SHARIF AND OTHERS VS. WICKRAMASURIYA AND OTHERS

COURT OF APPEAL
ERIC BASNAYAKE, J.
CHITRASIRI, J.
CA 972/2007
PR. LT. PUTTALAM 16097/P
SEPTEMBER 10, 2008
JUNE 1, 5, 2009
OCTOBER 8, 2009
NOVEMBER 18, 2009

Restitutio-in Integrum –Primary Courts Procedure Act – Section 66 – Section 66 (1) (a) (i). Jurisdiction of the Court of appeal to entertain Revision/Restitutio-in-Integrum applications from Primary Court orders? Constitution Article 138 – 13th Amendment Article 154 P(3) – High Court of the Provinces (Special Provisions) Act 19 of 1990 – Section 9 as amended by Act 54 of 2006.

The petitioner sought an order by way of restitutio in integrum and or revision to set aside an order made by the Primary Court Judge under Section 66 of the Act.

It was contended by the respondent that the Court of Appeal has no jurisdiction to hear revision applications filed against the orders or judgments of Magistrate Courts and that after the 13th amendment to the Constitution and Act 19 of 1990 the aggrieved parties should move the respective High Courts of the Provinces in Revision.

Held

(1) In terms of Article 138 Court of Appeal shall have and exercise sole and exclusive cognizance by way of appeal, revision. However Article 154 (3) has given the High Court Appellate and revisionary jurisdiction in respect of orders by Magistrates/primary Courts. Hence the Court of Appeal ceased to enjoy sole and exclusive jurisdiction. Article 154 P did not take away the powers exercised by the Court of Appeal under Article 138.

Per Eric Basnayake, J.

"High Court is vested with original jurisdiction and is placed lower to the Court of Appeal in the order of Courts on superiority".

(2) Jurisdiction enjoyed by the Court of Appeal through Article 138 remains intact. Both Courts enjoy concurrent jurisdiction on matters referred to in Article 154 P (3)

(3) High Court of the Provinces (Sp. Prov) Act 19 of 1990 had made provision for the Court of Appeal either to transfer such appeal or application to High Court or to hear and determine such applications.

Per Eric Basayake, J.

"I am of the view that it is more expedient for the Court of Appeal to hear and conclude this case rather than to transfer it to High Court and for the reasons given on the merits I find that the learned Judge has gravely erred in her order.

(4) The fact that the Primary Court had not made an effort to persuade parties to arrive at an amicable settlement fundamentally affects the capacity or deprives the Primary Court of competence to hold an inquiry into the question of possession.

APPLICATION for Revision/Restitutio in Integrum from an order of the Primary Court of Puttalam.

Cases referred to:-

(1) *Kanagasabai vs. Mylvaganam* 78 NLR 280

(2) *Ramalingam vs. Thangarajah* 1982 2 Sri LR 693

(3) *David Appuhamy vs. Yassassi Thero* 1987 1 Sri LR 253

(4) *Punchi Nona vs. Padmasena* 1994 2 Sri LR 117

(5) *Tudor vs. Anulawathie* 1999 3 Sri LR 235

(6) *Ali vs. Abdeen* 2001 1 Sri LR 413

(7) *In Re the Thirteenth Amendment* 1987 2 Sri LR 312 at 323

(8) *Abeywardane vs. Ajith de Silva* 1998 1 Sri LR 134

(9) *Gunaratne vs. Thambinayagam* 1993 2 Sri LR 335

(10) *Kanaglingam vs. Logeswaran* CA (Rev) 686/97 C.A.M. 9.6.1999

(11) *Ramalingam vs. Paramashwary* 2000 2 Sri LR 340

Ikram Mohamed PC with *Manjula Niyalpola* for petitioner.

Rohan Sahabandu with *Athula Perer* for respondents.

October 21st 2010

ERIC BASNAYAKE J.

The Petitioners-second party (petitioners) are seeking *inter alia* an order by way of *restitution in integrum* and/or revision and to set aside the order dated 17.10.2007 of the learned Additional Magistrate of Puttalam. By this order the learned Judge had determined that the respondents (1st and 2nd respondents) were in possession of the land (subject matter) two months prior to the date the information was filed and thus not to disturb their possession.

The petitioners' case

The extent of the disputed land is 14 acres. The original owners of this land were one Naina Marrikar and his wife. They sold this land by deed No. 11616 of 1967 to one Bashir. Bashir sold it by deed No. 383 of 1971 to the 1st petitioner's wife and her sister. Naina Marikar died in 1975. On 25.5.1997 the intestate heirs of Naina Marikar namely, the wife and the children executed deed No. 13501 and purportedly gifted the land in dispute to one of the children, namely, Munawer Ali. The petitioners claim that the deed 13501 did not convey anything as there was nothing left to be conveyed

1st case under section 66 of the Primary Court Procedure Act

On 26.06.1997 Munawer Ali made a complaint to Wanathawiluva police against Letiff, the father of the present owners. In this complaint to the police Munawer Ali stated that he became aware that his father owned 14 acres of land in Puttalam and that one Latiff was claiming ownership. This

resulted in a section 66 application being filed. The court dismissed this application as the information was filed two months after the complaint.

