

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

In the matter of an appeal from the Order  
dated 10<sup>th</sup> September 2012 of the High  
Court of the Southern Province.

1. Anita George Carey  
Hunts House, West Lavington, NR,  
Devizes, Wiltshire, England.

By her Attorney A.L.B. Britto  
Muthunayagam, No.50,  
Rosmead Place, Colombo 07.

2. William George Carey
3. Rhiannon George Carey
4. Angharad George Carey
5. Catrin George Carey
6. David George Carey

S.C. Appeal No 147/2014  
SC/HCCA/LA 442/2012  
SP/HCCA/GA/LA/2/2010  
DC Galle Case No 294/M

All of Hunt House, West Lavington, NR,  
Devizes, Wiltshire, England appearing by  
their next friend A.L.B. Britto  
Muthunayagam

**Plaintiffs**

**Vs.**

1. G.H.G.Elizabeth,  
No.100, Peddler Street,  
Galle.
2. Mirissa Gallappathige Eric  
Piyadarshana Udaya Kumara,  
'Somagiri', Goviyapana,  
Ahangama.
3. S.U. Dungi,  
No.26F, Dodanwela Passage, Kandy.
4. Mohamed Ali Mubarak,  
No. 65D, Akuressa Road,  
Katugoda, Galle.

**Defendants**

**And**

S.U. Dungi,  
No.26F, Dodanwela Passage, Kandy.

**3<sup>rd</sup> Defendant-Petitioner**

**Vs.**

1. Anita George Carey,  
Hunts House, West Lavington, NR,  
Devizes, Wiltshire, England.

By her Attorney A.L.B. Britto  
Muthunayagam, No.50,  
Rosmead Place, Colombo 07.

2. William George Carey
3. Rhiannon George Carey
4. Angharad George Carey
5. Catrin George Carey
6. David George Carey

All of Hunt House, West Lavington, NR,  
Devizes, Wiltshire, England  
appearing by their next friend  
A.L.B. Britto, Muthunayagam.

**Plaintiff-Respondents**

1. G.H.G.Elizabeth,  
No.100, Peddler Street,  
Galle.
2. Mirissa Gallappathige Eric  
Piyadarshana Udaya Kumara,  
'Somagiri', Goviyapana,  
Ahangama.
4. Mohamed Ali Mubarak,  
No. 65D, Akuressa Road,  
Katugoda, Galle.

**Defendant – Respondents**

**And**

S.U. Dungi,  
No.26F, Dodanwela Passage, Kandy.

**3<sup>rd</sup> Defendant-Petitioner-Petitioner**

**Vs.**

1. Anita George Carey  
Hunts House,  
West Lavington, NR,  
Devizes, Wiltshire, England.

By her Attorney A.L.B. Britto  
Muthunayagam, No.50,  
Rosmead Place, Colombo 07.

2. William George Carey
3. Rhiannon George Carey
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6. David George Carey

All of Hunt House, West Lavington, NR,  
Devizes, Wiltshire, England  
appearing by their next friend  
A.L.B. Britto, Muthunayagam.

**Plaintiff-Respondent-Respondents**

1. G.H.G.Elizabeth,  
No.100, Peddler Street,  
Galle.
2. Mirissa Gallapathige Eric  
Piyadarshana Udaya Kumara,  
'Somagiri', Goviyapana,  
Ahangama.
4. Mohamed Ali Mubarak,  
No. 65D, Akuressa Road,  
Katugoda, Galle.

**Defendant-Respondent-Respondents**

**AND NOW BETWEEN**

S.U. Dungi,  
No.26F, Dodanwela Passage, Kandy.

**3<sup>rd</sup> Defendant – Petitioner – Petitioner  
– Petitioner / Appellant**

**Vs.**

1. Anita George Carey,  
Hunts House,  
West Lavington, NR,  
Devizes, Wiltshire, England.

By her Attorney A.L.B. Britto  
Muthunayagam, No.50,  
Rosmead Place, Colombo 07.

2. William George Carey
3. Rhiannon George Carey
4. Angharad George Carey
5. Catrin George Carey
6. David George Carey

All of Hunt House, West Lavington, NR,  
Devizes, Wiltshire, England appearing  
by  
their next friend A.L.B. Britto  
Muthunayagam.

**Plaintiff-Respondent-Respondent-  
Respondents**

1. G.H.G.Elizabeth,  
No.100, Peddler Street,  
Galle.
2. Mirissa Gallapathige Eric  
Piyadarshana Udaya Kumara,  
'Somagiri', Goviyapana,  
Ahangama.

4. Mohamed Ali Mubarak,  
No. 65D, Akuressa Road,  
Katugoda, Galle.

**Defendant-Respondent-Respondent-  
Respondents**

Before: Murdu N.B.Fernando, PC. J.,  
P.P.Surasena J. and  
Yasantha Kodagoda, PC. J.

Counsel: Nihal Fernando PC with Ms. Rhadeena de Alwis instructed by Nimal  
Kuruwitabandara for the 3<sup>rd</sup> Defendant-Petitioner-Petitioner-Appellant.

Romesh de Silva PC with Aruna Samarajeewa and Shanaka Cooray instructed  
by Malin Rajapakse for the Plaintiff-Respondent-Respondent-Respondents.

Argued on: 03.03.2021

Decided on: 27.02.2024

**Murdu N.B. Fernando, PC. J.,**

The 3<sup>rd</sup> defendant-petitioner-petitioner-petitioner/appellant (“the 3<sup>rd</sup> defendant/  
appellant”) preferred this appeal against the Order of the High Court of the Southern Province  
 (“the High Court”) dated 10<sup>th</sup> September, 2012 and obtained leave from this Court on three  
 questions of law.

The High Court by the said impugned Order, affirmed the Order of the learned District  
 Judge of Galle dated 12<sup>th</sup> January, 2010 and rejected with costs, the application of the appellant,  
 *to lead evidence and to further cross-examine the 1<sup>st</sup> plaintiff-respondent-respondent-  
 respondent* (“the 1<sup>st</sup> plaintiff”), which application was made after the trial was concluded and  
 the case was fixed for written submissions and to tender marked documents.

The factual matrix of this appeal is unique. It amply demonstrates the abysmal speed at  
 which the wheels move in the administration of justice in this country.

**The narrative**

01. This appeal stems from an action instituted in the District Court of Galle way back  
 on 22<sup>nd</sup> December, 2000 by the 1<sup>st</sup> plaintiff and her children (all minors) claiming  
 damages from the defendants, consequent to the death of the 1<sup>st</sup> plaintiff’s husband  
 Peter Carey, who succumbed to his death, following a road accident that occurred  
 on 27<sup>th</sup> December, 1998 in Habaraduwa, Galle.

