IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Revision in terms of Article 138 of the Constitution

CA 74/07 Revision

H.C Revision - Colombo HCRA 132/06

MC 63581/06 (Fort)

Mohamed Shareef Nazar, Ascon Construction and Investments (PVT) Ltd, No:873, Kandy Road, Wedamulla

PARTY OF THE SECOND PART- PETITIONER-PETITIONER

Vs

Asoka Jayalal Karunanayake, yahala Group, No : 33 Staple Street, Colombo

PARTY OF THE FIRST PART- RESPONDENT-RESPONDENT.

BEFORE: W L R Silva, J and A W A Salam, J
COUNSEL: Faisz Musthapha P.C with Riad Ameen and Ishara Gunawardana for the Party of the second part petitioner-petitioner and M A Sumandiran with S Gunaratna for the Party of the first part respondent-respondent.
Argued on: 19.08.2008, 21.05.2009 and 28.04.2011
Written Submissions Tendered on : 15.09.2011.
Decided On: 18.01.2012

A.W. Abdus Salam, J.

This is an application for revision of the judgment delivered by the Provincial High Court holden at Colombo in the exercise of it's revisionary jurisdiction under Article 154 P (3) (b) of the Constitution. By the impugned judgment, the Learned High Court Judge dismissed the revision application filed against the determination of the Magistrate entered in terms of section 68 (3) of the Primary Court Procedure Act (PCPA).

The background to the case revolves around the right to possess a block of land. Proceedings were initiated by the officer in charge of the police station, Kollupitiya in Colombo Fort Magistrate's Court, under section 66 (a) (i) of the PCPA.

The actual dispute was between the unsuccessful party in the lower courts namely the party of the second part-petitioner-petitioner who is referred to in the rest of this judgment as the "Petitioner" and party of the first part-respondent-respondent who is referred to as the "Respondent". Noticeably, Petitioner and Respondent have preferred their rival claims for possession of the disputed land for and on behalf of "Ascon Construction and Investments (Pvt) Ltd" and "Yahala Group of Companies" respectively. "Petitioner" is an employee and representative of Ascon Construction and Investments (Pvt) Ltd and "Respondent" an employee and representative of Yahala group of Companies.

The learned counsel appearing for Respondent has submitted that the present application for revision is bad in law, inasmuch as no reasons have been adduced for the invocation of the extraordinary jurisdiction of the Court of Appeal, when the aggrieved party in fact had the right of appeal. He has further submitted that the right of appeal has already been exercised by the aggrieved party and therefore he had failed to satisfy court as to why the revisionary jurisdiction should be exercised.

As has been held repeatedly by our courts the revisionary powers of the Court of Appeal are extremely wide and the court is vested with an extensive discretion to revise the orders of the lower courts irrespective of the fact whether an appeal lies or not or whether the right of appeal, if available, had been exercised otherwise depending on the existence of exceptional circumstances.

In the case of Rasheed Ali v. Mohomed Ali 1981 SLR 2 29 it was held interalia that the powers of revision conferred on the Court of Appeal are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However, this discretionary remedy can be invoked only where there are "exceptional circumstances" warranting the intervention of the Court.

The expression "exceptional circumstances" has not been defined in the case of Rasheed but guidelines have been laid down from time to time as to the necessity for the exercise of the revisionary powers in the interests of

justice. In the case of Sabapathy Vs Dunlop - 37 NLR 113 it was held that where the interests of justice demand then the court would not hesitate to act in revision.

It is well recognized in our system of law that if an appeal would take time to come up on hearing and the ensuing delay would render the ultimate decision nugatory that would constitute an exceptional circumstance calling for interference of the court by way of revision. In relation to the present revision application, it must be observed that the appeal preferred against the judgment of the learned High Court judge would undoubtedly take an exceptionally long period for its disposal as it had been preferred in the year 2006. Presently this court takes up appeals preferred from the High Court in the year 1998, 1999. The anticipated long delay in the disposal of the appeal preferred by against the judgment of the learned High Court judge and the degree of serious error committed by him in this matter demand that this court should exercise the revisionary powers vested to revise the impugned judgment.

