

**In the Supreme Court of the Democratic Socialist Republic of Sri Lanka**

In the matter of an application for Special Leave to Appeal under Article 128 (2) of the Constitution of Sri Lanka, against the Order of the Court of Appeal dated 16<sup>th</sup> August 2022.

**SC/SPL/L A NO:246/2022  
CA/WRT/299/2022**

Ms Kayleigh Frazer  
972/4, Kekunagahawatta Road,  
Akuregoda  
Battaramulla

**Petitioner**

1. Controller General of Immigration  
Department of Immigration and  
Emigration  
Suhurupaya, Sri Subhuthipura,  
Battaramulla
2. The Attorney General  
The Attorney General's Office

**Respondents**

**And Now Between:**

Ms Kayleigh Frazer  
972/4, Kekunagahawatta Road,  
Akuregoda  
Battaramulla

**Petitioner – Petitioner**

1. Controller General of Immigration  
Department of Immigration and Emigration  
Suhurupaya, Sri Subhuthipura,  
Battaramulla
2. The Attorney General  
The Attorney General's Office  
Colombo 12

**Respondent-Respondents**

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

A. L. Shiran Gooneratne, J.

Mahinda Samayawardhena, J.

Counsels: Nagananda Kodituwakku for the Petitioner- Petitioner

Kanishka de Silva Balapatbendi, DSG for the Respondent- Respondents

Argued on: 07.06.2023

Decided on: 16.02.2024

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

The Petitioner-Petitioner (hereinafter referred to as 'Petitioner') is a British citizen residing in Sri Lanka. She filed the Writ Application No.CA/WRIT/299/2022 in the Court of Appeal against the Controller General of Immigration and Emigration (1<sup>st</sup> Respondent) and the Attorney-General (2<sup>nd</sup> Respondent). The Petitioner inter alia sought an interim relief staying the operation of alleged deportation order marked X4 with the said application along with the final reliefs of Writ of Certiorari quashing the said alleged decision of deportation marked X4 and a Writ of Mandamus compelling the 1<sup>st</sup> Respondent to restore the Petitioner's resident visa status. In fact, the said document marked X4 appears to be a letter informing the cancellation of her visa while advising her to leave the country on or before 15<sup>th</sup> August 2022- vide X4 annexed to the Petition. The

learned Judge of the Court of Appeal refused to grant the interim relief and issuing notices of this Writ application on the Respondents as prayed for, and dismissed the application for Writ of Certiorari and Mandamus by order dated 16.08.2022. As per the said order marked as X12 with the Petition, the learned Judge of the Court of Appeal has observed as follows;

- That no reasons had been mentioned or averred by the Petitioner to establish her rights to continue to stay in Sri Lanka.
- That even though, the Petitioner had filed a motion annexing a document which refers to an alleged offence of rape, her Counsel categorically indicated that the Petitioner had given instructions to Sri Lanka Police not to proceed with the complaint made by her in that regard.
- That the Petitioner had not alleged any grounds such as legitimate expectation, necessity to take medical treatment or legal requirement of giving evidence or appearing in a pending case before a Court of law.

Even though, the learned Judge of the Court of Appeal has referred to the absolute discretion of the prescribed authority mentioned in the relevant regulations and some case laws that refer to the sole discretion of the Controller, in refusing the application has mentioned as follows;

*“Anyhow, I am of the view that in the absence of any reasons establishing the rights of the Petitioner to continue to stay in the country, I should not use my discretion to review the decision of the Controller of Department of Immigration and Emigration. Further, it is observed that the Petitioner has failed to submit sufficient grounds to invoke the writ jurisdiction of this Court.”*

The aforementioned observations by the Judge of the Court of Appeal and afore quoted part of the said judgment indicate that the Court of Appeal did not refuse the application as it accepted the fact that the 1<sup>st</sup> Respondent Controller had an unquestionable absolute discretion in this matter as alleged by the Petitioner, but due to the fact that no sufficient reasons were placed before the said Court by the Petitioner to show that her substantial rights were affected.

