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

1. T.I.G. Suriyaarachchi

2. D.N. Suriyaarachchi

3. F.N. Suriyaarachchi

All of Halpathota, Baddegama.

PLAINTIFFS

C.A. Case No.272/1997 (F)

D.C. Colombo No.17364/L

-Vs-

1. L.C. Liyanage *alias* Gunewardena

No.5/4A, Sri Naga Vihara Road,

Pagoda, Nugegoda.

2. People's Bank

Sri Chittampalam A. Gardiner Mawatha,

Colombo 2.

DEFENDANTS

AND NOW BETWEEN

1. T.I.G. Suriyaarachchi

2. D.N. Suriyaarachchi

3. F.N. Suriya arachchi

All of Halpathota, Baddegama.

PLAINTIFF-APPELLANTS

-Vs-

1. L.C. Liyanage *alias* Gunewardena  
No.5/4A, Sri Naga Vihara Road,  
Pagoda, Nugegoda.
2. People's Bank  
Sri Chittampalam A. Gardiner Mawatha,  
Colombo 2.

DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Chula Bandara with Gayathri Kodagoda for the  
Plaintiff-Appellants  
Mrs. P. Narendran for the 1<sup>st</sup> Defendant-  
Respondent  
Kavinda Dias Abeysinghe for the 2<sup>nd</sup> Defendant-

Decided on : 08.06.2018

A.H.M.D. Nawaz, J.

This case raises the interesting question of jurisdiction of a District Court in relation to the constituent elements of Section 9 of the Civil Procedure Code (CPC).

In a nutshell the land in respect of which the case was instituted is situate in *Galle*, while the current owner of the land-the People's Bank is headquartered in *Colombo*. The Plaintiff-Appellants (hereinafter sometimes referred to as "the Plaintiff") instituted this action because the 2<sup>nd</sup> Defendant in the case the People's Bank *resides* within the local jurisdiction of the District Court of *Colombo*. An objection was taken that the District Court of *Colombo* was a wrong forum, because the land was situated in *Galle*. The

learned Additional District Judge of *Colombo* upheld this objection and thus one aspect of the appeal impinges on the interpretation of Section 9 (a) and (b) of the CPC.

Another bone of contention was *res judicata* that was raised before the learned District Judge in relation to a previous case-an application for a writ of certiorari in the Court of Appeal that had ended in a dismissal for the Plaintiffs particularly the 1<sup>st</sup> Plaintiff in this case who was the substituted Petitioner in the Court of Appeal and the objection of *res judicata* was raised by the 1<sup>st</sup> Defendant in bar of the regular suit in the District Court of *Colombo* and the learned District Judge of *Colombo* upheld that objection as well. It is against these two orders of the learned District Judge of *Colombo* that the Plaintiffs have appealed.

But in the course of the argument this Court raised another fundamental question before all counsel who represented the parties-i.e whether the learned District Judge had jurisdiction at all to entertain the plaint in view of the ouster clause in Section 70 (3) of the Finance Act, No. 11 of 1963. Though the question of ouster of jurisdiction was raised as Issue No. 14 by the Counsel for the People's Bank, this was not tried as a preliminary question of law. The question I posed to Counsel was-if the District Court had not engaged in this question and dealt with it, could this Court deal with it in appeal? These are issues that surface to the fore in this case and I look upon all these issues as three distinct jurisdictional bars that come up for determination namely 1) can jurisdiction be conferred on the District Court of *Colombo* when the land is situate in *Galle*? 2) will *res judicata* apply if the previous case was one for judicial review? 3) Does an ouster or privative clause that is engaged in this case bar the action in the District Court of *Colombo*?

It is this last question that did not engage the attention of the learned Additional District Judge of *Colombo* though the issue was quite live before her. I must say that these jurisdictional bars (Section 9(b) of the CPC, *res judicata* and ouster clause) would all come within the chapeau of Section 9 of the Civil Procedure Code though some of the principles underlying these jurisdictional objections may find their anchor either in

case law or any other section of the CPC or the statute pertaining to the People's Bank. Before I deal with these questions, a fascicule of facts needs narration.

In the end by her order dated 15.05.1997 the learned Additional District Judge of *Colombo* has rejected the plaint and dismissed the action of the three Plaintiff-Appellants on the two jurisdictional issues alluded to above. The Plaintiff-Appellants seek to set aside the judgment dated 15.05.1997 and the facts and circumstances that led to the dismissal of the plaint could now be set down.

