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

In the matter of an application for a writ of prohibition under Article 140 of the constitution of the Democratic Socialist Republic of Sri Lanka

CA WRIT 1572/2006

COLOMBO LAND AND DEVELOPMENT COMPANY LIMITED,

3RD FLOOR, LIBERTY PLAZA, NO 250, R A DE MEL MAWATHA, COLOMBO- 03

-VS-

1. ANGLO ASIAN SUPERMARKET LIMITED,

95, HYDE PARK CORNER, COLOMBO-02

2. JAYKAY MARKETING SERVICES LTD,
130, GLENNIE STREET, COLOMBO – 02

3. THE HON. MAGISTRATE,

COLOMBO FORT MAGISTRATE'S COURT,

COLOMBO- 02

RESPONDENTS

Before: A W A Salam, J

Counsel: Harsha Soza, PC with A R Surendran PC, Anuruddha Darmaratne and N Kandeepan for the Petitioner and Gamini Marpana PC with Navin Marapana and Uchitha Wikramasinghe for the 1st Respondent.

Argued on: 02.08.2013

Written Submissions tendered on: 25.09.2013 and 25.10.2013

Decided on: 28.11.2013

A W A Salam,J

This is an application for a mandate in the nature of writ of prohibition to restrain the Honorable Magistrate of Colombo Fort from proceeding with case No 68200. The application is directed at resolving an issue which requires a deeper study and analysis of the Law applicable to inherent powers of Court to remedy a rank injustice caused to a party and the circumstances under which a writ of prohibition can be issued against a Magistrate.

Without belabouring the facts relating to the background to the writ application, the predicament of the 1st respondent, as far as it relates to the present application, needs to be set out briefly. The 1st respondent was in possession of unit No 250/BO 2 of "Liberty Plaza" building running a supermarket.

There is no controversy that the premises in which the 1st respondent ran the supermarket constituted the basement unit of the multistoried building commonly known as "Liberty Plaza" was intended to be registered as a condominium property and later to be alienated to the 1st respondent upon the fulfilment of the terms of the agreement the parties had entered into on 18 August 1983, the date being relevant to ascertain the applicability of the particular Legislation in so far as it relates to the legal issue that arose for determination. Admittedly, there was no registration of the unit in question under the Apartment (Ownership Law).

Be that as it may, the 1st respondent was ejected by an order of the Magistrate's Court of Fort which the Supreme Court later ruled as being illegal, since the Court did not have the power or authority to dispossess the 1st respondent. The decision of the Supreme Court although not explicitly couched as such was a clear endorsement and implied affirmation of the decision of the High Court entered in the exercise of its revisionary jurisdiction over the order of the Magistrate.

A chronological account of the different turn of events that took place in various Courts, from the time litigation commenced, may be helpful to fully grasp the simple issue that comes up for determination in this case. The petitioner (Colombo Land and Development Company Ltd) initiated proceedings in the Magistrate's Court of Fort, purportedly

under the Provisions of Section 19 (D) of the Urban Development Authority Law as amended by Act No 41 of 1988 to have the Anglo Asian Supermarkets Ltd ejected from the premises in question, on the basis that it had violated the terms of the agreement under which it was placed in possession. The learned Magistrate having issued an order nisi for the ejectment of the 1st respondent later made it absolute on 5 March 1991. Quite unusually, the Fiscal of Court ejected the 1st respondent on the very same day, although the Law required that a writ of possession to the fiscal requiring and authorizing him to eject an occupier against whom an order absolute had been made in terms of part VA of the said Law shall not be a date "earlier than two calendar months and not later than two calendar months from the date of the issue of such writ.

According to the Provisions of Section 19 (F) (1) of the Law under which proceedings were initiated for the ejectment of the 1st respondent, the fiscal could not have been empowered by the Magistrate to execute such writ and eject the 1st respondent prior to 5 March 1991. In other words, even assuming that the making of the order nisi absolute against the 1st respondent is in order, yet the execution of the order by which the 1st respondent was ejected lacks proper authorization and is devoid of any legal basis. Thus the dispossession of the 1st respondent was totally arbitrary, illogical and contrary to every norm known to the Law.

In this background, the 1st respondent invoked both the revisionary and the appellate jurisdiction of the relevant High Court to challenge the propriety of the order of the learned Magistrate authorizing it's ejectment of the 1st respondent from the premises in question. The High Court held with the 1st respondent, both in the revision application and the appeal and set aside the order of the learned Magistrate and **further directed that if the 1st respondent has been ejected from the premises it be restored to possession.** [Emphasis is mine]

Being dissatisfied with the said orders of the High Court, the petitioner filed a revision application in this Court in CA PHC APN 71/94 and this Court by judgment dated 8 March 2002 set aside the judgment of the learned High Court judge.

Dissatisfied with the said judgment of this Court, the 1st respondent sought special leave to appeal from that judgment to the Supreme Court, in terms of Article 128 (2) of the Constitution. Having granted special leave and thereafter heard the appeal, the Supreme Court by its judgment dated 20.10. 2005 set aside the judgment of the Court of Appeal dated 8 February 2002. Quite remarkably, the supreme Court made no mention of the judgment delivered by the High Court but stated in the concluding paragraph that the appeal of the 1st respondent to this appeal is allowed.

Consequent to the said judgment of the Supreme Court, by motion dated 9 October 2006 filed in the Magistrate's Court of Colombo Fort, the 1st respondent sought to enforce the aforesaid order of the High Court, to have itself restored to possession of the premises from which it had been ejected on the order of the learned Magistrate.

Almost immediately after the filing of the said motion, the petitioner filed this application seeking a writ of prohibition to restrain the learned Magistrate from exercising jurisdiction in respect of proceedings bearing No 68200. In other words, the petitioner seeks the assistance of Court to prohibit the learned Magistrate giving effect to the specific orders of the High Court made in the revision application and appeal HC RA 20/91 and HCMCA 7/91.

The basis on which the petitioner has sought the writ of prohibition on the 3rd respondent reflects in paragraph 42, 43 and 44 of the petition. It being so, a reproduction of the said paragraphs from the petition would undoubtedly be of much assistance to ascertain the exact position of the petitioner in relation to the application for writ of prohibition, without reference being made to any other documents. Hence, the said paragraphs are reproduced below....

> 42. In any event as the Supreme Court has only set aside the judgment of the Court of Appeal in C A application No 1/94 and has not made any order affirming the direction of the High Court

to restore to possession of the premises in dispute to the 1st respondent, any steps taken by the learned Magistrate to restore possession of the premises in dispute to the 1st respondent upon the application dated 9 October 2006 made by the 1st respondent have been taken without jurisdiction.

43. In any event as the 1st respondent has not sought an order for restoration of possession to the premises in dispute in its petition filed in S.C. Appeal No 71/2002, the judgment of the Supreme Court not directing the restoration of possession to the premises in dispute is unassailable and as such any steps taken by the learned Magistrate for restoration of possession to the premises in dispute on the purported ground that the Supreme Court had made an order for restoration of possession would be totally without foundation.

44. In any event as part VA of the UDA Law as amended is inapplicable to the premises in dispute and as such the Magistrate's Court has no jurisdiction to make any order regarding the possession of the premises in dispute pursuant to proceedings instituted under part VA of the UDA Law, no such order could be made by the learned Magistrate and any order made would be without jurisdiction and/or in excess of his powers in the purported exercise of its inherent powers and any such or order made by the

learned Magistrate in this regard would be a total nullity.

It is of paramount importance at this stage to examine the impact of the judgment delivered by the Supreme Court (setting aside the impugned judgement of the Court of Appeal), on the judgment delivered by the High Court. It is common ground that the learned Magistrate allowed the application of the petitioner to have the 1st respondent ejected from the premises in question and the order of ejectment was carried out on the very same day. This order of the learned Magistrate was set aside by the High Court in the exercise of its revisionary jurisdiction. Having done so, the learned High Court judge took the extra precaution to make a directive on the Magistrate to restore the 1st respondent to possession as the order for ejectment was tainted with illegality and therefore it leads to nullity.