However, as mentioned before, the Petitioner had misleadingly stated in the application to the Court of Appeal that there was a deportation order and has also misleadingly stated the same in the Petition to this Court- vide paragraph 3(m) of the Petition tendered to this Court. This cannot be considered as a misconception of the letter marked P4 by the Petitioner as she has filed both

these applications with legal advice as appeared from the said Petitions itself. It is true, that if she does not act as per the advice in P4, the next step could have been towards an issuance of deportation order. However, when there was no deportation order but a cancellation of visa and an advice to leave the country within the given time, there was no threat of immediate arrest and deportation until she acts contrary to the advice. Thus, when she says that there is a deportation order referring to X4, it gives a different misleading character to the application.

However, being dissatisfied by the decision of the Court of Appeal dated 16.08.2022, the Petitioner has preferred this leave to appeal application to this Court inter alia to set aside the said decision and for interim relief staying the directive of the 1<sup>st</sup> Respondent (ref; X4) until the final determination of this appeal. When this matter was taken up to support for granting of leave on 07.06.2023, the learned DSG appearing for the Respondents raised preliminary objections based on the following grounds;

1. This Court has no jurisdiction to hear and determine this application as the Petitioner has exhausted her right of appeal.
2. The Petitioner has suppressed material relevant to the application before this Court and thereby attempted to mislead Court.
3. This application is vexatious and is unnecessary encumbrance of Court amounting to an abuse of due process by the Petitioner.
4. The application of the Petitioner is defective due to the lack of a proper affidavit.

After making oral submissions on the above preliminary objections, parties were allowed to file synopsis of their submissions. Thus, the learned DSG has tendered her synopsis of submissions along with the motion dated 15.06.2023 and the Counsel for the Petitioner has filed his written submissions with a motion dated 21.06.2023.

**1. Whether this Court has no jurisdiction to hear and determine this application as the Petitioner has exhausted her right of appeal;**

In this regard, the Respondents have brought this Court's attention to the Leave to Appeal Application No.SC SPL LA 218/2022 filed by the same Petitioner against the Respondents and its prayers which are identical to the prayers in the present Leave to Appeal Application No. SC SPL LA 246/2022. However, on 02.09.2022, this Court has dismissed the said application filed in SC

SPL LA 218/2022 based on the reason that when it was taken up for support, it was found that the application was not in compliance with the Supreme Court Rules; Particularly a certified copy of the impugned Judgment and a certified copy of Court of Appeal brief had not been tendered with the Petition- (see order marked F dated 02.09.2022 made in said SC SPL LA 218/2022 and Paragraphs 9 and 10 of the Petitioner's own petition referring to the said order). The Respondents contend that the right to file a Leave to Appeal application in terms of Article 128(2) of the Constitution has been duly exercised and due to its dismissal by this Court, the Petitioner's right to appeal has been exhausted. The Petitioner has not shown that when her previous application was dismissed, this Court reserved her right to file a fresh application and the said order does not indicate such right was reserved.

Article 118(c) of the Constitution provides that, "*The Supreme Court of the Republic of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions of the Constitution exercise final appellate jurisdiction.*" Further, Article 127 (1) of the Constitution states, "*The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.*" Thus, reading of Article 118 (c) and 127 (1) clearly indicate that the decision made by this Court in a final appeal is final and conclusive.

As per Article 128(1) and (2), an appeal is available against a decision of the Court of Appeal either with the leave granted by the Court of Appeal or when special leave is granted by the Supreme Court. If such special leave is not granted by this Court, there is no provision that makes a party empowered to file another or several applications praying for special leave over the same decision of the Court of Appeal against the refusal made by this Court even though a Special Leave to Appeal application can be filed when leave is refused by the Court of Appeal [see S C Rule 20(3) and Article 128(2)]. A right of appeal must be statutorily given. If that right is given with leave that is to be obtained first from this Court, and if such leave is refused, the right of appeal extinguishes with the said leave being refused. If such a right is considered as available to a party to file Special Leave to Appeal one after another even after the leave being refused by this Court,

