THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2010] 1 SRI L.R. - PART 8

PAGES 197 - 224

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company (Printers) Ltd.

Price: Rs. 25.00

DIGEST

On 17.01.2000, the respondent had filed a petition under Section 328 of the Civil Procedure Code, claiming *inter alia* that he was not a party to the said action between the appellant and the defendants, and that he was ejected by the Fiscal on10.01.2000. Accordingly the respondent prayed, *inter alia* that he be restored to possession of the premises in question (A2).

The appellant had denied that the respondent ever had any possession of the land and therefore stated that the respondent was not ejected by the Fiscal.

It was further submitted that the respondent had not adduced any oral evidence to prove that he was in possession of these premises at the time the Decree in the District Court was executed or that he was ejected by the Fiscal. Both parties had tendered written submissions and learned Additional District Judge of Colombo by his Order dated 14.09.2000, dismissed the respondent's application for want of proof of the facts he had adduced in his application. Learned Additional District Judge in his Order had stated that in the said Section 328 application, the onus was on the respondent to prove that he was in possession of the said premises at the time the Decree was executed and that since the respondent had failed to discharge this burden, his application should be dismissed.

The respondent had filed a Revision application, against the said Order of the learned Additional District Judge of Colombo on 14.09.2000, in the Court of Appeal.

The respondent, in the Court of Appeal contended that he had purchased the land in question from the 2nd defendant in D. C. Colombo Case No. 16694/L and that at the time the said case was instituted, the 2nd defendant was already

dead. Accordingly the respondent contended that the exparte Decree obtained against him is bad in law and that no summons were served on the 2nd defendant or his heirs. Further it was contended that the respondent's Counsel never agreed to have the Section 328 inquiry decided on written submissions alone and that written submissions were tendered only at the request of the learned Additional District Judge, who had informed Counsel that he would allow the parties to lead oral evidence, if necessary.

The appellant, in writing had submitted that to that date the respondent had not filed a case in the District Court against the appellant. Further it was contended that the respondent had no right to file a Revision application in the Court of Appeal to canvass an order made in terms of Section 328 of the Civil Procedure Code as he was provided with an alternative remedy under Section 329 of the Civil Procedure Code.

The Court of Appeal delivered its Order on 12.11.2001 allowing the respondent's application (y).

Learned President's Counsel for the respondent strenuously contended that the appellant had been fraudulent from the inception of his application before the District Court and referred to the facts that the appellant had filed action against 2 persons and had obtained an ex-parte Decree. By this the respondent, who was the lawful, owner was dispossessed. The respondent had become the owner of the land in question by Deed No. 671 in 1990. He had filed action (18615/L) against the pupil priest of the appellant on 01.07.1999 and had obtained an injunction preventing the said pupil priest, who was the defendant in that application from dispossessing the appellant. Learned President's Counsel for the respondent submitted that the said enjoining order still remains in

force and notwithstanding that, the appellant took out Writ and dispossessed the respondent, who was the plaintiff in Case No. 18615/L. Learned President's Counsel for the respondent further contended that it was common ground that prior to the institution of the present action, the 2nd defendant had passed away. It was also contended that the prayer to the plaint clearly indicated that both defendants were to be ejected. However, there was only one Decree against both defendants. The contention of the learned President's Counsel for the respondent was that since the 2nd defendant was dead prior to institution of action and no steps were taken for substitution, that the said action is a nullity and in any event the Decree is a nullity. Accordingly the submission was that, no Writ could have been taken out in terms of the said Decree and therefore all execution proceedings were null and void.

In the circumstances learned President's Counsel submitted that the respondent had been dispossessed consequent to an invalid action, an invalid Decree and invalid execution proceedings and therefore the respondent must be put back into possession.

Having stated the facts of this appeal and the submissions of the learned President's Counsel for the respondent and the learned Counsel for the appellant, let me now turn to consider the questions on which special leave to appeal was granted by this Court.

1. **Whether a petitioner in an application made under Section 328 of the Civil Procedure Code, against whom an Order has been made by the District Court, is entitled to canvas the correctness of the Order made by the District Judge by way of an application in Revision in the Court of Appeal?**

Learned Counsel for the appellant, strenuously argued that the respondent could not have filed a Revision application to canvass an order made under Section 328 of the Civil Procedure Code, since an alternative remedy has been provided in terms of Section 329 of the Civil Procedure Code. Learned Counsel referred to the decisions in ***H. S. Wattuhewa v. S. G. Guruge*** *(1)* ***and Letchumi v. Perera and another*** *(2)*. The contention of the learned Counsel for the appellant was that where a party seeks to revise an order made under Section 328 of the Civil Procedure Code without availing himself of the alternative remedy provided in terms of Section 329 of the Civil Procedure Code, the Courts will not exercise the revisionary power in favour of such a party. It was further contended that since the facts of the present appeal are identical to the facts of the aforementioned judgments, the respondent was not entitled to file a Revision application in the Court of Appeal.

