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

In the matter of an application made under Article 138 of the Constitution by way of Revision.

C.A. Case No.377/2015 (Rev)

D.C. Kegalle Case No.27941/P

Abdul Sameen Mohamed Jameel
and **Others**
PLAINTIFFS

-Vs-

Mohamed Zein Mohamed Shyam
and **Others**
DEFENDANTS

AND

K.S. Panditharatne,
No.18, Kalupahanagama Road,
Kegalle.
PETITIONER

-Vs-

1. **Pushpika Sanjeewa Samarakoon,**
Kelani Valley Plantations Limited,
No.400, Deans Road,
Colombo 10.

2. **Hariet Apponsu,**
   Kalupahana Estate, Kegalle.
   RESPONDENTS

AND NOW BETWEEN

1. **Pushpika Sanjeewa Samarakoon,**
   No.170 F, Sumanasiri Place,
   Kandy Road,
   Yakkala.
2. **Hariet Apponsu,**
   Kalupahana Estate, Kegalle.
   RESPONDENT-PETITIONERS

-Vs-

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

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Ikram Mohamed, P.C. with Neomal Senathilake for the 1st and 2nd Respondent-Petitioners Vikum de Abrew, DSG for the Attorney General
Decided on	:	01.08.2019

A.H.M.D. Nawaz, J.

This application for revision raises the issue whether contempt proceedings initiated in the District Court can proceed in the absence of the virtual complainant. The virtual complainant who brought the complaint before court was a Surveyor called Panditharatne who has since passed away in the course of the contempt proceedings.

A narrative of facts leading up to the institution of contempt proceedings becomes quite relevant at this stage. It is common ground that Mr. Panditharatne was a Court Commissioned Surveyor who was given the commission to conduct a preliminary survey in relation to District Court *Kegalle* Case No.27941/P which had been instituted in the District Court of *Kegalle* for the partition of a land called "*Kalupahanagamawatte*" in the *Kegalle* District.

The 1st Respondent-Petitioner, at all material times, was the manager of the Estate called "*Kalupahana* Estate", which allegedly included the land sought to be partitioned. The *Kelani* Valley Plantations Limited had become the lawful lessee of the land under the *Janatha* Estates Development Board from June, 1992 for a period of 53 years.

The 2nd Respondent-Petitioner happens to be an employee of the said *Kelani* Valley Plantations Limited and was, *inter alia*, in charge of a gate fixed to the entrance of the said estate. In order to execute the commission, Mr. Panditharatne had gone to the land but he reported to court by his report dated 17.07.2006 that he could not carry out the survey as he was prevented from doing so and he pleaded in the said report to court that action be taken against the Manager of the Estate. The report has been appended to the application for revision as 'G'.

Thereafter the said surveyor filed a petition dated 10.10.2006 along with his affidavit, praying that the two Respondents be punished for contempt of court for obstructing his duties whilst he was executing his commission.

The two Respondent-Petitioners were served with separate charge sheets dated 22.11.2006, certified copies of which have been filed along with this revisionary application as **'J1'** and **'J2'**.

Both the two Respondent-Petitioners pleaded not guilty to the said charges and the inquiry into the said charges commenced on 16.08.2007.

After the evidence of the said Court Commissioner was concluded, evidence of R.A. Jayaratne, S.K. Weerasinghe, H.P. Siriwardene and M.Z.M. Shyam were adduced on his behalf and the case of the Court Commissioner was closed on 30.11.2010. The 1st Respondent-Petitioner commenced his evidence on 26.10.2011 and was cross-examined and finally re-examined on 25.09.2014.

The Respondent-Petitioners plead that after the preliminary plan was made by another surveyor upon the survey of a part of *Kalupahana* Estate, the trial of the said partition case was fixed for 03.10.2014 on which date the Plaintiffs moved to withdraw the said action and accordingly the said action was dismissed without costs on 03.10.2014.

However, when the contempt matter was taken up for further inquiry on 16.12.2014, it was brought to the notice of Court that the Petitioner in the contempt proceedings, the Court Commissioner, had passed away. In the circumstances, the Court fixed the matter to be mentioned on 19.02.2015 on which date the Court granted the Respondent-Petitioners permission to tender written submissions on the question whether contempt proceedings could proceed further since the complainant who had initiated the contempt proceedings had passed away.

