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

In the matter of an Application for Special Leave to Appeal from the conviction and sentence of the Court of Appeal as per Judgement dated 8th October 2002.

Upali Dharmasiri Welaratne,
No. 654/13, Halangahadeniya, Gothatuwa,
Angoda.

Now at

No. 57/14, Jayaweera Mawatha,
Kotte.

DEFENDANT- RESPONDENT-RESPONDENT-APPELLANT

S. C. Appeal No. 65/2003
S. C. (Spl.) L. A. No. 271/2002
C.A. No. 312/1999
D.C. Colombo No. 18335/L

Vs-

Wesley Jayaraj Moses,
No. 57/14 A, Jayaweera Mawatha,
Ethul-Kotte.

PLAINTIFF-PETITIONER-PETITIONER-RESPONDENT

BEFORE : Dr. Shirani A. Bandaranayake, J.,
Saleem Marsoof, P.C., J., &
D. J. de S. Balapatabandi, J.

COUNSEL : L. C. Seneviratne, P.C. for the Defendant-Respondent-Respondent-Appellant.

Ransiri Fernando with Sarath Walgamage for the Plaintiff-Petitioner-Petitioner-Respondent.

ARGUED ON : 29-07-08 and 16-12-08

WRITTEN SUBMISSIONS : 17-12-08 – Plaintiff-Petitioner-Petitioner-Respondent
23-12-08–Defendant-Respondent-Respondent-Appellant

DECIDED ON : 27-05-2009

MARSOOF, J.

I have had the advantage of perusing the judgement prepared by my brother Balapatabandi, J., in draft, and I regret that I cannot agree with his findings, for the reasons outlined below.

This appeal is against the decision of the Court of Appeal dated 8th October 1999, holding that the Defendant-Respondent-Respondent-Appellant (hereinafter referred to as "the Appellant") is guilty of contempt of court, and imposing on him a sentence of 2 years rigorous imprisonment and a fine of Rs. 500,000/- along with a further term of 6 months rigorous imprisonment upon default thereof. The said conviction and sentence arose from the alleged violation of an undertaking given by the Appellant in the context of a revision application filed by the Plaintiff-Petitioner-Petitioner-Respondent (hereinafter referred to as "the Respondent") in the Court of Appeal challenging an order of the District Court of Colombo refusing an interim injunction to restrain the Appellant, his agents and servants from destroying the wall and roof of premises No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte belonging to the Respondent and continuing the construction of structures on or within the northern boundary of lot 2B in Plan No. 2451 dated 4th November 1986 made by N.E. Weerasooriya, Licenced Surveyor, on which the said premises is situated. Along with the said revision application, the Respondent had also filed CA Leave to Appeal application bearing No. 47/99 seeking leave to appeal against the said order, which was pending at the time of the contempt inquiry.

After the Appellant filed his Objections dated 10th June 1999 with respect to the application to revise the said order of the District Court and the application for interim relief, the inquiry into the application for interim relief commenced on 22nd June 1999. At this inquiry, Mr. A.K. Premadasa, P.C. with Mr. C.E. de Silva appeared for the Respondent and Mr. Harsha Soza appeared for the Appellant. As the inquiry could not be concluded on that date, it was adjourned for 30th June 1999, on which date, the matter was settled before the Court of Appeal by the following order:

> "Before :- Edussuriya, J., CP/CA
> Udalagama, J.
>
> Same appearances as before.
>
> At this juncture, the Defendant-Respondent (present Appellant) undertakes not to effect further constructions and to maintain the status quo. The interim injunction is accordingly issued *restraining the Defendant-Respondent from continuing to build hereafter.*"

It is the violation of this undertaking / interim-injunction that was held by the Court of Appeal to be in contempt of court, which decision is the subject matter of this appeal. Before dealing with the specific questions on which leave to appeal was granted by the Supreme Court, which are fully set out in the judgment of my brother Balapatabendi, J., it is necessary to consider a question of fundamental importance which has been raised, namely, whether

the Court of Appeal gravely misdirected itself and exceeded its jurisdiction by issuing an interim-injunction against the Appellant based on a general undertaking and without hearing both parties on the facts.

Does the Violation of an Irregular Order Amount to Contempt?