Section 329 of the Civil Procedure Code refers to the orders made under Section 326 or Section 327 or Section 328 and reads as follows:

> *"No appeal shall lie from any order made under Section 326 or Section 327 or Section 328 against any party other than the judgment-debtor. Any such order shall not bar the right of such party to institute an action to establish his right or title to such property."*

In *Letchumi v. Perera and another (supra)*, Edussuriya, J., considering the alternative remedy provided by Section 329 of the Civil Procedure Code, had cited with approval the reference made by Justice Senanayake in *H. S. Wattuhewa v. S. G. Guruge (supra)* that,

> "In my view this Section gives an alternative remedy to an aggrieved party in such a situation. It is the duty of the Court to carry out effectually the object of the statute. It must be so construed as to defeat all attempts to do so or avoid doing in a direct or circuitous manner that which has been prohibited or enjoined."

There is no dispute as to the applicability of Section 329, as an alternative remedy to an aggrieved party, who had sought to revise an order made in terms of Section 328 of the Civil Procedure Code, which position has been strengthened by the decisions of the Court of Appeal (*H. S. Wattuhewa v. S. G. Guruge (supra)* and *Letchumi v. Perera and another (supra).* Moveover, the Court of Appeal had agreed with the learned Counsel for the appellant that a party, whose claim under Section 328 of the Civil Procedure Code had been rejected cannot seek relief by way of revision, when he has not availed himself of the alternative remedy provided by Section 329 of the Civil Procedure Code.

Therefore, there cannot be any disagreement with regard to the contention of the learned Counsel for the appellant on the applicability of Section 329 of the Civil Procedure Code.

However, the difficulty which had arisen in this matter was with regard to the Decree obtained in the District Court, which was considered by the Court of Appeal as a Decree, which was invalid. The question that had to be considered by the Court of Appeal in view of the applicability of Section 329 of the Civil Procedure Code was as to whether the learned District Judge had duly complied with all relevant and necessary procedural requirements relating to the service of summons at the ex-parte trial against the 2nd defendant before the District Court, who was the predecessor in title of the respondent.

The appellant, who was the plaintiff in the District Court case, in his plaint dated 11.05.1994 had claimed title to a land in extent of 1 Acre and sought a declaration of title and ejectment against the two defendants namely, B. W. Premadasa (1st defendant) and M. S. Perera (2nd defendant) stating that they had entered into forcible possession of the appellant's land on 23.02.1993. The 1st defendant had filed answer to the effect that he had no rights in the land in question, stating that he was only a broker, who had entered into a sale agreement with the 2nd defendant M. S. Perera and was not a title holder. The 2nd defendant was the predecessor of the respondent. The 2nd defendant had sold his property to the respondent by Deed No. 671 dated 22.11.1999. The contention of the learned President's Counsel for the respondent was that the 2nd defendant was never served with summons.

Journal Entry of the District Court dated 23.11.1994 shows that the summons had been served on the 1st defendant, but the Fiscal had not met the 2nd defendant (94.11.23 පළවන විත්තිකරුට සිතාසි භාරදී ඇති බවත්, 2 වන විත්තිකරු හමු නොවූ බවත් පිස්කල් වාර්තා කරයි). On that day, the District Court had made Order giving a final date for the 1st defendant's answer, but had made no order regarding the service of summons on the 2nd defendant. Even thereafter no order had been made for the issue of summons on the 2nd defendant, and the appellant had not taken any steps to issue summons on him. On 27.03.1997, the case was fixed for ex-parte trial for 24.04.1997 on which day the case was taken for such trial.

Learned President's Counsel for the respondent contended that the said 2nd defendant was not among the living on the date, when the ex-parte judgment was delivered on 24.04.1997 as he had died on 29.12.1995.

Accordingly, it is not disputed that the Decree had been entered against the 2nd defendant, without serving summons on him and at a time he was not among the living and therefore the question in issue as to whether revision was available for the respondent should be examined in the above background.

Powers of revision of the Court of Appeal is clearly defined in Section 753 of the Civil Procedure Code. The said Section is as follows:

> *"The Court of Appeal may, of its own motion or on any application made, call for and examine the record of any case, whether already tried or pending trial, in any Court, tribunal or other institution for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such Court, tribunal or other institution, and may upon revision of the case brought before it pass any judgment or make any order thereon, as the interest of justice may require."*

The applicability of the powers of revision of the Court of Appeal in terms of Section 753 of the Civil Procedure Code had been discussed in several decisions. The power of revision, which is well known as an extraordinary power, is independent from the usual appellate jurisdiction. The basis for such extraordinary power vested in a Court with the jurisdiction for revision was clearly examined by Sansoni, C.J., in *Marian Beebee v. Seyad Mohamed et.al*[3], where it was stated that, the object of the power of revision is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid a miscarriage of justice.

