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

L.B. Finance Company
No. 101, Vidyalankara Mawatha,
Colombo 10.

PLAINTIFF

C.A 191/1997(F)
D.C. Mahawa 4084

Vs.

1. M. K. Walisinghe
   KelinVeediya
   Galgamuwa. .

2. H. M.Herath Banda
   Kattakaduwa Kolaniya
   Galgamuwa..

3. H. M. Kapuru Banda
   Saliya Ashokapura,
   Galgamuwa.

DEFENDANTS

And now between

M. S. B. S. M. Ajith Senanayake
No. 238, Saliya Ashokapura,
Galgamuwa.

CLAIMANT-PETITIONER-APPELLANT

Vs.

L.B. Finance Company
No. 101, Vidyalankara Mawatha,
Colombo 10.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: A. Devendra for the Claimant-Appellant

K. Peiris for the Respondent-Respondent

ARGUED ON: 02.09.2011

DECIDED ON: 27.10.2011

GOONERATNE J.

Appeal to this court arises on a claim being preferred to property seized in execution of a decree where judgment was entered against the 3rd Defendant in District Court, Colombo Case No. 99763. In the said District Court case action was instituted by the Respondent Company (L.B. Finance Ltd) against three Defendants in a money case and District Court held against the 3rd Defendant. Writ was issued by the District Court, Colombo in execution of decree to the Fiscal District Court Mahawa. The

Fiscal in execution of writ had entered the house of the Claimant-Petitioner-Appellant and taken over and seized certain properties alleged to be owned by the said Claimant-Appellant-Petitioner (hereinafter referred to as the Appellant). A claim was preferred in terms of Section 241 of the Civil Procedure Code against such seizure and the learned District Judge, Mahawa investigated such claim and pronounced his order on or about 11.11.1996. Appeal is against the said order.

The order of the learned District Judge inter alia refer to the fact that except for item 6 & 8 of the list of properties, the Appellant had not been able to satisfactorily prove that he own the items referred to in the list of properties. In this regard Appellant was able to produce receipts. The learned District Judge only allowed the claim made by the Appellant for a ceiling fan and a television set but disallowed the claims on other items.

At the hearing of this appeal learned Counsel for Plaintiff-Respondent-Respondent raised a preliminary objection and refer to Section 247 of the Civil Procedure Code and submitted that once an application is made in terms of Section 241 of the Code and the District Court after investigation pronounce an order in terms of Section 245 of the Code one could only have recourse to the procedure available under Section 247 of the

Civil Procedure Code and file a regular action in the District Court and no appeal shall lie.

However both counsel on either side made submissions on the entire case itself and the above preliminary objection.

The learned counsel for Appellant submitted inter alia the following:

(a) claim to property could be disallowed only if court is satisfied of the ingredients in Section 245 of the Civil Procedure Code. i.e property seized if it was in the possession of the judgment debtor as his own or some other held in trust for judgment debtor etc.

(b) Court should have released all the properties in the manner contemplated under Section 244 of the Code.

(c) In proving (b) above learned counsel suggest that at the closure of the inquiry, documents were not objected by the opposing party.

Counsel refer to Wanigaratne and another vs. Wanigaratne 1997 (2) S.L.R 267.

Held:

Per Edussuriya, J.

(1) Deed P11 though marked subject to proof was not objected to when the respondents case was closed reading in evidence P1-P17.

"Where no objection is taken when a document is read in evidence at the closure of the case to a document which had been marked subject to proof the earlier objection is deemed to have been waived".

In any event, the Notary gave evidence and had stated that she knew the Donor, Donee and the two attesting witnesses.

Sri Lanka Ports Authority Jugolinija – Boal East 1981 (1) SLR at 23/24…

When P1 was marked during the trial objection was taken "as the author of P1 has not been called". I take it, what was meant was, that P1 be rejected unless the author was called to prove the document. Counsel for the respondent closed his case leading in evidence P1 and P2. There was no objection to this by counsel for the appellants who then proceeded to lead his evidence. If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the cursus curiae of the original Civil Courts. The contents of P1 were therefore in evidence as to facts therein (vide section 457 Administration of Justice Law, No. 25 of 1975) and it is too late now in appeal to object to its contents being accepted as evidence of facts.

(d) All documents produced by way of receipts should be admitted as admissible valid evidence and all items should be returned and claim of appellant should be allowed.

