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“ CARRY ON REGARDLESS ”

Speech made by Mr. Wijeyadasa Rajapakse, President's Counsel, the President of the Bar Association of Sri Lanka, on the occasion of the felicitation accorded to Hon. Palitha Fernando, President's Counsel, Attorney-General at the Cinnamon Grand Hotel on 20th September, 2012.

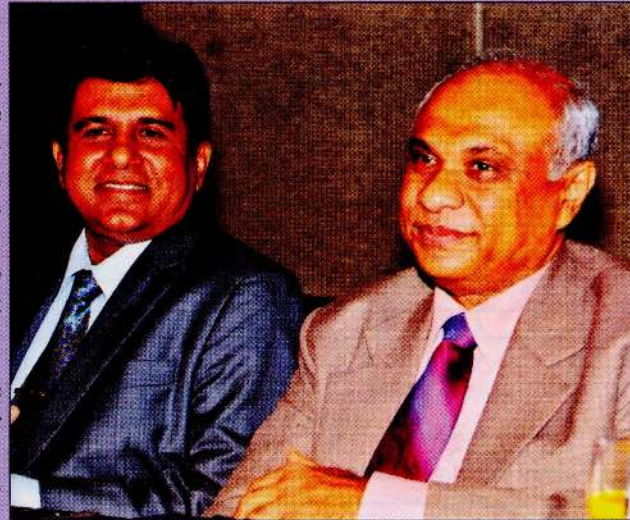
This evening we have assembled here to felicitate Hon. Palitha Fernando, President's Counsel on his elevation to the august and much-coveted post of the Attorney-General of the Republic of Sri Lanka. It is opportune to mention that you have been called upon to hold an office earlier held by a galaxy of legal luminaries, who have blazed a trail across the legal firmament. Your will be the latest addition to that illustrious chronology and I am sure that you will embellish it.

It is a well known fact that a considerable number of Attorneys-General have ended their career as the Chief Justices of this country. One could realise the inestimable worth of this office when one remembers that in 1952, the then Attorney-General, Sir Allen Ross acted for the Governor-General, Lord Soulbury when he was away from the country.

I had the opportunity of recognising Mr. Palitha Fernando's sterling qualities when he was pitted against me in the longest Trial-at-Bar, ever held in Sri Lanka, commonly known as the *Udathalawinna Murder Trial* in which I appeared for nearly a period of one year. His composure, friendly disposition towards opposing counsel and his deep knowledge of the intricacies of the law impressed me a great deal. The irony of my confronting him was that the longer I was opposed to him, the greater was my sneaking admiration for his humaneness. Over the years he has accumulated a wealth of experience and knowledge which would undoubtedly stand him in good stead in the discharge of his onerous duties in this high office.



The Head Table (from L to R) Mr. Sanjaya Gamage, Secretary of the BASL; Justice Siskandarajah, President of the Court of Appeal; Mr. Wijeyadasa Rajapakse PC, President of the BASL; Hon. Palitha Fernando PC, Attorney General; Hon. Rauff Hakeem, Minister of Justice; Mrs. Anoma Goonetilleke, Deputy President of the BASL



Hon. Palitha Fernando PC, Attorney General, and Mr. Wijeyadasa Rajapakse PC, President of the BASL, at the Felicitation

It may be a design of destiny that this morning at a ceremonial sitting of the Court of Appeal, when Mr. Palitha Fernando, who was the prosecuting counsel in the *Udathalawinna Trial-at-Bar* welcomed Hon. Justice Sunil Rajapaksa, who was a member of the said Trial-at-Bar which was presided over by Hon. Justice Deepali Wijesundara, as a Judge of the Court of Appeal on behalf of the Official Bar and I being a defence counsel in the trial did welcome Hon. Justice Sunil Rajapaksa on behalf of the Unofficial Bar. Now tonight my colleagues and I felicitate you, Mr. Palitha Fernando.

(Contd. on page 9)



**BAR ASSOCIATION OF SRI LANKA
RAFFLE DRAW ON 25TH AUGUST, 2012**

PRIZE	TICKET NO.	NAME
1 st	12615	Mr. S. K. Lankathilaka – Mount Lavinia
2 nd	15086	Mr. Harsha Amarasekara – Colombo
3 rd	04774	Mr. Nishantha Hiriburagamage – Galle



BASL Raffle Draw 2012 in progress at the BASL Auditorium on August 25, 2012

CONSOLATION PRIZES

	TICKET NO.	NAME
1	08953	Ms. P. Srimathi Perera - Kandy
2	00599	Mr. Siri A. Perera - Kalutara
3	15873	D. L. & F. de Seram - Colombo
4	04934	Mr. Bandula Silva - Galle
5	24101	Mr. H. Withanachchi - Colombo
6	03267	Mr. M. G. M. Attanayake - Menikhinna
7	03631	Mr. Y. Muthukuda - Millewa
8	24152	Mr. Kuvera de Zoysa – Colombo
9	03175	Mr. P. Vinath, Sampath Bank - Anuradhapura
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Please establish your identity and collect your prize

SANJAYA GAMAGE
SECRETARY
BAR ASSOCIATION OF SRI LANKA

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2nd Prize –Washing Machine
Chandana Dissanayake

3rd Prize - Microwave Oven
Dammika Prasad Ranasinghe
K. Upendra Gunasekera

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Jayanthi Ratnayake

Timeline	Monthly	A.E.R	Maturity	A.E.R
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6 months	14.50 %	15.50 %	16.25 %	16.91 %
1 year	15.50 %	16.65 %	16.50 %	16.50 %
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EDITOR'S NOTE

TITLE REGISTRATION FAST BECOMING A REALITY

The land policy of a State has grave social, political and economic implications. Expeditious clearance of title is necessary to make land available for productive use. A ceiling on land ownership is necessary to facilitate equitable distribution of land, and the means for equitable distribution of land promote social and political stability which is so necessary for the growth and development of a country.