2nd case under section 66

On 22.6.2006 the 1st respondent who had a special power of attorney from Munawer Ali had placed the 2nd respondent in the land in a temporary cadjan hut. The first respondent is a retired Grama Sevaka of this province. On 9.7.2008 the 2nd respondent was evicted allegedly by the petitioner or his agents. This resulted in a complaint being made to the police by the 2nd respondent on 10.7.2006. The police filed information on 26.9.2006 and initiated the present case No. 16097/06/P. The petitioners had complained that the court has no jurisdiction to hear this case as two months have lapsed from the date of the complaint to the date of filing the information.

The order of the Judge

The learned Judge having referred to section 68(3) of the Primary Court Procedure Act stated that "the documents filed by the respondents reveal that the respondents have been in possession for more than 6 months prior to the date of the dispute. The learned Judge stated that "by considering the affidavits tendered the court decides that two months prior to the filing of the information by the police, possession was with the respondents (first party). There was no determination as to who was in possession at the time of filing the information and whether there was dispossession.

The objections of the respondents

The respondents claimed that Munawer Ali was the owner by deed No. 13501 and the 1st respondent was in possession

throughout until the petitioners disturbed the 1st respondent's possession in 2006.

Written submissions of counsel for the 1st and 2nd respondents

In the written submissions tendered on 18.11.2009 the learned counsel for the respondents confirmed the following facts, Namely:

1. The date of eviction – 9.7.2006
2. The date of complaint – 10.7.2006
3. The date the information was filed 26.9.2006

Thus there is no dispute that the information was filed out of time. Whilst admitting that the information should have been filed within 2 months of the date of complaint, the learned counsel finds fault with the police for not having filed same. However the learned counsel justified the court entertaining this application. The learned counsel submitted that the act of the police should not be held against the aggrieved party. When the aggrieved party acted under Section 66(1) (a) (i), the aggrieved party expected the police also to act according to the law. When section 66(1) (a) (i) lays down that the police shall with the least possible delay file an information and the failure to adhere to the provisions in Section 66 (1) (a) (i) should not be held against the aggrieved party. The learned counsel submitted that a scheming party could prevent the aggrieved party from proceeding with the section 66 application by making the police file information after two months.

The Primary Courts procedure

The court shall before fixing the case for inquiry make every effort to induce the parties to arrive at a settlement

(66(6)). At the inquiry the court is required to determine as to who is in possession of the land on the date of the filing of information under section 66 and make order as to who is entitled to possession of such land (68(1)). If any person who had been in possession is forcibly dispossessed within a period of two months immediately before the date on which the information was filed, he may make a determination to that effect and make an order directing that the party dispossessed be restored to possession (Section 68 (3)) (*Kanagasabai vs. Mylvaganam*[1] *Ramalingm vs. Thangarajah*[2], *David Appuhamy vs. Yassassi Thero*[3] *Punchinona vs. Padumasena*[4] *Tudor vs. Anulawathie*[5]

The learned President's Counsel for the petitioners complained that no effort whatsoever was made by the learned Judge to pursue a settlement. The fact that the Primary Court had not made an endeavor to persuade parties to arrive at an amicable settlement fundamentally affects the capacity or deprives the Primary Court of Competence to hold an inquiry in to the question of possession *Ali vs. Abdeen*[6]. The learned counsel further submitted that the learned Judge has totally misdirected herself in law and made no determination in terms of sections 68(1) or 68 (3) of the Act.

It appears that the learned Judge has taken as easy path by not following the procedure laid down by the Act. There was no determination by the learned Judge as to who was in possession on the date of filing the information as required by section 68(1). The other limb of this section is to make an order as to who is entitled to possession. To make this order the Judge is required to make a determination as to who was in possession on the date of filing the information. Once the court decided as to who was in possession on the date of filing the information, the court must make an order as to who

is entitled to possession. Necessarily the person who was in possession at the time of filing the information is entitled to possession, unless there was dispossession within a period of two months immediately before the date on which the information was filed.

Admittedly it was the petitioner who was in possession on the date of filing the information. The information was filed on 26.09.2006. Two months period immediately before the date of the filing of the information would be 26.7.2006. The dispossession was on 9.7.2006 which falls outside the period. If the dispossession is outside the two months period, section 68(3) will have no application. A party dispossessed could be restored back in to possession under section 68(3). If section 68(3) has no application the court cannot make an order of restoration. In that event the court will have to make an order declaring the petitioner entitled to possession as it was the petitioner who was in possession on the date of filing the information.

