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

In the matter of an appeal with leave to appeal obtained from this Court.

PAN ASIA BANKING CORPORATION
at No.450, Galle Road, Colombo 03
and a branch office and/or a place of
business called and known as the
"Panchikawatte Branch," at No 221/221A,
Sri Sangaraja Mawatha, Colombo 10.

PLAINTIFF

S.C.C.H.C. Appeal No: 26/2010
S.C.(HC) L.A. No:21/2010
HC Civil Case No:421/09/MR

VS.

RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA,
No. 400/60/9, Longdon Avenue,
Colombo 07.

DEFENDANT

AND

PAN ASIA BANKING CORPORATION
at No.450, Galle Road, Colombo 03
and a branch office and/or a place of
business called and known as the
"Panchikawatte Branch," at No 221/221A,
Sri Sangaraja Mawatha, Colombo 10.

PLAINTIFF-PETITIONER

VS.

RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA,
No. 400/60/9, Longdon Avenue,
Colombo 07.

DEFENDANT-RESPONDENT

AND

RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA,
No. 400/60/9, Longdon Avenue,
Colombo 07.

DEFENDANT-RESPONDENT-PETITIONER

VS.

PAN ASIA BANKING CORPORATION PLC,
at No.450, Galle Road, Colombo 03 and a branch office and/or a place of business called "Panchikawatte Branch" at No 221/221A, Sri Sangaraja Mawatha, Colombo 10.

PLAINTIFF-PETITIONER REPONDENT

AND NOW BETWEEN

PAN ASIA BANKING CORPORATION PLC,
at No.450, Galle Road, Colombo 03 and a branch office and/or a place of business called "Panchikawatte Branch" at No 221/221A, Sri Sangaraja Mawatha, Colombo 10.

PLAINTIFF-PETITIONER REPONDENT-PETITIONER/ APPELLANT

VS.

RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA,
No. 400/60/9, Longdon Avenue,
Colombo 07.

DEFENDANT-RESPONDENT-PETITIONER-RESPONDENT

BEFORE: S.E. Wanasundera, PC. J.
Upaly Abeyrathne, J.
Prasanna Jayawardena PC. J.

COUNSEL: S.A. Parathalingam, PC with Varuna Senadhira for the Plaintiff-Petitioner-Respondent-Petitioner/Appellant.
Rasika Dissanayake for the Defendant-Respondent-Petitioner-Respondent

ARGUED ON: 05th October 2016.

WRITTEN SUBMISSIONS FILED: By the Plaintiff- Petitioner-Respondent-Appellant on 01st September 2010 and 01st November 2016.
By the Defendant- Respondent-Respondent on 08th November 2016.

DECIDED ON: 06th April 2017

Prasanna Jayawardena, PC, J.

The Plaintiff-Petitioner-Respondent-Petitioner/Appellant ["the plaintiff"] is a Licensed Commercial Bank and the Defendant-Respondent-Petitioner-Respondent ["defendant"] is a customer and account holder of the plaintiff bank. The plaintiff instituted this action against the defendant praying for the recovery of a sum of Rs. 16,350,246/13 together with interest thereon, which is said to be due upon an overdraft facility granted by the plaintiff to the defendant.

One month after the plaint was filed, the plaintiff made an application under section 653 of the Civil Procedure Code, praying for the issue of an Order sequestering the car bearing registration number WP GV 7007["the car"], before judgment. This application was made by way of a petition supported by an affidavit affirmed to by the Recoveries Manager of the plaintiff bank.

The plaintiff's application was supported *ex parte* on 07th October 2009. Having heard learned Counsel appearing for the plaintiff, the learned High Court Judge issued the sequestration order by way of a mandate (in Form 104 read with Form 38 of the First Schedule to the Civil Procedure Code) directing the Fiscal to seize and sequester the car and secure it until the further Orders of the Court. In terms of section 654 of the Civil Procedure, the learned High Court Judge also directed the plaintiff to furnish a bond in a sum of Rs.150,000/- to secure the payment of any damages or costs which the defendant may have to bear as a result of the sequestration and which may be awarded by the Court.

The learned High Court Judge directed that, the case be called on 05th November 2009. Since the petitioner has failed to annex the journal entries of the case in the High Court, this Court is unable to ascertain what occurred on that day. Further, in its application to this Court seeking leave to appeal, the plaintiff has stated that, the sequestration order could not be executed since the car was not located. As the journal entries are not before us, we are unable to gather any further information regarding the efforts to seize and sequester the car. Also, since the journal entries are not before us, we are not aware whether the defendant has filed answer.

In any event, on 03rd February 2010, the defendant made an application, by way of a petition and supporting affidavit, praying that, the Order for sequestration be vacated. The plaintiff filed its statement of objections to the defendant's application, with a supporting affidavit. The parties agreed that, the defendant's application to vacate the Order for sequestration, be decided upon written submissions. On 09th March 2010, both parties tendered their written submissions to the High Court. By his Order dated 22nd April 2010, the learned High Court Judge vacated the Order for sequestration which had been issued *ex parte*. Since the car had not been sequestered and seized, the learned Judge discharged the bond furnished by the plaintiff.

The plaintiff made an application to this Court seeking leave to appeal from the Order of the High Court. This Court has granted leave to appeal on the following three questions of law, which are set out *verbatim*:

(i) The learned Judge of the Commercial High Court in his said order having held that the Petitioner has complied with the requirements set out in the said section 653 of the Civil Procedure Code has misdirected himself on the case law applicable to the said section ?

(ii) In a situation where the Petitioner on the information given by the Respondent has stated in the Petition (marked **'P2'**) and the Affidavit (marked **'P3'**) that the Petitioner verily believes that the only valuable asset that the Respondent is possessed with is the said vehicle, the learned Judge of the Commercial High Court in his said order has gravely misdirected himself in holding that the Petitioner has failed to establish that the Respondent is not possessed with any other assets ?

(iii) The learned Judge of the Commercial High Court in his said order has not properly drawn his attention and/or misdirected himself with regard to the documents marked **'P2c'** and **'P5i'** already annexed to this Petition ?

At this point, it is pertinent to mention that, Section 653 of the Civil Procedure under and in terms of which the plaintiff has made the application to sequester the car and under and of which this appeal has to be decided, is contained in Part V of the Civil Procedure Code which provides for and governs the issue of the "Provisional Remedies" of `arrest before judgment', `sequestration before judgment', `injunctions', interim orders' and the `appointment of receivers'. Part V of the Civil Procedure Code consists of four Chapters. Chapter 47 makes provisions with regard to the "Provisional Remedies" of `arrest before judgment' and `sequestration before judgment'. Chapters 48, 49 and 50 make provisions regarding the other three "Provisional Remedies" of `interim injunctions', interim orders' and the `appointment of receivers'.

These "Provisional Remedies" provided by our Civil Procedure Code are referred to as "Interim Orders" and sometimes "Interlocutory Orders" in the India and England.

Such Orders may be issued by a Court *during the pendency of an action* where the Court is satisfied that the interests of justice require the issue of an Order granting one or more of these "Provisional Remedies" *before* the Court makes a final determination of the action.. As observed in Halsbury's Laws of England [4th ed. Vo. 37 para 326], *"Interlocutory applications are almost invariably necessary in order to deal with the rights of the parties in the interval between the commencement of the proceedings and their final determination. Their function is to enable the court to grant such interim relief or remedy as may be just or convenient. Such relief or remedy may be designed to achieve one or more of several objectives, for example to maintain the status quo ante, to prevent hardship or prejudice to one or other of the parties, to preclude one party from overreaching or outwitting the opposite party, to preserve a fair balance between the parties and to give them due protection while awaiting the final outcome of the proceedings, and to prevent any abuse of process during this period."*.

In the case of an Order for sequestration of property before judgment, which is the subject of the present case, section 653 of the Civil Procedure Code provides this "Provisional Remedy" to protect the interests of a plaintiff faced with the prospect of a defendant who is about to fraudulently dispose of his property, during the pendency of the action, in order to escape paying the monies which he will have to pay to the plaintiff, if a decree is entered against him. Thus, a sequestration order is issued to prevent a decree which may be entered in favour of the plaintiff being rendered nugatory, by the fraudulent disposal of property by the defendant.

In view of the circumstances in which a sequestration order is issued and its effect, a sequestration order may be described as an extraordinary remedy issued on a just and equitable basis.

A sequestration order can be issued at the commencement of the action or at any time before judgment. Due to the nature of the circumstances which give rise to a need to seek a sequestration order, such Orders are, usually, issued *ex parte*. That is because, a defendant who has ample notice of an application for an Order sequestering his property, is likely to then have equally ample opportunity to complete a fraudulent alienation of his property *before* the plaintiff can obtain a sequestration order and, thereby, render the sequestration order nugatory.

Section 653 states:

> *"If a plaintiff in any action, either at the commencement thereof or at any subsequent period before judgment, shall by way of motion on petition supported by his own affidavit and viva voce examination (if the Judge should consider such examination necessary) satisfy the Judge that he has a sufficient cause of action against the defendant, either in respect of a money claim of or exceeding one thousand five hundred rupees or because he has sustained damage to that amount, and that he has no adequate security to meet the same, and that he does verily believe that the defendant is*

fraudulently alienating his property to avoid payment of the said debt or damage; and if he shall at the same time further establish to the satisfaction of the Judge by affidavit or (if the Judge should so require) by viva voce testimony such facts that, the Judge infers from them that, the defendant is fraudulently alienating his property with intent to avoid payment of the said debt or damage, or that he has with such intent quitted Sri Lanka leaving therein property belonging to him, such Judge may order a mandate (Form No. 104, First Schedule) to issue to the Fiscal, directing him to seize and sequester the houses, lands, goods, money, securities for money and debts, wheresoever or in whose custody soever the same may be within his district, to such value as the Court shall think reasonable and adequate and shall specify in the mandate, and to detain or secure the same to abide the further orders of the Court.".

It is evident from a reading of section 653 that, a plaintiff who wishes to obtain an Order for the sequestration of a defendant's property before judgment, must satisfy the Court that he has established all the following five requisites:

(i) That, the plaintiff has a *"sufficient cause of action"* against the defendant;

(ii) That, the cause of action is for the recovery of money or compensation for damages, in a sum of Rs.1500/- or more;

(iii) That, the plaintiff does not hold adequate *"security"* for the satisfaction of his claim against the defendant in the event decree is entered in his favour against the defendant;

(iv) That, the plaintiff *"does verily believe"* that, *"the defendant is fraudulently alienating his property to avoid payment"* of the monies claimed by the plaintiff in the action;

(v) That, the plaintiff has established by affidavit [or by *viva voce* testimony if the Court requires] *"facts"* from which the Court can *"infer"* that the defendant is *"fraudulently alienating his property with intent to avoid payment"* of the monies claimed by the plaintiff in the action or that, the defendant has *"with such intent quitted Sri Lanka leaving therein property belonging to him"*.

