

DHARMARATNE AND ANOTHER
v
PALM PARADISE CABANAS LTD
AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.
BALAPATABENDI, J.
CALA 1113/2003
D.C. COLOMBO 5385/SPL
SEPTEMBER 25, 2002

Civil Procedure Code – S. 753 – Amended by 79 of 1988 – Companies Act 17 of 1982 – S. 113 – Revisionary jurisdiction of the Court of Appeal – Constitution Article, 138 – Exceptional Circumstances ? – Should they be pleaded.

The District Court, dismissed an application filed by the petitioners under S.113 Companies Act.

Held :

1. Legal submissions in the Petition do not indicate reasons why the Court of Appeal should exercise revisionary powers.

Per Amaratunga, J.

"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal."

2. The practice of Court is to insist in the exercise of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed.
3. The petitioner has not pleaded or established exceptional circumstances warranting the exercise of revisionary powers.
4. The amendment to Section 753 Civil Procedure Code by 79 of 1988 brought the proceedings of Tribunals/Institutions within the purview of the revisionary jurisdiction of the Court of Appeal. The enlarged power

has been conferred to deal with proceedings which cannot be brought before it by way of an appeal.

APPLICATION for Leave to Appeal from the Orders of the District Court of Colombo.

Cases referred to :

1. *Mariam BeeBee v Seyed Mohamed* - 68 NLR 36
2. *Ranasinghe v Henry* - 1 NLR 303
3. *Atukorale v Samynathan* - 41 NLR 165
4. *Abdul Cader v Sitty Nisa*- 52 NLR 536
5. *Soysa v Silva* - (2000) - 2 Sri LR 235
6. *Potma v I.P. Dodanwela* - 74 NLR 115
7. *Appuhamy v Weeratunga* - 23 NLR 467
8. *Somawathie v Medawala* - 1983 2 Sri LR 15
9. *Sirimavo Bandaranayake v Times of Ceylon* - (1995) 1 Sri LR 22
10. *Perera v Silva* - 1908 - Appeal Court Reports. Vol IV, 79
11. *Ameen v Rashid* - 6 CLW 8
12. *Atukorale v Saminathan* - 41 NLR 165
13. *Caderamanpulle v Ceylon Paper Sacks Ltd.*, (2001) 3 Sri LR 172
14. *Fernando v Ceylon Brewery* (1998) 3 Sri LR 61
15. *Perera v Agidahamy* - 48 NLR 87
16. *Ceylon Brewery Ltd., v Fernando* - (2001) 1 Sri LR 270, (SC)
17. *Thameena v Koch* - 72 NLR 192
18. *S.L.B.C. v De Silva* - (1981) 2 Sri LR 228
19. *Nadaraja v Thilaganathan* - (1986) III CALR 307

Palitha Kumarasinghe for Petitioners

Ms. S. Perera for 1st Respondent

N.R. Sivendran for 2nd Respondent

Ms Eva Wanasundera D.S.G., for the 3rd Respondent

cur.adv.vult

June 17, 2003

GAMINI AMARATUNGA, J.

This is a revision application filed by the petitioners against the order of the learned District Judge dismissing an application filed by the petitioners under section 113 of the Companies Act No 17 of 1982. By their petition, the petitioners have prayed *inter alia* for a

declaration that the 1st petitioner was entitled to 13400 shares and the 2nd petitioner was entitled to 8600 shares in the 1st defendant company and for a direction to the 3rd defendant-respondent to include their names in the Register of Members of the 1st defendant company and to delete the name of the 2nd defendant from the said register. The petitioners have sought an *Order Nisi* in the first instance to be followed by an order absolute. The court has issued an *order nisi* in the first instance. The 1st and 2nd respondents have raised a preliminary objection in the District Court that it was not open to the petitioners to make their application by way of summary procedure and the petitioners should have made their application by petition and affidavit as enacted in section 441 of the Companies Act. The learned District Judge, having upheld that objection has made order dismissing the petitioners application on 11.7.2001. The petitioners have filed this revision application on 24.7.2001 against the said order.

