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 of the Democratic Socialist Republic of Sri Lanka.

Officer - in – Charge
Police Station
Talangama

Complainant

Vs.

C.A. (PHC) APN No. 204/2006

H.C. Avissawella Case No. 69/2005 Sepala Ekanayake,

M.C. Kaduwela Case No. 36421 No. 369B, Pipeline Road,
Talangama North.

Accused

AND

Sepala Ekanayake,
No. 369B, Pipeline Road,
Talangama North.

Accused – Appellant

Vs

01. Officer - in - Charge,

Police Station,

Talangama.

02. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondents

AND NOW

Dr. (Mrs.) Ama Weeratunga

No.368/18, Pipeline Road

Talangama North

Virtual Complainant – Petitioner

Sepala Ekanayake,

No. 369B, Pipeline Road,

Talangama North.

Accused -Appellant -Respondent

01. Officer - in - Charge,

Police Station,

Talangama.

02. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent - Respondents

BEFORE : **K.T.CHITRASIRI, J.**

DEEPALI WIJESUNDERA, J.

P.W.D.C. JAYATHILAKE, J.

COUNSEL : Anil Silva P.C. for the Virtual – Complainant-Petitioner

A.H. M. D. Nawaz, D.S.G. with Rohantha Abeysuriya D.S.G. and Anoopa de Silva S.S.C. for the Complainant – Respondent - Respondents

Amila Palliyage for the Accused – Appellant-Respondent

Argued On	:	28.01.2014, 30.01.2014, 31.01.2014, 03.02.2014, 05.02.2014, 17.02.2014, 12.02.2014, 13.02.2014, 18.02.2014, 19.02.2014, 20.02.2014, 24.02.2014 and 10.06.2014
Written Submissions	:	03.03.2014 by the Virtual – Complainant - Petitioner
Filed On	:	14.03.2014 by the Respondent - Respondents
Decided On	:	02.09.2014

P.W.D.C. Jayathilake J.

Sri Lanka was purely a unitary state without any characteristics of federal system prior to the 13th amendment of the 1978 Constitution. Even though Sri Lanka continues to be a unitary state by the said amendment some characteristics of federal system were introduced to the constitution in order to achieve the devolution of power to the provinces. In this transfer of power, the power of all three sectors namely the Legislature, the Executive and the judiciary, was devolved. The court system of our country prior to the 13th amendment was as follows.

a) **The Supreme Court**

b) **The Court of Appeal**

c) The High Court

d) The District Court and Family Court

e) The Magistrate Court and

f) The Primary Court

(c), (d), (e) and (f) are courts of first instance. The Appellate and Revisionary Jurisdiction over the judgments and orders of all those courts of first instance lay in the Court of Appeal.

Article 138(1) of the constitution prior to the 13th amendment was as follows;

"The Court of Appeal shall have and exercise subject to the provisions of the constitution or of any law an appellate jurisdiction for correction of all errors in fact or in law which shall be committed by any court of first instance tribunal or other institution and sole and exclusive cognizance by way of appeal, revision, and restitution in integrum, of all causes suits, actions, prosecutions, matters and things of which such court of first instance tribunal or other institution may have taken cognizance. "

This provision conferred a wide Appellate and Revisionary Jurisdiction on the Court of Appeal. The jurisdiction of final appeal lay in the Supreme Court. The Court of Appeal was the only court that exercised the Revisionary Jurisdiction. Therefore, the Revisionary Jurisdiction was available only in respect of a decision of a court of first instance as an alternative relief under the exceptional circumstances and no revisionary Jurisdiction was available over an appellate decision of the Court of Appeal as the Supreme Court did not exercise a revisionary jurisdiction.

The High Court of Sri Lanka was the highest court of first instance that exercised original criminal jurisdiction. I would like to emphasize here that when the High Court of Sri Lanka was exercising its jurisdiction conferred on it at the time it was originally established, it seemed to be the most effective trial court in our court system. Subsequently, on a multiplication of its role, High Court came to be much more than a trial court.

The 1st change came through the 11th amendment to the constitution the purpose of which is to empower parliament to vest appellate and writ jurisdiction on the High Court in addition to its original jurisdiction.

Article 111(1) prior to the 11th amendment was as follows.

*"(1) The highest court of first instance exercising criminal jurisdiction and created by law shall be called and known as ' **The High Court of the Republic of Sri Lanka**' and shall exercise such jurisdiction and powers as Parliament may by law vest or ordain."*

The amendment made by the 11th amendment not only changed the designation of the court but also paved the way to the 13th Amendment.

(i) *"There shall be a **High Court of Sri Lanka** which shall exercise such jurisdiction and powers as parliament may by law vest or ordain.(paragraph (1)of Article 111 introduced by the eleventh amendment)*

Then came the 13th amendment, which created a new court namely, the **Provincial High Court** with both original and appellate jurisdiction as well as writ jurisdiction. This is an important point relevant to the matter in issue of the instant case. One may understand how the legislature has made the devolution of judicial powers to the provinces by examining article 154(P) of the 13th amendment. First article 154(P) (3) (b) transferred the appellate jurisdiction over the decisions of two lower courts, namely, the Primary Court and the Magistrate Court to the Provincial High Court. The said article reads thus,

"Notwithstanding anything in article 138 and subject to any law, [the Provincial High Court shall] exercise Appellate and Revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrate Courts and Primary Courts."

Therefore, the appellate and revisionary jurisdiction that exercised only by the Court of Appeal in respect of the decisions of Primary Court and Magistrate Court has been conferred on the Provincial High Court. It is the 13th amendment that added flesh and blood to the skeleton that was created by the amended article 111(1). Yet High Court of Sri Lanka established by article 105 of the constitution was left as the mother court from which the judges to the Provincial High Court shall be nominated by the Chief Justice.