For convenience sake let me refer to the direction given by the learned High Court judge with regard to the restoration of possession. The relevant direction made by the learned High Court judge reads thus...

> "If the respondent-petitioner[1] has been dispossessed from the said premises described in the schedule to the revision application in the purported execution of a writ which issued

[1] Anglo Asian Supermarkets Ltd.]

on 5.3.91 from the said Magistrate's Court, I direct and order the learned Magistrate of Colombo Fort to restore the respondent-petitioner to possession of the said premises **as it has, in that event, been wrongfully and unlawfully dispossessed by a wrong committed by the learned Magistrate without jurisdiction and the learned Magistrate of the Fort Magistrate's Court has inherent power to repair the wrong done by the Court to a litigant by its own act in the exercise of its inherent power.** [Emphasis is mine]

The petitioner submitted that any steps taken by the learned Magistrate to restore possession of the unit in dispute to the 1st respondent upon the motion filed had been taken without jurisdiction. It is pertinent to emphasize at this point that the learned Magistrate has yet not taken any steps to restore possession of the property to the 1st respondent. As a matter of fact, the learned Magistrate has not even embarked upon an inquiry to consider as to the fate of the application made by the 1st respondent, namely to have itself restored to possession. Quite appreciably, the learned Magistrate had entirely of his own volition decided to refrain from hearing the application made by the 1st respondent seeking an order of restoration, until such time the present application in this Court is heard and concluded. As regards the motion he had heard the President's Counsel initially in support of the motion and taken steps to have notice of the said motion given to the

petitioner. In the circumstances, as was rightly submitted by the learned President's Counsel for the 1st respondent, the petitioner is not quite correct when it alleged that the learned Magistrate has taken steps to have the petitioner restored to possession of the premises in question. The correct position is that the learned Magistrate has taken steps to hear the parties on the motion but had not taken steps to restore the 1st defendant to possession.

This undoubtedly is an averment in the petition which amounts to a misrepresentation of facts. Having considered the above matters, I am of the view that the first ground upon which the writ of prohibition has been sought, has no valid basis whatsoever. Further, in my view to issue a writ of prohibition against the 3rd respondent, would be tantamount to depriving the learned Magistrate from affording an opportunity to the 1st respondent of being heard on the application.

By reason of the fact that the petitioner had participated on the day the motion was supported and taken notice thereof, it is now open to it to make submissions, if necessary, in opposition to the motion. As such, the outcome of the motion filed by the 1st respondent is yet to be seen, upon the learned Magistrate hearing all the parties who have or claim to have a right of being heard against such motion. In view of my endorsing the argument of the 1st respondent and my own findings on the first ground urged by the petitioner in paragraph 42 of the petition, there is no doubt

that the petitioner has failed to satisfy Court this averment and therefore that ground alleged is remains as being not proved. Therefore, I am of the view that the petitioner is not entitled to take out a writ of prohibition against the learned Magistrate, on that ground.

The other ground urged by the petitioner requires further elucidation. It revolves around the failure on the part of the petitioner to seek an order for restoration of possession in the Supreme Court and the abstinence of the Supreme Court to order such restoration. To meet this argument the 1st respondent contended that it is totally unnecessary to seek an order from the Supreme Court for restoration of possession when the High Court has already made such an order and that appeal to the Supreme Court was to have the judgment of the Court of Appeal (setting aside the High Court order) vacated. The pith and substance of this argument is that the appeal preferred to the Supreme Court was merely to set aside the judgment of the Court of Appeal, which judgment if set aside, would revalidate the judgment of the High Court, unless it is varied by the Supreme Court. As such, the learned President's Counsel of the 1st respondent argued that it was totally unnecessary to seek such an order for all what the 1st respondent prayed for in the Supreme Court was to set aside the judgment of the Court of Appeal. It would mean that what the 1st respondent intended to achieve by preferring an appeal to the Supreme Court was to have the judgment of the Court of Appeal erased off so as to clear the obstacle in the way of

executing the specific directive of the High Court to place back Anglo Asian Super Market Ltd into possession