(e) Section 247 of the Civil Procedure Code does not take away his right of appeal. The wording in Section 247 is directory and not mandatory. The right to file a regular action is in the discretion of the party as it states … may institute an action. The party concerned would have the option to proceed on the regular procedure if he so desires.

I would at this point of this judgment refer to the following case law, although the written submissions filed by the Appellant dated 27.9.2011 gives further material which will be dealt in this judgment at a later stage.

Juwanis v. Engo Nona, (1926) 8 Law Recorder 45.

Where a claimant fails to institute an action – Property sold pending claim proceedings – Revisionary powers of the Supreme Court.

Where an unsuccessful claimant, applies to the Supreme Court to revise the Order of the Commissioner of Requests in the belief that the remedy under Section 247 is not available, the revisionary powers of the Supreme Court may be exercised in favour of the petitioner.

Adarahamy v. Abraham, (1907) 2 A.C.R. 120.

Test of jurisdiction – When contestatio arises – Character of action.

In an action under Section 247 of the Civil Procedure Code the test of jurisdiction is the amount due on the writ at the date of seizure.

The contestatio arises at that date and an action under Section 247 is in its character rather an appeal from the decision in the claim inquiry than a new and substantive action.

Chettiar vs. Coonghe 35 N.L.R 89 at 91 (Koch A.J).

I am in entire agreement with the judgment of my Lord the Acting Chief Justice, and would wish to add that the fundamental fact that has to be ascertained in an action under section 247 of the Civil Procedure Code, when instituted by a judgment-creditor, is whether the property seized was liable to be sold under the writ of the plaintiff. This would depend on whether the judgment-debtor had a seizable interest in the property at the moment of seizure-section 247 of the Civil Procedure Code. The institution of an action under section 247 follows on the result of a claim inquiry under sections 242, 243, 244 and 245. The claim investigated under these sections is made under section 241, which provides for such "a claim being preferred against a seizure". The claim made is the "objection" to the seizure being effected; so that the rights of parties have to be ascertained at a period of time immediately anterior to the act of seizure.

This view is supported by the decisions of this Court in Abubacker v. Tikiri Banda, which followed a judgment of a Bench of three Judges in Silva v. Nona Hamine

Amadoris vs. Nendo 7 NLR 333 Supreme Court will exercise it's power of revision in order to set aside an order releasing property from seizure, who such order is wholly based on a misapprehension.

Silva vs. Ibrahim Rawtor 10 N.L.R. 56

An unsuccessful claimant is entitled to maintain an action under section 247 of the Civil Procedure Code, notwithstanding the fact that at the date of such action the property, which is the subject of seizure and claim, has already been sold by the Fiscal under the execution creditor's writ.

Silva vs. Nonahamine 10 N.L.R 44

An unsuccessful claimant to a property seized cannot maintain an action under section 247 if he had no right to such property at the date of the seizure, even although he might have acquired title subsequently. The general rule is the claim of the litigant must be determined according to his rights and the law existing at the date of the action.

Peiris vs Peiris 9 N.L.R 189

A dismissal of a claim on the ground that it was improperly made is not an order falling under section 244, 245 or 246 of the code and claimant in such a case is not obliged to bring an action under this section o establish his rights to the property claimed.

Mohideen vs The proprietor of the Kellie Group 18 N.L.R 506

An order under section 247 is not appealable without leave being obtained.

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Marikkar vs Perera 29 N.L.R 61

Where upon a claim being preferred under section 241 of the Civil Procedure Code, the judge dismissed the claim, after obtaining certain information from the secretary of court

Held, that the order disallowing the claim was not conclusive as to the title of the claimant if no action under section 247 was brought.

Bala Menika vs. Abeysena 46 N.L.R 377

In an action under section 247 of the Civil Procedure Code brought by an unsuccessful claimant the burden rests on him to prove that at the date of seizure he had the right which he claims.

In the written submissions the claimant Appellate state that in terms of Article 138(1) of the Constitution this court derives power and as such has jurisdiction to hear this appeal. Provisions of the Civil Procedure Code cannot curtail this wide appellate powers of the Court of Appeal.

Article 138(1) reads thus:

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 the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance), tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things (of which such High Court, Court of First Instance) tribunal or other institution may have taken cognizance.

Emphasis is made on the Section 247 of the Civil Procedure Code on the use of the words 'may institute an action.