The jurisdiction of the Court of Appeal

The learned counsel for the respondents submitted that the Court of Appeal has no jurisdiction to hear revision applications filed against the orders or judgments of Magistrates. He submitted that after the 13th Amendment to the Constitution and the Act of No. 19 of 1990 (High Court of the Provinces (Special Provisions) Act the aggrieved parties should move the respective High Courts of the provinces in revision.

The Constitution

Article 138 of the Constitution gives jurisdiction to the Court of Appeal with regard to its revisionary powers. Article 138 is as follows:-

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 any court of first instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitution in integrum*, of all cases, suit, action, prosecutions matters and things of which such courts of First instance, tribunal or other institution may have taken cognizance** (emphasis added).

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The sole jurisdiction given by Article 138 was expended to High Courts by Article 154P (3) (b) under the 13th Amendment to the Constitution. The Article is as follows:

154P (3) Every High Court shall –

(b) Notwithstanding anything in Article 138 . . . exercise, appellate and revisionary jurisdiction in respect of orders. . . by Magistrate Courts and Primary Courts within the province

In terms of Article 138 the Court of Appeal shall have and exercise. . . sole and exclusive cognizance by way of appeal; revision. . . However Article 154(3) (b) has given the High Court appellate and revisionary jurisdiction in respect of orders by Magistrate Courts and Primary courts. Hence the Court of Appeal ceased to enjoy sole and exclusive jurisdiction. Article 154P did not take away the powers exercised by the Court of Appeal under Article 138.

However section 9 of the High Court of the Provinces (Special Provisions) Act appears to have caused a conflict with regard to the jurisdiction enjoyed by the Court of Appeal. According to this section an aggrieved person by a final order of a High Court in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P may appeal to the Supreme Court on a substantial question of law with leave first obtained from High Court.

Section 9 of High Court of the Provinces (Special Provisions) Act No. 19 of 1990 is as follows:-

> **Subject to the provisions of this Act or any other law any person aggrieved by (a) a final order . . . of a High Court. . . in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P. . . which involves a substantial question of law, may appeal there from to the Supreme Court if the Court grants leave to appeal to the Supreme Court. . .**

High Court is vested with original jurisdiction and is placed lower to the Court of Appeal in the order of Courts on superiority. However when a party chooses to go to High Court with a right of appeal to the Supreme Court, one may argue that the appellate powers of the Court of Appeal have been removed.

Has the powers of the Court of Appeal with regard to its appellate and revisionary jurisdiction been removed? This is not so. Articles 138 and 154P give jurisdiction to Court of Appeal and High Court respectively to hear appeals and revision from the Magistrate's Court Against the orders of these courts appeal lie to the Supreme Court with leave first obtained from the Court of Appeal or the High Court as the case may

be, on a question of law. This does not mean that the powers enjoyed by the Court of Appeal had been taken away. The powers of the High Court are limited to the Province. The Court of Appeal exercises its powers for the whole island.

The High Courts are given jurisdiction with regard to appeals and revision against judgements and orders of the Magistrate's Courts and Primary Courts through the Constitution (13th Amendment). High Courts are given appellate and revisionary jurisdiction with regard to judgements, decrees and orders of the District Courts in the Provinces through an Act of Parliament (Act No. 54 of 2006). Against the judgments and orders of the High Court, appeal would lie again to the Supreme Court with leave first obtained on a question of law from the Supreme Court. In this respect the High Courts have been given concurrent jurisdiction along with the Court of Appeal.

Act No. 54 of 2006

This Act amended Act No. 19 of 1990 with the insertion of sections 5A, 5B, 5C and 5D. Section 5A(1) gives the appellate and the revisionary jurisdiction which is as follows:-

> **5A (1) A High Court established by Article 154P of the Constitution for a province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such a province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be** (emphasis added).

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I am of the view that the jurisdiction enjoyed by the Court of Appeal through Article 138 remains intact. Through Article 138 one has the liberty to invoke the jurisdiction of the Court of Appeal or to resort to a Provincial High Court in terms of Article 154P (3) (b). If one chooses to go to the High Court, an appeal would lie to the Supreme Court with leave first obtained from the High Court (Section 9 of the Act 19 of 1990). If one invokes the jurisdiction of the Court of Appeal under Article 138 an appeal would lie from any final order or judgement of the Court of Appeal to the Supreme Court with leave of Court of Appeal first obtained (Article 128(1) of the Constitution). It is thus clear that both courts enjoy concurrent jurisdiction on matters referred to in Article 154P (3) (b). The jurisdiction enjoyed by the Court of Appeal had not been disturbed by Articles of the Constitution or by the Acts of Parliament.