"The Chief Justice shall nominate, from among Judges of the High Court of Sri Lanka such number of Judges as may be necessary to each such High Court. Every such Judge shall be transferable by the Chief Justice." (Article 154P (2))

The appellate jurisdiction in respect of a final order judgment or sentence of the Provincial High Court in the exercise of its appellate and revisionary jurisdiction and writ jurisdiction was given to the Court of Appeal by Article 154 (P) (6) of the 13th amendment. The purpose of enacting article 154 (p) (6) was to provide a right of appeal from the decisions of the newly established Provincial High Court. It should be noted that only the appellate jurisdiction was vested on the Court of Appeal but not revisionary jurisdiction.

Realizing that the High Court was going to be excluded from the article 138(1) of the constitution for the reason that article 138(1) referred to as courts of first instance, the legislature amended the said article by Section 3 of the 13th amendment. No reservation has been made in respect of the jurisdiction of the High Court when the legislature preserved the High Court within article 138. Without simply stating; **"by the High Court"** what has been stated in the amendment is **"by the High Court in the exercise of its appellate or original jurisdiction."** Very clearly the literal meaning is that the Court of Appeal has been given appellate and revisionary jurisdiction in

respect of each and every decision of the Provincial High Court and courts of first instance.

This is a protection given to the jurisdiction conferred on the Court of Appeal by the 13th amendment and it does not generate new artificial jurisdiction in my opinion. Along with the devolution of power done by the 13th amendment, the legislature has placed the newly established Provincial High Court in the place of the Court of Appeal exercising of appellate and revisionary jurisdiction in respect of convictions, sentence and order entered or imposed by Magistrate Courts and Primary Courts within the province. As stated above the appellate jurisdiction in respect of the final order, judgment or sentence of Provincial High Court in the exercising of its jurisdiction under paragraph (3) (b) or (c) or (4) of article 154 (p) was conferred on the Court of Appeal in accordance with article 138 by Article 154 (6) of the 13th amendment.

Powers in appeal of the Court of Appeal has been given by article 139 of the constitution. Article 139 (1) is as follows.

"The Court of Appeal may in the exercise of its jurisdiction affirm, revers, correct or modify any order, judgment, decree or sentence according to law or it may give directions to such court of first instance, tribunal or other institution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit"

There existed an "ambiguity" or rather "conflict" when the Court of Appeal exercised its power in appeal over the decisions of the Provincial High Court in exercising its appellate jurisdiction as the Court of Appeal had been empowered to give directions only to courts of first instance by article 139. But this position is not in existence after the enactment of High Court of provinces (special provisions) Act No: 19 of 1990. The preamble of the said Act reads thus.

"An Act to make provision regarding the procedure to be followed in, and the right to appeal, to and from, the High Court established under article 154(P) of the constitution; and from matters connected therewith or incidental thereto."

Article 139 of the constitution has been reproduced in Act No: 19 of 1990 by subsections (2) and (3) of Section 11. But, the appellate and revisionary power has been given by subsection (1) only in respect of decisions of Provincial High Court in exercising its original jurisdiction.

The legislature has adapted the court system to fit into the provincial council system by making the 11th and 13th amendments to the constitution and by enacting Act No: 19 of 1990. Accordingly, court system in a province has been arranged in the following manner.

The Primary Court is the lowest court adjudicating minor offences and minor disputes. The Magistrate Court exercises original, criminal jurisdiction in respect of offences other than offences triable in the Provincial High Court in exercising its original criminal jurisdiction. District Court adjudicates civil disputes in the exercise of its original civil jurisdiction. Provincial High Court exercises original jurisdiction, appellate and revisionary jurisdiction and writ jurisdiction conferred on it by the Constitution and by Law.

The judicial division is the territorial jurisdiction of the Primary Court and the Magistrate Court. The judicial district is the territorial jurisdiction of the District Court. The Judicial zone is the territorial jurisdiction of the Provincial High Court. There may be one or more judicial zones in a province. A judicial zone may comprise one or more judicial districts while a judicial district may comprise one or more judicial divisions.

The right of appeal only from the decisions of the Primary Court, and the Magistrate Court was conferred on the Provincial High Court at the first instance. Subsequently the appellate power in respect of decisions of the District Court too was conferred on the Provincial High Court. (High Court of the Provinces (Special Provisions) (Amendment) Act, No 54 of 2006)The appellate power in respect of decisions made by exercising the original criminal jurisdiction of the Provincial High Court has been left on the Court of Appeal while the appellate power in respect of decisions made by

exercising original civil jurisdiction and appellate jurisdiction has been conferred on the Supreme Court. (Sec. g (a) (b) of High Court of Provinces (Special Provisions) Act No 19 of 1990) The Supreme Court has decided that an appeal from a decision where the Provincial High Court has exercised its revisionary power should be made to the Court of Appeal. **(Gunaratne V. Thambinayagam and others)**[1] Practically the main role left to the Court of Appeal is only the appellate jurisdiction in respect of the decisions made by the Provincial High Court exercising its original criminal jurisdiction. Therefore, with the establishment of the Provincial Council system the Court of Appeal has become an exceptional court.

