

1948

*Present : Dias and Basnayake JJ.*PABLIS APPUHAMY, Petitioner, and DIAS *et al.*, Respondents.*S. C. 376—Application in revision in D. C. Colombo, 4,135.**S. C. 373—Application in revision in D. C. Colombo, 4,136.*

Courts Ordinance—Application in revision to Supreme Court—Difference of opinion between Judges hearing application—Re-hearing—Composition of Bench—Powers of revision of Supreme Court—By whom exercisable—Section 38.

Where two Judges of the Supreme Court hearing any matter cannot agree, the matter must be listed before a bench of three Judges and not before another bench of two Judges.

Per BASNAYAKE J.—Obiter : The powers of revision of the Supreme Court can be exercised by a single Judge even where the proceedings sought to be revised are those of a District Court.

APPLICATIONS to revise an order of the District Judge, Colombo.

Dodwell Goonewardene, for seventh defendant-petitioner.

S. R. Wijayatilake, for the respondent.

Cur. adv. vult.

February 24, 1948. DIAS J.—

These two applications were consolidated by consent of parties, as they refer to precisely the same point.

They are both applications by the seventh defendant-petitioner praying that this Court should exercise its revisional powers.

The cases were listed before a Bench consisting of Soertsz S.P.J. and Nagalingam J. The following order is journalled in the respective minute papers :—

“ To be listed before another Bench as their Lordships cannot agree in regard to the order that should be made in this case ”.

When the case came before us, Mr. Dodwell Goonewardene, for the petitioner, took the preliminary objection that when two Judges of the Supreme Court are not agreed, the matter should be listed before a Bench of three Judges in terms of section 38 of the Courts Ordinance. Mr. Wijayatilake for the respondents has no objection to the matter being listed before a Bench of three Judges.

Section 38 of the Courts Ordinance (as amended by section 5 of Ordinance No. 40 of 1938) provides as follows :—

“ All *appeals* in civil cases from judgments and orders of the several District Courts of the Island shall be heard before two at least of the Judges of the said Court In the event of any difference of opinion between such two Judges, the decision of the said Court shall be suspended until three Judges shall be present, and the decision of such two Judges when unanimous, or of the majority of such three Judges in case of any difference of opinion, shall in all cases be deemed and taken to be the judgment of the Supreme Court Nothing in this section shall preclude any Judge of the Supreme Court *sitting alone* in *appeal* from reserving any appeal for the decision of two or three Judges thereof. ”

Section 755 of the Civil Procedure Code (which was added to the Code by Ordinance No. 23 of 1901) enacts a section very similar to the provisions of section 38 of the Courts Ordinance.

It will be observed that the order of Soertsz S.P.J. and Nagalingam J. is not that the matter should be listed before another Bench of two Judges, but that the cases should be relisted “ before another Bench ”.

In the Courts Ordinance one of the jurisdictions of the Supreme Court is its “ *Appellate Jurisdiction* ”—section 19 (b), and it is clear from the language of the sub-section that the “ *appellate jurisdiction* ” *includes*

its "revisional jurisdiction", because the sub-section expressly says so. Therefore when section 38 of the Courts Ordinance provides that all "appeals" from a District Court should be listed before two Judges, it includes applications in "revision" from a District Court as well.

Therefore when Soertsz S.P.J. and Nagalingam J. were unable to agree and directed that the matter should be "listed before another Bench" it was implied that the procedure provided by section 38 when two Judges disagree should be followed. The matter must, therefore, be listed before a Bench of three Judges for final disposal. I make no order as to costs.

BASNAYAKE J.—

When the application No. 376—D. C. Colombo 4.135 P for the revision of the order of the District Judge came up for hearing before Justices Soertsz and Nagalingam they were unable to agree as to the order that should be made and directed that it should be listed before another bench. The Registrar of this Court has construed that direction to mean that the matter should be listed before two other Judges and accordingly listed it before my brother Dias and myself.

The question for decision is whether this matter should go before a bench of three Judges or be heard by a bench composed of two. The appellant's counsel contends that it should go before three Judges, while the counsel for the respondents is indifferent as to the composition of the bench.

Although section 37 of the Courts Ordinance which prescribes the powers of this Court in appeal or revision speaks of "the hearing on revision" there is no requirement of the Civil Procedure Code or the Criminal Procedure Code that Counsel or parties should be heard when this Court is exercising its powers of revision. In fact section 358 of the Criminal Procedure Code expressly declares that no party has any right to be heard either personally or by pleader before the Supreme Court when exercising its powers of revision. Section 753 of the Civil Procedure Code contains no such express provision but its language is such as is not capable of being construed as conferring on a party to a matter in which this Court is exercising its powers of revision the same rights as are conferred on a party to an appeal by Chapter LXI of that Code. Nor, in my opinion, can section 19 of the Courts Ordinance which, when dealing with the appellate jurisdiction as opposed to the original jurisdiction of the Supreme Court, speaks of its powers in appeal and revision in the same breath, be regarded as authority for the application of the provisions governing appeals to the exercise of the powers of revision. But that does not prevent this Court, where it deems necessary, from hearing any person concerned in any matter in which it is exercising its powers of revision. This Court, in fact, at present grants a hearing *ad coram* as a rule in all matters dealt with by it by way of revision. The question then arises how should the bench be composed when such a hearing is granted.

Section 38 of the Courts Ordinance prescribes how a bench hearing appeals should be composed but says nothing about the composition

of a bench hearing a matter in revision. In the absence of express provision in that behalf one has to turn to section 21 of the Courts Ordinance which declares :—

“ Subject to the limitations in that behalf in this or any other Ordinance for the time being in force prescribed, the several jurisdictions and all powers and functions by any such Ordinance conferred upon the Supreme Court may be exercised in different matters at the same time by the several Judges of the said Court sitting apart ”.

This provision is authority for a single Judge of this Court to exercise its powers of revision regardless of whether the Court whose proceedings are revised is a District Court or any other Court. The fact that both section 37 of the Courts Ordinance and section 753 of the Civil Procedure Code empower this Court in the exercise of its revisionary jurisdiction to 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 does not in my opinion make it necessary in law that the hearing of a matter on revision from a District Court should be by two Judges. Nor can an argument based on the view that it is anomalous that a single Judge should in revision decide a matter which in appeal from a District Court two Judges alone can decide, prevail against the clear words of the Statute. This is not the only instance in which the Courts Ordinance has conferred powers so extensive on a single Judge. Section 42 empowers any Judge of the Supreme Court to inspect and examine the records of any Court, and to grant and issue according to law, mandates in the nature of writs of mandamus, quo warranto, certiorari, procedendo and prohibition against any District Judge, Commissioner, Magistrate or other person or tribunal.

Sections 45, 68 and 69 contain further instances of such powers. It has been and is, so far as I am aware, the practice to list all matters in which this Court is called upon to revise the judgment or order of a District Judge before two Judges. It seems so well established that I have come across only one reported case in which a single Judge has exercised revisionary powers in a case from a District Court—*Ranasinghe v. Henry*¹. I do not know its origin nor do I know when it began, but a practice however longstanding does not become law nor can it be allowed to prevail over the true meaning of the Statute except perhaps in an instance such as the one dealt with in *Boyagoda v. Mendis*².

In the present case though the practice is at variance with what the Statute has prescribed it is not repugnant to the Statute, for there can be no legal objection to two Judges exercising powers which a single Judge may. As the scheme of the Statute does not provide for two Judges hearing a matter on revision there will naturally be no provision as to what should be done if the Judges do not agree. In my view neither section 38 of the Courts Ordinance nor section 775 of the Civil Procedure Code applies; but I see nothing in either of the Statutes I have mentioned above, which prevents the course contemplated in those sections being adopted in the absence of special provision in that behalf. I, therefore, agree to the order proposed by my brother.

To be listed before three Judges.

¹ (1896) 1 N. L. R. 303.

² (1929) 30 N. L. R. 321.