

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

Dharma S.Samaranayake,  
No.150/1,  
Moraketiya, Pannipitiya.

SC (CHC) Appeal No.60/2013  
HC (Civil) No. 27/2008/IP

**Plaintiff**

Vs.

Sarasavi Publishers (Pvt) Limited,  
No 30,  
Stanley Thilakaratna Mawatha,  
Nugegoda.

**Defendant**

**AND NOW BETWEEN**

Sarasavi Publishers (Pvt) Limited,  
No 30,  
Stanley Thilakaratna Mawatha,  
Nugegoda.

**Defendant- Petitioner/Appellant**

Vs.

Dharma S.Samaranayake,  
No.150/1,  
Moraketiya, Pannipitiya.

**Plaintiff- Respondent**

Before: **Murdu N.B. Fernando, PC J.**  
**P. Padman Surasena, J. and**  
**A.H.M.D. Nawaz, J.**

Counsel: K.G Jinasena with D.K.V Jayanath for the Defendant-Petitioner  
Asoka Serasinghe with Akalanka Serasinghe for Defendant – Respondent

Argued on: 29.01.2021

Decided on: 17.05.2023

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

The defendant-appellant (“the defendant”/ “the appellant”) preferred this Appeal against the judgement dated 17<sup>th</sup> May, 2013 of the Commercial High Court (“the High Court”).

The High Court by the said judgement recognized the plaintiff-respondent (“the plaintiff”/ “the respondent”) as the author of the book titled “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඞුම්” and went onto hold that the plaintiff Dharma S Samaranayake has the copyright for the said book and that the defendant Sarasavi Publishers (Pvt) Limited has infringed the economic rights of the plaintiff and directed the defendant, Sarasavi Publishers to pay a sum of Rs. 837,500/= as damages to the plaintiff for infringement of her economic rights.

The case presented by the plaintiff, *albeit in brief* before the High Court was

- that the plaintiff, a well-known journalist and the editor of a weekly sinhala newspaper and interested in local culinary methods was instrumental in introducing Publis Silva, a Cook at Mount Lavinia Hotel, (ගල්කිස්ස හෝටලයෙහි අරක්කුමියෙකු) to the female newspaper readers;
- that in 2003 the plaintiff gathered material and information to publish a book on local culinary and that Publis Silva assisted (ව්‍යවහාරික සහයෝගය) and supported her by trying out recipes;
- that there was an understanding between the plaintiff and Publis Silva to title the book using the words “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වා” and hence it was titled “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඞුම්”;
- that chapters one to eleven of the book were compiled with material personally gathered by her through interviews with Publis Silva and others; that for chapter twelve she received positive support (සාධනීය සහයෝගය) from Publis Silva by trying out recipes; that chapters 14,15 and 16 were written and created solely by her and therefore the plaintiff has the copy right of the said book;
- that she requested the Sarasavi Publishers to publish “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඞුම්”, but did not enter into a formal agreement with the publishing company; that the book was launched on 25<sup>th</sup> June, 2005 and she received a sum of Rs 25,000/= as an advance payment for the 1<sup>st</sup> edition of the book. A copy of the 6<sup>th</sup> edition of the book (not the 1<sup>st</sup>) was annexed to the plaint dated 30<sup>th</sup> July, 2008 as **P1**;
- that subsequently she became aware that the defendant had published six editions without her express or implied consent and was getting ready to publish the 7<sup>th</sup> edition; that in March, 2008 she demanded royalty for the six editions; the defendant failed to pay her royalty but indicated that the defendant had entered into an agreement with Publis Silva for publication of the said book;

- that Publis Silva cannot write and has not written a single word of the said book and that she is the author of the book; that the defendant publishing company has failed to pay her royalty and thus infringed her economic rights;
- therefore, plaint was filed against the defendant publishing company, *inter alia* for a declaration that the plaintiff is the author of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” and she has the copyright of the said book. Further she moved court for injunctive relief, royalty and compensation under Section 170(10) of the Intellectual Property Act No 36 of 2003 (“the IP Act”) and in the interim for an enjoining order and interim injunction against the publication, distribution and sale of the book.

The High Court did not grant the plaintiff the enjoining order prayed for in the plaint dated 03<sup>rd</sup> December 2008 but issued notice on the publishing company pertaining to the interim relief. The defendant publishing company, filed objections to the grant of interim injunction sought by the plaintiff and contended:

- that the creator of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” is Publis Silva and that the copyright of the book lies with Publis Silva;
- that the defendant has paid royalty to Publis Silva as expressly agreed between the parties and annexed a copy of the agreement (V2) and an affidavit from Publis Silva V5 to the objections;
- that plaintiff was only the editor of the book and she has been paid editorial fees (සංස්කාරක ගාස්තු) for such services by Publis Silva; and
- that prior to the 1<sup>st</sup> publication of the said book, upon the request of Publis Silva a sum of Rs. 25,000/= was given to the plaintiff by the defendant but the said sum of money was not an advance nor royalty as contended by the plaintiff and moved that the application for interim injunction be rejected.

On 19<sup>th</sup> February, 2009 the High Court delivered order refusing the plaintiff’s application for interim relief.

Thereafter the trial began, evidence led and the learned judge of the High Court delivered judgement in favour of the plaintiff and granted the below mentioned relief:-

- (i) a declaration that the plaintiff has the copyright for the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” and the defendant has violated the plaintiff’s economic rights;
- (ii) a direction for the defendant to submit a full report of books printed and sold and a further declaration for the defendant to pay royalty upon the sales to the plaintiff;
- (iii) a declaration for the defendant to pay a sum of Rs. 837,500/= to the plaintiff in terms of Section 170(10) of the IP Act; and
- (iv) a permanent injunction preventing the defendant from publishing, distributing, possessing and sale of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”.

Being aggrieved by the said judgement, Sarasavi Publishers came before this Court challenging the said judgement on many grounds based upon facts and law and that is the matter that this Court is now called upon to determine in this appeal.

Prior to examining the said judgement. I wish to consider the **copyright regime** in Sri Lanka with a brief overview of what is “copyright”.

‘Copyright’ deals with the rights of intellectual creators in their creation and originated with the creation of paper and vastly grew as a right with the development of the printing industry. ‘Copyright’ or ‘authors right’ is respected world over and blossomed during the medieval time both in the common law and civil law countries. It gained statutory force with the Statute of Anne enacted in England. During the period this country was governed by the British, common law norms on intellectual property which encompassed copyright, entered our domestic legal system through English statutes. We also became parties to many international conventions.

In 1908, we enacted our own statute, Copyright Ordinance which was followed by the Code of Intellectual Property in 1979. In 2003, the present Intellectual Property Act based on the frame work of international treaties and modernized to cater to global trends and specifically to safeguard the interests of owners and users of ‘copyright’ as well as its ‘related rights’ [or neighboring rights as it was termed earlier] was enacted.

Copyright consists of multiple rights. It is a bundle of different rights that spring from the ‘works’. These rights can be ‘assigned’ or ‘licensed’ either as a whole or separately and independently by the ‘owner of the copyright’.

However, there is no copyright in ‘ideas’ and subsists only in the material form in which the ideas are expressed. This gave rise to the “idea-expression dichotomy”. In order to secure copy protection, the author must bestow upon the ‘work’ sufficient ‘judgement, skill and labour or capital’ or ‘sweat of the brow’ as certain jurisdictions refers to the test. The precise amount of ‘judgement/knowledge, or skill and labour’ that is required in order to acquire copyright cannot be defined in explicit terms. It depends on the speciality and facts of each case and is very much a subjective test.

There is no doubt that ‘copyright’ subsists in the original ‘work’ but ‘originality’ does not mean that the work must be of original or inventive thought. Nevertheless, the ‘work’ must not be copied from another ‘work’ and it should originate from the author.

**Section 6(1)** of our IP Act enumerates the ‘works’ protected in the literary, artistic or scientific domain ranging from books and speeches to illustrations and sketches. **Section 6(2)** specifies that the ‘works’ referred to in **Section 6(1)** is protected by the sole fact of its creation, irrespective of its mode or form of expression, as well as its content, quality and purpose.

**Sections 9 and 10** of the IP Act bestows upon the ‘owner of copyright’ a series of exclusive rights to authorize certain acts termed ‘**economic rights**’ which include reproduction, adaptation and distribution of the works as well as an independent ‘**moral right**’.

**Section 13** gives the duration of copyright or the period upon which a work can be protected.

**Section 14(1)** indicates the ‘original owner of economic rights’ to be the ‘author who created the work’. However, this is subject to certain restrictions more fully referred to in sub-sections (2), (3) and (4) of Section 14.

**Section 15** clearly lays down the ‘presumption of authorship’ as the physical person whose name is indicated as the ‘author’ on a work. **Section 16** provides for assignment or licensing of authors rights by the ‘owner of the copyright’.

**Section 22** details the rights of the ‘owner of copyright’ to seek remedy in a court of law and or to seek the intervention of the Director-General of Intellectual Property for dispute resolution, in the event any person infringes or is about to infringe any of the rights protected under the IP Act. **Section 170** elaborates the infringement and the remedies in greater detail with regard to any of the recognized rights granted and safeguarded under the Intellectual Property Act which includes ‘copyright’.

Having referred to the relevant provisions of the IP Act in a nutshell, let me now proceed to examine the ‘work’ which is in issue in this appeal. In my view, such an examination at the outset is crucial, in view of the nature of this ‘work’ and as the ‘work’ itself is a repository of material that answers many issues that crop up in this appeal.

The ‘work’ marked **P3** at the trial, is the book titled “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඞුම්”, a cookery book in Sinhala consisting of 279 pages. (A literal translation of the title would be Mount Lavinia Hotel Publis Silva’s Local Cuisine) It has a coloured removable outer jacket. The front cover prominently depicts the face of Publis Silva. He is in a chef’s hat and his image covers the right half of the front cover. The words ‘Mount Lavinia Hotel’ embedded in the iconic building is depicted on the top left of the front cover. The title of the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඞුම්” is in black printed at the bottom left, in four lines, top two lines in bold font and smaller.

The back cover of the book, on top indicate the title of the book, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඞුම්”. The following statement appears right below the title:

“ශ්‍රී ලංකාවේ විශිෂ්ටතම සුප්‍රසිද්ධ කවුරුන්දැයි කවරෙකු හෝ ඇසුවහොත් බොහෝ දෙනෙකුට එකවර සිහිපත් වනු ඇත්තේ පබ්ලිස් සිල්වාගේ නමය. ගල්කිස්ස මහ හෝටලයේ ප්‍රධාන සුප්‍රසිද්ධ ලෙස ඔහු අද ශ්‍රී ලංකාව පුරාත්, ජාත්‍යන්තර ලෝකයේත් කීර්තියක් දිනුවෙකි. ගල්කිස්ස මහ හෝටලයේ අඟුරු ඇදීමේ රස්සාවට පැමිණ, එතැනින් අරක්කැමියෙකු ලෙස උසස් වී, කළමනාකාර දුරයකට පත් වී, අවසානයේ නතරවූයේ එම හෝටලයේම අධ්‍යක්ෂවරයෙකු බවට පත්වීමෙනි. හතරවැනි පන්තියට ඉගෙන පහළම තලයකින් ආරම්භකොට ඉහළම තලයට ළඟා වූ ඔහු දෙයිර්මත් තනි මිනිසෙකු පිළිබඳ පූර්වාදර්ශයක් බඳුය.

පබ්ලිස් සිල්වා ශ්‍රී ලාංකික සුප්‍රසිද්ධ අතර විශිෂ්ටත්වයට පත් වූයේ ඔහු මේ කලාව ඉතා මැනවින් ප්‍රගුණ කිරීම නිසා පමණක් නොවේ. ඔහු ශ්‍රී ලංකාවට ආවේණික ඉවුම් පිඞුම් කලාවක් හඳුන්වා දීමට පුරෝගාමියා ද වූයේ ය.....”

The bottom of the back cover depicts a picture of Publis Silva in chef kit cooking in front of a stove, holding a pan in one hand and a spoon in the other. The name of Sarasavi Publishers is depicted on to the right of the back cover.

The title of the book is repeated and depicted inside the book in the 1<sup>st</sup> page. It is conspicuously printed in black and standing alone in a very noticeable font. Similar to the front cover, the words “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ” is in slightly smaller font compared to the “හෙළ රටාවට ඉවුම් පිහුම්”. The name “පබ්ලිස් සිල්වාගේ” is in bold type and clearly identifiable.

Whilst, the 2<sup>nd</sup> page is blank, the 3<sup>rd</sup> page also depicts the title of the book, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”, in similar font as the cover and 1<sup>st</sup> page and is at the very top. The words “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ” is slightly smaller to “හෙළ රටාවට ඉවුම් පිහුම්” and the words “පබ්ලිස් සිල්වාගේ” is in black and eye catching.

The center of the 3<sup>rd</sup> page depicts in smaller lettering the name of the plaintiff, Dharma S Samaranayake as the editor (සංස්කරණය) and the bottom of the page depicts the name of the defendant, Sarasavi Publishers, its logo and the address.

The 4<sup>th</sup> page which is commonly referred to as the “title page” indicates in a clear and distinctive manner the following details: -

#### At the top

- The initial publication- March 2005
- ISBN No
- © **Publis Silva** [the holder of the copy right by the notation “©”]

#### At the center

- Computer page formatting and type setting by Pushpananda Ekanayake of ‘The Font Master’ and address
- Cover page by Sisira Wijetunga

#### At the bottom

- Printed by Tharanji Prints and the address

The **title page** is followed by the ‘**editors note**’ (සංස්කාරකගේ සටහන). It runs into three pages, bearing page numbers 5, 6 and 7. (The numbering of the pages begins from page five).

In **page 7**, at the end of the ‘editors note’ the name of the plaintiff is indicated very clearly together with the address and contact details including the e-mail address.

At **page 9**, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වා” pronounces his heart felt gratitude (මිඛ සැමට මාගේ හක්කි ප්‍රණාමය) and acknowledges many including the management of Mount Lavinia Hotel, the plaintiff and the defendant. **Pages 8** and **10** are kept blank and at **page 11**, it signifies that the book is dedicated to the Chairman of Mount Lavinia Hotel, Sanath Ukwatta and all readers with an epicurean taste.

**Page 12** depicts the **index** of the book, consisting of *14 chapters*. **Page 13** indexes the coloured photographs (in glossy finish) of 24 food styling, appearing in the book with the relevant page numbers. These food items range from *Waraka Pudding* to *Tibbatu Curry*.

Just below the heading ‘Coloured Photographs’ (වර්ණ ඡායාරූප පිටු), a statement acknowledging that the *photographs are published with the courtesy of Mount Lavinia Hotel and all rights of the photographs taken by Sisira Wijetunga are reserved with Mount Lavinia Hotel is depicted. It prohibits reproduction of the photographs in any form, without prior written permission of Mount Lavinia Hotel.*

**Pages 14 to 16** is a ready reckoner to 378 recipes contained in Chapters 11,12 and 13 of the book. **Chapter 11** heading ‘**Publis Special- Recipes Invented by Publis Silva**’ is followed by **Chapters 12 and 13** general recipes and reader’s recipes. These recipes spanning from pages 73 to 274 (200 pages) consist of the major part of the cook book, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉටුම් පිහුම්”.

Pages 14,15 and 16 of the ‘work’ *i.e.*, the afore discussed index to the recipes reflected in chapters 11,12 and 13 is followed by **Chapters 1 to 10**. Whilst chapters 1 and 2 depicts the life of Publis Silva, a short commentary on food is found in chapters 3 to 10.

**Chapter one**, heading “මා ආ මාවන” is the auto biography of ‘Publis Silva’ beginning at page 17 and consists of 16 pages. In this chapter Publis Silva narrates in ‘first person’, his life story, his village, his family, his education, first job, journey to Colombo, first assignment at Mount Lavinia Hotel as a helper of the hotel kitchen, initial duty to carry coal to light the kitchen hearth and his gradual rise to the top and includes his foreign tours sponsored by Mount Lavinia Hotel. His assignment to serve at the table of the chairman of Mount Lavinia Hotel as well as a cook at the official residence of the Governor General is highlighted in this chapter and concludes by his special interest in ‘enhancers’ and ‘curry powders’ predominantly used in Sri Lanka, which interest he says was awaken when in India.

**Chapter one** ends with the following statements which demonstrates Publis Silva’s mission in life with regard to Sri Lankan cuisine.

“මම ඒ වෙනස හඳුන්වා දුනිමි. මේ ආදී වශයෙන් මේ ග්‍රන්ථයේ වෙන්ව ඉදිරියේදී හඳුන්වාදෙන සුප ක්‍රම එක්රැස්කොට අපේ සුප කලාවේ ප්‍රමිතියක් සකස් කිරීම මගේ අරමුණයි.” (page 33)

**Chapter two** of the book consisting four pages (page 34 to 36) is a continuation of the autobiography and depicts Publis Silva’s interest in the culinary field, representing Mount Lavinia Hotel at foreign symposiums, conducting exhibitions for chefs of lesser known hotels and gives pride of place to UK Edmund, Chairman of Mount Lavinia Hotel for his (Publis Silva’s) success in life.