It is also evident from section 653 that, when issuing a sequestration order, the Court is required to determine the *"reasonable and adequate"* value up to which property may be seized in order to secure the plaintiff's claim. That value has to be specified in the Order.

With regard to the considerations which should guide the issue of sequestration orders in Sri Lanka, I have been able to locate only two reported decisions of our

Courts which refer to such considerations. Those are the cases of DAVID & Co. vs. ALBERT SILVA [31 NLR 316] and BOSANQUET & CO. vs. RAHIMTULLA & CO. [33 NLR 324] . In the first case, Fisher CJ stated (at p.316) with regard to section 653 of the Civil Procedure Code, *"….. the provisions of that section must be strictly complied with inasmuch as the section deals with very special procedure invoked at the outset of the action before the merits of the action or the legal rights of the parties have been dealt with on the basis of fraudulent conduct on the part of a defendant, involving interference with the proprietary rights of a defendant. Special procedure, such as this, can only be invoked if the provisions of section 653 are complied with."*. In the second case, Garvin SPJ stated *obiter* [at p.331], *"A mandate of sequestration is a lawful method of process, and nothing in this judgment must be read as discouraging its use under the proper circumstances, and these are that the debtor actually is fraudulently disposing of his goods with a view to avoiding payment of debts due, or that there are facts within the knowledge of the person applying for the sequestration which would justify a man of ordinary experience and common sense in supposing that the debtor was so fraudulently alienating his goods, for in either of these circumstances the applicant will have reasonable or probable cause for his application.…."*.

The other reported decisions of our Courts which deal with appeals arising from sequestration orders made under section 653, have succinctly dealt with the specific issues which arose in these appeals, particularly with regard to what a plaintiff must aver in his affidavit and establish in order to obtain a sequestration order. These decisions do not appear to have examined, in general, the considerations which should guide the issue of sequestration orders in Sri Lanka. In that background, this may be an opportune time to do so.

To start with, it is evident from section 653 that, it enables a plaintiff who satisfies the Court that the requisites of section 653 have been established, to obtain an Order for the sequestration of the defendant's property and, thereby, secure rights which the plaintiff *may* obtain if decree is eventually entered in his favour at the conclusion of the pending action. Thus, a sequestration order has the effect of securing rights which the plaintiff claims, long *before* the Court actually decides, at the conclusion of the action, whether the plaintiff is entitled to succeed in his claim or whether the plaintiff's claim should be dismissed. Therefore, when a Court is called upon to decide whether to issue a sequestration order, it must keep in mind the fact that, it has not yet had an opportunity to make a final determination with regard to the rights and liabilities of the parties and that, a sequestration order is issued, on a just and equitable basis, to protect the potential rights of a plaintiff who has satisfied the Court that, he has established the requisites of section 653 of the Civil Procedure Code.

At the same time, a Court has to keep in mind that, the issue of the sequestration order will immediately interfere with the defendant's proprietary right, in law, to enter into *bona fide* transactions with his own property during the pendency of an action instituted against him. In addition, the issue of a sequestration order and the consequent seizure of property can damage the reputation of a defendant or, in some cases, block the efforts of a defendant who is trying to sell a part of his

property and raise funds to vigorously defend himself in the pending action. There may also be instances where a manipulative plaintiff uses an *ex parte* sequestration order to try and coerce a defendant to pay the plaintiff's claim. The issue of an *ex parte* sequestration order can result in a defendant having to bear these consequences before he is heard.

Therefore, when a Court is considering whether to issue a sequestration order, the Court must keep in mind *both* the interests of a plaintiff who wishes to secure rights under a decree which he may obtain at the conclusion of the pending action *and* the aforesaid consequences which the defendant may have to bear, if the sequestration order is issued.

Further, a Court has to be vigilant to ensure that the plaintiff is seeking the sequestration order because he, *bona fide* and for good reason, apprehends that the defendant is attempting to fraudulently dispose of his property and not because the plaintiff is attempting to coerce the defendant into settling the case or to humiliate or harass the defendant out of ill will.

For these reasons, Orders for sequestration before judgment should be issued only where the Court, after exercising due care and consideration, is satisfied that, the plaintiff has duly established all the requisites of section 653. The Court should be of the view that, unless the sequestration order is issued, there is a likelihood that the defendant will fraudulently alienate his property and, thereby, render nugatory any decree which the plaintiff may obtain and that, therefore, the interests of justice require the issue of the sequestration order. Where the Court is so satisfied, a Court should not hesitate to issue a sequestration order and, thereby, secure the plaintiff's claim. But, where the plaintiff fails to establish all the requisites of section 653 to the satisfaction of Court, the extraordinary remedy of a sequestration order should not issue.

Useful insights can be gained by a look at some of the decisions in India which have examined the principles which are relevant when determining whether a sequestration order should be issued. In this connection, it is to be noted that, although there are differences between Section 653 of our Code and the corresponding Order 38 Rule 5 of the Civil Procedure Code in India, there are sufficient similarities between these two provisions, to make reference to the Indian decisions helpful to us in Sri Lanka. It should be mentioned here that, Order 38 Rule 5 of the Indian Civil Procedure Code, uses the term *"attachment before judgment"* while our Code uses the term *"sequestration before judgment"*. Both terms refer to much the same act and Order.

The fact that, an Order for sequestration of property before judgment is an extraordinary remedy which should be issued with due care and consideration was emphasised by the Calcutta High Court in RATAN KUMAR vs. THE HOWRAH MOTOR CO (PVT) LTD [AIR 1975 Cal 180 at p.187], which stated, *"….. the remedy of an attachment before judgment is an extraordinary remedy and should be granted*

with utmost care and caution.". Similarly, SRINIVASAN vs. SRINIVASAN [AIR 1985 Mad. 269 at p.269], the Madras High Court stated, *" …. utmost caution and circumspection should guide the court. The court must advert to the provisions of the Code in this regard, advert to and investigate the allegations thrown against the defendant, satisfy itself that a case for attachment before judgment has been made out and then pass the requisite order."*.

With regard to the prejudice that may be caused to a defendant by the interference with his proprietary rights when a sequestration order is issued, the Calcutta High Court observed in JAI PRAKASH vs. BASANTA KUMARI [1911 15 IC Cal 604], *"An attachment practically takes away the power of alienation and such a restriction on the exercise of the undoubted rights of ownership ought not to be imposed upon an individual except upon clear and convincing proof that the order is needed for the protection of the plaintiff."*. Similarly, in NOWROJI PUDUMJEE vs. DECCAN BANK LTD [AIR 1921 Bom. 69 at p.69], the Bombay High Court stated, *"A man is not debarred from dealing with his property just because a suit has been filed against him. Otherwise, in every case in which a suit is brought against a man, if during the pendency of the proceedings he sells some of his property that would be at once a sufficient ground to satisfy the Court that he is disposing his property with intent to defraud the plaintiff. Clearly, there must be additional circumstances before the Court can be satisfied that such an intention exists."*.

With regard to the other adverse consequences which may be caused to a defendant when a sequestration order is issued: The Gujarat High Court observed in BHARAT TOBACCO CO. vs. MAULA SAHEB [AIR 1980 Guj. 202 at p.204], *"An order of attachment before judgment is a drastic order and ordinarily the Court would be slow in exercising the power conferred upon it under Order 38 Rule 5 of the Code for the simple reason that if the power is not exercised with utmost care and caution, it may ruin the reputation and business of the party against whom the power is exercised. The Court must act with utmost circumspection before issuing an order of attachment so that the power vested in the Court is not abused by an unscrupulous litigant as a weapon of oppression against the opposite party."*; In CHANDRIKA PRASAD SINGH vs. HIRA LAL [AIR 1924 Pat. 312 at p. 314], the Patna High Court emphasised that, *"The power given to the Court to attach a defendant's property before judgment was never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before his liability is established by a decree, may have the effect of seriously embarrassing him in the conduct of his defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit, which may eventually prove to have been entirely devoid of merit."*; and in SRINIVASAN vs. SRINIVASAN, the High Court pointed out (at p.269) *"This process is never meant as a lever for the plaintiff to coerce the defendant to come to terms."*.

Having set out the five requisites which have to be established by a plaintiff who wishes to obtain a sequestration order under section 653 of the Civil Procedure Code and also some of the considerations which should be kept in mind when a

Court is deciding whether to issue a sequestration order, it is necessary to also examine whether a defendant against whom an *ex parte* sequestration order has issued, is entitled to make an application to have that sequestration order vacated. This question should be addressed here since section 653 and the subsequent sections in Chapter 47 of the Civil Procedure Code make no specific provision for a defendant against whom a sequestration order has issued, to make an application to have that Order vacated.

This question was considered by the High Court in the present case where the plaintiff obtained the sequestration order *ex parte* on 07th October 2009 and, later, the defendant made her application dated 03rd February 2010, praying the sequestration order be vacated. The learned High Court Judge, very correctly, issued notice of the defendant's application to the plaintiff and then held, at an *inter partes* Inquiry, that the defendant was entitled to make an application to vacate the *ex parte* sequestration order.

In holding so, the learned High Court Judge relied on the decision of this Court in MUTTIAH vs. MUTUSWAMY [1 NLR 25] in which it was held that, a defendant against whom an *ex parte* sequestration order has been issued by a Court, is entitled to make an application to the same Court, with notice to the plaintiff, to have that sequestration order vacated. In this regard, Lawrie ACJ held [at p.28], *"On the ground suggested that a District Court, having once ex parte allowed a sequestration to issue, cannot recall it, on good grounds shown by the defendant, all I can say is that I do not assent to so novel and, I think, so dangerous and unjust a rule. There is as a rule no appeal against an ex parte order. The proper course is to apply to the Court which made the order to vacate it with notice to the party who holds the order, and on showing good grounds that the order had been made on insufficient materials, or was otherwise wrong."*. I would also mention that, a perusal of the decisions in SAMARAKOON vs. PONNIAH [32 NLR 257] HADJIAR vs. ADAM LEBBE [43 NLR 145] and SINGHAPUTRA FINANCE LTD vs. APPUHAMY [2005 1 SLR 5] shows that, in all these cases, a defendant against whom an *ex parte* sequestration order had been issued in the District Court, succeeded in an application made by him to the same Court to have that sequestration order vacated. In appeal, it was recognised in all three cases that, the defendants were entitled to make such applications to the District Court.

Thus, it is established law that, a defendant against whom an *ex parte* sequestration order has been issued by a Court, is entitled to make an application to the same Court, with notice to the plaintiff, to have that sequestration order vacated. I must add here that, learned Counsel appearing for the plaintiff in the High Court and learned President's Counsel appearing for the plaintiff before us, did not, very correctly, dispute the defendant's right to make that application to the High Court.

To now turn to the three questions of law that are to be decided in this appeal, the first of them asks whether the learned High Court Judge misdirected himself on the

case law applicable to section 653 of the Civil Procedure Code having previously held that, the plaintiff had complied with the requirements of section 653.

At the outset, it has to be observed that, this question of law appears to have been framed upon a mistaken assumption that, the learned High Court Judge had held that, the plaintiff had complied with requirements of section 653. In fact, a reading of the Order dated 22nd April 2010 of the High Court, which is being challenged by the plaintiff, makes it very clear that, the learned High Court Judge's determination was that the plaintiff has failed to comply with the requirements of section 653. That is why the learned Judge vacated the sequestration order which had been issued *ex parte*. In this connection, the plaintiff cannot be heard to contend that, the issue of the *ex parte* sequestration order amounts to a final determination by the High Court that the plaintiff has duly established all the requisites for the issue of a sequestration order. That *ex parte* sequestration order was issued without the defendant being heard. The High Court had every right, and indeed a duty, to vacate the *ex parte* sequestration order if, after considering the defendant's application, the learned Judge determined that, the plaintiff is not entitled to the sequestration order.

Thus, the remaining aspect of the first question of law is whether the learned High Court Judge misdirected himself on the case law applicable to section 653.

When considering that part of the first question of law, it will be helpful to look, sequentially, at each of the five requisites of section 653, which were identified and set out above, in the light of the applicable decisions of the superior courts, and then examine the determination of the learned High Court Judge with regard to each such requisite.

The first requisite which the plaintiff had to establish to the satisfaction of the court was that, the plaintiff has a *"sufficient cause of action"* against the defendant. It is self explanatory that, this places a duty upon the Court to satisfy itself that, the plaint makes out a *prima facie* maintainable cause of action. If the defendant has filed a statement of objections or answer, the Court should also look at such pleadings to see whether the defendant has made out any ground which would, as a matter of law, prevent the plaintiff from succeeding in the action. The Court is not required to engage in any further analysis of the merits of the plaintiff's case at this stage. There do not appear to be any previous decisions of this Court which have considered this requisite of section 653. Most likely, because this requisite is self-explanatory.

In the present case, the learned High Court Judge has approached this aspect of section 653 in the aforesaid manner and has held that, the plaintiff had made out a sufficient cause of action in the plaint and the documents annexed thereto. He further held that, the defendant's contention that, the statement of account of the overdraft facility indicated that interest had been in charged in excess of capital, was a question that had to be determined at the trial and not at this interlocutory stage. I am in entire agreement with the learned High Court Judge.

The second requisite which the plaintiff had to establish was that, the cause of action is for the recovery of money or compensation for damages, in a sum of Rs.1500/- or more.This places a duty upon the Court to satisfy itself that, the plaintiff's cause of action is for the recovery of a sum of money of Rs.1,500/- or more or for the recovery of compensation for damages in a sum of money of Rs.1,500/- or more. Thus, plaintiffs who file actions for declarations or possessory actions or other types of reliefs which are not `money recovery' actions or actions for the recovery of compensation for damages, cannot obtain sequestration orders.

In the present case, the plaintiff has filed a money recovery action praying for the recovery of a sum of Rs.16,350,246/13.Therefore, this requisite has been satisfied. This issue was not disputed by the parties in the High Court.

The third requisite which the plaintiff had to establish to the satisfaction of the court was that, the plaintiff does not hold adequate *"security"* for the satisfaction of his claim against the defendant in the event decree is entered in his favour against the defendant. In my view, this places a duty upon the Court to satisfy itself that, the plaintiff does not hold *"security"* – by way of a mortgage or hypothecation or pledge or lien or other sort of charge over property – which provides him with *"security"* which can be sold to realise his `money claim' against the defendant. In my view, the word *"security"* used in section 653 is to be understood in the sense of *"Property etc deposited or pledged as a guarantee of the fulfillment of an obligation (as an appearance in court or the payment of a debt) and liable to forfeit in the event of default."* as defined in the Shorter Oxford English Dictionary, *"money secured on property"* as defined in Stroud's Judicial Dictionary [6th ed. Vol. 3 p.2390] and *"Collateral given or pledged to guarantee the fulfillment of an obligation"* as defined in Black's Law Dictionary [9th ed.] That is so since, a plaintiff who holds such *"security"* can look to that *"security"* to secure his claim against the defendant and has no cause to seek the additional protection of the sequestration of the defendant's *other* property.

In the light of the specific requirement in section 653 that the plaintiff must not hold adequate *"security"* for the satisfaction of his claim against the defendant, the plaintiff should have specifically averred in its petition and supporting affidavit, that it did not hold *"security"* or, at the very least, make averments which make it clear that, the plaintiff does not hold *"security"*. However, a perusal of the plaintiff's petition and supporting affidavit reveals that, the plaintiff has not done that.