there will not be any finality to proceedings and it may also pave the way for multiplicity of actions and conflicting decisions. To establish the finality of final appeal and that a party should not be given an opportunity to have *a second bite of the same cherry*, the Respondents have cited the cases; ***Panadura Acharige Don Thomas Edward Perera v Don Jayaweera Perera and Four others*** (CA/ RI/18/2018, CA Minutes of 09.11.2018; ***Welisarage Laksman Nishantha Fernando v The Hon. Attorney General and others*** (C. A. /MC. /Re Application No.04/2017 CA Minutes of 08.06.2018; and ***Ensen Trading & Industry (Pvt.) Limited v Minister of Finance and Mass Media and others*** (CA Writ Application No. 41/2019 of 01.04.2019). Respondents additionally has pointed out that in the aforesaid case of ***Panadura Acharige Don Thomas Edward Perera***, the application had failed at the leave to appeal stage and the merits of the said case were not canvassed but the principle of finality applied. In a recent case of ***Electroteks Network Services Private Limited v Dialog Broadband Network (Private) Limited SC/MISC/03/2019***, bench of five Judges of this Court reaffirmed the finality of the Supreme Court's decision and the absence of supervisory jurisdiction over its own judgments.

It must be noted that while the order refusing leave in the previous application is still valid, without making any application in that case, the Petitioner has resorted to file a fresh application for leave by filing this application. In other words, the Petitioner is trying to get leave through another application after the first one was refused. If leave is granted in this application, it will in fact set aside or alter or vary the effect of the order of the previous application. Effect of this application is very much similar to an appeal or revision against the previous order made by this Court when there is no right to file an appeal or revision against an order made by this Court.

It is true that in ***Jeyaraj Fernandopulle v Premachandra De Silva and Others (1996) 1 Sri L R 70***, this Court while affirming that, as a general rule, no Court has the power to rehear, review, alter or vary any judgment or order after it has been entered, identified certain exceptions where a Court can revisit an order already made using its inherent powers. The exceptions, though not exhaustive, identified in the said case are set out below;

1. Orders made *per incuriam* (Present application is not made on this basis stating that decision in SC SPL LA 218/2022 was made *per incuriam*)
2. Presence of clerical mistake or error from an accidental slip or omission- (Also see ***Marambe Kumarihamy v Perera (1919) VI C W R 325, Padma Fernando v T. S.***

- Fernando (1956) 58 N L R 262.*** However, the present application is not based on an accidental slip or omission occurred in SC SPL LA 218/2022).
3. Where a need arises to vary or clarify the order to carry out its own meaning and where the language used is doubtful to make it plain. (Also see ***Lawree v Lees (1881) 7 App.Cas 19,34, Re Swire (1895) 30 CH. D 239, Paul E De Costa & Sons v S. Gunaratne 71 N L R 214, Hatton v Harris (1892) A C 547.*** However, present application is not made for such purposes in relation to the order in SC SPL LA 218/2022.)
  4. Where a party has been wrongly named or described or where the judgment is a nullity owing to the fact that it was delivered against a person who is dead or a non-existing company- (However, present application does not relate to such circumstances occurred in the previous Leave to Appeal application.)
  5. Where the order or judgment has been delivered in default or *ex parte*. (Present application is not made on such grounds stating that SC SPL LA 218/2022 was made in default or *ex parte*.)
  6. Where there is a serious irregularity in procedure that makes the judgment a nullity- for e.g., not serving summons or not following a mandatory provision of law. (Present application is not based on such grounds relating to the previous refusal to grant leave but a fresh Leave to Appeal application against the Court of Appeal Judgment.)
  7. To repair an injury caused by an act of Court done without jurisdiction (by an invalid order). - for e.g., executing a decree to evict a party without a decree for possession. (Present application is not similar to the said situation. This Court had the Jurisdiction when it decided the Leave to Appeal Application No. SC SPL LA 218/2022).
  8. Dismissal of an FR application on a misunderstanding of facts placed by the opposite party that the petitioner has been or due to be released from detention. (In this regard said ***Jeyaraj Fernandopulle*** case has referred to ***Palitha v O. I. C Police Station, Polonnaruwa and Others (1993) 1 Sri L R 161.*** Present application is a fresh Leave to Appeal application against the Court of Appeal judgment and not to get the previous refusal of leave rectified based on facts similar to above.)
  9. An order made on wrong facts given to the prejudice of the Petitioner (In this regard ***Jeyaraj Fernandopulle*** case has referred to ***Wijeyesinghe et al v Uluwita (1933) 34 N***