These two chapters are followed by chapter 3- the history of culinary; chapter 4- food prior to Vijaya era; chapter 5- food and nutrition; chapter 6- the traditions around partaking of food; chapter 7- preparation of food; chapter 8- quality of food; chapter 9- food enhancers; chapter 10- health guide lines in preparing food; and chapter 14- cooking hints. These chapters 3 to 10 and 14 span through only 37 pages of the 279 page cook book, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉටුම් පිහුම්”.

The inner page of the front cover is a quotation from chapter 3 on history of food. The inner page of the back cover reads as follows:

“පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම් ශ්‍රී ලංකාවේ පළවන පළමු අංග සම්පූර්ණ සුප ශාස්ත්‍ර ග්‍රන්ථය යි. එය ඉවුම් පිහුම් කලාවේ ස්වදේශික ලකුණක් ඇති කළ, ශ්‍රී ලාංකික අන්‍යාත්මක බිහි කළ පබ්ලිස් සිල්වා සුපවේදියාගේ ප්‍රථම ග්‍රන්ථය යි. මෙතෙක් විවිධ විද්‍යුත් හා මුද්‍රිත ජනමාධ්‍ය මගින් සුපවේදය පිළිබඳ පබ්ලිස් සිල්වාගේ විශේෂඥභාවය අනාවරණය කරගෙන ඇතත් එය ග්‍රන්ථයකට ගොනුවන ප්‍රථම අවස්ථාව මෙය යි...” (emphasis added)

From the foregoing and on a careful examination of the ‘work’ in dispute, and specifically the title page, it is demonstratively seen that the copyright of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” lies with Publis Silva. Title page clearly and unequivocally notes by the notation “©” **Publis Silva**, that the copyright of this book, first published in March 2005, is with Publis Silva.

There is also no ambiguity that the ‘editor’ of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” is the plaintiff, Dharma S Samaranayake. Page 3 of the book and the ‘editor’s note’ at pages 5 to 7, clearly recognize and refer to the ‘editor’, Dharma S Samaranayake, the plaintiff in the instant case.

Thus, *prima facie*, the ‘work’ in issue, edited by Dharma S Samaranayake bestows the copyright of the book upon Publis Silva.

However, the finding of the learned High Court Judge was that the plaintiff is entitled to copyright of the book, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”.

In this appeal the crux of the issue to be determined by this Court is, *did the High Court Judge err when it came to the finding, that the owner of the ‘copyright’ of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” is the plaintiff, and if so, did the High Court err in granting relief to the plaintiff?*

Having referred to the factual matrix of the ‘work’ in dispute, let me now move over to the legal provisions governing the matter before us. i.e., Part II of the Intellectual Property Act, consisting of two chapters, chapter I- ‘copy right’ and chapter II- ‘related rights’. Whilst **sections 5 to 16** discussed in this judgement falls within chapter I- copy right, **Section 22** pertaining to remedies is placed ironically in chapter II, the related rights chapter.

In terms of the interpretation section *i.e.*, **Section 5**, the word ‘author’ means the physical person who created the work and in terms of **Section 14(1)** of the IP Act, the ‘original ownership’ of the ‘economic rights’ in a work is with the ‘author’ who created the work. This presumption however, is subject to three exemptions referred to in sub-sections (2), (3) and (4) of the said section 14, *viz* joint ownership, collective work and in the course of another’s employment, where the ‘original authorship’ will lie with the co-authors, or the physical person at the initiative and or under the direction of whom the work was created or the employer, subject to the provisions referred to in the said sub-sections respectively.

In terms of **Section 15(1)** the physical person whose name is indicated as the ‘author’ on a work in the usual manner, is presumed to be the ‘author’ of the work, unless proved otherwise.

The above sections clearly denote that in a ‘work’ the ‘author’ indicated therein, is the ‘holder of the copyright’ and upon whom the economic rights are bestowed.

In “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්” the work in dispute, there is no person indicated and identified as an ‘author’. Thus, the question for determination is who owns the copyright of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්”?

Is it the copyright holder signified by the notation “©” or the editor or the compiler or a 3<sup>rd</sup> party?

In order to ascertain an answer to the said question, I wish to examine the ‘work’ in greater detail.

The title page (page 4) clearly identifies that the copyright of the book is bestowed upon Publis Silva by the notation “©”.

In page 3, the role of the plaintiff has been clearly and precisely recognized and acknowledged as the ‘editor’ (සංස්කරණය). The plaintiff has penned the editor’s note (සංස්කාරකගේ සටහන) running into three pages and has categorically accepted that she is doing so as the ‘editor’.

The editor’s note begins at page 5 with the following words, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම් නමැති ග්‍රන්ථයේ සංස්කරණය වෙනුවෙන් සටහනක් තබනු පිණිස”. At page 7, the editor Dharma S. Samaranayake profusely thanks Publis Silva whom she accepts as the ‘true owner’ of the book ( මේ සන්ක්‍රියාවේදී පලමුවෙන්ම මාගේ ස්තූතිය පිරිනමන්නේ මේ ග්‍රන්ථයේ සැබෑ හිමිකරුවා වන පබ්ලිස් සිල්වා මහතාටය)

Publis Silva too, at page 9 in his appreciation and acknowledgement, (ඔබ සැමට මාගේ හක්ති ප්‍රණාමය) values the contribution made by the plaintiff in the following manner “මෙවන් ග්‍රන්ථයක් ඔබ අතට පත්කිරීමට මා යොමු කළ ධර්මා එස්. සමරනායක මාධ්‍යවේදිනිය”

The back cover and the inner back cover of the book (quoted earlier in this judgement), clearly acknowledge that this is the 1<sup>st</sup> book of Publis Silva, a renowned chef who has given a Sri Lankan identity to the culinary field and goes onto explain his vision to bring out this book. Publis Silva’s vision and mission is more fully referred to in chapters one and two.

In my view, the information and the specific details narrated above, distilled and elicited from the ‘work’ itself, sheds sufficient light to establish and answer the principal question in issue in this appeal viz, who is the original ‘owner of the copyright’ of the work “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්”. It is non-other than Publis Silva himself.

Further, the 1<sup>st</sup> edition of this book was published in March 2005 and was launched at a ceremony held on 06<sup>th</sup> April, 2005 at the BMICH. The four page invitation for the event (in Sinhala and English) marked at the trial as V3 (pages 425-428 of the brief) indicate thus;

*“The internationally famous chef of Mount Lavinial Hotel, **Publis Silva launches his book** ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්”*

Upon perusal of the invitation it is observed that at the launch, an address by Dharma S Samaranayake, the ‘compiler’ (සම්පාදකා) of the book was slotted in as the penultimate item.

The plaintiff filed this action on 30<sup>th</sup> July, 2008 praying for royalty and moving for enjoining order and interim injunction, three years after the launch and publication of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”. By then the 6<sup>th</sup> edition was published and a copy of the 6<sup>th</sup> edition was annexed to the plaint by the plaintiff.

On 19<sup>th</sup> February, 2009 the High Court after hearing the parties rejected the plaintiff’s prayer for interim relief. On 16<sup>th</sup> November, 2009 the trial began and admissions and issues based on specific and general grounds raised. Whilst the trial was proceeding on 01<sup>st</sup> April, 2010 the plaintiff filed the 1<sup>st</sup> edition of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” published in March 2005 in court (vide pages 132 - 136 of the brief)

It is observed, this 1<sup>st</sup> edition filed subsequently, is an autographed copy (page 135 of the brief) dated 06<sup>th</sup> April 2005 *i.e.* the date of launch of the 1<sup>st</sup> edition of the ‘work’. It is an established practice, that at a book launch, the book is autographed by the author. The signature appearing in the autographed copy is difficult to decipher but resembles the signature that is appearing at pages 90 and 131 of the brief, *i.e.* of “ටී. පබ්ලිස්”, reflected in the affidavit (V5) tendered by Publis Silva to court dated 03<sup>rd</sup> September, 2008 and in the agreement (V2) executed between Publis Silva and the defendant Sarasavi Publishers dated 22<sup>nd</sup> October, 2003. In fact, the plaintiff in her cross-examination (which will be discussed later) admitted the signature of Publis Silva appearing in the agreement V2, executed between Publis Silva as the ‘author’ and the Sarasavi Publications as the ‘publisher.’

Another significant factor that drew my attention in this appeal, is the assertion of the plaintiff at paragraphs 13 to 15 of the plaint, that chapters 1-11 and 14 - 16 of the book were compiled by her exclusively, whereas in compiling chapter 12 she received positive support from Publis Silva. However, upon perusal of the book “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” it appears, the said assertion is factually incorrect. The ‘work’ amply demonstrates that this book has only 14 chapters and not 16 as reflected in the plaint and chapter 1 and 2 is the life story of Publis Silva and chapter 11 is a compilation of recipes under the heading ‘Publis Special’ wherein Publis Silva has been acknowledged clearly and precisely as the inventor and creator (පබ්ලිස් සිල්වාගේ අත්හදා බැලීම්) of the said recipes. Further, the date of the launch of the 1<sup>st</sup> edition is erroneously stated in the plaint as 25<sup>th</sup> June, 2005.

