# MARTIN
# v.
# WIJEWARDENA

SUPREME COURT
RANASINGHE, C.J., JAMEEL, J. AND
AMERASINGHE, J.
S.C. REF NO. 1/89
C.A. NO. 43/86
A.T. KALUTARA NO. 18/109A
MAY 30, 1989

*Agrarian Services Act, No. 58 of 1979, Sections 18(1) and (2) – Failure of tenant-cultivator to pay rents – Forfeiture of tenancy rights – – Right of appeal – Constitution, Article 138 – Appellate jurisdiction of Court of Appeal.*

**Held:**

(1) A right of appeal is a statutory right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legisiative Enactments.

(2) Section 18 of the Agrarian Services Act, No. 58 of 1979 does not provide for nor does it create a right of appeal in a tenant cultivator who is aggrieved by the Order of the Commissioner to pay up his arrears to the landlord before a stipulated date. Further Article 138 of the Constitution does not confer on such a tenant cultivator a right of appeal.

(3) While the Agrarian Services Act, No. 58 of 1979 s. 5(6) provides for an appeal (on a point of law only) from a decision of the Commissioner given at an eviction inquiry, no such right of appeal is provided for a party aggrieved by the Order of the Commissioner of Agrarian Services at an inquiry into the non-payment of rent. No appeal lies from any Orders made under section 18 of the Agrarian Services Act.

**Cases referred to:**

(1) *Anchapulle* v. *Baker* 31 NLR 149

(2) *Silva* v. *Silva* 16 NLR 57

(3) *I.P. Police* v. *Fernando* 30 NLR 482

(4) *Sudharman de Silva* v. *A.G.* [1986] 1 Sri LR 9

(5) *Cassim* v. *Abdursak* 38 NLR 428

(6) *Culanthavelu* v. *Somasundaram* 2 Bal. 122

(7) *Suppiah* v. *Lokubanda* 4 CWR 127

(8) *Shockman* v. *John* CWR 93

(9) *Saunders* v. *Park* 1 Bal. 22

(10) *King* v. *Ratnam* 30 NLR 212

(11) *In Re Wijesinghe* 16 NLR 312

(12) *Kanagasunderam* v. *Podihamine* 19 CLW 53 (F.B)

(13) *A.G.* v. *Sellim* 11 ER 1200

(14) *King* v. *Joseph Hansom* 106 ER 102

(15) *In Re Albert Godamune* 38 NLR 74

(16) *Sangarapillai* v. *Chairman, Municipal Council, Colombo* 32 NLR 92

REFERENCE under Article 135 of the Constitution to the Supreme Court.

*P.A.D. Samarasekera, P.C.* with *Kanchana Abeypala* for (tenant-cultivator) respondent-appellant

*C.J. Ladduwahetty* for (landlord) complaint-respondent.

*Cur. adv. vult.*

June 27, 1989.

**JAMEEL, J.**

The landlord complainant-respondent had complained to the Commissioner of Agrarian Services, Kalutara that rents properly due to him, from the tenant cultivatior respondent-appellant, are in arrears.

After inquiry, inter partes, the Assistant Commissioner (Inquiries) had issued a notice under Section 18(1) of the Act No. 59 of 1979. By this notice The Assistant Commissioner had directed the appellant to pay to the respondent, on or before 31.1.1986 all the arrears that had been found to be due.

The appellant had failed to make payment as directed and his rights as tenant cultivator became forfeit, by operation of law under Section 18(2) of the Act.

Notwithstanding the absence of provisions for any proceedings to be had before The Assistant Commissioner, the appellant had complained to the Assistant Commissioner that he had gone to the house of the respondent on 31.1.1986 in order to make the payment, but that he had been informed that the respondent was not at home, and so was unable to make the payment in due time. Thereon the Learned Assistant Commissioner had held an inquiry and had concluded that on his own admission the appellant had forfeited his tenancy rights.

