

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

**S.C. (Appeal) No. 33/2009
S.C. (Spl.) L.A. No. 4/2009
C.A. No. 412/2002(F)
D.C. Colombo No. 17736/L**

D.G. Subadra Menike,
56/1, Kirikiththa,
Weliweriya.

appearing by her Attorney
M. Piyadasa of Mahawatta,
Batapola.

**Plaintiff-Appellant-
Appellant**

Vs.

H.D.S. Jayawardena,
334/F, Robert Gunawardena Mawatha,
Malabe.

**Defendant-Respondent-
Respondent**

BEFORE : Dr. Shirani A. Bandaranayake, J.
Jagath Balapatabendi, J. &
Imam, J.

COUNSEL : Ikram Mohamed, PC, with Padma Bandara for
Plaintiff-Appellant-Appellant

Ranjan Suwandarathne with Salini Herath for
Defendant-Respondent-Respondent

ARGUED ON: 05.10.2009

WRITTEN SUBMISSIONS

TENDERED ON: Plaintiff-Appellant-Appellant : 17.11.2009
Defendant-Respondent-Respondent : 15.12.2009

DECIDED ON: 04.03.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 27.11.2008. By that judgment the Court of Appeal had set aside part of the judgment of the District Court dated 20.05.2002, which was in favour of the defendant-respondent-respondent (hereinafter referred to as the respondent) and dismissed the respondent's claim. The plaintiff-appellant-appellant (hereinafter referred to as the appellant) instituted an application before this Court for special leave to appeal on the basis that the Court of Appeal had not entered judgment in favour of the appellant as prayed in the Plea on which special leave to appeal was granted by this Court.

When this matter was taken up for hearing, both learned Counsel agreed that the appeal could be considered on the following questions:

1. Whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question?
2. Whether the concept of prior registration would apply in respect of an undivided share in terms of Section 7 of Registration of Documents Ordinance?

The facts of this appeal, as submitted by the appellant, *albeit* brief are as follows:

The land in dispute was originally owned by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara, whom by Deed No. 4830 dated 07.07.1967 attested by Kodikara and Abeynayake, Notaries Public had transferred the same to one Robert Lamahewa. The said Robert Lamahewa had transferred the said property to the appellant by Deed No. 13496 dated 05.07.1930 attested by D.I. Wimalaweera, Notary Public. Sumanalatha Kodikara had however executed another Deed of Transfer bearing No. 1200 on 25.02.1980 attested by Kodikara and Abeynayake, Notaries Public in favour of one Asela Siriwardena in respect of the same property, who had thereafter executed a Deed of Transfer bearing No. 9271 on

25.08.1982 attested by Kodikara and Abeynayake, Notaries Public, in favour of the appellant. The appellant therefore had claimed that she had become the lawful owner of the said property by way of the aforementioned Deed as well as by way of prescriptive possession.

The appellant submitted that the respondent around 09.06.1996 had started to disturb the appellant's possession of the said property and disputed her title thereto and therefore the appellant had instituted action by plaint dated 15.01.1997 against the respondent for a declaration of title and for a permanent injunction restraining the respondent from interfering with her possession.

The respondent had filed answer dated 04.06.1997 and had pleaded *inter alia* that the said property belonged to Sumanalatha Kodikara, who by Deed No. 1200 dated 25.02.1980 transferred the same to one Asela Siriwardena. Thereafter the said Asela Siriwardena had transferred the said property by Deed No. 2708 on 31.10.1995 attested by W.H. Perera, Notary Public to the respondent. It was also submitted that the said Deed was duly registered in the Land Registry and that Deed had obtained priority over the appellant's Deeds. Therefore the respondent sought a declaration that his Deed No. 2708 obtains priority over the appellant's Deeds Nos. 9271 and 13496 and that the appellant's Deeds are void in law as against the respondent's Deed No. 2708.

