

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

Court of Appeal Case No.
CA (PHC) 166/2007

Subramaniam Sathasivam,
No. 180/2/118, People's Park Shopping
Complex,
Colombo 12

High Court of Colombo
No. 60/07

Magistrate Court of
Colombo No. 87311/5/6

Respondent – Petitioner – Appellant

Vs.

K.V.Dharmasiri,
Director General,
Urban Development Authority,
6th & 7th Floors, Sethsiripaya,
Battaramulla.

Applicant - Respondent - Respondent

Before : P.R.Walgama J.

L.T.B. Dehideniya J.

Counsel : Respondent – Petitioner – Appellant is present in person.
Vickum de Abrew DSG for the Applicant – Respondent -
Respondent.

Argued on : 25.02.2016

Written submissions of the Appellant filed on : 06.05.2016

Written submissions of the Respondent filed on : 09.05.2016

Decided on : 26.05.2016

L.T.B. Dehideniya J.

This is an appeal from the High Court Colombo. On the day fixed for argument the Respondent Petitioner Appellant was present in person. The Court inquired from him whether he has obtained the services of an Attorney at Law, and he replied in affirmative. The Court adjourned the hearing and granted time for him to consult and call his counsel to Court. When the case was taken up for argument, he submitted a letter from his counsel stating that he is appearing in other Court. The Court decided to hear the learned DSG in support of his case, but to avoid an injustice being caused to the Appellant due to the unethical behavior of his counsel; Court granted an opportunity to file written submissions. Accordingly, written submissions were filed. At this stage I wish to place on record my disapproval on the conduct of the counsel.

The facts of this appeal are briefly as follows. The Applicant - Respondent - Respondent (Respondent) filed action in the Magistrate Court Colombo under State Land (Recovery of Possession) Act No. 7 of 1979 as amended, seeking an order for ejectment of the Respondent - Petitioner - Appellant (the Appellant). The learned Magistrate pronounced the order on 22.05.2007 in favour of the Respondent and ordered to eject the Appellant. Being aggrieved by the said order of the learned Magistrate, the Appellant filed a revision application in the High Court of Western Province Holden in Colombo. The Appellant pleads that his revision application was numbered as 60/2007 and always it was called with the revision application numbered 59/2007. He further pleads that his revision application was due to call on 14.11.2007 but was not called. Later he found that it was called on 26.10.2007 and dismissed for the want of appearance of the Appellant. The Appellant on 04.12.2007

filed a motion together with two affidavits, (one from the Attorney At Law who appeared and the other from the Appellant) and moved Court to support the application. The Learned High Court Judge without giving a hearing to the Appellant on the application to support; dismissed the application. Being aggrieved by the said order of the Learned High Court Judge dated 04.12.2007, presented this appeal.

The learned DSG for the Respondent raised two preliminary objections. Firstly he submitted that the appeal is time bared. In the prayer to the petition of appeal the Appellant has sought several reliefs. The second relief sought is to set aside the order of the Learned High Court Judge dated 26.10.2007, by which the revision application was dismissed. The third relief sought was to set aside the order dated 04.12.2007, by which the application to support for relist was rejected.

An order made on a default of appearing has to be set aside by the same Court on an application presented to it. There are no rules specified in the Civil Procedure Code or in the Appellate Procedure Rules in relation to relisting of an appeal or a revision application. It has been held in the case of *Jinadasa and another v. Sam Silva and others* [1994] 1 Sri L R 232 that "*Since there is no legislation governing the matter, the power to restore the application to re-list is in the exercise of the Court's inherent jurisdiction.*" In the instant case, the Appellant made the application to the same Court, i.e., the High Court of Colombo, by way of a motion with two affidavits, one by the Attorney At Law who appeared for the Appellant on 26.10.2007 and the other by the Appellant himself, to re list the revision application. As such, the Appellant has correctly made the application to the same Court. The merits of that application have to be considered by the High Court and if the parties are not satisfied with the findings only this Court has to intervene in an appeal. In

the instant case, the High Court has not considered the merits. The Learned High Court Judge refused the application to support without giving an opportunity to present the case. The learned High Court Judge has come to a conclusion that there is a delay in making the application by arithmetically calculating the dates and without considering explanation offered. Therefore this Court need not to consider the second relief prayed for in the petition of appeal at this stage. Therefore the time period between the order dated 26.10.2007 and the date of filing the petition of appeal need not to be considered.

The third relief prayed for is to set aside the order dated 04.12.2007. The petition of appeal was filed on 17.12.2007, within the fourteen day period commencing from the date of order. Rule 2(1) of the Court of Appeal (Procedure for appeals from High Courts established by Article 154P of the Constitution) Rules, 1998 provides that the time period for filing of appeals against any judgment or final order is 14 days. Accordingly, the third relief prayed for is within the appealable time.

The next preliminary objection raised by the learned DSG is that the order canvassed against is not a final order and therefore there is no right of appeal.

The 13th Amendment to the Constitution established the High Courts of provinces by Article 154 P (1). High Courts established under the said Article was vested with the appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrate Courts and Primary Courts by Article 154 P (3) (b). Article 154 P (6) of the Constitution provide for any person who is aggrieved by a final order, judgment or sentence of any such Court, in the exercise of its jurisdiction under paragraphs (3)(b) to appeal there from to the Court of Appeal in accordance with Article 138.

154P (1) *There shall be a High Court for each Province with effect from the date on which this Chapter comes into force. Each such High Court shall be designated as the High Court of the relevant Province.*

(2)

(3) *Every such High Court shall (a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;*

(a)

(b) *notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province;*

(c)

(4)

(5)

(6) *Subject to the provisions of the Constitution and any law, any person aggrieved by a **final order, judgment or sentence of any such Court**, in the exercise of its jurisdiction under paragraphs (3)(b) or (3)(c) or (4), may appeal therefrom to the Court of Appeal in accordance with Article 138. (emphasis added)*

The rule 2(1) of the Court of Appeal (Procedure for appeals from High Courts established by Article 154P of the Constitution) Rules, 1998 provides that “*any person who shall be dissatisfied with **any judgment or***

final order or sentence pronounced by the High Court in exercise of the appeal or revisionary jurisdiction vested in it by article 154 P (3) (b) of the Constitution may prefer an appeal to the Court of Appeal against any such judgment for any error in law, or in fact-” . (emphasis added)

It is against a judgment or a final order of a High Court established under Article 154 P (1) that can be appealed to the Court of Appeal. The order appealed against in the present case is an order refusing an application to support an application for re list. It is not a final order. In Chettiar v. Chettiar (SC Appeal No. 101A /2009 SC mts 10.06.2010) it was held that *“if the decision whichever way it is given, will, if it stands finally dispose of the matter in dispute I think that for the purposes of these rules it is final.”* In the instant case, the application to support an application for re listing was refused. In any manner, it cannot be said that it is a final order. Therefore, there is no right of appeal.

I uphold the second preliminary objection raised by the learned DSG. Accordingly, I dismiss this appeal subject to costs fixed at Rs. 10,000/-

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal