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

SC Appeal No: 26/2019

SC/HCCA/LA No. 308/2017

WP/HCCA/GPH/247/2010 (F)

D.C. Gampaha Case No. 3088/D

IN THE DISTRICT COURT

Heeralu Arachchige Piyasena, of
No.453/4, Podi Wee Kumbura,
Ragama.

PLAINTIFF

- VS –

Malduwa Ranasinghe Gamage Chandrika, of No.388/B, Nandana Mawatha, Hunupitiya,
Wattala.

DEFENDANT

In an application to Purge Default in THE DISTRICT COURT

Malduwa Ranasinghe Gamage Chandrika, of
No.388/B, Nandana Mawatha, Hunupitiya,
Wattala.

DEFENDANT – PETITIONER

- VS -

Heeralu Arachchige Piyasena, of
No.453/4, Podi Wee Kumbura,
Ragama.

PLAINTIFF – RESPONDENT

AND BETWEEN IN THE HIGH COURT

Malduwa Ranasinghe Gamage Chandrika, of
No.388/B, Nandana Mawatha, Hunupitiya,
Wattala.

DEFENDANT – PETITIONER – APPELLANT

- VS -

Heeralu Arachchige Piyasena, of
No.453/4, Podi Wee Kumbura,
Ragama.

PLAINTIFF – RESPONDENT – RESPONDENT

AND NOW BETWEEN IN THE SUPREME COURT

Malduwa Ranasinghe Gamage Chandrika, of
No.388/B, Nandana Mawatha,
Hunupitiya,
Wattala.

DEFENDANT – PETITIONER – APPELLANT – APPELLANT

- VS –

Heeralu Arachchige Piyasena, of
No.453/4, Podi Wee Kumbura,
Ragama.

PLAINTIFF – RESPONDENT – RESPONDENT – RESPONDENT

Before : Murdu N.B. Fernando, PC, CJ.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel : S.A.D.S. Suraweera for the Defendant – Petitioner – Appellant – Appellant.

Sandamal Rajapakse for the Plaintiff – Respondent – Respondent – Respondent.

Argued on : 20.01.2023

Decided on : 13.06.2025

E.A.G.R Amarasekara, J.

This Appeal is made against the Judgment of the Provincial High Court of the Western Province holden in Gampaha (hereinafter sometimes referred to as the "High Court") dated 17.05.2017 by the Defendant – Petitioner – Appellant – Appellant, Malduwa Ranasinghe Gamage Chandrika (hereinafter referred to as the "Defendant" or "Appellant"), where the learned High Court Judges held in favour of the Plaintiff – Respondent – Respondent – Respondent, Heeralu Arachchige Piyasena, (hereinafter referred to as the "Plaintiff" or "Respondent"). The learned High Court Judges had refused to set aside the Judgment of the District Court of Gampaha dated 24.05.2007, which dismissed the Appellant's application to purge her default.

The Respondent had instituted a divorce action No.3088/D in the Gampaha District Court by the Plaint dated 24.05.2007. After it was reported that summons had been served on the Appellant on 11.07.2007, due to the absence of the Appellant, on 16.08.2007, said divorce action was fixed for *ex parte* trial to be taken up on 10.10.2007 – vide J.E. No. 2 and 3 of the District Court brief.

Prior to the date fixed for *ex parte* trial, by a Petition dated 28.09.2007, the Appellant moved the District Court to vacate the said order fixing the matter for *ex parte* trial, and to allow her to file an answer, stating that she did not receive summons but came to know of the divorce action when the Respondent's lawyer revealed it at the Maintenance Case No. 2980 of the Magistrate Court of Gampaha. Since the Appellant objected to this application, the Appellant had informed that she would come after serving the *ex parte* decree - vide J.E. No. 6 of the District Court brief.

Hence, after an ex *parte* trial, an *ex parte* decree had been entered. As it could not be served personally on the Appellant, it had been moved to serve it by substituted service, and accordingly, it has been served by substituted service. As a result, the Appellant had tendered an application to purge her default by way of Petition and Affidavit dated 26.11.2008- vide J.E. No. 07 to 13 of the District Court brief.

