

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

CA Application No. CA/CC/07/2016
DC. Colombo DCG 00023/11

Nilmini Dushanthi Pinto Alias Fathima Nadia
13A, Ocean View Towers,
Station Road, Colombo 04.

1st Respondent-Petitioner

Vs.

Mohamed Azath S. Salley
70, 3/2, St. Anthony's Road,
Colombo 03.

Petitioner - Respondent

And another

2nd Respondent - Respondent

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

C.A. No.07/2016 (Contempt of Court)

Before: L.T.B. Dehideniya J (P/CA) and
S. Thurairaja PC J

Counsel: Eraj de Silva with Manjuka Fernandopulle and
S. Janagan for the Petitioner.

Faisz Musthapha PC with Razik Zarook PC and N.M.
Shaheid for the Respondent.

Date: 06.07.2017

Recorded by Wijaya Kanthi de Silva and Thalatha Wijesinghe

Court

After following the procedures on 24.06.2016 this matter was taken up before the President of the Court of Appeal and the charges were read over to the respondent and the respondent pleaded not guilty. Subsequently, the matter was fixed for inquiry and the inquiry was taken up before H/L Justice V.K. Malalgoda PC (P/CA) and H/L Justice Thurairaja. The case for the petitioner was concluded and the case was reserved for the defence. After the elevation of H/L Justice Vijith Malalgoda PC (P/CA) to the Supreme Court this case could not be

reached. Therefore, the matter came up before this Bench afresh. The Counsel for the petitioner moves Court to adopt the proceedings and proceed in this matter. Counsel for the respondent submitted that he came knew to it. Therefore, due to the time considering Court decides to take the case afresh.

We direct the Registrar in Court to read over the Charge Sheet.

Charge sheet is read over.

The petitioner and the respondent both are present in Court.

When the charge sheet is read over, the President's Counsel Mr. Faisz Musthapha is taking following objections.

My submission is twofold. Respectfully firstly I am basing my submissions on the footing that there is a parallel jurisdiction in Your Lordship's Court and the District Court. My submission is that having regard to the facts involved and judgments of Your Lordship's Court, the appropriate forum is the District Court, the original Court to hear and determine this matter. In support of that I shall be citing two very pertinent judgments of Your Lordship's Court. Secondly, my submission is prima facie, on the face of it or rather ex facie the charge sheet does not disclose any offence of contempt. It is a twofold submission, one assuming that, even if that there is a charge known to the law that the

'forum conveniens' is the District Court. Then the other is that at any event one cannot proceed for the reason that its ex facie the charge sheet does not disclose a charge known to the law.

My Lord regarding the 1st submission may I advert to a very recent judgment. I referred to the unreported judgment of Your Lordship's Court, in the case of Mary Jean Varma vs. Dr. Chrisantha Nicholas Anthony Nonis and others C.A. Application bearing No.11 of 2016, dated 24th of January 2017. This arose consequent to restraining orders issued by the Civil High Court. The petitioner sought to deal with the Respondent for contempt for alleged disobedience. There is a considered judgment of Your lordships, delivered by the then President, Justice Malalgoda and Justice Surasena. His Lordship Justice Surasena held that "the petitioner had not adduced any acceptable reason as to why it is the Court of Appeal and the Court of Appeal alone which should deal with the case. There is absolutely no bar for the petitioner to file this case in the very High Court before which the main case is pending. Indeed it would be the learned High Court Judge who is already possessed of the facts and circumstances of this case and who has access to all the material adduced in this case, who would unboundedly be the best Judge to deal with this case. This court has taken a similar view in the case of Metthananda Vs. Kushan Fernando in which a similar objection was upheld of Your Lordships Court. This Court dismissed that

application and directed the Petitioner to institute the application for contempt in the District Court where the alleged subject matter of the complaint was said to have been occurred.”