After trial the District Court on 20.05.2002, had dismissed the appellant's action and had entered judgment in favour of the respondent as prayed in the answer, holding that the respondent's title Deed had obtained priority over the appellant's Deed. The appellant had come before the Court of Appeal against that order, where the Court of Appeal by its judgment dated 27.11.2008 had held that the respondent is not entitled to the reliefs claimed by way of a Claim in Reconvention in the Answer as he was only a co-owner, who was only entitled to a half share of the subject matter and had set aside that part of the judgment in favour of the respondent. The appellant had filed an application before the Supreme Court as the Court of Appeal had not entered judgment as prayed in the Plaint in favour of the appellant.

Having stated the facts of this appeal, let me now turn to examine the two questions of law on which this appeal was argued.

1. Whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question?

The contention of the learned Counsel for the respondent was that Sumanalatha Kodikara was the sole owner of the property in question. In support of his contention, learned Counsel for the respondent submitted that the appellant in the Pedigree set out in the Plaint, had merely stated that Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were the legal owners of the property described in the schedule to the Plaint. It was also stated that they had transferred the said property by Deed No. 4830 dated 07.07.1967 to one Robert Lamahewa. The appellant had alleged that the said Robert Lamahewa had conveyed the said property by Deed No. 13496 dated 05.07.1970 to her and thereby she had become the owner of the said property. The appellant in her Plaint had alleged that Sumanalatha Kodikara had conveyed the said property by Deed No. 1200 dated 25.02.1980 to one Asela Siriwardene.

It was also submitted that the appellant had alleged in her Plaint that Sumanalatha Kodikara had acted fraudulently, but stated in the Plaint that the appellant had got a transfer of the property in question by Deed No. 9271 dated 25.08.1982 attested by K. Abeynayake, Notary Public, in her favour.

Accordingly the contention of the learned Counsel for the respondent was that, the appellant by purchasing rights from Sumanalatha Kodikara in August 1982 by Deed No. 9271 dated 25.08.1982 had conceded that Asela Siriwardena had obtained rights by virtue of Deed No. 1200 dated 25.02.1980 and therefore the appellant is estopped from disputing the flow of title from Sumanalatha Kodikara to Asela Siriwardena. Learned Counsel for the respondent therefore contended that in terms of the aforementioned devolution, Sumanalatha Kodikara has acted as the sole owner of the property in question. It was further contended that by obtaining the transfer of the property by Deed No. 9271 dated 25.08.1982, the appellant had conceded that Sumanalatha Kodikara was the sole owner of the property concerned.

Learned President's Counsel for the appellant contended that as submitted at the outset on the basis of the facts of this appeal, the subject matter in question had originally belonged to

both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara. Later by Deed No. 4830 dated 07.07.1967 (P₁) both of them had transferred the said property to one Robert Lamahewa. The said Robert Lamahewa, by Deed No. 13496 dated 05.07.1970 (P₂) had transferred this property to the appellant by which the appellant had become the sole owner of the land. Thereafter the said Sumanalatha Kodikara had executed another Deed of Transfer bearing No. 1200 dated 25.02.1980 (P₃) in favour of one Asela Siriwardena in respect of the same property and later the said Asela Siriwardena had by Deed No. 9271 dated 25.08.1982 (P₄) had transferred the same property in favour of the appellant. Accordingly, the appellant claimed that she had thus obtained title to the said land by the aforementioned Deed as well as by prescription.

It is in the above background, that it would have to be ascertained as to whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question.

The contention of the learned Counsel for the respondent was that although the learned President's Counsel for the appellant contended that by Deed No. 4830 dated 07.07.1967, both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had sold the land in question to Robert Lamahewa, that there was no reference in the said Deed of such a transaction.

