

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

Michael Laurents Cyrille
Caderamanpulle,
No. 15/5, Victoria Place,
Off Elvitigala Mawatha,
Colombo 8.
(Deceased)

Joseph Romesh Sherhan
Caderamanpulle,
No. 33, Booran Road,
Canfield, Victoria 3162,
Australia.
Substituted Respondent-Petitioner-
Appellant-Appellant

SC/APPEAL/81/2011

CA/APPEAL/960/1999(F)

DC COLOMBO/5386/1999/SPL

Vs.

Ceylon Paper Sacks Limited
No. 47, Maligawa Road,
Etul Kotte.
Petitioner-Respondent-Respondent-
Respondent

Before: Mahinda Samayawardhena, J.
K. Priyantha Fernando, J.
Menaka Wijesundera, J.

Counsel: Dr. Lasantha Hettiarachchi with Minaali Haputantri and Nishadini Gunawardana for the Substituted Respondent-Petitioner-Appellant-Appellant.

Kuvera De Zoysa, P.C., with Sumedha Mahawanniarachchi and Randeewari Arangala for the Petitioner-Respondent-Respondent-Respondent.

Argued on: 14.10.2025

Written submissions:

By the Appellant and the Respondent on 14.11.2025.

Decided on: 26.03.2026

Samayawardhena, J.

The Respondent, Ceylon Paper Sacks Ltd., instituted this action (5386/1999/SPL) in the District Court of Colombo in 1999 by way of summary procedure against the Appellant, Mr. Caderamanpulle, under the Registration of Documents Ordinance seeking the cancellation of certain caveats filed by him over a property owned by the Respondent and for damages.

On 22.07.1999, the Court issued an order nisi in terms of section 377 of the Civil Procedure Code and fixed the next date as 27.08.1999. The order nisi was served on the Appellant through the Fiscal.

When the case was called on 27.08.1999, the Appellant being absent and unrepresented, the Court, in terms of section 383(1) of the Civil Procedure Code, made the order nisi absolute.

Section 383(1) provides as follows:

383(1). If on such day the petitioner appears, and the respondent does not appear, and if the court is satisfied by the affidavit of the serving officer, stating the fact of the service, or by oral evidence, that the order has been duly served upon the respondent in time

reasonably sufficient to enable him to appear, then if the order is an order nisi made under (a) of section 377, the court shall make it absolute, and shall pass no other order adverse to the respondent; but otherwise it shall make such order within the prayer of the petition as it shall consider right on the facts proved:

Provided, however, that in the latter case the court shall make no order to pay costs against the respondent, except in cases where the prayer of the petition expressly asks for the costs of the application, and the court thinks it fit that the respondent should pay them.

The Appellant thereafter made an application on 08.09.1999 “under section 839 of Chapter XXIV of the Civil Procedure Code” seeking to set aside the order absolute on the ground that the order nisi had never been served on him. Learned Counsel for the Appellant submitted that section 839 is a typographical error and that the correct provision referred to is section 389 of Chapter XXIV of the Civil Procedure Code. A reading of the judgment of the Court of Appeal indicates that the Court of Appeal has also proceeded on that basis. Accordingly, I proceed on the footing that it was a typographical error and that the application was in fact made under section 389 of the Civil Procedure Code.

Section 389 in Chapter XXIV of the Civil Procedure Code provides as follows:

No appeal by a respondent shall lie against any final order which has been made, in the case of the respondent’s non-appearance, on the footing of either an order nisi or an interlocutory order in the matter of a petition; but it shall be competent to the court, within a reasonable time after the passing of such order, to entertain an application in the way of summary procedure instituted by any respondent against whom such order has been made, to have such final order set aside upon the ground that the applicant had been prevented from appearing after notice of the order nisi or interlocutory order by reason of accident or misfortune, or that such

order nisi or interlocutory order had never been served upon him. And if the ground of such application is duly established to the satisfaction of the court, as against the original petitioner, the court may set aside the final order complained of upon such terms and conditions as the court shall consider it just and right to impose upon the applicant, and upon the final order being so set aside, the court shall proceed with the hearing and determination of the matter of the original petition as from the point at which the final order so set aside was made.

According to section 389, the application shall be made under summary procedure.

Upon that application dated 08.09.1999 being filed (Journal Entry No. 5), the learned District Judge, in chambers, directed that the case be called on 14.09.1999 for support of the said application.

On 14.09.1999 (Journal Entry No. 6), the case was called in open court and the Court fixed the matter for inquiry on 28.10.1999. This indicates that the Court did not issue an order nisi in terms of section 377(a), but instead made an interlocutory order appointing a day for the determination of the matter of the petition dated 08.09.1999 in terms of section 377(b).