In proceedings before Magistrate and subsequently in the two revision applications the identity of the land in respect of which the dispute to possession had arisen loomed large in the presentation of the case of both parties. The dispute was over the right of possession to Lot A2-1 in Plan No.2932 dated 30/06/2000 which is also depicted as Lots 1-9 in Plan No.2948 dated 07/08/2000. As is evident from the affidavit filed in the

Magistrate's Court by the party of the first part respondent-respondent, the land in dispute is identified as Lot 6 in plan No.447. Undisputedly, lots A 2-1 in plan No 2284 and 2932 lot No's 1 – 9 in plan No 2948 and lot 6 depicted in plan No 447 is identical and one and the same.

In the year 1970 the assessment number assigned to the land in dispute was 45/1, while in 1994 it was 45/10 (part), in 2003 it became 45/3 and in 2006 it was revised to read as No 41. In paragraph 11 of the Objections filed in this Court, the assessment number of the premises in dispute is referred to as 45/3 while in the Fort Magistrates' Court Karunanayaka identified it as No.45/1, which was applicable in 1970. Mrs.Indrani Peiris (Director, Yahala group of companies) in her letter dated 21/02/2006 marked "B2R29" had referred to the same as premises bearing No 45/1 and all these numbers were applicable to one and the same property during various years of assessment.

It is necessary to make a brief reference to the property adjacent to the land in dispute in the light of the patent error committed by the learned High Court judge in identifying a wrong land as being the property in respect of which the right to possession arose under Section 68 of the PCPA threatening a breach of the peace.

On a perusal of the plans produced by the parties, it is quite clear that a large abandoned building which is earmarked for demolition was in existence on the land adjacent to the property in question, when the dispute in

the present matter arose. Significantly, the adjacent land did not form part of the subject matter of the proceedings instituted under section 66 of the PCPA in respect of which the learned Magistrate made his determination. Nevertheless, the learned High Court judge has repeatedly made reference to the adjacent land by reason of the fact that there had been two actions filed in the district court of Colombo bearing No's 19530/L and No.19999/L.

Turning to the paper title relied upon by the parties, for the restricted purpose of appreciating the real dispute, it is to be noted that the original ownership of the land in dispute (Lot A2-2) and the other two blocks of land (Lots A2-2 and the Private Road A1 as depicted in plan No 2284) is attributable to one H C Peiris. He had gifted the same to his wife Mrs Indrani S M Peiris by deed No 4679 dated 5 March 1990.

Mrs Indrani Peiris in turn mortgaged it to Overseas Trust Bank as security against a loan by indenture of mortgage bearing No 699 (B2R10). Mrs Peiris had to settle the loan with Overseas Trust Bank availing herself of a financial facility of Rs 45.8 Million obtained from the Central Finance Company PLC. In consideration of the financial facility extended, Mrs Peiris sold and conveyed all that allotments of land marked lot A2 depicted in plan No 1432 and lot A1 depicted in plan No 1432 to Central Finance Company reserving the right to repurchase the same on or before a specified date.

As Mrs Peiris was not able to repurchase the property in the exercise of the right reserved in her, the Central Finance Company PLC became the owner of the two blocks of lands. Mrs Peiris disputing the ownership of Central Finance Company and claiming a constructive trust or a mortgage has instituted two actions in the District Court of Colombo. Quite strikingly Mrs. Peiris has categorically acknowledged the ownership of Central Finance Company PLC in the later Deed bearing No.909 dated 03/05/1995 ("B2R11") and the Provincial High Court too at page 5 of the impugned judgment has stated after analyzing the evidence that the title to the premises in dispute is prima facie with the Central Finance.

Despite the said observation the Provincial High Court dismissed the revision application and affirmed the determination of the Magistrate granting possession of the subject matter to Respondent on the ground that Yahala Group was in possession of the premises in dispute, firstly when Central Finance Company PLC filed actions in DC Colombo bearing No 19530/L and No 199999/L and secondly, the letter dated the 24 January 2006 was written by Ascon to Mrs Indrani Peiris to demolish the building on the "premises in dispute". These two grounds, according to the learned Judge of the High Court constituted sufficient proof of the respondent/ Yahala Group having been in possession of the "premises in dispute".