On this question too, I am inclined to the view voiced by the 1st respondent because the purpose of the appeal preferred to this Court by the petitioner was to set aside the judgment of the High Court, which the petitioner achieved by obtaining a judgment in its favour. The subsequent appeal by the 1st respondent to the Supreme Court was to set aside the judgment of the Court of Appeal which constituted a serious impediment to the 1st respondent making any progress to espouse its cause to get to possession. After the judgment of the Supreme Court, setting aside the impugned judgment of the Court of Appeal is delivered what in fact now remains is the judgment of the High Court which remains perfectly in its original form without an iota of variation.

It is appropriate at this stage to observe that the Supreme Court by its judgment under consideration held *inter alia* that part VA of the UDA Law as amended by Act No 41 of 1988 was not applicable to the premises in suit and further ruled that the said part VA does not apply to the premises and accordingly **Colombo Land and Development Company Ltd could not have invoked the jurisdiction of the Magistrate's Court for the recovery of possession of the premises in suit**.

The judgment of the Supreme Court on this matter, setting aside the judgment of the Court of Appeal is a clear indication that the Supreme Court has chosen not to interfere or otherwise over turn the judgment of the High Court in any manner. In such an event, it is open to the 1st respondent to invite the learned Magistrate to make an order for the restoration of its possession. Once such an invitation is so extended it is up to the learned Magistrate to evaluate the merits of the application according to Law and make an appropriate order. Hence, the second ground urged by the petitioner in paragraph 43 of the petition for a writ of prohibition is also without merits and therefore fails.

The next ground urged by the petitioner appears to be motivated by achieving its own selfish ends. Having obtained an order against the 1st respondent under part VA of the UDA Law, which admittedly is not applicable to the premises in question, the petitioner in the same breadth now states that as part VA of the UDA Law is inapplicable to the premises in dispute and the Magistrate's Court had no jurisdiction to make any order regarding the possession of the premises in dispute pursuant to proceedings instituted under part VA of the UDA Law. The petitioner further maintains that no such order could be made by the learned Magistrate and any order made would be without jurisdiction and/or in excess of his powers in the purported exercise of its inherent powers and any such step taken or order made by the learned Magistrate in this regard would be a total nullity. The position taken up by the petitioner to challenge the authority of the Magistrates Court to enforce

the directive of the High Court on that basis would amount to the petitioner being allowed to approbate and reprobate which comes from the maxim *quod approbo non reprobo,* which simply means that the Law allows no one to blow hot and cold.

The learned President's Counsel for the 1st respondent cited Section 6 (a) of the High Court of Provinces (Special Provisions) Act 19 of 1990 which reads that "A High Court established by Article 154P of the Constitution may in the exercise of any appellate jurisdiction vested in it by Constitution or Section 3 or any other Law, affirm, reverse, correct or modify any order, judgment, decree or sentence according to Law or may give direction to the Court of first instance or tribunal or institution or order a new trial or hearing upon such terms as to it may think fit".

Hence, in the light of Section 6 (a) of the High Court of provinces (special provisions) act 19 of 1990, it is not open to the petitioner to submit that the learned Magistrate has no jurisdiction to go into the application filed by the 1st respondent seeking the said order of restoration of possession. The effect of Section 6 (a) would be dealt at a different stage of this judgment when dealing with the inherent powers of Court.

The question as to whether a Court of justice has inherent power to repair the injury done to a party by its own act by

dispossessing of immovable property without jurisdiction was considered in the case of W. SIRINIVASA THERO, Appellant, and SUDASSI THERO, 63 New Law Report page 31. In that case having considered the fact that the Court had no power to issue, a writ of possession and it had acted without jurisdiction in issuing such a writ which was a nullity it was held that the very same Court is clothed with inherent power to set it aside and the person affected by the order is entitled *ex debito justitiae* to have it set aside. It was further held in that case that it is not necessary to appeal from such an order, which is a nullity.

