

MALEGODA
v.
JOACHIM

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
PERERA, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 110/95
H.C. COLOMBO NO. 33/91
M.C. COLOMBO NO. 65573
NOVEMBER 20, 1996.

Appeal – Jurisdiction of the High Court to entertain an appeal – Right of Appeal – Urban Development Authority Law No. 41 of 1978 as amended, Sections 19D(1) and 19H(1) – Article 154P(3) (b) of the Constitution.

The appellant appealed to the Court of Appeal against an order made by the Magistrate in proceedings under Section 19D(1) of the Urban Development Authority Law No. 41 of 1978, as amended by Act No. 41 of 1988. The Appeal which was filed in the Magistrate's court was forwarded to the High court of Colombo. The High Court Judge heard the appeal.

Held:

As at the date the appeal was filed, the appellant's statutory right of appeal was to appeal to the Court of Appeal, hence the High Court had no jurisdiction to hear and determine the appeal. Article 154P(3) (b) of the Constitution only conferred forum jurisdiction to hear appeals but does not create a corresponding right in any person to invoke the appellate jurisdiction. A right of appeal is a statutory right and must be expressly created and granted by statute.

Cases referred to:

1. *Gunaratne v. Thambinayagam* (1993) 2 Sri LR-355, 360.
2. *Martin v. Wijewardena* (1989) 2 Sri L.R. 409.
3. *Perera v. The Commissioner of National Housing* 77 NLR 361 at 366.

APPEAL from the judgment of the High Court of Colombo.

Faisz Musthapha, P.C., with *Amarasiri Panditharatne* for appellant.

Romesh de Silva, P.C., with *Harsha Amerasekera* for substituted respondent.

Cur. adv. vult.

December 16, 1996

G. P. S. DE SILVA, C.J.,

The predecessor of the substituted petitioner-respondent instituted these proceedings in the Magistrate's Court in terms of section 19D (1) of the Urban Development Authority Law No. 41 of 1978 as amended by the Urban Development Authority (Amendment) Act No. 41 of 1988 to eject the appellant and two others from unit (F) 132 of the 1st floor of the condominium property named Liberty Plaza. The Magistrate by his order dated 6.4.90 allowed the application and made absolute the order *nisi*.

The appellant filed in the Magistrate's Court a petition of appeal against the order of the Magistrate. It is to be noted that the petition of appeal was addressed to the **Court of Appeal**. The journal entry dated 18.4.90 shows that the Magistrate had made order (1) "accept appeal" (2) "enter in appeals register", (3) "forward to the High Court, Colombo, for preparation of briefs to be transmitted to the Court of Appeal" - (vide J. E. 18.4.90). It is Common ground that the appeal had been lodged in the Magistrate's Court on the 18th April 1990. However, the appeal was by an error, listed for argument before the High Court of the Western Province (Colombo). Written submissions

were filed, oral submissions were made on 22.3.95 before the High Court and the High Court on 24.5.95 dismissed the appeal.

The appellant filed an application for special leave to appeal to this court against the order of the High Court and leave was granted on the following matters:- (a) Did the High Court have jurisdiction to take cognizance of and/or hear and determine the appeal from the order of the Magistrate's Court; (b) if not, should this matter be referred to the Court of Appeal for decision in respect of the appeal against the order of the Magistrate's Court?

It was the submissions of Mr. Musthapha for the appellant that the High Court had no jurisdiction to hear and determine the appeal. With this submission I agree. The right of appeal against an order made in proceedings under section 19D(1) is conferred by section 19H(1) of the amending Act No. 41 of 1988. Section 19H(1) is in the following terms:- "Any person who is dissatisfied with an order under section 19E(3) or 19F(1) by a Magistrate's Court may before the expiry of a period of 14 days from the date of such order, **appeal to the Court of Appeal** against such order." It is clear therefore that the right of appeal was to the Court of Appeal and not to the High Court.

It is true that Article 154P (3) (b) of the Constitution enacts that a High Court for each Province shall "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 magistrates Courts and Primary Courts within the provinces." But the point to be noted is that while Article 154 P confers appellate jurisdiction on the High Court (forum jurisdiction) yet it does not create a corresponding right in any person to invoke the appellate jurisdiction. It is well settled law "that a right of appeal is a statutory right and must be expressly created and granted by Statute." *Gunaratne v. Thambinayagam and Others*⁽¹⁾. The right of appeal to a High Court for each Province from orders made by Magistrates Courts was expressly created and granted by section 4 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990. This Act came into operation only on the 15th of May 1990. Therefore on the 18th of April 1990, which was the date on which the petition of appeal was filed in the Magistrate's Court, there existed no right of appeal to the High Court established by Article 154P of the Constitution.

Mr. Musthapha cited the case of *Martin v Wijewardena* ⁽²⁾, which is of relevance to the matters in issue in this appeal. That was a case where the following preliminary question of law arose for consideration:- "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?"

Jameel J., having set out the provisions of Article 138 expressed himself in the following terms:- "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 (at page 413)... 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 to take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments." (at page 419). This reasoning would apply with equal force to the conferment of jurisdiction on the High Court established by Article 154P. As stated earlier, **the right of appeal to a High Court of the Province** was conferred only by the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 which was brought into operation on a date subsequent to the filing of the petition of appeal in this case.

Mr. Romesh de Silva for the respondent stressed the fact that no objection to the jurisdiction of the High Court of the Western Province to hear and determine this appeal was ever taken either in the written submissions or at the hearing of the appeal. In my view the failure to take such objection is of no avail to the respondent, as this is clearly a case where there was a patent want of jurisdiction in the High Court of the Western Province to hear and determine the appeal. (see *Perera v The Commissioner of National Housing* ⁽³⁾).

I accordingly hold that the High Court of the Western Province had no jurisdiction to hear and determine the appeal. The appeal is allowed, the judgment of the High Court is set aside and the Court of Appeal is directed to hear and determine this appeal. There will be no costs.

PERERA, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal allowed.