Accordingly, written submissions were tendered on 28.04.2015 on behalf of the Respondent-Petitioners to the effect that the said inquiry could not be proceeded with any further in view of the death of the Petitioner, the Court Commissioner.

The learned Additional District Judge delivered her order on 27.07.2015, holding that the said application made against these Respondent-Petitioners for contempt could be proceeded with. It is this order that is impugned in this revisionary jurisdiction.

The question before the Court is whether the contempt proceedings terminated *ipso facto* upon the death of the complainant. The learned President's Counsel submitted that when contempt proceedings were initiated by a person other than a court, the proceedings would come to an end upon the demise of the accuser. The learned Deputy Solicitor General contended that the contempt of court proceedings could be proceeded with notwithstanding the death of the Court Commissioner.

The argument urged on behalf of the Respondent-Petitioners was that now that the Court Commissioner was dead, the cross-examination of the 2nd Respondent-Petitioner and of any other witnesses would have to be done by the very Judge of the Court before whom the inquiry is held and that it is the learned Additional District Judge who would have to take over the prosecution in respect of the petition for contempt made by the deceased Court Commissioner. Thus the trial Judge would become both the prosecutor and the Judge. The learned President's Counsel cited the case of ***Abilian v. Davith Singho*** 58 N.L.R 566.

His Lordship Justice H.N.G Fernando (as he then was) set out the legal position as follows:

> *".....there was a more serious irregularity in the proceedings. After recording evidence in support of the charge against the appellant, the learned Judge "called upon him" for his statement if any.*
>
> ***Thereafter the Judge questioned the appellant and recorded his answers. The*** *appellant was also permitted to be cross-examined.* ***The order convicting the appellant was based to an appreciable extent on the answers given by him in the course of this interrogation by the Judge....."***

Upon a careful consideration of this case I take the view that the appellant in ***Abilian v. Davith Singho*** *(supra)* was convicted substantially on the evidence elicited from the questions posed to him by the Judge and H.N.G. Fernando, J. quite rightly condemned the procedure as irregular.

In this case no complaint is made against the proceedings had so far in the case and one cannot be speculative as to how the 2nd Respondent-Petitioner is going to be cross-examined in the future provided the 2nd Respondent-Petitioner chooses to give evidence. It may so happen that the 2nd Respondent-Petitioner may not elect to give evidence at all.

As for the conduct of future proceedings a cautious judge who descends into the dusty arena will know only too well about the perils of posing too many questions in view of the imperative requirement to exercise judicial restraint and no Judge who knows the import of ***Abilian v. Davith Singho*** *(supra)* will ever indulge in the overzealous questioning as dd the judge in that case.

H.N.G. Fernando, J. (as His Lordship then was) sounded a caveat in the case of **Abilian**:

> *"Section 797 contemplates that the Court will hear the accused person's explanations, but that obviously would mean hearing an explanation voluntarily given;* ***the section cannot be construed as authorizing procedure which the learned Judge has adopted in this case."***

The tenor of the above passage is that the risk of prejudice to an accused person should be reduced and the District Judge must ensure that due process is followed in contempt proceedings.

Fundamental to the concept of a fair trial is that the Court must approach contempt charges with complete impartiality. The jurisdiction of the District Court to try for contempt of court any person who disobeys any order or obstructs or resists any person acting under the authority of the court is given in Section 53 of the Partition Law No.21 of 1977 and in this regard Section 55 of the Judicature Act No.2 of 1978 states: *"Every District Court, Family Court, Magistrates Court and Primary Court shall, for the purpose of maintaining its proper authority and efficiency, have a special jurisdiction to take cognizance of, and to punish with penalties in that behalf as hereafter provided, every offence of contempt of court committed in the presence of the court itself and all offences which are committed in the course of any act or proceedings*

in the said courts respectively, and ***which are declared by any law for the time being in force to be punishable as contempt of court."***

Thus it is not only contempt in the face of court (*in facie curiae*) but also contempt not in the face of court (*ex facie curiae*) that becomes triable in the District Court by virtue of Section 55 of the Judicature Act read with Section 53 of the Partition Law No.21 of 1977.

