Rustom v. Hapangama & Co.

COURT OF APPEAL.
VYTHIALINGAM, J. AND VICTOR PERERA, J.
C.A. (S.C.) APPLICATION 412/78
NOVEMBER 1, 1978.

Revision—Application by plaintiff to revise order of District Judge granting defendant in default an opportunity to file answer—Right of appeal therefrom—When will Court of Appeal exercise its powers by way of revision—Exceptional circumstances—Tests applicable—Civil Procedure Code, sections 753, 754 (2), 756 (3).

The plaintiff-petitioner filed this application for revision of an order of the District Court permitting the defendant an opportunity to file his answer and defend the action and holding that an application by the plaintiff for ex-parte trial should not be allowed. A preliminary objection was raised on behalf of the defendant-respondent that it was not competent for the plaintiff-petitioner to invoke the revisionary powers of the Court of Appeal as he had a right of appeal against the said order of the learned District Judge.

Held

(1) 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. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are is dependent on the facts of each case.

(2) The order made by the District Court was one which was appealable under section 754(2) of the Civil Procedure Code with the leave of the appellate Court first had and obtained. Had this procedure been followed the defendant-respondent would have been heard at the preliminary stage when the Court considered the question as to whether leave to appeal should be granted or not and he would in effect be denied this opportunity when the plaintiff-petitioner invoked the revisionary powers of the Appellate Court.

(3) Considering the facts and circumstances of the present case there were no such exceptional circumstances disclosed as would cause the Appellate Court to exercise its discretion and grant relief by way of revision. Unless there was something illegal about the order made by the trial judge which has deprived the petitioner of some right, the justice of the cause required that the Appellate Court would not in the circumstances of this case grant the petitioner the indulgence of exercising its revisionary powers and the preliminary objection must therefore be upheld.

Cases referred to

(1) *Atukorale v. Samynathan, (1939) 18 C.L.Rec.. 200; 41 N.L.R. 165; 14 C.L.W. 109.*
(2) *Silva v. Silva, (1943) 44 N.L.R. 494; 26 C.L.W. 3.*
(3) *Lebbaythamby et al v. Attorney-General et al. (1964) 70 C.L.W. 53.*
(4) *Suranimala v. Grace Perera, (1964) 67 C.L.W. 37.*
(5) *Abdul Cader v. Sittinisa, (1951) 52 N.L.R. 537.*
(6) *Sinnathangam v. Meeramohaideen, (1958) 60 N.L.R. 394.*
(7) *Ranesinhe v. Henry, (1896) 1 N.L.R. 303.*
(8) *Fernando v. Fernando, (1969) 72 N.L.R. 549.*
(9) *In re the Insolvency of Hayman Thornhill, (1895) 2 N.L.R. 105.*
(10) *Sabapathy v. Dunlop, (1935) 37 N.L.R. 113.*

(11) *Goonewardena v. Orr, (1907) 2 A.C.R. 172.*
(12) *Perera v. Silva et al, (1908) 4 A.C.R. 79.*
(13) *Peter Fernando et al. v. Aisa Umma et al (1938) 13 C.L.W. 25.*
(14) *Ameen v. Rasheed, (1936) 6 C.L.W. 8.*
(15) *Alima Natchiar v. Marikar et al, (1945) 47 N.L.R. 81.*

APPLICATION to revise an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *D. R. P. Goonatilleke, M. Dharmadasa* and *Laxman Perera*, for the petitioner.
C. Thiagalingam, Q.C., with *S. A. Parathalingan*, for the respondent.

Cur. adv. vult.

December 1, 1978.

VYTHIALINGAM, J.

The plaintiff-petitioner filed this action in the District Court of Colombo against the defendant-respondent for ejectment and damages at Rs. 12,000 per mensem on the ground that it was in wrongful and unlawful occupation of the premises in suit which had been rented to it at a monthly rental of Rs. 6,000 as it had failed and neglected to quit and deliver possession after the 30th September, 1977, in terms of the notice to quit dated 8th August, 1977. He alleges that the summons in the case requiring the the defendant to enter an appearance within fifteen day of the service of summons was served on 9th November, 1977. Since the defendant had failed to enter an appearance within fifteen days of the service of summons as required by section 399(1) of the Administration of Justice (Amendment) Law, No. 25 of 1975, plaintiff's attorney-at-law moved the Court by motion dated 6.12.1977 to fix the case for ex parte trial in terms of section 416(1) of the said Law. The case was to be called on 17.1.1978 for the consideration of this motion.

