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

C A. PHC (APN) 24/2014

HC Colombo HC Spl.2/2012

Selvi Ranjan
14, Drew Street, Westmead, NSW
2145 Australia.

Presently at

3/2, 76, W.A. Silva Mawatha,
Colombo 6.

1ST RESPONDENT-PETITIONER

Vs

1. Kamalini De Silva
   Secretary to the Ministry of Justice,
   Superior Courts Complex,
   Colombo 12.

   PETITIONER-RESPONDENT

2. Ranjan Karuppiah,
   5/3, No.42,
   De Kretser Place,
   Colombo 4.

   2nd RESPONDENT-RESPONDENT

BEFORE: A.W.A.SALAM, J (P/CA) & SUNIL RAJAPAKSHA, J

COUNSEL: D.P. Kumarasinghe PC with Mahendra Kumarasinghe for the Petitioner.

Romesh de Silva PC with Sugath Caldera for the 2nd Respondent-Respondent.

Parinda Ranasinghe DSG for the Petitioner-Respondent.

ARGUED ON: 24.03.2014

WRITTEN SUBMISSIONS TENDERED ON: 29.05.2014

DECIDED ON (preliminary issue): 18.07.2014

A W A Salam, J (P/CA)

This application has been filed by the 1st respondent-petitioner (hereinafter referred to as the "petitioner") seeking a revision of the order of the learned and High Court Judge dated 20.12.2013. The impugned order has been delivered consequent upon an application made by the Central Authority namely, the Secretary to the Ministry of Justice under Section 9 of the Civil Aspects of International Child Abduction Act No.10 of 2001. In the said application the Secretary to the Ministry of Justice cited the father and the mother of the children whose return is sought to Australia where the children are alleged to be from and had their habitual residence. The petitioner to the instant revision application is the mother of the children and the 1st respondent-respondent (referred to in the rest of this judgment as

"1st respondent") is their father against whom an order seeking the return of the children to their habitual residence in Australia is sought. When the matter was supported for notice the learned President's Counsel of the 1st respondent raised several preliminary objections as to the maintainability of the application.

namely ;-

1. The petitioner has no locus standi to make this application;
2. She is guilty of laches;
3. That by the Central Authority has not filed an appeal and assuming that the petitioner has locus to maintain the present application she is bound to establish exceptional circumstances;
4. The affidavit filed by the petitioner if fatally irregular in that there is no compliance of the imperative Provisions of the relevant law;
5. When the competent authority decides not to challenge the impugned order, this Court will not exercise the revisionary jurisdiction.

As regards laches, it has to be noted that the impugned judgment has been delivered on 20 December 2013 and the instant revision application has been filed on 18th February 2014, approximately after two months of the order. The 1st respondent urges that the petitioner has failed to give any explanation whatsoever as to the delay and therefore the revision application should be

dismissed on that ground alone.

In this respect the petitioner has adverted us to the judgment in **Gunasekara v. Abdul Latiff [1995] 1 SLR at 225, Ceylon Carriers Ltd v. Peiris [1981] 2 SLR at 119** and **Sithambaram v. Palaniappa 5 N.L.R 353.** Taking into consideration that the petitioner is resident in Australia, it is difficult to subscribe to the view voiced on behalf of the 1st respondent that the petitioner is guilty of laches. The delay in filing the revision application is only eight weeks. As has been contended by the learned President's Counsel for the petitioner communication, correspondence and co-ordination need to take place as between the Counsel and client before the filing of the application and particularly when the petitioner is resident in Australia a period of two months cannot be considered too long to pronounce an utterance that the petitioner is guilty of laches.

As regards the affidavit attached to the application the 1st respondent maintains that the supporting affidavit of the petitioner is defective in that the petitioner has neither sworn nor affirmed to the correctness of the contents in the affidavit. On the contrary the 1st respondent states that the petitioner in making her application to the Competent Authority has categorically affirmed to the contents of the affidavit. The affidavit has been attested in New South Wales and the details of the driving licence of the petitioner are also given in the

affidavit.

As the affidavit has been attested outside Sri Lanka probably, it may have been attested according to the law applicable in that country. We were not provided with any assistance on that matter. However, in terms of section 9 of the oaths and affirmations ordinance, the irregularities pointed out by the 2nd respondent are not of serious nature that warrant the rejection of the affidavit. In the circumstances, the objection raised against entertaining the affidavit being too technical, merits no serious consideration.

The question whether an appeal is available against the impugned order was argued at length. The learned Presidents Counsel for the 1st respondent emphasised that the procedure in regard to an application made under Section 9 of Act No.10 of 2001 being summary, there is always an appeal available under the Provisions of the Civil Procedure Code. The petitioner's response to this is that a right of appeal has to be a specific creation of a Statute and as the Civil Aspects of International Child Abduction Act No.10 of 2001 has not conferred any such right, no party enjoys a right of appeal. It is well established principle of law that no appeal is available. Even though the procedure for the institution of proceedings under section 9 has been referred to as summary. The mere reference to the mode of institution of proceedings under section 9 as summary, does not

mean that the right of appeal is extended against an order made under section 9 of the Civil Aspects of International Child Abduction Act. Since there is no right of appeal specifically conferred by any Statute against an order under section 9 it cannot be implied that the reference to summary procedure made in the said Act as regards the mode of institution of proceedings can be interpreted to mean that an order under section 9 is appealable. In the circumstances, the objection raised in that respect, in my opinion is not helpful to the 1st respondent.

The learned President's Counsel of the 1st respondent heavily relied on his objection pertaining to the locus of the petitioner to maintain the present application. He argued that the Act in question has been enacted in view of the fact that Sri Lanka is a signatory to the Hague convention. The preamble to the Act inter alia focuses on the necessity to make provisions for the return of the children wrongfully removed from Sri Lanka or their country and retained in any specified country including Sri Lanka. Therefore the learned President's Counsel of the 2nd respondent submits that it is in an affair between the two authorities, namely the Sri Lankan authority and the authority abroad. Countering this argument the learned President's Counsel for the petitioner stated that his client being the mother of the two children has every right to maintain the revision application as an aggrieved

party by the decision of the High Court. The 2nd respondent cannot deny that the law against him has been set in motion on a complaint made to the relevant authority in Australia by the petitioner. Rightly or wrongly the petitioner has been made a party to the proceedings although she may not have filed in the pleadings. The second respondent has not objected in the High Court to the petitioner being made party to the proceedings. Further, the act in question does not speak of the necessary parties to an application under Section 9.

The preamble to the act sheds enough light as to the actual necessity for enacting such a piece of Legislation. Basically it is an act to give effect to the Hague convention against deprivation of the right of custody of children by the removal of the children from one country to another by any person. The Act contemplates on the return of children wrongfully removed from Sri Lanka or their country habitual residence and retained in any specified country or Sri Lanka and to seek redress through the central authority invoking the special jurisdiction conferred on the High Court of Western province.

Section 9 of the relevant Act merely authorises the Central Authority to make an application to the High Court established under Article 154P of the Constitution

for the Western Province to seek an order for the return of such child to the specified country in which the child has his or her habitual residence. Strictly speaking as no relief is sought against the petitioner it is unnecessary to have him cited as a party in the petition made to the High Court. However, once she is made a party and not objected to she remains a party in the case unless her name is struck off under section 18 of the CPC on the basis that she has been improperly made a party. In my opinion therefore in order made under section 9 is not appealable.

For the foregoing reasons, I am of the opinion that the preliminary objections raised on behalf of the 2nd respondent are overruled.

President/Court of Appeal

Sunil Rajapaksha, J

I agree

Judge of the Court of Appeal

TW/-