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

Regent Homes (Pvt.) Ltd., No. 941/1,
Jayanthi Mawatha, Kotte,
Athulkotte.

1st Defendant-Petitioner

Case No. : CA/RII/0015/2019

Vs

DC Kaduwela, Case No. 523/Spl

Rajapakshe Waidyalankara
Ratnadhipathi Gedara Tharanga
Udayanganee Rajapakse,
No. 484/10, Lifestyle Residencies,
Averihena, Hokandara.

Plaintiff-Respondent

1. A.D.Y. Anandani, Divisional Secretary, Kaduwela Divisional Secretariat Office, Kaduwela.

2. K.M. Pradeep, Chief Engineer (Construction), Western Province South II Lower Floor, Ceylon Electricity Board, 664, Sri Jayawardenapura Road, Ethul Kotte, 10100.

3. Ceylon Electricity Board, 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo.

4. Attorney General, Attorney General Department, Colombo 12.

Defendant-Respondents

Before: Hon. D.N. Samarakoon, J

Hon. Pradeep Kirthisinghe, J.

Counsel : Mr. Harith De Mel with Mr. Dulani Peiris instructed by Mr. G. Wijetunga for the Petitioner.

Mr. Murshid Maharoof with Mr. Shoaib Ahamad and Mr. Jemiah Saurjah instructed by Mr. Kumudu Rajapakshe for the Plaintiff-Respondent.

Dr. Charuka Ekanayake S.C., for the Defendant-Respondents.

Argued on: 30.04.2021

Written submissions tendered on: 08.04.2021 by Plaintiff-Respondent

Decided on: 23.03.2022

D.N. Samarakoon, J.

Judgment

1. The plaintiff respondent in her written submissions has cited the case Suneth Indika Nawagamuwa and others vs. Seylan Merchant Bank Limited., C. A. Application for Restitutio in Integrum and Revision 15/2016 decided by Justice Janak De Silva in which His Lordship citing cases Perera et al vs. Wijewickrema 15 NLR 411, Menchinahamy

vs. Muniweera et al 52 NLR 409 and Sri Lanka Insurance Corporation Ltd. vs. Shanmugam and another 1995 01 SLR 55 has said,

"The remedy by way of restitutio in integrum is an extraordinary remedy and is given under very exceptional circumstances and the power of the court should be most cautiously and sparingly exercised".

His Lordship also said in that case citing Perera vs. People's Bank (1995) 02 SLR 84 that,

"Revision is a discretionary remedy and the conduct of the defendant is a matter which is intensely relevant".

02. The present application for Restitutio in Integrum and Revision was made by the 01st defendant petitioner togetherwith an application bearing No. 08/2019/TRF for the transfer of the case No. 523/SPL from the district court of Kaduwela, on the basis of the **alleged injudicious behavior of the learned district judge with bias towards the plaintiff**, **who herself is a judicial officer** and on the basis that no fair hearing will be served to the 01st defendant petitioner. But the petitioner did not pursue with the application for the transfer of the case, since the said learned district judge himself has been transferred from the said district court.

03. Despite not being interested in the transfer application, the petitioner supported the present application for Restitutio in Integrum and for Revision, on the basis, that, orders dated 11.11.2019, 04.12.2019 and 10.12.2019, which the said last order was made after the present application was made, are prejudicial to the petitioner.

04. The 01st defendant petitioner has tendered a Second Amended Petition dated 12.12.2019 on which presently reliance is made. There is a preliminary objection by the plaintiff respondent, that, the said second amended petition is not supported by way of an affidavit. But it is clear that the original petition of the 01st defendant seeking Restitutio in Integrum etc., was supported by a valid affidavit and hence the jurisdiction of this court has been validly invoked.

05. The plaintiff, Tharanga Udayanganie Rajapakse is living in an upstairs house situated about 500 meters from the land on which the 01st defendant, Regent Homes Pvt. Ltd., is constructing about 09 houses for sale. The 02nd defendant is Mrs. A. D. Y. Anandini, the Divisional Secretary of Kaduwela Division who has granted the permit Z.01 for the supply of electricity to the land of the 01st defendant petitioner, through lines drawn along the Western Boundary of the plaintiff's premises. It is admitted that these lines carry a voltage of 33,000. The 03rd defendant, Mr. K. M. Pradeep was the Electrical Engineer whereas the 04th defendant is the Ceylon Electricity Board. The 05th defendant is the Attorney General.