Instead of making the averment that the plaintiff had no *"security"* or words to that clear effect, which is what is required by the plain wording of section 653, the plaintiff has, in its application for the sequestration order and the supporting affidavit, averred that, the aforesaid car is the *"the only valuable asset"* of the defendant. It appears that, the plaintiff has confused *"security"* which may be held by the plaintiff with the *assets* held by the defendant. As mentioned earlier, section 653 requires that the plaintiff must not hold any *"security"* (*ie:* by way of a mortgage or hypothecation or pledge or lien or other sort of charge over property) to meet its claim against the

defendant. Whether or not the defendant owns *assets*, is not relevant to the specific requirement specified in section 653 that the plaintiff must not hold adequate *"security"* for the satisfaction of his claim against the defendant.

The plaintiff has sought to overcome the aforesaid omission by stating in its statement of objections to the defendant's application and supporting affidavit that, the plaintiff does not hold *"security"*. But, that averment is belated and cannot remedy the aforesaid omission in the application for the Order sequestering the defendant's property before judgment. Lyall Grant J held the same view in SAMARAKOON vs. PONNIAH when he stated (at p.258-259) *"It is impossible to give effect to the contention that the insufficiency of material on which the mandate was granted can be made good if it shown that the state of things in fact existing at the time the application was made, had it been brought to the notice of the Judge, would have justified him in acting as he did. In my opinion there is no proper material upon which the mandate could be issued and it must therefore be dissolved."*.

The learned High Court Judge held that, the plaintiff had failed to establish that it held no *"security"*, basing his determination primarily on the failure of the plaintiff to establish any reasons for making the aforesaid statement that the car is the *"the only valuable asset"* of the defendant. The learned High Court judge was correct when he observed that, the plaintiff had failed to adduce any reasons for making that claim. I would add, as a compelling reason for the determination that the plaintiff has failed to establish that it held no *"security",* the fact that, the plaintiff has failed to state so in its application for the sequestration order and supporting affidavit. The plaintiff has failed to expressly state that it held no *"security"* by using those specific words or even by using other words to that clear effect. As I mentioned earlier, stating that the car is the defendant's *"only valuable asset"* is not the same as stating that the plaintiff holds no *"security"*.

In this regard, I think it should be emphasized that, since an application for an *ex parte* sequestration order invokes an extraordinary remedy which can cause prejudice to the defendant, a plaintiff who wishes to obtain that extraordinary remedy on an *ex parte* basis, must be held to strict compliance with all the requirements of section 653 of the Civil Procedure Code. As Fisher CJ stated in DAVID & Co. vs. ALBERT SILVA (at p.316) with regard to section 653 of the Civil Procedure Code, *"….. the provisions of that section must be strictly complied with…."*.

The essential requisites of section 653 must be clearly averred on the face of the petition and supporting affidavit. A Court cannot be expected to scour these documents searching for clues to check whether the plaintiff has satisfied the requirements of section 653. It would not be inappropriate to stress here that, it is incumbent on the pleader to exercise care and due diligence in the drafting of an application, especially where *ex parte relief* is sought.

The fourth requisite which the plaintiff had to establish to the satisfaction of the court was that, the plaintiff *"does verily believe"* that, *"the defendant is fraudulently*

alienating his property to avoid payment" of the monies claimed by the plaintiff in the action.

A glance at section 653 shows that, the specific requirements are that, the plaintiff has to first satisfy the Court that, the plaintiff believes that, the defendant is acting or is about to act ***"fraudulently"*** and, thereafter, discharge the burden of adducing facts from which the Court can reasonably infer that *"the defendant is* ***fraudulently*** *alienating his property ….."*. Thus, the defendant's ***"fraudulent"*** acts or intent is an essential component of section 653. As Lawrie CJ observed in MUTTIAH vs. MUTUSWAMY, Lawrie CJ (at p.28), *"Alienation is not enough. It must be* ***fraudulent*** *alienation"*. [emphasis added]. Further, in HING APPU vs. DONCHAHAMY [1 Browne's Law Reports 376], this Court appears to have taken the view that, there must be specific averments that the defendant were acting or about to act *fraudulently*. There is also the well known rule that, where a plaintiff wishes to rely on alleged *"fraud"* on the part of the defendant, the alleged *"fraud"* must be pleaded.

Therefore, in the light of these specific requirements of section 653, the plaintiff should have specifically stated, in its petition and supporting affidavit, that, the plaintiff believes the defendant is **fraudulently** alienating his property to avoid payment of the monies claimed by the plaintiff in the action or, at the least, said so by using other words to that clear effect.

However, the plaintiff makes *no* claim in its petition and supporting affidavit that the plaintiff believes that the defendant is acting or is about to act *"fraudulently"*.

Once again, the plaintiff has sought to overcome the aforesaid omission by making averments in its statement of objections to the defendant's application and the supporting affidavit, to the effect that, the defendant is *"fraudulently"* alienating his property to avoid payment of the monies claimed by the plaintiff in the action, But, here too, that averment is belated and cannot remedy the aforesaid omission in the application for an Order sequestering the defendant's property before judgment. The observations by Lyall Grant J in SAMARAKOON vs. PONNIAH which were cited a little earlier and the insistence on strict compliance with the requirements of section 653, which I stated earlier, will apply here too.

The learned High Court Judge observed that, the plaintiff had failed to specifically aver that the defendant is acting or is about to act *"fraudulently"*. I hold that, the learned Judge correctly determined that, the plaintiff had failed establish the aforesaid fourth requisite of section 653 of the Civil Procedure Code.

