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

Samaratunga Vidanalage Lalani Perera

68/11, Bandaranayake Mawatha,

Katubedda, Moratuwa.

1st Party –Petitioner-Appellant

Case No: CA(PHC) 63/2012

High Court of Panadura Case No. RA/17/2012

M.C. Moratuwa Case No. Pra/11/2011

Vs.

01. Malalage Dona Shanika Apsara

02. Malalage Don Sudesh Lakshan

Both of No. 100, Bandaranayake Mawatha,

Katubedda, Moratuwa.

2nd Party-Respondents-Respondents

Mallikarachchige Don Sunilkanthi Wijethunga,

No. 68/11, Bandaranayake Mawatha,

Katubedda, Moratuwa.

Intervenient Party-Respondent-Respondent

Headquarters Inspector of Police,

Police Station,

Moratuwa.

Plaintiff-Respondent-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Shiral Lakthilake for the 1st Party Petitioner-Appellant

Walter Perera for 2nd Party Respondent-Respondent

Written Submissions tendered on:

1st Party Petitioner-Appellant on 07.02.2018

2nd Party Respondent-Respondent on 12.09.2017 and 25.05.2018

Argued on: 07.02.2018 and 21.03.2018

Decided on: 13.07.2018

Janak De Silva J.

This is an appeal by the 1st Party Petitioner-Appellant (Appellant) against the order of the learned High Court Judge of the Western Province holden in Panadura dated 25.06.2012 by which she dismissed the revision application filed by the Appellant.

The Plaintiff-Respondent-Respondent reported facts to the Magistrate of Moratuwa under section 66(1) of the Primary Procedure Code Act. It was reported that a boundary dispute had arisen between the Appellant and the 2nd Party Respondent-Respondent (Respondent).

The learned Magistrate after inquiry delivered order on 27.04.2012 permitting the Respondent to hold possession of the land in dispute.

The Appellant preferred a revision application to the High Court of Panadura in case no. RA 17/2012 on 22.06.2012 and sought to support the application in open court on 02.07.2012. The journal entry dated 25.06.2012 is evidence of the said application.

However, the learned High Court Judge had, without calling the matter in open court on 02.07.2012 as requested by the Appellant, made order in chambers on 25.06.2012 dismissing the revision application. The reasons given was that the Appellant had failed to disclose reasons for the delay in filing the petition, the petition has failed to disclose that reliefs sought in the revision application cannot be obtained in a civil action, there was an alternative remedy for the Appellant and that no exceptional circumstances are set out in the petition. Hence this appeal by the Appellant.

The fundamental question that arises for determination is whether it was competent for the learned High Court Judge to have made the impugned order in chambers without hearing the Appellant in support of the revision application.

The learned Counsel for the Respondent raised a preliminary objection that this Court cannot entertain the appeal because the dispute has been gone into in the District Court in a partition action and an appeal lodged against the judgement which is pending.

Two issues engage my mind on the fundamental question.

Firstly, Article 106(1) of the Constitution mandates that the sittings of every court established under the Constitution or ordained and established by Parliament shall subject to the provision of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings. The rule requiring public sittings is a fundamental constitutional provision in the exercise of judicial power as in terms of Article 4(c) of the Constitution it is the judicial power of the people that is exercised by Courts. There can be no doubt that the people whose judicial power is exercised by Courts should have unimpeded access to court sittings. The exception to this rule is found in Article 106(2) of the Constitution which has no application to the instant matter.

In *Piyasena De Silva and Others v. Ven. Wimalawansa Thero and another* [(2006) 1 Sri.L.R. 219] the Supreme Court held that the failure of a single judge, who made order in chambers refusing an application to intervene, to hear parties infringed Article 106 (1) of the Constitution which requires "public sittings" save in exceptional cases and as such the order made by a single judge sitting in chambers was invalid. Accordingly, I have no hesitation in concluding that the learned

High Court Judge violated a fundamental constitutional provision which guides the exercise of judicial power of the people and as such the order dated 25.06.2012 is illegal and must be set aside.