The 2<sup>nd</sup> Defendant-Respondent in this case (the People's Bank) had become the owner of the land described in the schedule to the plaint in this case by virtue of a vesting order made by the then Minister of Finance in terms of Section 71 of the Finance Act, No. 11 of 1963 as amended. The land is situated in *Galle* and the vesting order had been made on the basis of a determination reached by the bank to acquire the premises, upon an application made by the original owner who had lost title to the property owing to a conditional transfer he had effected.

The mother of the Plaintiffs then filed an application in the Court of Appeal for a writ of certiorari to have the vesting order quashed, pleading, *inter alia*, that she had been in occupation of the property since 1963, having been placed in possession of the land by the transferee of the conditional transfer. Even in that application before the Court of Appeal she took up prescription but S.N. Silva, P/CA (as His Lordship then was) dismissed the application for judicial review, as the ground on which the Petitioner had sought the writ namely failure to afford a hearing at the inquiry conducted by the People's Bank, was not established. Her son T.I.G. Suriarachchi-the 1<sup>st</sup> Plaintiff in the District Court action was thereafter substituted in the writ application as the original Petitioner-his mother had passed away. S.N. Silva, P/CA (as His Lordship then was) made the observation in the writ application that the Petitioner could not plead a breach of the principles of natural justice having failed to adduce material in support of his case when he had had notice of the inquiry (*sic*). A special leave to appeal

application to the Supreme Court in terms of Article 128 (2) of the Constitution was refused on 16.01.1996.

On the same day as the special leave to appeal application was refused in the Supreme Court, the Plaintiffs (successors of Mrs. Mary Suriarachchi-the Petitioner in the application for judicial review and mother of the Plaintiffs) instituted this regular action in the District Court of *Colombo* for a declaration of title by prescription.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendant-Respondents (L.C. Liyanage *alias* Gunawardene and the People's Bank) filed separate answers denying the claim of the Plaintiffs' claim to prescriptive title and pleaded that the plaint did not disclose a cause of action and it did not comply with Section 40(c) of the Civil Procedure Code (CPC). The 1<sup>st</sup> Defendant L.C. Liyanage *alias* Gunawardene is the daughter of the original owner of this land, whilst the 2<sup>nd</sup> Defendant is the People's Bank which became the owner of the land by virtue of the vesting order made by the Minister.

The 1<sup>st</sup> Defendant's answer brought to the fore an important question namely as the land was situated in *Galle*, the regular action must have been filed within the local limits of the jurisdiction of the District Court of *Galle*. The District Court of *Colombo* would have no jurisdiction at all to hear and determine this action. The 1<sup>st</sup> Defendant further pleaded that in view of the Writ Application in the Court of Appeal bearing No. 918/85, which was dismissed by S.N. Silva, P/CA (as His Lordship then was), a plea of *res judicata* would operate. The plea would bar the regular action being filed.

The 2<sup>nd</sup> Defendant-Respondent-People's Bank stated in its answer that in view of the application for judicial review bearing No. 918/85, which had refused the application of the 1<sup>st</sup> Plaintiff for a writ of certiorari, the Plaintiffs were estopped from canvassing any title in a regular action. Quite significantly the 2<sup>nd</sup> Defendant-Respondent Bank also pleaded the ouster clause found in Section 71(3) of the Finance Act, No. 11 of 1963. The ouster clause was pleaded in the answer and raised as an issue but the learned District Judge of *Colombo* took up for determination as preliminary issues of law only the following:-

### Issue No. 5

Does the Court have jurisdiction to hear and determine this action for the reasons stated in paragraph 9 of the 1<sup>st</sup> Defendant's answer?

### Issue No. 6

Does the Court of Appeal decision in CA No. 918/85 referred to in paragraph 10 of the 1<sup>st</sup> Defendant's answer make the proceedings *res judicata*?

### Issue No. 7

If issues 5 and 6 are answered in the affirmative, should the action be rejected?

The learned District Judge of *Colombo* answered both jurisdictional questions in favour of the Defendants.

As regards Issue No. 5, the learned District Judge stated that as the land was not situated within the local limits of the jurisdiction of the District Court of *Colombo*, an action in *Colombo* cannot be instituted and proceeded with.