The fifth requisite which the plaintiff had to establish to the satisfaction of the court was that, the plaintiff has adduced, by affidavit [or by *viva voce* testimony if the Court requires], *"facts"* from which the Court can *"infer"* that the defendant is *"fraudulently alienating his property with intent to avoid payment"* of the monies claimed by the plaintiff in the action. [A question whether defendant has *"with such intent quitted Sri Lanka leaving therein property belonging to him"* did not arise in the present action].

In DAVID & CO. vs. ALBERT SILVA, Fisher CJ held that, the plaintiff's affidavit must set out reasonable grounds to justify the plaintiff's claim that he believes the defendant is disposing of his property. The learned Chief Justice stated (at p. 316) *"The affidavit in this case merely says that the plaintiff `has good reason to believe certain things'. There is no statement of any facts in the affidavit as required by section 653 of the Civil Procedure Code; and moreover, being an affidavit based on belief, section 181 is also applicable and must be complied with,. That requires reasonable grounds for the belief to be set forth in the affidavit"*. In SAMARAKOON vs. PONNIAH [32 NLR 257], Lyall Grant cited the aforesaid passage with approval. Lyall Grant J went on (at p.259) to explain with regard to section 181 of the Civil Procedure Code, *"Section 181 contains an exception to the rule that affidavits shall be confined to statements of such facts as the declarant is able of his own knowledge and observations to testify to, except in interlocutory applications, in which statements of his belief may be admitted provided that reasonable grounds for such belief are set forth in the affidavit. The requirement of section 181 and section 653 are similar."*. For purposes of easy reference, it may be mentioned here, Section 181 of the Civil Procedure Code provides that, in the case of interlocutory applications [such as in the present case] a statement of belief may be included in an affidavit, provided reasonable grounds for such belief are set out in the affidavit.

In RAJADURAI vs. THANAPALASINGHAM [2 CLW 147], this Court held that, a sequestration order should not have issued on a mere assertion that the defendant was making arrangements to draw money and place it beyond the reach of the plaintiff. Drieberg J stated (at p.148]) *"The Court should have required Ramapillai to state what the arrangements were which he mentioned in his affidavit"*.

In the later case of KARUNADASA vs. YOOSOOF [51 NLR 326 at p.326], Windham J further explained, *"Now an examination of sections 653 and 181 of the Civil Procedure Code makes two points clear. First, section 653 requires the affidavit to set out allegations of fact from which the judge may infer that the defendant is fraudulently alienating his property with intent to avoid payment of the debt or damage; that is to say, a mere statement in the affidavit that the defendant is fraudulently alienating is not enough, – it is for the court to infer fraudulent alienation, or not, from the allegations of fact set out in the affidavit. Secondly, since petitions under section 653 are interlocutory, the allegations of fact so set out in the affidavit need only comply with the second part of section 181 of the Civil Procedure Code and not with the first part; that is to say they need not be such as the declarant is able to of his own knowledge and observation to testify to; but they may be merely statements of his belief, provided that reasonable grounds for such belief are set forth in the affidavit."*.

In the facts and circumstances of that particular case, Windham J held that, statements in the plaintiff's affidavit that, the defendant is making preparations to withdraw an amount that was payable to him and has been trying to avoid the plaintiff and that, the defendant is making preparations to transfer his deposits to third parties and to dispose of his only immovable property, were sufficient to

establish reasonable grounds for the plaintiff's belief that the defendant is attempting to fraudulently alienate his property. In this regard, Windham J (at p.327) expressed his view that, the word *"facts"* in section 653 should not be construed so narrowly as to require the plaintiff state the precise *"movements or acts"* which give rise to his belief that the defendant was attempting to fraudulently alienate his property. His Lordship stated, *"To allege that somebody is preparing to do something is to allege a fact, and that is all that the section requires"*.

In SINGHAPUTRA FINANCE LTD vs. APPUHAMY, Wimalachandra J held (at p.57-58) that, since an application for a sequestration order is an interlocutory application, section 181 of the Civil Procedure Code permits the Court to act on statements of belief *provided* reasonable grounds for that belief which *"enable the Court to come to a conclusion whether it would be safe to act on the petitioner's affidavit to grant the relief sought by the petitioner in its petition."*, are set out in the affidavit.

It is clear from the aforesaid decisions and upon a reading of section 653 with section 181 of the Civil Procedure Code, that the reference to *"facts"* in section 653 will include statements of the plaintiff's belief if the plaintiff states reasonable grounds for such belief. Thus, a sequestration order may be issued not only upon the plaintiff adducing *"facts"* but also upon the plaintiff making statements of belief only, provided the Court can reasonably infer from those facts or statements that, the defendant is about to fraudulently alienate his property.

I would mention, with respect, that the aforesaid statements by Windham J in KARUNADASA vs. YOUSOOF (at p.327 of that judgment) should not be taken as giving a plaintiff the license to simply make a few unsubstantiated allegations and then claim that he has set out *"reasonable grounds"* for a belief that the defendant is attempting to fraudulently alienate his property. Instead, where a plaintiff wishes to rely on a statement of belief, the plaintiff must state, in some detail, reasonable grounds which give cause for that belief with reference to past and anticipated acts of the defendant and other relevant circumstances. It is only by doing so that, a plaintiff may enable a Court to consider it reasonable to infer that, the defendant is attempting to fraudulently alienate his property. That appears to have been the case in KARUNADASA vs. YOOSOOF.

