

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

In the matter of an appeal under the Code of Criminal
Procedure Act read with section 9 and 11 of the High
Court of Provinces (Special Provisions) Act No. 19 of
1990

Court of Appeal case no. CA/PHC/83/2015

H.C. Colombo case no. HC RA 129/2014

M.C. Kaduwela case no. 33625/Maintenance

Kirineliya Gamage Mahesh,
“Sumudu”, Weliwatta, Wattegama, Dikwella.

Respondent Respondent Appellant

Vs.

Muduyanse Arachchilage Shyama Nelum
Kumari Sugathapala,
No.626/13, Sama Place,
Govinna Mawatha, Athuruguriya.

Applicant Petitioner Respondent.

Before : H.C.J.Madawala J.

: L.T.B. Dehideniya J.

Counsel : Kamal Suneth Perera instructed by D.A.P.Weerathne for the
Respondent Respondent Appellant.

: S. Hettiarachchi for the Applicant Petitioner Respondent.

Argued on : 16.01.2017

Written submissions filed on 20th and 23rd January and 01st February

Decided on : 30.05.2017

L.T.B. Dehideniya J.

This is an appeal from the High Court of Colombo.

The Applicant Petitioner Respondent (hereinafter sometimes called and referred to as the Respondent) filed an application in the Magistrate Court of Kaduwela under Maintenance Act No. 37 of 1999 and the Respondent moved in revision in the provincial High Court of Colombo against the order of the learned Magistrate. The Respondent Respondent Appellant (hereinafter sometimes called and referred to as the Appellant) being dissatisfied with the order of the learned High Court Judge made in the revision application, filed this appeal. The Respondent raised a preliminary objection on the jurisdiction. His contention is that this Court has no jurisdiction to hear an appeal from the High Court under section 14(2) of the Maintenance Act No. 37 of 1999

Section 14 of the Maintenance Act, with the side note, reads thus;

Right of Appeal

14. (1) Any person who shall be dissatisfied with any order made by a Magistrate under section 2 or section 11 may prefer an appeal to the relevant High Court established by Article 154P of the Constitution in like manner as if the order was a final order pronounced by Magistrate's Court in a criminal case or matter, and sections 320 to 330 (both inclusive) and sections 357 and 358 of the Code of Criminal Procedure Act, No. 15 of 1979 shall, mutatis mutandis, apply to such appeal:

Provided however, notwithstanding anything to the contrary in section 323 of the Criminal Procedure Code Act, No. 15 of 1979 such order under section 2 shall not be stayed by reason of such appeal, unless the High Court directs otherwise for reasons to be recorded :

Provided further that the Magistrate in forwarding the record to the High Court shall retain a copy of his order for purposes of enforcement.

(2) Any person dissatisfied with an order made by a High Court in the exercise of its appellate jurisdiction under this section, may prefer an appeal therefrom to the Supreme Court, on a question of law, with the leave of the High Court, and where such leave is refused, with the special leave of the Supreme Court, first had an obtained.

The Respondent's contention is that an appeal from the Provincial High Court under the Maintenance Act (hereinafter sometimes called and referred to as the Act) has to be filed in the Supreme Court with leave and not in this Court. The Appellant argues that an appeal from an order of an appeal in the High Court lies in the Supreme Court but an appeal from an order of a revision application made to the High Court lies in the Court of Appeal.

The section 14 of the Act is on the right of appeal. This section has given a right to a party dissatisfied with an order of the Magistrate Court to appeal against and prescribes the procedure.

It is established law that unless otherwise the right to appeal is granted by law, there is no right of appeal. As per subsection (1) the appeal against the order of the Magistrate Court lies in the relevant High Court and

the procedure to be followed is the procedure prescribed in the Criminal Procedure Code.

The subsection (2) provides the procedure for an appeal against an order of the High Court made on such an appeal. The enabling words used in the subsection (2) are “Any person dissatisfied with an order made by a High Court in the exercise of its *appellate jurisdiction under this section*” (emphasis added). This section applies to or the parties who become enable to appeal under this section are the parties who were dissatisfied with an order made by the High Court in exercising appellate jurisdiction. The appellate jurisdiction referred in this section is the appeal made to the High Court under subsection (1) because the section clearly says that the “*appellate jurisdiction under this section*”.