My Lord, the concluding portion is in the same tenor. Counsel refers to the judgment in the case of Varma Vs. Dr. Nonis C.A. Application 11/16 the Minutes of the Court of Appeal of 24th January, 2017. I also refer respectfully to the Dicta appearing at Page 10 where the view was taken for reasons set out in the judgment that it was more appropriate to go to District Court and their Lordship’s made order referring the Petitioner, if he so desires to institute the proceedings in this regard, in the High Court before which the matter was already pending, and whose order is alleged to have been violated by the Respondents. I would submit that these dicta apply with full force to the present matter also and for the sake of completeness, may I refer to the case adverted to in the judgment in Metthananda Vs. Kushan Fernando 2006 1 SLR Page 290. I am duty bound to state to Your Lordship’s that there are cases which say that where parallel jurisdiction exist one is entitled as of right to invoke either and a Court cannot decline to exercise jurisdiction in respect of the particular court matter on the footing that there is a like application pending in the other court. My submission is that there is a distinction. Whereas of right you can invoke the jurisdiction since if, you are a plaintiff or you are a complainant you are entitled as a right to access to

both Courts but contempt is different. Actually the real complainant is the Court. The Complainant is only bringing the facts to the notice of the Court. So my submission is, in those circumstances, those cases are distinguishable because there was a right to invoke both jurisdictions. I am duty bound to say to your Lordships that there are cases which say that, but those are distinguishable. Your lordships are also aware that there are cases where without going to Provincial High Court parties have come before your Lordship's Court. These are cases in which Your Lordships did not decline to hear the case on the ground that the complainant should have gone to the High Court. But Your Lordships would appreciate that these are cases as of right, they were entitled to invoke both jurisdictions and both fora. But here it is different. Because here it is the Court that takes cognizance of a complaint pertaining to the Court itself, not as of right on the part of the petitioner. He is only bringing to the notice of Court and that the Court then sets in motion, the proceedings for contempt. This is distinguishable from the ordinary complaint in a civil case or in a criminal case. So my submission is respectfully that in this matter Your Lordships would appropriately refer the petitioner to the original Court, the District Court.

My Lord, the other submission is that if Your Lordships would peruse the charge sheet it is clear that it does not disclose an offence. I don't know My Lord it is a storm in a tea cup apparently this arises out of a

custodial dispute with regard to a minor child. Apparently there was an arrangement by which the Court gave joint custody, legal custody and physical custody to both. Further, the arrangement by the court said, "you take the child on Thursday and return by Sunday morning". Apparently My Lord, this is fall out of the bitterness among parties, as there was a little delay of two hours. So it's really a storm in a tea cup. There is bitterness of course where sometimes, the time is a healer.

But, be that as it may, only just two hours, the point is this. Respectfully the charge sheet does not allege willful or intentional delay, does not say it was calculated to bring the Court into any form of disrepute. It merely says failure to comply. Significantly Your Lordship would see there is an omission also to mention any penal section which is a part of a charge sheet. There is no reference at all to any penal provisions. But the substantive submission that I am making is, it doesn't constitute contempt ex facie. There is no offence unknown to the law because if I may refer Your Lordship to a fairly old case, 22 NLR the famous case Ismail Vs. Ismail, where it was specifically held at Page 190, judgment of H/L Bertram CJ agreeing with H/L Justice De Sampayo, it was held that, "disobedience order of Court is not contempt. There must be either, it should be calculated to bring the Court into disrepute. There must be defiance. Defiance of the order or some extra element of turpitude which elevates it from mere disobedience to contempt and Your Lordships be

pleased not to permit contempt proceedings to be used as a thumbscrew for enforcement. There is a modality for enforcement respectfully because there is specific provision for enforcement of these orders. In fact this was followed in a more recent case by H/L Justice Amarasinghe the case of Dayawathi & Pieris vs. Dr. Fernando where contempt proceedings were initiated, 1988 Vol.2 of Sri Lanka Law Reports commencing at page 314 – it sought to deal with the Respondents for alleged defiance or disobedience of the order of the Supreme Court. It was disallowed by H/L Amarasinghe, J. The dicta commences at 368. “I am unable to accept without qualification the submission of the learned President’s Counsel appearing for the Petitioner. No lesser person than Queen’s Counsel Mr. Jayawawardana. In order to establish contempt of Court the words of Lord Radcliffe in Reginald Perera vs. the King, where a member of parliament had occasion to pass some strictures in regard to the mode in which prisoners had been kept in jail pending trial. This was put up to Justice Basnayake who ordered that contempt proceedings be taken and the M.P. was hold up for contempt. The matter went up before the Privy Council. The Privy Council was acquitted the accused. This is a citation from that case at page 369. “There must be involved some act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority or something calculated to obstruct or interfere with the due course of justice or the lawful process of the Court.

This does not necessarily happen where a person has failed to or refused to obey an ordinary, non-coercive order of Court. Bertram CJ in the case of Ismail vs. Ismail said that “non-compliance with the judgment of a Court is not, in ordinary circumstances, a contempt of Court.” Where the order of court is declaratory i.e. where it is a decision merely expressing publicly, informal and explicit terms, the rights and obligations of the parties concerned a failure to abide by such an order would not, in my opinion, without more, amount to a contempt of Court. (See Law of Contempt such and such). Indeed even if the order of the court is more than merely declaratory, the failure, or even refusal to comply with it does not necessarily, by itself, constitute a contempt of court. Their Lordships said in Amarasekera Vs. Goonewardene, it’s a very elaborate judgment, a police Magistrate had directed the Respondent to abate a nuisance by removing a kiln to the furthest distance possible from the house or break it down. The appellant refused or failed to do that in that case. Now if the respondent said this in open Court in an offensive or contemptuous tone, he certainly deserved punishment and he rendered himself liable to punishment. But if the Magistrate called upon him to show cause why the court of law with regard to cases where the law expressly provides for the execution of decrees several proceedings such as contempt proceeding should not be resorted to the effect order of court.” This is very clear as set out in the judgment of Bertram CJ in the

case of Ismail Vs. Ismail Your Lordships' be pleased to look at the dicta which commences at 369 and goes on to 372. "Even if there is no process in law to execute a particular order and there is, in my opinion no such process prescribed by law to give effect to the order of the Supreme Court made in the exercise of its jurisdiction conferred upon it by the Article 126 of the Constitution the execution of administrative action does not by itself constitute contempt. I think it would be improper to use contempt proceedings as a lever obtaining such execution vide such and such and such a number of judgments. Perhaps it may be advisable in cases where the law does not provide for the execution in order to ensure that the party affected gives an undertaking to comply with an order for then the failure to honour such an undertaking would I think entitle or other party to legitimately use contempt proceedings to enforce the order of court." My lord this was followed again by the Supreme Court in the case of Cabbir Hasson Vs. Fairline Garments 1990 1 SLR page 394. Hon. H/L Justice Mark Fernando expressly said, "that failure to comply with order of Court does not much depend on contempt per se. Here there is no allegation in the charge sheet that is willful, virtual defiance or calculated to lower the estimation of the Court. The ex facie the charge sheet does not say so. Your willful disobedience not calculated to dishonor and does not say brings the Court into disrepute as evidenced by the charge sheet." The

dicta appear at page 400. "Except there is willful compliance, noncompliance or defines on the part of the respondents failed to would not ordinary per se the contempt of Court and cited the case of Ismail vs. Ismail. The assertion the charge sheet is mere none compliance." Now My Lords there is provision in Civil Procedure Code, Section 216 sets out the nature of the decrees that can be passed, orders that can be passed. Clause 'c' says it commands a person to do or refrain from doing an act. The modality in which decrees could be passed i.e. 216 (e) is material for the present purposes.

Section 217 (e) - A decree or order of court may command the person against whom it operates - do the following:

to pay money etc...

From Court: That is the procedure of contempt if it comes before the DC?

Yes My Lord. My submission where there is authority say, where there is provision for execution you must have recourse to the particular provision because as Your Lordships' aware where the act creates a specific remedy you must follow that. Section 334 of the Civil Procedure Code is material. How enforce, you can't command the person to do the physical act you can get recompense. It says mandatory and restraining orders clause (e) & (f). There is in line with the submission of rather dicta

in the judgment which say that there is a provision for execution you can't use this as a thumbscrew. The man doesn't comply you can get damages, which sought of contempt of Court. Unless there is an additional opposing he throws the summons himself I won't get it or make some commence about the Court. Everyday Your Lordships pass orders for instance in a land action. It doesn't comply. He asked to vacate the land, it doesn't go. You take out. That's not contempt. My submission is, the authorities say noncompliance of an order of Court unless they add an element which shows either defiance that was in manifesting in the charge sheet. Charge sheet merely says noncompliance. My submission is ex facie it does not disclose a charge of contempt. May I know with this context referred to the charge sheet. It says 1) On the 1st of May failing to return the physical custody of the 2nd Respondent in case number such and such to the 1st Respondent is case number such and such, District Court of Colombo by 8.00 a.m. 2) On the 8th of May 2016 failing to return the physical custody of the 2nd Respondent in case number such and such to the 1st Respondent, District Court of Colombo by 8.00 a.m. No ascertain either willful or contumacious conduct which committed they are affirmed to the Court, not deny rights of parties. That is so you must request 334. So my respectful submission is that therefore ex facie the offence of contempt is

not made out and therefore that these proceedings cannot be continued on two reasons:-

- 1) The more appropriate forum in the District Court.
- 2) Fundamentally the charge is flawed and consequently no proceedings of contempt can be continued.

Counsel for the petitioner Mr. Eraj de Silva submits as follows:-

With respect My Lord we were unaware of these sort of objections because my learned very senior President's Counsel said that he will consider whether this evidence can be adopted. We didn't expect this type of objection. But having being in the state of unawareness on my learned friend's own judgments we can show Your Lordships' Court that with greatest respect there is no substance to what the learned President's Counsel said. Because my learned President's Counsel in his eloquence is very very selective in what he chose to read to Your Lordships' Court. On the submission first of the question of whether noncompliance of order of Court will be contempt of court and whether one is to be willful or not on my learned friend's own judgments I say with respect noncompliance is contempt. My learned friend did not read this part. It was the distinction between directive orders and declaratory orders and in fact my learned friend did not read that part. With respect in the case of disobedience to injunctions and undertakings given to

court of cursive orders that means directory orders there is strict liability, but in the case of other orders noncompliance with the judgment of a court would not ordinarily be contempt of Court. So it draws the distinction between directive orders and non-directory declaratory orders. In the case cited Dayawathi vs. Fernando is a case of a declaration. In the case of a declaration of a status then there might have to be some will. But in directive orders such as this a case before Your Lordships' Court where there is a very clear direction that the physical custody of the child must be handed over to the mother at 8.00 a.m. and bitterly fought case. In those circumstances, the learned Court gave a direction to the parties. It's a custody order. What more directory than this. If I may handover the portion of that judgment that to Your Lordships it has been also highlighted in red. I am taking the judgment of my learned friend that part was not read to Court. I say with respect there has to be strict compliance of this sort of orders. Otherwise the whole judicial process of whole courts of Sri Lanka will be severely undermined and people will take the law in to their own hands as it is alleged that this particular respondent has done in this case and in several other instances. We have pleaded that he willfully disobey but we don't need to go that far. The submission that my learned friend made has no basis whatsoever. And that is why perhaps it was taken in the first instance when this case proceeded. But after this case came to

a certain point and it looks like the accused would be sent there would be some sanction against the accused. Now all these technical objections start coming. So I said it is not fair to the petitioner and to the judicial system of Your Lordships' Court.

My second objection which came first on the question of jurisdiction of Your Lordships' Court. On the judgments cited by my learned friend itself again there is no substance. My learned friend failed to cite the Galle Face Hotel case which is cited in this judgment in the case of Cyril Gardiner which very explicitly says that the original courts had a power to punish of contempt only if it is merely in the face of the court or if there is a specific provision of law that makes it so punishable. That is cited in this judgment. Now in the judgment cited by my learned President's Counsel, the application for contempt before the Court, the particular provision of law was 183 (b) of the Civil Procedure Code. In terms of 183 (b) there is an express punishment for contempt of Court (Counsel reads the 183 (b) of the Civil Procedure Code). Besides that there is an offence for contempt of Court disclosed in the relevant section itself. So therefore, it accords with the Cyril Gardiner case and the relevant statute gives the power of punishment of contempt and therefore the original court has power to punish. So completely distinguishable from this case. Because in this case there is no provision and both learned President's Counsel never cited before this Court any particular