In the spirit of the above considerations a brief reference to the principal features of the *Registration of Title Act*, No. 21 of 1998 is in the present context not out of place because the Act impinges on existing and future land ownership in the country, and because its implementation has in the recent past gathered momentum.

A cadastral map is at the centre of title registration. The expression "cadastral map" is not defined. Cadastral maps are prepared area-wise, and should show accurately the allotments of land in the area.

Once the cadastral map is prepared the Commissioner of Title Settlement will publish a Notice in the Gazette calling upon claimants to prefer their claims to the parcels mentioned in the Notice.

The Act provides for investigation of title claims, and the Commissioner having considered the claims will determine whether the claimant should be registered with a First Class Title of Absolute Ownership or a Second Class Title of Ownership.

There are special provisions with regard to co-ownership, condominiums and State lands. The *Partition Act* and the *Prescription Ordinance* will not apply to lands registered with a First Class Title of Absolute Ownership or a Second Class Title of Ownership. An instrument in respect of a land parcel executed in favour of two or more persons, unless done in accordance with the provision of the Act, shall be void.

The Commissioner is empowered to refer disputed claims to the appropriate District Court; he can request the Surveyor-General to do such additional surveys as may be necessary for the investigation before him.

Any person dissatisfied with a declaration of the Commissioner could appeal to the appropriate District Court within the prescribed time limit.

Once a land parcel is registered under the Registration of title Act, no entries will be made of any transaction in respect of that parcel in the Registers maintained under the Registration of Documents Ordinance except a cross reference to the Title Registers relating to such parcel maintained under the Registration of Title Act.

The registration of a person with a First Class Title of Absolute Ownership shall have the effect of vesting in that person absolute ownership of such parcel together with the rights and privileges appurtenant thereto subject to any registered encumbrances.

A person registered with ownership or an interest in a land parcel shall have vested in him the rights so registered together with all the appurtenant rights and privileges, express or implied, subject to any express agreements relating thereto.

Entries in the Title Register constitute conclusive evidence, and shall not be questioned in a Court of Law except as provided in the Act.

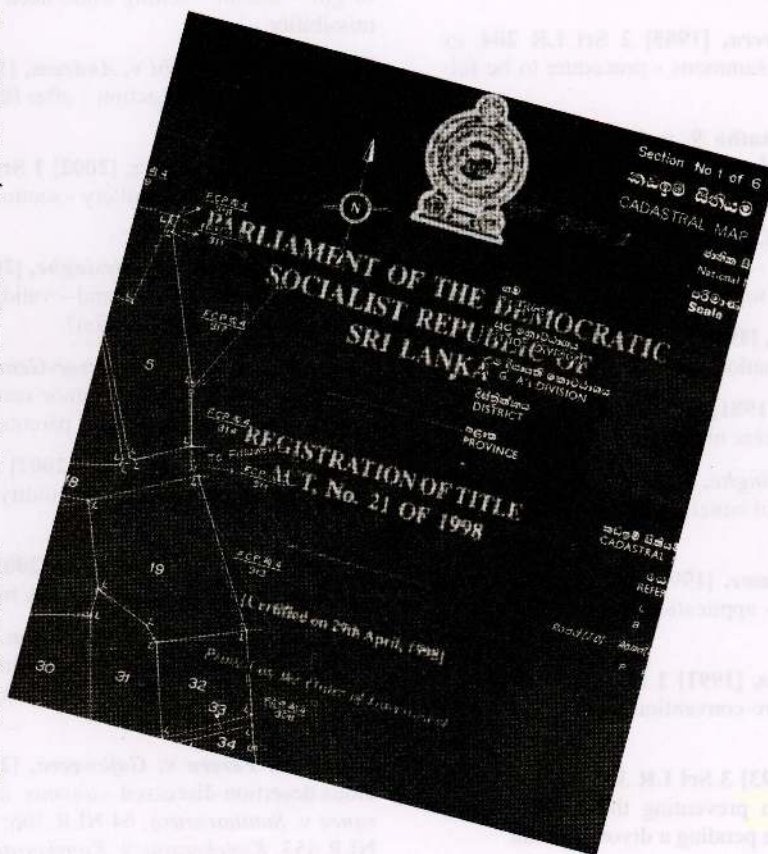
The Court may order rectification of the Register where it is satisfied that any registration has been obtained by fraud. Court has jurisdiction to intervene only where fraud is established. As in a normal civil case where fraud is alleged, it must be proved beyond reasonable doubt.

The Act has made heavy inroads into fundamental property rights and concepts. The law of co-ownership, the right to partition a land, possessory rights, acquisition of title by prescription, mortgages, servituted rights and condominiums come within

the purview of the Registration of Title Act, and may be described as affected subjects.

The bulk of land litigation in this country is in Courts outside Colombo. The people living in cities and the people living in rural areas do not have the same culture. It is questionable whether the people in rural areas have sufficient awareness to cope with the requirements of the Act.

Unless properly and carefully implemented, the Registration of Title Act will cause bewildering complications in property law. Creation of readily marketable titles appears to be one of the main objectives of the Act. It is doubtful whether this objective could be achieved if the provisions in the Act are not scrupulously followed. The services of competent men would have to be obtained to handle the implementation of the Act.



CASE LAW—DIVORCE

COMPILED BY MR. ROHAN SAHABANDU, ATTORNEY-AT-LAW

(ADDITIONAL EDITOR-IN-CHIEF OF THE SRI LANKA LAW REPORTS AND FORMER DEPUTY-PRESIDENT OF THE BASL)

1. *Tennakoon v. Tennakoon*, [1984] 2 Sri LR 217: Divorce versus judicial separation - ingredients
2. *K. A. Somawathie v. Perera*, CASC 948 / 75 C.A.M. 2.2.84: malicious desertion - guilty party (wife) - cannot ask for property
3. *Leelawathie v. Ponnambalam*, CA 1930 / C.A.M 21.1.81: divorce action - settlement - no decree entered - party dying - marriage stands
4. *Sediris Singho v. Somawathie*, [1978-79] 2 Sri LR 140: section 602 of CPC discussed
5. *Peiris v. Peiris*, [1978-79] 2 Sri LR 55: District Court has jurisdiction to declare marriage null and void on the ground of lack of consent and duress
6. *Andradie v. Jayasekera Perera*, [1985] 2 Sri LR 204: *ex parte* trial - fraud in service of summons - procedure to be followed - decree valid? See, 8
7. *Fonseka v. Silva*, 1 Sri Skantha 9: malicious desertion inability to live on a physical level - impotency - malicious desertion? is it?
8. *Soosapillai v. Parpathipillai*, [1985] 2 Sri LR 55: Customary marriage - kalam ceremony - presumption of valid marriage between man and woman living together - maintenance
9. *Mutubanda v. Jayawardane*, [1986] 2 CALR 203: Damages against co-respondent - condonation/connivance - discussed
10. *Ittepana v. Hemawathie*, [1981] 1 Sri LR 476: failure to serve summons - vacating of decree nisi - law discussed
11. *Samarasinghe v. Samarasinghe*, [1989] 2 Sri LR 180 / [1990] 1 Sri LR 31: forfeiture of benefits - section 615 - Dowry re-claimed - circumstances
12. *Kaluarachchi v. Wijewickrame*, [1990] 1 Sri LR 262: who is entitled: custody of children - application to make decree absolute - any party?
13. *Nihal Perera v. Seneviratne*, [1991] 1 Sri LR 313: Defendant proceeding with claim in re-convention for divorce - permissibility?
14. *Dias v. Kodithuwakku*, [1993] 3 Sri LR 354: District Court can grant an interim injunction preventing the husband from alienating the matrimonial house pending a divorce action
15. *Kandasamy v. Asokan*, [1994] 1 Sri LR 413: marriage contracted abroad - Defendant resident abroad - procedure - consequences - which Court has jurisdiction?
16. *Ramanathan v. Thambimuthu*, [1994] 3 Sri LR 367: *alimony pendente lite* discussed - circumstances
17. *Perera v. Rodrigo* [1994] 2 Sri LR 332: Right of divorced wife to claim maintenance - is it possible?
18. *Khan v. Moomia and Others*, [1995] 1 Sri LR 107: muslim - pronouncement of *Talak* - procedure - what follows?
19. *Pathmawathie v. Jayasekare*, [1997] 1 Sri LR 248: malicious desertion - duty of Judge to consider the expulsive circumstances
20. *Anulawathie v. Gunapala*, [1998] 1 Sri LR 63: what is constructive malicious desertion as opposed to malicious desertion - consider the expulsive circumstances which the plaintiff-appellant had placed before him which culminated in the act of desertion
21. *Mallika de Silva v. Gamini de Silva*, [1999] 1 Sri LR 85: interim relief for alienating matrimonial property - is it permissible?
22. *Ubeyratne v. Karunawathie*, [1999] 3 Sri LR 16: Third party cannot attack the validity of a contracted marriage nor its consequences
23. *Ajith Kulatunga v. Shiromala*, [2001] 2 Sri LR 108: divorce on grounds not pleaded - could divorce be granted
24. *Calendar v. Fernando*, [2001] 2 Sri LR 355: divorce - deed of gift - assault - setting aside deed on gross ingratitude - permissibility
25. *Kuruppuarachchi v. Andreas*, [1996] 2 Sri LR 11: divorce - adultery - cause of action - after filing of answer - no amendment possible?
26. *Bednarz v. Bednarz*, [2002] 1 Sri LR 99: divorce - counterclaim for divorce on adultery - section 598 of the CPC read with section 603 - discussed
27. *Kusumawathie v. Wijesinghe*, [2001] 3 Sri LR 238: divorce - *ex parte* - death of husband - validity of Judgment - is the divorce action a personal action?
28. *Gunarathnam v. Registrar-General*, [2002] 2 Sri LR 302: act 18 of 1995 prevails - minor cannot enter in to a marriage even with the consent of their parents
29. *Jayaratna v. Jayaratna*, [2002] 3 Sri LR 331: amendment of answer alleging adultery validity? - adultery after answer-See, 21
30. *Pushpakumara v. Marmet*, [2003] 2 Sri LR 244: malicious desertion - no issue - could divorce be granted?
31. *Pathmenayaky v. Mahenthiran*, [2003] 3 Sri LR 241: divorce - section 608 (2) - should matrimonial fault be established - willful non consummation of marriage - is it a matrimonial offence?
32. *Murin Perera v. Gajaweera*, [2005] 1 Sri LR 103: malicious desertion discussed - *animus discerendi*? See, *Rajeswararane v. Sunthararasa*, 64 NLR 366; *Ariyapala v. Ariyapala*, 65 NLR 453; *Kanekeratne v. Kanekeratne*, 66 NLR 380
33. *Jayawardane v. Ranaweera*, [2004] 3 Sri LR 37: divorce - husband removing child - custody under what section? section 621 or section 23 of Judicature Act
34. *Stella Perera v. Silva*, [2004] 3 Sri LR 233: when the husband is the owner of the property - occupied by the couple - he has no right when the marriage is in existence to eject his wife from or without providing her another alternative accommodation. Her occupation is not by license of her husband. It is *Sui Generis* - Similarly the wife has no right to eject her husband
35. *Karunasekare v. Abeywickrame*, [2005] 2 Sri LR 299: divorce action - custody of two minors - application to vary an earlier Order - when and how could it be made
36. *Varuna Jayasuriya v. Krishshangi Jayatunge*, [2005] 2 Sri LR 302: divorce action - no bar to an application for Habeas Corpus?