By the said application to purge her default, among other things, the Appellant had averred that;

- She is the Defendant and an *ex parte* Judgment had been delivered.
- She was not residing at the address given in the Plaint, and as she received the ex parte decree affixed on the said address by way of substituted service, she makes this application to get the said *ex parte* decree vacated.
- As she had left the said address prior to the filing of this divorce action, the Fiscal Report obtained to the effect that summons was served on her is false, and she was never served with summons.
- J.E.09 and 10 of the brief shows that the decree nisi could not have been served personally as she was not present at the address, and it is indicative of the fraud committed by reporting that the summons was served personally.
- Hence, the *ex parte* decree was obtained fraudulently by misleading the Court and therefore, to allow her to get the said *ex parte* decree vacated and file an answer.
- Even though she made an application previously after getting to know about this divorce action during the maintenance action, as at that time the *ex parte* decree was not served on her, she has to make this application again.

The learned District Judge, after an inquiry, delivered the Order dated 07.01.2010, dismissing the Appellant's application to purge her default based on the following reasons:

- The Appellant permanently resides at the address No.388B, Nandana Mawatha, Hunupitiya, Wattala. It is the address she had given to the District Court for that inquiry;

- As per the evidence of Somaratne, the process server, he had served summons on the Appellant on 12.07.2007 and the relevant report had been marked as V5. Even though he had been subject to lengthy cross examination, his reliability was not strongly challenged;

- Somaratne had stated in evidence, that he served summons at the above address and the Appellant had stated to him that she will not be coming to court, and had closed the door;

- The Appellant's claim that she did not receive summons cannot be accepted and her application should be refused.

Being aggrieved by the Order delivered by the learned District Judge, the Appellant appealed to the Civil Appellate High Court of the Western Province holden at Gampaha. By the Judgment dated 17.05.2017, the learned High Court Judges refused to set aside the aforesaid Order dated 07.01.2010 of the District Court of Gampaha in Case No.3088/D based on the following reasons:

- Even though when the Nisi Order was sent out it was returned due to the fact that the people living in the premises had indicated that the Appellant was not living in the house, subsequently, when the Nisi Order was made to serve by way of substituted service, the Appellant appeared in court and moved to support a motion.

- Even though the Parties agreed to dispose of the matter by way of written submissions, the Appellant had failed to file written submissions.

- After perusing the Respondent's written submissions and the original case record, the High Court could not see any reason to disturb the Order of the learned District Judge.

- Evidence led at the inquiry by both Parties had been discussed in the impugned Order of the District Court.

- Even though the Appellant had stated that she left the address giving it to her sister, as the learned District Judge had very correctly pointed out, the Appellant had always maintained the said address as hers.

- Even in giving evidence at the inquiry, the Appellant had stated, "Maliduwa Gamage Chandrika – 44 – address: No.388/B, Nandana Mawatha, Hunupitiya, Wattala," as her address and not a Seeduwa address.

- The officer who sent to serve summons, had been called as a witness, he had marked the report as V5.

On the aforesaid reasons, the learned High Court Judges have decided that there is no reason to interfere with the Order dated 07.01.2010 of the learned District Judge which refused the application of the Appellant.

Being aggrieved by the said Judgment of the Civil Appellate High Court, the Appellant had requested for Leave to Appeal from this Court and this Court granted Leave to Appeal on following questions of law on 23.01.2019:

01. *Did the learned High Court Judges err in law by failing to consider the totality of the evidence led by the Defendant – Petitioner – Appellant – Petitioner in order to get the ex – parte Judgement and decree set aside?*

02. *Did the Civil Appellate High Court Judgement dated 17/05/2017 comply with the requirements of a Judgement, within the meaning of the Civil Procedure Code?*

It must be noted that even though, other than setting aside the Judgment of the High Court, there is a prayer in the Petition to set aside the order of the District Court dated 07.01.2010 as well, no question of law has been framed to question the propriety of the said Order of the learned District Judge. Thus, as per the questions of law allowed, this court has to limit this Judgment either to affirm the High Court Judgment or to set aside it and order a rehearing. It is also noted that those two questions of law were not among the questions of law suggested by the Petition dated 26.06.2017 in its paragraph 15. However, all those questions suggested in the said paragraph 15 focuses only on the propriety of the High Court Judgment and there is not a single question of law suggesting the propriety of the Order of the District Court. As said questions of law mentioned in the said paragraph 15 query whether the learned High Court Judges erred deciding or appreciating different factual situation, it appears that this Court has allowed the above question of law No.1 which encompass all those different questions in the said paragraph 15 and more.