Ama Weeratunga is a medical practitioner. She was residing at Pipe line Road, Thalangama North. Sepala Ekanayaka was her immediate neighbor. The branches of a mango tree and a "Katuaththa" tree were overhanging Ama Weeratunga's house. She employed a labourer to chop those overhanging branches. While the labourer was doing that Sepala Ekanayaka started abusing Ama Weeratunga and finally hit her with a young "Katuaththa" fruit. On a complaint made by Ama Weeratunga, Thalangama Police filed a case under Sec: 314 and 486 of the Penal Code in Magistrate Court of Kaduwela. Magistrate convicted the accused on both charges and sentenced him to a six month term of imprisonment suspended for 5 years and additionally to a fine of Rs: 500/=. This conviction was set aside by Provincial High Court of

Avisawella. Thereafter, Sepala Ekanayaka has sent a letter of demand to Ama Weeratunga claiming Rs: 1000000/= for filing a case against him in the Magistrate Court. Ama Weeratunga, the Petitioner, has filed this revision application seeking to exercise the revisionary power of this court to set aside the order of the Provincial High Court.

The Officer in Charge of the Talangama Police Station was the complainant in the Magistrate Court case and Ama Weeratunga was only a witness. The O.I.C. Talangama Police and the Attorney General were the Respondents in the appeal before the Provincial High Court. Therefore, the order of the Provincial High Court is actually against the Attorney General who represents O.I.C. Talangama. Thus, the Petitioner in this application seeks the setting aside of the said order made against the Attorney General who is the 2nd Respondent - Respondent in this case. But the 2nd Respondent-Respondent raises a preliminary objection that the Court of Appeal has no revisionary jurisdiction in respect of an order made by the Provincial High Court exercising its appellate jurisdiction.

The learned President's Counsel for the Petitioner submits that the legal position on the above question of law is as follows.

The legislature, following the establishment of the Provincial High Court with both original jurisdiction and appellate jurisdiction, amended article 138(1) of the Constitution by the 13th amendment. The purpose of the said

amendment was to extend the appellate and revisionary power of the Court of Appeal to the decisions of the Provincial High Court, made exercising its appellate jurisdiction. The next step taken by the legislature was taking away the appellate jurisdiction of the Court of Appeal in respect of the decisions of Provincial High Court made exercising its appellate jurisdiction and conferring same on the Supreme Court. The core of the learned President's Counsel's argument is that the legislature has left out the revisionary jurisdiction conferred by the above mentioned amendment on the Court of Appeal in respect of the decision of the Provincial High Court exercising its appellate jurisdiction.

The Learned Deputy Solicitor General who raised the preliminary objection for the 2nd Respondent - Respondent submits as follows: The revisionary jurisdiction lies only to correct a miscarriage of justice in exceptional circumstances. The Court of Appeal will not go into inquire whether there are any exceptional circumstances, if the court has no jurisdiction. This is because the article 138 is subject to the provisions of the Constitution and any law and appellate power of the Court of Appeal over Provincial High Court which exercises appellate jurisdiction has been taken away by the act No.19 of 1990. When the appellate jurisdiction was taken away, the revisionary power of the Court of Appeal over the decisions of the Provincial High Court which exercises appellate jurisdiction also came to an end,

submits the learned Deputy Solicitor General. Accordingly, the core of his argument is that the Act No.19 of 1990 erases the appellate character of the Provincial High Court in the article 138.

I have got the privilege of perusing the judgment of my brother judge His Lordship Justice K.T. Chitrasiri. His Lordship has discussed all the judgments cited by the learned president's Counsel and the Other Counsel in their arguments. But the opinion expressed by His Lordship is that those decisions are not directly relevant to the matter in issue in the case. Even though I agree with that opinion I am of the view that two decisions namely **Merchant Bank of Sri Lanka Limited V. Wijewardana[2] and Australanka Exporters Private Ltd V. Indian Bank[3],** have to be considered as decisions with a directive effect. If there is no revision lying in the Court of Appeal when there is a direct right of appeal conferred on the Supreme Court in respect of a decision made by the High Court exercising its original jurisdiction, the same principle has to be applied more strictly in respect of the decisions made by the High Court exercising its appellate jurisdiction, in my opinion. That is because Article 138 cannot be applied in two ways in respect of decisions made by exercising original jurisdiction and appellate jurisdiction when a direct right of appeal has been conferred on the Supreme Court.

What is this jurisdiction we are talking about here? That is the power to revise an appellate decision. It has been universally accepted that appeal is a statutory right. The learned President's Counsel for the Petitioner submits that revisionary power is only a prerogative power. It is similar to writ jurisdiction according to the learned President's Counsel for the Petitioner. Appeal from courts of first instance to a higher court is a rehearing done on proceedings of evidence and documents. Appeal from an appellate decision is always with leave to appeal either from the appellate court or the apex court on a substantial question of law, or on a question to be decided is of public or general importance. Therefore, in my opinion the jurisdiction that we are discussing about is something not known or new to the law. Where did this jurisdiction lie prior to the 13th amendment? Was it the intention of the legislature to introduce a new jurisdiction which was not available prior to the devolution of power? Definitely it was not the case.

The conclusion is that there is no room in our court system for a revision over an appellate decision. Thus the preliminary objection succeeds and the petition is dismissed without cost.

The parties in the applications bearing case numbers C.A. (PHC) APN No. 107/2009, C.A. (PHC) APN No.150/2011, C.A. (PHC) APN No.109/2011, C.A. (PHC) APN No. 111/2013, C.A. (PHC) APN No. 157/2013 and C.A.

(PHC) APN No. 185/2010 are to abide by this order as this order is to be applicable in all those applications.

The Registrar of this court is directed to file a copy of this order in all those applications.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J

I agree

JUDGE OF THE COURT OF APPEAL

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1. S C. Appeal 81/2010 [S C / SPL LA 35/10]
2. 1993 (2) SLR 355
3. 2001 2 SLR 156

C.A.[PHC]APN NO.204/2006

K.T. CHITRASIRI, J.

1) When the revision application bearing No. C.A. (PHC) 204/2006 was mentioned on 10.02.2012; it was brought to the notice of Court that there is no clear judicial pronouncement as to the revisionary jurisdiction of the Court of Appeal in respect of the decisions, made by the Provincial High Court exercising its appellate jurisdiction, from the time that the High Court of the Provinces (Special Provisions) Act No.19 of 1990 came into operation. On that date, it was further submitted that different references had been made in this connection by this Court in the cases of **Merchant Bank of Sri Lanka Vs. Wijeyawardena and 4 others** [2010 B L R 233] [CA (PHC) APN 81/2006] and **Sunil Chandra Kumar Vs. Velu.**[2001(3)SLR 91]

2) Accordingly, upon considering the importance of the issue, a Divisional Bench was constituted to determine the aforesaid question of law. This issue has come up in several applications made to this Court and all those cases were taken up together for argument. Hence, number of Counsel who appeared in those cases made comprehensive submissions for many days in support of their respective view points.

3) In terms of Section 9 of the Act No.19 0f 1990, appeals filed to canvass the decisions made by the Provincial High Court

exercising its **appellate jurisdiction is vested with the Supreme Court**. However, the issue is whether **a revision application could be filed in the Court of Appeal** to challenge such a decision of the High Court invoking the jurisdiction vested in the Court of Appeal under Article 138 of the Constitution of the Republic of Sri Lanka.

4) The question of law framed on 10.02.2012 before the Divisional Bench in order to have a clearer decision on the issue is as follows:

Q: having failed to exercise the right to file an appeal in terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990, Could a person invoke the revisionary jurisdiction of the Court of Appeal referred to in Article 138 of the Constitution of the Republic of Sri Lanka, in order to canvass a decision made by a Provincial High Court exercising its appellate powers?

5) Learned Deputy Solicitor General in his written submissions at page 15, referring to the case of **Merchant Bank of Sri Lanka Limited V. Wijeyawardena** [S.C.Appeal 81/2010] [SC/SPL LA 35/10] has stated that the aforesaid decision of the Supreme Court is on the identical issue and therefore this Court is bound to follow the decision in that case. In that decision the Supreme Court held that no revision would lie in the Court of Appeal when there is a direct right of appeal conferred on the Supreme Court. I am not

inclined to agree that it is a decision on the identical issue. It was a revision application filed in the Court of Appeal challenging a decision of a High Court that was made, **exercising its original jurisdiction.** It was a decision of the High Court established in terms of the provisions contained in the High Court of the Provinces (Special Provisions) (Amendment) Act No.10 of 1996 (Commercial High Court) to which only the original civil jurisdiction is vested with and not the appellate powers. The issue at hand is to determine the availability of revisionary power of the Court of Appeal when an application is to canvass a decision made exercising appellate powers of the Provincial High Court and not its original jurisdiction.

6) Hence, it is clear that the issue now before this Court is different to the issue that was considered and decided by the Supreme Court in **Merchant Bank of Sri Lanka Limited V. Wijeyawardena.** [SC Appeal 81/2010] [SC/SPL LA 35/10] Under such circumstances, this Court is not strictly bound to follow the said decision of the Supreme Court adhering to the rule of *stare decisis.*

7) In this connection, yet another decision, namely **E.A.P.Ajith V. Attorney General** [S.C.01/2011 delivered on 24.06.2011-unreported] of the Supreme Court was referred to, in the submissions of Mr. Razik Zarook P. C. [at pages 8 and 9 in his

written submissions] In those submissions he has stated as follows:

> *"the 6th Respondent respectfully draws the attention of Your Lordships to the above Order in which was submitted during the course of argument by the Counsel for the 6th Respondent in which the* ***Supreme Court has exercised the revisionary powers*** *against a Judgment made by Your Lordships, the Court of Appeal which was filed after lapse of appealable period ..."* (emphasis added)

8) Even though the learned President's Counsel has submitted that the Supreme Court has acted exercising its revisionary powers in that case, I do not find any provision in law granting Revisionary Powers to the Supreme Court. Article 118 of the Constitution stipulates the jurisdiction of the Supreme Court. In that Article, jurisdiction of the Supreme Court is clearly stipulated and sub Article (g) in that Article gives the Parliament, the power to vest or ordain further powers to the Supreme Court. The powers given to the Parliament under Article 118, those being entrenched powers of the Supreme Court; it cannot be varied unless the Constitution is amended. No law is enacted as yet, grating revisionary powers to the Supreme Court even under the powers given to the Parliament in terms of the said Article 118(g).

9) Therefore, I am unable to agree with the contention of the learned President's Counsel to the effect that the Supreme Court has the power to exercise revisionary jurisdiction to grant relief to the parties who have failed to file appeals for various reasons. I believe the Supreme Court may have acted under the inherent powers it possesses on that occasion. Accordingly, it is seen that the aforesaid two decisions of the Supreme Court cannot be made applicable to the issue at hand.

10) Having discussed the applicability of the decisions by which this Court is bound to follow under the rule of *stare decisis,* I will now turn to consider the merits of the issue before this Divisional Bench. It is first necessary to refer to the Section relevant to the question to be answered. It is the Section 9(a) of the Act No.19 of 1990 that is relevant to the issue at hand and it reads thus:

> "9. Subject to the provisions of this Act or any other law, any person aggrieved by;
>
> (a) *A final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of article 154P of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal, therefrom to*

the Supreme Court if the High Court grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings:"

11) Plain reading of the Section referred to above, show that the **appeals** from the Provincial High Court are **to be filed in the Supreme Court bypassing the Court of Appeal.** Then the question is **whether or not, a revision application could be filed in the Court of Appeal** to challenge decisions made by the High Court exercising its appellate powers, particularly **when the appellate jurisdiction is vested with the Supreme Court** to review the same decision.

