

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

In the matter of an Application for Revision under and in terms of Article 138 of the Constitution read with the High Court of the Provinces (Special Provisions) Act No. 19 of 1990

**C.A. Revision Application  
No: CA(PHC) APN 02/2018**

High Court of Gampaha  
Revision No. HC RA 15/2016

Magistrate's Court of Attanagalle  
Case No. AR 16/16

Officer-In-Charge  
Police Station,  
Mirigama

**COMPLAINANT**

**Vs.**

1. Dehiwala Liyanage Priyantha  
Sanjeewanee Liyanage,  
No. 98, New Town, Giriulla.

**1<sup>st</sup> PARTY APPLICANT**

2. Dilum Rathnayake  
No. 132/57, Donald Watta  
Nalla, Diuldeniya.

**2<sup>nd</sup> PARTY APPLICANT**

**AND**

Dilum Rathnayake  
No. 132/57, Donald Watta  
Nalla, Diuldeniya.

**2<sup>nd</sup> PARTY APPLICANT-PETITIONER**

**Vs.**

Officer-In-Charge  
Police Station, Meerigama

**COMPLAINANT-RESPONDENT**

Dehiwala Liyanage Priyantha Sanjeewanee  
Liyanage  
No. 98, New Town, Giriulla.

**1<sup>st</sup> PARTY APPLICANT-RESPONDENT**

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

**RESPONDENT**

Hatton National Bank  
No. 9, Senanayake Mawatha,  
Rathnapura.

**INTERVENIENT PARTY**

Mohamed Siyad Mohamed Safwan  
No. 03, Temple Road,  
Massala, Beruwala.

**PARTY NOTICED**

**AND NOW BETWEEN**

Mohamed Siyad Mohamed Safwan  
No. 03, Temple Road,  
Massala, Beruwala.

**PARTY NOTICED-PETITIONER**

**Vs.**

Dilum Rathnayake.,  
No. 132/57, Donald Watta,  
Nalla, Diuldeniya.

**2<sup>nd</sup> PARTY APPLICANT-PETITIONER- RESPONDENT**

Officer-In-Charge  
Police Station, Mirigama

**COMPLAINANT-RESPONDENT-RESPONDENT**

Dehiwala Liyanage Priyantha Sanjeewanee  
Liyanage  
No. 98, New Town, Giriulla.

**1<sup>st</sup> PARTY APPLICANT-RESPONDENT-RESPONDENT**

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

**RESPONDENT - RESPONDENT**

Hatton National Bank  
No. 9, Senanayake Mawatha,  
Ratnapura.

**INTERVENIENT PARTY-RESPONDENT**

**Before: P. Padman Surasena J/ President, Court of Appeal**

**Arjuna Obeyesekere J**

**Counsel:** Saliya Peiris, P.C., with Thanuka Nandasiri for the Party Noticed -  
Petitioner

Terrence Wickramasinghe for the 2<sup>nd</sup> Party Claimant - Petitioner –  
Respondent

Ms. Nayomi Wickremasekara, Senior State Counsel for the Hon.  
Attorney General

**Written Submissions:** 2<sup>nd</sup> Party Claimant - Petitioner – Respondent on 23<sup>rd</sup> May 2018

Party Noticed – Petitioner on 24<sup>th</sup> May 2018

**Decided on:** 4<sup>th</sup> July 2018

**Arjuna Obeyesekere, J**

The Party Noticed - Petitioner (the Petitioner) has filed this revision application seeking *inter alia* the following relief:

- (a) To set aside the Order dated 25<sup>th</sup> July 2017 made by the learned High Court Judge of the Provincial High Court of the Western Province, holden at Gampaha in High Court Case No. HCRA 15/2016;
- (b) To set aside the Order dated 28<sup>th</sup> November 2017 made by the learned High Court Judge of the Provincial High Court of the Western Province, holden at Gampaha in High Court Case No. HCRA 15/2016;
- (c) To set aside the Order dated 9<sup>th</sup> November 2017 made by the learned Magistrate of Attanagalle in Case No. AR 16/2016;
- (d) To set aside the Order dated 30<sup>th</sup> November 2017 made by the learned Magistrate of Attanagalle in Case No. AR 16/2016.