02. The deceased and the plaintiffs are all British nationals. The 1<sup>st</sup> plaintiff is the wife of the deceased and the 2<sup>nd</sup> to the 6<sup>th</sup> plaintiff-respondent-respondent-respondents are the children of the deceased and the 1<sup>st</sup> plaintiff. The plaintiffs filed this action claiming damages in a sum of 2,176,710 Sterling Pounds or its equivalent in Sri Lankan Rupees as compensation from the defendants.
03. The plaintiffs together with the deceased, arrived in Sri Lanka for a holiday and were on their way to their destination when the accident occurred. The van in which they travelled [bearing registration no. 57-5280] collided with a bus [bearing registration no. 62-9444] which resulted with the untimely death of Peter Carey, a Solicitor by profession, based in Hong Kong.
04. The 1<sup>st</sup> and the 4<sup>th</sup> defendants-respondents-respondents-respondents (“1<sup>st</sup> and 4<sup>th</sup> defendants”) were respectively, the owner and the driver of the van in which the deceased and the plaintiffs travelled. **The appellant before this Court (the 3<sup>rd</sup> defendant) was the owner of the bus, that collided with the van and the 2<sup>nd</sup> defendant-respondent-respondent-respondent (“the 2<sup>nd</sup> defendant”) was the driver of the bus, that met with the fateful accident.**
05. All four defendants were represented before court and filed answer. The record bears out that the defence of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were undertaken by the Sri Lanka Insurance Corporation Ltd., at which the bus was insured and they were represented by counsel throughout the trial. The said counsel also filed proxy on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
06. The trial pertaining to this matter began in the District Court of Galle on 23<sup>rd</sup> March, 2004. Admissions were recorded and issues raised by all counsel including the counsel for the 3<sup>rd</sup> defendant *i.e.*, the appellant before this Court.
07. At the commencement, the learned trial judge made order dated 25<sup>th</sup> August, 2004 and directed trial to begin in respect of all issues, rejecting the preliminary objection raised on behalf of the 4<sup>th</sup> defendant, that legal issues should be answered first.
08. On 24<sup>th</sup> June, 2005 the counsel for the plaintiff led the evidence of two police witnesses. Thereafter, in March, 2006 the evidence of two other witnesses were led and a number of documents produced. The said two witnesses were the 1<sup>st</sup> plaintiff (deceased’s wife, a British national) and another foreign witness, named Mable Lui (the business partner of the deceased) from the firm, ‘Lui and Carey’, a British Law firm functioning in Hong Kong.
09. The record clearly bears out that the said four witnesses of the plaintiffs, were cross-examined by counsel of the defendants respectively, including the 3<sup>rd</sup> defendant, the appellant before this Court.

10. On 6<sup>th</sup> November, 2006 the counsel for the 1<sup>st</sup> defendant presented its defence, led evidence and marked documents. The counsel who appeared for the 2<sup>nd</sup> defendant [driver of the bus who had passed away by then] and the 3<sup>rd</sup> defendant [the owner of the bus - the appellant before this Court] thereafter moved for further time to lead evidence and the court granted such request.
11. On 9<sup>th</sup> July, 2007 the said **counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants informed court that no evidence would be led on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants**. The record bears out, that the said counsel also submitted to court that the plaintiffs should make representations to the Insurer, but the counsel for the plaintiffs indicated that prior to the commencement of the trial, a dialogue was initiated but there was no positive response from the Insurer.
12. On 23<sup>rd</sup> October, 2007 court was informed that no evidence would be led on behalf of the 4<sup>th</sup> defendant. Thus, the trial was concluded and the learned judge directed the parties to file marked documents and written submissions by 12<sup>th</sup> December, 2007.
13. On 12<sup>th</sup> December 2007, further time was moved for written submissions and the court granted time till 6<sup>th</sup> February, 2008. On the said date too, time was once again moved for written submissions (the 3<sup>rd</sup> date for written submissions) and court granted time till 4<sup>th</sup> June, 2008. [vide journal entries bearing numbers 43 to 46]
14. Subsequent to same, the 3<sup>rd</sup> defendant, the **appellant before this Court, by way of a motion dated 29<sup>th</sup> May, 2008** moved to revoke proxy and file fresh proxy and further prayed to call this case in open court on 30<sup>th</sup> May, 2008, three days prior to 4<sup>th</sup> June, 2008 - the 3<sup>rd</sup> date granted by court to file written submissions.
15. The case was thus called on the said date and **an application was made under Sections 134, 165 and 166 of the Civil Procedure Code**, on behalf of the 3<sup>rd</sup> defendant to '*lead further evidence and to further cross-examine the plaintiff-respondent*' and the court made order to notice all parties. The basis upon which such application dated 28<sup>th</sup> May, 2008 was made, *inter-alia* was that the bus owned by the 3<sup>rd</sup> defendant was insured with Sri Lanka Insurance Corporation Ltd., and that the plaintiffs have not given notice of action to Sri Lanka Insurance Corporation, in terms of the Motor Traffic Act.
16. Consequent to notices being issued on all parties, the application of the 3<sup>rd</sup> defendant was fixed for inquiry. On 19<sup>th</sup> May, 2009 inquiry was taken up and the plaintiffs objected to such application and moved to file written submissions. Court granted time till 9<sup>th</sup> July, 2009 to file written submissions pertaining to the 3<sup>rd</sup> defendant's application, to lead further evidence on her behalf and to cross-examine the 1<sup>st</sup> plaintiff.

17. On 9<sup>th</sup> July, 2009 the date given for filing of written submissions pertaining to the aforesaid application of the 3<sup>rd</sup> defendant, revocation papers and fresh proxy was filed on behalf of the 3<sup>rd</sup> defendant and the case was once again re-scheduled for 26<sup>th</sup> August, 2009.
18. Thereafter, all parties filed their written submissions and the matter was set down for Order on 30<sup>th</sup> September, 2009.
19. On 12<sup>th</sup> January, 2010 **the Order of the learned District Judge was delivered rejecting the application of the 3<sup>rd</sup> defendant to lead evidence and further cross-examine the 1<sup>st</sup> plaintiff**, the wife of the deceased who was initially examined and cross-examined in March 2006.
20. The 3<sup>rd</sup> defendant appealed against the said Order to the High Court. Based on written submissions, the High Court upheld the Order of the District Court and dismissed the 3<sup>rd</sup> defendant's appeal with costs.