provision of law that makes this punishable for contempt unlike section 183 (b). So this judgment is right in accordance with Cyril Gardiner's case which I cited before Your Lordships' Court. Then the other judgment that learned President's Counsel cited is a restraining order under the Companies Act. It is completely different and in that case that was the High Court. In that case, Their Lordships' also held that Section 18 of the Judicature Act specially empowers the High Court to punish for contempt. But this is in the District Court. These are all Court of Appeal Judgments and the case of Cyril Gardiner was not cited before this Court. This offence of contempt with respect noncompliance with the custody order is not something done in the face of the Court, the word used in the judgment is *ex facie curia*. Not in the face of the Court neither is it made explicitly punishable for contempt. I say with respect that these matters under Judicature Act are punishable for contempt and in terms of Constitution. It is only Your Lordships' Court that has the power to punish for contempt. So I say that these objections are without basis.

Thirdly, I say at this stage these objections cannot be taken. This is not the stage to take. Because at this stage the charge sheet has been read out. This is the stage for pleading. If these objections were to be taken they should have been taken first by way of filing objections to the summons and then taken at that stage. Now that stage has passed and

in any event already evidence has been led. This is the stage that the accused pleads and after the charge sheet is read out taken at that stage. I say with respect the respondent is estopped from taking these sort of objections without prejudice to my submission that on the basis of the judgment cited by my learned friend alone there is no substance in his objections and therefore, I respectfully ask from Your Lordships' take the plea from the accused and to start this inquiry.

Reply to the submissions of Counsel for the petitioner, Mr. Eraj de Silva, by Counsel for the respondent Mr. Faisz Musthapha, PC.

My Lord, My first submission, may I take Your Lordship the Case of Ismail vs. Ismail, this is a case where there is a cursive order, this was a direct order made by the Court as here, directing the respondent to install a boiler within a certain period at a certain location. The direct cursive order directing the respondent to do that. There was disobedience, noncompliance, Ismail vs. Ismail and proceedings were contempt to resorted to as well as the damages, and Their Lordships said that the mere noncompliance would not be punishable for contempt in fact specifically Your Lordship note 2nd page My Lord, there is a reference at page 191 Section 334 of the Civil Procedure Code. This is a cursive order, not a declaratory order commanding the respondent to comply and Bertram CJ specifically said (Counsel reads page 191)

“Noncompliance of the judgment of the Court is not in ordinary circumstances contempt of Court. They are passing over the fact that the proceedings are inappropriate and that the law has expressly provided for or the case in question by Section 334 of the Civil Procedure Code. Oblivious of this fact the Court made an order against the respondent punishing for contempt and subsequently the plaintiff brought this action against the defendant claiming damages.” So my submission is that authoritatively that is the case that I cited to Your Lordship, in fact I cited that portion apparently my learned friend’s attention His Lordship says a declaratory order certainly, even non-declaratory orders he says where it made a declaratory, you must give the undertaking. This is not a declaratory order. This is a declaratory order directing me to produce the child. But the judgment says, (H/L Justice Amarasinghe’s judgment, page 395). This is a declaratory order, but even in respect of non-declaratory order I mean merely declaratory unless there is an undertaking on the parties you cannot proceed by way of contempt and Section 183(b) referred to by my learned friend supports you because ordinarily it is not punishable. Section 183(b) says it is punishable as contempt. Ordinarily it is not. So my submission is that unless there is willful contumacious conduct, it is not punishable for contempt and the charge sheet says that.

From Court

President's Counsel Mr. Faisz Musthapha appearing for the respondent takes up a preliminary objection as stated above and Mr. Eraj de Silva responded to it. We heard submissions of both Counsel and it appears some of these materials are dealing with the substantive matter and it will be appropriate for the Court to decide after hearing the evidence of the parties. Therefore, the Court allows the case to proceed and make a decision at the end of it.

