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

In the matter of an application for Revision under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Case No. CA (PHC) APN 79/2017**

**H.C. Colombo Case No. HCRA/181/2016**

**M.C. Colombo Case No. 2781/06/2012**

01. Noor Suveira
02. A.S.M.Azwar

Both of them are at

No.157/39, Mahawatte Road,

Colombo 14.

**Respondents-Petitioners-Petitioners**

**Vs.**

01. Julian Pushpadevi (deceased)
02. Julian Robinson
03. Duleeka Nishanthi

All are at,

No.151/38, Mahawatte Road

Colombo 14.

**Petitioners-Respondents-Respondents**

**Before:** K.K. Wickremasinghe J.

Janak De Silva J.

**Counsel:**

Saliya Pieris P.C. with Rasika Dissanayake and W. Wijeratne for Respondents-Petitioners-Petitioners

Nevil Abeyratne P.C. with A. Dayaratne for Petitioners-Respondents-Respondents

**Written Submissions tendered on:**

Respondents-Petitioners-Petitioners on 23.07.2018

Petitioners-Respondents-Respondents on 12.06.2018

**Argued on:** 08.05.2018

**Decided on:** 02.11.2018

**Janak De Silva J.**

This is an application in revision made against the order of the learned High Court Judge of the Western Province holden in Colombo dated 26.05.2017.

The chronology of events material to this application began when the father of the Petitioners-Respondents-Respondents (Respondents) Joseph Julian instituted action bearing No. 17070/L in the District Court of Colombo against the father of the 2nd Respondent-Petitioner-Petitioner A.S.M. Ashroff in 1995. The said action was dismissed in 2001 and the father of the Respondents preferred an appeal to the Civil Appellate High Court of Colombo which allowed the appeal and directed trial de novo on 11.11.2011.

While the action in D.C. Colombo case no. 17070/L was pending the Respondents instituted proceedings in M.C. Colombo case no. 2781/06/2012 under the Primary Courts Procedure Act (Act) by way of private information in relation to a right of way. The learned Magistrate made order under section 69 of the Act declaring the Respondents entitled to the right of way. The Petitioners filed a revision application against the said order in the Provincial High Court of Colombo case no. HCRA 150/2012. The learned High Court Judge dismissed the said revision application by order dated 09.10.2015. The Petitioners preferred an appeal to this Court against the said order which appeal is currently pending.

Thereafter, the Respondents made an application to execute the writ in the Magistrates Court based on the order of dismissal dated 09.10.2015 made in High Court Colombo case no. HCRA 150/2012. The Petitioner objected to this application. The learned Magistrate after hearing parties delivered order dated 26.09.2016 allowing the application of the Respondents to execute the writ.

Thereafter the Petitioners preferred a revision application bearing case no. HCRA 181/2016 to the Provincial High Court of the Western Province holden in Colombo and obtained a stay order staying the operation of the order dated 26.09.2016. After due inquiry, the learned High Court Judge by his order dated 26.05.2017 dismissed the revision application with costs fixed at Rs. 25,000/=. The Petitioners then preferred this revision application against the said order dated 26.05.2017.

The Petitioners are challenging the order dated 26.05.2017 made in HCRA 181/2016 on two main grounds. *Firstly*, they submit that the learned High Court Judge of the Western Provincial High Court holden in Colombo as well as the learned Magistrate of the Magistrates Court of Colombo erred in law by failing to appreciate the fact that the Magistrates Court has no jurisdiction to hear and determine action instituted under the provisions of section 66 of the Act as the District Court action in case no. 17070/L was pending where the Respondents had sought the same relief as sought in the proceedings instituted under section 66 of the Act. *Secondly*, they submit that the learned High Court Judge of the Western Provincial High Court holden in Colombo as well as the learned Magistrate of the Magistrates Court of Colombo erred in law by failing to appreciate the fact that irreparable loss and damage would be caused to the Petitioners by allowing the Respondents to execute the writ pending the appeal.

***No automatic stay of proceedings by mere lodging of appeal***

I will first discuss the second ground raised by the Petitioners to resist the execution of the writ. In essence the argument of the Petitioners is that the mere lodging of an appeal in the Court of Appeal against the order dated 09.10.2015 made in the Provincial High Court of Colombo case bearing no. HCRA 150/2012 automatically stays the execution of the said order.