Being aggrieved by the Order of the High Court, the 3<sup>rd</sup> defendant thereafter came before this Court and obtained leave on the following three questions of law.

01. Did the learned judges of High Court of the Southern Province err in law and misdirect themselves by totally failing to take into account the factors that must necessarily be considered in exercising the discretion vested in court by Section 166 of the Code?
02. Did the learned judges of High Court of the Southern Province err in law and misdirect themselves by totally failing to consider that an admission of fact which is untrue and/or made by mistake or error can be withdrawn in the District Court?
03. Did the learned judges of High Court of the Southern Province err in law and misdirect themselves by making Order not permitting the Petitioner's evidence to be led?

The High Court, in a very short analysis upheld the findings of the learned trial judge upon the ground that the application of the 3<sup>rd</sup> defendant is not justiciable.

The learned judges of the High Court observed that the application of the 3<sup>rd</sup> defendant is not just and fair, as the papers filed before the trial court do not give reasons as to why further cross-examination of the 1<sup>st</sup> plaintiff [who is a foreign national] is necessary as the 1<sup>st</sup> plaintiff was cross-examined extensively by the counsel for the 3<sup>rd</sup> defendant at the trial.

The High Court also observed that the petition of appeal did not aver or indicate that the counsel who appeared for the 3<sup>rd</sup> defendant at the trial, acted contrary to instructions or that the intimation made to court that *no evidence would be led on behalf of the 3<sup>rd</sup> defendant or that no defence would be taken on behalf of the 3<sup>rd</sup> defendant at the trial* was erroneous or made with a mistaken understanding.



Having made the aforesaid observations, the learned judges of the High Court fully concurred with the findings of the learned District Judge.

Hence, let me examine the Order of the District Court first.

In the said Order, the learned District Judge considered the application made by the 3<sup>rd</sup> defendant in terms of Sections 134, 165 and 166 of the Civil Procedure Code, and rejected the contention of the 3<sup>rd</sup> defendant pertaining to Sections 134 and 165 of the Civil Procedure Code, on the ground that the said provisions have no bearing on the matter in issue.

The said provisions read as follows;

**Section 134 -**

“Subject to the rules of this Ordinance as to attendance and appearance, if the court at any time thinks it **necessary to examine any person other than a party to the action**, and not named as a witness by a party to the action, **the court may, of its own motion, cause such person to be summoned as a witness to give evidence**, or to produce any document in his possession, on a day to be appointed; and may examine him as a witness, or require him to produce such document.”  
(emphasis added)

**Section 165 -**

“The **court may also in its discretion** recall any witness, whose testimony has been taken, for further examination or cross-examination, whenever in **the course of the trial it thinks it necessary** for the ends of justice to do so.” (emphasis added)

The learned trial judge in his Order, observed that **Section 134** of the Civil Procedure Code, speaks of a ‘court, on its own motion, causing a person [other than a party to the action and or not named as a witness] to be summoned as a witness’. In the instant matter, since the trial court did not deem it necessary to summon any person, the learned judge held, that the provisions of Sections 134 cannot be made use of by the 3<sup>rd</sup> defendant, to lead further evidence to substantiate its case.

With regard to **Section 165** of the Civil Procedure Code, the finding of the trial judge was twofold;

*First*, it is the discretion of court to recall any witness, whose testimony has been taken. In this instance, the court has not deemed it necessary to recall a witness and therefore, on the said ground, the application of the 3<sup>rd</sup> defendant cannot be permitted.

*Secondly*, recalling of a witness for further examination or cross-examination may be resorted to in the instance such witness has given a testimony. The 3<sup>rd</sup> defendant did not give

evidence at the trial and hence ‘recalling’ a person who has not given evidence, does not come within the provisions of Section 165, the learned judge held.

As discussed earlier, the 3<sup>rd</sup> defendant’s application ‘*to lead further evidence and to further cross-examine the 1<sup>st</sup> plaintiff*’ was made under three provisions of the Civil Procedure Code namely, Sections 134, 165 and 166.

Having rejected the 3<sup>rd</sup> defendant’s contention relating to Sections 134 and 165 *in limine*, the trial judge went onto examine the provisions in Section 166 of the Civil Procedure Code.

The said Section reads as follows;

### **Section 166**

“The court may for grave cause, to be recorded by it at the time, permit a departure from the course of trial prescribed in the foregoing rules.”

The learned trial judge, whilst noting that in accordance with the provisions of Section 166, a court could depart from prescribed course of trial for reasons which in the opinion of court is grave, referred to the discretion placed in court in such instances. Further it was emphasized, that such discretion is not only a part of our law, but is accepted even in South Africa as referred to by **E R S R Coomaraswamy** in his book ‘The Law of Evidence’ [Volume Two, Book 2 at page 849].

Further, the trial judge considered the judicial dicta pertaining to the discretion referred to in Section 166 and the pronouncements in the Court of Appeal case of **Murin Perera v. Gajaweera [2005] 1 SLR 103** and the following observations of this Court in **Samarakone v. The Public Trustee 65 NLR 100** viz; ‘*An obvious instance for the application of Section 166 would be where a party having closed his case, is faced with evidence of a decisive nature arising ex-improviso which he could not reasonably have foreseen*’ (page 106), to hold that if a party could not have reasonably foreseen of any important evidence at the material time, the court could exercise its discretion and permit a party to lead such evidence.

Thereafter, the learned judge delved into the question of factors, **a party could not reasonably have foreseen** [as referred to in the aforesaid case of **Samarakone v. The Public Trustee**] *vis-à-vis*, the instant case, and in view of paucity of material submitted by the 3<sup>rd</sup> defendant to justify calling for fresh evidence, declined the discretion of court to depart from the prescribed course of trial. Thus, the learned judge rejected the application of the 3<sup>rd</sup> defendant and held that the 3<sup>rd</sup> defendant cannot have recourse to Section 166 of the Civil Procedure Code in the given circumstances.

The learned District Judge, while emphasizing that the 3<sup>rd</sup> defendant failed to spell out the new evidence that had later emerged went onto state that the 3<sup>rd</sup> defendant also failed to

establish that such material was not available or could not have been foreseen by the 3<sup>rd</sup> defendant at the time the evidence was led, and therefore, the court cannot be satisfied whether such material was actually available or not, in order to use its discretion, to permit the 3<sup>rd</sup> defendant to lead such evidence.

Moreover, the learned trial judge referred to another factor, which in the opinion of the judge was crucial, when the court decided to reject the application of the 3<sup>rd</sup> defendant. It was the relationship between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, a contention that was put forward by the counsel for the 3<sup>rd</sup> defendant in the written submissions, though not referred to in the petition filed before court.