In MOWJOOD Vs PUSSADENIYA AND ANOTHER 1987 2 SLR 287 the Supreme Court dealing with a case of a tenant who had been evicted without notice of execution being given to him as provided by Section 347 of the Civil Procedure Code held that in issuing the writ of possession, the Court had acted without jurisdiction and therefore the evicted tenant should be restored to possession. This judgment of the Supreme Court delivered by his Lordship Sharvanada, CJ is a clear endorsement of the view expressed in the case of SIRINIVASA THERO (supra).

Another point of law that was raised before me pertains to the question as to the extent to which the learned Magistrate is bound by the judgment of the High Court. To reiterate for purpose of clarity, the order of ejectment entered by the learned Magistrate was set aside by the High Court which in turn was reversed by the Court of Appeal on

the basis that the High Court had no forum jurisdiction to set aside the order of the learned Magistrate. Anglo Asian supermarkets Ltd having sought special leave to appeal from the judgment of the Court of Appeal to the Supreme Court and special leave being granted the Supreme Court held inter alia that the High Court had jurisdiction to deliver the judgment and ruled that the judgment of the Court of Appeal was erroneous when it held that the High Court had no forum jurisdiction to entertain either the revision application or the appeal. What does the judgment of the Supreme Court on this issue really mean? On a reading of the entire judgment of the Supreme Court it is quite evident that the Supreme Court in the exercise of the highest appellate jurisdiction over the judgments of the Court of Appeal has ruled that the High Court had the forum jurisdiction and therefore the decision of the Court of Appeal on this matter being erroneous needs to be set-aside. Does it not mean that the judgment of the High Court which was invalidated by the Court of appeal stood revalidated by the Supreme Court? My considered answer to this question is in the affirmative.

On a deeper study of the judgment of the Supreme Court, it appears that it has fully endorsed with no reservation, the judgment of the High Court. For purpose of ready reference, the relevant passages from the judgment of the Supreme Court are reproduced below...

> "As the respondent has now clearly conceded that if the Magistrate's Court to eject the appellant in terms

of part VA, then the appellant was not confined to the remedy of an appeal to the Court of Appeal. This admission would encompass the situation that since the Provisions of part VA did not apply to the premises in suit, then the appellant would not be confined to follow the procedure as set out in part VA either before the Magistrate's Court or in the Court of Appeal. This would mean that the question of the appellant having to follow the procedure laid down in Section 19 (H) becomes imperative only if part VA of the UDA Law was in fact applicable to the premises in suit.

It is to be noted that since the whole of part VA did not apply to the premises in suit, the appellant could have challenged the jurisdiction of the Magistrate's Court without following the procedure set out in Section 19E and the question of raising any objections by way of an affidavit does not arise".

In the concluding paragraph of the judgment of the Supreme Court His Lordship T B Weerasuriya,J held as follows..

"for the above reasons, I set aside the judgment of the Court of Appeal dated 8 February 2002 and allow this appeal with costs fixed at Rs.25,000/-."

From the above, it is quite clear that the appeal filed by the 1st respondent has been allowed without any reservation.

In order to find out the relief that had been granted to the petitioner by the Supreme Court it may be useful to advert to the prayer to the petition of appeal addressed to the Supreme Court. It reads as follows..

(a) Grants special leave from the said judgment of the Court of Appeal dated 8 March 2002 in case No C A (PHC) 1/94.

(b) To set aside the judgment of the Court of Appeal dated 8 March 2002 in case No C A (PHC) 1/94.

(c) Grant cost and

(d) such other and further relief as your Lordships Court shall seem meet"

From the above it could be gathered without any difficulty that when the Supreme Court allowed the appeal without any reservation it has granted the reliefs prayed for in the petition of appeal, which means that the judgment of the Court of Appeal has been set aside on the basis that the High Court had jurisdiction to enter judgment both in the exercise of its appellate and revisionary jurisdiction. In other words, the fact that the Supreme Court has refrained from setting aside or varying the judgment of the High Court, renders it crystal clear that the judgment of the High Court is faultless and should continue to remain unaltered.