The exercise of the revisionary power of the Court of Appeal and its restrictions, if any, were examined in detail in *Rustom v. Hapangama and Co.*[4]. In that case, the plaintiff-petitioner had filed an application for revision of an order of the District Court, which allowed the defendant an opportunity to file his answer and defend the action and holding that an application by the plaintiff-petitioner for exparte trial should not be allowed. A preliminary objection was raised by the defendant-respondent that the plaintiff-petitioner cannot invoke the revisionary powers of the Court of Appeal as he had the right of appeal against the said order of the Learned District Judge. Considering the said objection, it was held that the powers by way of revision conferred on the Appellate Court are very wide and can be exercised, whether an appeal has been taken against an order of the original Court or not. It was also stated that such revisionary powers could be exercised only in exceptional circumstances and the types of such exceptional circumstances would depend on the facts of each case. Considering the facts and circumstances of the case in *Rustom v. Hapangama and Co. (supra)*, the Court held that there were no such exceptional circumstances disclosed as would cause the Appellate Court to exercise its discretion and grant relief by way of revision. However it is noteworthy to mention that it was also clearly held that, in a situation where there had been something illegal about the Order made by the trial Judge, which had deprived the petitioner of his rights, the Appellate Court could exercise its revisionary jurisdiction.

There had been other instances, where the Court had held that the Appellate Court has the power in revision to set aside an erroneous decision of the District Court. For

instance in *Sinnathangam v. Meeramohaideen*[5] considering the question of revision, T. S. Fernando, J. stated that,

> "The Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security."

As stated earlier, learned President's Counsel for the respondent, contended that the 2nd defendant in the District Court case had died before the Order was made. A similar position was considered in *Marian Beebee v. Seyed Mohamed (supra)*, where it was clearly stated that if a party to the action was dead, and his estate was not represented at the time the adjudication as to title was made, his estate will not be bound by any decision entered thereafter. Further and more importantly, Sansoni, C. J., in *Marian Beebee v. Seyed Mohamed (supra)* had clearly stated the reasons for the exercise of the extraordinary power of revisionary jurisdiction by Appellate Courts. In the words of Sansoni, C. J.,

> "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice,"

This position was further strengthened in *Rasheed Ali v. Mohamed Ali*[6], where it was clearly stated that the power of revision vested in the Court of appeal is very wide and the Court can in a fit case exercise that power irrespective of the fact that whether or not an appeal lies against the decision in question.

It is not disputed that the learned District Judge had made an Order dismissing the claim preferred by the respondent in terms of Section 328 of the Civil Procedure Code and against that Order the respondent had come before the Court of Appeal by way of revision. It is also not disputed that, under Section 329 of the Civil Procedure Code no appeal shall lie from any order made under Section 326, 327 or 328 of the Civil Procedure Code against any party other than the judgment – debtor.

Considering all the aforementioned facts and circumstances, it is apparent that, the decision of the District Court was not only erroneous, but also amounts to a miscarriage of justice. In such circumstances, notwithstanding the provisions contained in Section 329 of the Civil Procedure Code, the Court of Appeal is empowered to set right an erroneous decision of the District Court, for the purpose of exercising due administration of justice and for such purpose could exercise its power of revision. Accordingly, the respondent, although he had made an application under Section 328 of the Civil Procedure Code, against whom an Order was made by the District Court, was entitled to canvass the correctness of the Order made by the District Judge, by way of an application in Revision in the Court of Appeal.

Both 2nd and 3rd questions of law deal with similar issues, which are as follows:

2. Whether in any event the Court of Appeal could in the exercise of revisionary jurisdiction in relation to an inquiry under Section 328 of the Civil Procedure Code hold that the Decree entered in the case against one of the parties (not being the petitioner) is void?

3. Whether in an inquiry under Section 328 of the Civil Procedure Code the Court could hold that the Decree entered against the defendants is void?

Since both these questions are raising similar issues regarding the judgment of the Court of Appeal and the inherent powers of the Court in relation to an inquiry under Section 328, both questions would be examined together.

As stated in detail under the first question of law, the Decree was entered against the 2nd defendant without serving summons on him and more importantly at a time when the 2nd defendant was dead. What could be the position, other than being regarded as a nullity of a Decree, which was entered against a dead man on whom summons had never been served? Although the learned Counsel for the appellant contended quite strenuously that the Court of appeal could not have held that the ex-parte Decree entered by the learned District Judge is null and void in the exercise of its revisionary jurisdiction, it is to be borne in mind that the said argument could be entertained only if the Order of the District Judge was a valid decision. As referred to earlier, the basic and the vital question in issue is as to the validity of the Order made by the District Judge, when there was an ex-parte judgment delivered and the Decree entered against the 2nd defendant, on whom the summons were not served and who had been dead well before the decision was entered against him. In such a situation there should be only one prime duty cast upon the Court, which hears an application made by an aggrieved party. Such a Court would be duty bound to make Orders for the due administration of justice and therefore to repair the injury and to undo the damage.