The learned judge emphatically stated that the 3<sup>rd</sup> defendant ought to have known the relationship between the 3<sup>rd</sup> defendant and the 2<sup>nd</sup> defendant, *viz*, whether the 2<sup>nd</sup> defendant was in the employment of the 3<sup>rd</sup> defendant and or whether the 2<sup>nd</sup> defendant acted as an agent of the 3<sup>rd</sup> defendant. If the 2<sup>nd</sup> defendant was not in employment or did not act in the capacity of an agent, the judge observed, then the 3<sup>rd</sup> defendant at the relevant time and when the defence was called, could have led evidence of such fact.

The 3<sup>rd</sup> defendant failed to avail of such opportunity and did not lead evidence of such fact at the given moment. Furthermore, the 3<sup>rd</sup> defendant failed to indicate to court, why she failed to give evidence since the relationship of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant is a matter, which is within the personal knowledge of the 3<sup>rd</sup> defendant, and a fact that the 3<sup>rd</sup> defendant should have known from the inception of the case. Hence, the learned judge, in his Order categorically emphasized, the relationship between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is not fresh or new evidence, that can be led under Section 166 of the Civil Procedure Code '*as evidence of a decisive nature, not reasonably foreseen*', as stated in **Samarakone's case** referred to above.

In the Order at page 13, the learned trial judge goes on to explore another factor to justify its findings *i.e.*, **a party does not have a right to lead evidence, contrary to an admission of fact recorded at the trial.**

In the instant matter, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have admitted the contents of paragraph four of the amended plaint and recorded it as 'an admission' at the commencement of the trial. Paragraph four of the amended plaint, reads '*that at the material time, i.e., 27<sup>th</sup> December, 1998 the 3<sup>rd</sup> defendant was the owner of the bus bearing number 62-9444, and the 2<sup>nd</sup> defendant was the driver of the bus and drove the bus as an employee or as an agent of the 3<sup>rd</sup> defendant*'.

Furthermore, the 3<sup>rd</sup> defendant, in the joint answer filed before the District Court [on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants] has categorically accepted such fact, namely, that the 2<sup>nd</sup> defendant was in the employment of the 3<sup>rd</sup> defendant and drove the bus at the material time. Thus, the learned judge went onto hold, having accepted the fact that the 2<sup>nd</sup> defendant was in the employment of the 3<sup>rd</sup> defendant in the answer, and recording it as an admission, the 3<sup>rd</sup> defendant cannot resile from such fact.

Further, the learned judge opined that with regard to an admission on a point of law, parties may not be bound, but on ‘an admission of fact’, a party is bound and cannot go back from such position or from the admission recorded.

Thus, based on the judicial dicta in **Mariammai et al v. Pethrupilli et al 21 NLR 200; Perera v. Samarakoon 23 NLR 502; Solomon Ranaweera v. Solomon Singho 79 (2) NLR 136;** and **Uvais v. Punyawathie [1993] 2 SLR 46** the learned Judge held that the court cannot permit the 3<sup>rd</sup> defendant to withdraw the impugned admission or to lead evidence contrary to such admission.

Finally, the learned judge referred to explanation two of **Section 150** of the Civil Procedure Code, which reads as follows;

*“The case enunciated must reasonably accord with the party’s pleading, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent’s pleadings.”* (emphasis added)

The above provision categorically states that the trial should take place in accordance with the pleadings; the character of a case cannot be changed; a party is not permitted from making at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet. Thus based upon the above provisions of explanation two in Section 150 of the Civil Procedure Code also, the trial judge came to the finding that the application of the 3<sup>rd</sup> defendant should not be permitted and dismissed the application.

The aforesaid Order of the trial court was upheld by the learned judges of the High Court and the appeal filed by the 3<sup>rd</sup> defendant was dismissed with costs, on the ground that the application of the 3<sup>rd</sup> defendant made to the trial court, after the case was closed to lead fresh evidence, was not justiciable.

The principle contention of the appellant before this Court was that ‘the admission of fact’ upon which the instant case revolves, is untrue and or made by mistake or error and therefore, the 3<sup>rd</sup> defendant should be permitted to withdraw such admission and or lead fresh evidence to negate such fact.

Mr. Nihal Fernando, President’s Counsel for the appellant went onto contend that the police inquiry notes produced before the trial court by the plaintiff, clearly indicate that the 3<sup>rd</sup> defendant did not have any vicarious liability towards the 2<sup>nd</sup> defendant. Therefore, it was vehemently contended that the 3<sup>rd</sup> defendant ought to have been permitted to lead evidence to establish such fact and by not permitting such evidence to be led, the learned District Judge

failed to take into account the necessary factors in order to exercise the discretion vested on him under Section 166 of the Civil Procedure Code, and thereby erred in law.

Moreover, the learned President's Counsel argued that by upholding the said Order and endorsing the actions of the District Judge in not permitting the 3<sup>rd</sup> defendant to lead fresh evidence, the High Court misdirected themselves and erred in law and hence, the Order of the High Court should be set aside.

Countering the said position, Mr. Romesh de Silva, President's Counsel for the respondents submitted, that the petition filed by the 3<sup>rd</sup> defendant before the trial court, the subject matter of this appeal, did not indicate any ground or reason whatsoever, as to why leading of fresh evidence is necessary or should be permitted. Thus, it was forcefully contended, that the learned trial judge correctly used the discretion vested in him, in rejecting the application filed by the 3<sup>rd</sup> defendant.

Furthermore, the learned President's Counsel argued, the defence of mistake, [on the part of the counsel appearing for the 3<sup>rd</sup> defendant at the trial by recording an erroneous admission] as contended by the 3<sup>rd</sup> defendant was taken up by the 3<sup>rd</sup> defendant belatedly and was an afterthought, as the petition filed by the petitioner in the trial court did not mention such fact. Hence, it was argued that the contention of 'mistake' should also be rejected *in limine*.

**We have considered the submissions made by the learned President's Counsel, the Order of the learned District Judge and the Order made by the High Court and we see no reason to interfere with the Order of the High Court which upheld the District Court Order.**

Undisputedly, a collision has taken place, a life has been lost and the plaintiffs, being the legal successors of the deceased, have filed this action claiming damages from the alleged wrongdoers.

The record amply bears out that **the defence of the driver and the owner of the bus, (i.e., 2<sup>nd</sup> and 3<sup>rd</sup> defendants) which collided with the van, in which the deceased and the plaintiffs were travelling, was undertaken by the insurer of the bus** from the inception of the case.