- L R 362.** Present application differs from this as this is a fresh application of Leave against the Court of Appeal Judgment and not an application to rectify the order made on the previous application.)
10. An action to rescind a judgment which has been obtained by fraud. –(See **Halsbury vol 26, paragraph 560, page 285**. In the present application, there is no allegation that the Court was deceived by fraud when this Court refused leave in Leave to Appeal Application No. SC SPL LA 218/2022.)
  11. An action to rescind a judgment on the discovery of new evidence which were not available before. (In this regard, **Jeyaraj Fernandopulle** case has referred to **Halsbury vol 26 paragraph 561, Loku Banda v Assen (1897) 2 N L R 311**. Present application does not fall into this category.)

The present application does not fall within such exceptions as identified by **Jeyaraj Fernandopulle** case and it is not so pleaded in the present application other than tendering it as a fresh application for leave against the Court of Appeal judgment. The said exceptions identified in the **Jeyaraj Fernandopulle** case indicate that the scope to revisit or reconsider an order already made, is limited for instances such as *per incuriam* orders and obvious errors where inherent powers may be used to rectify the situation. On the other hand, as expressed in the said **Jeyaraj Fernandopulle** case, inherent powers of a Court are adjuncts to the existing jurisdiction. Thus, inherent powers may not be used to entertain a fresh action to revise or revisit an order made previously in a different application. New action may arise if there is a new cause of action. If there is any error, mistake in an order or judgment where inherent powers may be used to rectify it, it has to be brought to the notice of the Court in the same application or action. The Petitioner has not moved in the same application No. SC SPL LA/218/2022 stating such grounds to indicate that inherent powers of Court should be used to rectify the order made in SC SPL LA 218 /2022. This application is a peculiar application moving to grant special leave while there is an existing valid refusal to grant special leave by this Court in SC SPL LA/218/2022, over the same decision of the Court of Appeal in CA/WRIT/299/2022. Hence, the Respondents' preliminary objection challenging the jurisdiction of this Court with regard to the second Leave to Appeal application is well supported by the facts and circumstances relating to this application.



It is pertinent to note the stance taken by the Petitioner in relation to the application No.SC SPL LA 218/2022. As per paragraphs 9 and 10 of the Petition, it has been dismissed since the copy filed in Court has not been duly certified by the Registrar of the Court of Appeal. Apparently, what those paragraphs indicate is that there was no fault on the part of the Petitioner but the copy tendered was without the certification by the Registrar of Court of Appeal as to its authenticity. However, now both parties have tendered a copy of the said order in SC SPL LA 218/ 2022 with their submissions- vide documents marked K1 and F. The said order is quoted below.

*“This application was taken up for support and Mr. Nagananda Kodituwakku commenced supporting the application. However, this application is not in conformity with the Rules of the Supreme Court particularly a certified copy of the judgment which is been impugned in these proceedings and a certified copy of Court of Appeal briefs has not been filed along with the Petition. In view of the above, this application is dismissed for noncompliance of the Supreme Court Rules.”*

Thus, it is clear that when the previous application was taken up for support for leave, there was no acceptable copy of the Judgment and proceedings of the Court below produced before this Court by the Petitioner. When a matter is fixed for support on an application of a Petitioner, it is the duty of such Petitioner and his or her lawyers to be ready for support on the given date. If they are not ready for some reasons, they must take steps prior to the date given for support to take it out from the support list, so that the Court could allocate that time for another litigant. The Petitioner in her written submissions attempts to say that she reserved her right to file certified copy of the record of the Court of Appeal as soon as the same was made available to her. To prove such reservation of right, Petition of the said application or any motion filed in that application in that regard or any journal entry proving such reservation of right has not been tendered by the Petitioner. On the other hand, even such reservation was prayed or granted, those documents which were necessary to support the leave application should have been obtained prior to the support date and, for some reasons beyond the control of the Petitioner, if the Petitioner failed to obtain necessary documents from the Court below, the Petitioner or her lawyer should have filed a motion and informed the Court to take it out of the support list enabling the Court to allocate that time for another case. The order quoted above clearly indicates that the Counsel for the Petitioner commenced supporting the application and then the Court found that no acceptable documents

have been tendered to support the application. Thus, it appears that the dismissal of the previous application was due to the fault of the Petitioner and her Lawyer to submit the necessary documents for support of her application.