As regards procedure to try the offence of contempt of court H.N.G. Fernando, J. (as His Lordship then was) had this to say in **Abilian's** case.

> *"In the absence of specific provision in the Act as to the procedure to be followed in cases falling under section 53, the learned Judge rightly decided that the provisions of Chapter 65 of the Civil Procedure Code would apply. Section 57 of the Courts Ordinance confers on a District Court a special jurisdiction to punish inter alia offences "declared by any law to be punishable as contempt of Court", and section 53 of the Partition Act is but one instance of a law contemplated in the Courts Ordinance.* ***Hence the procedure in the case of offences declared by section 53 of the Act would be the procedure "in that, behalf by law provided", namely Chapter 65 of the Code.'***

The contempt that is alleged against the Petitioners in this case took place not in the face of court and evidently it fell to the lot of the court commissioner to initiate contempt proceedings by a petition and affidavit as mandated by Section 792 of the Civil Procedure Code. Before he crossed the great divide he had given evidence and the Respondent-Petitioners had the opportunity to cross-examine him. The cross-examination would have elicited defences or explanations for the alleged offence and no irregularity can be complained of as regards the procedure adopted so far. **Abilian's** case is no authority for the proposition that when the Petitioner-the virtual complainant in a contempt of court proceedings passes away, the proceedings also extinguish themselves. Evidence has been led and it is on record. As to how the case is going to proceed is a matter that is left to the District Court to devise having regard to the fact that the ingredients of a fair trial are maintained and followed and due process complied with.

In fact the learned Senior Deputy General read out a passage from ***Arlidge on Contempt*** (3rd Edition 2005-sub note 220) on the Attorney-General's role in relation to contempt, which sets out that ***the Court may, if he chooses to do so, refer the matter to the Attorney General for action and that the Court will get involved only in exceptional cases where there is clear contempt.***

On an examination of Sub Note 2-236 in ***Arlidge, Eady & Smith on Contempt*** 5th Edition, I find the following:-

"*Arlidge, Eady & Smith on Contempt 5th Ed.,*

Chapter 2 - Contempt of Court: The Constitutional Dimensions

Section V - The Role of the Attorney General

F - The Attorney's role in relation to civil contempts

2-236

Where the contempt consists of a failure to comply with a court order, it is usual for contempt proceedings to be initiated at the behest of the party in whose favour the order was made. Even where the party takes the view that no further action is necessary, the court may, if it chooses to do so, draw the matter to the attention of the Attorney General for action." The reasons for this were explained by Megarry V-C in ***Clarke v. Chadburn*** (1985) 1 All E.R 211 as follows:-

> "*The order is made so as to assist the litigant in obtaining his rights, and he may consult his own interests in deciding whether or not to enforce it. If he decides not to, there may in some cases be a public element involved, and the Attorney General will judge whether the public interest requires him to intervene in order to enforce the order.*"

This is how the learned authors circumscribe the role of the Attorney-General in contempt proceedings. When there is a public element involved, the Attorney General is bound to play a role. Needless to say the Attorney-General is the *dominus litis* in cases where there is a public element. The order made in this case was an issuance of a commission to carry out a survey of a land that was sought to be partitioned. It was in

compliance with the order that the Commissioner repaired to the land in question where he encountered unruly behavior, which, as the report made to Court indicates, *prima facie* affords evidence of defiance or disobedience or obstruction to a court order. The 1st Petitioner has cross-examined the Commissioner and must have provided an explanation which remains on record for the trier to assay and evaluate. The 2nd Petitioner owes an explanation if he was contemptuous of the order of court and the death of the principal witness- the Court Commissioner cannot bring to an end the prospective unfolding of the 2nd Petitioner's explanation in Court.

The rationale of both civil and criminal contempt is essentially the same: upholding the effective administration of justice. If a court lacked the means to enforce its orders, and its orders could be disobeyed with impunity, not only would individual litigants suffer, the whole administration of justice would be brought into dispute.