Sharvananda C. J., Colin-Thome, Atukorale and Tambiah J. in the case of In Re the Thirteenth Amendment to *The Constitution and The Provincial Councils Bill* [7] at 323 in their determination held as follows:-

"The Bill do not effect any change in the structure of the courts judicial power of the people. The Supreme Court and the Court of Appeal continued to exercise unimpaired several jurisdictions vested in them by the Constitution. There is only one Supreme Court and one Court of Appeal for the whole Island. The 13th Amendment Bill only seeks to give jurisdictions in respect of. . . Without prejudice to the executing jurisdictions of the Court of Appeal. Vesting of this additional jurisdiction in the High Court of each province only brings justice nearer home to the citizen and reduces delay and cost of litigation."

In the case of *Abeywardene vs. Ajith De Silva* [8] the question was whether a direct appeal lies to the Supreme 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. Anandacoomaraswamy J held (with four Justices agreeing)"

There is no right of appeal from an order of the Primary Court Judge. . . 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 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 13th Amendment to the Constitution (supra)) In the result, he may file an application in the Court of Appeal or in the High Court"** (emphasis added). In *Gunaratne vs. Thambinayagam*[9]. Kulatunga J., G.P.S. De Silva C. J. and Ramanathan J agreeing) referring to Article 138 of the Constitution read with Act No. 19 of 1990 and 154P (3) (b) of the Constitution held that "The jurisdiction of the High Court in the matter is concurrent. . . In the result he may file his application in the Court of Appeal or in the High Court" (at 357) (Also *Kanagalingam vs. Logeswaran*[10] by J. A. N. De Silva J. (now Chief Justice). *Ramalingam vs. Parameshwary*[11] Act No 19 of 1990 had made provision for the Court of Appeal either to transfer such appeals or applications to High Court or to hear and determine such applications (by the Court of Appeal). It appears that Act 19 of 1990 was introduced for the purpose of expediting and disposing of cases. The relevant section is as follows:-

12(a) Where any appeal or application is filed in the Court of Appeal and an appeal or application in respect of the same matter has been filed in a High Court established by Article 154P of the Constitution invoking jurisdiction vested in that Court by paragraph (3) (b) or (4) of Article 154P of the Constitution, within the time allowed for the filing of such appeal or application, and the hearing of such appeal or application by such High Court has not commenced, the Court of Appeal may proceed to hear and determine such appeal or application or where it considers it expedient to do so, direct such High Court to hear and determine such appeal or application:

Provided, however, that where any appeal or application which is within the jurisdiction of a High Court, . . . is filed in the Court of Appeal, the Court of Appeal may if it considers it expedient to do so, order that such appeal or application be transferred to such High Court and such High Court shall hear and determine such appeal or application.

(b) Where the Court of Appeal decides to hear and determine any such appeal or application, as provided for in paragraph (a), the proceedings pending in the High Court shall stand removed to the Court of Appeal for its determination (emphasis added).

(c) Not reproduced

(d) Not reproduced

This application was filed in the Court of Appeal on 16.11.2007. The parties were noticed by the Court of Appeal and objections were filed by the respondents on 7.2.2008. The

written submissions were filed on 10.9.2008 and 1. 6.2009 & 18.11.2009. This was taken up for argument on 8.10.2009. When this case was taken up for argument counsel for both parties had addressed court with regard to the merits and the court was ready and had time to hear both counsel on its merits. Thus the Court of Appeal is in a position to make an order on its merits. Therefore there is no reason for the Court of Appeal to send it back to High Court. I am of the view that it is more expedient for the Court of Appeal to hear and conclude this case rather than to transfer it to the High Court.

Provisions have been made in the event an appeal or revision is filed in the Court of Appeal and without filing in the High Court of the Province, to transfer such cases. This is by Act No. 54 of 2006.

The section is as follows:

5D (1) Where any appeal or application in respect of which the jurisdiction is granted to a High Court established by Article 154P of the Constitution by section 5A of this Act is filed in the Court of Appeal, such appeal or application, as the case may be, may be transferred for hearing and determination to an appropriate High Court as may be determined by the President of the Court of Appeal and upon such reference the said High Court shall hear and determine such appeal or the application, as the case may be, as if such appeal or application was directly made to such High Court.

Thus both courts enjoy concurrent jurisdiction with regard to judgments and orders of the Magistrate/Primary Courts and District Courts. The powers enjoyed by the Court of Appeal had been given to the High Court of the Provinces

to facilitate the litigants in the provinces and also to reduce the work load of the Court of Appeal. I am of the view that the petitioners are at liberty to file this application before the Court of Appeal and the petitioners are before the correct forum. For the reasons given on its merits I find that the learned Judge has gravely erred in her order. Thus I set aside the order of the learned Judge and make order directing the Judge to issue a writ of possession forthwith and repair the injustice caused to the petitioner. I allow this application with costs.

CHITRASIRI J. – I agree.

Application allowed.