The learned President's Counsel on behalf of the petitioner took much effort to convince me that once the Supreme Court, without specifically affirming the judgment of the High Court had set-aside the judgment of the Court of Appeal which in turn has set aside the judgment of the

High Court, would mean that the judgment of the High Court is rendered invalid. As has been correctly submitted by the learned President's Counsel for the 1st respondent this argument is nothing but a futile attempt and I opt to add with respect that the fallacy of the petitioner's position as regards this submission is self-explanatory in the light of the unambiguous findings of the Supreme Court and therefore merits no favourable consideration.

The other contention of the petitioner that the failure on the part of the 1st respondent to seek an order of restoration of possession in the Supreme Court stands in the way of seeking a restoration possession order is equally fruitless and therefore should suffer the same fate as in the case of the previous argument.

The concept and the applicability of "inherent powers of the Court" were subjects argued at length in this application. This concept has been the topic of lengthy discussions in many landmark judgments of our Courts and Courts of other jurisdictions beyond seas.

On the question of inherent powers of Court, some valuable thoughts shared by His Lordship J FA Soza through the Bar Association Law Journal (1988) volume II part II page 42, in his illuminating contribution titled "INHERENT POWERS OF COURT" may be reproduced with a sense of gratitude to the late learned author who was much respected for his untiring efforts to impart legal knowledge

to the legal fraternity. The relevant passage of the author in the said article reads as follows...

> "Inherent powers of a Court are an important aspect of judicial power and fall within the ambit of authority necessary for a Court to administer justice where rules of procedure are not available to deal with particular situations. Where the Court has jurisdiction to deal with the matter it should not be hamstrung for want of a procedure to attain the ends of the law. Inherent powers thus are an important weapon in the armoury of judicial power.
>
> The Courts are often faced with situations where they are obliged to act in *ex debito justitiae* to do that real and substantial justice for the administration of which alone the Courts exist. The judge will not fold his hands and allow rank injustice to be done just because no rule of procedure is available. The parameters of inherent jurisdiction are not unlimited. The Court can fill the gaps or iron out the rucks in the law of procedure and no more. Avoidance of conflict with the civil procedure code, sound principle and attainment of ends of Justice must be guiding principles where no rule of procedure exists.

To emphasize on the importance of a Court of Law being clothed with inherent powers the work of Felix F stumpf, may be usefully quoted from the National Judicial College of United States, from a publication which dates back to the year 1994. The learned author in his endeavour to

emphasize on the significance of inherent powers of Court states as follows....

> The term "inherent powers" consists of all powers reasonably required to enable Court to perform efficiently its judicial functions, to protect its dignity, independence and integrity and to make its lawful actions effective. These powers are inherent in the sense that they exist because the Court exists; the Court therefore has powers reasonably required to act as an efficient Court"

In the case of Seneviratna Vs. Abeykoon 1986 2 SLR 1, the plaintiff had taken the law into his own hands and forcibly evicted the defendant alleging abandonment and deterioration of the premises. It was held that the Court could in the interests of justice resort to its inherent powers saved under Section 839 of the Civil Procedure Code and make order of restoration of possession for the Fiscal to execute even though the Civil Procedure Code provided for such restoration to possession only on a decree to be entered under Section 217 (c) of the Civil Procedure Code.

The judgment of the Supreme Court in the case of SIVAPATHALINGAM Vs SIVASUBRAMANIAM reported in 1990 SLR Volume 1 page 378 may be considered as a major landmark judgment dealing with the inherent powers of Court to remedy an injury done by the Court.

This judgment quite emphatically re-echoed the principle that a Court whose act has caused injury to a suitor has an inherent power to make restitution and this power is exercisable by a Court of original jurisdiction as well as by a Superior Court.

Having perused the judgment of his Lordship S B Goonawardena in the case of SIVAPATHALINGAM (supra) I am of the view that the decision of the privy Council in the case of Roger& Others v The Comptoir D 'Escompte de Paris (1871) LR 3 PC 465 is worth being re-cited from the judgment of the Supreme Court, as it would undoubtedly extend a helping hand to a considerable degree to resolve the present issue. The relevant passage from the judgment in the case of Roger& Others v The Comptoir D 'Escompte de Paris, cited by his Lordship Goonawardena,J with approval is re-quoted below.....