Secondly, the learned High Court Judge has blatantly disregarded one important aspect of the rules of natural justice which has profound root in our legal system. It was a basic principle of law in medieval Sri Lanka that a decision should be given only after both parties to a dispute had been heard: *ubhaya paksayen ma adyanta asa ganna dadek da.* [A.R.B. Amerasinghe, *The Legal Heritage of Sri Lanka*, p. 211 citing *Saddharmaratanavaliya*, page 365].

"In general, however, a judge cannot decide a matter without hearing the parties; nor may a judge decide a matter before hearing both parties to a dispute, for, it is 'an indispensable requirement of justice that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him." [Erle C.J. in *Re. Brook* (16 CB NS 416)]

There are instances where the law does provide for the making of *ex parte* orders such as Rule 2(1) of the Court of Appeal (Appellate Procedure) Rules 1990 and sections 84 and 87 of the Civil Procedure Code or sections 148(4), 188, 192, 241, 325 and 326 of the Code of Criminal Procedure where the party has failed to exercise his right to be heard. In the absence of such statutory exceptions, a judge must hear all parties to a dispute before making any order. A statutory exception for the need to hear both parties is not present in the instant case. In fact, the learned High Court Judge did not hear any party before making the impugned order.

In *Piyasena De Silva and Others v. Ven. Wimalawansa Thero and another* (supra) the Supreme Court held that for the reason that the failure to hear the parties was contrary to natural justice constituted a failure of a fair hearing for which the appellant had a legitimate expectation, the order made in chambers was invalid. For the same reasons, I am of the view that the order dated 25.06.2012 made by the learned High Court Judge is illegal and must be set aside.

Unfortunately, this is not the first time that a blatant breach of a fair hearing is reported to have occurred in the High Court. In *Rupathunga v. Attorney General and another* [(2009) 1 Sri.L.R. 170] Ranjith Silva J. stated:

> "It is pathetic to note that the High Court Judge has not even been mindful of Section 14 and Section 15 of the Bail Act when she made the impugned order. These are orders which could be founded as capricious, arbitrary and unjust. . . what shocks the conscience of this Court is that the High Court Judge has not even cared to provide an opportunity to the accused, at least to show cause as to why bail should not be cancelled instead has considered some extraneous matters which are not even covered by Section 14 and has rushed to the conclusion that bail should be cancelled which I shall say is indecent".

Justice Ranjith Silva in fact went on to direct the Registrar of the Court of Appeal to forward copies of his order to the Secretary to His Lordship Hon. Chief Justice and the Secretary to the Judicial Services Commission.

The learned Counsel for the Appellant submitted that this Court is entitled to go into the merits of the revision application filed before the High Court of Panadura and make order thereon. Having given my anxious consideration to this submission I am of the view that legally it is not permissible to do so. The learned High Court Judge has not considered the merits of the revision application made by the Appellant. In these circumstances, this Court will be usurping the revisionary jurisdiction of the High Court by examining the merits of the application when the High Court has not done so. Such a course of action on the part of this Court will also deprive a party the right of appeal it has against the order of the High Court on the merits of the application.

I am of the view that the preliminary objection raised by the learned Counsel for the Respondent that this Court cannot entertain the appeal because the dispute has been gone into in the District Court in a partition action and an appeal lodged against the judgement which is pending is not a matter that we must determine given the reasons set out above. That objection may, if the Respondent so wishes, be raised before the High Court when the revision application filed by the Appellant is considered by the High Court.

For the reasons set out above, I set aside the order of the learned High Court Judge of the Western Province holden in Panadura dated 25.06.2012.

The maxim "*actus curiae neminem gravabit*" means that an act of Court shall prejudice no one, becomes applicable in the instant case as the Appellant has been forced to litigate in the appellate forum for over 6 years due to a blatant and fundamental mistake made by the learned High Court Judge. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of Court. This must of course be done within what is permissible in law. In the instant case, the best that this Court can do is to direct the learned High Court Judge of Panadura to expeditiously hear and determine the revision application filed by the Appellant giving it priority over all other cases pending in the said Court.

The revision application is partly allowed. The Appellant is entitled to the costs of this application.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal