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

In the matter of an Application for Revision under Article 138 of the Constitution of Sri Lanka.

H.M.U.B. Herath,
Assistant Commissioner of Agrarian Development,
Badulla.

Applicant

C.A. (PHC) APN 53/2013
Badulla (PHC) 92/2010
M.C. Badulla Case No. 8961.

VS.

A.A. Mohamed Thaaj,
08, Martin Silva Mawatha,
Badulla.

Respondent

AND

A.A. Mohamed Thaaj,
08, Martin Silva Mawatha,
Badulla.

Respondent-Petitioner

VS.

1. H.M.U.B. Herath,
   The Assistant Commissioner of
   Agrarian Development,
   Badulla.

Applicant-Respondent

2. The Honourable Attorney
   General,
   Attorney General's Department,
   Colombo 12.

Respondent

AND NOW BETWEEN

A.A. Mohamed Thaaj
08, Martin Silva Mawatha,
Badulla.

Presently at
No. 20 Hunukotuwa Road,
Bandarawela Road
Badulla.

Respondent-Petitioner-Petitioner

VS

1. H.M.U.B. Herath,
   The Assistant Commissioner of
   Agrarian Development,
   Badulla.

Presently
K.P. Rasika Hemajith Silva,
Assistant Commissioner of Agrarian Development,
Keppitipola Road,
Badulla.

Applicant-Respondent-Respondent.

2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent – Respondent

BEFORE: **W.M.M. Malinie Gunaratne, J. &**

P R Walgama, J.

COUNSEL: W. Dayaratne, P C
for Petitioner

Nayomi Karawita, S.C.
for the Respondents

Argued on : 03.12.2015

Written submissions

filed on : 11.03.2015, 19.01.2016, and 17.02.2016

Decided on : 16.05.2016

Malinie Gunaratne, J.

This is a Revision Application against the Judgment of the High Court of Badulla dated 18th October 2011, made in respect of an Order by the

learned Magistrate of Badulla (in Case No. 8961) pursuant to an application filed by the Applicant – Respondent – Respondent (hereinafter referred to as the 1st Respondent) under Section 33 (1) of the Agrarian Development Act No. 46 of 2000.

Proceedings were instituted on the 01st of July 2009 by the 1st Respondent before the Magistrate of Badulla in terms of Section 33(1) of the Agrarian Development Act, against the Respondent – Petitioner – Petitioner (hereinafter referred to as the Petitioner) alleging that the Petitioner has filled a paddy land (10 perches in extent) without prior approval of the Commissioner General of Agrarian Development.

After an inquiry the learned Magistrate determining that an act has been committed in contravention of Section 33(1) by the Petitioner, delivered the Order on 03.01.2008, restraining the Petitioner, his servants and agents from doing any act in contravention of Section 33 (1).

Being aggrieved by the said Order of the learned Magistrate, the Petitioner preferred a Revision Application to the High Court of the Province seeking to set aside the said Order of the learned Magistrate.

The learned High Court Judge affirmed the Order of the learned Magistrate and dismissed the Petition. Being aggrieved by the said Judgment, the Petitioner has preferred this application seeking to revise it.

The Petitioner seeks to have the judgment of the learned High Court Judge and the Order of the learned Magistrate, set aside on the basis of several grounds set out in Para 11 (a) – (j) of the Petition filed in this Court.

When the 1st Respondent instituted the Action (M C No.8961) before the Magistrate of Badulla, under Section 33 (1) of the Agrarian Development Act No. 46 of 2000 (hereinafter referred to as the said Act) against the Petitioner, it was the contention of the Petitioner, that the subject matter of the application is not a paddy land; it is a high land. But after an inquiry the learned Magistrate rejected the contention of the Petitioner and made an Order in favour of the 1st Respondent. It is to be noted that the learned High Court Judge affirmed the Order made by the learned Magistrate.

When this case was taken up for argument the learned State Counsel raised two preliminary objections on the maintainability of this application before considering the merits of the case. However both parties agreed to argue and consider the preliminary issues and the merits of the case together. The learned State Counsel raised the following preliminary objections on the maintainability of this application.

i) The Petitioner has not pleaded or established any exceptional circumstances warranting the exercise of revisionary powers.

ii) There is a delay and / or laches on the part of the Petitioner in that the Order of the learned High Court Judge sought to be challenged by these proceedings is dated 18.10.2011 and this application has been filed on or about 02.05.2013, over twenty months later.