On the other hand, if the order made was done by mistake when the certified or uncertified photo copy was available in the brief as prescribed by the Rule 2 of the Supreme Court Rules (1990), that has to be moved in the same case by filing a motion and bringing the error or mistake of the Court to the attention of the Court, for the Court to consider whether the order was made *per incuriam* or by obvious mistake. (However, the Petition or the attached documents of the previous application for leave have not been tendered before this Court to see whether there was a possible mistake.) If the order was given by mistake or by an error it will not give rise to another opportunity to file a fresh application when the said order still exists as a valid order.

However, what was discussed above clearly shows that the Petitioner has no right to file a second Leave to Appeal application and to have a second bite of the same cherry and that she is guilty of misrepresentation as there is no deportation order as such but a cancellation of visa and advise to leave the Country before a given date. Further, she has not revealed sufficient material in the Petition to show that the refusal was not due to her or her lawyer's fault.

As elaborated above, this Court has no jurisdiction to entertain the 2<sup>nd</sup> appeal on the same matter. Hence, this Court has to uphold the first ground of objection referred to above and it is sufficient to dismiss this application.

Since what is elaborated above is sufficient to dismiss this application, this Court does not intend to go deep into the other grounds of objections. However, it is worthwhile to make certain observations in that regard too.

## **2. Whether the Petitioner has suppressed material relevant to the application before this Court and thereby attempted to mislead Court;**

The learned Deputy Solicitor General for Respondents with regard to the aforementioned 2<sup>nd</sup> ground of objection has brought this Court's attention to the matters mentioned below;

- That as per Rule 3 of the Supreme Court Rules (1990), a Special Leave to Appeal application shall contain a plain and concise statement of **all such facts and matters**

**necessary** to enable the Supreme Court to determine whether the Special Leave to Appeal should be granted (emphasis added.).

- That when a litigant makes an application to this court seeking relief, he enters into a contractual obligation with the Court which requires him to disclose all material facts correctly and frankly. Thus, a party seeking relief must maintain *uberrima fide* towards the Court - (Referring to *Jayasinghe v The National Institute of Fisheries and Nautical Engineering (Nifne) and others (2002) 1 Sri L R 277 at 286.*)
- That in this application the Petitioner seeks for a Leave to Appeal in respect of a decision made in a Writ application and Writ is a discretionary remedy which requires the highest level of disclosure and frankness. Further, if there is suppression of material facts and breach of *uberrima fide* the Court needs not go into the merits of the case. In supporting these contentions, *Atula Ratnayake v G.R. Jayasinghe 78 NLR 35* at pg 39-40 and *Jayasinghe v The National Institute of Fisheries and Nautical Engineering (Nifne) and Others (2002) 1 Sri LR 277*, *W.S. Alphonso Appuhamy L. Hettiarachchige and another 77 NLR 131*; *Hettiarachige Jayasooriya v N. M. Gunawathie C. A.( Writ) Application 63/2015 C A Minutes of 26.09.2019*; *Dahanayake and Others v Sri Lanka Insurance Corporation Ltd. and others [2005] 1 Sri LR 67*; *Fonseka v Lt. General Jagath Jayasuriya and Five others [2011] 2 Sri LR 372*; and *Lt. Commander Ruwan Pathirana v Commodore Dharmasiriwardene & others [2007] 1 Sri LR 24* have been cited by the learned DSG.

In the case of *Borella Private Hospital v Bandaranayake and Two Others [2005] (1) Appellate Law Recorder 27*, K. Sripavan J, noted that, the Writs of Certiorari and Mandamus being discretionary remedies will not be granted where the party applying lacks *uberrima fides* and fails to disclose material facts to Court.

