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

S.C/ FR Application No. 573/2010

In the matter of an Application and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Asitha Nanayakkara Liyanage
No. 1, Iriyavetiya Junction,
Kandy Road,
Kiribathgoda.

PETITIONER

Vs.

1. Prasanna Ranaweera,
Chairman
Pradeshiya Sabha,
Kelaniya.

2. Hemapala Hettiarachchi
Secretary,
Pradeshiya Sabha
Kelaniya.

3. Commissioner of Local Government
Kachcheri Complex
Gampaha.

4. Chief Inspector of Police
Kiribathgoda Police Station
Kiribathgoda.

5. Hapuarachchige Dilan Lakshitha
No. 132/55, Nahena,
Hunupitiya, Wattala.

6. Wickramasinghe Arachchige
Don Palitha Wickramasinghe
No. 554/D, Iriyawetiya
Kelaniya.

7. Mervyn Silva
Deputy Minister,
Ministry of Highways and Road Development
9th Floor, Sethsiripaya,
Battaramulla.

8. Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE: S.E. Wanasundara P.C., J.
Anil Gooneratne J. &
K. T. Chitrasiri J.

COUNSEL: Vishva Gunarathne with Sandeepani Wijesooriya
For the Petitioner

D.M.G. Dissanayake with Ms. L.M.C.D. Bandara
for 1st , 2nd, & 7th Respondents

Rajiv Goonathilake S.S.C. for 3rd, 4th, & 8th Respondents

Chathura Galhena with Ms. Manoja Gunawardene
For 5th & 6th Respondents

ARGUED ON: 14.06.2016

DECIDED ON: 28.11.2016

GOONERATNE J.

The Petitioner a resident of No. 1, Iriyawetiya Junction, Kandy Road, Kiribathgoda, complains against all Respondents in his Fundamental Rights Application to this court filed on 01.10.2010, of certain harassments and abuses caused to him and his family, which ultimately resulted in demolition and destruction caused to part of his residential house. It is averred inter alia in the petition filed in this court that on 18.09.2010 1st, 2nd, 4th, 5th, 6th and 7th Respondents had come with equipment and vehicles belonging to the Kelaniya Pradeshiya Sabha and destroyed the parapet wall bordering the Petitioner's property bordering the Kandy – Iriyawetiya Road and also destroyed two toilets and a wash room within the premises, owned by him.

In the body of the petition the Petitioner refers to submitting a building plan to 1st Respondent for approval and it was delayed for about five years and finally approved on March 2009. It is also stated in the said petition, in or around March 2008 a three wheeler stand, namely "Samagi Three Wheel Stand" which was run by the 5th and 6th Respondents commenced operating next to or adjacent to the Petitioner's land and 1st Respondent, erected bill boards. It is pleaded that the Petitioner complained about such a three wheeler stand to

the 1st and 2nd Respondents on numerous occasions but was informed by the 1st to 4th Respondents that it was only a temporary arrangement until another location could be found. In this background paragraph 15 of the petition refer to three incidents involving the 5th and 6th Respondents.

(a) Obstructing the entrance of the access to the Petitioner's house, by a three wheeler driver. Complaint lodged by the Petitioner's wife on 01.09.2008 with the relevant police.
(b) Indecent exposure by the 5th Respondent to the Petitioner's wife on 09.04.2009.
(c) Use of unacceptable language by the 7th Respondent against Petitioner's wife on 20.06.2010.

The complaints to police and response of 6th Respondent produced marked P6, P6(a) P6(b), P6(c), P6(d) and P6(e). However police initiated criminal proceedings against 5th & 6th Respondents but parties settled their disputes.

Petitioner had by letter P7 of 23.06.2010 complained to the 3rd Respondent about the inconvenience caused to him by the three wheeler stand and his complaints to the police. The 3rd Respondent by his letter of 21.07.2010 informed the Petitioner to seek legal advice. (P7a) However the position of the Petitioner is that the three wheeler stand is an unauthorised stand. Thereafter the Petitioner sent letters of demand marked P7(a) to P7(d) to 1st to 3rd Respondents and Secretary, Minister of Local Government (P7(e)) .

The more serious complaint of the Petitioner is contained in paragraphs 20 and 21 of the petition. It is pleaded that on 18.09.2010, a person who identified himself as Mervyn Silva (7th Respondent) had informed him over the mobile phone that within ½ hour he is coming to the Petitioner's house to destroy the parapet wall. Photographs annexed as P8.