The following material are further submitted in the written submissions.

According to the Section 244 of the Civil Procedure Code, <u>if the court is satisfied on following grounds, the court shall release the property wholly or to such extent as it thinks fit</u>

a. When seized, property was not in the possession of the Judgment-Debtor
b. If it was in Judgment-Debtor's possession, not on his own account or as his won property but on account or in trust for some other person
c. If it was in Judgment-Debtor's possession, partly on his own account and partly on account of some other person

The Respondent at the inquiry did not give evidence and thus had failed to satisfy Court the ingredients in Section 244 in any manner and thus the learned District Judge was erroneous in his findings. Further it is submitted the learned District Judge in his order had failed to even consider the requirements of Section 244 of the Civil Procedure Code in refusing the claim of the Appellant in respect of most of the items so claimed.

If the court is satisfied that the property was at the time it was seized,

a. In possession of judgment debtor as his own property and not on account of any other person
b. Was in the possession of some other person in trust for him
c. In the occupancy of a tenant or other person paying rent to him

   Court shall disallow the claim according to the Section 245 of the Civil Procedure Code.

That according to the Provisions of the law the Appellant has executed his burden to be entitled to the property seized while the Respondent have failed in the obligation to satisfy Court that the said claim should fail.

The Respondent at the inquiry did not give evidence and thus had failed to satisfy Court the ingredients in Section 244 in any manner and thus the learned District Judge was erroneous in his findings. Further it is submitted the learned District Judge in his order had failed to even consider the requirements of Section 244 of the Civil Procedure Code in refusing the claim of the Appellant in respect of most of the items so claimed.

A date for written submissions was moved by both counsel. Only the written submissions of the Claimant-Appellant was filed by 27.9.2011. Court cannot put off judgments on account of delay in filing written submissions. Usually delay in delivery of judgments and postponement of cases, blame goes initially to the judiciary, but in todays context parties could refer to various reasons other than blaming courts, for delays. Nevertheless I would consider the preliminary objection firstly although written submissions of Respondent was not received by me even on 30th instant. However a delay in filing, cannot be taken to reject the case of the Respondent.

Section 241 of the Code deals with claims to property seized and provision is made for the court to investigate such claim at an inquiry in a summary manner. The follow up to Section 241 is found in Sections 242 – 245. Under section 244 court could release the property claimed and under

Section 245 disallow the claim after investigation. The question is whether there is a right of appeal to the dissatisfied party? The Draftsman of these provisions and the legislature had not included a provision to enable parties to appeal or to state that there is no such right of appeal. It is silent. Does it mean that one could infer or imply a right of appeal to a party dissatisfied? In comparison I prefer to look at Section 328 of the Civil Procedure Code relating to claims of bone fide possessors who are dispossessed. Effect of final order under Section 326, 327 & 328 is subject to same conditions of appeal. As such denial of a right of appeal is embodied in the section itself. (Section 329)

This court was invited to consider article 138 of the Constitution. No doubt it is an enabling provision. One cannot fortify his argument by merely referring to Article 138 of the Constitution. I think there need to be specific provisions embodied in the legal provisions itself to rely on ones right of appeal.

In Martin vs. Wijewardena 1989(2) S.L.R 410...

Held:

(1) A right of appeal is a statutory right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments.

(2) Section 18 of the Agrarian Services Act No. 58 of 1979 does not provide for nor does it create a right of appeal in a tenant cultivator who is aggrieved by the Order of the Commissioner to pay up his arrears to the landlord before a stipulated date. Further Article 138 of the Constitution does not confer on such a tenant cultivator a right of appeal.

(3) While the Agrarian Services Act No. 58 of 1979 s. 5(6) provides for an appeal (on a point of law only) from a decision of the Commissioner given at an eviction inquiry, no such right of appeal is provided for a party aggrieved by the Order of the Commissioner of Agrarian Services at an inquiry into the non-payment of rent. No appeal lies from any Orders made under section 18 of the Agrarian Services Act.

This seems to be a question of interpreting the relevant legal provision. "The courts will not invent an appellate jurisdiction where none is given (to it by statute) Vythialingam J. Indian Bank Ltd. vs. Sri Lanka Shipping Company Ltd. 79 NLR 1, 15.

