

**ABEYGUNASEKERA**  
v.  
**SETUNGA AND OTHERS**

SUPREME COURT.  
G. P. S. DE SILVA, C.J.,  
KULATUNGA, J. AND  
RAMANATHAN, J.  
S.C. REFERENCE NO. 1/94.  
C.A. APPEAL NO. 18/92 (PHC).  
H.C. COLOMBO NO. 22/91 (REV).  
M.C. MT. LAVINIA NO. 68192.  
MAY 26, 1995.

*Jurisdiction of the Court of Appeal to hear appeals from orders of a Provincial High Court made in the exercise of its Revisionary Jurisdiction – Article 154P (3) (b), 154P (6) and 138(1) of the Constitution– Section 74(2) of the Primary Courts' Procedure Act No. 44 of 1979.*

The following questions were referred to the Supreme Court for determination in terms of Article 125(1) of the Constitution.

1. Does the Court of Appeal have an appellate jurisdiction in terms of Article 138(1) of the Constitution as amended by the 13th Amendment in respect of a decision of the Provincial High Court made in the exercise of its Revisionary Jurisdiction?
2. Does a party aggrieved by a decision of the Provincial High Court given in respect of a matter coming within Part VII of the Primary Courts' Procedure Act, have a right of appeal to the Court of Appeal in terms of Article 154P(6) of the Constitution as amended by the 13th Amendment read with Section 74(2) of the Primary Courts Procedure Act?

**Held:**

- (i) The Appellate jurisdiction of the Court of Appeal under Article 138(1) read with Article 154P(6) of the Constitution is not limited to correcting errors committed by the High Court only in respect of Orders given by way of appeal. The Court of Appeal has jurisdiction to hear an appeal against a decision of the High Court whether given by way of Appeal or Revision.
- (ii) Section 74(2) of the Act No. 44 of 1979 plainly prohibits an appeal from the decision of the Primary Court Judge. Such prohibition cannot affect the right of appeal to the Court of Appeal against a decision of the High Court.

The questions referred to are answered as follows:

1. Yes
2. Yes

**Per Kulatunga, J.,**

"There is no warrant for dissecting Article 138(1) into two parts and holding that the powers of Appeal and Revision given by the Second Part are limited to decisions given in the exercise of the original jurisdiction of the High Court. The entire article should be read as a whole."

**Cases referred to:**

1. *Gunaratne v. Thambinayagam* (1993) 2 Sri L.R. 355.

Reference to the Supreme Court under Article 125(1) of the Constitution.

*J. W. Subasinghe P.C.* with *D. R. P. Goonetilleke and Manohara de Silva* for appellants.

*S. Mahenthiran* with *Sampath Welgampola* for appellant in C.A. 1/93 (PHC).

*Nihal Jayamanne* with *Prasantha de Silva, Ms Noorania Amerasinghe and Ms. Vasana Perera* for 1st respondent.

Other respondents absent and unrepresented.

*Cur. adv. vult.*

June 8, 1995.

**KULATUNGA, J.**

A dispute affecting land (between the Party of the 1st Part and the Party of the 2nd Part, hereinafter referred to as the "appellant" and the "1st respondent", respectively) was referred to the Magistrate's Court of Mt. Lavinia under Section 66 of the Primary Courts' Procedure Act No. 44 of 1979. After inquiry, the Magistrate (acting in his capacity of a Primary Court Judge) made order in terms of Section 68 of the Act directing the appellant to be restored to possession. That order was set aside by the High Court of the Western Province acting in revision on an application made by the 1st respondent. The appellant being aggrieved by the judgment of the High Court, appealed to the Court of Appeal.

At the hearing of the appeal a preliminary objection was raised that the Court of Appeal has no jurisdiction to entertain the appeal as the same is in respect of an order made in the exercise of the revisionary jurisdiction of the High Court. A question was also raised as to whether in the light of Section 74(2) of Act No. 44 of 1979 the appellant is entitled to appeal to the Court of Appeal. The Court of

Appeal acting under Article 125(1) of the Constitution, referred the following questions to this Court for determination.

- (1) Does the Court of Appeal have an appellate jurisdiction in terms of Article 138(1) of the Constitution as amended by the 13th amendment in respect of a decision of the Provincial High Court made in the exercise of its revisionary jurisdiction?
- (2) Does a party aggrieved by a decision of the Provincial High Court given in respect of a matter coming within part VII of the Primary Courts Procedure Act, have a right of appeal to the Court of Appeal in terms of Article 154P(6) of the Constitution as amended by the 13th amendment read with Section 74(2) of the Primary Courts' Procedure Act.

