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

In the matter of an Application for Leave to Appeal to the Supreme Court in respect of the Judgment of the case bearing No. SP/HCCA/19/2024 dated 14.10.2024 in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 5(c) of the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006.

S.C.H.C. (CA) LA NO.437/2024

SP/HCCA/GA/19/2024(LA)

DC.Balapitiya Case No. L/3467

Bambarawana Hettigamage Hemachandra

62A, Dharmarama Road, Rathmalana.

Defendant-Petitioner-Petitioner

-Vs-

Hendahewa Jagath Kithsri,

Uduwila, Batapola.

Plaintiff-Respondent-Respondent

BEFORE : **Hon. JANAK DE SILVA, J.**
Hon. DR. SOBHITHA RAJAKARUNA, J. &
Hon. MENAKA WIJESUNDERA, J.

COUNSEL : Mahinda Nanayakkara with Wasantha Vithana for the Defendant-Petitioner-Petitioner.
Gihan Ranawaka with Thanuli Ameera Rupasinghe for the Plaintiff-Respondent-Respondent.

ARGUED &
DECIDED ON : 27.01.2026.

JANAK DE SILVA, J.

Heard learned counsel for the Defendant-Petitioner-Petitioner (Defendant) and learned counsel for the Plaintiff-Respondent-Respondent (Plaintiff).

We are of the view that Leave to Appeal should be granted on the following question of law:

> *"Did the learned District judge of Balapitiya and the learned Judges' of the Civil Appellate High Court err in holding that documents marked P9, P17 & P18 need not be proved in view of the provisions contained in Section 2 of the Civil Procedure Code (Amendment) Act No.17 of 2022?"*

With the consent of the parties (Plaintiff and Defendant are personally present in Court), we proceed to hear and determine the question in terms of the Proviso to Rule 16 of the Supreme Court Rules 1990.
The Plaintiff instituted this action seeking *inter alia* a declaration of title to the corpus and declaration that Defendant has no title and right to enter the corpus. Defendant filed answer denying the claim of the Plaintiff and seeking a declaration of title to the corpus.

During the trial, the Plaintiff sought *inter alia* to mark documents පැ.8 to පැ.10 and පැ. 17 to පැ. 19. Defendant moved that it be allowed subject to proof without specifying the matters that needed proof.

I have condemned this practice in ***Multiform Chemicals (Private) Limited v. Adrian Machado*** **[S.C. Appeal 183/2011, S.C.M. 18.07.2024]** and laid down the questions that must be considered when a document is sought to be marked in evidence. They are as follows (supra. pages 7-8):

> *"According to Section 154 of the Civil Procedure Code, every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness.*
>
> *At this point, if the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it.*
>
> *Where no objection is taken when the document is sought to be tendered in evidence, and the document is not forbidden by law to be received in evidence, any objection to its receipt as evidence is deemed to have been waived. [See* ***Kenakal v. Velupillai (2 N.L.R. 80); Muttuya Chetty v. Appu (4 N.L.R. 184); Silva v. Kindersly (18 N.L.R. 85); Siyadoris v. Danoris (42 N.L.R. 311)****].*
>
> *However, if the opposing party objects to a document being admitted in evidence when it is first tendered, commonly two questions arise for determination.*
>
> *Firstly, whether the document is authentic, in other words, if it is what the party tendering it represents it to be, and Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.*

It is pertinent to observe that more than 65 years ago, Basnayake, C.J. in ***Mendis v. Paramaswami [62 N.L.R. 302 at 307]*** *commended Section 154 and more especially its explanation to all Judges of first instance in civil proceedings. Regrettably, the trial judge in this matter failed to do so.*

In my view, there is a third, which in fact is the most fundamental, question which arises in terms of Section 136 of the Evidence Ordinance. That is whether the document proposed to be tendered in evidence is relevant in terms of the Evidence Ordinance.

Therefore, three issues arise for consideration by the trial judge when a document is sought to be tendered in evidence. They are; relevancy, admissibility and authenticity. All three must be determined by reference to the evidentiary rules in the Evidence Ordinance."

Unfortunately, the learned trial Judge lost sight of the relevant provisions and made confusion worse confounded by making order that the objections will be considered in the final judgment.

Here again I am compelled to refer to the decision in ***Multiform Chemicals (Private) Limited.*** **[supra. page 5]** where I held:

"What is objectionable is the practice of moving that a document be marked subject to proof without specifying the matters on which proof is required. Judges have become passive observers of such practice. This is not a healthy practice and more often than not, leads to additional issues as in this case. Moreover, it signifies a poor grasp of the relevant evidentiary principles. A trial judge must not condone such practices. There is a duty on a trial judge to inquire from the party moving that a document be marked subject to proof, what is required to be proved in the document."

Aggrieved by the said order, the Defendant sought and obtained leave to appeal from the High Court of the Southern Province (Exercising Civil Appellate Jurisdiction) holden in Galle. The High Court correctly set aside all orders which held that the objections of the Defendant to the marking of documents පැ.8 to පැ.10 and පැ. 17 to පැ. 19 will be considered in the judgment.

The High Court made further order that:

(a) පැ. 8 should be allowed to be marked subject to proving its contents as it is a statement made by the Plaintiff to the Police;
(b) Court must hear parties, consider the pleadings and issues before any decision is made on පැ.9, පැ.17 and පැ.18.
(c) Since පැ. 19 is a plan filed in a partition action instituted in the District Court of Balpitiya, it should be allowed to be marked subject to the leading of evidence of the Registrar or a responsible officer on whether there was an appeal in that partition action or whether it is a fraudulent plan. Once such evidence is led, if that document is sought to be assailed, evidence should be called by the party assailing the said plan.

When trial re-commenced, the learned trial Judge held that there was no need to further prove documents marked පැ.9, පැ.17 and පැ.18. Reliance was placed on the Civil Procedure Code (Amendment) Act No. 17 of 2022 (Act) which was certified on 23.06.2022.

It is against this order which the Defendant sought and obtained leave from Court. Hence, let me examine the Act in some detail.

The Act has two main provisions. Section 2 which inserts a new Section 154A to the Civil Procedure Code (CPC) and Section 3 which deals with transitional provisions.

There is a clear and important distinction between these two provisions as to their effective dates. Section 3 is qualified by the words *"Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence*

Ordinance, ***in any <u>case</u> or <u>appeal</u> pending on the date of coming into operation of this Act****"*. This is an unequivocal statement by the legislature that these provisions have retrospective application to all pending cases and appeals.

However, Section 2 of the Act which inserts a new Section 154A to the CPC is not so qualified. It has only prospective application.

The learned trial judge began the analysis correctly by starting from Section 3(b) of the Act. However, in reaching his conclusion he relied on Section 2 of the Act which does not apply to this action as it was pending when the Act became law. Rights of the parties must be determined as at the date of the action unless there is a clear legislative statement of enacting retrospective laws.

The Defendant filed answer in 2016. The issues were raised in 2017. Therefore, the Defendant was not under any obligation to, in his answer or in raising issues, comply with provisions of Section 2 of the Act enacted in 2022. Even the issues in this action was settled in 2017. To apply Section 2 of the Act to actions where pleadings were closed and issues raised before it was enacted will cause injustice to parties.

For all the foregoing reasons, I answer the question of law in the affirmative and set aside the order of the trial judge dated 03.06.2024 and the order of the High Court dated 14.10.2024.

Learned counsel for the Defendant submitted, albeit belatedly, that the application to allow documents marked පැ.9, පැ.17 and පැ.18 to be marked subject to proof was to require proof of their due execution.

Having examined all the circumstances of this action, it is my considered view that documents පැ.9, පැ.17 and පැ.18 should be marked subject to proof of their due execution. That is the only condition subject to which those three documents are permitted to be marked.

We direct the learned trial Judge to permit the Plaintiff to lead evidence necessary to prove due execution of පැ.9, පැ.17 and පැ.18.

Appeal is partly allowed. No costs.

JUDGE OF THE SUPREME COURT

DR. SOBHITHA RAJAKARUNA, J.

I agree.

JUDGE OF THE SUPREME COURT

MENAKA WIJESUNDERA, J.

I agree.

JUDGE OF THE SUPREME COURT