It must be noted that, as the learned High Court Judges have observed, that after agreeing to conclude the hearing in appeal before them by way of tendering written submissions, the Appellant had failed to tender written submissions, and it was only the Respondent who tendered written submission in that regard. Thus, after tendering the Petition of Appeal in the High Court, the Appellant had failed to present on what grounds she intended to challenge the

decision of the learned District Judge other than what is mentioned in the Petition of Appeal itself. This is important as it is not proper to allow the Appellant to bring in new grounds that were not raised before the High Court to challenge the decision of the Hogh Court. It is not proper to find fault with the decision of the High Court on grounds not urged before the High Court. If one looks at the Petition of Appeal tendered to the High Court, in its paragraph 3 what was contended is that the Fiscal Report pertaining to serving of summons on the Appellant was a false report since she was not residing in the said address as evinced by the substituted service of the *ex parte* decree. Based on that ground the Appellant had urged before the High Court that;

a) The impugned order is contrary to law;
b) The learned Additional District judge failed to consider the Appellant's bona fide intention pertaining to filing of a maintenance case without any knowledge of the pending divorce case.
c) The learned Additional District judge failed to consider the bona fide contention of the Appellant related to her evidence that she had not been residing in the address in the Plaint.
d) **In the above circumstances** the Order of the learned District judge cannot be supported both on facts and law.

It is true that in the first appeal made, a party is not limited to the questions of law mentioned in the Petition of Appeal. It can raise other questions of law during the hearing but on this occasion, the Appellant appears to have not filed written submissions and pointed out any other question of law that she relied on. A court cannot answer the contentions in the minds of the Appellant or her lawyers without pointing out them to the Court. Above (a) is wide and it was not pointed out why it is contrary to law at least through filing written submissions. Above (b) has no direct link to whether summons was served or not. Her bona fides has to be decided on the reliability of her evidence. Above (c) is linked to the contention contained in aforesaid paragraph 3 of the Petition of Appeal to the High Court, as said before, her bona fides depends on the reliability of her evidence. Above (d) relates to (a)(b) and (c). Thus, what is challenged by the Petition of Appeal was whether the report on service of summons was a false report and her bona fides were not considered by the learned District Judge in deciding that. Other than the above, no specific ground was urged before the learned High Court Judges as no written submissions was filed before the High Court by the Appellant even though it was agreed to dispose of the matter by way of written submissions. Now the Counsel for the Appellant,

attempts to indicate indirectly that the statement contained in the Judgment of the High Court as to the fact that Parties agreed to dispose of the matter before the High Court in that manner is not correct as the matter was fully argued before a different bench vide paragraph 10 of the written submissions dated 28.03.2019. If the matter was fully argued before a different bench and judgment was not delivered for some reason, and again taken up before a new bench it's a new hearing and it is in that new hearing Parties agreed to dispose of the matter by way of written submissions.

It is observed that, as per the J.E. dated 16.11.2016, it is recorded that Defendant-Appellant has filed written submissions, and a date is given to file written submissions on the request of the Respondent. However, it appears to be a misstatement, as no copy of such written submissions filed by the Appellant before the High Court has been tendered to this appeal brief and the complete set of journal entries also has not been tendered to show what is stated in the Judgment of the learned High Court Judges as to the non-filing of written submissions is incorrect. It is most likely that the above J.E. dated 16.11.2016 contains a misrepresentation made by the party itself stating that written submissions had been filed. Proceedings relevant to that J.E. has also not been tendered. Thus, the statement in the Appellant's aforesaid written submissions filed in this Court stating that written submissions was tendered in open court before the High Court is not properly supported by the documents tendered to this Court and available in the brief. The best way to show that the learned High Court Judges erred in stating that the Appellant did not tender written submissions is to tender the copy of that written submissions filed in the case record of the High Court or the Journal Entry on the day it was tendered, along with the Petition to this Court. As such, this Court has to rely on what the learned High Court Judges have stated in their Judgment that the Appellant had not tendered written submissions to the High Court even though she agreed to dispose of the appeal before it by way of written submissions.