On a reading of the material available, the basis of the finding of the High Court Judge appears to be utterly

inconsistent with the documents produced. In the first instance both District Court cases (19530/L and 19999) relied upon by the High Court Jugde to decide the question of possession relate to the adjacent land which was irrelevant to the present dispute. In the circumstances, even if the finding of the learned district judge is accepted as being correct, it would only mean that Yahala Group was in possession of the adjacent land when proceedings were instituted under section 66 of the PCPA. The question relating to the possession of the adjacent land having no relevance to the determination made under section 68 (3) by the Magistrate, the incorrect finding of the learned High Court Judge has undoubtedly ended up in a serious miscarriage of Justice and the interest of justice demands that this court set aside such a perverse order in the exercise of revisionary jurisdiction.

The finding of the learned High Court judge that Yahala Group was in possession of the disputed land based on the two District Court actions is incorrect even in the light of the implied admission made on behalf of Respondent to the effect that the subject matter of the two District Court actions were clearly outside the subject of dispute in the proceedings initiated under section 66 of the PCPA.

The learned High Court judge has also given undue weightage to the letter dated the 24 January 2006 written by Ascon to Mrs Indrani Peiris to demolish the building on the private road. The said letter clearly

relates to the building situated outside the subject matter of the proceedings taken under section 66 of the PCPA. The said building is situated on the 40 foot Private Road as it can be clearly seen from the plans produced by both parties.

As far as the evidence relating to possession under section 68 is concerned, both the learned Magistrate and the learned High Court judge have totally ignored the overwhelming evidence relating to possession of the subject matter of the dispute by Ascon and its immediate predecessor.

The learned President's Counsel strenuously argued that the order of the learned Magistrate is *ex facie* wrong in that it is made on the basis that, the Respondent (Yahala Group) was in possession of the premises in dispute on 2.3.2006 and the Petitioner has failed to set out the date and the manner of dispossession. It is further contended the learned Magistrate has failed to take into consideration paragraphs 6 (d) to 6 (n) of the counter affidavit filed on behalf of Ascon explaining the nature of possession enjoyed and the circumstances under which Ascon was dispossessed of the land.

Admittedly, the information has been filed in the Magistrate's Court under section 66 on 2.3.2006. According to Ascon (as averred in the counter affidavit) a director of Ascon had the met Karunanayaka one week prior to 24 January 2006 and requested permission to demolish the old dilapidated building situated on the Private Road which formed the northern boundary of the

land in dispute. It was thereafter as requested by Karunanayaka, the letter dated 24 January 2006 had been written to Yahala Group. While awaiting a reply in response to the request made by above letter, Ascon had received a letter dated 21.2.2006 from Yahala Group (2R9) requesting the removal of the name board. It is the position of Ascon that upon making inquiries, it found out that certain persons belonging to a security company acting on behalf of Yahala Group had entered the premises in dispute and unlawfully interfered with its possession that remained with Ascon. Ascon maintained in the counter affidavit that Yahala Group having unlawfully broken padlock placed by Ascon entered the premises and then made a complaint on 21.2.2006 to the police making out a false claim of continuous possession throughout the period. Thus from the point of view of the petitioner, it is quite clear that the alleged date of dispossession is around 21.2.2006 which date fell within a period of two months immediately preceding the filing of the information under section 66. The learned Magistrate has failed to consider the above aspect of the case presented by the petitioner when he came to the conclusion that the date of dispossession has not been revealed.

The learned Magistrate has been influenced to a great extent by his incorrect finding that the petitioner has failed to reveal the date and manner of dispossession. Implied in the said incorrect finding is that if the date of dispossession had been revealed, then the Magistrate

would have looked at the petitioner's entitlement for restoration of possession under section 68(3). As it was urged by the petitioner, I am in total agreement with the submission that the disclosure of such date and the manner of dispossession are not strictly necessary prior to making an order under section 68(3) in favour of a party who fails to unfold such details. In other words the precise date of dispossession is for an order to be made under section 68 (3) of the PCPA as long as the date of dispossession falls within a period of two months immediately preceding the date on which the information was filed. In this respect, it appears that the learned Magistrate has misdirected himself that it is imperative to reveal the exact date of dispossession. Having considered the contention of both counsel, I am of the view that to construe section 68 (3) as requiring the revelation of the exact date of dispossession leads to absurdity and would render the scheme in part VII of the PCPA hopelessly meaningless. On a perusal of the documents and the affidavits, it appears that the petitioner has revealed the date of dispossession with reasonable precision and is entitled to be considered for restoration of possession under section 68(3) .