On the question of Issue No. 6 which pertained to the plea of *res judicata*, the learned District Judge held that the plea would be upheld. In other words, the application for a writ of certiorari in the Court of Appeal would preclude a regular action being filed in the District Court. The writ application barred the regular action. That was thus the decision of the learned District Judge. Thus the door to jurisdiction of the District Court was shut on the Plaintiffs. Hence this appeal.

Mr. Chula Bandara, Counsel for the Plaintiff-Appellants quite strenuously argued that the learned District Judge got both answers to the two issues wrong. He contended that even though the land was situated within the local limits of the jurisdiction of the District Court of *Galle*, the owner of the land namely the People's Bank (the 2<sup>nd</sup> Defendant) had its head office in *Colombo* and therefore it "*resided*" within the parameters of Section 9(a) of the CPC, which would confer jurisdiction on the District Court of *Colombo*. The contention of Mr. Chula Bandara is that the four constituent

elements of Section 9 would enable a Plaintiff to bring his case under any of them and merely because the location of the land is within the jurisdiction of the District Court of *Galle* which will have jurisdiction by virtue of Section 9(b) of the CPC, it does not mean that Section 9(a) cannot confer jurisdiction on the District Court of *Colombo*, as the head office of the People's Bank is situate in *Colombo*. But the learned Additional District Judge of *Colombo* held otherwise.

The question of *res judicata* too was answered against the Plaintiffs and the action was dismissed.

Though in my view the issue on ouster clause which was not tried as a preliminary issue of law in the District Court would prove dispositive of this appeal, I would venture to state that the answers given by the learned District Judge based on location of the land and *res judicata* are open to impingement having regard to CPC and legal precedents.

#### **Issue No. 5-Jurisdiction of the District Court**

As I have stated above Issue No. 5 adverted to the jurisdiction of the District Court of *Colombo* having regard to the locus of the land which is the subject-matter of the action. The argument of Mr. Chula Bandara for the Plaintiff-Appellants was that as the head office of the 2<sup>nd</sup> Defendant People's Bank was in Colombo, the action could be instituted within the local limits of the jurisdiction of the District Court of *Colombo*.

Section 9 of the Civil Procedure Code provides the procedure as to which court in which an action could be instituted.

Subject to the pecuniary or other limitations prescribed by any law, action shall be instituted in the Court within the local limits of whose jurisdiction:-

- (a) a party defendant resides; or
- (b) the land in respect of which the action is brought lies or is situate in whole or part; or
- (c) the cause of action arises; or

(d) the contract sought to be enforced was made.

Out of the two Defendants in this case, the 1<sup>st</sup> Defendant resides in *Nugegoda*, whilst the head office of the 2<sup>nd</sup> Defendant People's Bank is located within *Colombo*. But the *res* is in *Galle*. The case of *Fernando v. Waas* (1891) 9 S.C.C. 189 was the first case to consider this situation. The Court (Burnside, C.J., with Dias, J agreeing) held on 29<sup>th</sup> September 1891) that an action could be brought in the court within the jurisdiction of which one of several defendants resided, though that court would not have jurisdiction over the land or the party in possession if sued alone-*see* CPC, Section 9(b), (c) and (d). In other words the action could be brought in the Court within whose jurisdiction any one of the Defendants resided. There came a conflicting decision later in *Tirimandura v. Dissanaike* (1896) 2 N.L.R. 290 which held that to satisfy the requirements of Section 9(a) all the Defendants should reside within the jurisdiction of the court, if it was sought to get a judgment against all of them. Thus there was a conflict between *Fernando v. Waas* and *Tirimandura v. Dissanaike* (*supra*).

This conflict was referred by Driberg, J. to a bench of three judges in *Hussan v. Peiris* (1932) 34 N.L.R. 238. This was a partition action in which the Plaintiff sued seven Defendants all resident within the jurisdiction of the District Court of *Kalutara* to partition the land situate at *Beruwala*, a place which was at that time beyond the jurisdiction of the District Court of *Kalutara*. So the Plaintiff and all seven Defendants were resident within the jurisdiction of the District Court of *Kalutara* and the action was instituted in that court, though the land was situated in *Beruwala*. The intervenients (8<sup>th</sup> to 9<sup>th</sup> Defendants) who were living in *Beruwala*, claimed a portion of the land and pleaded that the District Court of *Kalutara* had no jurisdiction. The District Judge upheld their plea and dismissed the action.