The First Party Applicant – Respondent - Respondent (the First Party) was, at the relevant time, the registered owner of vehicle bearing Registration No. NWPP 6629. On 19<sup>th</sup> December 2015, she lodged a complaint at the Giriulla Police Station against the Second Party Applicant – Petitioner - Respondent (the Second Party).<sup>1</sup> The complaint was that the Second Party was illegally retaining the said

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<sup>1</sup> A copy of the said complaint has been annexed to the petition marked 'P2'

vehicle which she claimed she had entrusted to the Second Party prior to being hospitalized.

The First Party had subsequently filed a similar complaint with the Mirigama Police. The Officer-in-Charge of the Mirigama Police (the Police) had produced the said vehicle before the Magistrate's Court of Attanagalla and reported facts to the learned Magistrate by way of an 'A' Report dated 05<sup>th</sup> January 2016. The First Party and the Second Party were cited as applicants or claimants of the said vehicle.

In the said Report, the Police had stated that the vehicle is being produced to the Magistrate's Court as there was a suspicion that the said vehicle may be used to commit an offence.<sup>2</sup> The Police had thus sought an order from the Magistrate's Court in terms of Section 431(1) of the Code of Criminal Procedure Act No. 15 of 1979, as amended (**the Code**).

The learned Magistrate, purporting to hold an inquiry under Section 431(1) of the Code had directed the First Party and the Second Party to file written submissions in order to determine the person to whom the vehicle should be handed over.

The Order of the learned Magistrate was delivered on 25<sup>th</sup> of February 2016. By the said Order, the learned Magistrate held as follows:

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<sup>2</sup> The relevant paragraph in the Report filed by the Police reads as follows: ඉහත වැනි රථය ආරවුල සම්බන්ධයෙන් මා විසින් විමර්ශනය කිරීමේදී මෙම වැනි රථය සම්බන්ධයෙන් මෙම දෙපාර්ශවයම අයිතිවාසිකම් කියන බවත් මෙම ආරවුල සම්බන්ධයෙන් පොලිස් ස්ථානයට කිප අවස්ථාවක පැමිණිලි ලැබී ඇති අතර මේ සම්බන්ධයෙන් යම් වරදක් සිදු කිරීමේ යැයි සැකයක් ඇති විට ඉඩ ඇති බැවින්

“ඒ අනුව මෙම නඩුවේ ඉදිරිපත්වී ඇති කරුණු පරීක්ෂා කිරීමේදී මෙහි අපරාධමය තත්වයක් ඉදිරිපත් නොමැති බවද, වෙනත් විසඳිය යුතු කිසිදු ආරවුල් ස්වභාවයක් නොමැති බව පෙනීයන බවත්...”

The learned Magistrate, having held that a criminal offence has not been made out, held further that the First Party as the registered owner of the said vehicle is the person who is entitled to the possession of the said vehicle. The learned Magistrate thereafter proceeded to release the said vehicle to the First Party.<sup>3</sup> Very importantly, the learned Magistrate did not impose any conditions relating to the release of the vehicle. Thus, there was no impediment to the First Party transferring the ownership of the vehicle.

Being dissatisfied with the said Order of the learned Magistrate, the Second Party filed Revision application No. HCRA 15/2016 in the Provincial High Court of the Western Province holden at Gampaha on 28<sup>th</sup> March 2016. The First Party, the Police and the Attorney General were cited as Respondents. The grievance of the Second Party was that the learned Magistrate had not held an inquiry and thereby deprived the Second Party from tendering any documents to substantiate his position. The Second Party also alleged that possession of the vehicle should be given to the person in whose possession the vehicle was, at the time the vehicle was seized by the Police.