There was at one time conflicting views expressed on this question. In *R.A. Kusum Kanthilatha v. Indrasiri* [(2005) 1 Sri. L. R. 411] this Court held *inter alia* that upon proof of an appeal being preferred to the Court of Appeal against a judgment of the High Court acting in revision in respect of an order made under Part VII of the Act, the original court should stay its hand until the determination of the appeal. A different view was taken by this Court in *R.P. Nandawathie and another v. K. Mahindasena* [(CA(PHC) 242/2006, C.A.M 03.11.2009] where it was held *inter alia* that the mere lodging of an appeal does not *ipso facto* stay the execution of the order of the High Court and that something more has to be done by the aggrieved party and something more has to be shown, to stay the execution of the judgment or order.

In order to resolve the conflict arising from these two decisions, a divisional bench of this Court was constituted in *Jayantha Wickremasinghe Gunasekera alias Kananke Dhammadinna v. Jayatissa Wickremasinghe Gunasekera and others* [CA(PHC)APN 17/2006; C.A.M. 30.09.2011] where it was held that the mere lodging of an appeal against the judgment of the High Court in the exercise of its revisionary power in terms of Article 154P (3)(b) of the Constitution to the Court of Appeal does not automatically stay the execution of the order of the High Court. The divisional bench followed the decision in *R.P. Nandawathie and another v. K. Mahindasena* (supra) subject to a slight variation as to the basis of the decision.

The question arise which decision must be followed by this bench. In *Walker Sons and Co. (UK) Ltd. v. Gunatilake and others* [(1978-79-80) 1 Sri.L.R. 231 at 245] Thamotheram J. quoted with approval the following statement of Basnayake C.J. in *Bandahamy v. Senanayake* (62 N.L.R. 313):

> "We have in this country over the years developed a cursus curia of our own which may be summarised thus:
>
> a) One judge sitting alone as a rule follows a decision of another sitting alone. Where a judge sitting alone finds himself unable to follow the decision of another sitting alone the practice is to reserve the matter for the decision of more than one judge.
>
> b) A judge sitting alone regards himself as bound by the decision of two or more judges.

c) Two judges sitting together also as a rule follow the decision of two judges. Where two judges sitting together find themselves unable to follow a decision of two judges, the practice in such cases is also to reserve the case for the decision of a fuller bench although the Courts Ordinance does not make express provision in that behalf as in the case of a single judge.

d) Two judges sitting together regard themselves as bound by a decision of three or more judges.

e) Three judges as a rule follow a unanimous decision of three judges, but if three judges sitting together find themselves unable to follow a unanimous decision of three judges a fuller bench would be constituted for the purpose of deciding the question involved.

f) Four judges when unanimous are regarded as binding on all benches consisting of less than four. In other words, a bench numerically inferior regards itself as bounded by the unanimous decision of a bench numerically superior.

g) The unanimous decision of a collective Court i.e; a bench consisting of all the judges for the time being constituting the Court is regarded as binding on a bench not consisting of all the judges for the time being constituting the Court even though that bench is numerically superior to the collective court owing to the increase in the number of judges for the time being constituting the Court." (emphasis added)

Accordingly, I am inclined to take the view that the decision in *Jayantha Wickremasinghe Gunasekera alias Kananke Dhammadinna v. Jayatissa Wickremasinghe Gunasekera and others* (supra) is binding on this Court. Therefore, I am of the view that the learned Magistrate was correct in allowing the application of the Respondents to execute the writ in M.C. Colombo case no. 2781/06/2012 by his order dated 26.09.2016 and that the learned High Court Judge was correct in not interfering with the said order by his order dated 26.05.2017.

***Similar Relief in both the District Court and Primary Court***

The Petitioner submits that the learned High Court Judge of the High Court of the Western Province holden in Colombo as well as the learned Magistrate of the Magistrates Court of Colombo erred in law by failing to appreciate the fact that the Magistrates Court has no jurisdiction to hear and determine action instituted under the provisions of section 66 of the Act as the District Court action in case no. 17070/L was pending where the Respondents had sought the same relief as sought in the proceedings instituted under section 66 of the Act.

The learned High Court Judge has rejected this submission by relying on the decision in *Kanagasabai v. Mylwaganam* (78 N.L.R. 280) where it was held that the mere fact that a suit is pending in a civil court does not deprive the Magistrate of jurisdiction to make an order under Sections 62 and 63 of the Administration of Justice Law, No. 44 of 1973. The learned counsel for the Petitioner submits that the facts of the said case is totally different from the facts of this case. He submits that in *Kanagasabai v. Mylwaganam* (supra) the proceedings in the Primary Court was filed prior to the institution of civil proceedings whereas in the instant case the proceedings in the Primary Court was filed while a civil action was pending in the District Court.

However, I am of the view that the issue of whether the Magistrates Court has no jurisdiction to hear and determine action instituted under the provisions of section 66 of the Act as the District Court action in case no. 17070/L was pending where the Respondents had sought the same relief as sought in the proceedings instituted under section 66 of the Act does not arise for consideration in this application. This application originated with the Petitioner objecting to the application made by the Respondent to execute the writ in M.C. Colombo case no. 2781/06/2012. The learned Magistrate by his order dated 26.09.2016 allowed the application. The Petitioner then moved in revision to the High Court which dismissed his application by order dated 26.05.2017 against which this revision application was filed by the Petitioner.

The issue on jurisdiction was specifically raised before the learned Magistrate in M.C. Colombo case no. 2781/06/2012 as well as before the learned High Court Judge in HCRA 150/2012 in the revision application made against the order in M.C. Colombo case no. 2781/06/2012. In both instances the objection was overruled. As pointed out earlier there is an appeal pending against

the judgment in the Provincial High Court of Colombo case bearing no. HCRA 150/2012. The issue raised by the Petitioner on proceedings in two courts is a matter that may have to be considered, if permitted by law, in the appeal filed against the order dated 09.10.2015 made in the Provincial High Court of Colombo bearing no. HCRA 150/2012. That issue cannot be raised in these proceedings.

For the reasons aforesaid, I see no basis to interfere with the order of the learned High Court Judge of the Western Province holden in Colombo dated 26.05.2017.

That leaves the question of costs to be decided. The learned High Court Judge in H.C. Colombo Case No. HCRA/181/2016 awarded Rs. 25,000/= as costs to the Respondent as he was of the view that the Petitioner had by resorting to several actions over a period of five years negated the intention of the legislature in providing a speedy remedy to prevent the breach of peace.

In *Leon Peris Kumarasinghe v. Samantha Weliweriya* [S.C. (Spl) L.A. No. 37/2012, S.C.M. 12.11.2013] Tilakawardane J. stated (at page 7):

> "The Court notes that the time has come for the Supreme Court to affirmatively determine the utility of punitive costs with the primary view of deterrence. The decision to award punitive damages is consistent with similar decisions in foreign jurisdictions including [but not limited to] the Indian Case of Reliance Mobile v Hari Chand Gupta (2006) (CPJ 73 NC), where punitive damages were awarded, for the production of a false affidavit, with the intention of preventing such actions in the future and Polye v Papaki and Another [2001](1 LRC 170), where the Supreme Court of Papua New Guinea determined that the jurisdiction of the Supreme Court was invoked without reasonable cause and amounted to a misconduct on the part of the Appellant which resulted in unnecessary expenditure by the Respondents and granted punitive damages accordingly.
>
> This Court cannot over emphasize the need to appropriately deal with litigants who attempt to abuse the process of Court and thereby cause unnecessary delay and costs to other parties in order to ensure that, in the future, litigants will not be tempted to indulge in such ill-conceived practices."

The decision in *Jayantha Wickremasinghe Gunasekera alias Kananke Dhammadinna v. Jayatissa Wickremasinghe Gunasekera and others* (supra) was delivered on 30.09.2011 thereby clarifying an issue on which there was a divergence of judicial view up to that point of time. However, the Petitioner has over a period of six years from 2012 resorted to several actions in order to delay the execution of the writ of eviction in the Magistrates Court on the basis of the pending appeal. The Petitioners did not pursue any action to obtain any interim relief staying the operation of the judgment in the Provincial High Court of Colombo case no. HCRA 150/2012. Furthermore, the District Court of Colombo delivered judgment on 27.10.2016 in D.C. Colombo case no. 17070/L by which the Respondents were given the right of way. Yet the Petitioner maintained this application clearly in view of having obtained a stay order staying the execution of the writ in the Magistrates Court.

In view of the above facts, I am of the view that Court is justified in directing the Petitioners to pay the Respondents costs of Rs. 1,00,000/=.

Application is dismissed with costs fixed at Rs. 1,00,000/=.

Judge of the Court of Appeal

**K.K. Wickremasinghe J.**

I agree.

Judge of the Court of Appeal