As said before, the main challenge made by the Petition of Appeal before the High Court was that the process servers report relating to serving of summons was false, and the alleged failure of the learned Additional District Judge to consider the bona fides of the Appellant in that respect. In that regard the learned High Court Judges has commented as follows:

'*Evidence of both Parties had been led, cross examined and discussed in the Judgment.*
The Defendant had given evidence to say that she left the Wattala address giving the house to the sister but as the learned District Judge has pointed out very correctly, she had always maintained the said address as hers.

In giving evidence in the application also she had said 'Maliduwa Gamage Chandrika-44-address: 388/B, Nandana Mawatha, Hunupitiya, Wattala and not of a Seeduwa Address'."

The above clearly shows, that even though the Appellant's position was that, the report of the process server is false due to the fact that she left the house and resided in Seeduwa, according to evidence, she maintains the same address as her address and even at the inquiry to purge default, she has used the same address. Therefore, the learned District Judge is correct in his finding. The learned High Court Judges have also observed that the Respondent has filed the report "Va5" through the process server to establish that summons was served on the Appellant. Thus, it is clear that the High Court, while affirming the finding of the learned District Judge as to the address of the Appellant at the relevant time of serving the summons, observed that the Appellant story of her residence in Seeduwa is not reliable, which in turns questions the bona fides of the Appellant's stance.

In fact, this observation by the learned High Court Judges as well by the learned Additional District Court Judge is correct. The Appellant's reason to say that the Fiscal Report is false is that she was not residing in that address at Nadana Mawatha, Hunupitiya Wattala but was residing in a place at Seeduwa, namely No.73, Bandarawatta, Seeduwa. However, the Address, she had given as her address at the commencement of her evidence is No.388/B, Nandana Mawatha, Hunupitiya, Wattala. She had admitted while giving evidence that she lived with her previous husband as well as with the Respondent in the said address. Her application to the District Court bears the address No.388/b Nandana Mawatha, Hunupitiya, Wattala. As per the report (Va5) of the process server, the said Fiscal Report was served on her on 12.07.2007. Close to that date, on 03.07.2007, the Appellant had filed a maintenance application in the Magistrate Court- vide "Va2". In that application, the Appellant had used No.338/B Nandana Mawatha, Hunupitiya, Wattala, as her address but not an address in Seeduwa. However, it can be observed that there is a difference in the Number as it is 338/B and not 388/B. However, in the evidence led at the maintenance case, the Appellant herself had explained that the correct number is 388/B not 338/B – vide 'Va 3', the proceedings in the said maintenance case. Even though she had stated in that proceedings that she lived in a rented house at Seeduwa, she had not used such an address as her address in that case too. No document, grama niladari certificate had been tendered to show that she had a different address. Thus, it was clear that she used No. 388B, Nadana Mawatha, Hunupitiya, Wattala, as her address during the time summons was served. It is also clear that she used the No.338/B for the same address interchangeably. Even

her mother, Leelawathie, had stated that she lived in that address which is No.388/B above and it was the address where the substituted service of the decree was done. Leelawathie had also admitted that it was the address where the Appellant and the Respondent lived after their marriage. When it was suggested that on 11.07.2007 the Appellant was residing at that address, she had not stated that it was not but stated she cannot remember. She had stated that there is no address with No.338/B and her daughter, the Appellant, has no such place with the No.338/B. However, this witness, Leelawathie, at one place in her evidence had stated that the Grama Niladari changed the addresses recently without referring to any number, but this may be the reason to use both numbers by the Appellant, as evinced by the proceedings in the maintenance case. It appears, as per the document in the brief, it is not only the Appellant who had used both those numbers to the same address, but also the Respondent who once lived in the same address. He had used both numbers to describe the address of the Appellant – vide the caption in the Plaint of the District Court action which refers to No.388/B as the number of the Appellant's address and the proxy found at page 95 filed by the Respondent in the District Court, which described the address of the Appellant using No.338/B. Thus, it is clear that both Parties used No.388/B, Nandana Mawatha, Hunupitiya, Wattala, as well as No.338/B, Nandana Mawatha, Hunupitiya, Wattala, to describe the address of the Appellant, and it refers to one and the same. It is the address used by the Appellant as her address throughout the time relevant to the matter at hand.