The above factors clearly denote that the plaintiff filed the instant case, seeking ownership of copy right, three years after its 1<sup>st</sup> edition and even after the 6<sup>th</sup> edition was published, without annexing a copy of the 1<sup>st</sup> edition and alluding to facts which are demonstratively incorrect as seen from the ‘work’ itself which was led in evidence as P3.

At the trial, the plaintiff gave evidence and the main contention of the plaintiff was that the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” was written by her and that Publis Silva cannot write (මහුට රචනා ගෙලියක් නැහැ, ලියන්නක් බැහැ- page 627 of the brief) and that the script handed over to the publisher was in her hand writing and therefore the copyright of the ‘work’ should be hers.

In cross-examination the plaintiff admitted her role as the ‘editor’ in the following manner:

ප්‍ර- මම අභන්තේ මුළු පොතම?

උ- ලිව්වේ මම. එයා කිව්වම මම ගැලපෙන විදියට ලිව්වා.

ප්‍ර- ඒක සංස්කාරකගේ කාර්යභාරය?

උ- පිළිතුරක් නැත (page 683 of the brief)

Further, she admitted the signature of Publis Silva in the agreement (V2) executed between Publis Silva as ‘author’ and Sarasavi Publishers as the ‘publisher’, wherein the said two parties agreed to publish ‘a compilation of recipes’ in Sinhala titled ‘ගල්කිස්ස මහ හෝටලයේ සිංහල සුප විධි’ (the title of the book being subject to change to one of very similar title) dealing particularly with recipes of food prepared at the Mount Lavinia Hotel under T. Publis Silva’s guidance. By the said agreement the parties *i.e.*, Publis Silva and Sarasavi Publishers, specifically agreed that the ‘author’ Publis Silva will be entitled to a payment of royalty of 15% of the sale price of the book.

In cross-examination, the plaintiff also admitted that many books authored by her had been published by Sarasavi Publishers. One such book was produced at the trial marked V6 (vide pages 429 - 574 of the brief). It was titled “දහකාරයන්ගේ වික්‍රමය (12) - ගිනිමැලයෙන් ආ අමුත්තෝ” and was published in March 2008, prior to filing of the plaint in the instant case. It is clearly seen that in the said book in the title page, the holder of the copyright is signified by the notation “©” and is the plaintiff herself. The plaintiff in her cross-examination admitted that the defendant publishing company has paid royalty to her for the said publication.

On behalf of the plaintiff, a Sinhala scholar gave evidence. He stated that he provided source material to the plaintiff to compile chapter 4 and that he is identified and acknowledged by name at the end of chapter 4. The said chapter consists of four pages and is on history of food prior to Vijaya’s period. He also gave expert opinion in relation to the meaning of the words ‘author’ (කර්තෘ) and ‘editor’ (සම්පාදක) and contended it was one and the same.

For the defendant, the Managing Director of Sarasavi Publishers gave evidence. His evidence pertained to discussions between the parties, namely Publis Silva, Management of Mount Lavinia Hotel, the plaintiff and the defendant, publishing company, in relation to the compilation and other matters connected thereto prior to publication of the ‘work’ P3.

In the affidavit tendered in evidence, at the trial, this witness referred to three other cook books published by Publis Silva and annexed copies of same to his affidavit. The High Court rejected the marking and production of the said cook books, upon the ground that though the said cook books were listed in an additional list of witnesses and documents, such list was not filed of record prior to the commencement of the trial. Court also made order that the said cook books could be produced only if Publis Silva gives evidence. However, this witness (the Managing Director) in his evidence contended that the said cook books are in the public domain and one such book titled “Authentic Sri Lankan Cuisine of Publis Silva”, a cook book printed in English, edited by Piyasiri Nagahawatte was published by Sarasavi Publications in 2011. The holder of the copyright of the said book “Authentic Sri Lankan Cuisine of Publis Silva” is Publis Silva and it is clearly acknowledged by the notation “©” in the book itself, as per the practice of the printing trade, the witness contended.

The 2<sup>nd</sup> witness for the defendant was a former employee of Sarasavi Publishes. He was the Manager, Publications during the period “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ

රටාවට ඉවුම් පිහුම්” was published. This witness gave evidence in relation to the discussions that took place prior to the publication of the works between Management of Mount Lavinia Hotel, Publis Silva, the plaintiff and himself representing the defendant company; the reservations made by Mount Lavinia Hotel with regard to the photographs in food styling to be included in the ‘work’ and also referred to the agreement (V2) which was executed between Publis Silva and Sarasavi Publishers in 2003, wherein he signed as one of the witnesses and identified the signature of the other witness by name as the representative from Mount Lavinia Hotel who was instrumental in the aforesaid discussions. He also gave evidence with regard to the contents of the (V2) agreement, the change of title of the ‘work’ and royalty granted to Publis Silva considering his expertise regarding the said book. In cross-examination, although a valiant attempt was made on behalf of the plaintiff to discredit this witness alleging that the agreement was an after-thought, the witness was unwavering in his evidence and stood his ground. At the time of giving evidence this witness averred, he was not in the employment of the defendant company but at another leading publishing company.

Having referred to the evidence led at the trial, let me now move onto examine the impugned judgement.

The learned judge of the High Court came to the finding that the plaintiff is the copyright holder of the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” mainly upon the ground that the defendant Sarasavi Publishers, failed to call Publis Silva as a witness to substantiate its contention that the reproduction rights of the ‘work’ was assigned to the defendant publishing company by Publis Silva.

The learned judge went onto hold that by not calling Publis Silva and leading his evidence, the defendant failed to rebutt the evidence given by the plaintiff that the ‘work’ was the plaintiff’s own creation. The learned judge also held, the defendant company failed to establish that the plaintiff was employed as an ‘editor’ by Publis Silva; that plaintiff was paid editorial fees (සංස්කාරක ගාස්තු) for editing of the book by Publis Silva and especially the sum of Rs. 25,000/= (admittedly given to the plaintiff by the defendant) was editorial fees given on behalf of Publis Silva and upon Publis Silva’s specific request and not *per se* by the defendant company.

The learned judge did not consider as relevant, the facts and assertions made by the plaintiff in the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” itself, especially the ‘editor’s note’ penned by the plaintiff stating that the ‘true owner of the book is Publis Silva’ and that ‘she (the plaintiff) is penning a few words only as the editor’.

In the judgement the learned judge re-iterated the failure of the defendant to call Publis Silva, as a material fact to establish that the plaintiff was paid to do a job as the ‘editor’ and specifically considered it as a significant factor in deciding this case for the plaintiff. The learned judge also accepted the contention of the plaintiff, that Publis Silva cannot write simply because Publis Silva did not rebutt the said position. (ඒ අනුව පබ්ලිස් සිල්වාට ලිවීමට නොහැකි බවට පැමිණිලිකාරිය පවසන විට පබ්ලිස් සිල්වා පැමිණ රට ප්‍රතිවිරුද්ධ කාරණා නොකියන විට, ඉහත කෘති ඔහු නමින් තිබීම තුලින්ම ඒවා ඔහු තම ලේඛන හැකියාවෙන් ලියූ ලෙස සැලකීම අසීරුය.)

The learned judge also glosses over the facts discussed earlier in this judgement pertaining to **chapters 1 and 2** of the ‘work’ *i.e.*, it is written in the 1<sup>st</sup> person and it is the autobiography of Publis Silva; the narration in the back cover page that this is Publis Silva’s 1<sup>st</sup> complete book on culinary methods; and the wording in the invitation for the launch of the ‘work’, ‘*that internationally famous Chef of Mount Lavinia Hotel Publis Silva launches his book*’ as factors that are irrelevant in coming to a finding regarding the ‘holder of the copyright’ of the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”, the matter in dispute.

Further, more, the learned judge rejects the affidavit filed by Publis Silva (V5), the agreement (V2) executed by Publis Silva and the defendant publishing company and the other cook books published by Publis Silva which are said to be in the public domain, upon the basis of Publis Silva not being present before court to substantiate such facts. The learned judge goes on to assert that the name of Publis Silva was used in the title of the ‘work’ with or without the knowledge of the plaintiff by the defendant, because of its ‘brand name’ and in order to increase the sales. (මෙම කෘතිය අලෙවි කිරීම සඳහා මෙය පබ්ලිස් සිල්වාගේ කෘතියක් ලෙස දැක්වීම සඳහා ප්‍රකාශකයා වන විත්තිකරු සමහර විට පැමිණිලිකාරියගේද අනුදැනුම හා සහයෝගය ඇතිව භාවිතා කළා වීමට බොහෝ ඉඩ කඩ ඇත). Thus, the learned judge asserts that the defendant publishing company has infringed the plaintiff’s economic rights.