In paragraph 21 (b) it is stated that the Petitioner is reliably made to understand, within one hour of the telephone call 1st, 2nd, 4th, 5th, 6th & 7th Respondents came with equipment, vehicles belonging to the Kelaniya Pradeshiya Sabha, and completely destroyed the parapet wall of the Petitioner. Petitioner annex 'P9' photographs to show the destruction. In paragraph 21(b) it is pleaded that the above Respondents also destroyed two toilets and a wash room within the premises. Petitioner lodged a complaint (P10) with the relevant police on the same day (18.09.2010). Documents P11, P11(a), P11(b) & P11(c) & P11(d) are complaints made in this regard to His Excellency the President, Secretary Defence and several other persons in authority during the relevant period. Letter P11 to P11d are dated 24.09.2010. The said letters clearly implicate the 7th Respondent, Kelaniya Pradeshiya Sabha, and the three wheeler drivers. There is a description of loss and damage caused to the Petitioner and he being informed about the incident by his employee who was present at the relevant time. It also describes the fears expressed by lawyers and their

reluctance to take over Petitioner's case due to 7th Respondent's involvement. It is a humble appeal, by P11 to P11d to consider Petitioner's plight. The said letters had been received and acknowledged by the recipients (vide letters B,C,D,E & F annexed to the counter affidavit of Petitioner). Complaint P10 along with documents P11 to P11d and B to F are all contemporaneous documents. It is no doubt in a way, solace sought by the Petitioner who was put into a state of fear of life and property.

The letter 'c' acknowledge Petitioner's letter of 24.09.2010 (P11) and the office of Secretary, Defence requesting the Petitioner to attend the Police Headquarters, Colombo 1 with all documents and make a complaint to I.G.P. Letter 'F' refer to Petitioner's letter of 24.09.2010 and a directive to Divisional Secretary, Kelaniya to make inquires and take suitable steps (copied to Petitioner by speaker's office). Letter 'B' makes no reference to Petitioner's letter. It is dated 23.09.2010 addressed to 7th Respondent to remove the three wheeler stand. Letter 'B' though no reference is made to letter of 24.09.2010, the writer hints at the problem Petitioner had with the three wheelers. Letter 'B' sent by the Presidential Secretariat. 'D' is from the Chief Secretariat Office to Commissioner of Local Government and Petitioner's lawyer, regarding the letter of demand. It is evident to court that Petitioner's complaint to the authorities concerned has been acknowledged by Secretary, Ministry of Defence and others

and recommends to the Petitioner and others in authority the course of action to be adopted. All those who received Petitioner's complaint as stated above, never rejected his complaints.

I would prefer at the outset, to consider the 1st complaint made to the relevant police by the Petitioner on the day of the incidents itself, marked and produced with the petition as P10. I note the following in statement P10 dated 18.09.2010.

(1) He left the premises in dispute on the morning of 18.09.2010, having locked his house and padlocked the gate. He left for his house at Kadawatha.

(2) At about 10.45 a.m Petitioner received a telephone call which was registered in his mobile phone, bearing No. 0722287210. The caller identified himself as Mervyn Silva. The caller told the Petitioner. "මම මර්වින් සිල්වා කතා කරන්නේ තව පැය ½ ක් ඇතුලත ඔයා මෙතනට එන්න නැතිනම් මේක කඩනවා කියලා". Thereafter Petitioner disconnected the call.

(3) Petitioner told an uncle of his to call the above number. His uncle did so and was told that Mervyn Silva is at a meeting.

(4) Petitioner's relatives prevented him leaving the house at Kadawatha.

(5) Therefore he sent another relative of his, to the premises in dispute.

(6) The person who went to the scene informed the Petitioner that the entire parapet wall was demolished, and that three toilets were also destroyed.

(7) Petitioner did not visit the scene of the incident.

(8) Petitioner observes that he had a suspicion that this was done by the three wheeler drivers. Petitioner did not see as to who damaged, and caused destruction.

(9) Unable to state whether it was due to any political pressure.

(10)Petitioner will provide further proof in due course. සාක්ෂි පසුව ඉදිරිපත් කරමි.

I observe that on a perusal of P10 consisting of (1) to (10) above, Petitioner, directly implicates in the way he could, the 7th Respondent and states further he is suspicious of the three wheeler drivers. Petition to this court was filed on 15.10.2010. A person in the position of the Petitioner certainly would have been in a very disturbed mental state of mind and would have also been in constant fear of his life and property and as well as his family. It is in fact far too much for a normal person to take up or bear up such a dreadful situation. I note that, by a gradual process the earlier incidents with the three wheeler drivers, for which police intervened, culminated in damage and destruction caused to house and property of the Petitioner.