A perusal of the Deed No. 4830 dated 07.07.1967, clearly indicates that both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had sold the land in question to Robert Lamahewa. It is interesting to note that, the respondent in his evidence in chief had stated that Sumanalatha Kodikara had got title by Deed No. 3312 dated 23.09.1962. He had further stated that the said land was divided and the land in question is Lot No. 45. According to the said Deed No. 3312, both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had become co-owners of the entirety of the land called *Delgahawatta, Delgahalanda and Delgahalandawatta*, situated at Thalagama, depicted in Plan No. 2464 dated 08.09.1962, prepared by V.A.L. Senaratne, Licensed Surveyor (P₅) in extent A10-R2-P16.5 and the land in question is Lot No. 45 shown in the said Plan No. 2464, which is 20 perches in extent as could be seen from the first schedule in Deed No. 4830 (P₁). This land is described in the schedule of Deed No. 3312 dated 23.09.1962, in the following terms:

“WHICH SAID allotments of land adjoin each other and now forming one property and according to a recent figure of survey, is described as follows: All that defined allotment of land depicted in Plan No. 2464 dated 8th September 1962 made by V.A.L. Senaratne, Licensed Surveyor of the land called *Delgahawatta, Delgahalanda* and *Delgahalandawatta* situated at Talangama aforesaid and bounded on the North by land of P.D. Abraham East by Road and land of Albert and others South by Path and land of P.D. Abraham and on the West by paddy field and containing in extent ten acres two roods and sixteen decimal five perches (A10.R2.P16.5) according to the said Plan No. 2464.”

As stated earlier, the respondent in his evidence in chief had accepted the position that the land in question is Lot 45 in Plan No. 2464, which was a part of the larger land purchased and the co-owners of Lot No. 45 had been both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara.

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ප්‍ර තමා මූලික සාක්ෂියේදී කියා සිටියාද මේ නඩුවට අද, දෙප, සුමනලතා කොඩිකාර සහ මැලේකම් ජයතිස්ස කියන දෙදෙනකුට අයිතිව තිබුණා කියාද?

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ප්‍ර ඩී, දරණ ලේඛනයේ සටහන් අනුව එම 3312 දරන ඔප්පුව මගින් සුමනලතා සහ මැලේකම් ජයතිස්ස යන දෙදෙනා විසින් මිලදී ගත් කියා සඳහන් වෙනවා?

උ මම දන්නේ නැතැ.

පු මෙහි තිබුණා කියුවොත් පිළි ගන්නවාද?

උ ඔව්

පු තමා විසින් ඉදිරිපත් කරන ලද ලේඛනයේ ඉහතින්ම ඇති සටහනේ 3312 දරන ඔප්පුවට අදාළව ලියා පදිංචි කර තිබෙන්නේ එහි සඳහන් දේපල සුමනලතාට සහ මැලේකම් යන දෙදෙනාට ලැබී තිබෙනවා කියුවොත් ms<s .kakjd?

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පු ඒ අනුව එම ලේඛනයේ සඳහන් දේප, අයිතීන් තිබෙන්නේ දෙදෙනෙකුට

උ ඔව්

පු ඒ සුමනලතා සහ මැලේකම් යන අයට

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පු මේ නඩුවට අදාළ දේපල තමා ඉදිරිපත් කරන ලද ඔප්පු අනුවද කුචිතාන්සි අනුවද සුමනලතා සහ මැලේකම්ට අයිති වී තිබෙනවා?

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පු තමාට ඉහලින් තිබෙන පුරවගාම් අයිති කාරයන් දෙදෙනාගෙන් එක්කෙනෙකුගෙන් අරන් තිබෙන්නේ

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උ එ ලොට් 45 කියන සම්පූර්ණ දේපල අරගෙන තියෙනවා

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උ තමා දන්නවාද 3312 ඔපපුව මගින් සුමනලතා සහ මල්කමි
යන දෙදෙනා අක්කර 10 රැකි 2 ක් පමණ විශාල ඉඩමක් මිලදී
ගෙන තිබුනා කියාද්