It is important to be borne in mind that although the procedure laid down in the Civil Procedure Code is binding on

all Courts, the said Code is not exhaustive as to the powers of a Court with regard to matters of procedure. Even at a time when there are no provisions that would be directly applicable to a situation, the Court has the inherent authority to make Order in the interest of due administration of justice. Considering such a situation, in *Victor de Silva et.al v. Jinadasa de Silva et.al*[7], Manicavasagar, J. said that,

> "Our Code is not exhaustive on all matters; one cannot expect a Code to provide for every situation and contingency; if there be no provision, it is the duty of the Judge and it lies within his inherent power, to make such order as the justice of the case requires."

When the need arises on situations, where no direct section could be found in the Civil Procedure Code, it is the duty of a Judge to base his decision on sound general principles, which are not in conflict with any other principles or with the intention of the Legislature. In *Sirinivasa Thero v. Sudassi Thero*[8], the Court clearly expressed the view that it is a rule that a Court of Justice, will not permit a suitor to suffer by reason of its own wrongful act, and it is under a duty to use its inherent power to repair the injury done to a party by its act. In that matter a Buddhist priest had sued three other priests for a declaration that he was entitled to the office of Viharadhipathi, incumbent and trustee of a Vihara and *Pansala* and to the management and control of their temporalities. He did not ask for possession of any property. He obtained judgment and Decree as prayed for and upon his application to execute the Decree, a writ of possession was issued in respect of a room in the *Pansala*. It was held, *inter alia,* that inasmuch as the Court acted without jurisdiction in issuing Writ, the person, who was dispossessed of property in consequence of the execution of

the Writ was entitled to be restored to possession. In such a case a Court of Justice has its inherent power to repair the injury done to a party by its act. Considering the inherent power of the Court in a situation, where an obvious injury has occurred, Sansoni, J., (as he then was) in *Sirinivasa Thero (supra)* had stated that,

> "Justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself, and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act. . . . .
>
> The duty of the Court under these circumstances can be carried out under inherent powers.
>
> I would, therefore, direct that the plaintiff be restored to possession of the room which he was occupying in the Happola Pansala prior to the execution of the writ in case No. L. 3167."

The aforementioned principle set out by Sansoni, J., (as he then was) in *Sirinivasa Thero v. Sudassi Thero (supra)* was cited with approved by G. P. S. de Silva, J., (as he then was) in *Jane Nona v. Jayasuriya*[9].

In *Jane Nona's case,* the defendant was already dead when the District Judge made an Order allowing plaintiff's application for execution of the Decree pending appeal. In consequence, the deceased defendant's eighty one (81) year old wife (the petitioner in that application) was ejected from the premises in suit. The petitioner sought revisionary powers of Court to have himself restored to possession of the

premises on the basis of unlawful ejectment. Considering the fact that the defendant was already dead when the District Judge made the Order allowing the plaintiff's application, Court of Appeal held that as the Order directing Writ of execution to be issued was made the defendant had died, it was a nullity and was therefore set aside. Further it was held that in the exercise of the inherent powers of the Court, which is under a duty to repair the injury done to a party by its acts, the petitioner should be restored to possession of the premises in suit.

Again in *Mowjood v. Pussadeniya*[10], Sharvananda, CJ., referring to the decision in *Sirinivasa Thero v. Sudassi Thero (supra)* held that as the Court had acted without jurisdiction in issuing the Writ, the appellant who was dispossessed of the premises in suit in consequence of the execution of the Writ is entitled to restoration to possession. Later in *Ariyananda v. Premachandra*[11], Wigneswaran, J., expressed a similar view regarding the duty of Court to correct the wrong committed by its decision. Considering the decisions in *Sirinivasa Thero v. Sudassi Thero (supra)*, *Wickramanayake v. Simon Appu*[12], *Mowjood v. Pussadeniya (supra)* and *Sivapathalingam v. Sivasubramaniam* [13], it was held that,

> "When a District Court finds that summons/Decree have not been served on the defendant and yet an ex-parte judgment had been illegally made and thereafter writ issued and executed, when must be the character of the legal order that should be made? It was the duty of the Court *ex mere motu* to have restored possession to the defendant even if such a relief had not been asked for."

It was also held that it is the duty of Court to *restore status quo ante* where a fraud had been perpetrated and as abuse of the process of Court had been committed.