06. **The petitioner places great reliance on the alleged fact that the other defendants have accepted the position of the petitioner.** In fact, two tables giving paragraphs of the second amended petition admitted by two sets of defendants has been attached to the written submissions of the petitioner tendered after the oral hearing. **It is pertinent to note what the other defendants admit as well as deny out of the averments made by the petitioner in its second amended petition.**

07. The 02nd and 05th defendants have filed objections together while the 03rd and 04th defendants have filed same objections. Apparently, the objections have been drafted with the advice of the 05th defendant, who appeared for all official defendants.

08. The 02,05 as well as 03,04 defendants deny paragraph 04 of the second amended petition, however that is where the plaintiff's case has been narrated.

09. In denying the averments the said official defendants state that they do deny the said averments in the second amended petition **in the exact form they are pleaded at present.**

10. Both sets of official defendants deny paragraph 27 of the second amended petition which says,

"Thereafter the Learned District Judge made several observations as to how it was disappointing why the parties were not settling and that the district court as a judicial officer must protect the other judicial officers and that it was likely that this case would be referred to the Supreme Court for violation of rights of a judicial officer which would take an immensely long time period to be heard and determined".

11. Both sets of official defendants deny paragraph 41 of the second amended petition which says,

"The petitioner states that in all of the above circumstances the petitioner is of the humble and respectful view that the further continuation and the proceeding of the matter in district court of Kaduwela before the Hon. District Judge of Kaduwela is not in the

interest of justice that a fair and impartial trial cannot be held to the cause of the 01st defendant for any one or more of the following reasons;

(a) It appears to the petitioner that the Learned District Judge is prejudiced against the 02nd to 04th defendants who have as public officers carried out certain functions in terms of the law and with respect to the decisions they have made which have aggrieved another judicial officer, the plaintiff,

(b) The petitioner is of the view that the learned district judge's mind has been affected by the fact that the plaintiff is a judicial officer just like the learned district judge and that a judicial officer should not be caused any inconvenience or grievance in any form or manner whatsoever and that persons who are responsible for such a wrong doers,

(c) The petitioner is of the respectful view that the learned district judge is of the view that even irrespective of the Law and the facts relevant that the plaintiff's complaint is valid and genuine and that the defendants should be at fault in one way or the other,

(d) It appears that the learned district judge has made certain observations and comments towards the 02nd to 04th respondents which do not give confidence to the petitioner that an objective decision will be taken or a correct decision will be taken in this matter,

(e) The manner in which the learned district judge has negotiated a possible settlement gives an appearance that the learned district judge does not agree to any determination other than that of a determination in agreement with the plaintiff,

(f) It appears that the learned district judge was unhappy that the 01st defendant was not willing to settle the matter as proposed to end the dispute and fears that this may cause some prejudice towards the 01st defendant,

(g) It appears that only the plaintiff's concerns are fully and thoroughly appreciated by the learned district judge but the material put forward by the defendants have been neglected at all times,

(h) The reluctance of the learned district judge to allow the objections to jurisdiction to be heard and determined cause grave concern that the petitioner's case may not be given a fair hearing,

(i) The statement from the Bench stating that the order will be made permanent and that it is better to settle than object has caused concern in the mind of the petitioner that irrespective of the merits the interim injunction will be issued so as to greatly pressure the 01st defendant to settle in order to obtain its electricity supply which is of urgent necessity,

(j) The 02nd respondent being the Divisional Secretary of Kaduwela maybe subject to several additional pressures due to the existence of this case being heard in the relevant area and also the 03rd respondent being in charge of Kaduwela district may also subject to further pressures and therefore it may be suitable that a judge of another district zone may hear this matter,

(k) at most times the record of the action has been kept in the chambers of the learned district judge,

(l) The instance of the plaintiff being told to remain in chambers of the learned district judge when she appeared in open court has eroded the confidence of the 01st defendant in the learned judge,

(m) Justice must not only be done but must be seen to be done".

12. Both sets of official defendants deny averments in paragraph 44 of the second amended petition which says,

"The 01st defendant petitioner states that in the above circumstances the enjoining order dated 16th September 2019 should be set aside in limine on any of the following grounds,

(a) Lack of jurisdiction in terms of section 23 and 24 of the Interpretation Ordinance,

(b) Lack of jurisdiction due to section 39 of the Electricity Act,

(c) Action being misconceived due to the validity and existence of the decision marked Z.01 dated 01.02.2019,

(d) The grave suppression and misrepresentation of facts by the plaintiff in obtaining the enjoining order,

(e) The lack of a prima facie case and or a balance of convenience in favour of the plaintiff".