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It is to be noted that it is common ground that the land in question is depicted as lot No. 45 in Plan No. 2464 dated 08.09.1962 prepared by V.A.L. Senaratne, Licensed Surveyor. It is also to be noted that, the respondent had produced a Deed of Transfer (V₃) bearing No. 3312 dated 23.09.1962. The contents of the said Deed No. 3312, clearly demonstrate the fact that Sumanalatha Kodikara and Malcolm Jayatissa Kodikara both of Dewala Road, Nugegoda had derived their title from Kahawita Appuhamilage Dona Grace Perera, Totagodagamage Kusumawathie, Swarna Perera and Totagodagamage Charles Perera all of Lily Avenue, Wellawatta as co-owners of the entirety of land called *Delgahawatta, Delgalanda* and *Delgalandawatta* situated at Talangama and depicted in Plan No. 2464 dated 08.09.1962 made by V.A.L. Senaratne, Licensed Surveyor, in extent A10-R2-P16.5.

Thereafter both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had transferred the aforementioned property to Robert Lamahewa by Deed No. 4830 dated 07.02.1967.

Considering all the aforementioned it is abundantly clear that the subject matter had originally belonged to both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara and they have been the original co-owners of the property in question.

2. Whether the concept of prior registration would apply in respect of an undivided share in terms of Section 7 of Registration of Documents Ordinance?

Learned Counsel for the respondent contended that Section 7 of the Registration of Documents Ordinance gives priority to an instrument which is registered and such an instrument would get priority over any other instrument which is not registered, although the previous document is prior considering the time it was purchased. Accordingly the contention of the learned Counsel for the respondent was that whether the Vendor gets absolute right to an immovable property or undivided interest to an immovable property is apparently irrelevant in considering the absolutely clear provisions contained in Section 7 of the Registration of Documents Ordinance.

Learned President's Counsel for the appellant on the other hand referred to the Full Bench decision in **Silva v Gunawardena** ((1915) 18 N.L.R. 241) and stated that a previous instrument to be void as against the subsequent instrument on the basis of due registration of the subsequent instrument, the said subsequent instrument must necessarily be adverse to the previous instrument and not against a part of the said previous instrument. The contention of the learned President's Counsel for the appellant was that, the concept of prior registration in terms of Section 7 of the Registration of Documents Ordinance would not be applicable to an undivided share such as the land in question.

The Registration of Documents first came into being in the maritime provinces of the country in 1801, by a proclamation of 01.03.1801, which imposed on the Presidents of Civil and Land Raads the obligation to maintain a Register of Lands within their respective districts. The proclamation had declared that,

“All title deeds, transfers, mortgage bonds and assignments so made out and enrolled by the aforesaid registers were to have **preference and precedence** over the like kind drawn up and executed before a notary or other person, excepting those passed by or before the Courts of Justice and Land Raads, Weeskamers or elsewhere, according to the formalities required by the Dutch Government.”

After several Regulations, the first Registration Ordinance came into operation in Ceylon in 1863, which was enacted by Ordinance No. 8 of 1863 and later amended by Ordinance No. 3 of 1865 and replaced by Ordinance No 14 of 1891. Thereafter in 1927 the Ordinance No. 23 of 1927 was introduced for the registration of documents. This was for the purpose of amending and consolidating the law relating to registration of documents and the said Ordinance No. 23 of 1927 had been amended on several occasions.

Chapter III of the said Ordinance on Registration of Documents refers to the registration of Instruments affecting land and Section 7 deals with registered and unregistered instruments. Section 7(1) of the said Ordinance reads as follows:

“7(1) An instrument executed or made on or after the 1st day of January, 1864, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance, be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this chapter or if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in Section 26 of that Ordinance.”