In the meantime the defendant's attorney-at-law by his motion dated 22.12.1977 moved to call this case for the purpose of filing proxy and answer of the defendant and the Court made order to mention this matter on 17.1.1978. On that date the defendant's attorney-at-law filed proxy and moved for further time to file papers on behalf of the defendant. The Court allowed the application and directed that the case be called on 21.2.1978. On that date the defendant filed a petition supported by the affidavit of the Managing Director of the defendant company. The defendant claimed that the summons in the case was by a mistake served on an unknown person who had delivered the same at the defendant's office during the middle of 1977. If these facts are true then the defendant was not in default as it had entered an appearance within the stipulated time when its Attorney-at-law filed his motion on 22.12.1977.

Further time was requested for the filing of its answer and in view of the objections of the attorney-at-law for the plaintiff the matter was fixed for inquiry on 28.2.1978. After inquiry the District Judge by his order dated 5.5.1978 held that the plaintiff's application for ex parte trial should not be allowed and that the defendant should be allowed an opportunity to file his answer. The plaintiff petitioner filed the application on 29.5.1978 for the revision of the District Judge's order in terms of section 753 of the Civil Procedure Code (Cap. 101) as amended by Law, No. 20 of 1977 which came into force on 15.12.1977, Law No. 25 of 1975 having been repealed by Law No. 19 of 1977. Mr. Thiagalingam who appeared for the defendant-respondent raised a preliminary objection to this application namely, that since the plaintiff petitioner had a right of appeal against the order of the District Judge it was not competent for him to invoke the revisionary powers of this Court.

Under the Civil Procedure Code as amended by Law No. 20 of 1977 when an action is filed summons must be served on the defendant by one of the modes prescribed in the Code. The summons requires the defendant to file in Court his answer if any. Section 84 sets out that if the defendant, inter alia fails to file his answer on or before the day fixed for filing of the answer, the Court, on being satisfied that the defendant has been duly served with summons shall proceed to hear the case ex parte. Then section 86 (1) provides that if at any time prior to the entering of judgment against him for default the defendant with notice to the plaintiff, satisfies the Court that he had reasonable grounds for such default the Court shall set aside any order made arising out of such default and permit the defendant to proceed with his defence as from the stage of the default.

In the instant case the District Judge has made order permitting the defendant to proceed with his defence. It is an order which is appealable in terms of section 754 (2) with the leave of this Court, first had and obtained. The first question which arises for decision is as to whether the plaintiff can circumvent the provision in regard to obtaining leave from this Court if he had appealed against the order made, by invoking the powers in revision of this Court. Mr. Jayewardene for the plaintiff petitioner submitted that for this purpose there is not much difference between the procedure to be followed in regard to both matters. He pointed out that even in the case of an application for revision the petitioner has to obtain notice to issue from this Court and for this purpose the Court does consider the question as to whether it is a fit and proper case in which notice should issue.

But there is a very important difference in the procedure followed in the two cases. In the case of a revision application it is no doubt true that the application is supported in open Court and the Court after considering the matter issues notice of the application. But there is no provision for hearing the respondents, in regard to whether notice should issue or not. Under the A.J.L. No. 44 of 1973 in the case of applications for leave to appeal also there was no provision to hear the other side at the stage when Court considers the question whether leave should be allowed or not—sections 326 to 328.

The position under the Civil Procedure Code as amended by Law No. 20 of 1977 is however quite different. Under section 756 (3) an application for leave has to be submitted as speedily as possible to a Judge in Chambers who may—

(a) forthwith fix a date for hearing of the application and order notice thereof to be issued on the respondent or respondents ; or

(b) require the application to be supported in open Court and the Court may then either reject the application or fix a date for the hearing of the application and issue notice on the respondents.

Thereafter on the date fixed for the hearing, the Court will hear the application for leave to appeal and grant or refuse leave to appeal. The important point to notice here is that the other side is given a full opportunity to be heard at the preliminary stage when the Court considers the question as to whether leave to appeal should be granted or not.

When, instead of asking for leave to appeal the petitioner asks this Court to act by way of revision he is in effect denying the respondent this opportunity. I am of the view that he should not be permitted to do this unless there are very exceptional circumstances which require that we should exercise our discretion and grant it as a matter of indulgence. I will refer to what are exceptional circumstance presently. This principle would be applicable equally to a case where there is an appeal as of right but where the petitioner without filing an appeal or in addition to an appeal invokes the discretionary power of this Court to act in revision.

Thus in the case of *Atukorale v. Samynathan* (1) Soertsz, J. pointed out at page 201 " The power by way of revision conferred on the Supreme Court of Ceylon by section 21 (now section 19) and 40 (now section 37) of the Courts Ordinance and by section

753 of the Civil Procedure Code are very wide indeed, and clearly, this Court has the right to revise any order made by an original Court, whether an appeal has been taken against that order or not. Doubtless, that right will be exercised in a case in which an appeal is already pending only in exceptional circumstances". These observations were approved and followed by Wijeyawardena, J. with Moseley, J. agreeing in the case of *Silva v. Silva* (2).

It is of course not possible to define with precision what matters would amount to exceptional circumstances and what would not. Nor is it desirable, in a matter which rests so much on the discretion of the Court to categorise these matters exhaustively or to lay down rigid, and never to be departed from, rules for their determination. It must depend entirely on the facts and circumstances of each case and one can only notice the matters which courts have held to amount to exceptional circumstances in order to find out the essential nature of these circumstances. It has been held that where the delay in determining an appeal would render the decision in appeal nugatory the court would act in revision even if an appeal was pending or available.

In *Samynathan's case* (*supra*) Soertsz, J. said at page 201 "For instance, this jurisdiction will be exercised in order to ensure that the decision given on appeal is not rendered nugatory". In that case the defendant had appealed against the judgment but the District Judge allowed writ of execution to issue pending the appeal. The petitioner appealed against this order as well but also filed an application for revision on the ground that the delay in the hearing of the appeal would render the decision in appeal nugatory if he was successful in the appeal. Soertsz, J. said at page 200, "In the ordinary course, these appeals will not come up for hearing for some time". The preliminary objection that revision did not lie in these circumstances was overruled.

In the case of *Silva v. Silva* (*supra*), in divorce proceedings the plaintiff was awarded custody of the child of the marriage *pendente lite*. The defendant filed an appeal against the order and also filed papers in revision. A preliminary objection was taken on the ground that the court had no jurisdiction to exercise its revisionary powers in this case especially in view of the appeal taken against the order. Wijewardena, J. said at page 496, "It must take some time for the appeal to be heard. Even after the appeal is perfected and sent to this court it has to remain on the list of pending appeals for at least, fourteen days before it is heard and, normally it should be taken 'in the order

of its position on the roll'. No doubt provision is made for a party to 'accelerate the hearing of an appeal', but an application for such a purpose can be made only after it has been numbered and entered on the roll. It is, therefore, most unlikely that the appeal will be heard before the trial in the District Court. It will serve no useful purpose to hear the appeal after the trial as the appeal itself is from an interim order. I think, therefore, that this is a matter in which our revisionary powers should be exercised."

Then again in the case of *Lebbaythamby et al v. Attorney-General et al.* (3) at the end of the plaintiff's case the trial judge allowed an application of the defendant for the issue of a commission to record the evidence of three persons in the United Kingdom. The plaintiff appealed against the order and asked for a stay of the issue of the commission. This was refused and the plaintiffs made an application for revision of the order. In allowing the application. T. S. Fernando, J. said at page 54 "It is correct to say, however, that if the commission issues and is either executed or is in the process of being executed before the appeal is decided, the appeal to this court, if successful will be rendered nugatory and the expenditure unnecessary. Moreover, in the present case the bars of gold are still in the possession of the proper officers of the Crown and it was not shown to the learned District Judge how the interests of the Crown in the litigation will suffer by a stay of the execution of the commission until the appeal has been decided by the Supreme Court".

Similarly where the circumstances call for a speedier remedy than would be available by way of appeal the court would be justified in acting by way of a revision even if an appeal was available or had been filed. Thus in the case of *Suranimala v. Grace Perera* (4) which is a decision of a bench of three Judges, in an action brought for the payment of money in terms of a contract for the building of a house, the court ordered the plaintiff despite his objection to hand over the house to the defendant pending the trial. In allowing the application for revision, and in dealing with the objection that revision did not lie as an appeal was available and had not been taken T. S. Fernando, J. said at page 39 "In certain circumstances revision can prove a speedier remedy than an appeal which today appears to take considerable time before it can be disposed of by this Court. We are of the view that this order was one that called for a speedy quashing".

Even where an appeal was taken but was abated on technical grounds the Supreme Court has granted relief by way of revision, as not to do so would be a denial of justice. Thus in

the case of *Abdul Cader v. Sittinisa* (5), the appellant had tendered Rs. 20 for the typewritten copies instead of Rs. 25 and the Court Secretary and the respondents accepted this without objection. On objection being taken at the hearing of the revision application that the appeal had abated in consequence of the failure to tender the proper sum the court held that as the respondents had not been in any manner prejudiced the appellant should as a matter of indulgence be heard by way of revision. Gratiaen, J. observed at page 545 "It is very *much to be hoped* that the Civil Appellant Rules will be amended at an early date so as to authorise Judges to grant relief to appellants where as in this case, a technical breach of the rules has caused no prejudice to the other side. To my mind it would be a travesty of justice if some mere technicality were to deprive a party of his right of appeal to the Supreme Court from a judgment which seriously affects his interests. Until the present rule is relaxed, I see no reason why the revisionary powers of this court should not be exercised in appropriate cases".

So also in the case of *Sinnathangam v. Meeramohaideen* (6) where an appeal was held to have abated on the ground that some technical requirement in regard to notice of tendering security had not been complied with, T. S. Fernando, J. observed at page 395 "We do not entertain any doubt that this Court possesses the power to set right an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have been abated. It only remains for us to examine whether there is a substantial question of law involved here and whether this is an appropriate case for us to exercise the powers of revision vested in this Court, by section 753 of the Civil Procedure Code." Having considered the judgment of the lower Court he concluded at page 397 and 398 "The decision of the trial judge has followed solely from the erroneous decision reached by him on a question of law, and this case is in my opinion, an appropriate one in which to restore to the petitioner his legal right to immunity from being sued upon a note declared by statute to be unenforceable"

So that where an order is palpably wrong and it affects the rights of a party also, this Court would exercise its powers of revision to set right the wrong irrespective of whether an appeal was taken or was available. See in this connexion also *Ranesinhe v Henry* (7). Other cases where exceptional circumstances were present are referred to by Alles, J. in the case of *Fernando v. Fernando* (8). He said "*In the matter of the Insolvency of Hayman Thornhill* (9) the Court was satisfied that the proceedings were conducted in a most perfunctory manner and that there

were a number of irregularities. The 'due administration of justice' therefore required the exercise of the Court's revisionary powers. In *Sabapathy v. Dunlop* (10) the revisionary powers of the Supreme Court were exercised where there was no appeal and where the Court below wrongly passed a decree on a consent order without satisfying itself of the legality of the agreement which was challenged on grounds of fraud, fear, mistake, surprise et cetera." at page 550. In that case there was an application for enhancement of the maintenance ordered *pendente lite* for the children in the divorce proceedings. Alles, J. said at page 552 "While I agree that the courts should be particularly vigilant where the interests of minors are concerned, it would be an unhealthy precedent for this Court to interfere in a case of this kind when the application is in effect one for payment of enhanced maintenance to the children". It was held that there were no exceptional circumstances in the case.

These are not intended to be an exhaustive enumeration of the circumstances in which this Court will interfere by way of revision but only as being merely illustrative of the principle applicable. Mr. Thiagalingam referred us to several cases in which the Supreme Court declined to use its powers of revision. But in all those cases the principle that the Court would interfere by way of revision in appropriate case even though an appeal was available was not denied but the court did not consider it fit to interfere in the facts and circumstances of those particular cases.

In the case of *Goonawardena v. Orr* (11) the petitioner filed a petition of appeal which was dismissed as being out of time. He could have asked for leave to appeal notwithstanding the lapse of time but he did not do so. Instead he filed papers in revision. Hutchinson, C.J. in refusing the application said "I see an expression of opinion by Acting Justices Perera and Grenier in 2 Bal p. 66 which I think I ought to follow. The effect of it is that the practice is not to exercise the power of revision under section 753 where the remedy of appeal is open; and here the party aggrieved might have obtained leave to appeal notwithstanding the lapse of time that has expired. The powers given by section 753 ought not to be exercised in such a case". No prejudice was caused to the petitioner in that case as the trial judge had rejected a claim in reconvention stating that it should be tried in a separate action.

In the case of *Perera v. Silva et al.* (12) the applicant had another remedy and in rejecting the application for revision Hutchinson, C.J. said "But I do not think that the power ought

to be exercised, or that the legislature could have intended that it should be exercised, so as to give the right of appeal, practically in every case, large or small, simple or difficult."

