law pronounced in the case of Chettiar v. Chettiar (supra), the decision of the High Court not to issue the notice is not a final order. Accordingly, no appeal lies".

[98] The term “final order” has been used in Article 154P (6) and Rule 2 (1) of the Court of Appeal (Procedure for Appeals from High Courts) Rules together with the term “judgment” and thus, some finality must be present in the case of a “final order” as opposed to an “interlocutory order”, if it is to be appealable under Article 154P (6) of the Constitution.

[99] It is only a “final order, judgment or sentence” that is referred to in Article 154P (6) of the Constitution that is appealable and an interlocutory order would be excluded from the category of a final order or judgment referred to therein. Thus, an appeal against a High Court decision, in the exercise of its jurisdiction under Article 154P (3) (b) would lie to the Court of Appeal only when its decision amounts to a “final order or judgment”.

[100] An order of the High Court amounts to a “final order” only if the order puts to an end the suit and if after the order, the suit is still alive, i.e., in which the right is still to be determined, it will not be a “final order”. The order under appeal, whichever way it is given, does not finally dispose of the rights of the parties in dispute or ending the dispute, but the order leaves the rights of the parties to be determined by the Courts in the ordinary way.

[101] The Appeal bearing No. CA (PHC) 170/2012 filed by the 1st Party-Appellant relates to the order made by the learned High Court Judge dated 09.11.2012 refusing to issue notices on the Respondents in the exercise of its **revisionary jurisdiction** under Article 154P (3) (b) of the Constitution. The order made by the learned High Court Judge of Kegalle refusing

notice, cannot be a “final order” according to the test laid down in *Salaman’s* case, which was reaffirmed by Denning LJ in *Salter Rex & Co. v. Gosh* (supra) and our Supreme Court finally in *Dona Padma Priyanthi v. H.G. Chamika Jayantha and two others* (supra).

[102] Although the order refusing notice in the High Court in Case bearing No. 4469/Revision went in favour of one of the parties (here, the 2nd Party-Respondent and the Intervenient Parties-Respondents), if the order was given in the other way, viz, issuing notice on the Respondents, it would allow the application to go on rather than ending the application.

[103] I am of the opinion that the order dated 09.11.2012 of the learned High Court Judge of Kegalle refusing notice on the Respondents is neither a ‘final order’ nor a ‘judgment’ within the meaning of the expressions used in Article 154 P (6) of the Constitution of Sri Lanka. In the result, I hold that no appeal would lie to the Court of Appeal under Article 154P (6) of the Constitution from the order of the learned High Court Judge of Kegalle dated 11.09.2012 refusing notice made in the exercise of its revisionary jurisdiction under Article 154P (3) (b) of the Constitution.

Conclusions

Conclusion in Appeal bearing No. CA (PHC) 103/2012 filed by the 2nd Party-Respondent and the Intervenient-Parties-Respondents

[104] I set aside the judgment of the learned High Court Judge of Kegalle dated 23.07.2012 and affirm the order learned Magistrate of Warakapola dated 04.07.2011.

[105] In the result, the Appeal filed by the 2nd Party-Respondent and the Intervenient Parties-Respondents in case bearing No. CA (PHC) 103/2012 is allowed. No costs.

Conclusion in Appeal bearing No. CA (PHC) 170/2012 filed by the 1st Party-Appellant

[106] The Preliminary Objection raised by the learned President's Counsel for the 2nd Party-Respondent and the Intervenient Parties-Respondents is upheld and the Appeal filed by the 1st Party-Appellant in case bearing No. CA (PHC) 170/2012 is rejected. No costs.

JUDGE OF THE COURT OF APPEAL

Shiran Gooneratne J.

I agree.

JUDGE OF THE COURT OF APPEAL