12) Of course, laymen who think logically, may say that if the appellate power is with the Supreme Court, then how could the Court of Appeal, it being a Court below, has the power to review such a decision making use of a different procedure. However, the task of a Court of law is to interpret the statute according to the prevailing law of the land and therefore, it cannot go by the laymen's point of view though it is logical. Accordingly, I will first look at the authorities referred to by Counsel, in order to interpret the law, referred to in Article 138 of the Constitution read with Section 9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

13) In the case of **Gunaratne V. Thambinayagam and others**, [1993 (2) S.L.R. at 355] the party aggrieved by a decision of the Provincial High Court which was made exercising its revisionary powers sought to canvass the said decision by filing a direct appeal to the Supreme Court. Supreme Court on that occasion held that an appeal from such a decision where the High Court has exercised its revisionary powers should be made to the Court of Appeal since there is no right of appeal created by statute to challenge such a decision in the Supreme Court. Indeed, ***ratio decidendi* in that decision is that the direct appeal provided to the Supreme Court by Section 9 of the Act No.19 of 1990 is limited to any order, judgment, decree or sentence of a provincial High Court made in the exercise of its appellate jurisdiction and not when it has made orders exercising revisionary powers.** Therefore, it is seen that the Supreme Court has not looked at a situation similar to the issue at hand; in deciding the said case **Gunaratne V. Thambinayagam**. (supra)

14) The issue in **Australanka Exporters Pvt Ltd V. Indian Bank,** [supra] was to determine whether the Court of Appeal has the revisionary power to review a decision made by the High Court in terms of the provisions contained in the High Court of the Provinces (Special Provisions) (Amendment) Act, No.10 of 1996. Once again, the decision subjected to in that case was a decision

by a High Court exercising its original jurisdiction and therefore the circumstances in that case are different to the matters that had arisen in the instant case. Hence, I am not inclined to accord much weight to the said decision in determining the issue at hand.

15) A similar situation has come up in **Senanayake and others V. Koehn and others** [2002 (3) S.L.R. at 381] and in the case of **Merchant Bank of Sri Lanka Ltd V. J.P.Wijewardhane and 4 others.** [S.C.Appeal 81/2010] [SC/SPL LA 35/10] In those two decisions too, the matter before Court was to determine the maintainability of revision applications filed to canvass the decisions of the High Court where original civil jurisdiction had been exercised by that High Court. Therefore, those are decisions made on circumstances different to the facts pertaining to the issue before this Bench.

16) Accordingly, the three decisions cited in the preceding two paragraphs have no direct bearing to the matter in issue. However, all those three decisions had been made by a Bench, comprising of two judges of this Court and therefore this Divisional Bench is not absolutely bound by those decisions.

17) In the case of **Jayawardena V. Puttalam Cement Company Ltd.** [2005 (3) S.L.R. at 148], the exact issue had been considered by the Court of Appeal. In that decision, it was held that this Court lacks jurisdiction to entertain revision applications when the right

of appeal is granted to the Supreme Court. However, even though the Court in that case has referred to the lack of jurisdiction of the Court of Appeal when arriving at its decision, it has also relied upon heavily on the necessity of the presence of exceptional circumstances in granting reliefs. Inability to exercise the right to file an appeal also was taken into consideration when dismissing the said application. Hence, it is seen that the lack of jurisdiction was not the only criterion, to have the said revision application dismissed. However, this Divisional Bench is not bound to follow the decision in that case as well, since the Bench by which it was decided comprised only two judges.

18) Having adverted to the aforesaid decisions which were referred to by the Counsel in support of the contention that this Court has no jurisdiction to entertain revision applications to canvass the decisions made in the exercise of appellate powers by the Provincial High Court, I will now look at Article 138 of the Constitution by which the Court of Appeal is empowered to have and maintain applications made by way of revision. The said Article 138 reads thus:

> "***The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law,*** *an appellate* ***jurisdiction for 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 added)

19) It is trite law that Constitutional provisions prevail over other enactments, it being the basic law in a country. This position in law had been discussed in the cases of:

- ✓ **Thoburn v. City Council;**
- ✓ **Hunt v. Hackney London Borough Council;**
- ✓ **Harman and Another v. Cornwall County Council;**
- ✓ **Collins v. Sutton London Borough Council.**

Those cases were amalgamated and heard together as it involved one important legal issue and the decision in those cases was delivered by Laws L J and Crane J and are reported in 2002 EWHC 195 (Admin) and also in 2003 Q.B. 151.

In the aforesaid decision, LAWS LJ held as follows:

"And from this a further insight follows. We should recognize a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. ..."

"... I think the test could only be met by express words in the later statute. Or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. I should add that in my judgment general words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute, by reference to what was said in Parliament by the minister promoting the Bill pursuant to Pepper V Hart [1993] AC 593. A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and state, by unambiguous words on the face of the later statute."

20) As mentioned above, it had been clearly held that even though the ordinary statutes may be impliedly repealed, Constitutional statutes may not. Therefore, it is clear that Article 138, it being a constitutional provision cannot be impliedly repealed by Section 9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990. Hence, it is clear that this Court is not in a position to decide that the implication of Section 9 of the Act No.19 of 1990 amounts to usurpation of jurisdiction vested in the Court of Appeal referred to in Article 138 of the Constitution.