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<sup>3</sup> The First Party was the registered owner of the said vehicle at the time the Magistrate made the Order

The relief sought from the High Court was to set aside the Order of the learned Magistrate. Very importantly, the Second Party had sought an interim order to prevent the First Party from selling the said vehicle<sup>4</sup>, in addition to staying the order of the learned Magistrate. It was imperative for the Second Party to support the application at the first available opportunity and obtain a stay order preventing the First Party from transferring the vehicle, to prevent the Revision application from becoming futile. It is rather regretful to note that the Second Party has not acted diligently in obtaining the stay order prayed for at the first available opportunity. As a result, he finds himself in this predicament today.

Even though the revision application was filed on 28<sup>th</sup> March 2016 and the learned High Court Judge directed that notices be served on 31<sup>st</sup> March 2016, the notices to be served on the Respondents had been tendered by the Second Party only on 18<sup>th</sup> April 2016, thereby contributing to the delay.

The application for interim relief was finally supported on 29<sup>th</sup> June 2016. The learned High Court Judge granted *ex parte* a Stay Order until the final determination of the Revision Application preventing the First Party from transferring the vehicle to a third party. It is clear from the Order of the learned High Court Judge that the stay order has been issued on the submission of the

<sup>4</sup> Paragraph 21 of the petition reads as follows:

පෙත්සම්කරු ප්‍රකාශ කර සිටින්නේ, මෙම නඩුවේ අවසාන නියෝගය දෙන තෙක් උගත් මහේස්ත්‍රාත්වරයා දුන් නියෝගය අත්හිටුවීමේ ආඥාවක් කරනු නොලැබුවහොත්, අදාළ රු 2,150,000/- පමණ 1 වැනි පාර්ශවය විසින් 2 වැනි පාර්ශවයට ගෙවිය යුතු ණය මුදල් සඳහා ඇපයක් හැටියට භාර දුන් වාහනය 1 වැනි පාර්ශවය විසින් අත්සතු කිරීම නිසා පෙත්සම්කරු අප්‍රතිකාර නානියක් සහ/හෝ පාඩුවක් හෝ අලාභයක් සිදුවන බවක් මෙම විභාගයෙන් පෙත්සම්කරු බලාපොරොත්තු වන අවසාන ප්‍රතිඵලය නිශ්චල වන බවත් ය.



Counsel for the Second Party that there is information that the said vehicle may be transferred by the First Party and that if the said vehicle is transferred, the Second Party would not receive the relief claimed in the revision application.

The First Party, having appeared before the High Court on notice, informed Court on 3<sup>rd</sup> August 2016 that it would be futile to proceed with the revision application as she had transferred the said vehicle to Egoda Arachchige Dinesh Sanjeeva on 11<sup>th</sup> April 2016. In turn Dinesh had transferred the vehicle to Peramabaduge Wickramasuriya Sanjaya on 16<sup>th</sup> May 2016.

Although the fact that the vehicle had been transferred was brought to the notice of the Second Party, no steps were taken on his behalf to add the new owner as a respondent and obtain a stay order preventing a further transfer of the said vehicle. It appears that the Second Party proceeded on the basis that the Magistrate's Court has the power to call for the vehicle, inspite of the vehicle having been sold. This Court observes that if this was the case, the Second Party need not have prayed for interim relief in his revision application.

The Revision Application before the learned High Court Judge was taken up for argument on 13<sup>th</sup> February 2017. Having heard the First Party and the Second Party, the learned High Court Judge delivered his judgment on 25<sup>th</sup> July 2017. By this judgment, the learned High Court Judge set aside the Order of the learned Magistrate dated 25<sup>th</sup> February 2016 and directed that possession of the said vehicle should be handed over to the Second Party forthwith. The learned High Court Judge had proceeded on the basis that the Magistrate could not have acted

under the provisions of Section 431(1) of the Code as the situations envisaged therein had not arisen and in view of the finding of the learned Magistrate that the dispute between the parties was entirely civil.

In compliance with the judgment of the High Court, the Magistrate had issued notice on the Petitioner, who by then was the owner of the said vehicle, having purchased the vehicle on 1<sup>st</sup> November 2016, directing that the vehicle be produced before the Magistrate. According to the Petitioner, he became aware of the case and the background circumstances relating to this case only when he received this notice. The Petitioner had appeared before the learned Magistrate and explained the circumstances under which he had purchased the said vehicle. However, the learned Magistrate, by an order made on 9<sup>th</sup> November 2017 had pointed out that his hands are tied and that he has to comply with the judgment of the learned High Court Judge.