13. Both sets of official defendants deny the averments in paragraph 45 of the second amended petition, which says,

"The 01st defendant petitioner states that the learned district judge of Kaduwela has not been inclined to take up or allow the 01st defendant petitioner to support its application to set aside the enjoining order and or the 01st defendant petitioner reasonably believes that his honour may refuse to dissolve the enjoining order in the circumstances pleaded".

14. Both sets of defendants deny paragraph 46 of the second amended petition, which says,

"The 01st defendant petitioner also states that the order dated 11.11.2019 and proceedings thereto should be set aside for one or more of the following reasons,

(a) Ex facie it was brought to the attention of court that this court has no jurisdiction but the court has avoided making an appropriate order,

(b) The learned district judge had no jurisdiction to refer any matter to the Public Utilities Commission of Sri Lanka,

(c) This is even further so as the 01st defendant has not consented to such a proposal,

(d) The learned district judge has no power to make orders that are to bind the parties at the Public Utilities Commission of Sri Lanka,

(e) The learned district judge ex facie by order appears to have implied that the plaintiff is correct and the defendants are wrong,

(f) The learned district judge was procedurally incorrect in partially

halting the submission of the 01st defendant under section 664(2) and directing such submissions be made in writing,

(g) The learned district Judge was incorrect to assume jurisdiction and continue to assume jurisdiction when the question of jurisdiction was brought up before him,

(h) The learned district judge has failed to record that the extension of the enjoining order was not of consent of the 01st defendant".

15. Both sets of official defendants also deny averments in paragraph 47(a)(b)(d)(g)(h) and (i) of the second amended petition, which are,

"The 01st defendant states that the order dated 04.12.2019 must be revised and set aside for following reasons,

(a) It is a settlement recorded without obtaining the consent of all parties with objections raised,

(b) It is an order which is ex facie favorable to the plaintiff and made on the presumption that plaintiff's contentions are held to be correct,

(d) It is an order which goes absolutely contrary to the matters pleaded by the plaintiff herself,

(g) It is an order which may affect the rights of the third parties who are not before this court,

(h) It is an order of a coercive nature against the 01st defendant in a matter where the 01st defendant has duly presented its stance in addition to the other parties who have all being deprived of a fair hearing,

(i) It is an order gravely affecting the rights of the 01st defendant for no reason whatsoever".

16. Furthermore, it appears that paragraph 07 of the second amended petition has been accepted by 02 and 05 defendants, whereas it has been denied by 03 and 04 defendants. The said paragraph 07 reads,

> *"The Petitioner further states that on the said day the Learned District Judge made comment about the conduct of the 1st Defendant in obtaining a supply of electricity in a manner that was inconveniencing the life of the Plaintiff who was a Judicial Officer and that this Order will be made permanent unless remedial steps are taken by the Defendants".*

17. The 02 and 05 defendants as well as 03 and 04 defendants have admitted paragraph 26 of the second amended petition, which says,

> *"The Petitioner states that when the Plaintiff arrived in Open Court the Learned District Judge told the Plaintiff that she need not remain in Open Court and can retire to the Chambers of the District Judge".*

18. The 02, 05 as well as 03, 04 defendants are unaware and hence deny paragraph 34 of the second amended petition. The said paragraph 34 is connected to paragraph 33 which read,

> *33- "The Petitioner states the Learned District Judge fixed the matter for 4th December 2019 at 2.30 PM for Oral Submissions in respect of the decision of the Public Utilities Commission of Sri Lanka".*
>
> *34- "The Petitioner states with utmost respect that it is bewildering as to (the) purpose of such a step in the District Court where the matter of inquiry has to be the Enjoining Order and the Interim Injunction".*

19. The 02, 05 defendants as well as 03, 04 defendants are unaware and hence deny paragraph 42 of the second amended petition which reads,

> *"The Petitioner further states that though none of the above events except the proceedings of the 11th November 2019 and the 4th December 2019 are of record that these events were observed by Counsel for the Petitioner Mr. Harith De Mel Attorney at Law, Instructing Attorney for the Petitioner Mrs. Gayanga Wijetunge Attorney at Law among others".*

20. It would be noted that paragraph 42 refers to "*above events*" which are referred to in paragraph 41 which has sub paragraphs (a) to (m), which as aforesaid has been denied by 02, 05 as well as 03,04 defendants in the exact form they are pleaded at present.