This court on 22.11.2010 granted leave to proceed for alleged violations of Article 12(1) of the Constitution. On the said day Supreme Court granted 8 weeks-time for the Respondents to file objections and thereafter 3 weeks-time granted to file counter affidavit for the Petitioner. However for various reasons recorded, the objections of the Respondents were not filed on the due date, and on applications of parties to this application further time was

granted to file objections. The filing of pleadings were completed before this court only on or about 16.01.2013.

The 1st and 2nd Respondents, the Chairman and Secretary respectively, of the Kelaniya Pradeshiya Sabha denies allegations levelled against them by the Petitioner, in their objections and affidavit filed of record. As regards the approval granted by the Pradeshiya Sabha for Petitioner's building plans, it is pleaded that for the purpose of building, for a commercial purpose, plan was approved and delay to do so was because the plans submitted by the Petitioner had to be amended from time to time (1R1, 1RA). These two Respondents merely state that they are unaware of the allegations referred to in paragraphs 20, 20(a), 23 and 28 of the petition of the Petitioner. (The said paragraphs refer to the incident of causing damage and demolition of the premises of the Petitioner as stated above). They also deny that they acted in an arbitrary manner, and nor did they violate Petitioner's Fundamental Rights. These Respondents state that the Petitioner complained to the Human Rights Commission about the incident of demolition, and state an inquiry had been initiated by the Commission.

The 7th Respondent's statement of objections and affidavit is a bear denial of the allegations made against the 7th Respondent. Further it merely aver

that the 7th Respondent did not violate any fundamental rights of the Petitioner and that the application of the Petitioner is misconcieved in law.

The 3rd Respondent (Assistant Commissioner of Local Government) in his objection and affidavit aver inter alia and admit the receipt of document P7 regarding alleged inconvenience caused to the Petitioner by the location of a Three Wheeler Stand in the vicinity of the Petitioner's business premises. It is pleaded that there were no by-laws to establish a parking area for vehicles within the limits of the Kelaniya Pradeshiya Sabha and 3rd Respondent had informed the 2nd Respondent (Secretary to the Kelaniya Pradeshiya Sabha) to take steps to have by-laws enacted to regularise parking arears. All other allegations are denied by the 3rd Respondent. I cannot find any material to implicate the 3rd Respondent regarding the incident of causing destruction/damage and demolition to the premises of the Petitioner on the day of the incident (18.09.2010). 3rd Respondent was never factually associated with the above incident alleged by the Petitioner that violated his rights. Complaints of the Petitioner does not make any reference to the complicity of the 3rd Respondent with the alleged conduct of the 1st , 2nd, 5th, 6th, & 7th Respondents, and no nexus at all.

The 4th Respondent (not named in the petition) the Officer In Charge, Police Station, Kiribathgoda in his affidavit inter alia state complaints of

Petitioner's wife regarding the three wheelers causing obstruction to their access, indecent exposure, were investigated and statements recorded (P6a & P6b). 5th Respondent was arrested on 10.04.2009. However the complainant intimated to the police that the above acts which resulted in a complaint were settled between parties (4R1, 4R2 (A) and (B). Further the complaint made against the 6th Respondent (P6(e)) was recorded but subsequently parties settled their disputes. As such I observe the above complaints made to the police by the Petitioner and his wife involving the three wheeler park had been duly investigated and action was taken by the relevant police, until such time same were settled between parties.

The question is the more important incident that was reported to the relevant police station by the Petitioner which occurred on 18.09.2010. The Office-In-Charge of the Police Station, Kiribathgoda who has sworn an affidavit (as 4th Respondent) states he was not on duty during the period 18th to 22nd September 2010. He produced the leave register and the attendance sheet marked 4R3 and 4R3A to establish his absence on the day in question. In the affidavit it is pleaded that Inspector of Police, Piyal Padmasiri covered up duties as Officer- In-Charge at the Kiribathgoda Police Station during his absence. Further, complaint P10 lodged at the police station had been investigated into in accordance with the law. It is also averred that the Petitioner made a further

statement on 05.10.2010 (about 2 ½ weeks after the 1st complaint). It is marked 4R4 stating that the Petitioner proposed to institute legal action in his personal capacity and further steps by the police into the complaint were not required. This seems to be the method adopted by the 4th Respondent to absolve himself from required routine official functions and duties.

Even if some credit could be given to documents 4R3 and 4R3A it may only establish his absence on the particular day. 4R4 is referred to as a further statement from the Petitioner, in contrast to 4R2 (B) which states withdrawal of complaint by Petitioner's wife pertaining to earlier incident with the three wheeler drivers. I observe that 4R4 does not suggest a withdrawal of the complaint or any attempt to settle or requesting police to strop investigations. Petitioner merely notify the police that the Petitioner intends to seek legal intervention and as such he is taking necessary steps with a view of obtaining a court decision. There is no settlement suggested or a withdrawal of Petitioner's complaint P10. There is nothing to suggest in 4R4 that further steps by the police is not required. I wander as to why such a fact has been pleaded (paragraph 18 (b) of the Respondent's affidavit) before the Apex Court of this country by the particular affirmant?

To clarify further the relevant portion in 4R4 reads thus: "මාගේ නාප්පය කඩා දැමීම සම්බන්ධව මෙම ස්ථානයට පැමිණිල්ලක් කලා. නමුත් එම

පැමිණිල්ල සම්බන්ධන්ධ අධිකරණය නීතිමය පියවර උදෙසා කටයුතු කිරීමට අදහස් කරන අතර මේ සම්බන්ධව මම දැනට නීතිමය උපදෙස් ලබා ගනිමින් සිටිනවා. එම නිසා මේ සිද්ධිය සම්බන්ධව අධිකරණය තින්දුවක් ලබා ගැනිමට කටයුතු කරමි". I have to take a very serious view of the affidavit of the 4th Respondent, particularly paragraph 18(b). This is an attempt to mislead court and an indirect or direct ploy adopted to give a different complexion to the case in hand or support the case of one or more Respondents. Notwithstanding the so called absence of the 4th Respondent, what steps did the police take on the complaint of the Petitioner to the police by P10 dated 18.09.2010? This is a serious case of mischief, house breaking, criminal trespass etc. To make it very simple to be understood, the following few questions come to my mind:

(a) Did the police visit the premises in question on the day in question and record statement of persons in and around the scene of the crime?
(b) Any notes made by the police of the damage caused to the property of Petitioner in question?
(c) Were facts reported to the relevant Magistrate?
(d) What steps were taken by the police during the period 18th September to 5th October even to support the averment in paragraph 18 (b) of the 4th Respondent's affidavit?
(e) Any steps were taken by the police to trace and establish the telephone number referred to in Petitioner's complaint P10?

At this point of this Judgment prior to considering the involvement of the 5th to 7th Respondents, I wish to observe as follows. A court of law cannot be immune or ignorant to happenings around the country that affect human lives which cause tremendous loss or injury to such persons or individuals, inclusive of loss to property. If an illegal act or wrong has been caused to a citizen, who seeks legal remedy a court needs to engage itself in an all inclusive inquiry to ascertain circumstantial and direct evidence and try the case according to law. Fundamental rights jurisdiction hitherto vested in the Apex Court is wide enough to reach a genuine complaint of a citizen who has suffered as a result of executive or administrative actions. That is the reason for this court even in the past permitted litigants to submit their grievance even by post or post cards, and permit application to be entertained beyond the period ordinarily permitted by the basic law. The underline reason is that this court has wide jurisdiction to make just and equitable orders, in cases involving breach of fundamental rights. One also should keep in mind that in an environment of lawlessness the fears, difficulties and resistance a law abiding citizen has to undergo. In such circumstances naturally a law abiding citizen would encounter delays to obtain material to support his case, more particularly when a State Minister is involved and incriminated.

In our Constitution (Chapter VI) directive principles of State Policy and Fundamental duties are enacted and recognised to guide the executive and the legislature in enacting of laws and in the governance of the country. The limitation referred to in the said chapter, provides in Article 29 that such principles and duties are not justifiable. Nevertheless Article 27(1)(c) recognise an adequate standard of living for a citizen and their families including housing. Article 29(2) (12) recognises and protect the family as the basic unit of society. Article 28(e) imposes a duty to respect the rights and freedom of others.

I also observe that in an appropriate case this court need to consider decisions and Judgments delivered elsewhere. In the case of *Velmurugu (1981) 1 FRD 180 Wanasundera J*. quoted with approval the observations of the the European Commission on Inhuman Degrading Treatment. In *Wijenayake Vs. Chandrasiri and Others* SC Appl. 380/93 scm 22.03.95 *Kulatunge J*. relied on Thomas Vs. Jamaica on the question of failure to give medical treatment sustained as a result of brutal attack by the police. In *Malinda Channa Peiris case 1994(1) SLR 28* Supreme Court referred to several decisions of the European Court of Human Rights. There are numerous cases in which the Supreme Court has referred to the decisions of other Courts and Tribunals of foreign nations, in dealing with other fundamental rights.