The cause of action of this matter arose in the year 1998 and the application of the 3<sup>rd</sup> defendant to lead fresh evidence was made only in 2008, *i.e.*, a decade after the collision. During the long gestation period of this case, it is a well-known fact and a matter in public domain, that the ownership of the insurer changed multiple times, from state-owned to privately owned. Throughout the said period, the defence of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants [the driver and the owner of the bus] had been undertaken, by the 'insurer of the bus', whether it be state-owned or otherwise.

A joint answer, for the driver and the owner was filed in court, in which the fact of the accident, the ownership of the bus and the status of the driver at the material time, *i.e.*, the 2<sup>nd</sup> defendant was acting in the capacity of an employee, agent and representative of the 3<sup>rd</sup> defendant when the accident occurred, was categorically admitted by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Moreover, such fact was recorded as an admission at the trial.

Further it is observed, the issues raised on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants take up the same stand and also shed light to the relationship of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. By issues bearing numbers 15 and 16, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants categorically put forward the point of contention that the accident occurred not due to the fault or negligence of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, but due to the negligence of the driver of the van in which the deceased and the plaintiffs travelled.

Having presented such a defence before the District Court in response to the case of the plaintiffs, it is beyond comprehension as to why the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, who were throughout represented by the insurer, (although by different counsel) thought it fit to change its stance and take up the position, that the 3<sup>rd</sup> defendant is not vicariously liable for the actions of the 2<sup>nd</sup> defendant.

Furthermore, this Court is intrigued by the fact that the 3<sup>rd</sup> defendant deemed it necessary to put forward an argument, that the admissions recorded based on the pleadings filed had been entered by mistake and or error, after conceding to court, days before that evidence will not be led on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. In the submissions filed before this Court, the 3<sup>rd</sup> defendant relied on **Sarkar's** two books, 'Code of Civil Procedure' and 'Law of Evidence' to substantiate, that a gratuitous or an erroneous admission can be withdrawn.

In any event, the questions of law that this Court is called upon to answer are, whether the learned judges of the High Court misdirected themselves by failing to take into account the factors that must necessarily be considered in exercising the discretion vested in a trial court in terms of Section 166 of the Civil Procedure Code; secondly, whether a party should be permitted to withdraw an admission of fact, already recorded, merely because a party thereafter takes up the position that the admission of fact, was an error and was recorded by mistake; and thirdly, whether in not permitting the 3<sup>rd</sup> defendant to lead evidence afresh, the High Court erred in law.

I would begin my analysis of the aforesaid questions of law by referring to pages 849 and 850 of the book 'The Law of Evidence' by **E R S R Coomaraswamy**. It reads as follows;

“Late Evidence Generally

Civil cases

A trial court has a general discretion to allow a party who has closed his case to lead fresh evidence at any time up to the judgement. This discretion is well-recognized in South Africa. Such leave will be more readily granted after only one party has closed his case than after both

have done so. It would be even more difficult for a party to obtain leave after the weaknesses in his case have exposed in argument or judgement has been reserved.

In exercising this discretion, the court must seek to preserve a balance between abstract justice and the need for finality in litigation. The following factors would be considered.

- (a) The reasons why the evidence was not led before: Leave will not generally be granted, unless the evidence could not by the exercise of due diligence have been led at the proper time. If the evidence is at the disposal of a party, who does not lead it, because he considers it unnecessary, he cannot reinforce his case by leading it later. More recent decisions in South Africa have taken a more liberal view and permitted evidence omitted earlier through mere inadvertence, or by considering it unnecessary on a *bona fide* mistake of law.
- (b) The materiality of the evidence and whether it is likely to have any effect on the result of the case.
- (c) The possible prejudice to the opposing party, as where he may no longer have available the witnesses who could have given evidence in rebuttal. If the opposing party is unlikely to suffer any prejudice, which cannot be compensated by an award of costs, leave may be granted. This would also be the case where the plaintiff seeks to lead further evidence when only he has closed his case.

In Sri Lanka, the same general discretion is recognised by section 166 of the Civil Procedure Code, which provides that the court may, for grave cause, to be recorded by it at the time, permit a departure from the course of trial prescribed in the rules contained in the earlier sections. The Supreme Court will not, as a rule, interfere with the exercise of the discretion of the trial judge under this section...”

Hence it is observed, the discretion to allow a party to lead fresh evidence is more readily granted after only one party has closed his case, than after both parties have done so; and it would be difficult for a party to obtain such discretion, when the weaknesses in a case have been exposed.

In exercising the discretion, the court must preserve the balance between abstract justice and the need for finality in litigation and should consider the reason why the evidence was not led before; the materiality of the evidence; and the possible prejudice to the opposing party.

The writer further states, quoting **Jaganadan Pillai v. Perera** 5 NLR 95 and **Samarakone v. The Public Trustee** (supra) “*that the Supreme Court will not as a rule, interfere with the exercise of the discretion of the trial judge.*”

There is no doubt, that Section 166 of the Civil Procedure Code, permits a trial court, to depart from the prescribed course of trial, if in the opinion of court there is a ‘grave concern’. In the event such a departure is permitted, the reasons for such departure should be recorded by the trial judge. Thus, first and foremost the court should be satisfied, that there was a ‘grave concern,’ *i.e.*, factors unforeseen for a party not to lead such evidence at the material time. Thereafter only the court could use its discretion and permit or disallow an application to depart from the laid down course of trial.

This Court observes, that the learned trial judge, in the instant matter relying on the pronouncements of Weerasooriya, J., in the case of **Samarakone v. The Public Trustee** (supra), emphasised that application of Section 166 should be when a party having closed his case, is faced with evidence of a decisive nature arising *ex-improviso*, which he could not have reasonably foreseen earlier.

Having considered the application of the 3<sup>rd</sup> defendant to lead evidence on her behalf and to further cross-examine the 1<sup>st</sup> plaintiff, the learned judge, being satisfied that there was no ‘grave concern’, declined the discretion vested in court, to permit a departure from the prescribed course of trial. In my view, the said reasoning of the learned trial judge cannot be faulted.

The appellant in the written submissions, took up the position, that the Order of the High Court is erroneous, since the High Court failed to consider, that the aforesaid case of **Samarakone v. The Public Trustee** as well as the case of **Murin Perera v. Gajaweera** (supra) [cited by the trial judge] can be distinguished. The contention of the appellant was, that in the said two cases, no application was made to have recourse to Section 166 before the trial court and hence, the pronouncements made in the said two cases have no bearing and cannot be relied upon in the instant appeal.

