1969 *Present :* **Alles, J., and Pandita-Gunawardene, J.**

A. R. G. FERNANDO, Petitioner, *and* W. S. C. FERNANDO, Respondent

S. C. 192/1968—Application in Revision in D. C. Colombo, 7655/D

Revision when right of appeal lies— Requirement of exceptional circumstances— Matrimonial action—Order for maintenance of children pendente lite—*Whether application in revision lies for enhanced maintenance—Civil Procedure Code, ss. 619, 624—Courts Ordinance, s. 73.*

Where a right of appeal lies, an application in revision will not be entertained unless there are exceptional circumstances which require the intervention of the Court by way of revision.

Where, in a matrimonial action, the wife, without exercising her right of appeal, moved the Supreme Court, by way of revision, to enhance the sum awarded by the District Court as maintenance *pendente lite* for the five children of the marriage—

Held, that the facts of the case did not warrant the exercise of the extraordinary powers of revision.

APPLICATION to revise an order of the District Court, Colombo.

Walter Jayawardena, Q.C., with *S. G. Wijeyasekera*, for the petitioner.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, for the respondent.

Cur. adv. vult.

May 18, 1969. ALLES, J.—

Counsel for the defendant-respondent has taken a preliminary objection to this application on the ground that the petitioner should have appealed from the order of the Judge. Section 73 of the Courts Ordinance read with Sections 61 and 624 of the Civil Procedure Code make it abundantly clear that it was open to the petitioner to exercise her right of appeal from the order directing the respondent to pay alimony *pendente lite* and maintenance for the five minor children of the marriage. Counsel relied on the decisions of this Court in *Gooneardene v. Orr* [1], *Carlina v. Mary Nona Silva* [2] and *Alima Natchiar v. Marikar* [3] in support of his submission that no application in revision should be entertained by this Court where a right of appeal lies. Counsel for the petitioner did not seriously contest the position that a right of appeal did lie from the order of the learned Judge but sought to argue that the facts of this case

[1] *(1907) 2 A. C. R. 172.* [2] *(1945) 47 N. L. R. 16.*
[3] *(1945) 47 N. L. R. 81.*

warranted the exercise of the revisionary powers of this Court. He only confined his present application to one of enhanced maintenance in respect of the minor children.

The powers of the Supreme Court to act by way of revision have been succinctly stated by Soertsz, J. in *Atukorale v. Samynathan* [1]. Said the learned Judge :

> " The powers by way of revision conferred on the Supreme Court are very wide indeed, and clearly this Court has the right to revise any order made by an original Court whether an appeal has been taken against that order or not. Doubtless that right will be exercised in a case in which an appeal is already pending only in exceptional circumstances. For instance this jurisdiction will be exercised in order to ensure that the decision given on appeal is not rendered nugatory. "

In *Atukorale v. Samynathan* an appeal had been filed by the defendant-petitioner against the order of the Judge allowing an application for execution of writ. Pending the hearing of the appeal, the defendant moved the Supreme Court by way of revision to stay execution on the ground that if the writ was executed in the manner execution was prayed for any order favourable to him in the ultimate appeal would be of doubtful value to him. There was therefore an exceptional circumstance which required the intervention of the Court by way of revision while the appeal was pending in order to ensure that the decision given in appeal would not be rendered ineffective.

Similar considerations exist in the other decisions of this Court to which our attention has been drawn by Counsel. In *Ranasinhe v. Henry* [2] an appeal was filed when there was no right of appeal but the revisionary powers of the Supreme Court were exercised because the order was *wrong ex facie*. In *In the Matter of the Insolvency of Hayman Thornhill* [3] the Court was satisfied that the proceedings were conducted in a *most perfunctory manner* and that there were a *number of irregularities*. The " due administration of justice " therefore required the exercise of the Court's revisionary powers.

In *Sabapathy v. Dunlop* [4] the revisionary powers of the Supreme Court were exercised where there was no appeal and where the Court below wrongly passed a decree on a consent order without satisfying itself of the legality of the agreement which was challenged on grounds of fraud, fear, mistake, surprise, *et cetera*.

In *Abdul Cader v. Sittinisa* [5] there was a mistake in the sum tendered for typewritten copies of the brief and accepted as correct by the Secretary of the Court and the respondents. On objection being taken that the

[1] *(1939) 41 N. L. R. 165 at 166.*
[2] *(1836) 1 N. L. R. 303.*
[3] *(1895) 2 N. L. R. 105.*
[4] *(1935) 37 N. L. R. 113.*
[5] *(1951) 52 N. L. R. 536.*

appeal had abated, both Gratiaen and Pulle, JJ. held that no prejudice was caused to the respondents and heard the appeal by way of revision. Gratiaen, J. stated that " it would be a travesty of justice if some mere technicality were to deprive a party of his right of appeal to the Supreme Court from a judgment which seriously affects his interests. "

In similar circumstances, the Supreme Court in *Sinnathangam v. Meeramohaideen*[1] acted by way of revision where there was an *erroneous decision* of the court even though the appeal against that decision had been correctly held to have abated on the ground of non-compliance with some technical requirements in respect of the notice of security.

Mr. Jayewardene for the petitioner also relied on *Appuhamy v. Weeratunga* [2] a partition case in which a party who was not a party on the record moved the Supreme Court in revision to exclude a lot to which he lay claim and which was erroneously included in the decree of sale—to support an argument that even such a party is entitled to apply to the Supreme Court by way of revision.

Finally in *Peries v. Silva* [3] Garvin, J in dealing with a case where the trial Judge rejected a plaint although it was " by no means clear that the correct procedure was not to appeal " to the Supreme Court, chose to deal with the matter in revision in view of a practice that had hitherto prevailed. In all the above cases it will be noted that there were " exceptional circumstances " of varying kinds which necessitated this Court exercising its revisionary powers, the paramount consideration being the due administration of justice. Reference must also be made to *Silva v. Silva*[4], a matrimonial action in which the Supreme Court, while an appeal was pending, dealt in revision with an application by the husband for the custody of the child *pendente lite* because of a genuine fear that some harm would come to the child if it continued to remain in the custody of the mother until the appeal was heard. Wijeyewardene, J. (as he then was) in that case cited with approval the observations of Soertsz, J. in *Atukorale v. Samynathan* (supra).

What are the " exceptional circumstances " in the present case which would warrant this Court in exercising the extraordinary powers of revision ? The application to the District Court was made by the petitioner for payment of Rs. 1,000 as alimony *pendente lite* and Rs. 1000 as maintenance for the children. It has been submitted by learned Counsel for the petitioner that the respondent in his affidavit of 27th January 1968 stated that he was willing to pay Rs. 75 for each of the five children in addition to their school fees which was a sum in excess of the amount of maintenance ordered in respect of the children. It is admitted that the petitioner was in receipt of an income from the Municipality till the end of December 1967 and even in January 1968 she received a sum of Rs. 281 from her employer. It was therefore not unreasonable

[1] *(1958) 60 N. L. R. 394.*
[2] *(1921) 23 N. L. R. 467.*
[3] *(1934) 12 Times L. R. 2.*
[4] *(1943) 44 N. L. R. 494.*

for the respondent to assume on 27th January 1968 that the petitioner was not in need of alimony and for that reason he was prepared to pay more for the children than the amount ultimately decreed because in his view no alimony was payable to his wife. Indeed it may well be that the petitioner being a Doctor and having been in receipt of a steady income from December 1965 could secure employment without difficulty even after her services were determined by the Municipality. The learned District Judge in his order has granted alimony *pendente lite* to her and reduced by about Rs. 200 per month the sum which the respondent was willing to pay for the children. In making this order, the Judge may well have considered the status of the parties (both being Doctors) and the reasonable possibility of the petitioner obtaining further employment. The learned District Judge had to make his order on a consideration of the matters referred to in the affidavits and it is difficult to agree with the submissions of petitioner's Counsel that he had misdirected himself in regard to the quantum of maintenance payable to the children. Learned Counsel for the petitioner stressed the fact that the real parties affected in this matter were minor children whose interest should be paramount, and in regard to whom the Courts of law have a special duty and consequently that these are exceptional circumstances that should weigh with us. While I agree that the Courts should be particularly vigilant where the interests of minors are concerned, it would be an unhealthy precedent for this Court to interfere in a case of this kind when the application is in effect one for payment of enhanced maintenance to the children.

The decision of the learned Judge in this case was arrived at on the material placed before him by the parties themselves and it is impossible for us to say that this is a case which falls within the exceptional circumstances referred to in the decisions of this Court to warrant the exercise of our revisionary powers. The preliminary objection is therefore upheld and the application refused. There will be no order as to costs.

PANDITA-GUNAWARDENE, J.—I agree.

Application refused.