The Petitioner thereafter filed a petition in the High Court of Gampaha, seeking to be added as a party in Revision Application No. 15/2016. The substantive relief sought by the Petitioner was to set aside the order of the learned Magistrate dated 9<sup>th</sup> November 2017 as well as set aside the judgment of the High Court dated 25<sup>th</sup> July 2017.

The Intervening Party – Respondent, the Hatton National Bank too had filed an application to intervene in the High Court case and to set aside the judgment of the High Court, as the said vehicle had been purchased by the Petitioner, having obtained a lease facility from the Bank.

Having considered the applications of the Petitioner and the Bank, the learned High Court Judge, by an Order dated 28<sup>th</sup> November 2017 refused to grant the relief prayed for by the Petitioner and the Bank. When the case was called before the Magistrate's Court on 30<sup>th</sup> November 2017, the learned Magistrate had once again pointed out that he is compelled to act in terms of the judgment of the High Court<sup>5</sup> and directed the Police to seize the said vehicle and produce it before Court.

Being dissatisfied with the Orders made by the learned High Court Judge on 28<sup>th</sup> November 2017 and the orders made by the learned Magistrate<sup>6</sup>, the Petitioner invoked the revisionary jurisdiction of this Court, seeking to set aside the said orders and the judgment of the High Court. This Court, on 21<sup>st</sup> February 2018, having heard the learned Counsel for the Petitioner and the Second Party, issued a stay order as prayed for in paragraphs 'B(iv) - (vi)' of the prayer to the petition.<sup>7</sup>

The Second Party thereafter filed its Statement of Objections. When this matter was taken up on 24<sup>th</sup> May 2018, both parties agreed that this Court can deliver its judgment on the Written Submissions filed by the Parties.

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<sup>5</sup> Judgment of the High Court dated 25<sup>th</sup> July 2017

<sup>6</sup> Orders dated 9<sup>th</sup> November 2017 and 30<sup>th</sup> November 2017

<sup>7</sup> Paragraph B(iv) - stay the order of the learned Magistrate dated 30<sup>th</sup> November 2017

Paragraph B(v) - stay the learned Magistrate of Attanagalle from implementing the orders of the learned High Court Judge of Gampaha dated 25<sup>th</sup> July 2017 and 28<sup>th</sup> November 2017

Paragraph B(vi) – Stay further proceedings in the Magistrate's Court until the final determination of this application.

The starting point of this application is the Report filed by the Police, seeking an Order under Section 431(1) of the Code. Hence, it would be appropriate at this stage to consider the provisions of Section 431(1) of the Code, which reads as follows:

“The seizure by any police officer of property taken under section 29 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate who shall forthwith make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained respecting the custody and production of such property.”

In terms of Section 431(1) of the Code, an order can be made *inter alia* with regard to possession of any property which has been stolen or with regard to property found under circumstances which create suspicion of the commission of an offence. The latter provision is primarily available to deal with property where the owner is not known. In this case, the ownership of the vehicle was known. As the learned Magistrate himself has held that no criminal offence has been made out and in view of the observation of the learned Magistrate that the dispute between the parties should be resolved through a civil action, this Court is in agreement with the view expressed by the learned High Court Judge that the provisions of Section 431(1) had no application in this case.

This Court is in agreement with the learned High Court Judge that if a criminal offence had been made out on the complaint made by the First Party, the correct course of action would have been for the Police to have reported facts to the Magistrate's Court by filing a report under the provisions of Section 136(1) of the Code of Criminal Procedure. Having done so, the Police could have invited the Magistrate's Court to make an order under Section 431(1) with regard to the vehicle.