37. *Paulis v. Joseph and Others*, [2005] 3 Sri LR 162: divorce *ex parte* - fraud - restitution in *intergrum* - misuse of legal process - decree valid?
38. *Neville Fernando v. Chandrani Fernando*, [2007] 1 Sri LR 159: constructive malicious desertion - ingredients - burden on whom? matrimonial relief only to the innocent?
39. *Nilanthi Siriwardana v. Crishantha*, [2008] 2 Sri LR 281: constructive malicious desertion - date on which malicious desertion took place - is it fatal? issue raised giving the exact date - permissibility?
40. *Samaraweera v. Jayawardana*, 4 NLR 106: allegation of misconduct - ought to specify the date and place of the act complained of - necessary?
41. *Karonchihamy v. Angohamy*, 8 NLR 1: can a man marry with the woman he lived in adultery after the death of his wife
42. *Dissan Appu v. Baba Hami*, 10 NLR 343: action for divorce brought by husband dismissed on the ground that the plaintiff has been guilty of connivance under section 601 - no damages against the Co-Respondent - divorce could not be granted
43. *Abeyagoonsekera v. Abeyagoonsekera*, 12 NLR 95: husband liable to pay into Court or give security to cover wife's cost in connection with case
44. *Pinhamy v. Babynona*, 14 NLR 104: agreement between party to marriage not to seek legal remedy was an immoral agreement. The Defendant getting the liberty to lead an immoral life and the Plaintiff deprived of his right under the law
45. *Appuhamy v. Menikhamy*, 15 NLR 100: divorce action - ground of adultery of wife can be dismissed if the husband himself was guilty of adultery. See, *Seneviratne v. Panishamy*, 29 NLR 97
46. *Appuhamy v. Julihamy*, 16 NLR 83: communication of venereal disease by a husband to his wife, if willful, constitutes legal cruelty
47. *Soysa v. Soysa*, 17 NLR 385: under Roman Dutch Law (RDL) an agreement for voluntary separation and granting of property - illegal but valid as between the parties
48. *Silva v. Silva*, 18 NLR 26: under RDL an agreement between husband and wife for separation *mensa et thoro* - payment of husband to the wife of a monthly allowance can be enforced, any party can terminate by agreement
49. *Silva v. Carlinahamy*, 23 NLR 344: it is not competent to the Court to enter in to a conditional decree of divorce in the event of wife not returning to her husband within a period fixed in the decree
50. *Silva v. Missinona*, 26 NLR 113: what constitutes malicious desertion? See also, *Gunawardana v. Wickramasinghe*, 34 NLR 5
51. *Eliyathamby v. Eliyathamby*, 27 NLR 396: letters written by the wife to the co-respondent but not delivered to him are not admissible against the co-respondent
52. *De Silva v. De Silva*, 27 NLR 289: in an action for divorce brought by a husband the nature of damages awarded against a co-respondent is compensatory, not punitive. The measure of damage is based on (i) actual value of the wife to the husband; (ii) proper compensation to him for the injury to his feelings, the blow to his honour and the hurt to his matrimonial and family life. See, *Perera v. Halwatura*, 59 NLR 233
53. *Joseph v. Alexander Elizabeth*, 28 NLR 411: if wife is possessed of property and is in a position to find the means to defend the action, the Court should not order the husband to provide for her costs
54. *De Silva v. De Silva*, 29 NLR 378: a decree nisi granting a divorce may be made absolute while an order with respect to a settlement on the aggrieved party is under appeal
55. *Annakedde v. Myappen*, 33 NLR 198: when the Defendant husband claims a divorce on grounds of adultery of the wife, the alleged adulterer should be made a party
56. *Aserappa v. Aserappa*, 37 NLR 372: liability to pay *alimony pendente lite* continues until the divorce is made absolute
57. *Gunathilaka v. Milinona*, 38 NLR 291: marriage may be dissolved on the ground of incurable impotency in either party at the time of marriage
58. *Sathiyathan v. Sathiyathan*, 39 NLR 241: can the Court enter a decree absolute where the marriage has been dissolved by the death of a party after decree
59. *Nelson v. Foenander*, 41 NLR 452: a person who suspects collusion between parties for the purpose of obtaining a divorce and who intervenes under section 606 is entitled to rely on collusion that has taken place after the decree nisi was entered
60. *Blok v. Blok*, 42 NLR 70: co-respondent conduct - reasonable suspicion - cost
61. *Silva v. Silva*, 44 NLR 494: father entitled to custody of a child pending divorce proceedings especially where the best interests and safety of the child require that the child should continue to remain in his custody
62. *Todd v. Todd*, 44 NLR 497: divorce - adultery with X - the Court may act on the admission of the Respondent, provided it has no reason to doubt the genuineness of the admission
63. *Asilin Nona v. Peter Perera*, 46 NLR 109: non-compliance with an Order of Court in divorce proceedings to pay *alimony pendente lite* amounts to contempt of court - the court may in its discretion stay proceedings until the alimony due is paid
64. *S. W. E. Dias v. Mensaline Hamine*, 46 NLR 193: wife lives in same house - shares same bed after knowledge of husband's adultery - no proof of condonation - further proof required of forgiveness and reinstatement of offending spouse required - discussed. See, *Baptiste v. Selvarajah*, 59 NLR 284; *Mutukumarasamy v. Parameshwary*, 78 NLR 488
65. *Wijeratne v. Wijeratne*, 47 NLR 324: no consummation of marriage - willful refusal of husband to copulate - wife was entitled to have the marriage dissolved on the ground of malicious desertion - discussed. See, *Sinnathamby v. Annammah*, 55 NLR 349
66. *De Silva v. De Silva*, 49 NLR 73: section 622 extends the jurisdiction of the District Court as regards the custody, maintenance and education of minor children to applications made after divorce absolute. Court can vary the provisions of the divorce absolute in respect of these matters from time to time as occasion arises
67. *Fernando v. Fernando*, 49 NLR 114: decree nisi entered - petition by defendant that decree be not made absolute - allegation of adultery at the time of action - can Court entertain this application? - Decree Nisi was *res judicata* between the parties - "any person" in sections 604 does not include a party to the suit?
68. *Jasline Nona v. Samaranayake*, 49 NLR 381: divorce action - adultery - adulterer a necessary party? - what follows?
69. *Fernando v. Peiris*, 50 NLR 40: action for nullity of marriage on the ground of latent impotency - should not be insti-

tuted until the lapse of at least three years from marriage?