It is to be borne out in mind that Section 7(1) of the Registration of Documents Ordinance deals with a situation where the instrument becomes void if there is no due registration and this is not applicable to one's rights or title acquired under such an instrument. Thus the key provision contained in this Ordinance clearly had pronounced that unregistered instruments are void against subsequent registered instruments and such an instrument means an instrument affecting land. It is also to be noted that, such an instrument would become void against all parties 'claiming an adverse interest thereto on valuable consideration'.

It is therefore important that when a question arises in terms of Section 7(1) as to the registration or non registration of an instrument, it is necessary to consider whether the instruments in question are adverse to each other. Furthermore, it is also necessary to refer to the provisions contained in Section 7(4) of the Registration of Documents Ordinance, which clearly states that registration of an instrument under the chapter on Registration of Documents shall not cure any defect in the instrument or confer upon it any effect or validity, which it would not otherwise have, except the priority conferred on it. This position has been carefully considered in a series of cases, which has clearly settled the applicable law in this country.

In **Massilamany v Santiago** ((1911) 14 N.L.R. 292) Van Langenberg, A.J., considering the effect of the registration of a document had stated thus:

“The only effect of registration was to give priority to the subsequent deed. The earlier deed is not affected in any way, save that it has to take second place.”

In **Lairis Appu v Tennakoon Kumarihamy** ((1958) 61 N.L.R. 97) Sinnetamby, J., was of the view that,

“Our Registration Ordinance provides for the registration of documents and not for the registration of titles. If it had been the latter, then, from whatever source the title was derived, registration by itself would give title to the transferee. When, however, provision is made only for the registration of documents of title, the object in its simplest form, is to safeguard a purchaser from a fraud that may be committed on him by the concealment or suppression of an earlier deed by his vendor. **The effect of registration is to give the transferee whatever title the vendor had prior to the execution of the earlier unregistered deeds**” (emphasis added).

The implications of Section 7 of the Ordinance dealing with the registration of documents as to priority of registered instruments was clearly described by Clarence, J. in **Silva v Sarah Hamy** ((1883) Wendt's Reports 383), where he had stated that,

“When an owner of land conveys it to A for value, and subsequently executes another conveyance of the same land in favour of B also for value, it is true that at the date of the second conveyance the owner has nothing left in him to convey, but, by the operation of the Ordinance, B's conveyance overrides A's, if registered before it. **Unless the Ordinance has this effect, it has none at all, and this seems the actual construction of the enactment**” (emphasis added).

Learned President's Counsel for the appellant strenuously contended that, a previous instrument to be void as against the subsequent instrument, on the basis of due registration of the subsequent instrument, the subsequent instrument must necessarily be adverse to the previous instrument and not against a part thereof. It was also contended that an undivided share cannot in our law gain priority by virtue of prior registration. The contention was that the concept of priority as contained in Section 7(1) of the Registration of Documents Ordinance, does not apply to an undivided share and therefore the subsequent transfer, even though duly registered, does not gain priority and will not confer any title since the owner has in fact transferred his title by the earlier instrument, although it was not duly registered.

As clearly stated earlier, the effect of an unregistered instrument becomes material only if there is a conflict with a subsequent registered instrument. However, if there is such a registered instrument, the unregistered Deed becomes deprived of any legal force. The criteria of such a situation was clearly described by Lascelles, C.J., in **James v Carolis** ((1914) 17 N.L.R. 76), where he had stated that,

“If an intending purchaser finds on the register no adverse deed affecting the property, he is placed in the same position, as regards his title to the land, as if no such deed in fact existed.

On the other hand, the grantee under the prior unregistered deed is penalized for his failure to put his deed on the register. He is taken to have given out to the world at large that his deed did not exist, and is prohibited from setting it up against the registered deed of the subsequent purchaser for valuable consideration.”