In my view, the aforesaid contention of the appellant has no merit since the material factor is the effect of such provision and not the point at which recourse to Section 166 was made, be it at the trial or in appeal. The crucial issue is, what is the evidence to be led afresh or anew; was it foreseeable? was such evidence available to such party; and whether such material was within the knowledge of the party, who is belatedly making an application to lead such evidence.

The appellant in his written submissions also contended that the discretion of the court should extend to permit evidence not led and even inadvertently omitted to be led by a party at the relevant time, since it is ‘mere inadvertence’. The appellant went onto submit relying on Law of Evidence by **E R S R Coomaraswamy**, that evidence inadvertently omitted is permitted to be led afresh in South Africa. The said argument of the appellant too, in my view



has no relevance to the matter in issue since the appellant has failed to demonstrate ‘mere inadvertence’ or for that matter any reason or ground whatsoever to justify leading of fresh evidence.

In the instant matter, if the necessity to lead new evidence, was to substantiate that no vicarious liability lies with the 3<sup>rd</sup> defendant *vis-à-vis* the 2<sup>nd</sup> defendant, that material was clearly within the knowledge of the 3<sup>rd</sup> defendant from the time of the collision, *i.e.*, the time the cause of action arose. Having taken up the position that the 2<sup>nd</sup> defendant driver, was acting in the capacity of an employee, agent or representative and filing a joint answer and moreover recording an admission to such fact, the 3<sup>rd</sup> defendant in my view cannot now resile from the said position, especially after the demise of the 2<sup>nd</sup> defendant, to put forward an argument that the 3<sup>rd</sup> defendant is vicariously not liable for the actions of the 2<sup>nd</sup> defendant.

The Civil Procedure Code, is a codification of procedural rules to be followed, when conducting a civil trial. It has clearly and precisely laid down a step-by-step procedure to be followed. Having failed to lead a piece of evidence at the opportune moment, intentionally or otherwise, a party cannot be permitted to have recourse to a special provision, which is incorporated in the Code, to be utilized only in a situation when the court deems it necessary and to be of importance and of ‘grave concern’.

In the said circumstances, I see no reason for the trial court to rely on Section 166 and to depart from the prescribed procedure and permit the appellant to lead fresh evidence. The evidence to be led anew was demonstrably always within the knowledge of the 3<sup>rd</sup> defendant/appellant. In such circumstances I am of the view, that the appellant has failed to convince this Court that the judges of the High Court have erred in law or misdirected themselves in coming to their findings. Thus, I answer the 1<sup>st</sup> question of law raised before this Court in the negative.

The 2<sup>nd</sup> question of law raised before this Court pertains to whether an admission of fact recorded before a trial court can be withdrawn, if such admission is untrue or made by mistake or error.

It is trite law that an admission recorded by a party cannot be withdrawn or contradicted. This proposition was succinctly laid down in the case of **Mariammai v. Pethrupillai** (supra) where Bertram, CJ., observed “*If a party in a case makes an admission for whatever reason, he must stand by it; and it is impossible for him to argue a point on appeal which he formally gave up in the court below.*”

However, in the case of **Perera v. Samarakoon** (supra) Bertram, CJ., whilst not referring nor distinguishing the above case, but relying on two Indian cases observed “*an erroneous admission of counsel on a point of law has no effect, and does not preclude the party from claiming his legal rights in the appellate court*”. This was a case pertaining to servitudes and easements, where there was no recorded admission and only the submission of the counsel

and the understanding of the judge relating to a dominant tenement losing his servitude over a servient tenement.

Having propounded the above statement Bertram CJ., went onto opine that in the said case, *“no formal note of the suggested admission was made in the learned judge’s notes and it is by no means clear [...] that the trial judge correctly appreciated the position of the plaintiffs’ counsel and therefore, the principal point is open for argument.”* Thus, in the said case, although an erroneous admission on a point of law was permitted to be withdrawn, the learned judge left the issue of withdrawal of an admission, whether it be a question of law or fact, open for further discussion.

Another land mark case, where withdrawal of admissions was discussed is, the case of **Solomon Ranaweera v. Solomon Singho** (supra), wherein Sharvananda, J., observed, in a partition action *“an admission made by counsel for one of the parties that such a decree was null and void for failure to make proper substitution, is a mistaken admission in law and is not binding on such party.”*

The aforesaid case relates to an interlocutory appeal stemming from a partition action which had been remitted to the trial court for re-trial. It is interesting to note that the learned counsel for the plaintiff-respondent, Mr. Thiagalingam Q.C. admitted that he over looked Section 651 (1) of the Administration of Justice (Amendment) Law No 25 of 1975, when drafting amended plaint in a partition action and moved to withdraw the admission in the Supreme Court [pertaining to a final decree being null and void in view of failure to make a proper substitution] which was made on a mistaken view of the law. He was allowed to retract such admission.

In my view, the facts relating to the aforesaid case, are unique in nature and the observations of Sharvananda, J., cannot be applied in general to all cases. In any event, the learned Queen’s Counsel was allowed to re-tract an admission based on a mistaken view of the law and not an admission based on a question of fact, as is the issue in the impugned case.

The case of **Uvais v. Punyawathie** (supra) a rent and ejectment matter, is another case relied upon by parties before this Court. It relates to withdrawal of admissions. In this case, Mark Fernando, J. considers a number of provisions in the Civil Procedure Code, pertaining to conducting of a civil trial, and elucidates the legal position in respect of ‘withdrawal of admissions’ in the following manner:

*“While it is sometimes permissible to withdraw admissions on question of law, the admissions now under consideration are primarily questions of fact; what the parties intended and understood by their letters, and their conduct in relation thereto, hardly involve questions of law. In any event, in the absence of evidence as to the circumstances in which those admissions were made, it would be speculative to regard them as resulting from the misconstruction of documents by the defendant’s lawyers: they*

*may equally well have been the result of express instructions given by the client. An additional circumstance is that, had these admissions not been made, the plaintiff would have had an opportunity of reconsidering this position, and may then have decided to withdraw his action and to institute another action on a different basis; the denial of that opportunity was a potential source of prejudice, and the Court of Appeal was in error in assuming that the plaintiff had suffered no prejudice, or had not acted to his detriment, where he had no chance of explaining how he would have acted. Quite apart from any question of estoppel or prejudice, to **permit admissions to be withdrawn in these circumstances would subvert some of the most fundamental principles of the Civil Procedure Code in regard to pleadings and issues.** Section 75 not only requires a defendant to admit or deny the several averments of the plaint, but also to set out in detail, plainly and concisely, the matters of fact and law, and the circumstances of the case upon which he means to rely for his defence; sections 146(2) and 148 oblige the Court upon the pleadings, or upon the contents of documents produced, and after examination of the parties if necessary, to **ascertain the material propositions of fact or of law upon which the parties are at variance, and thereupon to record issues on which the right decision of the case depends; section 150, explanation (2), prohibits a party from making at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet; the facts proposed to be established by a party must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings**". (emphasis added)*

Having propounded the aforesaid, Mark Fernando, J., went onto hold that the Court of Appeal was in error in holding that the defendant could withdraw admissions recorded at a trial.