The learned judge concludes his findings referring to the use of the notation “©” and holding that the law does not require such a notation and goes on to hold that in any event the use of the notation “©” is not the work of the plaintiff but of the defendant Sarasavi Publishers. The learned judge makes no reference regarding the book authored by the plaintiff (V6) marked and produced at the trial, wherein admittedly the notation “©” is depicted and the plaintiff paid royalty as the copyright holder, by the very same publisher, the defendant Sarasavi Publications.

Thus, based upon the evidence of the plaintiff, which the learned judge re-iterates was not rebutted by Publis Silva, a finding is made firstly, that the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” is the creation of the plaintiff and secondly, that the plaintiff is the ‘author’ of the publication and ‘holder of the copy right’ and thus, grants the following relief prayed for by the plaintiff to the plaintiff,

*namely,*

(i) prayer (a) and (b)

- a declaration that the plaintiff is the author of the ‘work’ and that the defendant publisher has infringed her economic rights;

(ii) prayer (c) and (d)

- a direction for the defendant to tender a report regarding the total sales and a declaration that the plaintiff is entitled to royalty payable by the defendant;

(iii) prayer (e)

- a sum of Rs. 837,500.00 to be paid by the defendant to the plaintiff as damages, computed on the basis of *10% royalty*, on books printed per edition x sale price x number of editions less advance paid; and

(iv) prayer (g)

- a permanent injunction preventing the defendant from printing, distributing, possessing and selling the ‘works’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉටුම් පිහුම්”.

The **computation of damages detailed in the judgement** is given below: -

- Total sale proceeds =	$\left[ \begin{array}{l} \text{Number of books x number of} \\ \text{per edition} \qquad \qquad \text{editions} \end{array} \right] \times \text{sale price}$	
=	2000 x 6x Rs 700/=	= Rs 8,400,000/=
- Royalty	= [10% of sales]	
=	Rs. 8,400,000/= x 10%	= Rs 840,000/=
- <b>Damages</b>	= [Royalty – advance paid]	
=	Rs 840,000/= - 25,000/=	= <b>Rs 837,500/=</b>

At the hearing before this Court, the submissions of the counsel for the appellant publishing company was as follows:

- that the learned High Court judge failed to analyse the evidence adduced at the trial with regard to the plaintiffs’ role as the ‘editor’ of the ‘work’;
- that the learned judge failed to consider the evidence *vis-a-vis* the provisions of **Section 14(3) and 14(4)** of the IP Act;
- the plaintiff failed to establish the authority she received and/or her relationship with Publis Silva to publish Publis Silva’s ‘ideas’ in the ‘work’ and to use Publis Silva’s picture and name in the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉටුම් පිහුම්”, by way of an express or implied contract or agreement or even as a ‘common understanding’ between the parties;
- that the learned judge failed to consider the delay and the silence of the plaintiff for more than two years, which creates a doubt regarding the genuineness of the cause of action; and
- that the plaintiff has failed to name Publis Silva as a party to the instant action.

Further the learned Counsel relied upon the judgements of **University of London Press Ltd v. University Tutorial Press Ltd [1916] 2 Ch 601; Macmillan and Co. Ltd v. Cooper (1924) 40 TLR 186; and JD Fernando v. Gamlath - S.C/CHC/04/2011- BASL LJ [2011] Vol XVII p.251-254** to substantiate its position.

Countering the said submissions, the counsel for the respondent took up the position,

- based upon **Section 5** of IP Act the plaintiff is the owner of the copyright;

- the defendant publishing company has failed to call Publis Silva to establish that the ‘work’ was a ‘commissioned work’; and
- the compensation granted by the High Court based on six editions is insufficient as there were twelve editions of the ‘work’ published.

Having referred to the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”, the impugned judgement, the submissions of the counsel for the appellant and the respondent, it is clear that Publis Silva plays a major role in the instant case. This brings me to the pivotal issue to be determined by this Court. Who is the ‘copyright holder’ of the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”?

**JAL Sterling** in his renowned work, “**World Copyright Law**” [2<sup>nd</sup> ed] emphasizes as follows:

*“The word ‘copyright’ means many things to many people. To some it signifies a component of the rights of man deriving from natural law and sustaining the work of the human mind by protecting authors in respect of all uses of their works. To others it represents a commercially inspired monopoly for the better regulation of the exploitation of the author’s works in the market place. In between are other concepts, each with its own philosophical and juridical justifications.”*

The law of copyright protects ‘work’ which are created as a result of an individual’s creativity. Thus, it concerns the ‘creators’, literary and artistic creations and safe guards the legitimate interests of the ‘users’ of such creation. These concepts were originally embodied in the Berne Convention for the Protection of Literary and Artistic Works and are the main ingredients and the rationale underlying the protection of copyright, which have now entered domestic legal systems.

Granting of copyright therefore is in the nature of a privilege granted by law to certain types of creative works. Its primary purpose is to foster originality in literary, artistic and scientific productions and to afford legal protection to the authors. The goal of the provisions pertaining to copyright seems to be to encourage creation of and facilitate public access to works of intellectual interest to society. [See: **Vasantha Obeysekara v. A.C.Alles - CA No. 730/92F dated 22-03-2000**].

In **University of London Press Ltd v. University Tutorial Press Ltd** (supra) Peterson, J., at page 608 observed:

*“The word ‘originality’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas but with the expression of thought. [...] But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work, that it should originate from the author”.*

In **Macmillan and Co. Ltd., v. Cooper** (supra) Lord Atkinson at page 190 observed:

*“What is the precise amount of knowledge, labour, judgement or literary skill or taste which the author of any book or compilation must bestow*

*upon its composition in order to acquire copyrights within the meaning of the Copyright Act of 1911, cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and in each case be very much a question of degree.”*

The above observations have been re-iterated by our appellate courts time and time again [See: **Wijesinghe Mahanamahewa and another v. Austin Canter [1986] 2 Sri LR 154; JD Fernando v. Gamlath [2011] 1 Sri LR 273** and **Director Department of Fisheries and Aquatic Resources and others v. Aloy Fernando and others SC/CHC/Appeal 30/2006 S.C.M. 10-09-2018]**

In order to establish ‘creativity’ and ‘ownership of a copyright’ which is distinctive from authorship, the factors to be proved and evidence to be led on skill, labour and knowledge would depend and vary on the special facts of each case and is very much a subjective test.

In **Fernando v. Gamlath** (supra) this Court clearly identified and recognized the reputation of a singer and went onto state that there has to be a way of safeguarding the rights of original artists, composers and singers especially when a singer has achieved a reputation which would be recognized from generation to generation.

In my view, such recognition could extend to a chef too, like in the instant case and his creations and copy right safeguarded for generations, regardless of him being able to read or write, educated or not so educated, a ‘cook’ (අරක්කුමියකු) rising up from humble beginnings or a chef (සුපවේදියකු) who has made an indelible mark in the culinary field here and overseas.

In a ‘work’, identification of the ‘author’ is paramount in deciding who the owner of the copyright is, since the author is entitled to not only ‘economic rights’ but ‘moral rights’ too, as guaranteed by **Sections 9 and 10** of the IP Act. To have the name of the author indicated in a work prominently is a ‘moral right’ and such right is not transmissible during the lifetime of the author. It is independent to the economic rights and will exist even after the author of the work has assigned the economic rights to another.

In the case before us, as discussed in detail earlier in this judgement, an ‘author’ is not identified in the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”. However, in the title page, the holder of copyright is clearly and precisely identified by the notation “©”, namely as “Publis Silva”.

The case presented by the plaintiff is that she is the author, whereas the ‘work’ itself only recognizes her as the ‘editor’. The plaintiff is suing the defendant publishing company for royalty, and the contention of the publishing company is Publis Silva, the ‘holder of the copyright’, has assigned the re-production and publishing rights of the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” to the defendant publishing company.

The plaintiff did not name or bring Publis Silva with whom she alleges she had an understanding (පොදු එකඟතාව) to this case either as a party for notice only or as a necessary party to justify her contention that she is the ‘author’ of the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”. Similarly, the plaintiff did not call or lead the evidence of Publis Silva as a witness, for the plaintiff to establish her contention or to challenge Publis

Silva for using the notation “©” in the ‘work’ in dispute, which she contends is her creation and upon which she claims she is entitled to royalty as the ‘author’ and ‘holder of copyright’.