Learned Counsel for the 1st respondent submitted that on a proper construction of the relevant provisions, the Court of Appeal cannot entertain the appeal; and the appellant's remedy is possibly by way of revision to the Court of Appeal. In the alternative he submitted that the decision in *Gunaratne v. Thambinayagam*<sup>(1)</sup> is wrong when it held that Section 9 of Act No. 19 of 1990 does not permit direct appeals to the Supreme Court from orders made in the exercise of revisionary jurisdiction of the High Court of a Province; and that it is the Supreme Court which has the jurisdiction to entertain an appeal from the impugned judgment. On the second question, Counsel submitted that Section 74(2) of Act No. 44 of 1979 provides that "an appeal shall not lie against any determination or order under this part"; that the right of appeal under Article 154P(6) is subject to law; hence Section 74(2) should be interpreted as prohibiting any appeal to any Court, including the Court of Appeal. Counsel argued that this interpretation will give effect to the intention of the Legislature which is to avoid protracted litigation in respect of orders made by a Primary Court Judge which are of an interim nature.

Learned Counsel for the appellant and Mr. Mahenthiran who was heard (in terms of Article 134(3) of the Constitution) in view of the fact that he appears for the appellant in a similar case C.A. No. 1/93 (PHC) submitted that in *Gunaratne v. Thambinayagam (Supra)* this Court was concerned with the interpretation of Section 9 of Act No. 19/1990; hence that decision has no application here. In the matter before us, there is no justification for eroding the appellate jurisdiction

of the Court of Appeal under Article 138(1) to entertain appeals lodged in the exercise of the right of appeal granted by Article 154P(6). Counsel also submitted that Section 74(2) only precludes an appeal from an order of the Primary Court Judge and it would not touch the power of the Court of Appeal to entertain an appeal from the judgment of the High Court.

In order to determine the questions referred to this Court, we have to interpret the provisions of Article 154P (3) (b), Article 154 (P) (6) and Article 138(1) of the Constitution. These Articles are reproduced below.

A. 154 P (3) –

"Every such High Court shall –

(a) .....

(b) notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrate's Courts and Primary Courts within the Province".

A. 154 P (6) –

"Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgment or sentence of any such Court in the exercise of its jurisdiction under paragraph (3) (b) . . . . ., may appeal therefrom to the Court of Appeal in accordance with Article 138".

A. 138 (1) –

"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 the High Court in the exercise of its appellate or original jurisdiction or 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 causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, Tribunal or other institution may have taken cognizance".

In *Gunaratne v. Thambinayagam (Supra)* the question that came up for consideration was whether the right of direct appeal to the Supreme Court provided by S.9 of Act No. 19 of 1990 is limited to orders made by the High Court in the exercise of its "appellate jurisdiction" in the narrow sense and excluded appeals from orders made in the exercise of its "revisionary jurisdiction". It was held that S.9 would not confer a right of appeal in respect of revisionary orders of the High Court. In so deciding, this Court had regard *inter alia*, to the following considerations:

- (a) The power of revision is an extraordinary power distinct from the appellate jurisdiction of the Court.
- (b) The right of appeal is a statutory right and must be expressly created and granted by statute.
- (c) Section 9 refers to orders made in the exercise of the appellate jurisdiction of the High Court. In contrast S.31DD(1) of the Industrial Disputes Act as amended by Act No. 32 of 1990 (which also provides for direct appeals to the Supreme Court) provides for an appeal from any final order of a High Court, in the exercise of the **appellate jurisdiction** or its **revisionary jurisdiction**, vested in it by law, in relation to an order of a Labour Tribunal.

It is thus clear that the expression "appellate jurisdiction" in S.9 of Act No. 19 of 1990 has a restricted meaning. If so, this Court cannot enlarge the right of appeal granted by that section. It is a matter for Parliament. As such, I am unable to agree that the case of *Gunaratne v. Thambinayagam (Supra)* has been wrongly decided. In the instant case, we are not concerned with the question whether a statutory right of appeal granted by ordinary law is subject to any limitation. The question here is whether the appellate jurisdiction of the Court of Appeal under Article 138(1) of the Constitution to entertain appeals made in terms of Article 154P(6) is restricted and excludes the power to entertain appeals from revisionary orders of the High Court. If it is so restricted then, it also means that the right of appeal granted by Article 154P(6) is restricted by Article 138(1).

Conceptually, the expression "appellate jurisdiction" includes powers in appeal and on revision. From the time of the Administration

of Justice Law No. 44 of 1973 it also includes *restitutio in integrum*. See Sections 36 and 37 of the Courts Ordinance (Cap.6), Sections 11 and 354 of the A.J. L. and Articles 138, 139 and 145 of the Constitution. Prior to the 13th amendment when only the Courts of First Instance, Tribunals and other institutions were subject to the appellate jurisdiction of the Court of Appeal, there was no question that the Court of Appeal was empowered to exercise its jurisdiction "by way of appeal, revision and *restitutio in integrum*". Under the 13th amendment the High Court of a Province which is vested with powers of appeal as well as revision is not a Court of First Instance. Hence, by a consequential amendment to Article 138(1), that Court also has been made subject to the appellate jurisdiction of the Court of Appeal. The amendment provides *inter alia* that "the Court of Appeal shall have and exercise ... an appellate jurisdiction for the correction of all errors ... which shall be committed by the High Court, in the exercise of its **appellate or original jurisdiction**".