21. The said paragraph 41 was reproduced above and it may be noted that it mainly contained certain allegations against the Learned District Judge, that he was prejudiced against the 02 and 04 defendants, his mind, has been affected by the fact that the plaintiff is a Judicial Officer, the Plaintiff's complaint is valid and genuine even irrespective of the law, he made certain observations and comments towards the 02 and 04 defendants which do not give confidents to the petitioner that an objective decision will be taken or a correct decision will be taken, the manner he negotiated a possible settlement gave the appearance that he does not agree to any determination other than a determination in an agreement with the plaintiff, he was unhappy that the 01st defendant was not willing to settle the matter as proposed, the plaintiff and the 01st defendant were differently treated, there was a grave concern that the petitioner's case may not be given a fair hearing, statements from Bench stating that the order will be made permanent and it is better to settle than object , the 02 and 03 defendants who are in charge of Kaduwela area may be subject to additional pressure, the record of the case was at most times kept in the Chambers of the Learned District Judge, the plaintiff being told to remain

in the Chamber of the Learned District Judge has eroded the confidence of the 01st defendant in the Learned District Judge and Justice must not only be done but seen to be done.

22. The said official defendants have also accepted sub paragraphs (a) (b) and (c) of paragraph 43 which read,

> *"The Petitioner states that the result of this case also has an overall bearing and impact on;*
>
> *a. The rule of law,*
> *b. Independence of the judiciary,*
> *c. The equality before law of all persons, and.....*

Therefore, whilst the official defendants do not accept and therefore deny, in the exact form they are pleaded at present, of several allegations of bias and prejudice against the Learned District Judge, they accept, the above sub paragraphs of paragraph 43 and paragraph 26 of the second amended petition that when the plaintiff arrived in open court, the learned District Judge asked her to retire to the Chambers of the Learned District Judge.

23. The petitioner relied on the book "**Judicial Conduct Ethics and Responsibilities**" 2002, of Dr. A.R.B. Amerasinghe.

It is stated in page 526 of the said book that,

> "In some Sri Lankan decisions of the Court of Appeal[73] following dicta of G.P.S. De Silva J, a Judge of the Court of Appeal as he then was[74] emphasis has been laid on the fact that a Judge is a person with a

[73] *Daya Weththasinghe Vs. Mala Ranawaka [1989] 1 SLR 86 at page 92 and Dr. Karunarathne Vs. Attorney General and another [1995] 2 SLR 298 at page 301*
[74] *per G.P.S. De Silva J, Perera Vs. Hasheeb 1 Sriskantha's LR 133 at page 145 (1982), reported sub nom. Abdul Hasheeb Vs. Mendis Perera and others [1991] 1 SLR 243 at 257. G.P.S. De. Silva J. repeated his dicta in Marcus Vs. the Attorney General (1984) Sriskantha's LR 131 at page 133*

'*trained legal mind*" and that "*it is serious matter to allege bias against a Judicial Officer*" and that a reviewing court "*would not lightly entertain such an allegation*". The Court of Appeal did not, as it should have, acknowledge the fact that apparent bias disqualifies, as does actual bias."

24. The said book also said at page 528

> "A judge may not be disqualified for prejudice unless it is shown that the prejudice is directed against the party, and is of such a nature and character as it would render it importable that under the circumstances the party could have received a fair and impartial trial[75]. The bias or prejudice must be overall, and if a judge has a bias or prejudice on a particular point this may not be sufficient to disqualify him or her if the judge can make his or her decision without being controlled by the judge's preconception[76]. **'*Bias*' or '*prejudice*' does not mean the total absence of preconceptions in the mind of a judge, since the human mind is not a blank piece of paper[77], or 'a tabula rasa,' as Justice Rehnquist described it[78].**

The above two passages were under the heading "**Actual Bias and Apparent Bias**".

25. At page 537 under the heading "**Proving actual or apparent bias or prejudice**", it is stated,

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[75] *State v Pizzuto, 119 Idaho 742, 810 P 2d 680, stay granted (US) 1991 US LEXIS 4039 and overruled in part on other grounds by State v Card, (Idaho) 1991 Ida LEXIS 155 and cert. den. (US) 117 L Ed 495, 112 S. Ct.1268.*
[76] *In. re J.P. Linaham Inc. (CA 2 NY) 138 F 2d 650.*
[77] *Young v Williams, (Mo App) 824 SW 2d 124*
[78] *Laird v Tatum, 409 US 824, 835, 935 S Ct 7, 34 L Ed 2d 50 (1972) See also below Personal Beliefs and Background at pp.693-714*

" The law presumes that a judge is unbiased and unprejudiced[79]. Judges are credited with the ability to remain objective notwithstanding there having been exposed to information which might prejudice a person[80]. It has been said that there is a strong presumption that judges are impartial participants in the legal process, whose duty is to preside as qualified is as strong as their duty to refrain from presiding when not qualified[81], and that a judge will not involve himself or herself in a proceeding in which he or she cannot be impartial[82].

26. It is also stated at page 538 of the said book,

" We have seen that a showing of actual bias is not necessary to disqualify a judge, for 'the policy of the law' is to require disqualification in cases of apparent bias[83]. There are various explanations for that rule. One view is that it is a hopeless exercise to probe any person's mind."

"In 1477 Chief Justice Brian said[84] , Comen erudition est q I' entent d'un home ne serr trie, car le Diable n'ad conusance de I'entent de home: anglice, 'it is common knowledge that the thought of a man shall not be tried, for the Devil himself knoweth not the thought of man'."

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[79] *Dahlin v Amoco Oil Corp., (Ind App) 567 NE 2d 806; State v Battieste, (La App 1st Cir) 597 S 2d 508, vacated on other grounds (La) 604 So 2d 960; Boyd v State, 321 Md 69, 581 A 2d 1.*

[80] *Jaske v State, (Ind App) 553 NE 2d 181*

[81] *Jefferson – El v State, 330 Md 99, 622 A 2d737; In re Disqualification of Kilpatrick, 47 Ohio St. 3d 605, 546 NE 2d 929. See also Locabail Ltd v Bayfield Properties, [2000] 1 ALL ER 65 at 76 f: 'A judge would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance'*

[82] *State v Crockett, (MO App) 801 SW 2d 712*

[83] *Locabail v Bayfield Properties [2000] 1 AII ER 65 at 70*

[84] *YB 17 Edw. 4 Pasch., fo.2 pl.2 (1477), cited with approval in Brogden v Metropolitan Railway Co (1877) 2 App Cas 666 at 692, per Lord Blackburn, and in Keighley Maxted & Co v Durant [1901] AC 240 at 247 per Lord Macnaghten.*

27. Under the same heading the book says at page 541,

> " The judge's confidence in his ability to hear a matter impartially because of the judge's training and experience is irrelevant if a reasonable onlooker may in the circumstances of the case doubt his impartiality. In *Johnson v District Court of County of Jefferson*[85] it was held that although the judge is convinced of his or her own impartiality, if it non the less appears to the parties or to the public that the judge may be biased or prejudiced, the same harm to public confidence in the administration of justice occurs. Public confidence in the impartiality of the judiciary is the core issue. Thus in *Kandasamy Vs. Subramaniam*[86] despite the assurance from the magistrate, whom the Supreme Court described as '*a judge of considerable experience and seniority in the judicial service*', that he was confident that he could impartially hear and decide the case, the court allowed an application to have the case transferred before another judge.

28. The said book at page 546, 547 under the heading "**Judge, must adjudicate unless disqualification is required**" says,

> "In the absence of a valid reason for disqualification, a judge has a duty of hearing a case assigned to the judge[87]. " R.W. Watson, Ex parte Armstrong[88], it was stated: [the] principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an

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[85] *(Colo.) 674 P 2d 952*

[86] *(1961) 63 NLR 574 at page 575, 576)*

[87] *Blades v Da Foe, (Colo App) 666 P 2d 1126; Medina v state, (Tex AppForth Worth) 743 SW 2d 950. See also p. 85 ff. above*

[88] *(1976) 136 CLR 248, quoted with approval in A.R.B. Amerasinghe, Professional Ethics and Responsibilities of Lawyers, at 383-384. See also Livesey v N.S.W. Bar Association (1983) 151 CLR 288; President of the Republic of South African Rugby Football Union 1999 (4) S.A. 147 at 177*).

impartial and unprejudiced mind to the resolution of the question involved in it."

29.The said book under the heading "**What is the test – reasonable suspicion or apprehension or real danger?**", says at page 572.

> The picture in Sri Lanka is far from clear. In *Kandasamy v Subramaniam*[89] L.B. De Silva J in the Supreme Court said: 'it would appear from the authorities cited to this Court that the real test in deciding an application of this nature is not whether the Judge in fact would be prejudiced and that the parties would not get an impartial hearing but whether the party to a case or even the general public may have some reason to feel that the course of justice was not was not absolutely fair and impartial.' The report of the case does not show what authorities were cited. The 'reasonable suspicion or apprehension' test has been used by the Supreme Court in some cases[90]. T.S. Fernando J in *In re Ratnagopal*[91] formulated the test as follows: Would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of [the adjudicator] being biased against him?' That test was followed by Wimalaratne J in *W.D. Simon and others Vs. The Commissioner of National Housing and 3 Others*[92]. Both the '**reasonable suspicion**' test and '**real likelihood**' tests were applied by the Supreme Court in *Bandaranaike Vs. De Alwis*[93]. Although in the Court of Appeal G.P.S. De Silva J (as he then was) referred to the '**the reasonable suspicion**' and '**real likelihood'** tests in *Abdul hasheeb* Vs. *Mendis*

[89] *(1961) 63 NLR 574 at 575*)
[90] *E.g. see Bogahalande Vs. Podi Sinno (1915) 1 Ceylon Weekly Reporter 99; Carberry Vs. Wickramasinghe (1917) IV Ceylon Weekly Reporter 158 at 159.*) The 'real likelihood' test was applied by Akbar J in *Vanrooyen v Perera.* (*(1933) 35 NLR 186, 187*
[91] *(1968) 70 NLR 409 at 435-6 (SC*)
[92] *(1972) 75 NLR 471 at 477-8 (SC*)
[93] *[1982] 2 Sri LR 664 at 675.*

Perera and others[94] it was found not to be necessary to choose between them. However, G.P.S. De Silva J in *Marcus Vs. Attorney General*[95] chose to apply '**the reasonable suspicion**' test, which he described as '**the less rigorous test**'. In Dr. *Karunaratne Vs. Attorney General and Another*[96] the Court of Appeal applied both tests. The '**real likelihood**' test was applied by the Court of Appeal in *Mohamed Mohideen Hassen et al. Vs. N.S. Peiris et. Al*[97]., Daya Weththasinghe Vs. Mala Ranawaka[98]; and in *Samarasinghe Vs. Samarasinghe*[99]. *See also Shell Gas Lanka Ltd. Vs. ACCIWU*[100]. In *Kumarasena Vs. Data Management Systems Ltd*[101]. Goonawardene J, followed Paul Jackson's view[102] that 'the somewhat confusing welter of authority does not indicate a genuine difference of opinion on the correct test to apply but rather a confusing variety of ways of describing one test. The real difficulty is applying the test to the facts of particular cases.' Goonawardene J followed '**the simple test**' suggested by Lord Carson in *Frome United Breweries Vs. Bath JJ [1926] AC 586, 618*), namely, '**whether there was such a likelihood of bias as entitled the court to interfere**.'

30. Under the heading "**The basic rule and its rationale**". It is said in page 573,

"A number of principles govern the question of disqualification for bias or prejudice, but they seem to have developed from a basic rule, namely,

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[94] *[1991] I Sri LR 243 at 257 (1982) (CA) reported sub. Nom Perera Vs. Hasheeb 1 Sriskantha's Lr 133 at 145 (CA).*
[95] *2 Sriskantha's LR 131 at 133 (CA) (1984)*
[96] *[1995] 2 Sri LR 298 (CA)*
[97] *[1982] 1 Sri LR 86 at 92 (CA)*
[98] *[1989] 1 Sri LR 86 at 92 (CA)*
[99] *[1991] 1 Sri LR 259 at 262 (CA)*
[100] *[2000] 3 Sri LR 170 at 182-3 (CA)*
[101] *[1987] 2 Sri LR 190 at 200 (CA)*
[102] *Natural Justice, 2nd ed.48.*

that it is axiomatic that no man can be at once judge and suitor – *nemo potest esse simul actor et judex. 364*