Macdonell, C.J. Garvin, S.P.J. and Dalton, J. held that an action may be brought in a District Court that any party Defendant resides, viz, any defendant against whom the right to any relief is alleged to exist. In other words, a party Defendant in Section 9(a) of the CPC would mean any party Defendant. At p.242 Macdonell, C.J. alluded to

Section 14 of the CPC which speaks of a Defendant “*against whom the right to any relief is alleged to exist*”. Then the term “party defendant” will not include a person made a party for the reason only that this is necessary for the proper constitution of the action, but not because any relief against him is claimed by the Plaintiff.

Macdonell, C.J. continued:-

“Further: if a “party defendant” means one “*against whom the right to any relief is alleged to exist*”, this definition of the term, will prevent a plaintiff commencing an action in a particular district against one residing in the same who is in the same interest as the plaintiff and is therefore a nominal defendant-one who in *Baker v. Wait* L.R.9 Eq.103, was described as “a pocket defendant”- whereby he would compel, by a side wind, the real defendant, the one against whom a right to relief was alleged to exist, to come and be sued out of his own District.”

At p.244-245 of the judgment Dalton, J. also commented that any Defendant means a substantial Defendant and not a “pocket” Defendant as mentioned in *Baker v. Wait* (*supra*). In other words the term a party Defendant in Section 9 (a) of the CPC has to be read with Section 14. If there is a plurality of Defendants and one of them is put forward to found jurisdiction based on his residence within the jurisdiction of a particular court, he cannot be a “pocket” Defendant. He cannot be a dummy. He has to be a real or substantial Defendant against whom a right to relief is alleged to exist. In other words where a party Defendant resides within the jurisdiction of a particular District Court, the other Defendants residing outside its jurisdiction, and although the land may not be within the local jurisdiction, the District Court nevertheless has jurisdiction.

Though the learned Judges in *Hussan v. Peiris* (*supra*) did not allude to it, I find a compelling reason for the above interpretation. All the four jurisdictional bases of Section 9 of the CPC are framed in the alternative. Every jurisdictional base, from (a) to (d) is followed by the disjunctive Or. The disjunctive Or follows each jurisdictional head. Then it is sufficient if one of the elements in 9 (a) or 9 (b) or 9 (c) or 9 (d) is present to found the jurisdiction of a District Court, subject of course to the caveat that

if Section 9 (a) is to be used, a party Defendant or any party Defendant has to be real or substantial. He cannot be a pocket Defendant.

Here the 2<sup>nd</sup> Defendant-the People's Bank whose head office was within *Colombo* was certainly a substantial Defendant against whom the plaintiff alleged that a right to relief existed though the *res* was in *Galle*, Therefore the action was properly instituted in the District Court of *Colombo* and the learned Additional District Judge was in error when she answered Issue No. 5 (*Does the Court have jurisdiction to hear and determine this action for the reasons stated in paragraph 9 of the 1<sup>st</sup> Defendant's answer?*) in the negative and rejected the plaintiff. But as I will presently show, the learned Additional District Judge embarked upon an inquiry to answer this issue in a jurisdiction which the Court did not possess as a result of the ouster clause.

Before I part with Issue No. 5, the question of residence for a corporate personality such as the People's Bank to found jurisdiction in terms of Section 9(a) remains to be answered and I need only to make some familiar observations as follows.

Does the People's Bank reside within the jurisdiction of the District Court of Colombo?

In *Sirimavo Bandaranaike v. Times of Ceylon Ltd.*, II Sriskantha's Law Reports vol. II 134 at 139, Samarakoon, C.J (with Wanasundera, J. and Colin Thome, J) agreeing said "A registered office gives the company a domicile and residence".

In *Martin Silva v. Central Engineering Consultancy Bureau and Another* (2003) 2 Sri L.R. 228 Weerasuriya, P C/A with Balapatabendi, J. held:-

*"The Plaintiff-Appellants have distinctly averred that the registered office of the 1<sup>st</sup> Defendant was at 415, Bullers Road Colombo 7. Therefore, this averment is sufficient for the purpose of conferring jurisdiction on the District Court of Colombo."*-p.233.

In *Somasiri v. Ceylon Petroleum Corporation* (1992) 1 Sri L.R. page 39 at 43 it was held: "Even if the residence of the corporation is not distinctly and clearly averred it is no ground to reject the plaintiff or dismiss the action, when the Plaintiff-Appellant has

averred the principal place of business at the mentioned address as within the jurisdiction of the court”.

