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

Gratian Kingsley Goonewardena,
No. 154,
Ramya Road,
Colombo 4.
Respondent-Respondent-Petitioner

CASE NO: CA/PHC/APN/182/2017
HC JAFFNA REVISION APPLICATION NO: 1978/16
PRIMARY COURT OF MALLAKAM CASE NO: PC/4/2014

Website Copy
Website Copy

Vs.

Vallipuram Vishnukaran,
Manippay Road,
Kopay Central,
Kopay.
Informant-Petitioner-Respondent

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Harsha Fernando for the Petitioner.
K.V.S. Ganesharajan for the Respondent.

Argued on: 10.12.2019

Decided on: 19.12.2019

Mahinda Samayawardhena, J.

The respondent-respondent-petitioner (hereinafter "the petitioner") filed this revision application before this Court against the Judgment of the High Court of Jaffna dated 02.11.2017. By the said Judgment, the High Court set aside the order of the Magistrate's Court dated 12.05.2016.

The learned counsel for the informant-petitioner-respondent (hereinafter "the respondent") has taken up a preliminary objection to the maintainability of this revision application on the basis that the petitioner has failed to aver in the petition why he could not come before this Court by way of final appeal against the Judgment of the High Court as provided for by Article 154P(6) of the Constitution read with Rule 2(1)(a) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988.

Website Copy
Website Copy

Article 154P(6) of the Constitution reads as follows:

> *Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgement 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.*

Rule 2(1)(a) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988 reads as follows:

> *Any person who shall be dissatisfied with any judgment or final order or sentence pronounced by a High Court in the exercise of the appellate or revisionary jurisdiction vested in it by Article 154P(3)(b) of the Constitution may prefer an*

appeal to the Court of Appeal against such judgment for any error in law, or in fact-

(a) by lodging within fourteen days from the time of such judgment or order being passed or made with such High Court, a petition of appeal addressed to the Court of Appeal

There is no dispute that the petitioner has not averred in the petition of this revision application why he did not exercise his right of appeal.

During the course of argument, in defence, the learned counsel for the petitioner first submitted that in terms of section 74(2) of the Primary Court's Procedure Act, No. 44 of 1979, "An appeal shall not lie against any determination or order", and, therefore, revision is the only remedy.

This revision application has been filed against the Judgment of the High Court (delivered in the exercise of the revisionary jurisdiction granted under Article 154P(3)(b) of the Constitution) setting aside the order of the Magistrate's Court made under section 66 of the Primary Courts' Procedure Act.

Section 74(2) of the Primary Courts' Procedure Act is applicable to orders of the Magistrate's Court and not against Judgments of the High Court.

Hence, this argument is bound to fail.

The next argument of the learned counsel is that, as the Judgment of the High Court is *ex facie* wrong, the petitioner has opted to come before this Court by way of revision, rather than by way of final appeal.

Website Copy
Website Copy

According to the argument of the learned counsel, the petitioner can first decide whether or not the Judgment is *ex facie* erroneous, and then decide whether to come before this Court against that Judgment by way of final appeal or revision.

I have no hesitation in rejecting that argument on first principles.

If the Judgment is *ex facie* erroneous, I cannot understand why this Court cannot set it aside on appeal. There is absolutely no legal impediment to do so.

When there is a right of appeal, the party dissatisfied with the Judgment shall come by way of appeal.

It does not mean that a party who has the right of appeal shall necessarily come by way of appeal.

The revisionary jurisdiction of this Court is wide, and the Court can in an appropriate case exercise that jurisdiction whether or not an appeal lies against a Judgment.