The respondent was asked whether he is comfortable and understanding the language in English, Sinhala or Tamil. The accused answered that he is comfortable in English. The Court asks whether he has any objections the proceedings to be conducted in English. The accused says that he is comfortable and he has no objection of conducting these proceedings in English. Now we ask the Counsel for the complainant whether he is comfortable to have these proceedings in English. On instructions, Counsel for the Complainant says that he has no objections. Both are comfortable in English. Hence the proceedings will be conducted in English. If necessary, if any party needs any translation in English, Tamil or Sinhala it can be provided by the Court.

This Court is comfortable and convenient in handling all three languages.

The Charge Sheet read over and explained to the respondent. He pleads not guilty.

The witness by the name of Nilmini Dushanthi Pinto Alias Fathima Nadia called to the witness box.

From Court

Witness submits to Court that she is comfortable in English. The Bench informs the witness that to make her comfortable in the witness box and if she need any assistance or any facilities it can be provided. Evidence will be taken at her own phase and she said that she is comfortable. She takes her oath in English.

Nilmini Dushanthi Pinto Alias Fathima Nadia, 48 years of age, 13A, Ocean View Tower, Station Road, Colombo 04, Buddhist, Affirmed.

Examination in Chief by Mr. Eraj de Silva, Counsel for the petitioner.

Q: Witness you are the 2nd respondent-petitioner in this application?

A: Yes.

Q: That means you were the 2nd respondent in a case in the District Court?

A: Yes.

Q: What was that case?

A: It was the custody case of my son Mohamed Nafiz Azath Salley.

Q: Who is the accused in this case present before the Court of Appeal?

A: My son's father Mr. Azath Salley

Q: And this was a custody case in the District Court for the custody of your son?

A: Yes.

Q: Now what would you say about the nature of that case? Was it a bitterly fought case?

A: Yes My Lord. I would say it was more than a custody where the child's welfare was looked after it was merely I think, it was a more of a prestige battle. In my case I was trying to make comfortable for that little child. It started when the child was I think about 4 years or even smaller. He was very small, very tender age. (Witness is crying) When I try to remember all the incidents Sir, it gets very

hard for me. It was hardship I have been subjected to will be using this child again like an ammunition to get back to me. So It was very hard task for me to protect my child, the balance mind and bring him up does this hard and my son the biggest, the thing that prompted me, there were much more incident sir that I met very hard.

From Court

Witness we appreciate your feelings. Only thing is if you confine your answers to your Counsel's question it will be easy because he will narrate what is necessary to this case. At the end of it if you want to say anything you have the right to say. We will allow you to talk. That's not a problem. But for the time being please will co-operate with your Counsel to go ahead with the case

A; Yes My Lord.

Q: Witness please compose yourself and this is a bitterly fought custody case that we understood.

A: When I recall, everything is very hard for me to control because it was so hard.

Q: Yes witness, but we must ask is relevant to the matters in the Court. Now this was a bitterly fought custody case as you said. Now there was an order given by the District Court. Is that correct?

A: Yes.

Q: Now that order had been marked "D" to the application filed before their Lordships Court and you seek permission to mark that order as "P1" and you produced that order to Court? (It is already marked and initial by Your Lordship)

A: Yes.

Q: Now this order is dated 29th April 2016?

A: Yes.

Q: And the order is very clear?

A: Yes.

(Shown a document)

Q: The operative part of the order is found in page 5 of that order?

A: Yes.

Q: And it starts from the 1st sentence of page 5 and goes down paragraph until the 4th line

A: Yes.

Q: Can you read that paragraph?

A: Yes. {witness reads the paragraph}

ඒ අනුව පාසැල පවතින දිනයන්හි ඉරිදා පෙරවරු 8.00 සිට බ්‍රහස්පතින්දා දිනයන්හි දරුවා පාසැලට යොමුකරන තෙක් වන කාලය තුළ හෝ බ්‍රහස්පතින්දා පාසැල් නිවාඩු දිනයක් වේනම් පෙරවරු 8.00 දක්වා එක් දෙවන වගුත්තරකාර දරුවාගේ ශාරීරික හරකාරත්වය පළවන වගුත්තරකාරියට ප්‍රධානය කරමි.