It was from this order that the appellant had filed this appeal to the Court of Appeal. The respondent had raised a preliminary objection. Thereon the Court of Appeal had framed and forwarded the following question for consideration and decision by this court, namely:

"Does Article 138 of the Constitution confer any rights on any aggrieved person to appeal to the Court of Appeal from any order made by the Assistant Commissioner of Agrarian Services in terms of Section 18(1) of Act No. 58 of 1979, when such a right has not been specifically conferred by statute?"

Article 138 of the Constitution is an Article located in Chapter XVI and more particularly in the portion under sub-head Court of Appeal. This chapter deals with the Superior Courts.

Article 138 reads as follows:-

"The Court of Appeal shall have and exercise, subject to the provisions of the Constitution or of any Law, an Appellate Jurisdiction, for the correction of all errors in fact or in law, which shall be committed by any Court of First Instance, Tribunal or Other Institution, and sole and exclusive cognizance by way of Appeal, Revision and Restitutio In Integrum of all cases, suits, actions, prosecutions, matters and things of which such High Court and Courts of First Instance, Tribunal or Other Institution may have taken cognizance."

It is the contention of Learned President's Counsel for the appellant that Article 138 not only spells out the Appellate Jurisdiction of the Court of Appeal but that it also grants, impliedly, a right of appeal to all parties who came before the Court of First Instance, Tribunal or Other Institution concerned.

He further contended that, this right is an unfettered right, granted to the litigant, with only such limitations as are included in the phrase:-

"Subject to the provisions of the Constitution or of any Law."

That is to say, Learned President's Counsel contends that, other 'Provisions of the Constitution, if any, or any other Law' could only curtail the total and unfettered right of appeal granted to each and every disputant before any Court, Tribunal or Other Institution.

He thus contended for a full and unfettered right in the tenant cultivator respondent-appellant to have filed this appeal.....a Constitutional Right.

He illustrated his second proposition by reference to Section 5(6) of this same Act No. 59 of 1979, wherein the right of appeal is 'Restricted to' 'Points of Law' only. Mr. Samarasekera also cited in support the decisions of this Court in:-

1. *Anchapulle v. Baker*(1)
2. *Silva v. Silva*(2)
3. *I.P. Police v. Fernando*(3)

Article 138 is an enabling provision which creates and grants jurisdiction to the Court of Appeal to hear appeals from Courts of First Instance, Tribunals and Other Institutions. It defines and delineates the jurisdiction of the Court of Appeal. It does not, nor indeed does it seek to, create or grant rights to individuals viz-a-viz appeals. It only deals with the jurisdiction of the Court of Appeal and its limits and its limitations and nothing more. It does not expressly nor by implication create or grant any rights in respect of individuals. Article 139 makes it quite clear that the Court of Appeal is an appellate tribunal in respect of the Orders, Judgments, Decrees or Sentences of the Courts of First Instance, Tribunals or Other Institutions

In the case of the Courts of First Instance, referred to above, it is the Judicature Act which creates and institutes them. (Vide Section 5 of the Judicature Act No. 2 of 1978). Sections 13(3), 14, 15 and 16 of this Act designated the persons who are entitled to appeal from orders and judgments of the High Courts, in its several jurisdictions. These sections contain the general limitations on those rights of appeal. Sections 23, 31 and 35 designate the persons entitled to appeal from Orders, Judgments and Decrees of the District Courts, Magistrates Courts and the Primary Courts respectively. These several sections of the Judicature Act expressly create the rights of appeal in each case and invest those rights in the several persons respectively designated in those sections. These sections enable those designated persons to lodge appeals while Article 138 enables the Court of Appeal to receive and entertain them. This differentiation is made explicit in the terms of Section 13 of the Judicature Act itself. Section 13(1) vests the High Court with Admiralty Jurisdiction while Sections 13(3) and 13(4) respectively create and vest in the several persons mentioned therein the right of appeal to the Court of Appeal, either directly or with the leave of court first had and obtained, from

the Judgments and Orders respectively of the High Court. The right of the Court of Appeal to entertain and hear and dispose of those appeals is given by Article 138 of the Constitution.

It is significant that the marginal to Article 138 reads, "Jurisdiction of the Court of Appeal" while the marginals to Section 14, 15 and 16 of the Judicature Act read "Right of Appeal". Equally significant is the fact that the right to appeal from Orders and Judgments of the Court of Appeal itself is contained in another Article of the Constitution, namely, Article 128, which too is included in Chapter XVI, but under a different sub-title,..."Supreme Court." The marginal to that Article too reads "Right of Appeal." On the other hand the marginal to the enabling section in respect of the jurisdiction of the Supreme Court in respect of Appeals, namely, Article 127, which reads, "Appellate Jurisdiction."

On a consideration of the several Articles of the Constitution and the several sections of the Judicature Act, adverted to above, it is not possible to accept the contention of Learned President's Counsel that there is implied in Article 138 a 'Right of Appeal' to the Court of Appeal. The 'Right' of 'an Aggrieved Party' or of 'A party dissatisfied with' an Order or Judgment of a Court of First Instance is contained in the several sections of the Judicature Act.

The words 'Subject to the provisions of the Constitution or of any Law' are a limitation on the powers of the Court of Appeal. They do not constitute a limitation on the Rights of an Appellant. One such limitation placed on the powers of the Court of Appeal is to be seen in the proviso to this very Article. On the other hand Sections 14, 15 and 16 of the Judicature Act amply illustrate the kind of limitations placed by law on the rights of appeal granted to different parties to a criminal case heard by a High Court. They also spell out the circumstances in which these rights could or could not be exercised.

The rights of appeal granted by the Judicature Act are curtailed, in respect of civil cases by the provisions of Section 754 of the Civil Procedure Code. They are restricted to the parties to the suit. A further restriction on the right of appeal is that an appeal from an Order, not being a Judgment, is exercisable only with the leave of the Court of Appeal first had and obtained. The Code also provides for a Notice of Appeal prior to filing the Appeal petition itself. There are

other provisions in the Code, for instance, section 88(1) and Section 389, which preclude an Appeal in certain circumstances.

In respect of criminal appeals from the Magistrate's Courts, too, there are similar restrictions – Eg. Sections 317 to 319 of the Code of Criminal Procedure Act. Indeed, Section 316 provides that there shall be no appeal from any judgment or order of a criminal court except as provided for by that Code or by any other law for the time being in force. In this context it is pertinent to note that while Section 14(a) of the Judicature Act grants a right of appeal to a person convicted by a High Court after trial by Jury, Section 14(b) grants this right of appeal, as of right, to a person convicted at a trial without a jury. Even so, certain categories of convicted persons are excepted. (Vide: *Sudharman de Silva Vs. A.G.*(4)).

Under the Administration of Justice Law, The Supreme Court was the only court endowed with jurisdiction to hear and entertain appeals whether civil or criminal. (Vide: Section 11 Part 1 – Judicature Act No. 44 of 1973.)

The rights of appeal granted, and the limitations placed thereon, by the Administration of Justice Law are detailed in Section 316 of that Law for criminal cases and in Section 317 for civil cases. (Chapter IV – Appeal Procedures.)

Section 31 (D) (1) of the Industrial Disputes Act (Cap. 131 of the 1956 C.L.E.) provides that Orders made by Labour Tribunals are final and not to be questioned in any Court. However, Sub-section (2) of the same section grants a right of appeal to the worker, the employer or to the trade union from any judgment of a labour tribunal. Nevertheless, the appeal could only be on a point of law.

