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

In the matter of on application for leave to Appeal under and in terms of section 754(2) and 757 of the Civil Procedure Code.

Sunil Perera
No. 437, Galle Road,
Ratmalana.

Plaintiff

Vs.

D.C. Colombo No. 27667/MR
C.A.L.A 401/2005

1. GaminiSumanasekera
   Editor, IridaDivaina
   223, K. Cyril C. Perera Mawatha,
   Colombo 13.

2.UpailNawspapers Ltd,
   223, K. Cyril C. Perera Mawatha,
   Colombo 13.

Defendants

AND NOW BETWEEN

1. GaminiSumanasekera
   Editor, IridaDivaina
   223, K. Cyril C. Perera Mawatha,
   Colombo 13.

2. Upail Nawspapers Ltd,
223, K. Cyril C. Perera Mawatha,
Colombo 13.

Defendants – Petitioners

Vs.

Sunil Perera
No. 437, Galle Road,
Ratmalana.

Plaintiff – Respondent.

BEFORE: E.A.G.R. Amarasekara J.

DECIDED ON:08.06.2018

This leave to appeal application dated 10.10.2005 was filed by the Defendant Petitioners (hereinafter sometimes referred to as the Defendants) challenging the order dated 23.09.2005 marked P11 of the learned District Judge of Colombo. As per the Journal Entry dated 08.05.07 parties have agreed to file written submissions with regard to leave as well as the main matter. Unfortunately, this case has gone down without making any order for many years for various reasons.

The factual background to this application indicates that during the cross examination of the Plaintiff in defamatory action No. 27667 in the District Court of Colombo, the Defendants moved by way of a motion marked P7 to show a VCD and its contents to the Plaintiff and cross examine the Plaintiff. Furthermore, the Defendant had alternatively moved under Section 7 of the Evidence (Special

Provisions) Act No.14 of 1995 (Vide P7). The Plaintiff had filed his written objections marked P8 to this application on 02.05.2005 before the learned District Judge.

The Plaintiff's main objections were as follows;

1. There were no provisions to make this application,
2. The Defendant wasguilty for laches in making the application,
3. The Defendant could have properly listed the VCD to produce it in evidence.
4. The Plaintiff had clearly denied that he is there in that VCD.

The learned District Judge delivered his order dated 23.09.2005 marked P11 refusing the application of the Defendant on the ground that the Defendant hadfailed to give 45 days' notice as per the section 7(1)(a) of the Evidence (Special Provisions) Act No. 14 of 1995. The learned District Judge has also referred to section 2 of the same Act which reads as follows;

"Notwithstanding anything contained to the contrary in the Evidence Ordinance or any other written law the provisions of this act shall be applicable in respect of any matter provided here in."

The aforesaid section only applies to the matters provided in Evidence (Special Provisions) Act No. 14 of 1995 and when they are contrary to the provisions in other Laws but not for Casus Omisus or to situations which are not contrary.

This court is aware of the decision made in Abeygunawardana V Samoon and others (2007) 1 Sri L.R 276 which stated that after the Evidence (Special Provisions) Act 14 of 1995 came into operation admission of video Recordings is governed solely under the provisions of the said act. Section 7(2) of the said act states that a party shall not be permitted to tender computer evidence or contemporaneous recordings in evidence if they fail to give notice as provided in section 7(1) of the said Act but One has to adduce evidence only to prove a

fact.Section 7 applies only when one wants to tender evidence. What is admitted need not be proved. Section 58 of the Evidence Ordinance provides that facts admitted **at the hearing** or before the hearing by any writing or by any rule of pleading need not be proved unless the court in its discretion require that to be proved otherwise. Even the Section 8(1) of the Evidence (Special Provisions) Act No. 14 of 1995 states as follows;

"8(1)**In any proceeding it shall not be necessary for any party to tender any evidence of any fact which is admitted by the opposing part."**

This shows that even under Evidence (Special provisions) Act facts which are admitted need not be proved.

The idea of showing a document or contents of a VCD in cross examination is to get admissions with regard to the contents or part of the contents of it or to get admissions in relation to that document or VCD (for e.g.; the receipt of such document or signature on it or of what is contained therein). The document or VCD can be marked in cross examination only if a fact relating to that document or VCD is admitted. If any admission takes place there is no need to adduce evidence to prove that. If the witness refuses to identify or make any admission with regard to what is shown during cross examination the opposite party cannot mark it or produce it as part of the trial proceedings. In this context I do not think Section 7(1) of the evidence (Special Provisions) Act No. 14 of 1995 has anything to do with contemporaneous recordings or electronic evidence shown during the cross examination.If the witness cannot identify or make any admission with regard to it, matter ends there and if the party who relied on it wants to tender it in evidence then he/she will have to follow the provisions of law, including section 7 of the Evidence (Special Provisions) Act, to prove it.