Q: Witness the relevant portion of the order you marked as “P1A”

A: Yes.

From Court:

Q: Is that go to the route of your case?

A: Yes, My Lord respectfully.

Q: Now what happens is, if you are going to decide that, then we are deciding the culpability of a person.

A: No My Lord my submission is at this point of time, Your Lordships will proceed only if there is charge known to the law.

Q: Whether the charge is known or not, it is the facts of the case?

A: Respectfully, no My Lordships, ex-facie.

Q: Ex-facie there is something because there is an order by the Court?

A: Yes My Lord, Your Lordships see in order to elevate it to contempt my submission is this.

Q: That of course we have to see after the facts.

A: My Lordship my submissions is this, I should be called upon to meet the charge of contempt.

Q: Now it's like this way, if you goes back to the same Court, you will turn back and say you are appearing your own case. So then what happened?

A: My Lord even in the High Court case that was sent back the same issue surfaces.

Q: There is a different there, Now in this case, he gave the order and it's violated and You are sending back and the other Court has a supervisory jurisdiction Under Section 105(3) and you can overall supervise the Court as well as the subject matter.?

A: But likewise in the case that was sent back, where the order was made by the Original Court by the High Court and the other Me Lords Commercial High Court. It was sent back to the same Court.

Q: Commercial High Court that we won't get the jurisdiction?

A: It has Me Lords, Section 105(3) has.

Q: Section 105 (3) has.

A: Section 18 conferred that jurisdiction. The contempt is ordinarily dealt with by the sitting Judge. For instance if there is something in the course of proceedings it has to go before the same Judge.

Q: No. proceedings different. This is violation of an order. Unfortunately, I have some material, because I heard this case. I heard the evidence. I may be going to hear it again or I may not. So it says it's more than beyond what we see.

A: Your Lordships see we are not commencing de novo. The point is this. Two aspects. One is troubling Your Lordship is whether it could be sent back to the same Court, because is that District Judge sitting there. But the answer to that is in contempt proceedings it ordinarily goes before the same judge you can't avoid it. In fact the law contemplates that. In the two judgments that I gave Your Lordships, it was sent back to the same Court. Then as to whether the question is in order to commence upon proceedings there should be an offence known to the law. When you merely say the charge sheet, you have not complied, the answer to that is that is through the ex-crucial proceedings. It doesn't disclose any offence for contempt. May it be you may lead evidence but my submission is you have to lead the evidence enlighten to the charge sheet.

Q: Has the President preferred a Charge Sheet here?

A: Yes My Lord there is.

My Lord my submission is the ingredients do not disclose the offence of contempt.

Q: That comes at the end of it?

A: No My Lord even at the commencement. That is why I am declined to plead because the charge sheet does not disclose the offence of contempt. That is why I asked disclose an offence known to the law. The mere fact that you don't comply the order of Court does not by itself constitute contempt. Your Lordship sees the authorities say specially a cursive order there is a provision for execution Section 334. Ismail vs. Ismail said that is not an offence. The point I am making is ex-facie on the face of the charge sheet there is no offence disclosed. It is different from saying Your Lordship sees a finding at the end the ex-facie does not disclose an offence known to the law because the alternative is there is provision for execution and mere noncompliance in terms of Ismail vs. Ismail does not constitute the offence of contempt. It does not disclose an offence of contempt. Those are my submissions.

Court

Further examination of the petitioner will be taken up on the next date.

Registrar is directed to follow the same order made previously and make arrangements with the Court House 301.

Registrar is further directed to make the attached documents available to the second Judge's brief.

Further inquiry on 09.08.2017 at 2.00 p.m. in Court No.301 which is the date convenient for the President's Counsel and the Counsel for the petitioner.

The accused is cautioned to appear on the next date.

L.T.B. Dehideniya J
PRESIDENT OF THE COURT OF APPEAL

S. Thurairaja PC J
JUDGE OF THE COURT OF APPEAL

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