In my view, the plaintiff’s failure to call or name Publis Silva who is a key player and literally adorns the ‘work’ cover to cover is a material fact that the learned judge has missed, ignored, and not considered in coming to its finding. It is more so and propound, since Publis Silva who was hitherto acknowledged and paid royalty as the holder of the copyright of the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” for six editions, has now been deprived of that right and privilege without hearing him, which goes against the grundnome of the rule of law.

The gravity and importance in bringing the necessary parties before court, time and time again enunciated by this Court. In the said backdrop, I wish to look at the case law pertaining to the copyright regime in Sri Lanka (especially civil) to ascertain and identify the necessary parties that have been brought before our Courts, as defendants, in matters pertaining to infringement of copyrights.

In **Mahanama hewa v. Canter** (supra), the dispute related to two publications authored by the plaintiff and the 1<sup>st</sup> defendant on sinhala shorthand. The plaintiff alleged, that his copyright has been infringed by the 1<sup>st</sup> defendant and the question of originality of the work was the matter in issue and both parties were before Court and heard in determining the issue on ‘originality’.

In **Fernando v. Gamlath** (supra) the dispute related to a musical composition of a renowned singer, plaintiff’s late husband, which was alleged to be infringed by the defendant by distorting and using it in a teledrama without the permission of the plaintiff the holder of the copyright. In this case too, both parties were represented and heard prior to judgment being pronounced.

In **Ariyawathie Senadheera and another v. Shantha Senadheera and another SC/CH/Appeal 40/2010 S.C.M. 22-06-2017** the dispute revolved around a book titled “නුතන චිත්‍ර කලාවේ රසික සංකල්ප” authored by Kulanatha Senadheera an artist and scholar. Upon his death, a 2<sup>nd</sup> edition was published and the heirs of the author sued the alleged copyright holder the 1<sup>st</sup> defendant, [a relative who was signified by the notation “©” in the relevant publication viz the 2<sup>nd</sup> edition] and two others. The 1<sup>st</sup> defendant *i.e.* copyright holder, denied he was the copyright holder though cited by the notation “©” in the 2<sup>nd</sup> edition and acknowledged Kulanatha Senadheera as the copyright holder. The plaintiff thereafter did not pursue the case against the 1<sup>st</sup> defendant (whose name was signified by the notation “©”) as well as the 3<sup>rd</sup> defendant, the publisher of the book and proceeded only against the 2<sup>nd</sup> defendant a nephew of the author, who was alleged to be directly responsible for the publication of the 2<sup>nd</sup> edition, without the express authority of the heirs of the deceased author. The High Court, having heard the evidence of the plaintiff and the 2<sup>nd</sup> defendant and taking into consideration the stand of the 1<sup>st</sup> and 3<sup>rd</sup> defendants, dismissed the application of the plaintiff pursued against the 2<sup>nd</sup> defendant. This decision was upheld by the Supreme Court. Thus, in this case too, the necessary parties were before court and heard prior to dismissal of the plaint.

In **Director, Department of Fisheries and Aquatic Resources and others v. Aloy Fernando** (supra), the Department of fisheries called tenders for a ‘compilation of fishing crafts, gear and methods’ for a UNDP project. The plaintiff and another person were hired for the said project by the Department of Fisheries and the said two persons submitted a report, ‘a compilation’ under their name. This report was published by the Department of Fisheries and in the ‘published work’, the plaintiff and the co-authors names were not included nor acknowledged, which ensued in the plaintiff filing this case against the defendant, Department of Fisheries, praying for a declaration that the plaintiff and the other, were the ‘co-authors’ of the ‘published works’. Hereto, the court heard both parties who were before court prior to granting relief to the plaintiff.

From the foregoing it is apparent that all relevant and necessary parties have been brought before court as parties, represented and heard, prior to the trial court coming to a finding, regarding the ownership of the copyright and consequently the infringement of the copyright of the ‘work’ *per se*, in the cases referred to above.

In the instant case the main actor, the copyright holder, has not been brought before court as a party nor heard, prior to delivery of the judgement. Thus, an important link is missing in the equation. The learned High Court judge goes on the basis, that the defendant publishing company, did not bring Publis Silva to establish its defence. Is it the responsibility of the defendant or the plaintiff? Where does the burden lie?

The stand of the defendant publishing company is that the reproduction or the publishing rights were assigned to it by the ‘creator’ and the ‘copyright holder’ of the ‘work’ as evince by the agreement (V2) executed between Publis Silva and the defendant publishing company. Plaintiff is challenging the said position and states, she as the ‘author’ entered into an understanding with the defendant, to reproduce the ‘work’. Then shouldn’t the plaintiff first establish the said position. *i.e.*, that she is the author and she entered into an agreement to assign and/or license the defendant publishing company, to exploit her economic rights?

In my view, the plaintiff’s real dispute appears to be not with the defendant publishing company but with Publis Silva himself who is recognized and identified by the notation “©” as the holder of the copyright of the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”.

In the impugned judgement, it is clearly seen that the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” *per se*, *i.e.*, the introductory pages, the title page, the front and back cover and its contents have not been examined by the learned judge. Nevertheless, based only on the evidence of the plaintiff and the assumption that the defendant failed to call Publis Silva to rebutt the evidence of the plaintiff and considering it to be the key element, the High Court judge gave judgement for the plaintiff accepting her as the ‘author’ and ‘copyright holder’ of the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”.

Thus, the queries that need answer in the first instance or in other words, the threshold issues this Court should determine is, who is the creator? Who should call Publis Silva? Is it the plaintiff or the defendant? Who should establish the case in order to obtain the relief prayed

for? On whom does the burden of proof lie to substantiate the claim? Has the plaintiff proved the instant case on balance of probability or has the plaintiff failed to establish her contention?

In my view, Publis Silva is a necessary party to the instant matter, and the plaintiff has failed to name him as a party or call him as a witness to justify her contention that she is the author and the copyright holder, especially, since the ‘work’ prominently carry the notation “©” and bestows the copy right on Publis Silva. The defendant is only the publishing company and has no role to play in respect of the dispute pertaining to copyright between the plaintiff and Publis Silva. The significance in the plaintiff not bringing Publis Silva as a party or a witness to the instant case is greater, than the defendant calling him, as a witness to rebut the plaintiff’s evidence as opined by the learned judge, since the burden lies on the plaintiff to establish her case. Moreover, the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්”, specifically acknowledges and identifies Publis Silva as the ‘holder of copyright’ by the notation “©” and that fact too, has to be negated by the plaintiff. Hence, my considered view is that the plaintiff has failed to discharge the burden of proof and thus, failed to establish the case for the plaintiff.

Regarding to the notation “©”, the learned High Court Judge determined, it is not relevant, since our IP Act does not mandate such a notation. There is no dispute that our IP Act does not recognize registration of a ‘copyright’ with a state authority or in a particular register. Our law based on the Berne Convention and common law concepts protects the ‘works’ from its creation as opposed to other jurisdictions where registration is mandatory. **Section 6(2)** of the IP Act provides that the ‘specified works’ referred to in **Section 6(1)** is protected by the sole fact of its creation and irrespective of its mode or form of expression, as well as its content, quality and purpose. Nevertheless, the publishing companies in Sri Lanka uses the notation “©”, to indicate the ownership of copyright following global trends.

In **Ariyawathie Senadheera v. Shantha Senadheera** (supra), the copyright acknowledged by the notation “©” was the matter in issue and this Court considered such notation in arriving at its determination. Hence, there is judicial precedence to rely on such notation and in my view the learned High Court judge erred in rejecting the notation “©” *in limine* and more so, what it symbolizes, namely, that the copyright holder of the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්” is Publis Silva.

Another factor that the counsel for the appellant drew the attention of this Court was the learned judge’s failure to distinguish “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්” with a book authored by the plaintiff herself titled, “දහකාරයන්ගේ වික්‍රමය” (V6) and published by Sarasavi Publications. This Court observes, that the very same Dharma S. Samaranayake the plaintiff, has been acknowledged as the copyright holder by the notation “©” in the title page of the said book (V6) and paid royalty for her creation by Sarasavi Publishers, the very same defendant before this Court.

We also observe, that the learned judge has failed to appreciate the evidence of the 1<sup>st</sup> witness for the defendant, the Managing Director of Sarasavi Publishers, who referred to another cook book published by Sarasavi Publishes, titled “Authentic Sri Lanka Cuisine by Publis Silva” wherein too, the notation “©” is used, acknowledging that the copyright of the said book is with Publis Silva.

Hence, in my view, though the IP Act does not require any formality relating to ‘copyright’ it is evident in the publishing trade that the symbol “©” is vastly used to denote the holder of copyright and use of the said notation “©” has become a trade practice. Ironically, it has been used even in a book authored by the plaintiff (V6) herself, as discussed earlier.

