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

In the matter of an Application for Leave to Appeal against Judgment dated 01/03/2011 delivered by the High Court of Western Province exercising civil appellate jurisdiction at Kalutara in WP/HCCA/Kalutara/02/2010 (Revision) D.C. Kalutara 5350/L.

SC Appeal No. 97/2011

SC/HCCA/LA 121/2011

WP/HCCA/Kalutara/02/2010 (Rev)

D.C. Kalutara Case No. 5350/L

Matilda Herathge, of No.1118 F, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda.

Plaintiff

Vs.

Halowita Arachchige Dayananda, of No.1118E, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

Defendant

AND

Matilda Herathge, of No. 1118F, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

Plaintiff - Petitioner

Vs.

Halowita Arachchige Dayananda, of No.1118E, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

AND NOW BETWEEN

Matilda Herathge, of No. 1118F, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

Plaintiff – Petitioner – Appellant

Vs.

Halowita Arachchige Dayananda, of No. 1118E, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

Defendant-Respondent-Respondent

Before: Buwaneka. P. Aluwihare, PC, J.

Vijith K. Malalgoda, PC, J.

E. A. G. R. Amarasekara, J.

Counsel: Ms. Sudarshani Coorey for the Plaintiff-Petitioner- Appellant

Argued on: 11th January 2021

Decided on: 19th October 2023

E. A. G. R. Amarasekara, J.

The leave to appeal application relevant to this appeal was filed by the Plaintiff Appellant Petitioner (hereinafter sometimes referred to as the Plaintiff) against the order dated 01.03.2011 made by the learned High Court Judges of the Civil Appellate High Court of the Western Province after the hearing of a revision application made to that Court. Being aggrieved by the order dated

11.12.2009 made by the learned Additional District Judge of Kalutara in case no. 5350/L, the Plaintiff made the aforesaid revision application to the said High Court. The learned District Judge made the said order refusing to accept a land registry folio G /63/221 which had also not been listed in terms of the provisions of the Civil Procedure Code, when the Plaintiff attempted to mark the said folio in evidence as P7 (marked as P10 with the Petition) during re-examination of the Plaintiff. The Plaintiff had argued before the learned Additional District Judge that, since there is a reference to this G/63/221 in the folio marked as V2, no harm would be caused to the Defendant Respondent Respondent (hereinafter sometimes referred to as the Defendant) by allowing to produce this document in evidence during re-examination and producing it in evidence would help to answer the matters in issue. The Defendant objected to the document as neither was it listed in terms of the law nor was shown during cross- examination. It was further stated on behalf of the Defendant before the District Court that documents cannot be marked during the re-examination; perhaps counsel for the Defendant would have meant that new evidence contained in documents cannot be allowed through re-examination- vide proceedings dated 11.12.2009 before the District Court).

As per the order made, the learned Additional District Judge has refused to allow the Plaintiff to mark the document stating that as per the provisions of Section 138(3) of the Evidence Ordinance, a document cannot be marked without permission, therefore, P7 (P10 with the Petition) was not allowed to be marked as evidence. I must state that what the learned Additional District Judge meant by "without permission' is not clear as the objection was raised when the permission was asked by the lawyer for the Plaintiff. Perhaps, what he meant would have been that there was no proper application due to the fact that when permission was sought it was not revealed that it was not listed in terms of section 175(2) of the Civil Procedure Code or it contains new evidence as contemplated in section 138(3) of the Evidence Ordinance. It must be noted here that a document cannot be produced in evidence without leave in terms of section 175(2) of the Civil Procedure Code if it was not included in a list filed in terms of section 121(2) of the Civil Procedure Code and that new matters cannot be introduced during re-examination without permission in terms of section 138(3) of the Evidence Ordinance.

As per the section 138(3) of the Evidence Ordinance, re-examination shall be directed to the explanation of matters referred to in the cross-examination and if new matters are introduced with the permission of court, the adverse party may further cross-examine. Thus, before obtaining permission, it may be necessary to enlighten the Court regarding the nature of the evidence and any lapse by the party requesting permission in order to evaluate whether introducing new evidence at that stage can be countered without harm only by further cross examination. When such permission is sought the Court shall see whether allowing it would prejudice the rights of the adverse party.

However, if dissatisfied by the order made by the learned Additional District Judge in the matter at hand, the Plaintiff could have taken steps to file a leave to appeal application, but without taking such a step, the Plaintiff, on the same day, had closed his case. Thereafter, the Defendant

also had closed his case without calling any evidence. The learned Additional District Judge has given time till 20.01.2010 to file written submissions. It appears that when the District Court case was pending for filing of the written submissions before judgment, on 18.01.2010, the Plaintiff has filed the aforesaid revision application before the Civil Appellate High Court praying to set aside the said order dated 11.12.2009 and for an order directing the District Court to accept the said folio G/63/221 and a deed bearing number 3060 attested by Kuintos Cory [Sic] Notary Public- vide X1. It must be noted that no permission was asked from the District Court to tender deed no. 3060 attested by Quintus Cooray, Notary Public in evidence. Thus, the revision application before the High Court focused not only in correcting the order made by the learned District Judge if there was any miscarriage of justice, but it also contained a prayer to allow a deed to be produced in evidence which application was never made before the District Court. In my view, the Plaintiff should not have asked any relief from the High Court in relation to the tendering of deed no.3060 as there was no application made in that regard to the original court nor a decision made on that aspect. However, there was no relief contained in the petition to the High Court praying to set aside all proceedings held after the said order was made by the District Court on 11.12.2009. Anyhow, in the leave to appeal application made to this court over the dismissal of the said revision application, other than for a direction on the District Court to accept the said folio G/63/221, there is no relief prayed in relation to the said deed no.3060, but it contains a new relief praying to set aside the proceedings that was held after the making of the said order dated 11.12.2009 by the District Court; a new relief that was not there before the High Court. Thus, other than correcting any errors in the order made by the learned High Court Judges, this application made to this Court is intended to get more relief which was not within the scope of the prayer made to the High Court. I do not think that it is proper for this Court to consider a relief which was not canvassed before the High Court in an appeal made against the order of the High Court.

Even the Plaintiff admits that the said Folio G/63/221 was not included in a list tendered in accordance with section 121(2) of the Civil Procedure Code. Section 138 of the Evidence Ordinance provides for clarifications which may be needed after cross-examination. If new evidence is led during such clarification with the permission of Court, the adverse party is entitled to cross examine again. Thus, it is necessary to see whether marking of the Folio G63/221 was necessary to clarify matters revealed through cross-examination or rather the application to produce the said folio was to cure the lapses made by the Plaintiff in preparing for the Trial and leading evidence. In this regard, it is pertinent to refer to the facts relevant to the case at hand.

The Plaintiff instituted the action by the plaint dated 31.01.2005 in the District Court of Kalutara against the Defendant for a declaration of title to a divided and defined allotment of land called Lot 3E of Lot 3 of Horagasmulla more fully described in the 2nd schedule to the plaint which was 2.73 perches in extent as per the plan no.4972A made by W. Seneviratne L.S., and sought a decree be entered in her favour, if necessary to evict the Defendant and place her in possession. She further prayed for recovery of damages from the Defendant for wrongfully removing the gate fixed by the Plaintiff.

The Plaintiff in her plaint averred;

- That she purchased Lots 3C and 3D of plan no 4972A of the same land upon deed No.1667 (marked P2 with the Petition) dated 06/05/1991 and used it as her place of residence along with her family.
- That she possessed the aforesaid Lot 3E of plan no.4972A along with aforesaid Lots 3C & 3D and later acquired title to the aforesaid Lot 3E by right of purchase of the same on deed of transfer No. 6794 dated 30/01/2003. (As per the said deed marked as P6 with the petition, the vendor is Alliance Finance Company Limited.)
- That she had acquired prescriptive title to the aforesaid lots 3E,3C and 3D.
- That the dispute arose when the Defendant who was residing in Lot 3B, on 15/11/2005, removed the wooden gate fixed up at the western boundary of the subject matter, Lot 3E.

The Defendant filed answer dated 25.04.2007 while denying the claims of the Plaintiff and stated that he bought his land Lot 3B by virtue of Deed No.33 dated 02/11/1992 attested by S. Abeyweera, Notary Public and used the aforesaid Lot 3E as part of vehicular access to his land and later bought the right of way over Lot 3E on 26.02.2002 by deed no.283 attested by said S. Abeyweera, Notary Public. As per the land registry folio marked P8 with the petition, which was marked at the trial as V2 before the learned Additional District Judge, the deed of the Defendant bears a prior date but the Vendor is one L.D. Henry Jayawardane. The Defendant, in his answer, denied any cause of action accrued to the Plaintiff against him and admits that he objected to a gate being fixed in November 2004 and states that on one occasion the Pradeshiya Sabha got the gate removed in January 2004. The Defendant claimed damages for malicious prosecution by the Plaintiff.

The Plaintiff filed a replication denying the claims of the Defendant and his counter claim. Even though the Defendant pleaded deed no.283 in his answer which was executed prior to the Plaintiff's deed no. 6794, other than refuting Defendant's cross claim, the Plaintiff had not taken any interest to state in the replication that the vendor in Defendant's deed had executed a deed conveying his rights to the vendor of his deed no.6794 prior to the execution of deed no.283 by deed no.3060 for which he tried to get permission from the High Court through revision application without making any application in that regard before the District Judge to produce the same. The Plaintiff's move to produce the folio marked P10, Folio G/63/221 (P7 at the trial) appears to be in support with this contention to indicate that the vendor in the Defendant's deed had transferred his rights to the vendor in Plaintiff's deed. Even if the Plaintiff did not aver those facts in the replication for some reason, the Plaintiff and his lawyers should have been vigilant to list those documents in the list that was to be tendered in accordance with section 121(2) of the Civil Procedure Code as those were vital to meet the case presented through the answer. It appears that they neglected to list them. Further, they have not asked permission to submit those documents as unlisted documents during the evidence-in-chief of the Plaintiff. The Plaintiff moved to tender folio marked P10, Folio G/63/221 (P7 at the trial) which was refused by the

District Court only after the Defendant tendered folio marked V2 in cross-examination which has a cross reference to Folio marked P10 with the petition. V2 has been marked to show that the Defendant has an older deed when compared to the Plaintiff's deed. In my view, there is nothing to clarify in that evidence. The attempt to mark P10, Folio G/63/221 (P7 at the trial) by the Plaintiff was to cover her lapses and bring new evidence to indicate that the vendor of the Defendant's deed had no title at the time he executed deed no. 283 which issue was there from the time the answer was filed. As mentioned above, the Plaintiff could have taken steps to present such a position from her replication, or take steps to give notice of her intention to produce such evidence at the trial by filing list of documents as contemplated by the Civil Procedure Code etc., which was neglected. If the plaintiff was vigilant enough to reveal her position while filing replication or to list the necessary documents in her list of documents, the Defendant could have listed what would have been necessary for him to meet the stance to be taken up by the Plaintiff in reply to his answer or he could have used the provisions in the Civil Procedure Code under chapter XVI including interrogatories and inspection and production of documents for the benefit of his case. This court also observes that P10, Folio G/63/221, the folio which is expected to be tendered in evidence, describes the Lot 3 with reference to a plan no.375 made by a surveyor named E.P. Gunawardane, and that plan has not been used in this case in evidence or to superimpose the plan used for this case. Since the prayer in the revision application to the High Court includes a prayer to accept deed no.3060 which was not moved in the original court, it is clear that the intention of the Plaintiff is to submit more documents other than the folio G/63/221(P10) which were not listed as per the provisions of the Civil procedure Code. This approach of the Plaintiff is further fortified, since the Plaintiff has prayed to set aside all the proceedings after the impugned order of the learned District judge which proceedings is resulted in consequence of closing of her case by the Plaintiff herself without resorting to the legal remedy available by filing leave to appeal application. It appears that the Plaintiff has not tendered a copy of the said deed no. 3060 along with the petition to the High Court, for the High Court, or now, for this Court to appreciate what it contains and to see the nature and contents of the evidence that the Plaintiff intends to lead. Thus, if the intention to use the said folio marked P10 and any document arising out of that was revealed through the replication or the list of documents, as said before, the Defendant could have used the provisions of the Civil Procedure Code for his benefit and could have included further documents (if any) in his list to meet the case intended to be presented by the Plaintiff. Further he could have asked for a commission to superimpose plans referred to in those documents. In the backdrop explained above, I am not inclined to accept the position that allowing this new evidence contained in P10 will not prejudice the rights of the Defendant even though he was not represented to present his case before this Court.