Firstly, I will consider the preliminary objections raised by the learned State Counsel. As set out before, the first preliminary objection is the

Petitioner has not pleaded or established any exceptional circumstances for the exercise of the power of revision.

It is the contention of the learned State Counsel that since the Petitioner has not pleaded or established any exceptional circumstances in this case, the Petitioner cannot maintain this action. To support her contention the learned State Counsel relied on the following decided cases:

i) Bank of Ceylon vs.Kaleel and Others, (2004) 1 S.L.R. 284;

ii) Rustom vs. Hapangama and Company (1978 – 79) 2 S.L.R. 225;

iii) Warapragasam and Another vs. Emmanuel C.A. 931 / 88 D.C. Jaffna 4772/L C.A.M. 24.07.1991.

iv) Caderamanpulle vs Ceylon Paper Sacks Ltd.(2001) 3 S.L.R. 112.

v) Dharmaratne vs. Palm Paradise Cabanas Ltd. (2003) 3 S.L.R. 24.

In the written submissions filed in this Court by the Petitioner it was contended that having declared that this land is a paddy field, he cannot use the said land for any purpose which has caused grave miscarriage of justice to him and the said ground mentioned above is an exceptional circumstance as irreparable loss and damaged has been caused.

At this juncture it is relevant to note that, the 1st Respondent instituted proceedings against the Petitioner alleging that, the Petitioner has filled a paddy land without prior approval of the Commissioner General of Agrarian Development. Since the Court has decided, the land is a paddy land and, if the Petitioner needs to use it for some other purpose or fill the land he can do

so after obtaining the prior approval from the Commissioner General of Agrarian Development. Then it will not cause any miscarriage of justice to him.

Hence, I disagree with the submissions made by the learned President's Counsel for the Petitioner, that the averments in Paragraph 11 (d) – (j) do not constitute exceptional circumstances on the face of it.

The trend of authority clearly indicates that the revisionary powers of the Court of Appeal will be exercised if the exceptional circumstances exist only.

In Attorney General vs. Podisingho 51 N.L.R.385, it was held, an application in revision should not be entertained save in exceptional circumstances; such as,

(a) Where there has been a miscarriage of justice;
(b) when a strong case for the Supreme Court has been made out by the Petitioner;
(c) when the applicant was unaware of the order made by the Court of Trial.

The object of the power of revision as stated by Sansoni Chief Justice in Mariam Beebee vs. Seyed Mohamed 68 N.L.R 36 is the due administration of justice "The Court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred". (In the words of Soza J. in Somawathie vs. Madawala and Others 1983 (2) SLR 15).

In Atukorale vs. Saminathan 41 N.L.R. 165 Soertsz J. stated, that the right of the Court to revise any order made by an original Court will be exercised only in exceptional circumstances.

Furthermore, in Dharmarathne and Another vs. Palm Paradise Cabanas Ltd; (2003) 3 S L R 24, Gamini Amaratunga J. stated, that the practice of Court to insist on the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed.

On a consideration of the above authorities, it is abundantly clear, the revisionary powers of the Court of Appeal will be exercised if the exceptional circumstances exist only. Thus, the existence of exceptional circumstances is a process by which the method of rectification should be adopted.

The 2nd preliminary objection is namely undue delay in filing this application.

In the written submissions filed in this Court by the learned President's Counsel for the Petitioner, it was contended that the Petitioner was compelled to file the revision application as his appeal was dismissed purely on a technical ground that it was out of time. The learned State Counsel contended that, if the Petitioner had exercised due diligence while exercising the statutory right of appeal he should have filed the Appeal within the prescribed time period as per the Rules. She has further contended that, the Petitioner's negligence led to the filing of belated appeal and getting the same dismissed from the Court of Appeal. It is the contention of the learned State Counsel that although the Petitioner resorted

to filing this revision application averring that there were exceptional circumstances but he had failed to disclose one such exceptional circumstance.

It is to be noted that although the Petitioner has stated in Paragraph 14 of his Petition that the Appeal was dismissed on technical ground, the date of the dismissal is not mentioned. Even a copy of the Order of dismissal is not filed along with the Petition. However this revision application has been filed after 20 months from the Order of the learned High Court Judge and it is to be noted that the Appeal was rejected, due to the Petitioner's own delay and fault.

In the case of Attorney General vs. Kunchihambu 46 N.L.R. 401, it was held the delay of three months was to disentitle the Petitioner for relief. In Camillus Ignatious vs. Officer in Charge of Uhana Police Station (Rev) C.A. 907/89 M.C. Ampara 2587 held that, a mere delay of four months in filing a revision application was fatal to the prosecution of the revision application before the Court of Appeal.