In the case of *Peter Fernando et al. v. Aisa Umma et al.* (13) Poyser, S. P. J. refused to exercise the discretion because the point was taken up for the first time only in the application and he stated, "I am consequently asked to exercise revisionary powers on the ground that the petitioner's legal advisers were mistaken as to the procedure to raise a point of law at the trial. I do not consider that these are grounds for granting this application ; it would in my opinion be establishing a very bad precedent, if I were to hold otherwise". In the case *Ameen v. Rasheed* (14) where also the court refused to exercise its discretion. Abrahams, C.J. said at page 9 "It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have a discretion to act in revision. It has been said in this Court often enough that revision of an appealable order is an exceptional proceeding, and in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal."

Finally in the case of *Alima Natchiar v. Marikar et al.* (15) Keuneman, S. P. J. said in a short judgment of six lines "In the circumstances we should be slow to exercise our discretion to allow an application in revision in view of the fact that no appeal has been taken in this case". This Court has the power to act in revision even though the procedure by appeal is available, in appropriate cases. The question which has now to be decided is whether the instant case is an appropriate case in which we should exercise our discretionary powers of revision. In his petition and affidavit the petitioner has not set out the reasons for his seeking this method of rectification of the order rather than the ordinary method of appeal. Nor has he set out any exceptional circumstances as to why we should grant him the indulgence of exercising our revisionary powers when he could have appealed against the order with leave.

Mr. H. W. Jayewardene, who appeared for the petitioner submitted that this was an action for rent and ejectment in which the petitioner was claiming damages in a sum of Rs. 12,000 per mensem. The Rent Restriction Act does not apply and if the tenant fell into arrears a very large sum would accumulate and recovery would be difficult. He submitted therefore that a speedier remedy was called for. The agreed rental was only 6,000 per mensem. There is nothing in the plaint or affidavit of

the petitioner to indicate why he is making double this amount as damages or the basis on which he has assessed it at that figure except that the premises are business premises situated within the limits of the Colombo Municipal Council. Prima facie, therefore, he will be entitled to recover only the agreed rental as damages unless of course he can prove that he has suffered loss and damage in Rs. 12,000 per mensem.

Admittedly the defendant was not in arrears of rent at the time of the notice to quit. The petitioner has admitted in his plaint that even after that the defendant has paid the damages for September and October at Rs. 6,000 per mensem which he has accepted without prejudice to his claim, for damages at a higher rate and to his rights. The plaint was filed on 31.10.1977. There is nothing in the papers filed or the submissions made as to whether the defendant was continuing to pay the damages at Rs. 6,000 per mensem after October 1977 or not. So that this argument that a large sum would have accumulated if the petitioner is not given speedy relief is not so weighty as to require us to act by way or revision. Nor do I see any merit in the fact that a landlord is entitled to recover his property as quickly as possible. After all most landlords are in that same position and this is nothing exceptional to the petitioner.

Mr. Jayewardene's second submission was that this application involves a consideration of the applicability of the amendments introduced to the Civil Procedure Code by Law No. 20 of 1977 to pending actions and that since this question will arise daily in almost all the Courts in the Island an early clarification of the position by this Court is desirable. Undoubtedly this is so. But however desirable this may be I do not think that this argument can be made use of to make us grant an indulgence to the petitioner if he is otherwise not entitled to it. Mr. Jayewardene also submitted that in whatever way the parties have come, they are now before Court and affidavits have been filed by both parties and no prejudice would be caused if the matter is argued. But as I have pointed out on account of the procedure adopted by the petitioner the respondent has been deprived the opportunity of objecting to the grant of leave and if he is successful the matter cannot be argued at all.

If we refuse the petitioner's application it would only mean that instead of obtaining an ex parte decree he would now have to go through a trial and prove his case. On the other hand if the petitioner is successful then the defendant would not only have to vacate the premises but also pay twice the amount of

the agreed rental as damages. I think that unless there is something, illegal about the order made by the judge which has deprived the petitioner of some right, the justice of the cause requires that we would not, in the facts and circumstances of this case, grant him the indulgence of exercising our revisionary powers. There are no exceptional circumstances which require us to do so. The preliminary objection is therefore upheld and the petitioner's application for revision is dismissed with costs.

VICTOR PERERA, J.—I agree.

Application dismissed.