As was pointed out in the Australian decision of ***Re Nash, ex parte Tuckerman*** (1970) 3 NSWR 23 (NSW, CA);

> *"The expression "interfere with the course of justice" is not confined to physical disturbance of particular proceedings in the court....it comprehends as well an interference with the authority of the courts in the sense that there may be a detraction from the influence of judicial decisions and an impairment of confidence and respect in the courts and their judgments..."*

As such the Attorney General becomes the *dominus litis* to ensure that disrespectful behavior which amounts to contempt is visited with sanctions bearing in mind that the object of contempt is to protect the administration of justice and not to satisfy personal feelings and peccadilloes.

I need not expatiate on the contours of contempts and in the Sri Lankan context several precedents repay attention.

In the case of ***Reginald Perera v. The King*** 52 N.L.R 293, Basnayake, J. found Reginald Perera, a member of the House of Representative, who had made some remarks in the Prison Visitor's Book on his visit to the Prison, guilty of contempt of Court, and he was

fined Rs.500, and in default to undergo six weeks rigorous imprisonment. When the accused appealed against this order to the Privy Council, it set aside the order of the Supreme Court and expressed the view that; "Their Lordships are unable to find anything in his conduct that comes within the definition of Contempt of Court. That phrase had not lacked authoritative interpretation. In a case of contempt of Court there must be involved some act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority, or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the courts".

In ***Croos and Another v. Dabrera*** (1999) 1 Sri L.R 205 the defendant against whom an enjoining order was in force not to lease, let, mortgage, alienate or enter into any kind of transaction of the land, entered into an agreement to sell the premises in question, was charged for contempt of Court.

It was held:-

1. The offence of contempt of court under our law is a criminal charge and the burden of proof is that of proof beyond reasonable doubt.
2. Under Rule 31 of Old English Rules of the Supreme Court, an act of disobedience would become an act of contempt only if it was 'wilful'. Wilful was taken to mean that while, where the terms of an injunction were broken, it was not necessary to show that the person was intentionally contumacious or not he intended to interfere with the administration of justice. Yet where the failure or refusal to obey the order of court was casual or accidental or unintended, it would not be met by the full rigours of the law-*see* ***Borrie & Lowe's The Law of Contempt*** 4th Edition page 139 following Lord Russel, C.J in ***Fairclough and Sons v. Manchester Ship Canal Co*** (No.2)-(1897) 41 Sol Jo 225-For a better report see (1966) 2 All ER 101.
3. There is a difference between disobedience to injunction and undertakings given to court and disobedience to a declaratory order or a judgment or decree of court. Our law therefore strictly does not need a proof of a willful *mens-rea.*

4. If the act was done after obtaining legal advice, it may be a mitigatory factor and relevant to certain circumstances only to prove *bona fides*.

Shirani Tilakawardena, J. held: *"Action taken with regard to acts of contempt is based on the premises that a well regulated law of a civilized community cannot be sustained without sanctions being imposed for such conduct. It is important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law because without such respect, public faith in the administration of justice would be undermined and the law itself would fall into disrepute."*

In ***Dharmasena v. Sagarika Priyadharshanie Navaratne*** (2004) 2 Sri L.R 173 an enjoining order had been issued restraining the defendant from constructing a building in the subject-matter of the action. The plaintiff moved court to commence contempt proceedings against the defendant alleging that even after the enjoining order was served, the defendant continued the construction work violating the enjoining order. At the inquiry an objection was raised on behalf of the defendant that the summons has not been served in accordance with the provisions of the Civil Procedure Code. Then the plaintiff moved to withdraw the charge with liberty to move Court again to commence fresh contempt proceedings, but the Court refused to grant leave to bring a fresh charge of contempt. The plaintiff sought leave to appeal against the said order. The Court of Appeal considered the question whether the contempt proceedings come under the phrase "civil action, proceeding or matter" appearing in Section 754(2). Gamini Amaratunga, J. held:-

i. Jurisdiction to take cognizance of and to punish contempt is a special jurisdiction.

ii. Although contempt is not a crime, contempt proceedings bear a criminal character.

iii. The charge must be read out to the accused and plea shall be recorded. This is imperative. ***Fernando v. Fernando*** 71 N.L.R 344.

iv. In order to find the accused guilty the charge must be satisfactorily proved, that is beyond reasonable doubt.

v. In those circumstances the contempt proceedings cannot come within the phrase "civil action, proceeding or matter" appearing in Section 754(2) of the code cannot be invoked in respect of an order made in contempt proceedings.

vi. The word order in Section 798 of the Civil Procedure Code would include discharge or an acquittal. *See* ***Thuraisingham v. Karthigesu*** 50 N.L.R 570. The District Judge's order falls within the word 'order' appearing in Section 798 of the Civil Procedure Code. The said order could be canvassed in accordance with the provisions of the Code of Criminal Procedure Act.