It has been a maxim of the law that *aliquis non debet esse judex in propria causa, quia non potest esse judex et pars*. 365 the principle *nemo debet esse judex in propria sua causa* or *nemo judex in re sua*- no man can be a judge in his own cause- came to be recognized and observed in practice by the English courts from early times. Bertram CJ observed: 'It is an axiom of English Law, as ancient as the Law itself'366 the rules has been recognized in the USA, 367 and has been applied to disqualify a judge who is member of a class on whose behalf a class action is brought. 368 at least as early as the fourteenth century common law judges were held to be incompetent to hear cases in which they were themselves parties. 369"

31. It is also interesting to note that the book says under the heading "**Legislative variation of the basic rule**", at age 574,

"Consequently, in the seventeenth century, and faintly even into the eighteenth century, it was asserted that Parliament could not make laws that were against natural justice. Hobart CJ said: '**Even an Act of Parliament made against natural equity, as to make a man judge in his own cause is void in itself; for *jura naturae sunt immutabilia,* and they are *leges legum*.** 375 a few years earlier, in **Dr. Bonham's case** 376 Chief Justice Coke had said that the court could declare an Act of Parliament void if it made a man a judge in his own cause, or was otherwise '**against common right and reason**'. Holt CJ said in 1701 377 that Coke's view was '**far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person shall be party and Judge .. it would be a void Act of Parliament'**."

"In the eighteenth- century Blackstone 378 expressed the principle in a way somewhat more fitting to modern ears: 'Thus if an Act of Parliament gives a man power to try all causes that arise within his manor of Dale; yet if a cause should arise in which he is himself a party, the Act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel'."

32. Having so examined of the impartiality of Judges, if one takes a look at the written submissions of the plaintiff respondent, dated 08th April 2021, it is filled with advice to the 01st defendant petitioner; the former part as to what other remedies at law were available to the petitioner and the latter part as to how the 33,000 volt wire should be laid, whether it should be by a "zig-zag" method or by underground cables. But it must be hastily added that the aforesaid statement is not in complete jest, for the said latter part should be taken serious note of, when it comes to the safety of the plaintiff and her family, of which more will be said later.

33. When the plaintiff argues that the petitioner could have made an application to the district court itself for the vacation of the enjoining order or leave to appeal applications in respect of other orders to the Provincial High Court that exercise civil appellate jurisdiction, one must not forget the fact that initially the present application was coupled with a transfer application, No. 08/2019/TRF, on the basis of the alleged bias of the learned District Judge. Hence this court does not agree with the plaintiff when she alleges that the petitioner joined three orders in restitutio in integrum to circumvent its delay in making applications to vacate the enjoining order or leave to appeal applications. Therefore this court decides that the cases such as **Sri Lanka Insurance Corporation Ltd., vs. Shanmugam and another (1995) 1 SLR 55** and **Don Lewis vs. Dissanayake 70 NLR 8** are not applicable.

34. For the same reason authorities that says restitutio in integrum is not available when there is another remedy, such as **Perera et al vs. Wijewickreme 15 NLR 411** and **Menchinahamy vs. Muniweera (1950) 51 NLR 409** (the latter case only with regard to this effect) are not applicable.

35. Despite the 02,05 respondents and 03,04 respondents have not accepted several allegations made by the petitioner against the learned district judge, as discussed in the earlier portion of this judgment, those respondents have accepted the petitioner's allegation that the plaintiff when present in court was asked to retire to the Chamber of the judge, by the learned district judge since she is a judicial officer. The authorities discussed in an earlier portion of this judgment regarding **"Actual Bias and Apparent Bias"** and **"reasonable suspicion"** test and **"real likelihood"** test will show that the question posed by T.S. Fernando J., in *In re Ratnagopal*, "Would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of [the adjudicator] being biased against him?" has to be answered "Yes".

36. Therefore, this court acting in restitutio in integrum, sets aside the orders dated 16.09.2019, 11.11.2019, 04.12.2019 and 10.12.2019. In doing so this court takes note of the case of **Menchinahamy vs. Muniweera (1950) 51 NLR 409**, in which Dias S.P.J., said,

> "The situation which emerges in the present case is that Saineris was a, party. He died before the trial without steps having been taken to substitute his heirs who were, therefore, not bound by all the subsequent proceedings. In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. **We are merely declaring that, so far as the petitioner-is concerned, there has been a violation of the principles of natural justice which makes it incumbent on this**

Court, despite technical objections to the contrary, to do justice[103]. In my opinion, therefore, the order of this Court should be that the petitioner and the other heirs of Saineris should be forthwith added as parties to this action, and that after she has filed her statement of claim, the District Judge should proceed to adjudicate on the merits of her application".