The revision does not come under section 14 of the Act. It is a discretionary remedy made available under the Constitution. The Provincial High Court was vested with the revisionary jurisdiction on orders made by the Magistrate Courts within the Province under the Article 154P (3) of the Constitution. The Article 154P (3) reads;

(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;

(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) exercise such other jurisdiction and powers as Parliament may, by law, provide.

The revision application in this case has been made under the Constitution read with the Provincial High Court (Special Provisions) Act. It is not under the section 14(2) of the Maintenance Act.

A full bench of the Supreme Court in the case of Abeywardene vs. Ajith de Silva [1998] 1 Sri L R 134 considered the difference between an appeal and a revision application made to the High Court and held that;

The cumulative effect of the provisions of Articles 154P (3) (b), 154P (6) and section 9 of Act No. 19 of 1990 is that, while there is a right of appeal to the Supreme Court from the orders, etc., of the High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by Article 154P (3) (b) or Section 3 of Act No. 19 of 1990 or any other law, there is no right of appeal to the Supreme Court from the orders in the exercise of the revisionary jurisdiction. An appeal from an order of the High Court in the exercise of its revisionary jurisdiction should be made to the Court of Appeal. An appeal to the Supreme Court from the decision of the Court of Appeal would lie, with leave.

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 (5) Vide also Somawathie v. Madawela (6) and Attorney-General v. Podisingho (7)

Affirming this decision the Supreme Court held in the case of Wickramasekara V. OIC Ampara [2004] 1 Sri L R 257 that "*The Court of Appeal does not have appellate jurisdiction in terms of Article 138(1) of the Constitution read with Article 154(6) in respect of decisions of the Provincial High Court made in the exercise of its appellate jurisdiction and it is the Supreme Court that has the jurisdiction in respect of appeals from the Provincial High Court as set out in section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.* " The appellate jurisdiction exercised by Court of Appeal in respect of the orders made on revision application in the Provincial High Courts, was not removed.

In the case of *Wewalwalahewage Hemantha Ariya Kumara Vs. Kaluappu Kankanamalage Dona Bernadeth Yamuna Rani Karunaratne SC Spl LA No. 169/2013 decided on 26.03.2014* Dep J. (as he was then) held that;

Therefore it is clear that when the High Court exercises original criminal jurisdiction under article 154 P (3) (a) or revisionary jurisdiction under Article 154P (3) (b) of the Constitution , the appeal lies to the Court of Appeal. On the other hand if it exercises appellate jurisdiction, appeal lies to the Supreme Court. The case of Gunaratne Vs. Thambinayagam 1993 (2) SLR 355 settled the law on this issue. This decision was followed in Abeywardana Vs. Ajith de Silva 1998 (1) SLR 134. Wickremasekara v Officer in Charge, Police Station, Ampara (2004) 1 SLR 257 .

This case being an appeal from an order on a revision application made to the Provincial High Court, this Court has the jurisdiction to hear and conclude. I overrule the preliminary objection.

The application of the appellant is that since he has filed an action in the District Court to declare that the marriage between the Appellant and the Respondent a nullity, it has to be considered as a change of circumstances

under section 8 of the Maintenance Act and wants to stop the payment of the maintenance ordered by the Magistrate Court. Filing an action cannot be considered as a Change of circumstances, it is only an attempt to change the circumstances. Until the case is decided the circumstances will prevail as it is.

The Appellant rely on two matters to declare the marriage a nullity. One is that the Respondent was previously married and therefore the marriage is a nullity. The Respondent was acquitted from the criminal prosecution held against her for bigamy. Therefore there is no *prima facie* case established on that point. The other reason is that the name of the Respondent. It is a fact that the Appellant married the Respondent. He did not marry the name of the Respondent. The name is only to identify the person. Whatever the name she was called, the Appellant married the Respondent in person.

Under these circumstances I don't see any reason to interfere with the findings of the learned High Court Judge dated 22.05.2015.

Accordingly the appeal is dismissed subject to costs fixed at Rs. 10,000.00

Judge of the Court of Appeal

H.C.J. Madawala J.

I agree.

Judge of the Court of Appeal