The power to review the orders of Magistrate's Courts and Primary Courts by way of appeal and revision is conferred on High Courts by Article 154P (3) (b). Section 3 of Act No. 19 of 1993 extended this power to orders of Labour Tribunals and orders made under Sections 5 and 9 of the Agrarian Services Act. Had these provisions conferred appellate jurisdiction on the High Court to be exercised by way of appeal and revision, the questions of interpretation of the kind which have arisen from time to time may not have arisen. However, the use of the expression "appellate and revisionary jurisdiction" has given rise to such questions. Whenever such questions arise as to the meaning of a particular provision, the Court has to interpret the statute and determine its meaning on the basis of the intention of Parliament or the supposed intention of Parliament, having regard to the language of the statute and relevant rules of interpretation. As stated in Bindra's "Interpretation of Statutes" 7th Ed. p.945:

"It is the duty of the Court to determine in what particular meaning or particular shade of meaning the word or expression was used by the Constitution makers, and in discharging the duty the Court will take into account the context in which it occurs, the subject to serve which it was used, its collocation the general congruity with the concept or object it was intended to articulate and a host of other considerations. Above all, the Court will avoid repugnancy with accepted norms of justice and reason".

In the case before us, Article 154P (3) (b) conferred "appellate and revisionary" jurisdiction on the High Court. Article 154P (6) provides that any person aggrieved by a decision of the High Court **in the exercise of its jurisdiction** *inter alia*, under paragraph (3) (b) may appeal therefrom to the Court of Appeal in accordance with Article 138. Thus Article 154(P) (6) itself has not limited the right of appeal given by it to orders made by the High Court by way of appeal. However, that Article refers back to Article 138 which spells out the jurisdiction of the Court of Appeal and the manner of its exercise.

Learned counsel for the 1st respondent relies upon the wording of the first part of Article 138(1) to argue that the right of appeal given by Article 154(p) (6) is limited to correcting errors committed by the High Court in deciding appeals. This argument is based on the use of the words "appellate jurisdiction for the correction of all errors . . . committed by the High Court in the exercise of its appellate or original jurisdiction". Counsel next cites the second part of Article 138(1) which gives the Court "sole and exclusive cognizance by way of appeal, revision and *restitutio in integrum* of all causes, suits actions, prosecutions, matters and things of which such High Court, Court of First Instance, Tribunals or other institution may have taken cognizance". He argues that by this part the Court of Appeal is given appellate and revisionary jurisdiction only with regard to orders made by the High Court in the exercise of its original jurisdiction.

In my opinion there is no justification for the suggested construction of Article 138(1). In using the expression "appellate or original jurisdiction" Parliament intended to refer to the appellate jurisdiction of the High Court as opposed to its original jurisdiction. These words were not used to limit the appellate jurisdiction of the Court of Appeal to correct the errors committed by the High Court only in respect of decisions given by way of appeal. This is the interpretation which is most agreeable to justice and reason.

Secondly, there is no warrant for dissecting Article 138(1) into two parts and holding that the powers of appeal and revision given by the second part are limited to decisions given in the exercise of the original jurisdiction of the High Court. The entire Article should be read as a whole. The second part is complementary to the first part and proceeds to give the Court sole and exclusive cognizance over

all the matters referred to in that Article and to spell out the manner of exercise of the appellate jurisdiction of the Court of Appeal. The second part refers to "such High Court" viz. the High Court having appellate and original jurisdiction. Accordingly, I hold that the Court of Appeal has jurisdiction to hear an appeal against a decision of the High Court whether given by way of appeal or on revision.

There is also no merit in the submission that Section 74(2) of Act No. 44 of 1979 is a bar to an appeal to the Court of Appeal from the judgment of the High Court. That section plainly prohibits an appeal from a decision of the Primary Court Judge. Such prohibition cannot affect the right of appeal to the Court of Appeal against a decision of the High Court. It is true that the right of appeal given by Article 154(P) (6) is subject to any law. However, having regard to its plain meaning, Section 74(2) cannot be invoked to deprive the appellant's right of appeal to the Court of Appeal. On the other hand, in the absence of clear and express provision, it is in the interest of justice that such right should be upheld rather than denied lest erroneous decisions of the High Court will be immune from scrutiny by a Superior Court.

For the foregoing reasons, the questions referred to this court have to be answered as follows:

1. Yes.
2. Yes.

The appellant will be entitled to costs in a sum of Rs. 750/- payable by the 1st respondent.

**G. P. S. DE SILVA, C. J.** – I agree.

**RAMANATHAN, J.** – I agree.

*Questions referred answered.*