**DM Karunaratne**, in his book “**An Introduction to the Law of Copyright and Related Rights in Sri Lanka**” at page 39 observes as follows:

“The Indian Copyright Act for example, provides for registration of a copyright but it is not mandatory and is only *prima facie* evidence as it being entered in the Register of Copyright. In the United States of America, an action for infringement of copyright cannot be initiated unless the copyright is registered, subject to an exemption in respect of a work covered by the Berne Convention and work in question has been created in a country other than the United States of America”.

I am also mindful that our IP Act by **Section 26**, has extended the scope of the application of our copyright and related rights law to non-nationals and to ‘works’ that are protected in accordance with any international convention or agreement to which Sri Lanka is a party.

Thus, a harmonized legal framework on copyright through increased legal certainty, while providing for a high level of protection of intellectual property will foster creativity. Hence, a consideration for trade practice, especially the use and significance of the notation “©”, without rejection in toto, in my view would auger well, for both the creators and the printing industry of this country.

In the said circumstances, especially when the ‘work’ itself acknowledges, by the notation “©” that the ‘copy right holder’ is Publis Silva, the failure of the plaintiff to name Publis Silva as a party to this case and more so, the failure of the plaintiff to call Publis Silva as a witness are relevant factors which should have been addressed by the learned judge, prior to coming to a finding on the question of copyright, since the paramount duty of a judge is to ascertain the truth at a trial.

In the instant case, the learned judge not only held that the plaintiff was the ‘author’ and ‘copyright holder’ and directed the publishing company to pay royalty to the plaintiff on the assumption that the ownership of the copyright of “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉඩුම් පිහුම්” is with the plaintiff but deprived Publis Silva, of his copyright without hearing him. The learned judge, came to such a conclusion, when Publis Silva is expressly acknowledged in the ‘work’ as the copyright holder by the notation “©” and moreover, when Publis Silva has been enjoying such right for the past nine years, flowing through many editions of the ‘work’. The gravity of the finding of the learned judge, becomes significant since there is an express agreement (V2) before court implying that the rights of the copyright holder for publishing and reproduction of the ‘work’ had been assigned to the defendant publishing company by Publis Silva himself even prior to the publication of the 1<sup>st</sup> edition of the ‘work’.

Thus, I see merit in the submissions of the appellant, that the High Court judge failed to analyse the evidence before court in determining the ownership of the copyright of the work “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඤ්ඤා”. It is also observed that the learned judge failed to appreciate the role of the plaintiff *i.e.*, as the ‘editor’ of the work “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඤ්ඤා” *vis-a-vis* the copyright holder and more so, when the ‘work’ was a compilation and a compilation of recipes - a cook book. The mere fact of providing assistance in an abstract level as an editor or compiler, in my view will not entitle a person or a party to claim creativity of a ‘work’ and more so, the ownership of copyright of the said ‘work’.

The learned counsel for the appellant as his next submission drew the attention of this court to **Section 14(3)** and **14(4)** of IP Act and contended that the learned judge has failed to analyse the provisions of the said sub-sections *vis-a-vis* the evidence led in arriving at the finding that the copyright of the work is with the plaintiff.

The said sub-sections read as follows:

**Section 14(3)** - In respect of a collective work, the physical person [...]at the initiative and under the direction of whom or which the work has been created shall be the original owner of the economic rights.

**Section 14(4)** - In respect of a work created by an author employed by a physical person [...] the original owner of the economic rights shall, unless provided otherwise by way of a contract, be the employer. If the work is created pursuant to a commission, the original owner of economic rights shall be, unless otherwise provided in a contract, the person who commissioned the work.

The learned judge in his findings, limits his observations to the sub-section pertaining to an ‘author employed by a person’ *i.e.*, **Section 14(4)** and determines, that the defendant cannot rely on this sub-section, since Publis Silva was not called by the defence, the publishing company.

Nevertheless, it is seen that the aforesaid sub-sections **14(3)** and **14(4)** clearly denotes that in the event the ‘work’ *is done or created at the initiative and under the direction of another or in the course of employment or pursuant to a commission*, the person under whose direction or the employer or the person who commissioned the work shall be the original owner of the economic rights.

In the instant case, the plaintiff categorically admitted that the work was created under the direction of Publis Silva. (ලිව්වේ මම, එයා කිව්වම මම ගැලපෙන විදියට ලිව්වා).

Further, the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඤ්ඤා” clearly denotes that the content therein, is of *Sri Lanka Cuisine* by **chef Publis Silva of Mount Lavinia Hotel**. Moreover, the colour photographs included in the ‘work’ is published with the courtesy of Mount Lavinia Hotel and all rights of the photographs are reserved with Mount Lavinia Hotel. The ‘work’ itself is a compilation of 378 recipes. chapter eleven specifically refers to “Publis Special”- recipes invented by Publis Silva and chapters one and two is the autobiography of Publis Silva. The front and back cover pages feature Publis Silva and the

inner back cover page indicate the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඞුම්”, is chef Publis Silva’s 1<sup>st</sup> book. (පබ්ලිස් සිල්වා සුපවේදියාගේ ප්‍රථම ග්‍රන්ථයයි).

In the aforesaid, I find it difficult to fathom the rationale of the learned judge, when he shifts the burden of proof to the defendant and opines that the defendant publishing company should have called Publis Silva to rebut the evidence of the plaintiff. Similarly, the learned judge’s finding that Publis Silva was not called by the defendant, because the defendant may with or without the knowledge of the plaintiff use the “brand name” or good will of Publis Silva as a marketing tool, and for that reason the original economic rights of the ‘work’ should vest with the plaintiff, to say the least is incomprehensive.

This is especially so, when the plaintiff herself pens, the ‘editorial note’ as ‘editor’ and not as the ‘author’. The ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඞුම්” as discussed herein admittedly acknowledges the plaintiff as the ‘editor’ and not as the ‘author’. This leaves me with an unanswered query. Does the learned judge assume that the defendant has commercialized a celebrity’s right or misappropriated an individual’s personality? Is that the reason for the learned judge to determine, that the ‘work’ is the creation of the plaintiff? Moreover, is it the reason for the learned judge to hold that the defendant has infringed or violated the copy right of the plaintiff?

In my view, the aforesaid contention of the learned judge is illogical and not in accordance with the law. The evidence clearly indicate that the plaintiff has only edited the ‘work’, which was created under the direction and guidance of Publis Silva. Significantly, by the notation “©”, in the 1<sup>st</sup> edition of the ‘work’ itself, the ‘copyright’ was bestowed on Publis Silva and it continues to be with him even with the 6<sup>th</sup> edition. Thus, in terms of the law the economic rights too, should vest with the ‘holder of the copyright’, namely Publis Silva, until such rights are assigned or licensed to another, in accordance with the law.

Furthermore, the learned judge, as discussed earlier has not considered the ‘work’ as a whole nor looked into or referred to the contents therein and thus, failed to analyze the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඞුම්” as a cook book, which has a separate copyright regime as a ‘compilation’, where the selection, arrangement and co-ordination of recipes are protected, if the recipes are creative in their own way and if accompanied by substantial literary expression in the form of an explanation or direction.

Hence, I see merit in the submission of the appellant, that the learned judge has failed to analyse the evidence adduced by the plaintiff with regard to her role as the ‘editor’ *vis-a-vis* the provisions of **Section 14(3) and 14(4)** of the IP Act.

Another factor that drew my attention is the finding of the learned judge, that the word ‘author’ and ‘editor’ are one and the same, based on the evidence of the plaintiff’s only other witness, a Sinhala scholar of repute. However, the Court observes in the “මහා සිංහල ශබ්දකෝෂය” published by MD Gunasena and Co and edited by the same scholar, there is a marked difference between the definition of the word “කර්තෘ”- කිසියම් ක්‍රියාවක් කරන්නා- නිර්මාණය කරන්නා and “සම්පාදක”- සකස් කරන්නා- පිලියෙල කරන්නා- සපයන්නා.

Similarly, in the Sinhala-English Dictionary compiled and edited by Budhadasa Hewage and the Sinhala-English Dictionary compiled by Sompala Jayawardena, the words

‘author’ and ‘editor’ are defined and given separate meanings. Malalasekara’s English-Sinhala Dictionary also defines the words ‘author’ and ‘editor’ as two distinct words. Thus, it is very clear, that ‘author’ and ‘editor’ are definitely not one and the same as expressed by the learned judge. Corollary, Black’s Law Dictionary [11<sup>th</sup> ed] defines ‘author’ as the person who created an expressive work or the person or business that hires another to create an expressive ‘work’.

