IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

CA (PHC) APN 69/2009

H.C Avissawella Rev. 70/07

MC Kaduwela 72858

1. WELIKAKALA WITHANAGE SHANTHA SRI JAYALAL,
151/A/1, Hewagama, Kaduwela.

2. PATTI WIDANALAGE IROSHINI MALLIKA,
151/A/1, Hewagama, Kaduwela.

1ST PARTY-PETITIONER-APPELLANT

VS

1. ANGODA KUSUMAWATHIE PIGERA,
149, Hewagama, Kaduwela.

2. PATHIRAGE RANJITH PERERA,
257P, Rajasingha Mawatha,
Hewagama, Kaduwela.

2nd PARTY RESPONDENT-RESPONDENT

1. KALUTHANTHRIGE DON CHANDRASENA
2. KALUTHANTHRIGE DONA WIMALAWATHIE
3. KALUTHANTHRIGE DON GUNAPALA

143, Hewagama, Kaduwela

INTERVENIENT-PARTY-RESPONDENT-RESPONDENT

OFFICER-IN-CHARGE,
Police Satation,
Nawagamuwa

COMPLAINANT-RESPONDENT-RESPONDENT

Before : A.W.A. SALAM, SUNIL RAJAPAKSHE, J, J.

Counsel : Kamal Dissanayaka with Mrs Lalitha Liyanage for the 1st party-petitioner-appellant and Pubudu de Silva with S H U Amarawansa for the 2nd party-respondent-respondent.

Argued on : 29. 5. 2013

Decided on : 23.07.2013

A.W.A. Salam, J.

The 1st party-petitioner-appellants (appellants) have preferred this appeal against refusal to entertain their revision application filed in the High Court of Avissawella, challenging the propriety of the determination of the learned Judge of the Primary Court, made under the Provisions of Section 68 of the Primary Court Procedure Act No 44 of 1979. The learned High Court Judge has dismissed the revision application based on two grounds. First and foremost he was of the view that the application for revision should fail due to lack of an express averment in the petition to the effect that exceptional grounds existed; secondly, the affidavit filed in support of the petition was invalid inasmuch as it did not contain the word in the jurat "swear"; namely the fact of taking an oath or being sworn.

As regards the first ground, the learned High Court Judge stated in the judgement that he is bound by the decision in Urban Development Authority Vs Ceylon Entertainment Ltd and others 2004 1 SLR 95. In his attempt to apply the decision in that case, the learned High Court judge misquoted a passage, as being a ruling in the judgment in Urban Development Authority Vs

Ceylon Entertainment Ltd. The misquoted passage in the impugned judgment reads as follows...

> "It is only when the petitioner has adopted complied with mandatory requirements of the rules, by expressly pleading the existence of exceptional circumstances.... Therefore I am of the view that the absence of such a specific plea disentitled the petitioner to the relief claimed and the respondent's preliminary objection in regard to this matter should be succeeded".

In actual truth the judgment in Urban Development Authority (supra) contains no such passage as quoted by the learned High Court Judge signifying that it binds him. In the case of Urban Development Authority, the answer of the defendant was rejected for the failure to reply the interrogatories. The court of appeal rejected the application of the defendant to revise the order of the district court on the ground that the petitioner (defendant) before the Court of Appeal had failed to set out any exceptional circumstances which warranted the exercise of the revisionary jurisdiction of that court and the petitioner had failed to annex to his application for revision either the originals or the certified copies of the documents relied upon by him as required by the rules of court. Aggrieved by the decision of the Court of Appeal the defendant preferred an appeal with the special leave had and obtained, against the said judgement and after hearing the appeal the Supreme Court held *inter alia* that Rule the 3 (1) (a) read with Rule 3 (1) (b) requires strict adherence in the matter of an application for revision. As the petitioner (defendant) had not adhered to Rule 3 (1) (a) read with Rule 3 (1) (b) the Supreme

Court affirmed the order of the Court of Appeal rejecting the revision application and observed that by reason of the finding relating to the adherence to Rule 3 as aforesaid, it is not necessary to look into the other question whether it is necessary to plead specifically the circumstances which warranted the exercise of the extraordinary revisionary jurisdiction of the Court of Appeal. As such the Supreme Court in Urban Development Authority (supra) refrained from deciding or making any observations on the question as to whether the Court of Appeal had erred in holding that the presence of exceptional circumstances in the pleadings is by itself insufficient for the exercise of revisionary jurisdiction.