In *Somasiri v. Ceylon Petroleum Corporation* (*supra*) Ananda Coomarasamy, J. explained at page 42- “The Ceylon Petroleum Corporation was having its head office at *Kollupitiya* and carries on its business all over the island through its branches, but has its principal place of business at *Kollupitiya* where it has its Head Office, from where it had its central control and administration. Therefore it is quite clear that the Ceylon Petroleum Corporation is deemed to reside for purpose of suit wherever it carried on business in its own name”

Thus the *cursus curiae* in Sri Lanka is for the conferment of jurisdiction on the court on the basis of corporative residence, the corporate residence being determined by the principal place of business and / or registered office.

Thus all the elements of Section 9(a) were fully satisfied in the case of the 2<sup>nd</sup> Defendant Bank.

#### **Res Judicata-Issue No. 6**

Does the Court of Appeal decision in CA No. 918/85 referred to in paragraph 10 of the 1<sup>st</sup> Defendant’s answer make the proceedings *res judicata*?

The above plea was answered in the affirmative by the learned Additional District Judge. The learned Additional District Judge concluded that the application for a writ of certiorari constituted *res judicata*, which precluded a regular action being filed in court.

The plea of *res judicata* often reminds me of the tantalizing question of how many bites of the cherry or apple must be permitted. The answer to that question depends on whether the apples are the same or different. At this stage it is apposite to take note of the observations of Dr. Sunil F.A. Coorey in his work *Principles of Administrative Law in Sri Lanka*, 3<sup>rd</sup> Edition Vol. II (2012) at p.1009 wherein the learned author states that an application for a prerogative writ is not an “action” or “suit” within the meaning of

statutory provisions and that statutory provisions dealing with an “action” or “suit” have no application to a prerogative writ.

It was Basnayake, C.J. in *Herath v. The Attorney-General et al* 60 N.L.R 194 who expressed this compendious view:-

*“The whole of our law of res judicata is to be found in sections 34, 207 and 406 of the Civil Procedure Code. The decrees spoken of in section 207 are decrees drawn up by the court under section 188 after judgment has been pronounced in the manner contemplated in section 184, 185, 186 and 187 of the CPC. Section 207 will therefore apply only to decrees pronounced after there has been adjudication on the merits of a suit and not to a decree entered under section 87 of the CPC in consequence of the non-appearance of the plaintiff”*

In the case of *Jayawardene v. Arnolishamy* 69 N.L.R. 497 Samarawickrama, J. having analysed the authorities on the question of “subject matter”, opined that “The term ‘subject matter’ in Section 406 of the CPC does not mean the property in respect of which an action is brought. It includes the facts and circumstances upon which the Plaintiff’s right to the relief claimed by him depends. It is incumbent upon a party who makes a plea of *res judicata* to place before Court, material necessary to show what the matters were in dispute in the earlier action and that matters in dispute in the action under consideration are the same.”

In the same case it was further held that, “*The dismissal of an action upon its withdrawal by the plaintiff gives rise to the statutory bar provided for in section 406(2) of the Civil Procedure Code. It does not, however, provide the basis for a plea of res judicata properly so termed, because there is no adjudication. That the decision of the question raised in the action that was withdrawn, had it proceeded to judgment, would have been decisive in respect of some of the issues that arise in the subsequent action is of no moment if the subject matters of the actions are not the same*”.

### **The previous judgment must be a final judgment**

It is also settled law that the previous judgment to operate as *res judicata*, it should have been finally adjudicated on the cause of action and between the same parties. The

matter in question must have been submitted for the decision of the Court and must have been adjudicated upon and decided or determined as to the rights of the parties. An order regarding possession made in criminal proceedings does not operate as *res judicata* in respect of the question of title arising in a subsequent civil action-see *Nilabdeen v. Farook* 1984 (1) Sri L.R. 14. It must be noted that the jurisdiction of the Primary Court to inquire into disputes affecting land where a breach of the peace is threatened or likely, is purely on the question of possession and not on title.