Learned Counsel for the appellant contended that a party whose claim under Section 328 of the Civil Procedure Code has been rejected cannot seek relief by way of revision where he has not availed himself of the remedy provided by Section 327 of the Civil Procedure Code. This position is not disputed at all and even the Court of Appeal had been in agreement with this contention.

However, the issue that has to be considered is whether Court could take into account the applicability of Sections 328 and 329 of the Civil Procedure Code under the circumstances which prevailed in the present case. As referred to earlier, in terms of Section 329, there is no provision for an appeal against the Order made under Section 328 of the Civil Procedure Code other than by the judgment-debtor. However, when the respondent had been dispossessed due to a Decree which had been issued without serving summons to the 2nd defendant who was dead, such a Decree undoubtedly must be regarded as a nullity and should be set aside. In the circumstances it becomes necessary and the Court is under a duty to exercise its inherent powers to repair the injury caused and to meet the ends of justice.

Accordingly the Court of Appeal was correct in its decision when it held that the Decree entered in the case against the 2nd defendant was void.

For the reasons aforesaid, I answer all the questions of law on which special leave to appeal was granted in the negative. The judgment of the Court of Appeal dated 12.11.2001 is therefore affirmed. This application is accordingly dismissed. I make no order as to costs.

MARSOOF, J. – I agree.

BALAPATABENDI, J. – I agree.

Appeal dismissed.

KULATILAKE VS. ATTORNEY GENERAL

COURT OF APPEAL
RANJITH SILVA J.
CHITRASIRI J.
CA 500/2004
DC COLOMBO 21178/MR
JUNE 19, 2009
SEPTEMBER 17, 2009

Appeal against judgment – Revision application on same grounds – Does Revision lie? – Exceptional circumstances – Does delay in deciding the appeal amount to an exceptional ground?

The petitioner appealed against the judgment of the District Courts, in addition the petitioner also filed a revision application seeking similar reliefs that had been prayed for in the final appeal. It was contended that the delay in deciding the appeal would amount to an exceptional ground.

Held:

(1) It is trite law that the revisionary jurisdiction would be exercised if and only if exceptional circumstances are in existence to file such application.

(2) Court would exercise the revisionary jurisdiction, it being an extra ordinary power vested in Court especially to prevent miscarriage of justice being done to a person and or for the due administration of justice.

(3) Delay in deciding the appeal would not amount to an exceptional ground. Delay in hearing appeals, would not be a ground to take up an appeal filed subsequently to the appeals that are being heard, unless proper papers are filed to accelerate the same.

APPLICATION in revision from the judgment of the District Court of Colombo.

Cases referred to:-

1. *Caderamanpulle vs. Ceylon Paper Sacks Ltd* 2001 3 Sri LR 112
2. *Dharmaratne and another vs. Palm Paradise Cabanas Ltd and others* 2003 3 Sri LR 25
3. *Revision 1695/2006* DC Kurunegala 8295/Spl
4. *Karolis vs. Dharmaratne Thero and others* 2006 2 Sri LR 322
5. *Kumarasiri and another vs. Rajapakse* 2006 1 Sri LR 322
6. *Selliah Marimuttu vs. Siva Pakkiam* 1986 1 CALR 264
7. *Halwan and others vs. Kaleelul Rahuman* 2000 3 NLR 50
8. *Rustom vs. Hapangama* – 1978 – 79 – 80 1 Sri LR 352
9. *Hotel Galaxy (Pvt.) Ltd. 1987* 1 Sri LR 5
10. *Vanik Incorporation Ltd vs. Jayasekera* 1997 2 Sri LR 365
11. *A. G. vs. Podi Singho* 51 NLR 381
12. *Rasheed Ali vs. Mohamed Ali* 1981 1 Sri LR 262
13. *Thilagaratnam vs. Edirisinghe* 1982 1 Sri LR 56
14. *Iynool Careesa vs. Jayasinghe* 1986 2 CALR 147
15. *Janitha vs. Abeykone* Sri Skantha Law Reports Vol IV – 22
16. *Samadh vs. Moosage* 1988 2 CAR 147
17. *Gnanapandithan vs. Balanayagam* 1998 1 Sri LR 391
18. *Navaroch vs. Shri Kanthan* 1991 1 Sri LR 286

C. Goonetilake with *R. R. S. Thangarajah* for plaintiff-petitioner.
Milinda Gunetilaka SSC for defendant-respondent.

Cur.adv.vult.

May 05th 2010

CHITRASIRI, J.

