

ABEYWARDENE
v.
AJITH DE SILVA

SUPREME COURT
AMERASINGHE, J., WADUGODAPITIYA, J.,
WIJETUNGA, J., ANANDACOOMARASWAMY, J.
AND SHIRANI BANDARANAYAKE, J.
S.C. SPECIAL L.A. NO. 457/96
29TH JULY 1997.

Appeal – Article 154 P (3) (b) of the Constitution – Sections 5 and 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 – Appeal from an order of the High Court in the exercise of its revisionary jurisdiction.

The petitioner sought leave to appeal to the Supreme Court from an order made by the High Court in the exercise of its revisionary jurisdiction.

Held:

A direct appeal does not lie to the Supreme Court from the order of the High Court in the exercise of its revisionary jurisdiction. An appeal from such order should be made to the Court of Appeal.

Cases referred to :

1. *Gunaratne v. Thambinayagam and others* (1993) 2 Sri LR 355.
2. *Abeygunasekara v. Setunge and others* (1997) 1 Sri LR 62.
3. *Yapa v. Ameer and another* S.C. Spl. L.A. S.C. minutes 5 March 1977.
4. *In Re 13th Amendment to the Constitution* (1987) 2 Sri LR 310, 323.
5. *Mariam Beebee v. Seyed Mohamed* (1966) 68 NLR 36, 38.
6. *Attorney-General v. Podisingho* 51 NLR 385, 388.
7. *Somawathie v. Madawela* (1983) 2 Sri LR 15, 26.
8. *Thameena v. Koch* (1969) 72 NLR 192.
9. *S.L.B.C. v. De Silva* (1981) 2 Sri LR 228 (CA).
10. *Nadarajah v. Tilagaratnam* (1986) 3 CALR 303 (CA).

APPLICATION for Special Leave to Appeal from the judgment of High Court, Anuradhapura.

Mohan Peiris with Shanaka Ranasinghe, Nuwanthi Dias, Nirosha Jayamaha, Jayantha Fernando, Nishada Gamage for the petitioner.

Patrick Fernando with R. E. Thambiratnam for the respondent.

Cur. adv. vult.

13th October, 1997

ANANDACOOMARASWAMY, J.

This is an application for Special Leave to Appeal from the order of the learned High Court Judge of Anuradhapura dated 5th August, 1996. When this application was supported for special leave before a Bench consisting of Amerasinghe, J., Anandacoomaraswamy, J. and Gunawardena, J., Counsel for the respondent raised a preliminary objection namely that the petitioner had filed this application in the wrong forum, for the petitioner should have first appealed to the Court of Appeal and thereafter if he was unsuccessful come to this court if he so desired. He relied on the decision of this court (Kulatunga, J. with whom G. P. S. de Silva C.J., and Ramanathan, J. agreed) in the case of *Gunaratne v. Thambinayagam and others*⁽¹⁾. In that case it was held :

1. "The right of appeal is a statutory right and must be expressly created and granted by statute.

2. S. 9 of Act No. 19 of 1990 does not give a right of appeal to the Supreme Court from an order of the High Court in the exercise of its revisionary jurisdiction".

He also relied on the decision of this court by the same Bench in the case of *Ananda Gordon Abeygunasekera v. Adikari Mudalige Don Mervyn Joseph Setunga and two others*⁽²⁾. In that case, this Court answered the following two questions referred to this court by the Court of Appeal in the affirmative:

- (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 154 P (6) of the Constitution as amended by the 13th amendment read with section 74 (2) of the Primary Courts Procedure Act?"

In that case it was argued that *Gunaratne v. Thambinayagam (supra)* was wrongly decided.

Learned counsel for the respondent also relied on the decision of this court (Fernando, J., Wadugodapitiya, J., Perera, J.) in *Yapa v. Ameer and another*⁽³⁾. Where the Court held that according to the decision in *Gunaratne v. Thambinayagam (supra)* there is no such right of appeal and the Court agreed with that decision.

Learned counsel for the petitioner submitted that the cases relied on by learned counsel for the respondent were wrongly decided. In view of his submission that Bench requested His Lordship the Chief Justice to consider appointing a fuller Bench to consider the following question :

"Does a direct appeal lie to the Supreme Court from an order of the High Court in the exercise of its revisionary jurisdiction without appealing to the Court of Appeal".

In view of this request His Lordship The Chief Justice nominated this Bench to hear and determine the question of law.

At the outset I must say that these three decisions are right and that if in consequence of these decisions there would be an undesirable increase of litigation, that is the matter for the legislature.

In the instant case a dispute relating to land had been referred to the Magistrate's Court of Anuradhapura in terms of section 66 (1) (b) of the Primary Courts Procedure Act, No. 44 of 1979. The respondent in that case raised an objection stating that the Magistrate lacked jurisdiction to inquire into the matter. That objection was overruled and the respondent filed an application in the High Court of Anuradhapura for the revision of the said order. The learned High Court Judge allowed the application for revision and set aside the order of the learned Magistrate. It is from the order of the learned High Court Judge that the petitioner has filed this application in this court for special leave to appeal.

The question before this court is whether a direct appeal lies to this court from an order of the High Court in the exercise of its revisionary jurisdiction without first preferring an appeal to the Court of Appeal.

There is no right of appeal from an order of the Primary Court Judge by reason of the provisions of section 74 (2) of the Primary Courts Procedure Act, No. 44 of 1979. However, parties appeal to the Court of Appeal by way of revision under Article 138 of the Constitution read with Article 145 to have the order set aside. After the 13th Amendment, section 5 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 154P (3) (b) of the Constitution (enacted by the 13th Amendment) entitled him to file such application in the High Court of the province. The jurisdiction of the High Court in the matter is concurrent. *In Re the 13th Amendment to the Constitution.*⁽⁴⁾ In the result, he may file an application in the Court of Appeal or in the High Court. Article 154P establishes a High Court for each province. Article 154P (3) (b) states as follows:-

"Every such High Court 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 Magistrate's Courts and Primary Courts within the province".

Article 154P (6) states as follows :-

"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 paragraphs (3) (b) . . . may appeal to the Court of Appeal in accordance with Article 138".

After the 13th Amendment, appeals to the Court of Appeal from High Courts established by Article 154P of the Constitution were governed by the Court of Appeal (Procedure for appeals from High Courts established by Article 154P of the Constitution) Rules, 1988 made by the Supreme Court and published in *Gazette Extraordinary* No. 549/6 of 13.03.89. This was followed by Act No. 19 of 1990. Section 9 of Act No. 19 of 1990 provides for a direct appeal to the Supreme Court from any final or interlocutory order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by Article 154P (3) (b) or s. 3 of the Act or any other law. s. 10 provides as follows :-

- (1) "The Supreme Court shall, subject to the Constitution be the final court of appellate jurisdiction within Sri Lanka for the correction of all errors in fact or in law which shall be committed by a High Court established by Article 154P of the Constitution, in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act, or any other law and the judgments and orders of the Supreme Court shall, in such cases, be final and conclusive in all such matters.
- (2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgment, decree or sentence made by a High Court established by Article 154P of the Constitution, in the exercise of the appellate jurisdiction vested in such High Court by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act or any other law and it may affirm, reverse

or vary any such order, judgment, decree or sentence of such High Court and may issue such directions to such High Court or Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by such High Court, or any Court of First Instance".

The cumulative effect of the provisions of Articles 154P (3) (b), 154P (6) and section 9 of Act No. 19 of 1990 is that, while there is a right of appeal to the Supreme Court from the orders, etc., of the High Court established by Article 154P of the Constitution in the exercise of the *appellate jurisdiction* vested in it by Article 154P (3) (b) or Section 3 of Act No. 19 of 1990 or any other law, there is no right of appeal to the Supreme Court from the orders in the exercise of the *revisionary jurisdiction*. An appeal from an order of the High Court in the exercise of its revisionary jurisdiction should be made to the Court of Appeal. An appeal to the Supreme Court from the decision of the Court of Appeal would lie, with leave.

It is contended on behalf of the petitioner that the expression "appellate jurisdiction" (as opposed to "Original Jurisdiction") would ordinarily include the power to review decisions by way of appeal, revision or *restitutio in integrum*. I do not agree with this submission. Article 154P (3) (b) refers to "appellate" and "revisionary" jurisdiction, but "revisionary jurisdiction" is omitted in section 9 of Act No. 19 of 1990. The omission, in my view, is not inconsequential, for jurisdiction in respect of revision is distinct from appellate jurisdiction (*Mariam Beebee v. Seyed Mohamed*⁽⁵⁾). Vide also *Somawathie v. Madawela*⁽⁶⁾ and *Attorney-General v. Podisingho*⁽⁷⁾.

Prior to the enactment of section 3 of Act No. 19 of 1990, the remedy by way of revision was not available against the order of a Labour Tribunal: Vide *Thameena v. Koch*⁽⁸⁾, *S.L.B.C. v. De Silva*⁽⁹⁾ and *Nadarajah v. Tilagaratnam*⁽¹⁰⁾. Section 3 of Act No. 19 of 1990 vested in the High Court (in addition to *appellate jurisdiction*) *revisionary jurisdiction* in respect of the orders of Labour Tribunal and orders made under sections 5 and 9 of the Agrarian Services Act. Further, while section 9 of Act No. 19 of 1990 does not give a right of appeal to the Supreme Court from an order of the High Court made in the exercise of its revisionary jurisdiction, section 31D of the Industrial Disputes Act as amended by Act No. 32 of 1990 (which also provides for direct appeals to the Supreme Court) provides as follows :

"Any workman, trade union or employer who is aggrieved by any final order of a High Court established under Article 154P of the Constitution, in the exercise of the appellate jurisdiction vested in it by law or in the exercise of its revisionary jurisdiction vested in it by law, in relation to an order of a Labour Tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained".

It will thus be seen that if a litigant invokes the revisionary jurisdiction of the Court of Appeal, he has one chance for an appeal to the Supreme Court, whereas if he invokes the revisionary jurisdiction of the High Court he will have two chances of appeal, one to the Court of Appeal and then to the Supreme Court, except when the revisionary jurisdiction of the High Court is invoked in relation to an order of a Labour Tribunal, in which case there is only one appeal and that too to the Supreme Court only.

It is further seen that the legislature did intend to have the right of appeal to the Court of Appeal from a revisionary order of the High Court except when the revisionary jurisdiction of the High Court is invoked in relation to an order of a Labour Tribunal.

In response to the question placed before this court, I hold that a direct appeal does not lie to the Supreme Court from the order of the High Court in the exercise of the revisionary jurisdiction. An appeal from the order of the High Court in the exercise of its revisionary jurisdiction should be made to the Court of Appeal. Where a party is dissatisfied with the order of the Court of Appeal, the party may, with leave of the Court of Appeal or when such leave is refused by the Court of Appeal, with leave of the Supreme Court, appeal to the Supreme Court.

For the foregoing reasons I am of opinion that the preliminary objection must be upheld.

Special Leave to Appeal is therefore refused, with costs fixed at Rs. 5,250/-.

AMERASINGHE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

WIJETUNGA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Special leave to appeal refused.