Now, it is important to look at the evidence of the process server, Somaratne, and his report as to the personal service of summons on the Appellant. He has marked the report as 'Va5' and his notes as to the service of summons as 'Va7' and 'Va7a' (as per the proceedings') but it has to be 'Va4'and 'Va4a' as found at page 149 of the brief. As per 'Va5', summons has been served personally on the Appellant at the address No.338/B Nandana Mawatha, Hunupitiya, Wattala. His notes made on the same date, 'Va4' and 'Va4a' (or 'Va7'and 'Va7a" as per the proceedings) states that it was so served on her at No.388/B. As per the said Witness Somaratna, he identified the place by the description given by Jayanthi, the process server, who was assigned to that area, and identified the Appellant by questioning the Appellant as to her identity when she admitted that it was her name – vide page 67 of the brief. This difference of the number of the address, as stated above, is one of the grounds urged in challenging the learned High Court Judges' decision, but as explained before, Parties have used both numbers to explain the address of the Appellant and as per evidence led, it appears to be one and the same address. The number had been used interchangeably. On the other hand, for the learned

High Court Judges to make a finding on that, it was not specifically averred in the Petition nor through any written submissions before the High Court.

As the said process server, Somaratne, had stated in evidence that he did not check the identity card or take the signature of the Appellant, it is argued that the learned High Court Judges erred as they did not consider those facts in coming to their decision. It must be said again that this too was not an issue pinpointed through their Petition or through a written submission as agreed, for the learned High Court Judges to make their findings over that. On the other hand, said process server, in his evidence, had stated that when he went to the address, the Appellant identified herself as the relevant person (vide page 67 of the brief) then he served summons. He had further stated in evidence, that, after accepting summons, the Appellant closed the door saying that she would not come to Courts- vide page 61 of the brief. This part of his evidence had not been challenged by cross examination at least suggesting that it is a lie. Now it is argued that it is hearsay evidence. I do not think it is correct to say that it is hearsay evidence as it was said before the Court when the Appellant was the opposite party. The Respondent cannot call her to prove that she told that. As said before, that part of the evidence was not challenged. Thus, I cannot find that the learned District Judge erred in that finding by relying on that statement. Anyway, no question of law had been raised to find whether the learned District Judge erred in his findings and now, this Court is invited to find errors in the High Court Judgment on issues which were not pinpointed before the High Court.

It is also argued that the fiscal (process server), who served summons personally, had no jurisdiction to serve summons in the relevant area when the fiscal, who has jurisdiction to serve summons in the relevant area, had reported he could not find the Defendant at the given address. This is a misconceived argument, as any process server can serve summons within the Judicial District that belongs to the relevant District Court. Merely because the Registrar allocates different areas within the Judicial District for each process server for the ease of administration, it does not make serving of summons by a process server in an area allocated to another process server invalid or illegal. Somarathne, who served the summons, as well as Jayanthi Perera, to whom the area where the Appellant's address is allocated, had given evidence and had explained why they made such an arrangement to serve the summons through Somaratna. It is explained how the said Jayanthi Perera failed to serve summons. As he is known in the area, there was a possibility of avoiding summons, and thus, they had made arrangements to serve it through Somaratne. Merely because Somaratne admitted in evidence during cross examination

based on a wrong premise, that he did a wrong thing by serving summons in an area allocated to Jayanthi Perera, it does not make the serving of summons illegal or invalid. In suggesting questions of law in paragraph 15 of the Petition, the Appellant had indicated that the learned High Court Judges erred in deciding that said 'Jayantha' had given evidence orally to say that he personally handed over summons to the Defendant. Nowhere in their Judgment have the learned High Court Judges referred to said "Jayantha". The learned High Court Judges have referred to the fiscal who served summons by handing it over to the Defendant in person. As per the evidence before the learned Additional District Judge, it was Somaratna who served summons by personal service, and it was not Jayanthi Perera who did that. In the Petition, in the same paragraph, the Appellant had taken up the position that the learned High Court Judges gravely erred in deciding that 'when the order was made to serve by substituted service the Defendant appeared in court to support a motion'. That statement of the learned High Court Judges has to be understood in the context it was made. The learned High Court Judges had mentioned how the nisi order was returned when it was issued to serve by personal service, thereafter, it has stated that when the order was made to serve by substituted service the Defendant appeared in court to support a motion, as alleged by the Appellant. What the learned High Court Judges appears to have meant, was that when it was issued to be served by personal service, it became a failure, but once the order was made and served by substituted service, the Appellant appeared and supported the motion. As per the evidence led, it is factually correct that the Appellant first came to court to support the motion filed along with her application to purge the default after serving of the *ex parte* decree by substituted service- vide J.E. No. 11 and 12 at pages 24 and 25 of the brief. Thus, the appearance of the Appellant was after it was ordered to serve the decree by substituted service. It is understood that the High Court Judges had referred to *ex parte* decree as the 'order or nisi order' in their Judgment.