While referring to the aforesaid legal position with regard to suppression of material facts, the learned DSG has taken up the position that subsequent to the CA WRIT 299/2022, the Petitioner has invoked the Jurisdiction of this Court on multiple occasions through applications such as SC SPL LA 218/2022, SC SPL LA 246/2022( Instant Application), SC FR 299/2022 and SC FR 399/2022 and however, the Petitioner failed to disclose in the present application that the identical issue had been canvassed by her in SC FR 299/2022 which was pending at the time the present

application was filed. The Petitioner now takes up the position that SC FR 299/2022 had been filed without her consent or authorization. Even if it is assumed that the Petitioner's version that SC FR 299/2022 was filed without her consent or authorization, she could have revealed that such an action has been filed in her name but without her consent or authorization. This Court does not intend to make any comment on whether her said version can be accepted at this juncture since there seems to be certain complaints made against the relevant lawyers by the Petitioner and such allegations would have to be considered and decided if such allegations are allowed to be proceeded with- vide K3, K4, K5, K6. However, it appears that the lawyer for the Petitioner, on 30.09.2022 has asked time to obtain instruction with regard to the FR application and thereafter has filed a motion dated 13.10.2022 along with an affidavit dated 04.10.2022 purportedly sworn by the Petitioner- vide documents marked K8. In that motion or in the said affidavit, the Petitioner or her lawyer had not said that institution of SC FR 299/2022 was not an act of the Petitioner. In fact, the said motion by her lawyer admits that said FR action was filed and, in the affidavit, it is stated why the said FR application was dismissed without resorting to say that filing of it was not her act. Whatever it is, tendering of that motion dated 13.10.2022, was an act of her own lawyer in this case.

On the other hand, if the Petitioner's present stance is correct, it is questionable without giving instructions by the Petitioner about the facts, how the lawyers in SC FR 299/2022 drafted the petition in that fundamental right case. As per the written submissions tendered, the Petitioner now states that she has never met and gave instructions to the lawyers involved in filing of SC FR 299/2022. Anyhow, the same lawyer, namely Mr. Nagananda Kodituwakku, who tendered the said motion dated 13.10.2022 along with the affidavit dated 04.10.2022 now tries to submit that said affidavit is a forged affidavit- vide penultimate paragraph of page 4 of his written submission. In that regard, he has now tendered an unsigned and unsworn "oral statement" and a soft copy of an "oral submission" purportedly made by the Petitioner- marked as K9 and K10 with the written submission. It appears that they were not tendered with the Petition for other parties to respond.

After observing the change of stance, when queried by the Court, Mr. Nagananda Kodituwakku, while making his oral submissions stated that SC FR No.299/2022 was filed without the consent and knowledge of the Petitioner and she is not in a position to sign proxy. Therefore, he filed this application as per the Rules as an Attorney-at-law and he takes the full responsibility of what is

averred and presented before this Court- vide Journal Entry dated 07.06.2023. Therefore, Mr. Nagananda Kodituwakku exceeding the limits of an officer of Court presenting facts on the instruction of his client, took full responsibility of what is averred and presented before this Court. One cannot take full responsibility unless he has personal knowledge of what he has presented. In fact, this Leave to Appeal application has been filed by the Petitioner through her Lawyer, Mr. Nagananda Kodituwakku after giving a proxy to him and the said proxy is filed of record- vide Journal Entry dated 15.09.2022 and the proxy filed along with the Petition. The backdrop explained above raises a serious concern about the conduct of Mr. Nagananda Kodituwakku as an Attorney-at-Law. Once an Attorney-at-Law marks his appearance, he becomes an officer of Court to represent the case of his client. This Court is always willing to give due regard to the noble profession and allow them to present the case for their client but at the same time a Court cannot allow them to take the Court for a ride. If the affidavit dated 04.10.2022 tendered with the motion dated 13.10.2022 is a forged document as the Petitioner and her lawyer Mr. Naganada Kodituwakku now claim, it is not incorrect to presume that it had been tendered without the instruction of the Petitioner. He being the lawyer of the Petitioner, cannot tender documents as documents sworn by the Petitioner on behalf of the Petitioner without instructions from the Petitioner in that regard. If it is a forged document, it must be within the knowledge of Mr. Naganada Kodituwakku as it is he who tendered it to Court as an affidavit of the Petitioner. As said before he has already undertaken full responsibility with regard to what is presented to Court, and on the other hand, as the Registered Attorney, he has to take the responsibility of what he has tendered to Court. It appears either the Petitioner along with her lawyer, Mr. Nagananda Kodituwakku, have been lying and misleading Court or Mr. Nagananda Kodituwakku has acted without instruction of his client and has tendered an affidavit as one made by his client which, now, as per him and his client ,is a forged document. This situation warrants to initiate disciplinary proceedings against the lawyer, Mr. Nagananda Kodituwakku.