It is contended on behalf of the Plaintiff that the paramount consideration for a judge is the ascertainment of truth and not the desire of a litigant to be placed at an advantage by some technicality and it is also said that the Court can use its discretion, if special circumstances appear to it to render such a course advisable in the interest of justice, to permit those documents to be

marked. In this regard the Plaintiff has brought this court's attention to the decided cases in **Girantha et al. V Maria et al. 50 N L R 519** and **Casie Chetty V Senanayake (1999) 3 Sri L R 11.** In **Girantha et al V Maria et al** the Court was interpreting the repealed section 121 where there was no stipulation to file list of witnesses and documents 15 days before the date fixed for trial. By stating that I do not intend to say that ascertainment of truth or interest of justice are not matters of concern. They are indeed, but the Court must consider why this condition to file the list 15 days prior to date fixed for trial was introduced. One reason may be to avoid delays due to applications of this nature being made during the trial. On the other hand, listing of documents and witnesses was always there to avoid the element of surprise being caused to the opposite party by introducing new documents and witnesses during the course of the trial. In my view, by introducing this condition to file it 15 days before the date fixed for trial has caused a party to make the other party or parties to the action know the nature and extent of its evidence before the trial so that the other party or parties could take steps to properly meet the case presented by that party. For obvious reasons, in terms of proviso to section 175(2) of the Civil Procedure Code, the documents to refresh memory and documents intended to be shown during the cross examination are the only documents that need not be listed. For the interest of justice and ascertainment of truth, it is necessary for each party to know the scope of and nature of evidence of each other's case. If one acts in a prejudicial manner affecting the opposite party's rights or entitlements by not listing an important document, he or she cannot be allowed to ask permission to produce the same for interest of justice. In **Kandiah V Wisvanathan and Another (1991) 1 Sri L R 269**, it was stated that the precedents indicate that leave may be granted for documents that are not listed;

- Where it is in the interest of Justice
- Where it is necessary for the ascertainment of truth
- Where there is no doubt about the authenticity of documents (as for instance certified copies of public documents or records of judicial proceedings)
- Where sufficient reasons are adduced for the failure to list the document (as for instance where the party was ignorant of its existence at the trial)

It was further held in that case that leave may not be granted if the other party would be placed at a distinct disadvantage.

In the matter at hand, no acceptable reason has been given before the District Judge as to why the documents were not listed even when the Defendant revealed his stance through his answer. On the other hand, as explained before, P10, Folio G/63/221, which was refused by the District Court refers to a Plan in describing the land relevant to that folio and such plan has not been used for the purposes of this case as stated before. As per the application before the High Court, it appears that the Plaintiff intends to mark at least another deed after getting the impugned order vacated, for which no application was made before the District Court. That deed also may contain reference to plans etc. Without producing that deed before this Court, even this court cannot decide whether it affects the substantial rights of the Defendant. This also indicates that the

Plaintiff did not apprise the District Court fully regarding the new documents which she intended to produce in evidence during re-examination. If it was revealed before the learned Additional District Judge, the Additional District Judge would have referred to that deed too in his order. If these documents were revealed through a list and the Defendant was put on notice of the Plaintiff's intention to produce them, the Defendant could have taken steps to meet such evidence as explained above. Thus, in my view if the folio G/63/221 marked P10 was allowed to be produced during re-examination, it would have placed the Defendant at a distinct disadvantage. As said before, even if the decision of the learned Additional District Judge lacks clarity, his decision not to accept the document is correct.

On the other hand, without taking steps to file an application for leave to appeal against the impugned order of the learned District Judge, the Plaintiff closed her case on her own and the Defendant also closed his case without calling any evidence. It must be noted here, as per the surveyor's evidence led on behalf of the Plaintiff, there are discrepancies between the true copy of plan 4972A (marked as V1 at the trial) and the tracing (P2 at the trial) that was used to make his plan (P1 at the trial).