*“A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution and is absolute, complete, certain and when it is lawfully subject to subsequent rescission, review or modification by the tribunal which pronounced it.” (Spencer Bower, Turner & Handley on the Doctrine of res judicata Sec.102 p.88-89)*

So in light of the above principles I would hold that the application for a writ of certiorari could not have operated as *res judicata*. As it would have, the writ application bearing No. CA 918/85 never went into title and it must be borne in mind that an application for judicial review investigates process rights such as failure to afford a hearing and traditionally it would never go into the merit of a decision. This is the traditional view of judicial review. English Courts have gone into the distinction between merits of a decision and procedural defects that preceded the making of a decision. In *Chief Constable of the North Wales Police v. Evans* (1982) 1 WLR 1155, Lord Brightman stated:-

*“Judicial review is concerned, not with the decision, but with the decision making process....”*

In the writ application bearing No. 918/85, S.N. Silva, P/CA (as His Lordship then was) never went into the title of the Plaintiffs vis-à-vis that of the People's Bank. There was only the decision making process before the vesting order that was challenged before the then President of the Court of Appeal. The challenge was based on an absence of the right to a hearing and the learned President of the Court of Appeal (as His Lordship then was) concluded that as the ground for judicial review was not established, he

would dismiss the application for a writ of certiorari. But the later action filed by the Plaintiffs in the District Court of *Colombo* that has led to this appeal was a *rei vindicatio* action. Metaphorically the apples were not the same. Judicial review and an action *rei vindicatio* are not comparable. Therefore the learned Additional District Judge of *Colombo* was quite incorrect when she held that *res judicata* applied in this case.

I would also adopt the following statement of William Wade & Christopher Forsyth in their tome *Administrative Law* 11<sup>th</sup> Edition (2014) at page 206, which sums it all:-

“.....in these procedures the Court ‘is not finally determining the validity of the tribunal’s order as between the parties themselves’ but ‘is merely deciding whether there has been a plain excess of jurisdiction or not’. They are a special class of remedies designed to maintain due order in the legal system, nominally at the suit of the Crown and that they may well fall outside the ambit of the ordinary doctrine of *res judicata*”.

Therefore the learned Additional District Judge of *Colombo* was once again in error when she decided that the writ application filed by the mother of the Plaintiffs constituted *res judicata*.

One could thus see that the learned Additional District Judge of *Colombo* got both answers to Issues No. 5 and 6 wrong. Ordinarily I would have inclined to the view that in these circumstances the action must be remanded back to the District Court of *Colombo* to proceed.

But the question arises whether the learned Additional District Judge had jurisdiction at all in the first instance to embark on an inquiry to answer the above two issues in light of the fact that there was a limiting factor to the jurisdiction of the District Court namely the ouster clause in Section 71 (3) of Finance Act, No. 11 of 1963 which immunizes the decision of the People’s Bank to acquire the premises in question.

In fact Section 9 of the CPC begins with the words-“*Subject to the pecuniary or other limitations prescribed by any law, action shall be instituted in the Court within the local limits of whose jurisdiction.....*”. The opening words.....*other limitations* in Section 9 of the CPC would

include an ouster clause and in my view what was fundamental to the jurisdiction of the District Court of Colombo or any original court for that matter was raised in the answer and issues of the People's Bank-the 2<sup>nd</sup> Defendant to the case.

The relevant privative or exclusion clause is Section 71 (3) of the Finance Act, No. 11 of 1963 which provides that the determination of the Bank shall be final and conclusive and shall not be called in question in any Court. As is trite, this privative clause will not preclude judicial review but a regular action in the District Court. The Court cannot but refer to the case of *Atapattu and Others v. People's Bank and Others* (1997) 1 Sri L.R. 208 where M.D.H. Fernando, J. rejected the argument that Section 71 (3) of the Finance Act, No. 11 of 1963, as amended deprived the Court of Appeal of jurisdiction to issue an order in the nature of a writ of *certiorari* under Article 140 of the Constitution. It has to be noted that that Section 71 (3) of the Finance Act, No. 11 of 1963, as amended is a pre-Constitution ouster clause which is kept operative under Article 168 (1) of the Constitution, read with Section 22 of the Interpretation Ordinance. The view of the Supreme Court that judicial review is available despite ouster clauses has since been followed by the Supreme Court-see *Sirisena Cooray v. Tissa Dias Bandaranayake* (1999) 1 Sri L.R. 1 at p 13-14; *Wijayapala Mendis v. Perera* (1999) 2 Sri L.R. 110 at 119 and *Moosajees Ltd., v. Arthur* (2004) 2 ALR 1 at p.15. But an original action in the District Court would be embargoed by this particular ouster clause that we encounter in this case namely Section 71 (3) of the Finance Act, No. 11 of 1963, as amended.