Turning to the nature of possession established by the petitioner, it can conveniently be begun with the meticulous preparation made by Ascon in the professional manner towards the construction of an apartment complex of 12 floors and 60 apartments at an estimated cost of Rs.1.2 Billion. The documents

produced clearly establish that Ascon had appointed M/s Jayampathy Herath Associates (Pvt) Ltd, as its architects and Mr.Laksiri Cooray as the structural engineer for the proposed apartment complex at the premises in dispute. Further Ascon has commissioned a soil investigation at the premises in dispute for the proposed apartment complex and the soil investigation had been conducted by Professor B.L.Tennakoon of the University of Moratuwa on behalf of the Engineering Soil Laboratories (Pvt) Ltd at site during the period 9th to 21st September 2005. Quite significantly the investigations involved drilling five boreholes through the soil with a 76 mm diameter to an approximate depth between 23 meters to 29 metres. It also required extraction of soil thereafter for the purpose of testing. The petitioner has paid engineering laboratories Private Limited in advance of a sum of rupees 50,000/-of the said soil investigation. (vide documents marked R16a to d).

The architects M/S Jayampaty Herath Associates Private Limited have prepared architectural plans for the apartment complex at the premises in dispute as is evident from 2 R 17 (A)-(h)

The evidence relating to the possession of Ascon of the property is further strengthened by the arrangement made by Ascon during the period of October to November 2005 when it arranged through an advertising agency to prepare up its logo for "waterfront Ascon residencies" to be constructed at the premises in dispute. The type of possession of Ascon is transparently obvious when one

looks at the sponsorship undertaken by Ascon towards the ITF men's future tennis 2005 conducted by Sri Lanka tennis association to promote "**waterfront Ascon residencies**" as it could be seen from documents marked 2 R 18 (a)-(c)

The letter dated 30 November 2005 of the Hatton National bank produced marked 2 R 19 is of much assistance to ascertain as to which party to the proceedings would have probably had possession of the land in dispute two months prior to the filing of the information under section 66. More importantly the physical possession of Ascon is adequately proved by the petitioner having commissioned Nuski Eenterprises of No 30,Nwam Mawatha Colombo 2 to clean and clear that premises in dispute and the said Nuski Enterprises billing the petitioner on 19 February 2006 in respect of the said assignment as is evident from 2 R 20.

As has been submitted by Ascon it has affixed the board in its name on the fence of the premises in dispute, as is confirmed in the information filed by the police and in addition the Assessment No 45/3 of the premises in dispute had been recently re-assessed by Colombo Municipal Council to read as an assessment No 41 and the petitioner was issued with a certificate of registration of ownership by Colombo Municipal Council dated 24 October 2005 in respect of the premises in dispute. The petitioner has also been issued with the two statutory notices of assessment in respect of the fourth quarter of 2005 and all four quarters of 2006.

Quite interestingly even prior to the Ascon having purchased the premises its predecessor namely Sabir M Hussain has been in possession of the premises in dispute since 16 December 2003. The construction of garage to park his vehicle in the premises in dispute by Sabir M Husein has given rise to an allegation of criminal misappropriation in February 2005 between Hussein and his sister which culminated in criminal proceedings set in motion in the Colombo Fort Magistrate's Court in case No B/1219/05. (Vide 2 R 22).

Incidentally, another dispute had arisen between Hussein and his brother-in-law with regard to possession of the premises in dispute. The Kollupitiya police thereupon had filed information, 2 R 23 (a) regarding that dispute to Colombo Fort Magistrate's Court in case No 62388 in terms of section 66 (1) (b) of the primary court procedure act No 44 of 1979.

The terms of settlement entered in that case had been placed before the learned Magistrate who had failed to appreciate the evidential value of it, prior to his deciding the pivotal issue relating to possession in this case. The terms of settlement entered in the said case include the return of the keys of the garage and the gate of the premises in dispute to Hussein that were taken over by the police on 10 June 2005 and an undertaking by the rival party not to interfere with the possession of Hussein.

Another important document that has escaped the attention of the learned Magistrate is the summons

issued in case No 99473 by Magistrate's Court, Maligakanda on aforesaid Hussein and one Fonseka (an employee of Hussain) to appear in court on 14 February 2006[1] at the instance of Colombo municipal Council to answer a charge relating to the failure to take steps to get rid of mosquito breeding locations on the subject matter of the instant proceedings 2 R 23 (c).

Quite strikingly, the proceedings relating to criminal misappropriation, dispute relating to the right to have the keys to the garage and the gate and the statutory offence relating to environmental pollution demonstrate convincingly on a probability of the petitioner having had possession of the subject matter until he was dispossessed as alleged in the affidavit.

The petitioner has also adduced evidence as to the manner in which the Central Finance had exercised its right of possession from the year 2000. Central Finance Ltd. by letter dated 28th February 2000 sought clarification from the Colombo Municipal Council as to the minimum extent for subdivision of the aforesaid properties and the Colombo Municipal Council responded by letter dated 5th April 2000 that the minimum subdivision is 6.0 perches. Subsequently Central Finance Limited caused the premises in dispute to be resurveyed on 30th June 2000 with a view to selling the premises in dispute after causing a sub division. Central Finance Limited has been issued with a certificate of registration of ownership (2R25) by the

[1] The date of dispossession is 21.02.2006

Colombo by the Colombo Municipal Council on 22nd June 2002.

The Colombo Municipal Council further issued a non-vesting certificate dated 18th September 2003 to Central Finance Limited confirming that the name of Central Finance Limited has been in the Assessment Register as owner and that consolidated rates have been paid up to 3rd Quarter of 2003. Vide 2R26. The respondent never claimed to have paid rates for the disputed property.

The respondent has not denied specifically the evidence relating to the mode of possession of the subject matter of dispute by Central Finance, Sabir M Hussein and Ascon Construction and Investments (PVT) Ltd. Further the respondent has failed to assert any right of possession from the year 2000.

The patent error committed by the learned High Court judge in identifying the adjacent land as the subject matter of the dispute and the failure to give his mind to the palpable mistakes committed by the learned Magistrate who had failed to evaluate the evidence regarding possession of the subject of dispute have ended up in serious miscarriage of justice and the only manner in which it could be remedied is by way of invoking the revisionary jurisdiction of this court. Even if the appeal of the petitioner is to be determined on the material available, no appellate court will allow the determination of the Magistrate and the judgment of the learned High Court judge to remain in force by reason of

the series of misdirection of law committed by both courts.

In the case of Athukorala Vs Samynathan 18 CLR page 200, overruling a preliminary objection against the exercise of revisionary powers in a case where there was a right of appeal Soertsz J with whom Moseley SPJ concurring stated as follows...

"The powers by way of revision conferred on the Supreme Court of Ceylon by sections 21 and 40 of the Courts Ordinance and by section 753 of the Civil Procedure Code are very wide indeed and clearly this court has the right to revise any order made by any 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 pending only in exceptional circumstances. For instance this jurisdiction will be exercised in order to ensure that the decision given in appeal is not rendered nugatory".

The dictum of Soertsz J in the case of Athukorala (supra) received unreserved recognition in the case of De Silva vs De Silva 26 CLW 3 and has been hitherto followed our courts. For reasons stated, it is my considered view that the judgment of the High Court dated 30.03.2007 and the determination of the Magistrate's Court dated 22.06.2006 should be set aside to avoid a miscarriage of justice and to properly serve the course of justice.

For reasons stated above it is my considered view that the impugned order of the provincial High Court judge dated 30.3.2007 and the determination of the Magistrate dated 22.06.2006 should be set aside. Accordingly, the said order and determination hereby set aside.

As it is quite clear from the material available that the petitioner has been dispossessed of the subject matter

two months immediately preceding the date of the information filed under section 66, the learned Magistrate is directed to enter an order for restoration of possession in favour of the petitioner.

The petitioner is entitled to costs. The appeal preferred by the petitioner shall stand terminated.

Judge of the Court of Appeal

I agree

W L R Silva, J

Judge of the Court of Appeal

CR/-