It has been strenuously contended on behalf of the Appellant that he cannot in law be found guilty of contempt of court since the issue of the interim injunction which the Appellant is alleged to have violated, was irregular as the Court of Appeal had not heard both parties on the facts (either on affidavits, documents or oral evidence with consent). It may be noted at the outset that it is trite law, as was held in *Silva v. Appuhamy* 4 NLR 178, that "an injunction granted by a competent court must be obeyed by the party whom it affects until it is discharged, and that disobedience can be punished as for a contempt of court, notwithstanding irregularity in the procedure". The competence of the Court of Appeal to issue an injunction by way of interim relief is well recognized. The Court of Appeal is vested under Article 143 of the Constitution with jurisdiction to grant and issue injunctions to prevent any irremediable mischief that might ensue before a party making an application for such injunction could bring an action in any court of first instance to prevent the same. It also has appellate and revisionary jurisdiction in regard to decisions of courts of first instance such as the District Court, and has the power in terms of Article 145 of the Constitution, to revise any order of such a court issuing or refusing an injunction, whether interim or final. In terms of Rule 2 of the Court of Appeal (Appellate Procedure) Rules, 1990, the Court of Appeal also has the power to grant, in appropriate circumstances, a stay order, interim injunction or other interim relief, after notice and inquiry, and in cases of urgency even without such notice, provided the duration of the relief does not exceed two weeks.

In the instant case, the Court of Appeal had issued an interim-injunction after noticing the Appellant and after hearing submissions of his Counsel, except that it did not have to complete the inquiry for the grant of interim relief in view of the undertaking given by the Appellant in open court on 30th June 1999. It is clear from the relevant journal entry that had the Appellant not given the said undertaking, the inquiry in regard to interim relief would have continued and the Court of Appeal would have made an order in terms of Rule 2 of the Court of Appeal (Appellate Procedure) Rules, 1990, published in the Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka bearing No. 645/4 dated 15th January, 1991. The undertaking given to court by the Appellant effectively put an end to the inquiry into interim relief. When a party or counsel gives an undertaking in court, such undertaking obviates the need to hold an inquiry, but such undertaking has exactly the same force as an order made by the court, and accordingly, it follows that the breach thereof amounts to contempt of court in the same way as a breach of an injunction. In *de Alwis v. Rajakaruna* 68 NLR 180, where by majority decision the Supreme Court, the Respondent was held to be guilty of contempt of court by his failure to honor an undertaking given to court, Basnayake, C.J., at page 184 quoted with approval the following passage from *Oswald on Contempt*-

> An undertaking entered into or given to the Court by a party or his counsel or solicitor is equivalent to and has the effect of an order of the Court, so far as any infringement thereof may be made the subject of an application to the Court to punish for its breach. The undertaking to be enforced need not necessarily be embodied in an order."

As Sir John Donaldson MR observed in *Hussain v. Hussain* [1986] 1 All ER 961 at 963 -

> "Let it be stated in the clearest possible terms that an undertaking to the court is as solemn, binding and effective as an order of the court in the like terms."

In the South African case of *York Timbers Ltd v. Minister of Water Affairs & Forestry* 2003 (4) SALR 477, at page 500 Southwood, J., having cited the above quoted *dicta* of Sir John Donaldson MR, stated that –

> "In my view there is no difference between the legal effect of an undertaking to do something or refrain from doing something which is made an order of court and the legal effect of an order to the same effect made by the court after considering the merits and giving judgment."

Thus, it is obvious that a party that has given an undertaking cannot be heard to say that an interim-injunction has been issued without due hearing as the very purpose of giving such an undertaking is to save for the court as well as to the parties, valuable time that would otherwise be spent on the inquiry into the grant of interim relief. Nor is it open to such a party to later challenge the jurisdiction of the court if the party had voluntarily submitted himself or itself to the jurisdiction of court by the very act of giving the undertaking. Furthermore, where the solemn undertaking given to court is recorded as an order of court, it is the undertaking, and not the order of court that requires the giver of the undertaking to act in accordance with its terms. The power of the Court of Appeal to punish for contempt of itself, whether committed in the court itself or elsewhere, as well as its power to punish for the contempt of any other court, tribunal or institution referred to in Article 105(1)(c) of the Constitution is enshrined in Article 105(3) of the Constitution, and as Samarakoon, C.J., observed in *Regent International Hotels Ltd. v. Cyril Gardiner and Others* [1978-79-80] 1 Sri LR 278 at page 286 -

> "The Supreme Court "being the highest and final Superior Court of Record in the Republic" and the Court of Appeal being a Superior Court of Record with appellate jurisdiction have all the powers of punishing for contempt, wherever committed in the Island in *facie curiae or ex facie curiae."*

The submission that the Court of Appeal had acted in excess of its jurisdiction in treating the violation of such an undertaking as a contempt of court, is therefore, altogether devoid of merit.

Admissibility of Photographic Evidence

The first of the questions on which leave to appeal has been granted by this Court, relates to the very interesting issue of admissibility of photographic evidence, which at the time of the admission of the photographs in question, were governed by the provisions of the Evidence Ordinance No. 14 of 1895 (CLE 1956 Official Ed. Cap. 14, as amended by Act No. 10 of 1988, No. 33 of 1998, No. 32 of 1999 and No. 29 of 2005 and supplemented by The Evidence (Special Provisions) Act No.14 of 1995). The question is: Did the Court of Appeal err in placing reliance on the dates appearing on the photographs produced by the Respondent at the contempt inquiry? The said dated photographs were produced by the Respondent marked P7 to P18 at the contempt inquiry held on 20th July 2001 to show that the Appellant

had acted in disregard of the undertaking given by him to court on 30th June, 1999. These photographs, which contain imprints of dates ranging from 2nd July to 17th July 1999 on which dates it is alleged that the Appellant continued with the building operations which he had undertaken to discontinue and maintain the *status quo* pending the hearing of the revision application filed in the Court of Appeal, are of great value in deciding on the guilt or otherwise of the Appellant.

The Appellant, who at that stage contempt inquiry conducted his own defence without the assistance of counsel (prior to Mr. Sanath Jayathilake appeared as his counsel), took objection to the production of the said dated photographs marked P7 to P18 on the ground that they were not admissible as "documents" under the Evidence Ordinance. The Court of Appeal made order overruling the said objection and admitting the photographs "subject to proof". With the view to proving the said photographs, the Respondent called witness Roshan Seneviratne, the Manager of Salaka Group, who testified that the said photographs were developed at his establishment, and produced marked P7a to P18a respectively, the negatives of the said photographs. When President's Counsel for the Respondent closed his case on 16th May 2002, he moved to read in evidence the said photographs and the negatives, without any objection thereto being taken on behalf of the Appellant. As was observed by Samarakoon, C.J., in *Sri Lanka Ports Authority and Another v. Jugolinija-Boal East* [1981] 1 Sri LR 18, at page 24 "if no objection is taken, when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the *cursus curiae* of the original civil courts".

Mr. L.C. Seneviratne, P.C., who appeared for the Appellant in this appeal, reformulated the objection against the admission of the photographs marked P7 to P18 on the basis that the Court of Appeal, which has placed reliance on the dates appearing on the photographs, has failed to consider that the date imprint on the photographs taken in the camera belonging to the Respondent could have been manipulated through the controls of the camera. A photograph, according to the *Oxford Concise English Dictionary*, is "a picture made by a camera, in which an image is focused onto film and then made visible and permanent by chemical treatment." All cameras, ranging from the earliest "pin hole" cameras to the modern film or digital cameras, operate on the same principle, namely that the light gathered from a scene or object that is photographed can be used to create an image on a light sensitive medium such as a film or a charge-couple-device (CCD) of a modern digital camera. A photograph is essentially a conversion or transformation of a contemporaneous recording which is made through mechanical or electronic means.

Photographs, and other forms of contemporaneous recordings, have been admissible in evidence in Sri Lanka despite the limitations of Section 3 of the Evidence Ordinance which confined its definition of "evidence" to oral and documentary evidence. Our courts have utilized other provisions of the Ordinance, such as the second proviso to Section 60, which empowered the court to require any material thing that is referred to in oral testimony to be produced in court for its inspection, and Section 165, which empowered court to order the production in court of any thing, to admit in evidence, contemporaneous recordings of public speeches (*Abu Bakr v. The Queen,* 54 NLR 566; *Kularatne and Another v. Rajapakse,* [1985] 1 Sri LR 24), telephone conversations preserved through wire or a tape recording (*See, In re S.A.Wickremasinghe* 55 NLR 511, *K.H.M.H.Karunaratne v. The Queen,* 69 NLR 10; *Cf, Roberts and Another v. Ratnayake and Others,* [1986] 2 Sri LR 36) and photographs (*Shahul Hameed and*

Another v. Ranasinghe and Others [1990] 1 Sri LR 104 and *Peiris and Another v. Perera and Another* [2002] 1 Sri LR 128).

Of course, like any thing else, contemporaneous recordings too could be manipulated, and hence it is necessary to take precautions with the view to preventing or detecting such possibilities, but the attitude of our courts in regard to such matters have generally been permissive rather than prohibitive. As Canakeratne, J., once observed in *The King v. Dharmasena,* 50 NLR 505 at 506, while assessing the value of photographic evidence produced in court, -

> "It may be that, cameras do lie (e.g., one not held at eye-level, one with a long focus lens, &c.), but one does not dispense with all witnesses because there are perjurers. If real evidence (e.g., a knife) can be brought, why not a photograph? If a jury may view a scene, why not a photograph of the scene?"

It is important to note that at the time of the conduct of the contempt inquiry, the production of photographic evidence was governed by the provisions of Section 4 of the Evidence (Special Provisions) Act No. 14 of 1995. Section 4 (1) of the said Act provides that in any proceeding where direct oral evidence of a fact would be admissible, "any contemporaneous recording or reproduction thereof, tending to establish that fact" shall be admissible as evidence of that fact, if it is shown that -

(a) the recording or reproduction was made by the use of *electronic or mechanical* means;

(b) the recording or reproduction is capable of being played, replayed, displayed or reproduced in such a manner so as to make it *capable of being perceived by the senses*;

(c) at all times material to the making of the recording or reproduction the machine or device used in making the recording or reproduction, as the case may be, was *operating properly*, or if it was not, any respect in which it was not operating properly or out of operation, was not of such a nature as to affect the accuracy of the recording or reproduction; and

(d) the recording or reproduction was *not altered or tampered* with in any manner whatsoever during or after the making of such recording or reproduction, or that it was kept in safe custody at all material times, during or after the making of such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with, during the period in which it was in such custody.

It is expressly provided in Section 4 (2) of the Act that if the conditions set out in Section 4 (1) are satisfied, "the recording or reproduction *shall be admissible in evidence of the fact recorded or reproduced, whether or not such fact was witnessed by any person*." It is also provided in Section 4 (3) of the Act that where any such recording or reproduction cannot be played, replayed, displayed or reproduced in such a manner so as to make it capable of being perceived by the senses, or even if it is capable of being so perceived but is unintelligible to a person not conversant in a specific science, or is of such nature that it is not convenient to perceive and receive in evidence, in its original form, the court may admit in evidence "*a*

transcript, translation, conversion or transformation" of such recording or reproduction as may be appropriate and is intelligible and is capable of being perceived by the senses.

Modern cameras are more electronic than mechanical, but that makes no difference as regards the underlying law that is applicable in regard to the production in court of photographs taken using such cameras, whether they be dated or not. Mr. Seneviratne has submitted that the date on a camera can be changed with ease, and that the camera with which the photographs marked P7 to P18 were taken should have been produced in court. The procedure for the production in legal proceedings of evidence derived from contemporaneous recordings is set out in Part III of the Evidence (Special Provisions) Act, and in particular in Section 7(1) (a) thereof, which requires that a party "proposing to tender such evidence shall, not later than forty-five days before the date fixed for inquiry or trial file or cause to be filed, in court, after notice to the opposing party, a list of such evidence as is proposed to be tendered by that party, together with a copy of such evidence or such particulars thereof as is sufficient to enable the party to understand the nature of the evidence." According to Section 7(2), a party who fails to give notice as aforesaid, shall subject to the provisions of Sections 8 and 9 of the Act, not be permitted to tender such evidence in respect of which the failure was occasioned.

Section 7(1) (b) of the Act specifically provides that any party to whom a notice has been given under Section 7(1) (a) "may within fifteen days of the receipt or such notice apply to the party giving such notice, to be permitted access to, and to inspect-

(i) the *evidence* sought to be produced ;

(ii) the *machine, device or computer*, as the case may be, used to produce the evidence; and

(iii) any *records relating to the production of the evidence* or the system used in such production."

The Act also specifies an outer time limit of fifteen days for a party proposing to produce such evidence to provide a reasonable opportunity to the party against whom such evidence is sought to be produced or his agents or nominees, "to have access to, and inspect, such evidence, machine, device, computer, records or systems." The procedure so laid down in the Act is intended to give an opportunity for a party against whom the evidence is sought to be produced to challenge the same on the ground that it is not an accurate recording or reproduction of what it purports to be.

At not time in these proceedings has the Appellant objected to the production of the photographs marked P7 to P18 on the ground that the notice contemplated by Section 7(1)(a) of the Evidence (Special Provisions) Act of 1995 has not been given to the Appellant, and no submissions in these lines were addressed to court in the Court of Appeal or before this Court. However, I have given my mind to this question, and I hold that the Appellant had notice of the fact that the Respondent was relying on the dated photographs marked P7 to P18 in the contempt proceedings when notice of the Respondent's petition dated 21st July 1999, by which he complained to the Court of Appeal of the alleged contempt, was served on him. In paragraph 11 of the affidavit of the Respondent dated 20th July 1999 attached to

the said petition, the Respondent has specifically listed the said photographs in the following manner:

> "I attach hereto marked C and D photographs showing the construction being carried on 2-7-1999 and photograph marked E showing the position of the building on 4-7-1999 and photographs marked F, G, H and I taken on 5-7-1999 showing the construction done on 5-7-1999, marked J, K, showing the construction done on 15-7-1999, marked L and M showing the construction done on 17-7-1999 and plead them as part and parcel hereof."

The said Petition was supported before Edussuriya, J., on 30th July 1997, and the Court directed the issue of summons on the Appellant for 17th August 1999. On that date, the Appellant appeared in person and moved for a further date, and the matter was re-fixed for 15th October 1999. On 15th October 1999, the chargers were read out to the Appellant who pleaded not guilty to the said charges. After several inquiry dates and calling dates, the contempt inquiry ultimately commenced before a Bench of the Court of Appeal consisting of Shiranee Tilakawardane, J., and Chandradasa Nanayakkara, J., on 20th July 2001. During the one year period that elapsed between the filing of the Petition dated 21st July 1999 and the commencement of the contempt inquiry, the Appellant made no effort to move Court for permission to examine the camera used for the purpose of taking the photographs in question, as he was entitled to do in terms of Section 7 (1) (b) (ii) of the Evidence (Special Provisions) Act 1995.

In the circumstances, and for the reasons outlined above, I am of the opinion that the Appellant is not entitled to take any objections to the admissibility of the said photographs at the appeal stage of this case. Accordingly, I am of the opinion that the Court of Appeal has not erred in placing reliance on the dates appearing on the photographs produced by the Respondent.

Proof of Contempt

The next four questions on which this Court has granted leave to appeal relating to the burden and standard of proof may, for convenience, be considered together. These questions are –

(i) Has the Respondent discharged the burden of proof placed upon him in this inquiry?

(ii) Have their Lordships' of the Court of Appeal erred in accepting the evidence led on behalf of the Respondent?

(iii) Have their Lordships' of the Court of Appeal erred in rejecting the evidence led on behalf of the Petitioner (Appellant)?

(iv) Have their Lordships' of the Court of Appeal erred in taking to consideration extraneous factors / material in convicting and sentencing the Petitioner (Appellant)?

The Appellant was charged in the Court of Appeal for committing contempt of court on 1st July 1999, 2nd July 1999, 4th July 1999, 5th July 1999, 15th July 1999, 16th July 1999 and 17th July 1999 by effecting further constructions and continuing to build after 30th June 1999 in premises bearing Assessment No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte thereby damaging premises bearing Assessment No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte "on the *northern* side." This charge is essentially one of civil contempt, which is an 'offence' of a private nature since it thereby deprived the Respondent of the benefit of the undertaking given to court by the Appellant, and the interim injunction granted by the Court of Appeal on 30th June 1999 at the instance of the Respondent.

The line between civil and criminal contempt is a thin one indeed. The distinction was explained by Barrie and Low in *The Law of Contempt,* (3rd Ed – Butterworths, at page 655) as follows :

> "Criminal contempts are essentially offences of a public nature comprising publications or acts which interfere with the due course of justice as, for example, by tending to jeopardise the fair hearing of a trial or by tending to deter or frighten witnesses or by interrupting court proceedings or by tending to impair public confidence in the authority or integrity of the administration of justice. Civil contempts, on the other hand, are committed by disobeying court judgements or orders either to do or to abstain from doing particular acts, or by breaking the terms of an undertaking given to the court, on the faith of which a particular course of action or inaction is sanctioned, or by disobeying other court orders (for example not complying with an order for interrogatories, etc). "

While the need for society to preserve the rule of law and protect the rights of its citizen as well as those of the State lies at the heart of both civil and criminal contempt, the distinction between the two types of contempt, though clear in theory, is one which may often be difficult to make in the context of the peculiar circumstances of each case in which it may become necessary to determine whether a particular act amounts to a criminal or civil contempt. One of the reasons for this difficulty is that there is a punitive element even in cases of civil contempt, for it must be remembered that the law of contempt as a whole is concerned to uphold the due administration of justice, and it is obvious that disregard of a court order not only deprives the other party of the benefit of that order but also impairs the effective administration of justice. As Cross, J., said in *Phonographic Performance Ltd. v. Amusement Caterers (Peckham) Ltd.* [1964] Ch 195 at 198 :

> "Where there has been wilful disobedience to an order of the court and a measure of contumacy on the part of the defendants, then civil contempt, what is called contempt in procedure, "bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest"."

Although the contempt, the Appellant has been charged and convicted of is civil in nature, it is clear that the applicable standard of proof is that applicable to criminal cases. As Lord Denning MR observed in *RE Bramblevale Ltd.* [1970] Chancery 128, at 137 –

> "A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him."

On appeal, this Court is called upon to examine whether the Respondent has discharged the burden placed on him to prove, beyond reasonable doubt, that the Appellant violated the solemn undertaking given by him to court, and / or the interim injunction imposed by Court, and whether the Court of Appeal took into consideration extraneous factors or material in convicting and sentencing the Appellant. It is however necessary to bear in mind, that in doing so, that the applicable standard of proof does not require that the guilt of the Appellant should be established beyond any and every shade of doubt, but only beyond doubts which may be called reasonable.

At the contempt inquiry before the Court of Appeal, the Respondent personally gave evidence, and led the evidence of Roshan Seneviratne, the Manager of Salaka Group, and that of Dr. George Nelson Perera, a close neighbour. The Appellant was the only witness for the defence. The Court of Appeal, in my opinion, has carefully analyzed all evidence and arrived at the conclusion that the guilt of the Appellant has been established beyond a reasonable doubt. In convicting the Appellant, the Court of Appeal has observed that-

> "On the consideration of the totality of the evidence and the documents filed in the revision application, including the pleadings referring to the District Court action and the orders, this Court is in no doubt whatsoever that the construction was carried out as complained by the Plaintiff-Petitioner-Petitioner (present Appellant)."

The required elements for a finding of civil contempt are (1) the existence of an undertaking or order; (2) knowledge of the undertaking or order; (3) ability to comply with the undertaking or order; and (4) willful or contumacious disobedience of the undertaking or order. It has been submitted by the learned President's Counsel for the Appellant that his client had no knowledge of the content of the undertaking / order as a copy thereof was not formally served on him. It is, however, material that in this case the undertaking was given on behalf of the Appellant by his Counsel when the inquiry into interim relief resumed after an adjournment, and the wording of the relevant journal entry makes it obvious that the Appellant was consulted by his Counsel *before* the undertaking was given. The undertaking given to court, and the consequent interim-injunction, were in the following terms:-

> *At this juncture*, the Defendant-Respondent (present Appellant) undertakes not to effect further constructions and to maintain the status quo. The interim injunction is accordingly issued *restraining the Defendant-Respondent from continuing to build hereafter*."

The Respondent, in his testimony, has categorically stated that the Appellant was in the precincts of the Court, and was consulted by his Counsel Mr. Harsha Soza, before the undertaking was given, which has been denied by the Appellant, who in the course of his evidence denied that he was in court, although he could not remember where he was when the case was taken up in the Court of Appeal. Significantly, the Appellant who did not call

Mr. Soza to testify on his behalf, did admit that after he became aware of the undertaking given to court on his behalf by his Counsel, he verified the "specifics" of the undertaking and order from the Registry of the Court within three days. The Appellant's testimony in this regard, under cross-examination, is quoted below:-

"Q : You came to know from Mr. Harsha Soza that an undertaking has been given and interim injunction has been issued restraining the Defendant-Respondent (present Appellant) from continuing to build?
A : I asked him. He told me that there was an order against me.
Q : You never asked him what is the order against you? And the Court of Appeal has issued an order against you?
A : I found it subsequently. About two or there days thereafter from the Registry.
Q : Till two or three days after 30.6.1999 you did not know what is the order ? Is that correct ?
A : Yes. The specifics of the order."

It is manifest that on his own admission, at least by 4th July, 1999 the Appellant was aware of the nature and content of the undertaking given by Counsel on his behalf, and the interim-injunction issued by the court, and should have moved the court if there was any lack of clarity or ambiguity in it. Prior to complaining about the alleged violation of the undertaking / interim-injunction by the Appellant to the Court of Appeal, the Respondent has contemporaneously complained to the Welikada Police, and with his petition dated 21st July 1999 filed in the Court of Appeal, he has produced marked A and B respectively copies of the complaints he made to the Police on 1st July 1999 and 5th July 1999, which were subsequently marked in evidence as P5 and P6. The particulars of the damage caused to the house of the Respondent are set out in P6 the relevant portion of which is quoted below:

"99'06'30 jk osk f.dvke.Sï yd boslsrSï kj;k f,ig wNshdpkd wOslrkh u.ska ;Skaÿjla oS,d we;' tal fuu Wmd,s O¾uisrs fjs,dr;ak hk wh jsiska kej; udf.a ksji wi, boslsrSï lrf.k hkjd' ta boslsrSï lrk tajd iïnkaOj uu f*dfgda wrf.k ;sfnkjd' fuu boslsrSï lrk jsgoS udf.a ksjfia jy,h weianeiafgdaia ISÜ folla levS we;' tys jgskdlu re' 1500$ la muK fjs' jy,hg oud we;s wvs 40 l muk ;dr ISÜ ;ekska ;ek levS we;' tajdfha jgskdlu re' 1600$ la muK fjs' we,auSkshï ng folla" ;dr ISÜ Wv oud ;snqkd' wvs 10 la wvs 9 la muk os. ta folo fuu boslsrSï l, fiajlhka fofokd wrf.k we;' tys jgskdlu re' 700$ la muK fjs' uqÿka W¿ leg y;rla muK levS we;' tys jgskdlu re' 50$ la muK fjs' uq,q jgskdlu re' 3800$ la muK fjs' ;jo udf.a jy,h Wv Tjqka jsiska boslsrSï ksid isfuka;a ;Ógq .Kka jegS we;' fuu ksid udf.a ksji we;=,g j;=r .,d f.k tkjd' fuu Wmd,s O¾uisrs fjs,dr;ak hk wh jsiska l=,shg wrf.k kï fkdokakd jev lrk fofokd udf.a jy,h Wv isg ;ud fuu ;dmamh n|skafka' fuu ug w,jx.=j Wiaid urK njg ;¾ckh lr jy,fhka neye,d .shd' udf.a bvfuka wvshl m%udKhla muK w,a,d f.k ;uhs fuu ;dmamh bos lrkafka' wo osk oj,a 12'15 g muk ;ud uu ksjig wdfjs' ta tk jsg ;ud jy,h Wv isgskjd uu oelafla' udj oel,d ;uhs ;¾ckh lr neye,d .sfha' fuu jy,h Wv isgskjd udf.a nsrs| jk tÉ' iS' ndnqIka hk who oelald' udf.a ÿj ksjfia isgshd thd t,shg wejs;a ke;' fus iïnkaOg uu by; kvq ijrd we;s wOslrK ;=kg jd¾:d lrus' ud fmd,sisfhka b,a,d isgskafka wOslrK ksfhda.h mrsos Wmd,s O¾uisrs fjs,dr;ak hk wh jsiska boslsrSï lrk tl kj;d fok f,ig yd ug jS;sfhk w,dNh iïnkaOj ls%hd ud¾.hla .kakd f,igh' ug lSug we;af;a tmuKhs'"

By the time of making the above-quoted statement to the Police, it is apparent that the Respondent had taken some photographs, and he has testified that he did so in accordance with the instructions he received from his lawyer, and he has produced in the course of the contempt inquiry marked P7 to P18, these and the subsequent photographs he took, with

date imprints, which clearly show that the work at the building site had been continued after the Appellant gave his solemn undertaking to court on 30th June 1999, and even after he admittedly perused the court record, and got the "specifics" of the interim-injunction issued by the Court of Appeal at most three days thereafter.

The position of the Appellant, at least at the initial stage of the contempt inquiry, was that he was not the owner of premises No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte, and that it was owned by his son and that the he had nothing to do with the building operations there. However, later in his testimony, under cross-examination, he admitted that he used to go there to see the constructions to give directions on behalf of his son who was abroad. It is also significant that the Appellant when he testified in the contempt inquiry denied that the building shown in the photographs P7 to P18 was his house, or the house in which he resided, and had stressed that none of the photographs showed the assessment number of the house, but when the Respondent and Dr. Perera testified no questions were put to them on these lines. Although the Appellant was at pains to show that he has nothing to do with the premises in which the building operations were alleged to have taken place, he led no evidence whatsoever to show that he lived in another premises located in some other place. He did admit in cross-examination that he made complaints to the Mayor and to the Central Environmental Authority on the nuisance caused by the poultry farm owned by the Respondent, but if he was not residing at premises No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte, the question naturally arises as to how he came to do so, if the Appellant was not living in the very same premises in which the building operations were alleged to have taken place.

Mr. L.C. Seneviratne, P.C has sought to assail the conviction of the Appellant on the basis that the photographs marked P7 to P18 were wrongfully admitted in evidence, which question has been dealt with by me fully earlier in this judgment. He has also submitted that the said photographs, in any event, did not show the site on which the building operations allegedly took place in violation of the undertaking / order of court, namely the building bearing assessment No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte which is to the north of the Respondent's house bearing No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte, the two premises having one common boundary which is the northern boundary of the Respondent's house and the southern boundary of the site on which the building operations were alleged to have taken place. Mr. Seneviratne further submitted that the photographs did not prove beyond reasonable doubt that the Appellant destroyed "*the roof and wall on the Northern side of premises depicted as Lot 2B in Plan No. 2451 dated 04/11/1986 made by A. E. Wijesuriya, Licensed Surveyor, bearing Assessment No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte, and constructed structures on the northern side in the said premises.*"

It is pertinent to note that the undertaking given to court by the Appellant and the interim-injunction issued by court did not specifically refer to the "northern side of the premises" although there is reference to same in the pleadings before the District Court. What the Appellant had undertaken was *not to effect further constructions and to maintain the status quo*. The interim-injunction issued by the Court of Appeal was to restrain the Appellant "*from continuing to build hereafter.*" It is abundantly clear from the testimony of the Appellant and that of Dr. George Nelson Perera that the Appellant did continue building operations on northern side of the Respondent's premises which is the southern side of the neighbouring premises in which the Appellant admittedly resides. The allegations have been denied by the Appellant, who was the sole witness for the defence in the contempt inquiry, and the

Court of Appeal has rejected his testimony as being mutually inconsistent and altogether unconvincing. The Court of Appeal has also held that the Appellant had the ability to comply with the undertaking he gave to court and the interim injunction issued by court, and that he had acted in willful or contumacious disobedience of the said undertaking and order.

In this context, it is important to bear in mind the following oft-quoted words of Viscount Simon from the decision of the House of Lord in *Watt v. Thomas* [1947] 1 All E. R. 582, at pages 583 which were cited with approval by the Privy Council in *Munasinghe v. Vidanage* 69 NLR 97-

> "…….an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given".

In this case, the Court of Appeal, having heard evidence placed before it by the Respondent and the Appellant, has come to certain findings having regard to the demeanor of witnesses, and the Supreme Court, sitting in appeal, will be extremely reluctant to review these findings. The time tested principle guiding our courts in these matters as enunciated by James L.J. in *The Sir Robert Peel*, 4 Asp. M. L. C. 321, at 322 and quoted with approval by Viscount Sankey L.C in *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243 at 248, is that an appellate court-

> "will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created a wrong impression."

I bow to the wisdom of this dictum, and only wish to add that I did not find any governing fact which in relation to others might have created a wrong impression in the Court of Appeal. Accordingly, I am of the opinion that there is paucity of material even to suggest that the Court of Appeal has erred with regard to the discharge of the burden placed by law on the Respondent to prove beyond reasonable doubt that the Appellant committed contempt of court by his conduct, and in particular, I hold that questions (i), (ii) and (iii) have to be answered against the Appellant.

As regards, question (iv) on which leave was granted, learned President's Counsel for the Appellant has invited the attention of this Court to page 2 of the judgement of the Court of Appeal wherein it has been stated that "the Plaintiff-Petitioner-Petitioner instituted an action against the Defendant-Respondent-Respondent, an attorney-at-law….." He has stressed that the proceedings before the Court of Appeal were not initiated against the Appellant in his capacity as attorney-at-law, and the manner in which the Appellant has been referred to in the judgement of the Court of Appeal, suggests that the said Court has taken into consideration extraneous factors / material in convicting and sentencing the Appellant. In my view, the description of the Appellant by reference to his vocation, which in my opinion is a very noble and responsible profession, does not demonstrate any prejudice on the part of the court, particularly in the context that the Appellant had denied prior knowledge of the content of the undertaking which was given to Court by his Counsel, for the violation of which he had been charged. Accordingly, I am of the opinion that question (iv) also has to be answered against the Appellant.

The Punishment

There remains the question whether the sentence of imprisonment and fine imposed on the Appellant is excessive and / or contrary to law.

No submissions have been addressed to Court on the lawfulness or otherwise of the said sentence, and the only ground urged for the mitigation of the sentence of imprisonment is the advanced age of the Appellant. It has been submitted that he was 63 years of age at the time of his conviction, and that in any event, the sentence imposed is excessive. Contempt of court has been described as an offence *sui generic,* and there is no statutory or other limits on the punishment that may be imposed on an offender, it being a matter entirely for the court imposing the same. The Court of Appeal, when sentencing the Appellant, has given its mind to all the circumstances of this case, and I have no reason to interfere with the sentence so imposed.

I would therefore, dismiss the appeal, but without costs.

JUDGE OF THE SUPREME COURT