Section 377 provides as follows:

If the court is satisfied on the evidence exhibited or adduced that the material facts of the petition are prima facie established or is of opinion that on the footing of these facts the petitioner is entitled to the remedy, or to the order in his favour, for which the petition prays, or any part thereof, then the court shall accordingly make either—

- (a) an order nisi, conditioned to take effect in the event of the respondent not showing cause against it on a day appointed by the order for that purpose; or*

(b) an interlocutory order appointing a day for the determination of the matter of the petition, and intimating that the respondent will be heard in opposition to the petition if he appears before the court for that purpose on the day so appointed.

According to the proceedings dated 28.10.1999, on that day, the Appellant was absent but was represented by two Attorneys-at-Law. However, as borne out by the same proceedings, the Court dismissed the Appellant's application with costs on account of his absence in Court.

Being dissatisfied with this order, the Appellant appealed to the Court of Appeal. The Court of Appeal, by its judgment dated 04.10.2010, affirmed the order of the District Court and dismissed the appeal. Hence this appeal to this Court.

Section 382 provides as follows:

If on the day appointed in an order made under section 377 for the determination of the matter of the petition, the petitioner does not appear before the court either in person or by his registered attorney to support the petition, the court shall dismiss the petition, and shall have power to make such order for the payment of costs by the petitioner to the respondent as to the court shall seem just.

The pivotal argument of learned Counsel for the Appellant is that, in terms of section 382, the Court cannot dismiss the application on the ground of the absence of the Appellant if he was represented by his Attorney-at-Law. I have no hesitation in accepting that argument.

According to section 382, the Court may dismiss the petition only if the petitioner is neither present nor represented. In the present case, however, on 28.10.1999, the Appellant was represented by his Attorneys-at-Law. In other words, the Court ought to have proceeded on the basis that both the Appellant and the Respondent Company were represented in Court on 28.10.1999.

If both parties were represented, sections 384 to 387 became applicable, and the inquiry ought to have commenced by the Respondent, not the Appellant. In *Chemisales Holding (Pvt) Ltd. v. People's Bank* (SC/APPEAL/148/2019, SC Minutes of 03.04.2025 at pages 36-41), I had the occasion to explain this procedure in some detail.

Sections 384 to 387 provide as follows:

384. If on such day both the petitioner and the respondent appear, the proceedings on the matter of the petition shall commence by the respondent in person, or by his registered attorney, stating his objections, if any, to the petitioner's application; and the respondent shall then be entitled to read such affidavits or other documentary evidence as may be admissible, or by leave of the court to adduce oral evidence in support of his objections, or to rebut and refute the evidence of the petitioner:

Provided that no affidavit or other documentary evidence shall be so read without express leave of court, unless a copy of the document shall have been served on the petitioner or his registered attorney at least forty-eight hours before the day when the matter of the petition comes on to be heard and determined; and the oral evidence shall be taken down in writing by the Judge.

385. In the event of the respondent stating objections to the application, and not otherwise, and after the respondent's evidence, if any, shall have been read or given, the petitioner shall be entitled by way of reply to comment upon the respondent's case.

386. When the respondent's evidence has been taken, it shall be competent to the court, on the request of the petitioner, to adjourn the matter to enable the petitioner to adduce additional evidence; or, if it thinks necessary, it may frame issues of fact between the petitioner and respondent, and adjourn the matter for the trial of these issues by oral testimony. And on the day to which the matter

is so adjourned, the additional evidence shall be adduced, and the issues tried in conformity with, as nearly as may be, the rules hereinbefore prescribed for the taking of evidence at the trial of a regular action.

387. The court, after the evidence has been duly taken and the petitioner and respondent have been heard either in person or by their respective attorneys-at-law or recognized agents, shall pronounce its final order in the matter of the petition in open court, either at once or on some future day, of which notice shall be given in open court at the termination of the trial.

It is therefore clear that both the District Court and the Court of Appeal erred in law when both Courts disallowed the Appellant's application solely on the basis that the Appellant himself was not personally present in Court on 28.10.1999.

On 21.06.2011, a previous Bench of this Court granted special leave to appeal on several questions of law set out in sub-paragraphs (c) to (j) of paragraph 51 of the petition dated 02.11.2010. In my view, it is unnecessary to answer all the questions of law. It is sufficient to answer question 51(d), which reads as follows:

Did the Court of Appeal fail to take cognizance of the significant fact that the District Court gravely erred in law when it proceeded to dismiss the petition dated 08.09.1999 on 28.10.1999 on the ground that the Appellant was not personally present when the case was called?

I answer the said question of law in the affirmative. Accordingly, the order of the District Court dated 28.10.1999 and the judgment of the Court of Appeal dated 04.10.2010 affirming that order are set aside, and the appeal is allowed.

The District Court is directed to hold the inquiry under summary procedure from the stage at which it was terminated on 28.10.1999, in accordance with the law. The Appellant is entitled to costs of this appeal.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court

Menaka Wijesundera, J.

I agree.

Judge of the Supreme Court