In order to embrace and fortify my views on rights cases and more particularly to the case in hand I quote the following useful passage from the text – *Fundamental Rights in Sri Lanka – Justice S. Sharvananda pgs. 1 – 2.*

> "A Constitution and in particular, that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive Construction" , per Lord Diplock in *Gambia v. Momodu Fobe* (1984) A.C. 689 at 700; (1985) 1 A.E.R 864 at 873 P.C. Construing the fundamental rights and freedoms provisions of the Bermuda Constitution Lord Wilberforce said in *Minister of the Home Affairs v. Fisher* (1979) 3 A.E.R. 21, 25 P.C that "those provisions 'call for a generous interpretation avoiding what has been called the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms". This statement was quoted by the Privy Council in *Ongsh Chilan v. Public Prosecutor* (1981) A.C. 648 as expressing the relevant principle of construction of the fundamental rights provisions of the Constitution of the Republic of Singapore. This principle was again reaffirmed by the Privy Council in construing the Constitution (of Gambia and) of Mauritius-in *Societe United Dock v. Government of Mauritius* (1985) A.C. 585, 605 where Lord Templeman, delivering the judgment of the Privy Council, said that "A Constitution concerned to protect the fundamental rights and freedoms of the individual shall not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies". The Constitution is a living piece of legislation. Its provisions are not 'time-worn adages or hollow shibboleths - they are vital living principles" (Chief Justice Warren). The Constitution, in the eloquent prose of Justice Cardozo, contains 'not rules for the passing hour, but principles for an expanding future'.
>
> In *Maneka Gandhi v. India* A.I.R. (1978) S.C. 597 at 691-692, Bhagwati, J. unequivocally declared that "the role of the Court should be to expand the reach and ambit of fundamental rights 'rather than attenuate their meaning and content by a process of judicial construction".

The 5th and 6th Respondents in their objections dated 30.03.2012 state they are drivers of the three wheelers and it is parked at a three wheeler stand at the Iriyawetiya junction, and deny the allegation level against them. It is their position that complaints were made by the Petitioner against them merely to get the three wheeler park or stand, removed. Objections also state that in the complaint P10, Petitioner states he does not know who had broken the parapet wall, but only a suspicion, and no valid allegation against them. As such no direct involvement against them, regarding the incident of destruction caused to Petitioner's property. Therefore these Respondent's aver that Petitioner has failed to state any violation of a fundamental rights by the 5th and 6th Respondents. The objections of the 5th and 6th Respondents not filed on the due date as the Petitioner had not been able to issue notices on the 5th and 6th Respondents. In fact the Petitioner filed his counter objections based only on the objections of the other Respondents other than the 5th and 6th Respondents. Therefore court on 08.08.2012 for the reasons recorded therein granted further time for the Petitioner to reply objections of the 5th and 6th Respondents by way of a further counter affidavit and <u>further counter affidavit</u> of Petitioner was filed on 13.01.2013.

In the counter affidavit of the Petitioner, being presented to this court it is stated by the Petitioner, having perused the objections of 1st to 4th and 7th Respondents it is inter alia pleaded

(a) His wife settled the disputes with the 5th & 6th Respondents due to pressure from the 4th Respondent, and due to an appeal by the wife of 5th Respondent on sympathetic grounds.

(b) 4th Respondent was present at the place of destruction on the instructions of the 7th Respondent and 4th Respondent's plea of absence during the said period is a fabricated 'alibi'. The incident of destruction had the blessings of 4th Respondent since he provided security when parapet wall was destroyed.

(c) Failure of 4th Respondent to act with reasonable diligence and 4th Respondent verbally informed Petitioner that 7th Respondent over powering influence prevented from reporting facts to court or to investigate.

(d) No plausible action taken by 4th Respondent to launch a prosecution (25 days lapsed without any action)

(e) Demolition of parapet wall of Petitioner was done with vehicle and instruments of the Kelaniya Pradeshiya Sabha with the blessing of the 1st and 2nd Respondents and 4th Respondent deployed police personnel to provide security on the instructions of 7th Respondent.

(f) Overwhelming evidence suggest that 7th Respondent participated at the incident. However persons due to fear of their life were unwilling to testify but it is pleaded the person named in paragraph (4d) of the counter affidavit due to confidence placed in this court gave affidavits. The

affidavits produced and marked ‘A’, ‘A1’ and ‘A2’ with the counter affidavit, of the Petitioner.