Section 5(6) of the Agrarian Service Act, No. 58 of 1979 provides for an appeal, again on a point of law only, to the Court of Appeal, from a decision of the Commissioner, given at an Eviction Inquiry. Under those provisions a "Landlord" or "the person evicted" if aggrieved by that decision can appeal to the Court of Appeal. Section 5(7) (b) (11) takes into account and provides for the possibility that the eviction may have been effected by a third party and that it could have been so done with or without the knowlege, consent or connivance of the Landlord or the person evicted from an order of the

Commissioner under that Section no such provision is made, however, in respect of his Order under Section 18. Neither the Landlord nor the Person Evicted is given a right of appeal in respect of orders made under Section 18. Learned Counsel for the respondent contends that such non-grant must be construed to mean that, therefore, no appeal lies from any Orders made under Section 18.

The case of *Anchapulle v. Baker*(1) cited by Learned President's Counsel for the appellant was a case in which the accused was bound over on an order made under Section 325(1) (b) of the Criminal Procedure Code and in that case it was held by Lyall Grant (J) that an appeal does lie in such a case. In coming to this conclusion, Lyall Grant (J) relied on a decision by Akbar (J) in *I.P. Police v. Fernando*(3) wherein it was held that when an accused is warned and discharged by a Magistrate, the remedy open to the complainant is to appeal. Akbar (J) himself relied on an earlier judgment of Lyall Grant (J) in P.C. Dandagamuwa in revision No. 670 S.C.M. 31.10.1928.)

Soertsz (J) however, in *Cassim v. Abdursak*(5) following the case of *Culanthavelu v. Somasunderam*(6) departed from the ruling of Lyall Grant (J) and went on to hold that no appeal lay from an order made under Section 325(1) of the Criminal Procedure Code. His Lordship Justice Soertsz distinguished the cases of *Suppiah v. Lokubanda*(7) and *Shockman v. John*(8) both of which cases dealt with situations that arose from the Magistrate having discharged the accused and thereon referred the complainant to his civil remedy and followed the decision of Montcrieff (J) *Saunders v. Park*(9). While making reference to all these cases His Lordship Justice Soertsz also made reference to the Full Bench decision of the Supreme Court in *Culanthavelu v. Somasunderam* (Supra) wherein, it was held that from a binding over order made under Section 88 of the Criminal Procedure Code, no appeal lay. Vide:- *King v. Ratnam*(10) and In Re. Wijesinghe (11).

*Kanagasundaram v. Podihamine*(12) was a case which dealt with the right of appeal from an Order to tax costs under Section 31 of the Land Acquisition Ordinance. Whilst rights of appeal are specifically mentioned in respect of Orders made under Sections 26 and 35 of

the Ordinance no mention is made of any such right of appeal in respect of Orders under Section 31. It was held by the Full Bench that no appeal lies. In their judgment their Lordships quoted and relied on the decision in *A.G. v. Sellim* (13) in which case Lord Westbury had stated as follows:-

> "The criterion of a new Right of Appeal is plainly an act which requires Legislative Authority. The Court from which it is given and the Court to which it is given must both be bound and that must be the act of some higher power."

Howard (C.J) has also quoted a passage from the judgment of Abbot (C.J.) in the case of *King v. Joseph Hanson*(14) namely:-

> "For the rule of law is 'Although Certiorari lies, unless expressly taken away, yet an appeal does not lie unless expressly given' by Statute."

The question that arose for decision was as to whether the language of Sections 21 and 32 of Cap. 203 gives, not merely by implication, but by express words a Right of Appeal. Howard (C.J.) held that the Supreme Court had no right to entertain an appeal when that power is not expressly given by statute.

A case which is more in accord with the facts of this case is that of *In Re. Albert Godamune*(15). That was a problem under the Notaries Ordinance---Cap. 91 (1938) C.L.E..

Section 26 (1) of the Ordinance provides for the Secretary of the District Court to issue Annual Certificates to Notaries who apply for them. The application should be made before the FIRST of MARCH of each year.

Section 28 (1) provides that should the Secretary refuse to issue the Certificate the notary could apply to the District Judge who could make on Order as justice demands.

Section 28 (2) provides for an appeal to the Supreme Court from the Order made by the District Judge.

However, Section 26 (2) which covers the situation where the application has been made after the time granted, provides that in such a case, the District Judge could direct the Secretary to issue the certificate if the District Judge is satisfied that the delay in making the application had not been due to the negligence of the Notary. Not having been so satisfied in that case the District Judge had refused to give such a direction for the issue of Certificate to Mr. Godamune for that year. The Notary lodged an appeal with the Supreme Court. Justice Akbar (with Justice Koch in agreement) held:-

> "unfortunately for the powers of this Court, to entertain such an appeal we have to look to the words of Section 27 (Section 28 of Cap. 91 (1938) C.L.E). Section 27 is clear, that the Right of Appeal is only given to the Notary only in cases where proceedings begin by the Secretary refusing or declining to issue a certificate and it does not apply to a case, like this, where the Secretary has no power at all to have anything to do with the matter until the District Judge had made his Order under the proviso to Sub-section 2 of that section.

*Sangarapillai v. Chairman Municipal Council, Colombo*(16) where the Supreme Court in a similar case held that it had no right to entertain an appeal where the power was not expressly given by the Statute.

*Sangarapillai's case* (Supra) was a case in which the Chairman had refused to issue a Certificate of Conformity under Section 15 of Ordinance No.19 of 1915. The District Judge had dismissed an appeal made to him against that refusal. On an appeal against that dismissal of his appeal by the District Judge the party dissatisfied lodged an appeal in the Supreme Court. Dalton (J) (with Jayawardena (A.J.) agreeing) held that no appeal lay. The only remedy, it was held was a case stated on a question of Law as the District Judge had functioned as an Appellate Tribunal and no appeal lies from that order unless provided for in the Ordinance.

It is significant to note, that the Legislature appears to have taken cognizance of the judgment in *Godamune's Case* for, the reprint of the Notaries Ordinance as appearing in the (1956) C.L.E. (Cap. 107) shows an amendment to section 28 by way of an additional sentence to Section 28 (2) which is the corresponding section in that reprint which reads as follows:-

> ".....or, by the refusal of the District Judge to direct the issue of a certificate in any case referred to in Section 27 (2), may appeal against such Order or refusal to the Supreme Court."

This amendment has been effected by Ordinance No. 59 of 1943.

These interpretations of the Supreme Court must be taken to have been within the knowledge of the Legislature when it enacted Sections 5(6) and 18 of the Agrarian Services Act, No. 58 of 1979, on 25.4.1979.

MAXWELL on the INTERPRETATION OF STATUTES (12th Edi.) at Page 159 records the case of *A.G. Vs. Sellim* (Supra) and goes on to state:-

> "It is also presumed that a statute does not create new jurisdictions or enlarge existing ones, and express language is required if an Act is to be interpreted as having this effect."

In the light of these authoritative statements it is not possible to accept the contention that there is implied in Article 138 an unfettered "RIGHT OF APPEAL" to the Court of Appeal. Nor, is it possible to accept the contention that this alleged "RIGHT OF APPEAL" under this Article 138 is only fettered to the extent provided for in the Constitution or other Law. An Appeal is a Statutory Right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments. That is to say, for appeals from the regular courts; in the Judicature Act, and the Procedural Laws pertaining to those courts. For the various Tribunals and other Quasi-Judicial Bodies, in the respective statutes that created them. For these reasons the question formulated by the Court of Appeal is answered in the Negative. Section 18 of the Agrarian Services Act, No. 58 of 1979 does not provide for nor does it create a Right of Appeal in a tenant cultivator, who is aggrieved by the Order of the Commissioner to pay up his arrears to the Landlord before a stipulated date. Further, Article 138 of the Constitution does not confer on such a tenant cultivator a Right of Appeal.

The Registrar is directed to transmit this determination to the Court of Appeal.

**RANASINGHE, C.J.** – I Agree
**AMERASINGHE, J.** – I Agree

*No right of appeal*
*from section 18 (1) of Agrarian*
*Services Act to Court of Appeal.*

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