This right cannot be implied Palakindar J. 1989 (2) SLR 409, 419 Gamhewa Vs. Maggie Nona 1982 (2) SLR 250, 252; case of Monrovia vs. Oilborne Shipping Co. 1978-79 2 SLR 293, 300. The right of appeal must be expressly stated. Perera J. 16 NLR 312 Tillakawardena Vs. Obeysekera 33 NLR 193, 196. However, to be an express provision, it is not necessary that the thing should be specially mentioned. It is sufficient that it is directly covered by the language however broad the language by which covers it so

long as the applicability arises directly from the language used and not by inference therefrom. See Shanmugam vs. Commissioner of Registration of Indian and Pakistani Residents (1962) 64 NLR 29,33.

As such I have to take the view that there is no right of appeal to the Claimant-Appellant. However he would not have been without a remedy since recourse to Section 247 was available within a stipulated time. (refer to Chettiar vs. Coonghe). But if I take this case forward I am convinced that revisionary powers of this court could be exercised in this situation. There cannot be a bar to exercise revisionary powers by the Court of Appeal in a given situation, in the interest of justice.

In case of exercising revisionary powers usually exceptional circumstances should be shown to the satisfaction of court.

Peter Singho vs. Costa 1992 (1) S.L.R. 50 at 53 a case where Petition of Appeal tendered outside the stipulated period.

At 53 …

The learned Counsel for the appellant invited us to consider the appeal on the merits of the case, despite the preliminary objections in this appeal. He relied on the decision in the case of Abdul Cader v. Sittinisa where the Supreme Court was of the view that where an appeal did not conform to Civil Appellate Rules, to allow the matter to be

heard in Revision, as the Respondent had not been prejudiced. Such revisionary powers could be exercised only in exceptional cases (Rustom v. Hapangama). We are not unmindful of these decisions. We have perused the proceedings and the judgment of the learned District Judge and we find no reasons to interfere with his judgment and we find no exceptional circumstances to act in revision.

Abdul Cader Vs. Sittinisa 52 N.L.R 536

(i) The appellant, when he made his application for typewritten copies under Rule 2 of the Civil Appellate Rule, 1938, tendered by mistake Rs. 20 instead of Rs. 25 which was the appropriate sum according to the Schedule.

As no objection was taken either by the Court Secretary or by the respondents, the sum tendered was accepted and the record was duly forwarded to the Supreme Court.

On objection taken in appeal, under Rule 4 (a) of the Civil Appellate Rules, that the appeal had abated in consequence of the failure to tender the proper sum of Rs. 25 -

Held, that as the respondents had not been in any manner prejudiced the appellant should, as a matter of indulgence, be heard by way of revision.

Observations regarding the urgent need for the amendment of the Civil Appellate Rules so as to enable the Court to grant relief to the appellant in a case where a technical breach of the rules has caused no prejudice to the other side.

At pg. 545 …

With regard to the preliminary objection raised by Mr. Jayawardene to the constitution of this appeal, I agree so entirely with the observations made by my brother Pulle in his separate judgment that it is unnecessary to add to anything

> which he has said. It is very much to be hoped that the Civil Appellate Rules will be amended at any early date so as to authorize Judges to grant relief to appellants where, as in this case, a technical breach of the rules has caused no prejudice to the other side. To my mind, 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 interest. Until the present rule is relaxed, I see no reason why the revisionary powers of this Court should not be exercised in appropriate cases.

The Respondent in the written submissions vehemently object to the Claimants-Appellant's application by way of appeal. Several positions with authorities are discussed. This court has expressed the view that the Claimant-Petitioner-Appellant has no right of appeal. However I cannot agree with the critical analysis of the learned counsel for Respondent in his written submissions and I am compelled to reject all those arguments relating to the dicta in the case of Sri Lanka Ports Authority and Another vs. Jugolinia Boal East. The cursus Curiae of the original court is that if no objection is taken at the close of a case when documents are read in evidence they are evidence <u>for all purposes of the law.</u> I do not wish to go beyond this case and express a view that it is not full proof. What flow from the dicta in the above case is not merely admitting a document in evidence, but it is for all purposes of the law, evidence in the case and court is bound to act upon and recognize the material elicited.

In the case in hand I cannot see any objection recorded to documents, as and when it was marked. Instead after producing the 3rd document (3 පිම) it is recorded that all documents are to be marked subject to proof. Strictly this is not the correct procedure. Then on the last date of evidence (27.6.1996) it is recorded that the claimant has closed his case marking documents පිම 1 - පිම 13.