(g) Immense pressure was brought about on Petitioner and his wife and other emissaries of 7th Respondent, conveyed to him not to proceed with this case.

(h) 7th Respondent thereafter made further threats.

(i) Loss to property estimated to Rs. 2.0 million supported with ‘H’, statement of accounts.

The affidavit ‘A’ is testified by an employee of the Petitioner, dated 25.11.2010. It is stated that he left the premises in question at 10.00 a.m on 18.09.2010. and returned at about 1.00 p.m. When he left at 10.00 a.m the building was in good condition but when he returned to the scene of incident, it was a total destruction. I note paragraphs 3 and 5 of the said affidavit, it reads thus:

03 වර්ෂ 2010-09-18 වන දින උදෑසන 10 ට පමණ මා එම ව්‍යාපාරික ස්ථානයෙන් පිටත්ව එළියට යන විට එකී ස්ථානය පරිපූර්ණ තත්ත්වයෙන් තිබූ අතර නැවත මා එම ස්ථානයට දහවල් 1ට පමණ පැමිණෙන විට එකී ස්ථානයට අයත් තාප්පය නවීන පන්නයට අයත් නාන කාමරය සහ වැසිකිලි දෙක අමානෝ ෂිට්ස් වලින් නිම කරන ලද යකඩ ගේට්ටු තුන සහ එකී ව්‍යාපාරික ස්ථානයට ඇතුළුවන තරප්පු පෙල සහ එය ආවරණය කර තිබූ අමෝනා ෂිට්ස් වලින් නිම කරන ලද වහලය යනාදි ස්ථානයන් කැළණිය ප්‍රාදේශිය සභාවට අයත් බැකෝ යන්ත්‍රයක් මගින් බිඳ දමා තිබූ අතර එකී සුන්බුන් එකී යන්ත්‍රය මගින්ම වත්ත තුළට දමන ආකාරය මා සියැසින් දුටු බව මින් ප්‍රකාෂ කර සිටිමි.

05 තවද එම ක්‍රියාව සිදු කලේ ත්‍රිරෝද රථ රියදුරන් එම වෘාපාරික ස්ථානයෙන් ඉවත් කිරීමට මාගේ වෘාපාර හිමිකරු විසින් ගන්නා ලද ප්‍රයත්නයන් වලට එරෙහිව දේශපාලන අතකොළුවක් බවට එකී ත්‍රිරෝද රථ රියදුරන් පත්වෙමින් සංවර්ධන කටයුත්තක මුවාවෙන් ගන්නා ලද ක්‍රියාවක බවද ප්‍රකාශ කර සිටිමි.

The affidavit 'A' is of one Ratnapala. He pleads that he saw the premises in question being damaged and destroyed on 18.09.2010. Person who took photographs were chased by the police. A 'backhoe' vehicle was being used to break the wall and police provided security.

In the Affidavit 'A2' sworn by one K.K.V. Perera states Mervyn Silva (7th Respondent) came to the place in question with some people and a 'backhoe' vehicle at 10.30 a.m. Among the crowd the 1st Respondent and a member called Osanda Nandasena was present. Backhoe belongs to the Kelaniya Pradeshiya Sabha. He heard 7th Respondent telling Osanda Nandasena to demolish the parapet wall and the buildings. He also states 7th Respondent directed the said Nandasena to wait and see the progress of the demolition until it is completed. Paragraphs 7 & 8 reads thus:

07. අමාත්‍ය මර්වින් සිල්වා ඉහත කී ඔසද නන්දසේන යන අයට පැමිණා කියා සිටියා මෙම තාප්පය සහ ඊට යාබද දේපළ සම්පූර්ණයෙන් කඩා ඉවත් කිරීමට ක්‍රියා කරන ලෙසත් ඇමතිවරයා එම ස්ථානයෙන් ඉවත්ව යන බැවින් සම්පුර්ණයෙන් කඩා දමන තුරු බලා කියා ගන්නා ලෙසට ඔසද නන්දසේන යන අයට උපදෙස් දුන්නා.

08 ඒ අනුව අමාත්‍ය මර්වින් සිල්වා සිටියදිම කැඩීම අරම්භ කල අතර අසළ ත්‍රි රෝද රථ නවත්වන ස්ථානයේ සිටින ත්‍රි රෝද රථ රියදුරු පාලිත යන අයට අවශ්‍ය ලෙසට කැඩීම කරන ලෙසට අමාත්‍යවරයා ඔසද නන්දසේන යන අයට වැඩි දුරටත් උපදෙස් දුන්නා.

In the further counter affidavit of Petitioner in answer to the objections of 5th & 6th Respondents it is inter alia pleaded that three eye witnesses have sworn affidavits suggesting or incriminating the above Respondent and involvement of the 5th & 6th Respondents in the demolition of the parapet wall and the premises of the Petitioner.

The material placed before this court by the Petitioner and all those who have sworn affidavits on behalf of the Petitioner no doubt suggest and demonstrate the colossal damage caused to his house and property on 18.09.2010. Even prior to such destruction there is ample proof of Petitioner and his family being harassed and abused by the 5th & 6th Respondents as stated above. The 7th Respondent's involvement is clearly apparent and demonstrated from the beginning with the statement P10 divulging his complicity in the incident of demolition could be safely established as the <u>starting point</u>. It appears to this court that from that point onwards certain amount of manipulation took place in order to conceal the truth. That was clearly shown by police inaction as stated above to perform their legitimate duties. The police

did so either deliberately or recklessly or willingly or unwillingly. Whatever it may be Petitioner was deprived of equal protection of the law.

The Petitioner having made a statement to the police (P10) thought it fit to address letters to persons in authority just six days after the incident, may be having realised the lapses of law enforcement agencies.

It is in a way laudable that Petitioner's appeals to persons in authority by P11, P11(a), P11(b), P11(c) and P11(d), were received and acknowledged by the recipients. It is not a mere acknowledgment but having realised the gravity of the problem the recipients of the above letters replied with instructions to Petitioner and some others having authority to assist the Petitioner or remedy the grievance of the Petitioner (I have already discussed this aspect). None of the recipients thought it fit to reject the plea of the Petitioner. I will desist any argument of the Respondents that it was not contemperaneous. What else can a man in the position of the Petitioner could do in that mental state, having lost his house and property by violent means.

The substance and material contained in affidavits A, A1 and A2 are of persons who directly saw the incident. Except for the fact that the three persons who have sworn affidavits were belated in coming forward. I see no reason even to hint that it is false testimony on their part. The role played by the 7th Respondent is established without a doubt. The instructions given by the 7th

Respondent to do the job of demolition to the satisfaction of 6th Respondent 'Palitha' a three wheeler driver is a strong item of evidence. Details provided by the persons who have sworn the affidavits provides proof of the incident as well as those involved and the position and details of the state of the house and property of Petitioner before and after. It also reveal the way in which the demolition was done. Damage caused by the use of Backhoe vehicles which are heavy vehicles and a team employed for the purpose, which had been organised and planned, by several wrong doers, and 7th Respondent being the leader of the team.

The three affidavits (A, A1 & A2) provides support and fortify the case of the Petitioner. Though somewhat belated and alleged not be contemporaneous, there is no prohibition in law to reject such statements contained in affidavits A, A1 & A2. Belated witnesses and evidence is nothing new in our legal system.

In *Sumanasena Vs. A.G – 1999 (3) SLR 137 FND Jayasuriya J*. In his Judgment followed and adopted the case of *Q Vs. Pauline De Croos 71 NLR 169* at pg. 180. I will for better understanding the point refer to that portion of the Judgment at pg. 140 which justify the reception of belated statement of witness and just like the case in hand considered the question of fears generated in the minds of the witnesses.

> It is manifest that this witness has come out with the version, that he later volunteered in the trial Court, to the Magistrate as well one month after the happening of the incident. Learned counsel laid stress on this fact and described the witness as a belated witness and that in the circumstances there was opportunity for fabrication and concoction. Justice *T.S. Fernando* in *Queen v. Pauline De Cross* at 180 had to consider a similar issue and his Lordship observed that "just because the witness is a belated witness the Court ought not to reject his testimony on that score alone and that a Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness. Witness Nandasena has stated before the trial Judge that he had known both accused before this incident. He has stated that they have known the accused and they had slept with Sumanasena on the verandah of several houses and he has also stated that the first accused who was alleged to have committed this offence with Haramanis Kuragama who was a powerful businessman described as Rajjuruwo in the village and who was feared by all. He has stated that in view of the fact they knew these persons and because of the fear generated in his mind he delayed to make his statement for a period of one month. Trial Judge looked into these reasons and has accepted the grounds adduced by the witness for the delay and decided to act on his testimony.