Dias S.P.J. thus set aside a decree entered pursuant to a judgment given by two judges of the former Supreme Court (Supreme Court of Ceylon). He did so accompanied on the Bench with Gunasekera J., who agreed with him. Thus, even the decree of the same court was set aside exercising the power of restitutio in integrum.

37. The judgment of Dias S.P.J. in **Menchinahamy vs. Muniweera** was cited with approval, by Ranasinghe J., in His Lordship's minority judgment in **Vinayagam Ganeshanatham v. Vivienne Goonewardene [1984] 1 Sri L. R. 319** and by Amerasinghe J., in **JEYARAJFERNANDO PULLE V. PREMACHANDRA DE SILVA AND OTHERS 1996** in the only judgment in that case. But in both cases, the present Supreme Court did not set aside its own judgment or order. Perhaps Dias S.P.J. was the last Judge in the former Supreme Court to have exercised the power of restitutio in integrum to set aside even its own judgment.

38. Incidentally in **Vinayagam Ganeshanatham v. Vivienne Goonewardene [1984] 1 Sri L. R. 319** the learned Chief Justice (who wrote the leading judgment in the majority) said,

[103] Dias S.P.J. said at page 413 "It was argued that the Supreme Court by means of **restitutio in integrum** cannot vary its own decrees, especially after they have passed the Seal of the Supreme Court".

" "He submits that this caption read with prayer (a) to the petition invokes a jurisdiction in revision which this Court does not have. One has to look at the legislation which created this Court to find an answer to this dispute. That legislation is to be found in the second Republican Constitution of 1978. **The Supreme Court which existed up to the time of the first Republican Constitution of 1972 and which continued to exist under that Constitution ceased to exist when the 1978 Constitution became operative.** (Vide Article 105 (2) of the Constitution). **Its place was taken by the Court of Appeal** (Vide Article 169 (2) of the 1978 Constitution). A new Supreme Court has been constituted which is the highest and final Superior Court of Record. (Article 118 of the Constitution)."

Hence even on an **empirical** basis, so to say, what is similar to the then Supreme Court is the present Court of Appeal, which means that the Court of Appeal has every authority to act in restitutio in integrum in the way the old Supreme Court did. Besides under Article 138 of the Constitution, the power of restitutio in integrum is **judicially** vested in the Court of Appeal.

39. This court does not wish to reproduce the orders dated 11.11.2019, 04.12.2019 and 10.12.2019 adding to the length of this judgment. But the reading of those orders shows a strong bias towards the plaintiff and prejudice towards the petitioner. Some of the directions in those orders such as the order dated 04.12.2019 issuing an interim injunction against the 04th defendant respondent and the order dated 10.12.2019 issuing an interim injunction against the 01st defendant petitioner are irrational. Hence those three orders are set aside with immediate effect.

40. It may be noted that Dias S.P.J. said in **Menchinahamy vs. Muniweera** that His Lordship is exercising the power of restitutio in integrum because there was a breach of the rule audi alteram partem. Same thing could be said

here because when the adjudicator shows bias towards one party, he does not properly hear the opposing party.

41. The order dated 16.09.2019 is the enjoining order. As already said despite the prejudice caused to the 01st defendant petitioner, there is a danger by laying high tension wires by the 01st defendant through other defendants close to her (plaintiff respondent's) house. Considering this danger, although the orders dated 11.11.2019, 04.12.2019 and 10.12.2019 are immediately set aside and the position before making those orders is restored, the cancellation of the order dated 16.09.2019 will only take effect in 03 months or when the present learned district judge makes an order either granting or refusing the same enjoining order or a different enjoining order to be claimed by the plaintiff respondent within 02 months from this judgment, whichever happens first.

42. That is to say, the order dated 16.09.2019 will be cancelled in 03 months from this judgment. But if the plaintiff respondent, within 02 months of this judgment goes before the district court in a fresh application for the same or different enjoining order and interim injunction, the order dated 16.09.2019 will be cancelled on the granting or refusal of such enjoining order.

43. Subject to that the appeal of the petitioner is allowed with costs.

D.N. Samarakoon

Judge of the Court of Appeal

I agree

Pradeep Kirthisinghe

Judge of the Court of Appeal