21) Moreover, in the case of **Atapattu and others V. People's Bank and others,** [1997 (1) S.L.R. at 222] Supreme Court going further, has held that even by having a specific clause in a statute ousting the jurisdiction of court will not supersede constitutional provisions. Even in the case of

Sirisena Cooray V. Tissa Dias Bandaranayaka [1999 (1) S L R at page 01] and also in the **Supreme Court Reference 03/08 (mandatory sentencing case)** had upheld the supremacy of the Constitution over ordinary legislation.

22) The authorities referred to above show that the revisionary jurisdiction of the Court of Appeal enshrined in Article 138 shall remain intact and cannot be impliedly repealed despite the appellate power over the same decision is given to the Supreme Court by an ordinary legislation; in this instance it is the Act No.19 of 1990.

23) At this stage, it is also pertinent to refer to the manner in which the clauses to ouster jurisdiction are being discussed and explained in the Book **"Maxwell on the Interpretation of Statutes".** In that book, referring to the decision in **Commissioners of Customs and Excise v. Cure & Deeley, Ltd** [1962] 1 Q.B.340 has stated thus:

> *"the well-known rule that a statue should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect".*
>
> [at page 153 in the 12th Edition in Maxwell on The Interpretation of Statutes]

In the Act No.19 of 1990, no clear words are found to take away the revisionary jurisdiction conferred upon this Court referred to in Article 138 of the Constitution.

24) However, an argument may be advanced stating that; it is inappropriate to have two different forums to review one and the same decision simultaneously when the ultimate goal is to have a judicial decision reviewed though two different procedures are to be adopted to achieve the same.

25) Importance of the availability of the two procedures had been discussed and decided in **Abeywardene v. Ajith de Silva.** [1998 (1) S.L.R. at 139] In that decision, the expressions "appellate jurisdiction" and "revisionary jurisdiction" had been clearly identified as two separate powers, by a Bench comprising of five judges. In that decision it was held thus:

> *"It is contended on behalf of the petitioner that the expression "appellate jurisdiction" (as opposed to "Original Jurisdiction") would ordinarily include the power to review decisions by way of appeal, revision or restitutio in integrum. I do not agree with this submission. Article 154P (3)(b) refers to "appellate" and "revisionary" jurisdiction, but "revisionary jurisdiction" is omitted in section 9 of Act No.19 of 1990. The omission, in my view, is not inconsequential, for jurisdiction in respect of revision is distinct from appellate jurisdiction (Mariam Beebee v. Seyed Mohamed. Vide also Somawathie v. Madawela and Attorney General v. Podisingho".*

Hence, it is seen that a significant importance is accorded to the procedure adopted in canvassing a judicial order though the outcome of both the applications becomes the same.

26) Furthermore, I need to refer to the case of **Sunil Chandra Kumar V. Velu,** [2001 (3) S L R 91] as well, on this point. In that decision appellate and revisionary powers had been identified as two different jurisdictions altogether. In that decision, Jayasinghe J having held that both the appellate and the revisionary powers should be exercised subject to the Constitution, has clearly identified the difference in the two methods by which a judicial order could be reviewed. In that decision he, referring to the case of **Abeygunasekara V. Setunga** [1997 (1) S L R 67] has further stated that those two expressions are conceptually different. I quote the following passage from the said decision where Jayasinghe J has highlighted the importance of the applications made by way of a revision.

> *"Revision is a discretionary remedy: it is not available as of a right. This power that flows from Article 138 of the Constitution is exercised by this Court on application made by a party aggrieved or ex mero motu; this power is available even where there is no right of appeal as for instance Section 74 (2) of the Primary Courts Procedure Act. The petitioner in a revision application only seeks the indulgence of Court to remedy a miscarriage of justice. He does not assert it as a right. Revision is available unless it is restricted by the Constitution or by any other law. I am unable to see any such impediment as observed by Mark Fernando, J. in Weragama (supra)* [at pages 102 and 103]

27) Upon considering the above decisions, it is clear that merely because the appellate power is with the Supreme Court, revisionary power under Article 138 of the Court of Appeal over the same decision will not amount

to usurpation of its revisionary jurisdiction since those two methods are considered and identified as two different ways, containing two different criteria in reviewing a judicial order.

28) Having adverted to the judicial pronouncements on the issue, I will now look at the manner in which Article 138 of the Constitution is worded in order to ascertain whether or not; the said Article prevails over the provisions contained in the Act No.10 of 1990. Article 138 of the Constitution reads thus:

> "***The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law***, *an appellate jurisdiction for 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 added)

29) The above Article empowers the Court of Appeal to entertain revision applications in order to correct all errors in fact or in law committed by the Provincial High Court in the exercise of its appellate powers. This power to entertain revision applications, still remain intact and not been taken away, curtailed or restricted by a statute enacted by the Parliament as yet. Hence, it is clear that the Parliament has not intended to take

away the revisionary jurisdiction vested in the Court of Appeal, by way of a statute.

30) Significantly, it is seen that the aforesaid Article itself empowers the Parliament to amend or alter jurisdiction of the Court of Appeal by an ordinary legislation. It is evident by the words that are highlighted and underlined above. Even though the Parliament possess the power by enacting an ordinary statute, to take away the revisionary jurisdiction of the Court of Appeal in respect of the decisions made exercising its appellate powers by the High Court; the Parliament in its wisdom has thought it fit to have it remained undisturbed having given the appellate power to the Supreme Court.