I have considered the oral and written submissions of the Respondents. The position of the 7th Respondent referred to in the submissions are without any merit. Only matter that concerns this court is that P10 complaint does not suggest any direct involvement. This court has arrived at a conclusion by considering the cumulative effect of all proof contained in pleadings and documents connected to the petition of the Petitioner and that of the counter affidavits of the Petitioner. There is overwhelming evidence and material to make the 7th Respondent liable for breach of fundamental rights of the

Petitioner. What has been discussed above need not be repeated over and over again. I place special emphasis on the statements contained in affidavits A, A1 & A2 along with P10, and all other documents produced on behalf of the Petitioner in these proceedings. Each of those items of evidence taken together is conclusive proof of damage caused to the Petitioner's property by the 7th Respondent and several others. The material placed before court also implicate the 5th and 6th Respondents. However the fundamental rights jurisdiction cannot be extended to them.

As regards the 3rd Respondent, I agree that the 3rd Respondent has no hand at all in this entire episode. (already discussed) So are the 1st & 2nd Respondents who were only the Chairman and Secretary of the Pradeshiya Sabha, though some material has surfaced, it is not sufficient to implicate both of them for breach of fundamental rights. However I am taking a very strong view of the Police Department. The 4th Respondent is not named but the affidavit sworn indicates that Edisooriya Patabendige Chaminda Edisooriya, Inspector of Police, Officer-In-Charge, Police Station, Kiribathgoda swear as the 4th Respondent. I have discussed the lapses of the police pertaining to the incident described as far as the case in hand is concerned. It is clear that 4th Respondent is responsible for dereliction of duties. His conduct is a slur to the good name of the Police Department. He was unable to provide and afford the

required equal protection of the law as regards the Petitioner, who had to undergo a threat to life and of property. Law does not permit any kind of manipulation of the 7th Respondent to cause damage to citizens and interfere with their basic rights.

I have already discussed above 4th Respondents absence of the relevant time and period regarding the acts of destruction caused to the Petitioner. The 4th Respondent being not named in the petition cannot be a bar to this court to proceed to hold that 4th Respondent is liable for breach of fundamental rights of the Petitioner. 4th Respondent on his own filed objections.

In *Ganeshananthan Vs. Vivienne Goonewardena and three others* 1984 (1) SLR 319 it is reported that the above named *Vivienne Goonewardena* a well known politician of that era filed a fundamental rights case bearing No. S.C. 20/83 alleging that the 1st Respondent one Hector Perera (Officer-In-Charge) of the Kollupitiya a police had illegally arrested her and subjected to cruel, inhuman and degrading treatment. A bench of three Judges of the Supreme Court heard the case and held Petitioner-Respondent had not established that she had been subjected to cruel, inhuman and degrading treatment by the 1st Respondent, and that the Petitioner-Respondent was arrested by the Petitioner (Ganeshananthan) and not by the 1st Respondent. Court further held that the arrest was unlawful and state liable in damages fixed at Rs. 2500/-.

In a subsequent proceeding (in *Ganeshananthan Vs. Vivienne Goonewardena* (cited above)) S.I. Ganeshanandan sought to have the order of the Supreme Court set aside on the ground that the Petitioner had not complained against him in her application, and that he had not been given an opportunity to defend himself. Dismissing this application the Supreme Court (Seven Judges) said that where violation of a fundamental right is alleged, Article 126(2) does not limit an inquiry to the person named in the petition and that court has power to grant relief when it is established that some other officer was responsible for the violation. The court held further that the Rule audi aulteram partem had been sufficiently observed.

In all the facts and circumstances of this Fundamental Rights Application, I state that Article 126 of the Constitution gives wide powers to the Supreme Court to make just and equitable orders for violations of Fundamental Rights. I hold and declare that for the reasons contained in this Judgment the 7th Respondent and 4th Respondents have infringed the Petitioner's fundamental rights guaranteed in terms and Article 12(1) of the Constitution. Both the above Respondents have wittingly breached the fundamental rights of the Petitioner. This court directs the 7th Respondent to pay a sum of Rs. 400,000/- (Four hundred Thousand) and the 4th Respondent a sum of Rs. 50,000/- personally as compensation to the Petitioner. At all times relevant to this application a

Minister of the State was involved and thus makes the State also liable. As such court directs the State to pay a sum of Rs. 100,000/- as compensation to the Petitioner.

This court further directs the Inspector General of Police to conduct investigations according to law and ascertain whether any other person is responsible for the destructions of Petitioner's property and in doing so whether instruments and machinery belonging to the State had been used and utilised, and take suitable action having consulted the Hon. Attorney General.

Application allowed as above with costs.

JUDGE OF THE SUPREME COURT

S. E. Wanasundara P.C., J

I agree.

JUDGE OF THE SUPREME COURT

K. T. Chitrasiri J.

I agree.

JUDGE OF THE SUPREME COURT