70. *Karunatileke v. Karunatileke*, 52 NLR 300: divorce action defendant husband's counter-claim for divorce - allegation of acts with A, B, C and D - husband condoning acts of A, B, C, D - not necessary to make all of them parties? who should be made a party

71. *Subramaniam v. Pakkiyedchumy*, 55 NLR 87: if one of the spouses re-married before decree nisi absolute - that party has no right to claim maintenance as wife from new partner - subsequent marriage treated as void

72. *Wijesinghe v. Wijesinghe*, 57 NLR 489: decree of judicial separation moral cruelty will suffice

73. *Fernando v. Fernando*, 59 NLR 522: a divorced wife is entitled to make an application under section 10 of the Maintenance Ordinance to enhance an order of maintenance obtained by her under section 2 prior to divorce

74. *Perera v. Hulwatura*, 59 NLR 233: reduction of damages in appeal. See also, *Alles v. Alles*, 51 NLR 416; *Dean v. Anthoniz*, 54 NLR 539

75. *Visvaverni v. Murugiah*, 60 NLR 541: action for declaration of nullity of marriage - pregnancy prior to marriage - no condonation permissible - is this marriage a nullity?

76. *K. Sinnathanby v. Yokammah*, 61 NLR 183: divorce action - *alimony pendente lite* - failure of husband to pay - Court cannot strike out defence

77. *Emelda Fernando v. W. S. Elaris Fernando*, 63 NLR 416: where, in a divorce action parties do invite Court to grant any relief by way of settlement of property under section 617 / 618 they may be permitted by Court, on their election, to reserve their rights to file separate actions under the common law for the recovery of any property in the hands of each other

78. *V. S. Nadarasa v. Navamany*, 64 NLR 232: where for dissolution of marriage is entered at the suit of a husband, a promise by the husband to make an ex gratia payment to the wife cannot be incorporated in the decree so as to compel him to pay the sum

79. *T. Christina v. Cecilin Fernando*, 65 NLR 274: decree absolute for divorce entered - however erroneous or irregular it may have been as between the parties to the action, it was not open to collateral attack by third parties in other proceedings

80. *Rajeswararane v. Sunthararasa*, 64 NLR 366: divorce - malicious desertion - proof - willfully brought to an end the state of cohabitation

81. *W. H. Babunona v. Albin Kemps*, 67 NLR 183: cruelty on the part of one spouse is not a ground for divorce, for the dissolution of marriage unless it is of such a nature as to make cohabitation intolerable for the latter and amounts to constructive malicious desertion

82. *Perera v. Mathupali*, 71 NLR 461: divorce - suit by husband - husband guilty of matrimonial offence - delay in filing action - circumstances when he nevertheless be granted divorce - discretion vested proviso section 602 - interest of child considered

83. *Canekeratne v. Canekeratne*, 71 NLR 522: right of deserted wife to remain in occupation of matrimonial home - can she be evicted? See, [2004] 3 Sri LR 233

84. *Dharmasena v. Nawarathna*, 72 NLR 419: statement made outside Court by the defendant's wife admitting adultery cannot be used against the co-respondent - proof beyond reasonable doubt is a required proof

ENGLISH CASES

85. *Bartholomew v. Bartholomew*, [1952] 2 All ER 1035 CA: wife lazy/dirty - husband files for divorce - no constructive malicious desertion?

86. *Smith v. Smith*, [1939] 4 All E R 533: couple - same house - mother looked after husband - in basement all duties performed by husband - constructive desertion - divorce - husband deserted?

87. *Littlewood v. Littlewood*, [1942] 2 All E R 515: wife ignoring husband - but cooked for husband - no desertion?

88. *Pheasant v. Pheasant*, (1972) Fam 202, 208; [1972] 1 All ER 587, 591 (*Bromley's Family Law - 8th Edition p.194*): See, *Kisala v. Kisala*, (1973) 117 Sol Jo 664. Sole charge against the wife was that she was unable to give him the demonstrative affection for which he craved. Court found that she had given him all the affection she could and nothing in her behavior could be regarded as a breach of any of the obligations of marriage

89. *Stringfellow v. Stringfellow*, [1976] 2 All ER 539: simple desertion on the part of the Respondent cannot found a petition based on breach of any of the obligations of marriage

90. *Thurlow v. Thurlow*, (1976) Fam 32 (*Bromley's Family Law - 8th Edition p.197*): As a result of mental disease the wife became progressively less able to perform any domestic duties. Eventually she became bedridden and incontinent and was admitted to hospital. When her husband could no longer cope with the situation. There was no reasonable hope that her condition would improve and the husband petitioned for divorce alleging that her behavior was such that he could no longer reasonably be expected to live with her.

91. *Williams v. Williams*, (1964) AC 698 (*Bromley's Family Law - 8th Edition p.196*): House of Lords laid down the rule that the Respondent's mental illness was not necessarily a defence to a charge of cruelty but was one of the matters to be taken in to account

92. *Bergin v. Bergin*, [1983] 1 All ER 905 (*Bromley's Family Law 8th Edition p.198*): The wife accepted as part of married life three serious physical attacks by her husband. Six months after the last, when she was two months pregnant, she left in fear when her husband started throwing the furniture about. It was held that she was justified in alleging that she could not reasonably be expected to live with him.

93. *Biggs v. Biggs*, (1977) Fam 1; [1977] 1 All ER 20 (*Bromley's Family Law 8th Edition p.223*): Cohabitation between decree nisi and decree absolute is to be treated in the same way as cohabitation before decree nisi. Hence, if the parties live together for more than six months after a decree nisi based on adultery, this must lead to its rescission.

94. *Savage v. Savage*, (1982) Fam 100, (1982) 3 All ER 49, (*Bromley's Family Law 8th Edition p.223*): Decree based on the respondent's behavior will not be made absolute if the subsequent cohabitation shows that the Court was wrong in finding that the petitioner could not reasonably be expected to live with the respondent at the time of the decree nisi.

95. *Walter v. Walter*, (1949) 65 TLR 680 (*Bromley's Family Law 8th Edition p.208*): husband and wife were both working in different parts of London. Neither of them could succeed on petitions based upon desertion because neither could prove that the separation was due to the other's fault.

96. *Estate Nichols v. Nichols, N.O., 1948 (3) S.A.I.(N), (Hahlo, H. R. Husband and Wife 2nd Edition p.347)*: In the case of the dissolution of a marriage by divorce the marriage tie is severed as from the date when the decree of divorce is pro-

nounced.

97. *Colly v. Colly's Estate*, 1946 W.L.D. 83, (Hahlo, H.R. *Husband and Wife* 2nd Edition p.373): Husband had agreed to pay his divorced wife maintenance until her death or remarriage. The husband died before the wife who had not remarried. The Court held that in the absence of any provision to the effect maintenance was to cease on the husband's death, the obligation continued and had to be met out of his estate.

98. *Belfort v. Belfort*, (1961) ISA 257, (Hahlo, H. R. *Husband and Wife* 2nd Edition p.384): Despite the sympathy for the husband who had suffered unhappiness by reason of the Defendant's conduct, their married life been ridden with drink, neglect, deceit and broken promises, the husband was not granted a divorce, because there was no evidence that the wife never visualized his departure.

JUDGMENTS

Failure to aver previously invoking the jurisdiction of the Court of Appeal

SUPREME COURT

Surendra Das v. G. Jeevananthan David and Another

S. C. Appeal No. 109/2009

SC (SPL) LA No. 87/2009

CALA No. 504/2006

D.C. Horana Case No. 2533/L

Decided on: 05-03-2012

Decided by: Hon. R. K. S. Suresh Chandra, J; Hon. S. Tilakawardane, J.; Hon. C. Ekanayake, J.

In this case the learned District Judge of Horana made an Order dated 30th November, 2006, to issue an interim injunction restraining the Defendants from selling, transferring, mortgaging or leasing the property described in the schedule to the Plaintiff at the instance of the Plaintiff-Appellant.

The Defendants-Respondents filed an application for leave to appeal against the said Order in the Court of Appeal.

At the argument the Plaintiff-Appellant raised a preliminary objection that the Defendants-Respondents have failed to aver in their petition that they have not previously invoked the jurisdiction of the Court of Appeal and to produce material documents, namely, Motion dated 31-05-2006 and Journal Entries 9 and 10 in contravention of Rule 3(1)(a), 3(1)(b) and 3(2) read with Rule 3(15) of the Court of Appeal (Appellate Procedure) Rules, 1990 and that the Leave to Appeal application of the Defendants-Respondents should be dismissed *in limine*.

The Court of Appeal overruled the preliminary objection following the decision in *Caderamanpulle and Others v. Caderamanpulle and Others*, [2005] 1 Sri LR 397 where Amaratunga J. held that Rules 3(1)(a) and 3(1)(b) do not apply to Leave to Appeal applications and that the procedure to be followed in relation to Leave to Appeal applications are laid down under sections 757 and 758 of the Civil Procedure Code. The Court of Appeal further held that Rule 3(2) of the Court of Appeal (Appellate Procedure) Rules, 1990 only governs applications made in terms of Articles 138 and 140 necessitating the averment that the jurisdiction of the Court of Appeal has not been previously invoked in respect of the same matter.

On appeal the Supreme Court affirmed the Order of the Court of Appeal, and dismissed the Appeal.

Suresh Chandra J. said as follows:-

“Considering the present case it is clear that considering the interpretation of Rule 3(15) it would suggest that since the Learned Judge did not make any specific directions as to the procedure needed to be followed the normal procedure for Leave to Appeal applications would have to have

been followed which would mean that it would have had to be in accordance with s.757 and s.758 of the Civil Procedure Code which provides the normal procedure to be followed for any leave to appeal application. The rule of exclusion as stated in Bindra Interpretation of Statutes (10th edition) at pg. 427 provides the rationale for the above interpretation of Rule 3(15) as it is clear that what has been left out was left out clearly with the intention of leaving it out of the scope of the said provision.

The wording of Rule 3(2) of the Court of Appeal Rules suggests that even when the party makes a false or incorrect averment in relation to whether the jurisdiction of the court being previously invoked the Court would still have a discretion as to whether it should dismiss the application or not. Considering the repercussions of such a situation and when looking in to a situation where the party fails to mention that they have not previously invoked the jurisdiction of the court, it would suggest that it would be a grave injustice if there would be a mandatory dismissal of the application due to such an omission. It would be in the interests of justice for the judge to be given the discretion as to the course of action needed to be taken in such a situation as stated in Rule 3(2) for situations of a false or incorrect averment being mentioned in the Petition. This would suggest that even if such a Leave to Appeal application is required to be made under the procedure laid down in accordance with the Court of Appeal Rules, in such a situation the failure to adhere to Rule 3(2) alone would not warrant a mandatory dismissal of the application.

Considering the issue as to the filing of certified copies of documents it would be necessary to consider the procedure to be followed under the Civil Procedure Code in relation to Leave to Appeal applications supra. The procedure to be followed under the Civil Procedure Code under s.757 and s.758 makes no mention as to filing of any documents apart from the Petition of Appeal and Affidavit by the Petitioner. This would clearly suggest that there is no mandatory requirement to file certified copies of documents in Leave to Appeal applications when following the normal procedure laid down under the Civil Procedure Code. The judge using his discretion under Rule 3(15) of the Court of Appeal Rules may require parties to file any such documents as required or follow the procedure laid down under the Court of Appeal Rules but in neither situation would a mandatory dismissal of an application be permissible for failing to submit certified copies of documents to the court. It is extremely clear that the relevant procedure to be followed by the courts in relation to Leave to Appeal applications under the normal procedure would be under the Civil Procedure Code and that the Courts should follow a uniform approach in dealing with such applications.” (vide pages 6 and 7)

From the Secretary's Desk

WORKSHOPS ORGANISED BY THE CONTINUING LEGAL EDUCATION (CLE) AND SEMINARS COMMITTEE

The CLE and the Seminars Committee organised weekly workshops at the BASL Auditorium.