It must be also noted that K9 (appears to be a transcript of K10), has been tendered by Mr. Nagananda Kodituwakku, lawyer for the Petitioner, to support the stance that SC FR 299/2022 was filed without the Petitioner's consent and approval. However, this stance clearly contradicts the first two paragraphs of the motion dated 13.10.2022 filed in this application by Mr. Nagananda Kodituwakku as the lawyer of the Petitioner as those paragraphs clearly admit the filing of the said SC FR 299/2022. The affidavit dated 04.10.2022 tendered along with the said motion, purportedly

sworn by the Petitioner, but which now they claimed as a forged affidavit, also admits the filing of the said FR application and attempts to give reasons relating to the dismissal of the said FR application without stating that it was filed without her consent and approval. Mr. Nagananda Kodituwakku has not stated that the said motion dated 13.10.2022 is a fake motion. In fact, what the Petitioner and her Lawyer, Mr. Nagananda Kodituwakku now allege is that SC FR 299/2022 was filed by two other lawyers without instruction of the Petitioner- vide written submissions referring to K3 to K6. However, it must be noted that the said motion dated 13.10.2022 and the affidavit dated 04.10.2022 have been filed after obtaining time to get instructions from the Petitioner- vide journal entry dated 30.09.2022.

Above explained situation demonstrates that there is a high possibility that the Petitioner and/or her lawyer have misled this Court which is the basis of the second ground of objection.

However, the facts revealed before this Court, makes it impossible to keep a blind eye on certain allegations and acts that, if proved, indicate attempts to misuse the authority of the apex Court and to take this Court for a ride. Hence, the following directions are made in that regard;

1. The Registrar of this Court, if any steps have not yet been taken on the complaints marked K4 and K6 along with K3 and K5, is directed to bring those matters to the attention of His Lordship the Chief Justice and take steps accordingly. If any inquiry commences or already have commenced and if it is found that the allegations are false, take necessary steps to proceed disciplinary or contempt proceedings against the Petitioner and her lawyer in this application as their submissions to this Court amount to false and misleading representation before this Court. Had the Petitioner left the Country by the time such finding is made, the Lawyer, Mr. Naganada Kodituwakku has taken full responsibility on what has been presented to this Court.
2. With regard to the motion dated 13.10.2022 filed by Mr. Nagananda Kodituwakku and the affidavit dated 04.10.2022 tendered by him as one purportedly sworn by the Petitioner, now it is clear that they were either presented to Court without the instruction of his client, the Petitioner or the Petitioner and Mr. Kodituwakku in collusion tried to mislead the Court by tendering an affidavit now they called as a fraudulent one. If it is a bogus affidavit, if it is not an act of the Petitioner, Mr.

Nagananda Kodituwakku must take the responsibility as the Registered Attorney or the Lawyer for the Petitioner for tendering it to Court as one sworn by the Petitioner. A responsible lawyer cannot be allowed to say that what he tendered to Court as an affidavit of his client is a forged one without proper explanation. It is his duty to get instructions and get the authenticity of the affidavit verified by his client before it was presented to Court. Therefore, Registrar of this Court is directed to bring this to the notice of his Lordship the Chief Justice and to take appropriate steps accordingly.

3. Honourable Attorney General is directed to look into the above matters and advice and assist the Registrar with regard to the possible measures that can be taken in relation to the above matters and also to see whether any criminality is involved in preparing and tendering forged affidavit to the apex Court and take necessary steps accordingly.

Other than what is observed above, during the discussion relating to the 1<sup>st</sup> ground of objection, I have already referred to certain instances of misleading statements or misrepresentation that may be attributed to the Petitioner.