31) Under those circumstances, could this Court decide that the Court of Appeal has no power to entertain revision applications when that power still remains with the Court of Appeal under the provisions of the Constitution though the appellate power over the same decisions is vested with the Supreme Court? My opinion is "NO". Answer to this question is found in the case of **Abeygunasekera v. Setunga and others** (supra) as well. In that decision Kulatunga, J held thus:

> *"In the instant case, we are not concerned with the question whether a statutory right of appeal granted by ordinary law is subject to any limitation. The question here is whether the appellate jurisdiction of the Court of Appeal under Article 138(1) of the Constitution to entertain appeals made in terms of Article*

154P(6) is restricted and excludes the power to entertain appeals from revisionary orders of the High Court."

In that judgment, Kulatunga, J has further stated that:

"However, the use of the expression "appellate and revisionary jurisdiction" has given rise to such questions. Whenever such questions arise as to the meaning of a particular provision, the Court has to interpret the statute and determine its meaning on the basis of the intention of Parliament or the supposed intention of parliament, having regard to the language of the statute and relevant rules of interpretation. As stated in Bindra's "interpretation of Statutes" 7th Ed. P.945:"

32) In the light of the above, it is seen that the duty of Court is to ascertain the intention of the Legislature when interpreting the provisions in law. Then the question is whether or not the Parliament intended taking away the revisionary jurisdiction of the Court of Appeal by enacting the Act No.19 of 1990. If intended so, the Parliament acting under the powers vested in it by the Article 138 of the Constitution could have taken away the revisionary jurisdiction referred to in that Article as well at the time, the Act No.19 of 1990 was enacted by which the appellate power was given to the Supreme Court by an ordinary Legislation.

33) At this stage, it is pertinent to note that Mark Fernando J in **Faiz V Attorney General,** [1995 (1) S L R 372] when he examined the

jurisdiction of the Supreme Court given to it under Article 126 (4) has stated that the ambit of the said jurisdiction can only be determined by carefully and patiently analyzing and understanding the fundamental principles underlying the Constitution, as well as the specific provisions taken in their context and by applying tried and tested principles of interpretation. In that decision he has further held thus:

> *"That jurisdiction cannot be expanded by twisting, stretching or perverting the Constitution provisions through a populist process of activist usurpation of the legislative function thus creating a judicial despotism under which the courts assume sovereignty over the Constitution."*

34) The decisions referred to above show that the Supreme Court when interpreting the law has always recognized the supremacy of the Constitution over ordinary legislation. Under such circumstances, I am not inclined to decide that the provisions in the Act No.19 of 1990 amount to usurpation of Constitutional provisions; in this instance it is the Article 138 of the Constitution in which the revisionary jurisdiction of this Court is guaranteed. The said jurisdiction has not been repealed as yet though it is possible by enacting an ordinary statute.

35) Moreover, in the event this Court decides that it lacks jurisdiction to entertain revision applications pursuant to the appellate power been given to the Supreme Court by the Act No.19 of 1990, then it is possible to advance an argument that it amounts to an amendment being made to

Article 138 of the Constitution which is not the function of the Judiciary. As mentioned hereinbefore, an amendment to Article 138 can only be made by a statute enacted by the Parliament.

36) In the circumstances, I am of the view that the Parliament with having a specific purpose has thought it fit to retain the revisionary jurisdiction of the Court of Appeal as it stands now when affording the appellate power to the Supreme Court over the decisions made exercising the appellate jurisdiction of the provincial High Court. Otherwise, the Parliament could have enacted by express provisions taking away the revisionary jurisdiction of this Court as it was the case when Section 37 of the Arbitration Act No.11 of 1995 was enacted. The said Section 37 (1) reads thus:

> 37(1)*Subject to subsection (2) of this section,* ***no appeal or revision shall lie*** *in respect of any order, judgment or decree of the High Court in the exercise of its jurisdiction under this Act except from an order, judgment or decree of the High Cour under this Part of this Act.*

37) At this stage, it is pertinent to refer to another situation whereby a majo jurisdictional change was effected with the enactment of the High Court (the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006. came into operation enabling the Provincial High Courts to entertai appeals and revisions that are filed to challenge the decisions of t District Courts. However, the Parliament has thought it fit not to gr

the power to have and maintain the applications in the nature of *restitutio in integrum* to such High Courts exercising civil appellate powers though the very purpose of filing an application of *restitutio in integrum* also is to review decisions made by District Courts. The said power to entertain *restitutio in integrum* applications still remains with the Court of Appeal despite the power to review decisions by way of an appeal and a revision is given to another forum. Same principle should apply in this instance as well. Hence, it is incorrect to decide that the revisionary powers of the Court of Appeal is deemed to have been taken away merely because the Parliament intended to give the appellate power to the Supreme Court by enacting the Act No.19 of 1990, particularly in the absence of a clear provision in law to that effect.

38) Having adverted to the provisions in law, I will now look at the facts of the case that was argued first, namely the facts in the case bearing No. C. A. (PHC) 204/2006, since it is necessary to ascertain whether there exist exceptional circumstances to entertain a revision application in order to succeed in such an application. Admittedly, the impugned decision in that case was made without informing of the date of argument to the petitioner who filed this application despite the fact that the said decision had a bearing on her rights.

39) It was an appeal to have a conviction imposed on the accused who is th respondent in this application, set aside. In that appeal, the Hon Attorney General has appeared for the State at the argument stage in th

High Court and the petitioner though she is the virtual complainant of the incident, had no notice what so ever of the appeal filed in the Provincial High Court. Hence, it is clear that it was a decision made without hearing the virtual complainant. The accused respondent was acquitted by the High Court Judge and soon thereafter he, namely the accused has sent a letter of demand claiming damages from the petitioner relying upon the said decision of the High Court Judge. Petitioner became aware of the appeal filed by the accused appellant only when she received the said letter of demand. By then, the period of time given to file an appeal has lapsed. Hence, she was prevented exercising her right of appeal referred to in the Act No.19 of 1990 though she was the aggrieved party.