The existence of this clause would in my view create a patent want of jurisdiction in the District Court. Tennekoon, C.J. in *Beatrice Perera v. Commissioner of National Housing* (1974) 77 N.L.R. 361 drew a distinction between 'patent want of jurisdiction' and 'latent want of jurisdiction' at p.366.

*"Lack of competency in a court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are*

*jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or a defectus triationis. Both classes of jurisdictional defects result in judgments or orders which are void. But an important difference must also be noted..... In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may stop him from making or attempting to establish by evidence, any averment to the effect that the court was lacking in contingent jurisdiction."*

Tennekoon, C.J stated that the distinction is illustrated in **Shortt on Mandamus** (1887) and **Spencer Bower on the Law Relating to Estoppel by Representation** (1<sup>st</sup> Edition (1923) at p.188-189). The learned Chief Justice further held that a judgment entered by the Court without jurisdiction is a nullity and can be challenged both in the very Court and in the proceedings in which it was had and also collaterally. But here is a Defendant who pleaded the want of jurisdiction in its answer and raised it as an issue. No amount of waiver or acquiescence on the part of the Defendants in suggesting that the Court should assume jurisdiction to try as preliminary issues of law only Issues No. 5 and 6 could have conferred any jurisdiction on the District Court.

Though the Court got both answers to Issues No. 5 and No 6 wrong, that exercise was undertaken in an absence of jurisdiction. The usurpation of jurisdiction cannot validate the proceedings in the teeth of the ouster clause namely Section 71 (3) of the Finance Act, No. 11 of 1963 which declares that the determination of the Bank shall be final and conclusive and shall not be called in question in any Court. Likewise Section 71 of the Finance Act, No.11 of 1963 as amended gives the modes of acquisition and the acquisition is focused on lands which are:-

- a) sold in execution of a mortgage decree by a court;
- b) transferred by an owner in satisfaction of a debt;

- c) transferred by an owner secured by a Mortgage;
- d) a conditional transfer.

If the Plaintiffs or their predecessors had prescribed against the conditional transferee in this case, a regular action on prescription should have been instituted against the conditional transferee long before the People's Bank began its process of acquisition, which right has been statutorily granted to it. It is too late in the day to institute an action on prescription 15 years after the vesting order had been made in respect of the land and the 2<sup>nd</sup> Defendant Bank had become the owner of the land. The District Court is precluded from entertaining this action by virtue of Section 71 (3) of the Finance Act, No. 11 of 1963 as amended.

The title paramount by virtue of the vesting order has overtaken any adverse rights which the Plaintiffs allege their predecessors might have manifested against the conditional transferee, despite the fact that the predecessors were let into the property with the leave and license of the conditional transferee. If this permissive possession had turned adverse, there was no reason why they could not have presented a plaint in the appropriate court to prove prescriptive title at an anterior point of time. Having let time lapse, it will be tantamount to a reversal of the jurisdictional bar if this Court were not to enforce the strict terms of the finality clause. The People's Bank should be permitted to carry into effect the intent and purpose of provisions of the Finance Act which was enacted to afford relief to hapless owners of land who had parted with their lands owing to impecunious circumstances. Otherwise the vesting order would become infructuous if the finality clause is rendered inoperative in respect of a District Court action.

Therefore I hold that the ouster clause operates as a total or patent want of jurisdiction and accordingly this Court cannot remit this case to the District Court to proceed on the other remaining issues. Notwithstanding this jurisdictional bar the learned Additional District Judge went ahead to try Issues No. 5 and Issues 6, which task was undertaken on the presumed assumption that she had jurisdiction. But this was in a

jurisdiction she did not possess. In *Spencer Bower on the Law Relating to Estoppel by Representation*-(2003) 4<sup>th</sup> Edition at p.172-it is declared that no contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of land, or add to the jurisdiction lawfully exercised by any judicial tribunal; it is equally plain that the same results cannot be achieved by conduct or acquiescence by the parties. In the words of Lord Reid: ‘...it is a fundamental principle that no consent can confer on a Court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such Court or tribunal has acted without jurisdiction’- see *Essex CC v. Essex Incorporated Congregational Church Union* [1963] AC 808 at 820-1. Since the total want of jurisdiction bars this action, the District Court cannot proceed to try the remaining issues.

So I would dismiss the action *nunc pro tunc* on the issue of lack of jurisdiction embodied in Issue No. 14 and the appeal would accordingly stand dismissed.

JUDGE OF THE COURT OF APPEAL