Just 2 days before the date of filing the final written submissions, the Plaintiff has filed the revision application dated 18.01.2010. In the said revision application, the Plaintiff has;

- Not revealed any reason for not using his right to file a leave to appeal application.
- Not revealed any reason for not listing relevant document/s in his list of documents even when the Defendant has revealed his position in his answer.
- Not revealed that she closed her case and accordingly the Defendant closed his case and matter was pending for written submissions prior to judgment.
- Not revealed the discrepancies revealed through evidence between the tracing his surveyor used and the certified copy of the same plan marked V1 at the trial and V1 was not even referred to in the Petition.
- Not revealed that even though she has asked relief in the revision application directing the District Court to accept the deed number 3060, she did not move the District Court to accept the same.
- Not prayed for an order to set aside the proceedings that took place after the closing of her case by her lawyer on her behalf.

It is expected from a party to reveal all material and relevant facts when praying for relief from a court. In **Wijesinghe V Tharmaratnam, Srikantha's L R (IV) at page 47**, it was held that revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of Court. It is not proper for a court to come to a conclusion that the circumstances disclosed in a petition shocks its conscience when the petition does not reveal certain facts that may give different complexion to the application before the court. As per the decision in **Perera V People's Bank (1995) 2 Sri L R 84**, revision is a discretionary remedy and the conduct of the party making the application is intensively relevant.

It is settled law that the exercise of the revisionary power is limited to instances where exceptional circumstances exist warranting the intervention of the court- vide **Hotel Galaxy (Pvt.) Ltd. V Mercantile Hotels Managements Ltd. (1987) 1 Sri L R 5 and Rustom V Hapangama & Co. (1978/79) 2 Sri L R 225. Cadaramanpulle V Ceylon Paper Sacks Ltd. (2001) 3 Sri L R 112.** Not allowing to produce the said Folio G63/221, P10 and a deed contained therein may be prejudicial to the Plaintiff's case but it was a result of her and her lawyer's being not vigilant, since if they were vigilant, they could have taken steps to reply referring to them in their replication or by listing them in their list of documents while giving notice to the Defendant to take steps to meet the case going to be presented against him through such evidence. Now, the Defendant cannot list any documents including plans or get commissions to execute superimpositions of the plans referred to in the said documents or if necessary, use provisions under chapter XVI etc. and that may cause unfairness to the Defendant. The result of the harm caused to the Plaintiff is part of her or her lawyer's negligence or a result of them being non-vigilant but the Defendant need not be allowed to suffer for that. Such a situation should not be considered as an existence of exceptional circumstances for the benefit of the Plaintiff even if not allowing the relief may cause harm to the Plaintiff's case.

It is true that even if there is an alternative remedy, when exceptional circumstances exist, the appellate court can exercise its revisionary jurisdiction but no reason has been elucidated to state why the Plaintiff closed her case without taking steps to file a leave to appeal application. After the impugned order in the District Court, the Plaintiff and her lawyer has not asked time to take necessary steps but proceeded to further re-examine and close her case. If such step was taken to file a leave to appeal application and leave was granted proceedings would have been stayed in the lower court. The Plaintiff's own conduct has made the opposite party and the court to proceed further and conclude the proceedings and allow the parties to file written submissions prior to judgment. In such a background, it is not proper to set aside the proceedings made after the impugned order made by the District Court and in fact, there is no such order prayed before the High Court. Even though, it is prayed before this court to set aside those proceedings, in my view, this court is not empowered in appeal to grant relief exceeding the relief prayed in the Court below, namely the High Court. In **Surangi v Rodrigo [2003] 3SLR 35** it was held that no court is entitled to or has jurisdiction to grant reliefs which is not prayed for in the prayers. Thus, the High Court could not vacate the proceedings taken up after the impugned order as there was no such relief prayed for and as said before, such part of the proceedings was not revealed by the petition to the High Court. By praying for a such relief in this Court, the Plaintiff is trying to cover his lapses in the application for revision to the High Court. If any harm is caused to the Plaintiff, it is due to her lapses from filing of the replication and listing of documents and so forth.