40) In the circumstances, it is seen that the petitioner will have no place to complain to have the impugned decision made in the appeal filed in the Provincial High Court, reviewed, in the event she is not allowed to file this revision application. Unless, she is allowed to present her case before a forum which has the power to review an order which had been made in her absence, her rights may liable to be affected in view of the letter of demand she received claiming damages. Such a result may amount to denial of access to justice as far as she is concerned which is a basic right of a citizen.

41) Article 12 (1) guarantees the equal protection of the law of all persons whilst Article 105 ensures to have justice administered through courts established under the Constitution, in order to protect, vindicate and

enforce the rights of the People. Even though only the Supreme Court has the power to interpret the provisions of the Constitution, this Court also should be mindful of the contents of the Constitution when considering issues that come up before it. Therefore, it is my view that it may prejudice the said rights referred to in the Constitution which the petitioner could claim, if she is not allowed to proceed with her revision application filed in this Court. For the aforesaid reasons, I conclude that it is incorrect to decide that the provisions of the Act No.19 of 1990 have impliedly taken away the revisionary power given to the Court of Appeal in terms of Article 138 of the Constitution.

42) When the matter was taken up for hearing, an argument was advanced stating that in the event revision applications are allowed to be filed in the Court of Appeal as contended by the petitioners in these applications, then there would be two layers of appeal against one particular decision. I do not think it is correct to arrive at a decision, depending on the number of appeals; a person is entitled to file against a judicial order. As stated hereinbefore, it is a matter for the Parliament. There are instances in which an aggrieved party could make applications to have reviewed one decision, sometimes at three levels. One such example is found when applications are filed to review a decision made in terms of the provisions contained in Part VII of the Primary Courts Procedure Act. (applications made under Section 66 of the Act) Therefore, I am not inclined to consider

the number of appeals; a person is entitled to file in different forums, as a reason to refuse applications made in revision to this Court.

43) Having expressed my opinion on the issue at hand, I also wish to comment on the submission of the learned Deputy Solicitor General who argued that the Supreme Court being the court having final appellate jurisdiction, no other court is empowered to review the decisions when the said appellate power is vested in the Supreme Court. However, it must be noted that even if the revisionary jurisdiction is exercised by the Court of Appeal, it will not hamper the final appellate jurisdiction of the Supreme Court enshrined in Article 118 of the Constitution since an appeal can always be preferred to the Supreme Court against a decision of the Court of Appeal made in a revision application. Hence, I am not inclined to accept the said contention of Mr.Nawaz D.S.G.

44) In the circumstances, it is my considered view that the Parliament did not intend taking away the revisionary jurisdiction of the Court of Appeal bestowed in it, in terms of Article 138 of the Constitution, consequent upon enacting the Act No.19 of 1990. Hence, I make order that the merits in all these revision applications should be examined by this Court without those being dismissed on the basis of lack of jurisdiction. Accordingly, I am not inclined to uphold the preliminary objection which was raised at the outset.

45) However, I need to emphasize that revision applications filed to review decisions made by the Provincial High Court in the exercise of its

appellate jurisdiction, should be carefully examined by the Court of Appeal and the petitioners in those applications should not be allowed to abuse the process of court particularly in view of the jurisdiction to entertain appeals over such decisions is vested in the Supreme Court. Accordingly, I intend imposing a condition precedent when invoking jurisdiction in terms of Article 138 in order to have the decisions of the Provincial High Court made in the exercise of its appellate power, reviewed by way of a revision application.

46) Accordingly, I make it mandatory to have mentioned in specific and unambiguous words, the exceptional circumstances and the reasons for the failure to file an appeal that led to file a revision application invoking the jurisdiction of the Court of Appeal under Article 138 of the Constitution to review a decision of the Provincial High Court made in the exercise of its appellate powers. Those exceptional circumstances should be by way of evidence that may contain in an affidavit filed with the petition. Failure to adduce such evidence shall result in a dismissal of the petition without notice being issued to the respondents. The Court also is duty bound to consider those special circumstances mentioned in the affidavit carefully, in order to ascertain whether those circumstances are sufficient to allow the revision application to proceed with. Particularly the Court of Appeal shall not condone matters such as laches on the pa of the petitioner. Then only the Court should decide whether it shou allow the petitioner to proceed with the application or not.

47) This same question of Law as to the jurisdiction of this Court that has been dealt with hereinbefore in this judgment had been raised in the applications bearing Nos. C.A.(PHC) APN No.107/2009, C.A.(PHC) APN No.150/2011, C.A.(PHC) APN No.109/2011, C.A.(PHC) APN No.111/2013, C.A.(PHC) APN No.157/2013 and C.A.(PHC) APN No.185/2010 as well. The order pronounced today in this application bearing No.CA (PHC) APN No.204/2006 is to be made applicable in those Revision Applications too, and the parties in those applications are to abide by this order. The Registrar of this Court is directed to file a copy of this order into the dockets of all those revision applications.

48) In view of the decisions and the reasons referred to above, merits in all the applications mentioned before, are to be examined provided that the criteria mentioned in paragraph 46 is adhered to.

Preliminary objection is overruled. Further hearing of this matter and of the revision applications in all those matters referred to in the preceding paragraph is to be commenced on a date fixed by the Court.

JUDGE OF THE COURT OF APPEAL