> "By the Order in Council made on an appeal to the Privy Council it was ordered that judgment of the Supreme Court of Hong Kong of 3rd June, 1867, should be set aside and that a judgment of non-suit should be entered in lieu of the judgment granted for the plaintiff. Before the decision of the Privy Council however the amount of the judgment had been paid at the plaintiffs' demand by the defendants-appellants. After the decision of the Privy Council a motion was made by the defendants in the Supreme Court in Hong Kong for a rule for repayment of the amount of the judgment paid by them to the

plaintiffs-respondents on their demand to be made, with interest on the sum so paid. The Chief Justice of the Supreme Court of Hong Kong however while making order for the repayment of the amount actually paid refused to order interest as asked for, expressing his opinion that no powers vested in the Supreme Court to give interest in this manner. The appellants applied to the Supreme Court for leave to appeal against the order refusing to make a rule for payment of interest and such leave was granted. The appellants however afterwards presented a petition to Her Majesty in Council setting out the facts and praying that Her Majesty in Council refer the appellants' petitioners to the Judicial Committee to hear and determine the matter and to order the payment of interest. The Privy Council thereafter taking the view that there was a miscarriage of justice committed by the Supreme Court of Hong Kong in carrying out the Order in Council took up the petition in the form of a supplementary appeal. Lord Cairns in disposing of the appeal expressed the view of the Privy Council that it was in the power and it became the duty of the Court at Hong Kong to do everything and to make every order which was fairly and properly consequential upon the reversal of the original judgment by the Privy Council. Whilst stating that the question which the Privy Council had to consider was whether the Court at Hong Kong had or had not that power to order payment of interest and if so whether in the particular case it was or was not

proper to exercise that power, Lord Cairns said thus " Now their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression **"the act of the Court" is used, it does not mean merely the act of the Primary Court, of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter to the highest Court which finally disposes of the case. It is the duty of these tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court".**
(Emphasis is mine)

The Privy Council held that the Supreme Court of Hong Kong in addition to ordering the payment of principal should have on the principle set out above ordered the payment of interest and directed the payment of such interest. This case is authority as I understand it for the proposition that there is an inherent power in the Court not referable to a particular jurisdiction specially given by written law to correct its errors which result in injury to a suitor. I say so for the reason that, as Lord Cairns said, it becomes the duty of all tribunals from the lowest to the highest to take care that an act of the Court does not do injury to a suitor in the course of the whole of

the proceedings, the authority wherever redress is made must needs be referable to an inherent power. The Supreme Court of Hongkong could have ordered interest as the Privy Council said it could have, after its jurisdiction had been exhausted and when the case came back from the Privy Council only upon the basis of an inherent power to do so residing in it. This case is also an authority for the proposition that a superior Court has jurisdiction to direct a Court inferior to it to remedy an injury done by its act in the exercise of inherent power and in so far as the instant case is concerned I would say that this Court therefore would have jurisdiction to direct the Court of Appeal to take steps in restitution had it not done that already".

Applying the principle enunciated in the case of Roger& Others v The Comptoir D 'Escompte de Paris, it would be seen that the High Court which exercised appellate and revisionary jurisdiction over the impugned order of the learned Magistrate, had every right conferred by Section 6 (a) of the High Court of provinces (special provisions) act 19 of 1990 to give direction to the Court of first instance with regard to any matter. As the High Court had such powers to give directions to any Court of first instance, the learned Magistrate is presently under a legal duty to consider the motion and make an appropriate order. To restrain the learned Magistrate from making such an order by way of a writ of prohibition would undoubtedly amount to an unnecessary interference by this Court with regard to a

statutory duty owed by the learned Magistrate to the petitioner.