In its petition seeking the sequestration order and supporting affidavit, the plaintiff relied only on the defendant's letter dated 17th August 2009 marked **"X3"** to establish the plaintiff's claim that the defendant is attempting to alienate her assets and from which the plaintiff wishes the Court to infer that the *"defendant is fraudulently alienating his property"* in order to avoid paying the plaintiff's claim.

This letter marked **"X3"** is written by the defendant to the plaintiff. By this letter, the defendant has stated that, she had leased the aforesaid car from the plaintiff and duly paid all monies owing on the lease facility. She has stated that, therefore, she would like the plaintiff to hand over the certificate of registration of the car (which had

been held by the plaintiff in view of the lease agreement) and that she wished to sell the car to meet a financial commitment.

I cannot see how that letter can be regarded as establishing or even suggesting that the defendant was attempting to *"fraudulently"* alienate her assets. It is well known that, the established practice in the leasing industry is for the lessor to release the registration certificate to a lessee who pays all monies due upon the lease agreement. Therefore, the defendant could have, reasonably, expected the plaintiff to hand over the registration certificate since she had paid all monies due on the lease agreement. The defendant has written to the plaintiff asking for the registration certificate and has mentioned that she intends to sell the car to meet a financial commitment. She need not have mentioned that detail if she wished to hide her wish to sell the car. It seems to me that, the defendant's act is far from that of a fraudulent person. On the contrary, the defendant has acted honestly and frankly. Further, it has to be kept in mind that, at this preliminary stage of the action, the plaintiff has no priority over other creditors of the defendant and, therefore, the defendant's stated desire to pay off another creditor is not necessarily fraudulent *vis-a-vis* the plaintiff. In these circumstances, the letter marked **"X3"** is not sufficient to raise an inference that, the defendant is acting or is about to act fraudulently and alienate her assets to avoid paying the plaintiff's claim.

The plaintiff has adduced no other *"fact"* or *"reasonable ground"* in support of its application for the sequestration order.

In these circumstances, the learned High Court Judge referred to the cases of DAVID & CO. vs. ALBERT SILVA and SAMARAKOON vs. PONNIAH and MUTTIAH vs. MUTUSWAMY and concluded that, the plaintiff has failed to adduce any fact or reasonable ground from which the Court could infer that the defendant is fraudulently alienating her assets. Here too, I am in agreement with the learned Judge.

In the defendant's written submissions made in this Court, learned President's Counsel appearing for the defendant has urged that, the learned High Court Judge erred in failing to consider the decision in KARUNADASA vs. YOOSOOF and submitted that, in that case, Windham J had taken a contrary view to the views expressed in DAVID & CO. vs. ALBERT SILVA, SAMARAKOON vs. PONNIAH. I cannot agree with that submission since it appears to me that, all three decisions expounded much the same principle – namely, that the plaintiff must adduce *"facts"* or *"reasonable grounds"* in support of the plaintiff's belief that the defendant is attempting to fraudulently alienate her assets and from which the Court can infer that the *"defendant is fraudulently alienating his property"* in order to avoid paying the plaintiff's claim. In fact, in KARUNADASA vs. YOOSOOF, Windham J referred to the decisions in DAVID & CO. vs. ALBERT SILVA and SAMARAKOON vs. PONNIAH and stated (at p. 326), *"The position as I have set it forth with regard to both these points is recognized in David & Co. v. Albert Silva and in Samarakoon v. Ponniah.*"

For the aforesaid reason, the first question of law is answered in the negative.

The second question of law asks whether the learned High Court Judge has erred in holding that, the plaintiff had failed to establish that the defendant had no assets other than the aforesaid car.

Section 653 certainly does not entitle a plaintiff to obtain a sequestration order against a defendant simply because the defendant has only one asset and is attempting to sell it. Instead, as explained earlier, a plaintiff has to adduce *"facts"* or *"reasonable grounds"* in support of the plaintiff's belief that the defendant is attempting to *"fraudulently"* alienate assets and from which the Court can infer that the *"defendant is fraudulently alienating his property"* in order to avoid paying the plaintiff's claim. As held earlier, in the present case, the plaintiff has failed to do that. Therefore, the second question of law is also answered in the negative.

The third question of law asks whether the learned High Court Judge has failed to consider the defendant's letters marked **"P2c"** and **"P5i"**. The letter marked **"P2c"** is the letter marked **"X3"**. The learned High Court Judge has correctly decided the effect of **"X3"**. The letter marked **"P5i"** was not annexed to plaintiff's application for the sequestration order. Therefore, the learned High Court Judge was not required to consider it. In any event, the contents of **"P5i"** (which was produced by the defendant with her application to vacate the sequestration order) are similar to **"X3"** apart from the defendant voicing her indignation that the plaintiff is holding on to her certificate of registration long after she has paid all the monies due on the lease agreement. Therefore, even if the learned High Court Judge had considered **"P5i"**, it would have made no difference to his Order. Accordingly, the third question of law is also answered in the negative.

The Order dated 22nd April 2010 of the High Court is affirmed. This appeal is dismissed. In the circumstances of this appeal, no order is made with regard to costs.

Judge of the Supreme Court

S.E. Wanasundera PC, J.

Judge of the Supreme Court

Upaly Abeyratne J.

Judge of the Supreme Court