In this regard, it would be appropriate to refer to the judgment of H.N.G.Fernando J (as he then was) in Jayasuriya v Warnakulasuriya<sup>8</sup>. The facts of that case are briefly as follows. Proceedings before the Magistrate had commenced with an "intimation to Court" of an alleged complaint by Warnakulasuriya that Jayasuriya had removed a fishing boat from his custody and taken the boat to Jayasuriya's land. The "intimation" further stated that there was a dispute between the parties claiming ownership of the boat and, "*as the Police apprehended a breach of the peace the boat was kept in the custody of the Village Headman*". An order had therefore been sought from the Magistrate's Court regarding the disposal of the boat. The Magistrate thereafter held an inquiry at the conclusion of which he held that the boat which originally belonged to Jayasuriya had been handed over to Warnakulasuriya on an agreement and that Warnakulasuriya was entitled to the possession and use of the boat. On this ground the learned Magistrate held that the boat had been unlawfully removed from Warnakulasuriya's custody and made order that the boat be delivered to him. During the appeal, the principal argument was that the Magistrate has no jurisdiction to order the delivery of the

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<sup>8</sup> 61 NLR 189

boat to Warnakulasuriya except after the conclusion of proceedings duly instituted in one of the modes prescribed in section 148 of the Criminal Procedure Code.

The Supreme Court held that if the Magistrate's order was allowed to stand, Warnakulasuriya would, through the intervention of the Magistrate, be recovering possession of the boat from Jayasuriya although he has neither instituted a prosecution for theft against Jayasuriya nor instituted proceedings in a civil court.

The Supreme Court further held as follows:

“In my opinion section 419<sup>9</sup> was not intended to afford a means of settling civil disputes in this manner. I would hold that section 419 cannot be utilised by a "complainant" in order to obtain an order of possession from a Magistrate of any article seized from the possession of another as being stolen property if the other person denies the theft and claims the property as his own. In such case Section 413<sup>10</sup> is the only provision which can be invoked, and it can be invoked only if, as this court has previously held, proceedings have been instituted in respect of the alleged offence of theft.”

In the above circumstances, this Court is in agreement with the learned High Court Judge that the learned Magistrate could not have proceeded to make an order under Section 431(1) of the Code.

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<sup>9</sup> Almost identical provision is found in Section 431(1) of the Code of Criminal Procedure Act No. 15 of 1979

<sup>10</sup> Identical provision is found in Section 425(1) of the Code of Criminal Procedure Act No. 15 of 1979

Having held that the Magistrate had erred by exercising jurisdiction under Section 431(1) of the Code, the learned High Court Judge proceeded to make order that possession of the said vehicle be handed over to the Second Party. For the reasons that would be set out henceforth, this Court is of the view that the learned High Court Judge erred when he made this direction and that the said direction is a wrongful exercise of the discretion vested in him.

To start with, releasing the vehicle to the Second Party was not a substantive relief prayed for by the Second Party in his revision application, even though one may argue that a necessary consequence of holding that the learned Magistrate has erred when he exercised powers under Section 431(1) of the Code is to release the vehicle to the Second Party, thus restoring the status quo that prevailed at the time the learned Magistrate made the order.

Quite apart from granting a relief not specifically prayed for, the learned High Court Judge failed to consider the provisions of the Motor Traffic Act No. 14 of 1951, as amended that deal with the ownership and possession of motor vehicles. Section 2(1) of the Act provides that, *"No person shall possess or use a motor vehicle unless that vehicle is registered, and the person for the time being entitled to the possession of the vehicle is registered as the owner thereof, in accordance with the provisions of this Part."*

Thus, the Second Party having possession of the said vehicle while not being its registered owner is contrary to the provisions of the Act. This is further fortified

when one considers the provisions of Section 12(2) and 12(4) of the Act. These sections make it obligatory for the registered owner of a vehicle to inform the Commissioner of Motor Traffic in writing of the change of possession of a vehicle within seven days thereof<sup>11</sup>. The person into whose possession the vehicle has passed is required within fourteen days after the change of possession, to forward to the Commissioner of Motor Traffic the revenue license and the certificate of registration relating to the vehicle, and to apply to the Commissioner to be registered as the owner in place of the person registered as such.