As to the legality of the order made by the learned High Court judge directing restoration of possession of the property, the learned President's Counsel of the petitioner maintains that the said directive is both an *obiter dictum* and made *per incuriam.* The position of the petitioner is that the reasoning in the passage directing restoration of possession is clearly not the basis upon which the orders of the learned Magistrate were set aside. Therefore, the petitioner, as far as I could understand submits that the said pronouncement is no part of the ratio decidendi in the case, and is, therefore, an obiter dictum. It is common knowledge that obiter dicta are remarks made by judges which are not necessary to reach decisions but are made as comments, illustrations or thoughts. The concept *stare decicis* is essentially the doctrine of precedents. This doctrine requires the judges to apply the same reasoning to lawsuits as has been used in prior similar cases by superior Court. An *obiter dictum* does not have such binding effect on the subordinate Courts as it is made in the form of a comment. As a matter of fact, the question whether the direction given by the High Court is *stare decisis* or an obiter dictum does not arise in this case because it is issued in the form of a command on the Magistrate. Therefore the learned Magistrate is now duty-bound to consider the motion filed by the petitioner and is obliged to make an order according to law.

As the learned High Court judge has not made the direction contrary to law or in ignorance of the law or by mistake or inadvertence the concept per incuriam is not applicable to the issue before hand.

The circumstances in which a writ of prohibition can be applied were clearly laid down by Lord Justice Atkin in the case of R Vs Electricity Commissioners (1924) 1 KB 171 at page 205. According to His Lordship Lord Atkin "whenever anybody of person having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, acts in excess of their legal authority they are subject to the controlling jurisdiction of the Kings bench division exercising writs.

As far as the present cases is concerned although the learned Magistrate has a legal authority to determine the questions affecting the right of the subjects and duty to act judicially there is no evidence to establish that he had acted in excess of his legal authority as far as the motion filed by the 1st respondent is concerned. To inquire into the circumstances under which relief is sought in the motion and to grant or refuse relief prayed for in the motion is within the jurisdiction and authority of the learned Magistrate. In such a circumstance, it is elementary principle that no Court is empowered to exercise prerogative powers to issue a writ of prohibition. To issue such a prohibition on the learned Magistrate would be an infringement of the Constitutional Provisions contained in article 105, namely to restrain the learned

Magistrate from protecting, vindicating and enforcing the rights of the people.

It is the bounden duty of the Magistrate to inquire into whether a rank injustice has been done to the 1st Respondent with the view to remedy the same, either by invoking his inherent powers or that of the High Court to give direction in terms of the law. It is stated authoritatively by the Privy Council that it is the duty of every court that no act of the court in the course of the whole proceedings does an injury to the suitors in court.

To perform the judicial function efficiently, to protect the dignity and independence of the institution created for the administration of justice and to prevent the abuse of the powers of court, it is my opinion that the learned Magistrate should be given a free hand to consider the motion to make an appropriate order according to law.

In terms of article 105 of the Constitution of the Democratic socialist Republic of Sri Lanka read together with section 2 of the Judicature Act to protect , vindicate and enforce the rights of the people the learned Magistrate should be at liberty to consider the motion so as to ascertain the extent to which the 1st respondent can be granted relief as against the alleged damage caused by the rank injustice said to have been committed by the learned Magistrate.

In conclusion, it is my considered view that the petitioner has not made out a case for the issuance of the writ of prohibition sought against the 3rd respondent. Further, even if it be otherwise, yet to issue a writ of prohibition, in this matter is an unnecessary exercise, as it is too early in the day to consider such a remedy, for the petitioner could still challenge the issuance of a writ of possession, if issued, before the appropriate forum by way of appeal, if such appeal is available or by invoking the revisionary jurisdiction of the appropriate Court. The long and short of it is that the petitioner, in any event has not established that the learned Magistrate has acted in excess of his legal authority by entertaining the motion filed by the 1st respondent. As a matter of Law, the learned Magistrate is in fact not precluded from making an appropriate order on the motion, after hearing the parties.

Hence, the application of the petitioner is dismissed subject to costs payable to the 1st respondent fixed at Rs 52500/-.

JUDGE OF THE COURT OF APPEAL

NR/-