The petitioners in paragraph 21 of their petition have stated that the aforesaid order is a final judgment and that they intended to exercise their right of appeal against the said order. They have thereafter filed an appeal against that order. When this revision application came up before this Court the 2nd respondent has raised a preliminary objection in limine to the effect that the petitioners have not pleaded and the petition does not disclose any exceptional circumstances warranting the exercise of the revisionary powers of this Court. It appears that the petitioners have relied on the averments set out in paragraphs 19 and 20 of the petition to show exceptional circumstances warranting the exercise of the revisionary powers of this Court. However those two paragraphs contain legal submissions made to show that the order of the learned District Judge was erroneous. Those legal submissions do not indicate reasons why this court should exercise revisionary powers when a right of appeal against the same order was available (and in fact subsequently availed of). All questions of law raised in paragraphs 19 and 20 of the petition are matters which can be decided in the appeal.

There is no question that the revisionary powers of this Court are very wide and may be exercised for the correction of all errors of fact and law committed by all inferior courts and sometimes com-

mitted by this court itself. Its object is the due administration of justice and the avoidance of miscarriages of justice. Revisionary powers will be exercised when it appears to court that unless the power is exercised, injustice will result. *Mariam Beebee v Seyed Mohamed* ⁽¹⁾. Relief by way of revision may be granted even in a case where there is no right of appeal and also in the absence of a separate application for revision. *Ranasinghe v Henry*.⁽²⁾ Where a party has a right of appeal and an appeal preferred in the exercise of that right is pending, revisionary powers will be exercised if it appears that the result of the appeal will be rendered nugatory if relief by way of revision is not granted. *Atukorale v Samynathan*.⁽³⁾ Relief by way of revision may be granted even where an appeal has been rejected on technical grounds. *Abdul Cader v Sitty Nisa*⁽⁴⁾, *Soysa v Silva*⁽⁵⁾ In an appropriate case relief by way of revision is available even in a case where the appeal has been dismissed after consideration if it later appears to court that a material fact has escaped the attention of court. *Potman v I.P. Dodangoda*⁽⁶⁾. Revisionary powers will be exercised even on the application of a person who is not a party to the proceedings. *Appuhamy v Weeratunga*⁽⁷⁾, *Meeriam Beebee v Seyed Mohamed* (*supra*). Even where the law says that a judgment of a court is final and conclusive, the court may interfere with such judgment by way of revision. *Somawathie v Madawala*⁽⁸⁾. Any uncertainty as to the scope of the Courts revisionary jurisdiction 'must unhesitatingly be resolved in favour of a wider, than a narrower, jurisdiction'. *Sirimavo Bandaranayake v Times of Ceylon*,⁽⁹⁾ per Fernando J.

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Article 138 of the Constitution which provides for the revisionary jurisdiction of the Court of Appeal does not state that it can be exercised only in exceptional circumstances. Section 753 of the Civil Procedure Code (as amended by Act No 79 of 1988) which sets out the revisionary powers of the Court of Appeal in civil cases provides that the Court may make any order "as the interests of justice may require". This section too does not state that revisionary powers can be exercised only in exceptional circumstances.

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In the early case of *Perera v Silva* ⁽¹⁰⁾ Hutchinson C.J. has stated that "I do not feel in the least able to say in what cases the Court ought and in what court ought not, to exercise that power of revi-

sion under s.753. 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. (emphasis added) In *Ameen v Rashid*⁽¹¹⁾ Abrahams C.J. has said "It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we shall 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 ordinary method of appeal. I can see no reason why the petitioner should expect us to exercise our revisionary powers in his favour when he might have appealed..." Similarly Soertsz J. in *Atukorale v Saminathan*⁽¹²⁾ at 166 stated that the right of the Court to revise any order made by an original court will be exercised in a case in which an appeal is already pending only in exceptional circumstances. Recently in *Caderamanapulle v Ceylon Paper Sacks*⁽¹³⁾ this Court has held "when the decided cases cited before us are carefully examined, it becomes evident in almost all the cases cited, the powers of revision have been exercised only in a limited category of situations. The existence of exceptional circumstances is a precondition for the exercise of the powers of revision and the absence of exceptional circumstances in any given situation results in refusal of remedies." (per Nanayakkara, J.)

In *Fernando v Ceylon Brewery Ltd.*⁽¹⁴⁾ U.de Z Gunawardana J has stated that the existence of exceptional circumstances is not an indispensable pre-condition for the exercise of revisionary powers vested in the Court of Appeal. He has expressed this view after comparing section 753 of the Civil Procedure Code as it originally stood with the amendment made to section 753 by amending Act No 79 of 1988. As section 753 stood before the amendment, the court in revision could make any order which it might have made had the case been brought before it in due course of appeal instead of by way of revision. commenting on the nature of the order the Court is empowered to make in revision Nagalingam A.J. in *Perera v Agidahamy*⁽¹⁵⁾ has stated that if the court could not have passed a particular order in an appeal, then such order could not be made even if the matter be brought before it by way of revision.

By the amendment of 1988 the words 'make any order thereon as the interests of justice may require' were substituted in place of the words 'make any order which it might have made had the case been brought before it in due course of appeal instead by way of revision' in section 753. It appears that the amendment of 1988 has been brought to bring section 753 of the Civil Procedure Code in line with Article 145 of the Constitution which confers power on the Court of Appeal for the examination of records of the Courts of First Instance. That article empowers the court to make any order as the interests of justice may require. 120

Commenting on the effect of the amendment made to section 753 by Act No 79 of 1988, Gunawardana, J. in *Fernando v Ceylon Brewery Ltd (supra)* has said that "the amended section enable the court to be more flexible and less legalistic in its means and approach in dealing with a matter for section 753 in its amended form seems to exalt not so much the rigor of the law but unalloyed justice in the sense of good sense and fairness. So that the basis for the rationale for insisting on the requirement of special circumstances as a condition precedent to the exercise of revisionary jurisdiction had disappeared as a consequence of the amendment section 753...." 130

The decision of Gunawardana J. in *Ceylon Brewery* case was set aside by the Supreme Court in *Ceylon Brewery Ltd v Fernando*⁽¹⁶⁾ on the basis that the period of 14 days provided in section 86(2) of the Civil Procedure Code is mandatory (and not merely directory as decided by Gunawardana, J). The Supreme Court has not expressed any opinion on the question whether exceptional circumstances are unnecessary under the amended section 753 to invoke the revisionary jurisdiction of the Court of Appeal. 140

The requirement of exceptional circumstances for the exercise of revisionary jurisdiction is not a requirement statutorily laid down anywhere. As Gunawardana J. himself has referred to, Abrahams CJ. in *Ameen v Rashid (supra)* has explained the rationale for insisting on the existence of exceptional circumstances for the exercise of revisionary jurisdiction. According to Abrahams CJ. revision of an appealable order is an exceptional proceeding and a person seeking this method of rectification must show why this extra- 150

ordinary method is sought rather than the ordinary method of appeal. As Hutchinson CJ. has stated in *Perera v Silva (supra)* it is not possible to contend 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. 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. If such a selection process is not there revisionary jurisdiction of this Court will become a gateway for every litigant to make a second appeal in the garb of a revision application or to make an appeal in situations where the legislature has not given right of appeal. 160

The practice of Court to insist on the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed. The words used by the legislature do not indicate that it ever intended to interfere with this 'rule of practice'. 170

There was another reason for the legislature to confer power on the Court of Appeal to make any order as the interests of justice may require without limiting the Court's power to make any order the Court might have made had the case been brought up before it by way of an appeal. In its original form, revisionary powers under section 753 could be exercised only in respect of proceedings of courts and did not extend to proceedings of Tribunals and other institutions. See *Thameena v Koch*⁽¹⁷⁾, *SLBC v de Silva* ⁽¹⁸⁾ and *Nadaraja v. Thilaganathan*⁽¹⁹⁾. The amendment No 79 of 1988 brought the proceedings of Tribunals and other institutions within the purview of the revisionary jurisdiction of the Court of Appeal. In *Perera v Agidahamy (supra)* it has been held that if there is no right of Appeal against a particular decision, revision too was not available as the court's power was limited to the making of an order which it would have made had the matter been brought up by way of an appeal. Sometimes the legislature does not confer a right of appeal against a decision of a Tribunal or any other institution. It appears that the enlarged power has been conferred on the Court of appeal to deal with proceedings which cannot be brought before it by way of an appeal. 180 190

Therefore I hold that even after the amendment brought to section 753 by Act No 79 of 1988, the existence of exceptional circumstances is a necessary pre-condition for the exercise of revisionary powers. In this case the petitioner has not pleaded or established exceptional circumstances warranting the exercise of revisionary powers. The petitioner had already filed an appeal against the decision of the learned District Judge and all matters set out in paragraphs 19 and 20 of the petition are matters which could be canvassed in the appeal. 200

Accordingly application for revision is dismissed with costs in a sum of Rs.10,000/- payable to the 2nd respondent.

BALAPATABENDI J. - I agree

Application allowed