The Plaintiff-Petitioner (hereinafter referred to as the Petitioner) sought to set aside the judgment dated 23rd January 2001 delivered by the learned Additional District Judge of Colombo by which, the plaint filed by the petitioner in the District Court was dismissed. Against the said judgment the petitioner filed an appeal exercising his statutory right referred to in the Civil Procedure Code. In

addition to the said appeal, the petitioner has filed this revision application as well seeking similar reliefs that had been prayed for in the final appeal. With that introduction. I will set out the facts briefly pertaining to the issue in this case.

The petitioner was appointed as a Primary Court Judge in June 1979. Subsequently, he was designated as a Labour Tribunal President in June 1981. Both these appointments were made by the Judicial Service Commission. By the letter dated 27th September 1993 (marked P5), the Judicial Service Commission terminated his services by sending him on compulsory retirement on the ground of inefficiency. Petitioner, challenging this decision of the Judicial Service Commission filed plaint (Case No. 21178/MR) in the District Court of Colombo, making the Hon. Attorney General as the defendant. The trial in this case was taken up by different judges and the judgment was delivered on the 23rd October 2001 by the Judge who presided over that Court then, answering the issues 9 to 23 as preliminary issues of Law. Those preliminary issues of law were answered by the learned Additional District Judge in favour of the defendant and then he dismissed the plaint filed by the petitioner with costs.

Consequently, as mentioned herein before, the petitioner exercising his statutory right, filed an appeal against the said judgment. The petitioner relying upon the same grounds filed this application also invoking the revisionary jurisdiction of this Court.

Since there are two applications filed by the petitioner in this same forum, it is necessary to examine the maintainability of a revision application under those circumstances. **It is trite Law that the revisionary jurisdiction of this Court would be exercised if and only if exceptional**

circumstances are in existence to file such an application. Moreover, it must be noted that the Courts would exercise the revisionary jurisdiction, it being an extra ordinary power vested in Court, especially to prevent miscarriage of justice being done to a person and/or for the due administration of justice. The following authorities would amply demonstrate this proposition in Law.

In the case of *Caderamanpulle vs. Ceylon Paper Sacks Ltd.*[1], it was held that –

> *"The existence of exceptional circumstances is a precondition for the exercise of the powers of revision".*
>
> Per Nanayakkara, J. at 116.
>
> *". . . . when the decided cases cited before us are carefully examined, it becomes evident in almost all the cases cited, that powers of revision had been exercised only in a limited category of situations. The existence of exceptional circumstances is a pre-condition for the exercise of the powers of revision and absence of exceptional circumstances in any given situation results in refusal of remedies".*

In the case of *Dharmaratne and another vs. Palm Paradise Cabanas Ltd and others*[2]. It was held by Amaratunga J. that –

> *"Thus the existence of exceptional circumstances is the process by which the Court selects the cases in respect of which this extra-ordinary method of rectification should be adopted."*

In one of my judgments delivered in a Revision Application[3] I have referred to the following decision

in which the same legal position had been accepted. In that I have quoted the case of *Karolis vs. Dharamaratana Thero and others*[4] where Justice Andrew Somawansa has stated thus:

> *"In the circumstances his remedy as laid down in Section 754(2) was to file a leave to appeal application against the impugned order of the Learned District Judge refusing his application. However, the Petitioner without having recourse to his statutory remedy available to him under Section 754(2) of the Civil Procedure Code has come by way of revision. In the circumstances the contention of Counsel for the Petitioner that this objection taken by the Respondent has no merit for revision as the mode of relief available as the Petitioner was never a party to the action in the lower Court cannot be sustained and has to be rejected".*

In the case of *Kumarasiri and another vs. Rajapakse* [5] referring to *Selliah Marimuttur vs. Sivapakkiam*[6] and *Halwan and others vs. Kaleelul Rahuman* [7], it was stated:

> *"In any event, the question of correctness of the Learned District Judge's order in accepting the amended plaint is a matter that can be canvassed in the final appeal and no prejudice would be caused to the Defendants – Petitioners if this Court decides not to go into the merits of the application and I must say I do not intend to do so."*

In *Rustom vs. Hapangama & Company*[8], it was held:

> *"the trend of authority clearly indicates that where the revisionary powers of the court of appeal are invoked the practice has been that these powers will be exercised only if the existence of special circumstances are urged necessitating the indulgence of this court to exercise its powers in revision"*

In *Hotel Galaxy (Pvt) Ltd. Vs. Mercantile Hotels Ltd.*[9], it was held that *"It is settled law that the exercise of revisionary powers of the appellate court is confined to cases in which exceptional circumstances exist warranting its intervention."*

In *Vanik Incorporation Ltd. vs. Jayasekara*[10], Justice Edissuriya had reiterated the necessity to have exceptional circumstances when filing revision applications quoting a passage from the judgment of Justice Dias, in *Attorney General vs. Podi Singho*[11]. In that decision, Dias J. had held that even though the revisionary powers should not be exercised in cases when there is an appeal and was not taken, the revisionary powers should be exercised only in exceptional circumstances such as:

(a) Miscarriage of justice;

(b) Where a strong case for interference by the Supreme Court is made out;

(c) Where the applicant was unaware of the order.

In the following decisions also, it had been held that the presence of exceptional circumstances is needed when invoking revisionary jurisdiction of the appellate courts. They are namely:

- *Rasheed Ali vs. Mahamed Ali* [12]
- *Thilagaratnam vs. Edirisinghe* [13]
- *Iynool Careesa vs. Jayasinghe* [14]
- *Jonitha vs. Abeysekare* [15]
- *Samadh vs. Moosajee* [16]
- *Gnanapandithan vs. Balanayagam*[17]
- *Navaroch vs. Shrikanthan*[18]

In the light of the aforementioned authorities, it is abundantly clear that the superior Courts in this country have always declined to entertain revision applications when exceptional circumstances have not been averred in those applications even though an aggrieved party had failed to file a final appeal. In this instance, the petitioner has filed a final appeal as well. Therefore, he is not without a remedy.

However, in the petition to this Court, the petitioner has stated (paragraph 27 of the petition) that the final appeal filed by the petitioner may not be taken up for hearing in the near future. Therefore, it is clear that the contention of the petitioner by filing this revision application is purely to expedite the applications made against the decisions of the learned District judge in the original court. Other than the delay in deciding the final appeal, no other reason had been adduced as exceptional circumstances in this petition, for this Court to consider. In fact no separate averment is found in the petition filed in this Court referring to any special reasons as to the filing of this application invoking revisionary jurisdiction.

The delay in deciding the appeal would not amount to an exceptional ground. The appeals filed in this Court are being heard according to a manner that had been decided upon after due consideration. Delay in hearing appeals, would not be a ground to take up an appeal filed subsequently to the appeals that are being heard, unless proper papers are filed to accelerate the same. Furthermore, such an attitude may lead to file revision applications by aggrieved parties without pursing the appeal filed, causing difficulties to the due administration in the court house.

For the aforesaid reasons, I do not see any special reason to consider that there exist exceptional circumstances for this

Court to look into this revision application. However at the same time, it must be noted that this Court is aware of the fact that the filing of an appeal would not be a strict barrier to file a revision application. In such a situation, the person who files a revision application should be in a position to state adequate reasons or the circumstances that should necessitate looking at the merits of a revision application. As I have already mentioned herein before, no such circumstances have been averred in this instance.

For the aforesaid reasons this revision application is dismissed. Defendant-Respondent is entitled to the costs of this application as well.

RANJIT SILVA, J. – I agree

Application dismissed.

DIRECTOR GENERAL, COMMISSION TO INVESTIGATE ALLEGATIONS OF BRIBERY OR CORRUPTION V. GENERAL ANURUDDHA RATWATTE

COURT OF APPEAL
SILVA, J. AND
D. S. C. LECAMWASAM, J.
CA 325/07
H. C. (COLOMBO) B 1579/15
FEBRUARY 26TH, 2010

Judicature Act – Section 39 – Objection to jurisdiction of any Court of first instance when? – Bribery Act – Section 23A(4) – Opportunity to show cause before instituting proceedings-No action can be instituted without giving such opportunity to show cause – Legal maxim expression unius est exclusion alterius - Patent - Latent lack of Jurisdiction?

The Director General of the Bribery Commission filed action against the Accused under Section 23A(3) of the Bribery Act. At the end of the prosecution case, the defence took up an objection that the prosecution had failed to comply with the pre-conditions found in Section 23A (4) of the Bribery Act. The learned High Court Judge upheld the objection and discharged the Accused.

In the appeal, the defence raised two preliminary objections, namely, the Bribery Commission should give a person an opportunity to show cause as to why he should not be prosecuted for such offence and there must be a certificate stating either the person has failed to show cause or the cause shown by the persons is unsatisfactory in the opinion of the Bribery Commission.

Held:

(1) The salient ingredient of Section 23A (4) of the Bribery Act is the 'affording of an opportunity' to 'show cause' before instituting an action. If the opportunity is not given, then it can tantamount to a patent lack of jurisdiction as no prosecution is possible without affording such opportunity before institution of action.

(2) There is no requirement that a certificate or a document should be annexed to the indictment that the Bribery Commission is not satisfied with the explanation given by the Accused in terms of Section 23A (4). A certificate of dissatisfaction is not a requirement under Section 23A (4) of the Bribery Act.

Held further –

Per Lecamwasam, J., -

> ". . . once an opportunity is given and if the Commission is not satisfied with the explanation given in reply on such occasion, I hold that the Commission is not bound to issue a certificate or letter of dissatisfaction. Mere fact of institution of action is ample proof of such dissatisfaction."

Cases referred to:

1. *Kanagarajah v. Queen* – 74 N.L.R. 378

APPEAL from an order made by the High Court of Colombo.

Jayantha Jayasuriya, D.S.G. for the Complainant – Appellant

Rienzie Arsecularatne, P.C., with *Wasantha Batugoda* for the Accused-Respondent.

Cur.adv.vult.

June 17th 2010

D. S. C. LECAMWASAM, J.

In this case the Director General of the Bribery Commission filed action against the accused under Section 23 A (3) of the Bribery Act. At the end of the prosecution case the defence took up an objection to the effect that the prosecution failed to satisfy two pre conditions embodied in section 23 A (4) of the Bribery Act and therefore moved court to acquit the accused.

On a perusal of the proceedings it is evident that the parties have made lengthy submissions and on 30th November

2007 the learned High Court Judge upheld the objection and discharged the accused. Being aggrieved by the aforementioned order the complainant has filed the instant appeal and a revision application bearing No. 168/2007.

In his written submissions learned Presidents Counsel has raised two preliminary objections, to wit; The Bribery Commission should give a person an opportunity to show cause why he should not be prosecuted for such offence and there must be a certificate stating either the person has failed to show cause or the cause shown by the person is unsatisfactory in the opinion of the Bribery Commission.

Although the learned Presidents Counsel has urged two pre conditions before this court by way of written submissions, before the High Court he had confined his objections merely to the second point and the order dated 30th November 2007 of the learned high court judge too reflects only the second point, as the learned defence counsel had not raised any objections based on the first point. Quite contrary to the position taken up by the defence counsel in this court, before the High court at page 1033 on 26th October 2007 the learned Presidents Counsel had admitted that the commission has fulfilled the requirements in relation to the first precondition. Therefore now he is estopped from taking up this particular objection and the defence cannot be allowed to blow hot and cold. Hence I will only deal with the second precondition to which the learned counsel has drawn the attention of this court.

The learned Deputy Solicitor General in his written submissions has stated that under section 39 of the Judicature Act the defence is precluded from raising an objection to the Jurisdiction of the High Court at this late stage of the proceedings. Section 39 of the Judicature Act provides thus;

"Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any court of first instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter. . ."

It is common ground that in the instant application defence had raised the preliminary objection after the prosecution closed its case. Defence's contention is that although there was no certificate from the commission to the effect that it was not satisfied with explanation given, yet they anticipated some oral evidence to that effect in the course of the trial.

Defence further argued by relying on previous judicial pronouncements that an objection to the patent lack of jurisdiction can be taken up at any stage of the case. As defence has argued that in the instant case the absence of a certificate by the commission amounts to a patent lack of jurisdiction it is pertinent to look into the provisions of Section 23A (4) of the Bribery Act.

Section 23 A (4) provides that;

"No prosecution for an offence under this section shall be instituted against any person unless the Bribery Commission has given such person an opportunity to show cause why he should not be prosecuted for such offence and he has failed to show cause or the cause shown by him is unsatisfactory in the opinion of such commission"

A plain reading of section 23 A (4) reveals clearly that giving "an opportunity" to show cause is of paramount importance and no action can be instituted without giving

such an opportunity to show cause. It is also clear that the intention of the legislature was to protect the subjects from arbitrary prosecution. A careful scrutiny of the section makes it evident that the salient ingredient of this section is the 'affording of an opportunity' before institution of action. If the opportunity is not given, then it can tantamount to a patent lack of jurisdiction as no prosecution is possible without affording an opportunity. However once an opportunity is given, and on such occasion no cause is shown or if the commission is not satisfied with the explanation, then legal action will follow. According to section 23 A (4) it is the commission who should be dissatisfied with explanation and no one else. Nowhere in the section is it stipulated that a certificate or a document should be annexed to the indictment. Under section 23 A (4), if at all, a patent lack of jurisdiction can only arise if an opportunity is not afforded. Assuming but without conceding that the existence of a certificate of dissatisfaction is a requisite, still it cannot be a patent lack of jurisdiction.

Section 12 (2) of Act No. 19 of 1994 stipulates that there shall be annexed to every such indictment, in addition to the documents which are required by the Code of Criminal Procedure Act No. 15 of 1979 to be annexed there to, a copy of the statements, if any, made before the commission by the accused and by every person intended to be called as a witness by the prosecution. The section is unambiguous and does not disclose any other requirement. The law makers never intended to include a certificate of dissatisfaction or any analogous document as a requisite in an indictment under the Bribery Act.

In my opinion this is eminently a suitable situation wherein the maxim ***'expressio unius est exclusion alterius'*** should apply. Conceding that this rule of interpretation must be applied with great caution, nevertheless in the situation at hand out of necessity it is relevant.