The Learned High Court judges has refused the application on the following grounds,

1. That the refusal of permission to mark folio G/63/221 has not caused any prejudice to the rights of the Plaintiff, as she was well aware that she had to prove how the title derived and that if she had a better title than the Defendant, she should have listed the relevant

prior registration extract of G/63/221 in her list of witnesses and documents whereas she has totally failed to do so, and therefore it is not correct to produce P7(P7 at the trial which is P10 with the Petition to this Court) during re-examination.

2. That the Plaintiff has failed to established the existence of exceptional circumstances.

3. That, as the revision application has been filed only after the closing of the case by both parties, it was not proper for the High Court to exercise its powers of revision at that stage.

4. That, no new evidence may be introduced in re-examination without the leave of court.

As per the item 1, 2 and 4 above, as explained before in this judgment, not allowing the relevant Folio may have caused some harm to the case of the Plaintiff and the Plaintiff may also need to mark at least another deed for which there was no application before the District Judge. However, this harm is caused by the lack of vigilance by the Plaintiff and her lawyers but allowing those documents in re-examination may cause prejudice to the Defendant. As such, circumstances relevant to this case do not establish exceptional circumstances other than a negligence or fault by the Plaintiff or her Lawyers. It was not proper to introduce new evidence at that stage that may cause harm to the Defendant. I have already dealt sufficiently above in relation to the revision application being filed after the conclusion of the cases of both parties without any prayer to vacate those proceedings taken up after the making of the impugned order by the learned Additional District Judge which resulted due to the close of her case by the Plaintiff.

Therefore, I answer the questions of law allowed by this Court when granting leave as follows,

Q. a) Whether the High Court erred in holding that no prejudice has been caused by the refusal of the application to mark P7 folio G/63/221 (P10 with the petition)?

A. The harm, if any, caused by the refusal is a result of the fault of the Plaintiff but allowing the application to mark Folio G/63/221 is prejudicial to the Defendant. Thus, the refusal is correct and this question has to be answered in favour of the Defendant.

Q. b) Whether the High Court erred in holding that it is not proper for the High Court to exercise its revisionary jurisdiction because the cases for both parties had been closed before the revision application was filed?

A. Answered in the Negative.

Q. c) Whether the High Court erred in holding that this application for revision cannot succeed because there were no exceptional circumstances involved in this matter for the exercise of revisionary jurisdiction?

A. Answered in the Negative.

Q. d) Whether the contents of folio G/63/221 arose directly out of the cross-examination; it was also relevant in respect of issues Nos 26 and 28 namely, whether it was the Petitioner 's (Plaintiff's) deed or the Respondent's (Defendant's) deed which passed the title?

A. It did not directly arise from the cross-examination but was in issue from the moment the answer was filed. Raising of issues no.26 and 28 itself indicates that the Plaintiff was aware about what she has to prove to be successful in the case filed but for some reason did not list the documents in terms of section 121(2) of the Civil Procedure Code. The Plaintiff could have taken steps to list necessary documents and indicate the scope of his evidence for the Defendant to take notice to prepare for his case and take necessary steps to present his case in relation to those documents. The question has to be answered in favour of the Defendant.

Q. e) Whether the order of the learned trial judge was ex facie and palpably incorrect in as much as the petitioner (Plaintiff) in fact sought the permission of court to produce p7(P10 with the petition), a copy of the said folio G/63/221, and that itself constituted a ground for the exercise of revisionary jurisdiction?

A. Even if the permission was sought to mark it during evidence in re-examination, no acceptable reason was given why it was not listed in term of section 121(2) of the Civil Procedure Code and why it was not moved to produce in examination-in-chief. Since allowing of the document at that stage could have caused prejudice to the Defendant, even if such request was considered as properly made, refusal to accept the document is correct and Revision being a discretionary remedy it should not have been used by the High Court. Hence this Court need not interfere with the decision. The question has to be answered in favour of the Defendant.

For the reasons given above this appeal is dismissed. No costs.

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Judge of the Supreme Court

Buwaneka P. Aluwihare, PC, J

I agree.

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Judge of the Supreme Court

Vijith K. Malalgoda, PC, J.

I agree.

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Judge of the Supreme Court