- 19th July - *Law and Practice Relating to Partition Actions* by Mr. Mayura Gunawansa
- 26th July - *Injunctions and Interim Orders* by Mr. M. U. M. Ali Sabry
- 2nd August - *Drafting of Pleadings in a Civil Suits and Framing of Issues* by Mr. Wijeyadasa Rajapakshe PC
- 9th August - *Money Recovery and Liquid Claims under Special Summary Procedure* by Mr. S. A. Parthalingam PC
- 23rd August - *Divorce Actions* conducted by Mr. Wijeyadasa Rajapakshe PC
- 30th August - *Maintenance in Divorce Actions* by Mr. Neville Abeyratne

All the workshops were well attended and the BASL sincerely thanks Ms. Anoma Goonetilleke and Ms. Pansy Joseph for organising this very successful series of workshops.

CLE SEMINARS

MATUGAMA: A one day workshop was conducted on the 21st of July in Matugama for the Kaluthara Bar Association, Elpitiya Bar Association and the Panadura Bar Association. The Resource Persons were Mr. Wijeyadasa Rajapakshe PC, Mr. Yasantha Kodagoda (DSG) and Mr. M. U. M. Ali Sabry. The workshop was organised by the CLE Committee and Ms. Nethyakumari Goonethilake, President of the Matugama Bar Association.

KANDY: A one day workshop was conducted on the 8th of September in Kandy with participants attending from the Kandy Bar Association, Matale Bar Association, Nuwara Eliya Bar Association and the Theldeniya Bar Association. The Resource Persons were Justice Saleem Marsoof PC (Judge of the Supreme Court), Justice Sisira de Abrew (Judge of the Court of Appeal), Mr. Wijeyadasa Rajapakshe PC and Mr. Sarath Jayamanne (DSG). The workshop was organised by the CLE Committee and Mr. Upali Bogahapitiya, President of the Kandy Bar Association.

JAFFNA: A one day workshop was organised on the 15th of September in Jaffna with participants attending from the Jaffna Bar Association, Point Pedro Bar Association, Kayts Bar Association, Mullathivu Bar Association, Kilinochchi Bar Association, Vavuniya Bar Association and the Mannar Bar Association. The Resource Persons were Mr. K. Kanag Iswaran PC, Mr. Wijeyadasa Rajapakshe PC, Mr. Gnanathan PC (ASG), Mr. K. Neelakandan, Mr. C. V. Vevekananthan and Mr. M. U. M. Ali Sabry. The workshop was organised by the CLE Committee and Ms. Shantha Abhimanasingham PC, President of the Jaffna Bar Association.

DIPLOMA CERTIFICATE COURSES

The **Diploma of Information Communication Technology (ICT) Certificate Course** for the 3rd batch commenced on the 9th of August. Over 30 participants signed up for the course comprising 12 modules covering all aspects of ICT and the lectures are conducted from 3pm to 5pm every Thursday at the BASL Auditorium.

The **Diploma of Criminal Defence Certificate Course** for the 4th batch commenced on the 25th of August and over 60 participants registered to follow the course. This course comprises 15 modules and the lectures are conducted from 9am to 11am every Saturday at the BASL Auditorium.

OBITUARIES

Mr. J. J. Rajakaruna (former Treasurer of the BASL 2007 - 2008)	
Mr. T. Sri Ramanathan (President of the Law Society of Sri Lanka 1969 -1973)	
Mr. M.A. Ellepola	Ms. N.K. Devasinghe
Mr. M.D.K. Kulatunga	Mr. Vincent Jayawardane

MAIDEN INTER-ZONAL CRICKET TOURNAMENT OF THE KEGALLE JUDICIAL ZONE

The maiden Inter-Zonal Cricket Tournament of the Kegalle Judicial Zone was held at the Public Grounds, Kegalle and the *Advocate Francis Perera Trophy* was won by the *Kegalle Lawyers – Juniors* while the *The Warakapola Lawyers* won the Ladies Trophy.

Carry on Regardless (Contd. from page 1)

On this occasion it is appropriate for me to recall an observation made by Mr. Palitha Fernando, at a seminar for lawyers held in Kandy soon after the Judgment of the *Udathalawinna Murder Trial* was delivered. He attributed the acquittal of the accused that I represented, more to the lack of evidence than to the brilliance of the defence counsel, Mr. Wijeyadasa Rajapakse. When it was my turn, I responded saying that going by what Mr. Palitha Fernando said, it could be concluded that his expression amounted to a confession that when the Attorney-General's Department wants to indict a person, the availability of substantial evidence or not seems to be immaterial and insignificant.

In fairly recent times, the very converse of it occurred, thereby making it a public controversy, that when the Attorney-General wanted to withdraw indictments, the availability of substantial evidence or not, was relegated to the background. We fervently hope that during your tenure of office, you will restore the receded prestige of your office and thereby ensure the upholding of the Rule of Law in this country.

On this occasion I wish to refer to a bit of admonition given by a British Chief Justice to a newly appointed Attorney-General. The newly appointed Attorney-General while paying a courtesy call to the Chief Justice, in his chamber, asked him for some inspirational advice. Then the Chief Justice said that I can envelope my advice to you into three words and said "carry on regardless". Mr. Palitha Fernando, the newly appointed Attorney-General of this country, on this solemn occasion I can do no better than remind you of that advice "carry on regardless".

May the blessings of the Noble Triple Gem be upon you in full measure!