This Court also observes that in terms of the Motor Traffic Act, every application for a revenue license for a motor vehicle shall be signed by the registered owner of the motor vehicle<sup>12</sup> and that no revenue license for any motor vehicle shall be issued by any licensing authority unless the certificate of registration relating to that vehicle is produced<sup>13</sup>.

It is common ground that the First Party was the registered owner of the said vehicle at the time of the complaint and that the First Party had at no time transferred the ownership of the said vehicle to the Second Party. In the light of the above provisions of the Motor Traffic Act and in the circumstances of this case, this Court is of the view that the learned High Court Judge erred in law when he directed that possession of the vehicle be given to a person other than its registered owner.

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<sup>11</sup> Upon a voluntary transfer or otherwise

<sup>12</sup> Section 30(1)(c) of the Motor Traffic Act

<sup>13</sup> Section 27(1) of the Act



In any event, the Second Party had failed to exercise due diligence when he failed to obtain a stay order at the first available opportunity. The present predicament faced by the Second Party could have been avoided had he obtained without delay a stay order preventing the First Party from transferring the vehicle. This Court has already observed that the stay order had been obtained four months after the order of the learned Magistrate releasing the said vehicle to the First Party. By the time the judgment of the High Court was delivered, Court had already been informed by the First Party that the said vehicle had been sold by her. The Second Party had not taken any steps on the said disclosure. Thus, this Court is of the view that the learned High Court Judge should not have exercised his discretion as the Second Party by his own conduct and negligence, had disintitiled himself to any relief.

Finally, as far as the High Court was concerned, the only parties before it were the First party, Second Party, the Police and the Attorney General. As the said vehicle was no longer with the First Party, the learned High Court Judge could not have made any orders and could not have intended to have made any orders that affected the rights of third parties.

Considering the fact that the High Court was exercising revisionary jurisdiction, which is a discretionary remedy, this Court is of the view that these facts should have been sufficient for the High Court to decide not to exercise its discretion in favour of the Second Party despite the errors committed by the learned Magistrate.

It is in these circumstances that the Petitioner has invoked the revisionary jurisdiction of the Court. In considering this application, this Court is mindful of the following passage from the judgment of the Supreme Court in **Marian Bee Bee Vs. Mohamed and others**<sup>14</sup> where Sansoni CJ held as follows:

“The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this court itself, in order to avoid miscarriage of justice. It is exercised in some cases by a judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result.”

In **Kayas vs. Nazeer & others**<sup>15</sup> the Supreme Court cited with approval the above judgment of Sansoni J that a person who is aggrieved by any order of Court can seek a revision of such order even though he is not a party to such action. Weerasuriya J held that *"the object of revision is the due administration of Justice and correction of errors and that power can be exercised in respect of any order of a lower Court to prevent an injustice on an application by an aggrieved person who is not even a party to the case."*

Quite apart from the order of the learned High Court Judge directing that the vehicle be handed over to the Second Party being contrary to law, this Court is of the view that grave injustice will be caused to the Petitioner if the Petitioner is to

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<sup>14</sup> 69CLW34

<sup>15</sup> 2004 3 Sri LR 202

hand over the vehicle to the Second Party at this stage. This is in addition to the practical difficulties that will arise when a vehicle is used by a person other than the registered owner, but where the registered owner will nonetheless be liable for any damage caused by the said vehicle. In these circumstances, this Court is of the view that the learned High Court Judge erred in law when he directed that the vehicle be handed over to the Second Party.

In view of the above findings, this Court is of the view that this is a fit case where the revisionary jurisdiction of this Court should be exercised. Accordingly, this Court sets aside the judgment of the learned High Court Judge dated 25<sup>th</sup> July 2017 as well as the order of the learned High Court Judge dated 28<sup>th</sup> November 2017 and the orders made by the learned Magistrate on 9<sup>th</sup> November 2017 and 30<sup>th</sup> November 2017, as they are all consequential orders made pursuant to the judgment of the Learned High Court Judge.

Taking into consideration all of the circumstances of this case, this Court makes no order with regard to costs.

Judge of the Court of Appeal

**P. Padman Surasena J/ President, Court of Appeal**

I agree.

**President, Court of Appeal**