I set out the above case since there arose in the course of arguments in Court what characteristics the contempt proceedings partook of-whether it was criminal or civil-for contempt proceedings that arose out of a surveyor's report-*see* U. de. Z. Gunawardana, J. in ***Somindra v. Surasena*** (2000) 3 Sri L.R 159.

I have given my anxious consideration to all the issues immanent in this case and I take the view that there are no irregularities or illegalities that I find in the proceedings that have taken place in the District Court of *Kegalle*. In ***Kankanamage Chandana Geetha Priya v. Don Martin Amarasinghe and Others*** CA R.I. Case No.382/2014 (CA minutes of 07.05.2019) I had occasion to observe in regard to the scope and ambit of revisionary jurisdiction thus:-

> *"....It is axiomatic that the revisionary jurisdiction of this Court is available to rectify manifest error or perversity. This principle was explained by this Court succinctly in* ***Chandraguptha v. Gunadasa Suwandaratne*** *C.A. L.A 508/2005 (CA minutes of 12.09.2017). In* ***Sinnathangam v. Meeramohaideen*** *60 N.L.R 394-T.S. Fernando, J. (with Weerasooriya, J. agreeing) opined that the Court possesses the power to set right, in revision, an erroneous decision in an appropriate case even though an appeal has abated on the ground of non-compliance with technical requirements. Jayawickrama, J. (with De Silva, J. agreeing) followed* ***Sinnathangam v. Meeramohaideen*** *(supra) in* ***Soysa v. Silva and Others*** *(2000) 2 Sri L.R 235 and considered the case of a revision application that had been filed in the Court of Appeal 10 years*

after the pronouncement of the judgment in the District Court. In fact the appeal filed against the said judgment had failed in the Court of Appeal on a technicality namely the appellant had signed the notice of appeal on his own when there was a registered Attorney on record. The appeal was rejected as it was preferred contrary to Section 754 of the Civil Procedure Code. Not to be outdone, the appellant in the case preferred a revisionary application. The argument was raised that the petitioner could not move by way of revision after the appeal was rejected by the Court of Appeal. The revisionary application was also resisted on the ground of long delay in that it was after a lapse of 10 years from the pronouncement of the judgment that the petitioner moved by way of revision. It was in those circumstances that this Court observed that the power given to a superior court by way of revision is wide enough to give it the right to revise any order made by an original court. Its object is the due administration of justice and the correction of errors sometimes committed by the Court itself in order to avoid miscarriage of justice.....

Revisionary jurisdiction of this Court under Article 138 of the Constitution is untrammeled by delay in its invocation provided there is irreparable damage, miscarriage of justice or perversity in the judgment of the court a quo.

The underlying theory behind revisionary jurisdiction is that there must be a manifest error-see ***Saheeda Umma and Another v. Haniffa*** *(1999) 1 Sri L.R 150 wherein J.A.N. de Silva, J. (as His Lordship then was) held that the Court of Appeal should act in revision, when there is a grave irregularity or a miscarriage of justice, even in a case where revisionary powers have not been invoked by the Petitioner. In my view this case merits intervention by revision and restitution-the two extraordinary remedies bestowed on this Court by virtue of Article 138 of the Constitution. It is trite that in applications for revision, there must be circumstances that shock the conscience of court-* ***Wijesinghe v. Tharmaratnam*** *I V Sri L.R 47....."*

I do not find such countervailing and exceptional circumstances in this case. In my view the contempt proceedings did not come to an end upon the demise of the Court Commissioner and it must proceed to a close in the District Court provided the

Petitioners are afforded all opportunities to explain their conduct and expiate their infractions if there were such acts that would be tantamount to contempt of court.

So I would affirm the order of the District Court of *Kegalle* dated 27.07.2015 and remand the case to the District Court for an early disposal as expeditiously as expeditious could be.

JUDGE OF THE COURT OF APPEAL