BASL EVENTS CALENDAR

Sports Gala - 14th October
Law Week - 26th November to 01st December
Neethi Ranga - 26th November at Nelum Pokuna Mahinda Rajapaksa Theatre
Neethi Kekulu - 14th December

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Attorney-at-Law & Notary Public
Commissioner for Oaths
ACTING MAGISTRATE

Events Organised by the Junior Bar Committee of the BASL

Junior Bar Forum - 20th October, 2012 at Water's Edge, Colombo
LPO Awareness Program - 03rd November, 2012 at the BASL Auditorium
Junior Bar Legal Aid Clinic - 10th November, 2012 at Dehiattakandiya
Junior National Law Conference ("Timely Justice")- 16th, 17th and 18th of November, 2012 at Jetwing Blue, Negombo
Launch of the Junior Bar website - 16th November at Jetwing Blue, Negombo
25th Law Asia Conference (Bali, Indonesia) - 18th to 21st November

25th LAWASIA CONFERENCE

BALI, INDONESIA

18TH TO 21ST NOVEMBER, 2012

Payment with regard to the Membership and Registration should be made online individually. Membership fee is handled by the LawAsia Secretariat, Australia. The LawAsia Conference Secretariat in Indonesia will accept Registrations for the Conference, only from the Members who have paid up the Membership fee for the current period.

Please visit following websites for further details;
 LawAsia Membership: <http://lawasia.asn.au>
 Registration: <http://registration.lawasia2012.com/registration.html>

For Further Details Please Contact:
 Godfrey Cooray (Chairman/Overseas Relations Committee) - 0722270792
 Pansy N. Joseph (Convenor/Overseas Relations Committee) - 0773186022
 Ms. Gnana (Coordinator/BASL) - 0112447134 / 0112331697

NOTICES

COMMONWEALTH LAW CONFERENCE

One of the most prestigious events on the international legal calendar is the biennial Commonwealth Law Conference. In April 2013, judges, legal academics and practising lawyers from across the Commonwealth will meet in Cape Town, South Africa's oldest and most beautiful city, to debate current issues affecting the rule of law, commercial law, legal practice and the profession at the 18th Commonwealth Law Conference.

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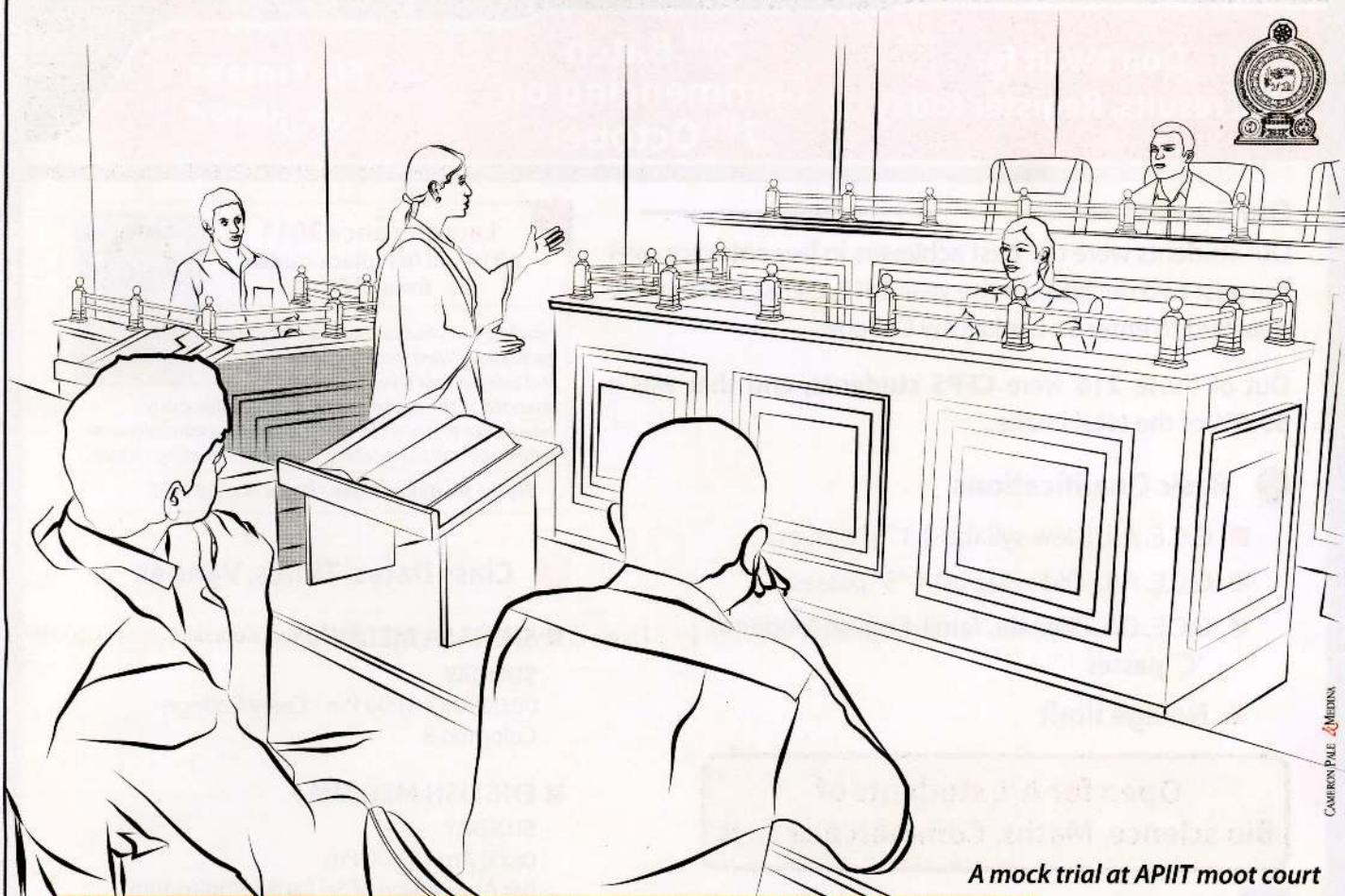
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Introduction to ICT Law	Sunil D. B. Abeyaratne	1,200.00
Criminal Defence (Sinhala)	U. R. de Silva	1,200.00
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■ ENGLISH MEDIUM :

SUNDAY

08:00 Am - 01:00 Pm

Bar Association of Sri Lanka Auditorium,
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