Website Copy
Website Copy

However, as this Court held in *Pradeshiya Sabha of Wattala v. Assistant Commissioner of Labour*[1]:

> *One cannot invoke the extraordinary jurisdiction of this Court by way of revision as of right. Revision is a discretionary remedy. When a right of appeal is available against a Judgment or Order, a party who did not exercise that right is ought to give an explanation in his application why he did not exercise that right in the event he decides to*

[1] CA/PHC/APN/124/2016, CAM on 25.07.2019

> *come before the Appellate Court by way of revision instead of appeal.*

According to Rule 2(1)(a) of the Court of Appeal Rules 1988, which I quoted above, any person who shall be dissatisfied with any Judgment of a High Court can prefer an appeal to the Court of Appeal against such Judgment for any error in law or in fact within fourteen days from the date of the Judgment. The right of appeal is available to *any* person dissatisfied with *any* Judgment. The degree of dissatisfaction, which is subjective, is irrelevant and beside the point. Such a construction leads to absurdity.

The learned counsel does not give any other reason why the petitioner did not come by way of final appeal and why he did not state it in the petition.

In my view, the preliminary objection raised by the learned counsel for the respondent is entitled to succeed and the application is liable to be dismissed on that ground alone.

Without prejudice to the above conclusion, let me briefly consider the petitioner's application on merits.

The respondent instituted these proceedings on or around 14.06.2014 under section 66(1)(b) of the Primary Courts' Procedure Act in the Magistrate's Court, on the basis that he was forcibly dispossessed from the land in dispute by the police on 03.06.2014 on the ground that the petitioner purchased the land.

Website Copy
Website Copy

It is undisputed that Vallipuram, the father of the respondent, was, at one time, the owner of the land. The respondent claims the land on inheritance.

The position of the petitioner seems to be that Vallipuram transferred the land on a deed of conditional transfer to Yogeshwary, the mother of Ganeshan; upon failure to fulfil the conditions of the said deed, Yogeswary became the absolute owner of the land; upon the death of Yogeswary, Ganeshan prepared a deed of declaration and transferred the land to the petitioner by way of a deed executed in 2012.

According to this deed, both Ganeshan and the petitioner are living in Colombo although the land is in Jaffna.

The learned High Court Judge has stated in his Judgment that there is no proof that possession was handed over to Yogeswary with the execution of the conditional deed of transfer. Ganeshan was only 9 years old at the time.

According to page 6 of the Judgment of the High Court, the Grama Seva officer of the area, by "E21", has confirmed that the subject land was in the possession of the respondent and his parents up to 1987 and, due to the civil war, nobody was in possession of this land from 1987-2010.

Both parties have tendered copious documents, including affidavits from various people, to prove possession.

The respondent's position is that he employed Baskaran as a watcher to look after this land. He has tendered bank slips to prove deposit of money as salary in the name of Baskaran.

Website Copy
Website Copy

However, none of these bank slips are relevant to the year 2014. The alleged dispossession has taken place on 03.06.2014.

According to the petitioner, when he was in possession through Baskaran, the respondent forcibly entered the land on 03.06.2014. But, neither the respondent nor Baskaran made a single complaint to the police. At the argument, the learned counsel admitted that the police removed the respondent from the land on 03.06.2014, but they did so on the request of the petitioner to prevent a breach of the peace. When the Court inquired how the police acted so swiftly without a police complaint, the learned counsel candidly stated that the respondent was a former Assistant Superintendent of Police. This shows the police have not independently investigated this land dispute and have referred the matter to the Magistrate's Court under section 66 of the Primary Courts' Procedure Act for the Court to take a decision.

Website Copy
Website Copy

The private security guards were employed after the incident on 03.06.2014.

By way of an interim order the learned Magistrate restored the respondent to possession at the beginning of the case, and the leave to appeal application filed against that interim order was refused by the High Court.

The respondent is now in possession of the land.

At the argument it was revealed that the respondent has filed a civil case in the District Court against the petitioner to vindicate his rights regarding this land.

I do not think that the Judgment of the High Court is *ex facie* erroneous, as the learned counsel for the petitioner submits. According to the facts and circumstances of this case, the Judgment of the High Court is correct.

I dismiss the revision application with costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Court of Appeal

Website Copy
Website Copy