In the circumstances, it would appear that the learned High Court Judge has misquoted the decision in Urban Development Authority as being the *ratio decidendi,* for the proposition of law that want of an averment in the petition to the effect that "exceptional circumstances existed", is a ground for the dismissal of the revision application at the threshold stage, without the petitioners being heard on its merits.

It is appropriate at this stage to refer to Rustomjee vs Hapangama 1978-79 SLR volume 2 page 225 where the importance of the revisionary jurisdiction has been emphasised. As has been decided in the case of Rustomjee vs Hapangama 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 that an appeal lay and as to what such exceptional circumstances are is dependent on the facts of each case.

Dealing with the exceptional circumstances the court in that case further held that it is not possible to define with precision what matters would amount to exceptional circumstances and what would not and it is not 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.

Be that as it may, the trend of authorities plainly point to the position that where the revisionary powers of the Court are invoked, in respect of a decision against which an alternative remedy is available, it will be exercised only if exceptional circumstances necessitating the indulgence of court are available.

It does not mean, that the petitioner who invokes the revisionary powers of the court should in his petition state in so many words that "exceptional grounds exist" to invoked the revisionary jurisdiction in addition to pleading the grounds on which the revision is sought. To rule on the question as to whether those grounds constitute exceptional circumstances is a matter for court to decide at the threshold stage before entertaining the application for revision or turning it down.

Quite noticeably none of the decisions referred to by the learned High Court Judge deal with the requirement to state in so many words in a single averment that "exceptional circumstances exit" or words to that effect. As has been quite correctly contended by the learned counsel for the appellant in a revision application of this nature the necessity is the existence of exceptional circumstances but not the inclusion of the phrase the words to the effect "exceptional circumstances" in the petition. It is

actually for the court find out whether the circumstances enumerated in the petition constitute exceptional circumstances. In the instant matter, the petitioner is in paragraph 15 of the petition has clearly stated 11 grounds to invoked the revisionary jurisdiction. The main grounds urged by the petitioner when examined in the light of the impugned determination of the Primary Court Judge it is quite clear that the petitioner has disclosed exceptional grounds to invoke the revisionary jurisdiction of court.

As regards the defect in the affidavit the learned High Court Judge has followed the judgment in Ravi Karunanayake vs Wimal Weerawansa 2006 2 SLR 16 delivered by the Court of Appeal. The learned counsel for the appellant contended that the learned High Court Judge has failed to consider the judgment in the case of De Silva and others vs LB finance Ltd 1993 1 SLR 371in which the Supreme Court held that where the affidavit stated that deponents ' affirm ' and in the body of the affidavit the deponents described themselves as ' affirmants and in the jurat there was a statement that the affidavit was read over and explained to the "within - named affirmants" there was a sufficient compliance with Section 438 CPC and the affidavit was valid despite the fact that the jurat did not contain the fact of affirmation. It was further held in that case that there was no reference to Form 75 in section 438 of the Civil Procedure Code and only the marginal note in Form 75 makes reference to section 438 and therefore compliance with Form 75 is not essential.

In the instant case the affidavit filed in support of the petition has been objected to on the ground that the word “swear” has

not been included in the jurat. However, as contended by the learned counsel for the appellant, the main part of the affidavit reads "අපි රෝමානු කතෝලික භක්තිකයන් වශයෙන් පහත සඳහන් කරුණු සත්‍යය ලෙස හා අවංකවත් නිවැරදිවත් දිව්රා ප්‍රකාශ කර සිටිමු".

Taking into consideration the matters referred to above, it is my considered view that the learned High Court Judge ought to have entertained the revision application and issued notice on the respondents. If any serious legal objections are raised by the respondent, against the revision application, he is at liberty to hear both sides on those matters and decide the matter according to law. Accordingly, the impugned judgement of the learned High Court Judge is set aside and he is directed to entertain the revision application of the appellant.

There shall be no costs.

Judge of the Court of Appeal

I agree.

Sunil Rajapakshe,J

Judge of the Court of Appeal

Kwk/-