Thus, it is crystal clear that a court will not permit a party to withdraw an 'admission of fact', whereas in certain circumstances an 'admission of a question of law' may be permitted.

Similarly, in the absence of evidence as to the circumstances upon which admissions were made, it would be speculative to permit withdrawal of an admission, without knowing the full picture pertaining to recording of admissions, since it could well have been the express instructions of the party concerned.

In **Uvais case**, discussed above, Mark Fernando, J., went onto observe, if not for the admission by the defendant pertaining to increase of rent creating a new tenancy agreement, the plaintiff may have changed its strategy. Further, His Lordship succinctly opined, in any event withdrawal of an admission will go against the gravamen of the fundamental principles of the Civil Procedure Code in regard to pleadings and issues and the whole concept of a civil trial encapsulated by Sections 75, 146(2), 148 and explanation (2) of Section 150 would become superfluous.

The appellant in written submissions filed before this Court, put forward another argument, based on Section 58 of the Evidence Ordinance as well as upon the cases of **Perera v. Samarakoon** and **Solomon Ranaweera v. Solomon Singho** (supra), that an admission of fact which is untrue or made by mistake or error can be withdrawn. The appellant further distinguished the **Mariammi's case** and **Uvais's case** as not relevant to the facts of the instant case, upon the ground that in the said two cases the withdrawal of the admission of fact was moved for the first time in appeal, and not before the trial court.

The said submission of the appellant, in my view, has no merit and should be rejected. As clearly outlined in **Uvais's case** decided in 1991, permitting an admission of fact to be withdrawn, would subvert the guiding principles laid down in the Civil Procedure Code. Moreover, it would transform the case to a different position not pleaded, nor suggested to in cross-examination and not supported by the evidence of the witnesses.

Furthermore, the aforesaid principles laid down in **Uvais case**, have been referred to and followed in many judgements of the appellate courts. In **Jayalath v. Karunatilake [2013] 1 SLR 337** the Court of Appeal re-echoed that, while it is sometimes permissible to withdraw admissions on questions of law, admissions on questions of fact cannot be withdrawn. See also **Soysa v. Fernando and others [2012] 1 SLR 182**.

The recent judgement of this Court in **Chaminda v. Janashakthi General Insurance Ltd., - S.C.Appeal 134/2018- decided on 09-10-2019** re-iterated the principles laid down in **Mariammai's case** and **Uvais's case**.

The facts of the aforesaid **Chaminda v. Janashakthi case** is similar to the instant matter. It refers to a comprehensive insurance policy issued to a party pertaining to a vehicle. The vehicle met with an accident and extensive damage was caused to it. A claim was made and the insurer repudiated the claim. When the matter went into trial, an admission was recorded regarding the jurisdiction of the court. Thereafter the defendant insurance company, moved to withdraw the said admission relating to jurisdiction.

Amarasekara, J., in his judgement referred to **Uvais's case** and other authorities, and held that the admission of jurisdiction by the defendant, was an admission of fact and not a question of law and as such the defendant cannot withdraw an admission of fact at a belated stage.

I am in agreement with the judicial dicta of the aforesaid **Uvais's case** and **Chaminda's case**. I re-iterate that the time tested principles laid down in the Civil Procedure Code, and more so, in Sections 75, 146(2), 148 and explanation (2) of Section 150, should be strictly followed and rigidly enforced. A party cannot be permitted to withdraw an admission belatedly and at its whim and fancy. An admission once recorded by all parties with consent, cannot be permitted to be withdrawn, arbitrarily by a party, many years after it was recorded, whether it is true or untrue and or made by mistake or error or not.

In the instant appeal, the 3<sup>rd</sup> defendant moved to withdraw the admission after the trial was concluded, and the case was called for the third occasion to tender written submissions. The admission to be withdrawn related to the relationship between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. In my view, it is an admission of fact and not a question of law. In any event, the 3<sup>rd</sup> defendant cannot propound a theory that it was untrue or made by mistake or error after categorically accepting the relationship in its pleadings, admissions and issues.

The District Court rightly rejected such request and the High Court upheld the Order of the District Court.

In the said circumstances, I am of the view that the High Court acted correctly and in accordance with the law. Thus, the appellant has failed to convince this Court, that the learned judges of the High Court have erred or misdirected themselves in coming to such conclusion. Therefore, I answer the 2<sup>nd</sup> question of law raised before this Court in the negative.

The final matter that the Court is called upon to answer, is whether the appellant should be permitted to lead evidence.

Undisputedly, the 3<sup>rd</sup> defendant /appellant opted not to lead evidence nor put forward a defence at the trial. Generally, in a trial, it would have been vital to have had the evidence of the 3<sup>rd</sup> defendant led, since the 3<sup>rd</sup> defendant was the principal defendant before court and also to negate the case of the plaintiff filed against the 3<sup>rd</sup> defendant and others. Nevertheless, the 3<sup>rd</sup> defendant thought otherwise.

As discussed in this judgement in detail, the appellant having failed to put forward a defence and or lead evidence at the material time made an application to lead the evidence of the 3<sup>rd</sup> defendant and further cross-examine the 1<sup>st</sup> plaintiff. The trial court rejected such application. Being aggrieved by the Order of the District Court, the appellant went before the High Court. In the High Court, the appellant abandoned the relief to further cross-examine the 1<sup>st</sup> plaintiff and only sought to lead her evidence. The said application was rejected by the High Court with costs.

Now, once again before this Court, the appellant is moving for the very same relief by way of the 3<sup>rd</sup> question of law. In my view, the 1<sup>st</sup> and 2<sup>nd</sup> questions of law have a direct bearing on this matter. The 3<sup>rd</sup> question is a follow up question. Thus, stemming from the answers given to the 1<sup>st</sup> and 2<sup>nd</sup> questions, this question too should be answered in the negative.

Nevertheless, the appellant fashions her submissions on the basis of Section 839 of the Civil Procedure Code and contends that the court is vested with inherent power to make order ‘in the interests of justice’.