It is therefore apparent that in a situation, where there is a conflict between a registered and an unregistered Deed, the registered Deed has to be given priority. This appears to be a penalty a party has to pay for the non-registration of an instrument, as he has been negligent in protecting his own rights. When considering the provisions contained in Section 7(1) of the Ordinance, it also appears that the intention of the Legislature was to protect the ‘innocent’ second purchaser of the land in question. This aspect was referred to in **Samaranayake v Cornelis** ((1943) 44 N.L.R. 508), where it was stated that,

“The ordinance does not expressly penalize the purchaser who did not register, nor was that its object probably, for it arrived at protecting the innocent second purchaser, but the result is that the first purchaser pays the penalty.

On a consideration of the facts of this appeal, it appears that both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara have been the co-owners of the land in question. Both of them had transferred the said land by Deed No. 4830 dated 07.07.1967 (P₁) to Robert Lamahewa, who in turn had transferred the same to the appellant by Deed No. 13496 dated 05.07.1970 (P₂). Thereafter Sumanalatha Kodikara had transferred the same land by Deed No. 1200 dated 25.02.1980 (P₃) to one Asela Siriwardena from whom the appellant had purchased her rights by Deed No. 9271 dated 25.08.1982. Asela Siriwardena had also sold his rights by Deed No. 2708 dated 31.10.1995 (V₇) to the respondent, which Deed was admittedly duly registered.

In such circumstances, what would be the position regarding the competing Deeds of the appellant (P₂) and the respondent (V₇)?

As referred to earlier the original owners of the land known as *Delgahawatta, Delgahalanda* and *Delgahalandawatta* had co-owned lot 45 viz., the land in question. The general rule regarding co-ownership is that, a co-owner has no right to alienate more than his undivided share of the common property (**Vaz v Haniffa** ((1948) 49 N.L.R. 286, Voet 18.1.14). When Sumanalatha Kodikara and Malcolm Jayatissa Kodikara transferred the property in question to Robert Lamahewa, both of them had transferred the entire extent of the said lot 45 to him and therefore when Robert Lamahewa in turn transferred the said property to the appellant, she became the owner of the said lot 45. However, thereafter, Sumanalatha Kodikara had transferred the same land to Asela Siriwardena by Deed No. 1200 dated 25.02.1980 (P₃). It is obvious that the said transfer was only limited to the half share of Sumanalatha Kodikara and not the entire extent of the land in question.

It is quite clear that in terms of Section 7(1) of the Registration of Documents Ordinance, an instrument becomes void if it is not duly registered, provided that there is an adverse claim against the said instrument by virtue of a subsequent instrument, which is duly registered.

It is also important to note that there is no provision made under the Registration of Documents Ordinance, stating that instruments dealing with co-owned immovable property come under the category of instruments of which registration is optional or not necessary.

In this appeal the adverse claims are between the appellant and the respondent. Whilst the appellant claims that she derived her rights from Robert Lamahewa to whom the land in question had been sold by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara, the respondent's claim is that he got his rights from Asela Siriwardena to whom the land was sold by Sumanalatha Kodikara. If it was only by Sumanalatha Kodikara, it could only be a half share, as the property in question was owned both by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara. In those circumstances, considering the fact that the respondent had registered his Deed, when the appellant had not taken steps for such registration in terms of Section 7(1) of the Registration of Documents Ordinance, the Deed which was registered would prevail over an unregistered Deed. Accordingly the respondent's deed should prevail over the appellant's Deed.

However, since it was only a half share that was transferred to the respondent, he would only be entitled to a half share of the land in question.

Accordingly, the two questions on which this appeal was heard are answered as follows:

1. Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question.
2. The concept of prior registration would apply in respect of an undivided share in terms of Section 7 of the Registration of Documents Ordinance.

For the reasons aforesaid the judgment of the Court of Appeal dated 27.11.2008 is affirmed and this appeal is accordingly dismissed.

I make no order as to costs.

Jagath Balapatabendi, J.

I agree.

Judge of the Supreme Court

Imam, J.

I agree.

Judge of the Supreme Court

Judge of the Supreme Court