Under the aforesaid circumstances it is my considered view that learned District Judge erred in considering Section 7(1) as applicable or governs the evidential material that are to be shown in cross examination. Even the witness could have made admission after seeing that. One of the objections is that the Plaintiff

denied that he is there in the VCD. The Plaintiff in his evidences in chief, when questioned about the existence of a VCD, has said that he has heard about it and denied his appearances in it but his answer relates to a VCD he has heard about.That answer was given without seeing the real VCD and its contents. Therefore, it is not a ground to refuse the application of the Defendant to show the contents of the VCD and cross examine. However, my view is that Section 3of the Evidence (Special Provisions) Act No. 14 of 1995 has some relevance here. It provides for causes omisus. No section in the said Act provides for computer evidence or contemporaneous recordings shown to the witness during cross examinations. The learned District Judge erred by contemplating section 7(1) of the said Act has provided for such situations.

Aforesaid Section 3 reads as follows;

"3(1) For the determination of any matter arising out of the application of the provisions of this Act or incidental thereto and not provided for in this Act, the provisions of the Evidence Ordinance or any other law shall, where appropriate, and with suitable adaptations as the justice of the case may require, be adopted and applied.

(2) For the purpose of applying the provisions of the Evidence Ordinance or other law for the determination of any matter not provided or in this Act, the provisions relating to documents or governing a like matter in the Evidence Ordinance or such other law shall with such suitable adaptations as the interests of justice may require, be adopted and applied in the case of a recoding, reproduction, statement or other evidence admissible under this Act.

(3) Where it is not appropriate or practical to adapt and apply the provisions of the Evidence Ordinance or other law as aforesaid for the determination of any matter not provided for this Act, the court may in the exercise of its

inherent power, determine such matter by making such order as the interests of justice may require."

It is clear that the learned District Judge could have used Section 3(1) and (2) and adapt proviso to Section 175 (2) of the Civil Produce code to allow the application made by the Defendants. Therefore, it is my considered view that learned District Judge erred in refusing the application. Since the application was made during the cross examination there was no delay in making the application. Questions of lashes could not have arisen. The objection saying that there is no provision in law to allow the application cannot hold water due to the existence of Section 3 of the Evidence (Special Provisions) Act No. 14 1995. On the other hand, what is to be shown during the cross examination need not be listed. It is a way of getting admissions relating to which is produced in cross examination. Furthermore, whether this is the VCD the Plaintiff denied containing his appearance has to be ascertain only after showing it to him. Thus, I do not see any other valid ground of objection for the learned District Judge to refuse the application of the Defendants.

In his written submission to this court the counsel of the Plaintiff Respondent has stated that prior to 1995 the VCD could not have been produced in Evidence. By this he tries to convey that under Evidence Ordinance a VCD cannot be admitted as evidence. Though I doubt this view to certain extent I do not wish to go into detail with regard to that supposition as I have already decided the learned District Judge could have allowed the application under Section 3 of the Evidence (Special Provisions) Act.

However, I must state that some texts indicate that the digital recording on a compact disc is done by creating marked spots (pits or holes, laser burnt spots etc.) and unmarked spots (Flat area or lands and unburnt spots etc.) recorded on it.The change of the reflection of laser beam on pits and flat areas or burnt spots or unburnt spots represent '1'sand '0's.(Videhttps://www.iasa-web.org/tc05/231-recording-principle visited on 6.6.2018).As per Section 3 of Evidence Ordinance,any matter expressed or described upon any substances and recorded

therein by means of letters, figures or **marks** or by more than one of those means can be considered as a document. In that sense,even the Evidence Ordinance could have been interpreted to recognize VCD as documentary evidence.

As mentioned before in this order the learned District Judge erred in refusing the application of the Defendants. He should have allowed it under Section 3 of the evidence (Special Provisions) Act while adapting proviso to Section 175 (2) of the Civil Procedure Code.

Hence, I allowed the leave to appeal application and the appeal and allow the Defendants to show the VCD and its contents to the Plaintiff witness and cross examine but the marking of the VCD can be allowed only if the Plaintiff witness make any admission in relation to the VCD and/or its contents.

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E.A.G.R. Amarasekara, J

I agree

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A.H.M.D Nawaz, J.