Hence, the words ‘author’ and ‘editor’ has to be considered not in a literal sense as propounded by the plaintiff’s witness and accepted by the learned judge but in the light of the copyright regime and the provisions of the IP Act, especially **Section 5** read together with **Section 14** and its sub-sections and the presumption in **Section 15**. Such consideration is necessary since this in turn would extend to the ‘author’ of a work or the ‘copyright holder’ to exploit or make profit of the ‘protected rights’ referred to in the IP Act, namely the ‘economic rights’, referred to in **Section 9**.

Independently, the ‘author’ of a ‘work’ is entitled to safeguard the ‘moral rights’ referred to in **Section 10**. This brings me to another matter that needs an answer. What is the moral right the plaintiff has in respect of the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” as against Publis Silva? To have the plaintiff’s name indicated prominently on the copies or to object to any distortion, modification or other derogatory action as stated in the section, in relation to “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” prejudicial to the plaintiff’s honour and reputation? In my view, acknowledging the plaintiff who was only the ‘editor’ of the ‘work’, to be put on a pedestal as the ‘author’ and ‘copyright holder’ goes against the pith and substance of the IP Act and would amount to absurdity, when the plaintiff is given a moral right for example, to protect her honour and reputation, which Publis Silva will not be entitled to, with regard to “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”.

At this juncture, I wish to consider the submissions of the learned counsel for the respondent. His main submission was that the plaintiff is the ‘author’ of the work and based upon the definition clause in **Section 5** of the IP Act and, the plaintiff is the sole owner of the copyright and such position has not been rebutted by the defendant. For the reasons elucidated in detail earlier in this judgement, I find it difficult to accept the contention of the counsel for the respondent and limit myself to look at **Section 5** only, and permit the plaintiff to exploit the protected rights, when the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” (**P3**), *prima facie*, showcase that the plaintiff was not the ‘author’ but was only the ‘editor’ of the ‘work’ in dispute “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” and the role of the ‘editor’ cannot be compared with the role of the ‘author’. Thus, I reject the contention of the respondent and look at the broader picture of the IP Act, to come to a determination of this appeal.

The next contention of the plaintiff that the script handed over to the defendant publisher was in the hand writing of the plaintiff in my view, cannot negate or over-ride the ‘work’ itself which clearly acknowledge the ‘copyright holder’ to be Publis Silva. In order to challenge what is embodied in the ‘work’ itself in black and white, the plaintiff should have named or called and led the evidence of Publis Silva. Then maybe, as transpired in the case of **Ariyawathie Senadheera v. Shantha Senadheera** (supra) where the dispute pertained to the book titled ‘නුතන චිත්‍ර කලාවේ රසික සංකල්ප’, the copyright holder denoted by the notation

“©”, could have clearly indicated to court, whether such person was the owner of the copyright or not, which would have sealed the issue, *in limine*.

Further, this Court observes that the plaintiff has not only failed to establish her relationship with Publis Silva but also failed to prove the ‘common understanding’ and or the authority and or approval she obtained to use Publis Silva’s name, his profile, his picture, his vision, the recipes invented and created by Publis Silva as well the permission to reproduce the food styling and coloured photographs depicted in the ‘work’. Similarly, the plaintiff has also failed to establish under what authority the name of Mount Lavinia Hotel, is referred to in each and every page of the ‘work’ and the hotel itself is featured on the cover page of the book, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්”.

Having considered and examined the evidence led at the trial and the law pertaining to copyright, my considered view is that the plaintiff has failed to establish that she is the ‘owner of the copyright’ of the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්” and therefore the action filed by the plaintiff cannot be substantiated.

The final submission of the counsel for the appellant at the hearing before us, was the delay and the long silence of the plaintiff in challenging the ownership of the copyright of the ‘work’, which he submitted tainted the impugned judgement. Therefore, the judgment cannot be left to stand, the learned counsel contended.

The work in dispute was first published in March 2005. The plaintiff demanded royalty from the defendant publishing company only three years after the publication and even after the 6<sup>th</sup> edition rolled out of the press. No reason has been offered for the delay and the failure to demand royalty from March 2005, until a letter of demand was sent in March 2008. Further, it is observed the plaintiff failed to annex even a copy of the 1<sup>st</sup> edition of the ‘work’ to the plaint when filing the instant case in July 2008 and did so only after the trial began.

Thus, this Court sees merit in the submission of the learned counsel for the appellant, that the delay in the plaintiff to espouse her claim and especially the long wait of three years to claim the balance sum due as adverted to by the plaintiff, on the ground that Rs 25,000/= was paid by the defendant publisher only as an advance payment, creates a doubt as to the veracity of the plaintiff’s claim. Would a prudent person, wait for such a long time, without demanding royalty if it was justly due? In any event, it is an accepted legal maxim, that “delay defeats equity”.

In the aforesaid circumstances, it is evident that the learned High Court judge has failed to analyse the evidence before court in respect of the plaintiff’s role as the ‘editor’ of the disputed work and also failed to appreciate the difference and the precise nature of the ‘author’ and the ‘owner’ of the copyright of the ‘work’ in dispute “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිඹුම්”.

Furthermore, the learned judge has misdirected himself in applying the provisions of the copyright law in determining the original owner of the economic rights and the assignment and transfer of the economic rights pertaining to the disputed ‘work’.

Moreover, the learned judge has erroneously determined the burden of proof in the instant case by shifting the responsibility to the defendant, when in fact the plaintiff should establish the case instituted.

The learned judge has also failed to appreciate the role of Publis Silva in the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” and also not appreciated the distinction between originality and creativity in determining this matter in favour of the plaintiff and thus the judgment goes against the grain of basic principles of the rule of law.

Upon perusal of the impugned judgement, it is further observed that the relief granted by the learned judge is also imprecise and ambiguous. Consequent to granting prayer (a) and (b) of the plaint, viz the declarations more fully discussed earlier in the judgement, the plaintiff was also granted statutory damages, as per prayer (e) of the plaint in a sum of Rs. 837,500/= said to be computed as ‘royalty less advance paid’. However, when the advance payment of Rs. 25,000/= is deducted from Rs. 840,000/= the royalty granted (calculated as per the learned judge’s computation), the balance amount to be paid would be Rs. 815,000/= and not Rs. 837,500/= as stated in the judgment. Thus, the computation of damages by the learned judge is also patently erroneous.

Further it is observed, the learned judge also granted the plaintiff relief in terms of prayer (c) & (d) i.e., a direction to call for a full report of sales of the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” and a declaration for the defendant to pay royalty to the plaintiff upon the said sales but did not determine a rate or a percentage as a basis of calculating royalty.

In any event, no evidence was led by the plaintiff with regard to the computation of royalty. Is it 10% or 15% as agreed in the V2 agreement or some other rate?

Corollary, is the aforesaid declaration in prayer (d) to pay royalty, independent to the payment of statutory damages in prayer (e)? If so, when should prayer (c) & (d) be implemented? These are also matters that have not been clearly and precisely stated and answered in the impugned judgement, which leads on to the assumption that the relief granted by the learned judge is ambiguous and uncertain.

The issue becomes more compounded by the respondent peddling a case before this Court that the damages granted is not sufficient and that the learned judge was in error when only royalty was calculated for six editions, when it ought to be for twelve editions of the ‘work’, “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”.

I observe that although the learned judge granted statutory damages in terms of **Section 170(10)** of the Intellectual Property Act, that the calculation of such sum *i.e.* damages, was based upon royalty calculated at 10% into six editions of the ‘work’ been published. Nevertheless, there was, no documentary evidence whatsoever to suggest that twelve editions have been published.

In the aforesaid circumstances, whilst I reject the submission of the respondent with regard to the enhancement of damages, I hold that the relief granted by the High Court is ambiguous, imprecise and erroneous.

Having considered the facts of this instant case and especially the ‘work’ in dispute “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රචාවට ඉඩුම් පිහුම්” and the law governing “copyrights” and for reasons more fully adumbrated in this judgement, I hold that the learned High Court judge was in error and misdirected himself in declaring that the plaintiff is the author, owner and copyright holder of the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රචාවට ඉඩුම් පිහුම්”. Moreover, the relief granted to the plaintiff, is erroneous and not in accordance with the law.

In conclusion and for reasons more fully stated herein, the impugned judgement of the High Court dated 17<sup>th</sup> May, 2013 is set aside and the plaint dated 30<sup>th</sup> July, 2008 is dismissed with costs fixed at Rs. 25,000/=, payable by the Plaintiff-Respondent to the Defendant-Appellant.

The appeal is allowed with costs of Rs. 25,000/=.

**Judge of the Supreme Court**

**P. Padman Surasena, J.**

I agree

**Judge of the Supreme Court**

**A.H.M.D. Nawaz, J.**

I agree

**Judge of the Supreme Court**