It is true that it may be better that if the process servers can adopt a procedure to check the identity card and get the relevant persons signature etc. but there may be occasions that such documents are not forth coming or available and/or where there is lack of corporation from the recipient in that regard. Somaratna had stated how he got the details about the place from Jayanthi Perera, who is the regular process server for that area, and Jayanthi Perera had revealed how he collected information from the post office and close by houses. This indicates that the process servers, before serving a summons or a decree, collected relevant information to verify the address etc. The process server had clearly said that at the relevant address, the Appellant identified herself and, after serving summons, stated that she would not attend Courts. As said

before, that part of evidence had not been challenged through cross examination. There is no material to say there was an abuse of process of Court as alleged. On the other hand, it is clear that the address was the Appellant's address. If she was not residing there, it is she who knows who was there at the relevant time. As per her evidence she had gone to reside in a Seeduwa Address, giving the relevant address to her sister. She had not called the person who was there on the relevant date to say that the process server did not visit that place on the relevant date or that it was not the Appellant who took summons.

As per the reasons discussed above, I do not find sufficient material to answer the question of law No.1 above in favour of the Appellant and thus, it is answered in the negative.

The second question of law challenges the Judgment of the High Court on the ground that it is not a judgment that falls within the meaning of the Civil Procedure Code. Nothing has been mentioned in this regard in the written submissions dated 28.03.2019 filed in this Court on behalf of the Appellant. As per Section 187 Civil Procedure Code, a judgment shall contain a concise statement of the case, the points for determinations, the decision thereon, and the reasons for the decision. This section basically contemplates a judgment given after a trial in the original court. However, similarly, even a proper judgment delivered by a court sitting in appeal must also contain an identification of the questions involved and the decisions made on them along with the reasons for such decisions. The learned High Court Judges in the first 7 paragraphs of their Judgment had explained the factual background to the application before them. Though it is not specifically mentioned that the question to be solved is whether the learned Additional District Judge was correct in finding that the report relating to the serving of summons on the Appellant was true when the position taken up by the Appellant was that she was not residing in the said address, reading of paragraphs 8 to 13 indicates that the learned High Court Judges identified the said question involved in that appeal. As I explained above, the Petition of Appeal was based on the premise that the said report was false and that the learned District Judge failed to consider the bona fides of the Appellant and no other specific issues were pinpointed through any written submissions for the Court to looked into, even though it was agreed to dispose of the matter by way of written submissions. The learned High Court Judges have observed that the process server's report, which is in the form of an Affidavit, had been marked as "Va5" at the inquiry before the District Court. Thus, they have indicated that there was a document that can be considered as prima facie proof of serving the summons as per law, marking of which itself put the burden on the Appellant to prove that

summons was not served (vide **Wimalawathie and Others v. Thotamuna and others** (1998) 1 Sri L R 1. Paragraphs 8 to 10 of the Judgment shows that after going through the case record, and submissions of the Respondent which was available, the learned High Court Judges approved the reasons given by the learned District Judge while giving an example in support of that finding and for not believing the Appellant. I view that the High Court Judgment could have been presented in a better way, but it contains why the learned High Court Judges did not accept the stance of the Appellant that the process server's report is false. Thus, I am not inclined to answer the question of law No.2 in the negative and thus, it is answered in the affirmative.

Hence this Appeal is dismissed.

Appeal dismissed.

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Judge of the Supreme Court

Hon. Murdu N.B. Fernando, PC, CJ.

I agree.

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The Chief Justice

Hon. Mahida Samayawardhena, J.

I agree.

……..

Judge of the Supreme Court