The Petitioner has filed this application after 20 months from the Order of the High Court. In Dissanayake vs. Fernando 71 N.L.R. 356, it was held, it is essential that the reason for the delay in seeking relief should be set out in the Petition. The inordinate delay has not been explained by the Petitioner to the satisfaction of this Court. Accordingly, the long period of inaction and failure to seek relief on the part of the Petitioner was fatal to an application in revision.

It is relevant to note that the Petitioner had not filed along with his Petition, the documents marked by the 1st Respondent in the case No. 78784

of Badulla Magistrate's Court. The documents which had been marked as X and X 5 by the 1st Respondent are vital documents to arrive at a correct adjudication on the main issue of this case. The 1st Respondent has filed copies of the said documents marked as X and X 2. Hence, it is to be noted, that the appeal brief of P H C 172 – 2010 does not contain copies of all the marked documents filed in the two cases in the Magistrate's Court of Badulla.

Accordingly, the Petitioner has not complied with Rule 46 of the Supreme Court Rules 1978 and has suppressed from this Court some essential materials. It is to be noted the materials filed by the 1st Respondent is in, support of his own case and is in no way intended to supplement the Petitioner's case or to make good any omissions on the part of the Petitioner.

Due to the aforesaid reasons, this Court has no alternative but to conclude that the Petitioner failed to substantiate presence of exceptional circumstances by way of illegality or error on the face of the record. Accordingly his plea for invoking of the discretionary revisionary powers of this Court must necessarily fail.

The long period of inaction and failure to seek relief on the part of the Petitioner was fatal to an application in revision.

Taking into consideration the entirety of the submissions adduced by both parties, this Court upholds the preliminary objections raised by the 1st Respondent and conclude that this is not a fit and proper case to invoke the discretionary revisionary powers of this Court.

Without prejudice to the above views, now I consider the submissions made by both parties with regard to the main issue of this application.

In this application, the pivotal question to be determined is whether the subject matter of the application filed in the Magistrate's Court is a paddy land or a high land.

When this application was taken up for argument, it was the stance of the learned President's Counsel for the Petitioner that, it is not a paddy land within the meaning of Section 101 of the said Act. In the written submissions filed in this court by the learned President's Counsel for the Petitioner, it is contended to complain that in filling a paddy land the Commissioner shall satisfy that it is a land within the meaning of Section 29 (1) of the said Act. It is further contended, in the instant case, there is neither any such ascertainment nor any evidence of committing any act of filling before the learned Magistrate and the 1st Respondent was totally relying on preclusive Clause of Section 33(7).

Section 33 (7) reads as follows:

"Court shall not be competent to call for any evidence from the Commissioner General or Additional Commissioner General or Commissioner or Deputy Commissioner or Assistant Commissioner in support of the application".

A plain reading of this Section makes it abundantly clear that the Court has no authority to call for any evidence, neither the 1st Respondent. However, since the Petitioner was entitled to give evidence and call the witnesses, he himself has given evidence and summoned witnesses to give evidence on behalf of him.

It is the contention of the 1st Respondent that, the evidence elicited before the Magistrate's Court is sufficient to establish that the subject land has always existed as a paddy land.

On perusal of the evidence led before the learned Magistrate and the documents marked by both parties, I am of the view, that the learned Magistrate, after due consideration of the evidence and documents had come to the correct findings that, the land in question was a paddy land subject to filling without a written permit by the 1st Respondent.

Even though the Petitioner claims that the land in question is not a paddy land there is no evidence to support his fact.

In the course of the hearing in this Court, the learned President's Counsel for the Petitioner sought to impress upon Court that the learned Magistrate has made his Order erroneously without considering the evidence led by the Petitioner. I am unable to agree with the submissions made by the learned President's Counsel in the light of the above reasoning.

For the reasons set out above, I hold that the learned Magistrate's Order is correct and as such there is no reason to set aside the Order. Therefore it is not necessary to interfere with the Judgment of the learned High Court Judge, who affirmed the Order of the learned Magistrate.

Accordingly, no ground exists which justifies the intervention of this Court to set aside the Order of the learned Magistrate dated 25.08.2010 and the Judgment of the learned High Court Judge dated 18.10.2011.

For the above reasons I hold that there is no merit in this application and I dismiss it with costs.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Application is dismissed with costs.