The opposing party has not offered to object to these documents. As and when documents are marked parties are required to object and at the closure of the case of Plaintiff or Defendant as the case may be, when documents are read in evidence, objection to a document or several of them need to be recorded. It is a practice developed from time immemorial in the original court. All courts are bound to recognize this practice.

The latest case on this aspect reported in 2011 Bar Association Law Reports at pg. 204. Latheef and another Vs. Mansoor, recognized this principle. (though in that case for good reasons it was not possible to adopt the procedure since there was no strict application of the procedure). The following extract from the above judgment to be noted.

There remains, however, one more matter on which learned Counsel for the contending parties have made submissions, which was raised in the context that the usual practice of reading in evidence the documents that were marked and produced at the trial in the course of witness testimony was not followed when the case for the Respondents was closed on 27th April 1993. This is substantive question 5, which specifically focuses on this issue, namely: is it mandatory to read the documents in evidence at the conclusion of the trial? There is no provision in the Civil Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our courts. For instance, in Sri Lanka Ports Authority and Another v. Jugolinija – Boat East (1981) 1 Sri LR 18 Samarakoon, C.J., commented on this practice, and ventured to observe at pages 23 to 24 of his judgment that if no objection to any particular marked documents is taken when at the close of a case documents are read in evidence, "they are evidence for all purposes of the law." It has been held that this is the cursus curiae of the original courts. See, Silva v. Kindersle (1915-1916) 18 NLR 85; Adaicappa Chettiar v. Thomas Cook and Son (1930) 31 NLR 385 Perera v. Seyed Mohomed (1957) 58 NLR 246; Balapitiya Gunananda Thero v. Tolalle Methananda Thero (1997) 2 Sri LR 101; Cinemas Limited v. Sounderarajan (1998) 2 Sri LR 16; Stassen Exports Ltd., v. Brooke Bond Group Ltd., and Two Others (2010) BLR 249.

The law requires the Claimant-Appellant to prove that he had some interest in the item seized and he is possessed of those times (vide Section 243). Strictly ownership to property need not be proved. The learned District Judge has considered an irrelevant aspect of the case, stating the claimant had not proved residence or the residence of his father (debtor), and

in this regard the Claimant-Appellant has not even produced the electoral list. Section 243 does not require one to prove residence. All items seized are movable properties. Law requires only an interest to be proved in the properties seized. As discussed above, by law the documentary evidence would be acceptable and it would be evidence for all purposes of the law. Therefore the claimant cannot be deprived of his legal entitlement. In a situation as this and in these circumstances the party litigant should not be deprived of his legal right merely by taking up a legal objection on his right of appeal (though cannot be faulted) and deny his rightful valid claim recognized by law. As such this court could use it's inherent powers and act in revision. I would interfere with the judgment of the District Judge substantially on a point of law.

It appears to me that there is a miscarriage of justice. As such wide powers of the Appellate Court should not be ignored or curtailed in a case of this nature. I refer to the following case law

Leslie Silva vs. Perera 2005(2) SLR 184

Held:

(i) The Court after deciding that issue No. 13 is not a pure question of law erred by answering the issues in the negative

(ii) In terms of Section 40(d), the Plaint should contain a statement as to where and when the cause of action arose and is not a fact which should be kept to

be disclosed at the trial. The Plaint, it is apparent does not say as to when the purported action arose.

(iii) No other evidence/documents are required to decide whether the plaint is drawn out in compliance with Section 40(d) – this is a fatal defect which goes to the root of the case.

(iv) The Defendant Petitioner has invoked the revisionary jurisdiction to avert a miscarriage of justice caused to him by the error committed by the trial Judge, and in the circumstances, this is a fit and proper instant to exercise the revisionary jurisdiction.

Per Somawansa, J. (P/CA)

"the error committed by the trial judge by answering Issue No. 13 in the negative without giving a hearing and in fact according to the reasons given by her she could not have answered the said Issue in any event without considering evidence .... Is a clear and unforgivable error committed by the trial Judge ......"

At pgs.190/191 ....

Atukorale vs. Samyanathan 41 NLR 165

"The powers given to the Supreme Court by way of revision are wide enough to give the right to revise any order made by an original court whether an appeal has been taken against it or not.

This right will be exercised in a case which an appeal is pending only in exceptional circumstances as for example, to ensure that the decision given on appeal is not rendered nugatory"

Silva vs Silva 44 NLR 494

"The Supreme Court has the power to revise and order made by an original court even where an appeal has been taken against that order.

In such a case the court will exercise its jurisdiction only in exceptional circumstances and in order to ensure that the decree given in appeal is not rendered nugatory"

Sinnathangam vs. Meeramohaideen 60 NLR 394

"The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though and appeal against such decision has been correctly held to have abated on the ground on non compliance with come of the technical requirements in respect of the notice of security.

In this respect I would say it is settled law and our Courts time and again has held that the revisionary jurisdiction of this Court is wide enough to be exercised to avert any miscarriage of justice irrespective of availability remedy or inordinate delay.

In the case of Ganapandithan vs Balanayagam an application was made to the Court of Appeal to set aside the judgment in a partition action after 2 ½ years was disallowed mainly on the ground of undue delay which remained unexplained. In appeal to the Supreme Court the appeal was allowed as the judgment of the learned District Judge was manifestly wrong and the order of the Court of Appeal also was set aside as it had focused only on the question of delay and not on the merits. Per G.P.S. de Silva, CJ at pages 397/398.

"On a consideration of the proceedings in this case. I hold that there has been miscarriage of justice. The object of the power of revision as stated by Sansoni, C.J in Marian beebee vs.. Seyed Mohamed at 389 "is the due administration of justice….." In the words Soza J, in Somawatie vs. Madawala and others at 30 and 31. "The court will not hesitate to use

its revisionary powers to give relief where as miscarriage of justice has occurred ..... Indeed the facts of this case cry aloud for the intervention of this court to prevent what otherwise would be a miscarriage of justice. "The words underlined above are equally applicable to the present case. I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its revisionary powers having regard to the very special and exceptional circumstances of this partition case."

Also per Sansoni, CJ in the case of Marian Beebee Vs. Seyed Mohamed (Supra) 68 NLR 36 at 38

"The power of revision is an extraordinary power which is quite independent of and district from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some case by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, conceive, made any change in the respect, and the power can still be exercised in respect of any order or decreed of a lower Court."

The other decided case that has considered the legal position with several authorities is the case of Rustom V. Hapangama & Co. 1978/79 2 SLR 225 (though did not permit to revise).

Held (1)

(1) The powers by way of revision conferred on the Appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original Court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are is dependent on the facts of each case.

At pg. 229 ....

It is of course not possible to define with precision what matters would amount to exceptional circumstances and what would not. Nor is it desirable, in a matter which rests so much on the discretion of the Court to categorise these matters exhaustively or to lay down rigid, and never to be departed from, rules for their determination. It must depend entirely on the facts and circumstances of each case and one can only notice the matters which courts have held to amount to exceptional circumstances in order to find out the essential nature of these circumstances. It has been held that where the delay in determining an appeal would render the decision in appeal nugatory the court would act in revision even if an appeal was pending or available.

At pg. 231 & 232 ....

So that where an order is palpably wrong and it affects the right of a party also, this Court would exercise its powers of revision to set right the wrong irrespective of whether an appeal was taken or was available. See in this connection also Ranesinhe v. Henry (7). Other cases where exceptional circumstances were present are referred to by Alles, J. in the case of Fernando v. Fernando (8). He said "In the matter of the Insolvency of Hayman Thornhill (9) 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 (10) the revisionary powers of 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." at page 550.

In all the above circumstances I have taken the view that the Appellant has no right of appeal. Nevertheless this is a fit and proper case to exercise revisionary powers of this court. Due administration of justice

requires this court to interfere by way of revisionary powers. Whether it be a trial or inquiry the original court need to follow and adopt correct procedure hitherto accepted in the District Court. I have already discussed the applicability of the famous authority and judgment of C.J., N.D.M. Samarakoon in the case of Sri Lanka Ports Authority and Another vs. Jugolinija Boal East. There cannot be a departure from the dicta in the above case. The claimant Appellant has proved and established the claim made to several items of movables. He should not be deprived of his right to use those items and own it merely on technical objections. The case of the claimant should not be compared or confused with that of the judgment debtor. Exercising powers in revision I set aside the order of the learned District Judge dated 11.11.1996 and allow the claim as in the nature of relief referred to in sub paragraph (ii) of the prayer to the Petition of Appeal with costs.

JUDGE OF THE COURT OF APEPAL