To substantiate the said argument, the appellant relies on **Seneviratne v. Fonseka Abeykoon (1986)1 CALR 434** also reported in **[1986] 2 SLR 1** and submits that in the said

case, it was stated that Section 839 of the Civil Procedure Code is intended not only to repair errors committed by the court itself but also extends to ‘repair injuries’ done to a party by the parties’ own act, and contends that the court should permit the 3<sup>rd</sup> defendant to correct the injury done, in not leading evidence at the material time. It is ironic that the ‘injury’ complained of by the 3<sup>rd</sup> defendant, was an injury brought upon on the 3<sup>rd</sup> defendant, by 3<sup>rd</sup> defendant herself and not by any other.

Upon perusal of the submissions of the appellant, it is apparent that the ‘injury’ the appellant and/or the insurer is perturbed by, is the payment of damages. In my view, the belated application to establish that the 3<sup>rd</sup> defendant is not vicariously liable for the actions of the 2<sup>nd</sup> defendant driver, especially in a situation where the 2<sup>nd</sup> defendant driver is no longer in the land of the living to refute such fact, is for a collateral purpose. Further, the eagerness of the appellant to rely on the inquiry notes of the police [which were produced by the plaintiff, and were available at the time the 3<sup>rd</sup> defendant indicated to court that evidence will not be led on her behalf] to justify the application to lead the evidence of the 3<sup>rd</sup> defendant, amply demonstrate the real reason for the belated application, *viz;* to avoid payment of damages and that too, by the insurer of the bus at a subsequent point of time.

My considered view is that this line of argument, *viz.*, to repair injury, will not help the appellant since the appellant by its pleadings, admissions and issues accepted the relationship between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. This Court has already come to the finding, that the trial judge was not in error and acted in terms of the law, when he rejected the application of the 3<sup>rd</sup> defendant.

In any event, the question of vicarious liability is yet to be decided by the trial court and the inquiry notes are before the trial court. Such decision has been hampered and delayed, by the actions of the appellant herself, by making this application to lead evidence, after the case was closed, and more so after indicating to court, that no evidence will be led on behalf of the 3<sup>rd</sup> defendant.

My attention is also drawn to the final point in the appellant’s further written submissions. It is as follows; *“Appellant is not seeking the withdrawal of the admission already recorded, but is merely seeking to lead her evidence under Section 166 of the CPC”*

Thus, in my view, the appellant is blowing hot and cold. On one hand, expressly by the 2<sup>nd</sup> question of law the appellant is moving to withdraw the admission and in the written submissions, takes up the position that the appellant is not seeking withdrawal of the admission.

Similarly, in the ‘conclusion’ of the appellant’s initial written submissions, it is submitted *“that no prejudice will be caused to the plaintiff, except a delay of one more trial day which can be compensated with an award of costs”*. It is clearly seen that the 3<sup>rd</sup> defendant’s application and the appellate procedure resorted to by the appellant pertaining to the said application, has already taken a decade. In such a situation, can the appellant maintain that no prejudice had been caused to the plaintiffs?

Having put forward the contention relating to ‘no prejudice’, the appellant goes on to state that ‘in the interests of justice’, the appellant’s application should be permitted. The appellant drew our attention to two cases, namely, **De Fonseka v. Dharmawardena [1994] 3 SLR 49** to emphasise that Section 839 recognizes the inherent power of court to make an order, as may be necessary, for ends of justice; and **Velupillai v. The Chairman, Urban District Council 39 NLR 464** to emphasise that this is a court of justice and not an academy of law.

We have considered the above submissions of the appellant, and we see no reason to rely on Section 839 of the Civil Procedure Code, *viz* the inherent power of court, in the instant matter, to permit the appellant to lead evidence, ‘in the interests of justice’.

There is no doubt that the ‘injury’ the appellant is complaining of, was the appellant’s own doing. The appellant would have we assume, opted not to give evidence nor to lead evidence on her behalf and not to put up a defence to negate or challenge the action filed, after a careful consideration of all relevant facts and circumstances.

Having taken such a stand, a reasonable person should stand by its decision. He cannot resile from such position. In a court of law, a party cannot approbate and reprobate. Moreover, a party cannot be permitted to materially change the composition of its defence. A party should not take the other party by surprise nor take undue advantage of a situation. Rule of Law demands that justice and fair play should prevail.

Similarly, a party cannot be allowed to prolong a case and hamper the administration of justice. Already a decade and a half had passed and the trial court has still not delivered judgement of its findings, although the trial had been concluded.

The Civil Procedure Code, provide the manner in which a case has to be presented, defended and adjudicated. Section 166 categorically provides, that a court may, for ‘grave cause’, permit a departure from the course of trial, prescribed in the rules of the Code.

When a trial court has decided that a departure cannot be permitted under Section 166, I see no reason as to why a party should move court under Section 839 of the Code, to make an order, ‘in the interests of justice.’

In the instant appeal the learned trial judge, having considered all relevant matters decided that a departure from the course of trial is not required and should not be permitted. Thus, the application of the 3<sup>rd</sup> defendant to lead evidence was refused and rejected. The learned judges of the High Court upheld such decision for reasons stated.

In such circumstances, I see no reason to interfere with such decision. The appellant has failed to convince this Court, that the learned judges of the High Court have erred in law or misdirected themselves in coming to such a finding. Hence, I answer the 3<sup>rd</sup> question of law in the negative.

This Court granted leave to the appellant on three question of law and all three questions of law have been answered in favour of the respondents for reasons morefully stated in this judgement.

Having Considered the submissions of the parties and the law relating to the matter in issue, this Court rejects the application of the Appellant.

Thus, for reasons, adumbrated in this Judgement, the Order of the High Court of the Southern Province dated 10<sup>th</sup> September, 2012 is upheld. The Order of the District Court of Galle dated 12<sup>th</sup> January 2010 rejecting the application of the 3<sup>rd</sup> defendant dated 28<sup>th</sup> May, 2008 is also upheld.

The appeal of the 3<sup>rd</sup> defendant-petitioner-petitioner-appellant made to this Court is thus, dismissed with costs fixed at Rs. 150,000.00 payable by the appellant.

The District Court of Galle is further directed to determine the instant case expeditiously and forthwith, on the evidence and material available in the record.

The Appeal of the 3<sup>rd</sup> defendant-petitioner-petitioner-appellant is dismissed with costs fixed at Rs. 150,000.00.

**Judge of the Supreme Court**

**P.P. Surasena, J.**  
I agree

**Judge of the Supreme Court**

**Yasantha Kodagoda, PC. J.**  
I agree

**Judge of the Supreme Court**