### **3. Whether this application is vexatious and is an unnecessary encumbrance of Court amounting to an abuse of due process by the Petitioner**

As explained above this is the second Leave to Appeal application against the decision of the CA Writ 299/2022 by the Petitioner, where she has exhausted her right to file Leave to Appeal application with the rejection of the first application. As stated above this Court has no jurisdiction to entertain such second Leave to Appeal application against the same decision. It is already explained above that the rejection of the first Leave to Appeal was based on the non-availability of the necessary document on the date given for support and the fault might have been with the Petitioner and her Lawyer for not having the necessary documents ready before the date for support. If she exercised due diligence and she could not get the documents from the Court of Appeal before the date given for support, she could have filed a motion beforehand and take the matter out of the support list so that the Court could allocate that time for another litigant. No material has been placed before this Court to show that she exercised due diligence and asked for certified copies with sufficient time before the said date given for support of the first Leave to Appeal application. A person who was asked to leave the country should have placed sufficient

material to show that he/she exercised due diligence in obtaining the documents and non-availability of document was beyond his/her control. Otherwise, one could use this type of delaying tactics to get the case postponed and delay the leaving of the country.

This second Leave to Appeal application without a right for a second Leave to Appeal naturally had wasted the valuable time of the Court and the Respondents that can be allocated for other matters. Further, this type of action also causes annoyance to the Respondents. Therefore, this Court can fully agree with that this second Leave to Appeal application is vexatious and is an unnecessary encumbrance of Court amounting to an abuse of due process by the Petitioner. In this regard, the learned DSG has cited *Ensen Trading & Industry (Pvt.) Limited v Minister of Finance and Mass Media and Others (CA (Writ) Application No. 41/2019, 01.04.2019)* where it was held that one circumstance in which abuse of process applied is where the litigation before Court is found to be in essence an attempt to re-litigate a claim which the Court has already determined [Also see *Spring Gardens Ltd. V Walte (1990) 3 WLR 347*]. In the instant case, this Court has once decided to refuse leave and the Petitioner has no right to re-agitate it.

#### **4. Whether the application of the Petitioner is defective due to the lack of a proper affidavit**

The Respondents submitted that the Petitioner in a hand written note filed along with a motion dated 23.01.2023 in SC FR 399/22 has claimed as follows:

*“This affidavit SC SPL LA No. 246/2022 document I am seeing for the first time and I note that it contains a signature which is clearly not my own. I completely reject this signature that has been put on this document and also the content of the affidavit.” - vide K11 or B and X18 or K12*

It should be noted that the said note does not mention the date of the affidavit filed in the instant case No.SC SPL LA No.246//2022 referred to therein and there are two affidavits tendered dated 06.09.2022 (one accompanied by the Original Petition) and another one dated 04.10.2022 (one the Petitioner and her lawyer now states as a forged affidavit). As per K11 or B (motion filed in the SC FR 399/2022 along with the said note), it appears that the said note refers to the affidavit dated 04.10.2022. Therefore, this Court at this juncture need not hold that the Affidavit filed along with the original petition in this application is not a proper affidavit. However, it is observed that both



affidavits have been affirmed before the same Justice of Peace and one, now they state as a forged one was tendered to the Court by the lawyer of the Petitioner as one made by the Petitioner after obtaining time to get instructions from the Petitioner with regard to the Fundamental Rights Application -vide Journal Entry dated 30.09.2022. In that backdrop, reliability of the present application including the contents of the affidavit accompanying the Petition as well as with regard to the maker of it itself is questionable. However, as mentioned before the first ground of objection is sufficient to dismiss this application. Thus, it is not necessary to make a finding with regard to the authenticity of the affidavit filed along with the original petition at this juncture. As per the reasons discussed above, the order refusing Leave to Appeal in SC/SPLA/ 218/ 2022 is final with regard to the leave being granted. Hence, we dismiss this Leave to Appeal application subject to costs fixed at Rs. 250,000/=.

.....  
Judge of the Supreme Court

A. L. Shiran Gooneratne, J

I agree.

.....  
Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree.

.....  
Judge of the Supreme Court