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

In the matter of an application for revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

The Democratic Socialist Republic of Sri Lanka

Plaintiff

Vs.

1. Rajapakse Arachchige Thushara Ranjan Rajapakse
2. Ratnayake Mudiyanselage Ajith Prasanna
3. Horathal Pendige Chaminda Priyadarshana
4. Kandawala Pathirannalage Upul Sanjeewa

Accused

Court of Appeal
Revision Application No :
CA/ PHC/APN 78/2021

High Court of Kuliyapitiya
Case No : HC 176/2013

And now between

Galgamu Ralalage Chandima Dilrukshi

Kuliyapitiya Road, Hettipola.

Substituted Petitioner

Vs.

Rajapakse Arachchilage Thushara Ranjan

No. 1, Kuliyapitiya Road, Hettipola

Convicted 1st Respondent

The Democratic Socialist Republic of Sri Lanka.

2nd Respondent

BEFORE	:	Menaka Wijesundera J.
		Neil Iddawala J.
Counsel	:	Shiral D. Wanniarachchi for the Petitioner**.**
Supported on	**:**	02.08. 2021
Decided on	**:**	17.08. 2021

Iddawala - J

The Counsel for the substituted petitioner (hereinafter referred to as the petitioner) supported this instant application to invoke the revisionary jurisdiction of this Court conferred under Article 138 of the Constitution seeking to set aside the Judgment of the High Court of Kuliyapitiya HC 176/2013 dated 10.12. 2016.

At the conclusion of the trial, the Learned High Court Judge convicted the "convicted 1st respondent" by judgment dated 10.12.2016. The learned High Court Judge imposed a term of 8 years Rigorous imprisonment and a fine with a default term of rigorous imprisonment, on the convicted 1st respondent. Furthermore, the he was ordered to pay compensation to the prosecution witnesses.

On the above context, petitioner being the wife of the convicted 1st respondent has filed this application on 05.04 2021 on behalf of the convicted 1st respondent to invoke the revisionary powers of this Court.

Prior to perusing the facts of the case, there are preliminary points that this Court must take cognizance of. Firstly, it is well settled law that the exercise of the revisionary powers is confined to cases in which exceptional circumstances exist, warranting the intervention of court.

In **Hotel Galaxy Ltd & others v Mercantile Hotel Management Ltd** (1987) 1 SLR 5 Sharvananda C.J. reiterated *"it is settled law that the exercise of revisionary powers of the Appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention*"

In **Kulatilake v Attorney General** (2010) 1 SLR 212, it held*; "It is trite law that the revisionary jurisdiction of this Court would be exercised if and only if exceptional circumstances are in existence to file such an application. Moreover, it must be noted that the Courts would exercise the revisionary jurisdiction, it being an extra ordinary power vested in Court, especially to prevent miscarriage of justice being done to a person and/or for the due administration of justice."*

In **Dharmarathne and Another v Palm Paradise Cabanas Ltd**. (2003) 3 SLR 24, Gamini Amaratunga J. stated that *"….. the practice of court to insist on the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed".*

In **Perera v Silva,** (1908) 4 ACR 79, Hutchinson C.J. commenting on the requirement of exceptional circumstances stated that *".....if such selection process is not available, then revisionary jurisdiction of the Court will become a gateway for every litigant to make a second appeal in the garb of a revision application to make the appeal in situations where the legislature has not given the right of appeal".*

However, the mere existence of exceptional circumstances by itself would not allow this court to invoke its revisionary jurisdiction. In order to maintain a revision application, exceptional circumstances should be precisely and expressly averred in the petition.

In **Urban Development Authority v Ceylon Entertainments Ltd** CA 1319/2001 Court of Appeal Minute dated 5.4.2002 Nanayakkara J. held with Udalagama J. agreeing, *"that presence of exceptional circumstances by itself would not be sufficient if there is no express pleading to the effect in the petition whenever an application is made invoking, the revisionary jurisdiction of the Court of Appeal".*

Similarly, in **Siripala v Lanerolle** (2012) 1 SLR 105, Sisira de Abrew J. held that *"Even though the petitioner attempts to justify the recourse to revision in his written submissions, it is well settled law that existence of such exceptional circumstances should be amply and clearly demonstrated in the petition itself….in the instant application the petitioner has neither disclosed nor expressly pleaded exceptional circumstances that warrant intervention by way of revision."*

In **K.W. Ranjith Samarasinghe v K.W. Wilbert** C.A (PHC) 127/99 and PHC Galle No. 59198, the appellant made an appeal to the Court of Appeal from the High Court of Galle against the order under Section 66 of the Primary Court Procedure Act, Sisira de Abrew J. held "*It is a well-established principle that a party who has an alternative remedy can invoke revisionary jurisdiction of a Superior Court only upon establishment of exceptional circumstances. As I observed that the respondent who sought the revisionary jurisdiction of Court of Appeal has an alternative remedy in this case. Petitioner aggrieved by the judgment of the learned High Court Judge in the exercise of his revisionary jurisdiction against the order made by the learned Magistrate has not appealed against the said order, but he has filed the present application in revision. I have gone through the petitioner's petition and note that the petitioner has not established any exceptional circumstances in his petition. In order to maintain a revision application an exceptional circumstance should be averred in the petition".*

On examination of the present application, neither in the petition nor in the affidavit does the petitioner aver the existence of exceptional circumstances warranting the invoking of the revisionary jurisdiction of this Court.

Having referred to the authorities above and a close scrutiny of the petition, it is the considered view of this Court that the petitioner had failed to expressly aver exceptional circumstances in which she had to file this revision application. It must be highlighted in this instant that a petitioner cannot rely on the revisionary jurisdiction of this Court as of a right. Revisionary jurisdiction is only a creature of the discretion of this Court and as such, petitioner must expressly state the exceptional circumstances in which such a use of discretion is warranted.

The second point of consideration is the delay in filing the present application. The instant application was filed on 05.04 2021 and it prays *inter alia* to set aside an order of the High Court of Kuliyapitiya dated 10.12. 2016. It is evident that there is a lapse of close to 4 ½ years since the impugned order was delivered.

Delay is a fatal error that would cause an application to be dismissed *in limine*, if the petitioner fails to adduce sufficient and reasonable explanations for such delay. This matter was discussed at length in **Rajapakse v The State** (2001) 2 SLR 161 which stated the following: *"…if this Court were to act in revision the party must come before Court without unreasonable delay. In the instant case there is a delay of 13 months.* In this regard vide Justice Ismail's judgment in **Camillus Ignatious vs. OIC of Uhana Police Station** (Rev) CA 907/89 M.C. Ampara 2587 (Application in revision) where His Lordship was of the view that a mere delay of 4 months in filing revision application was fatal to maintain a revision application before the Court of Appeal. His Lordship further added- "These *matters must be considered in limine before the Court decides to hear the accused-petitioner on the merits of his application. Before he could pass the gateway to relief his aforesaid contumacious conduct and his unreasonable and undue delay in filing the application must be considered and determination made upon those matters before he is heard on the merits of the application."*

In, **Herath Mudiyanselage Ratnasiri Alias Nilame v The Attorney General** CA (PHC) APN 44/2016 Court of Appeal Minute dated 15.10.2019 was a case in which the revision application was filed after 3 years and 3 months since the impugned order that was sought to be revised. In an attempt to explain such delay, it was alleged that an appeal has been filed. However, petitioner did not submit any document to prove that such an appeal was filed. As such this unexplained delay had constituted a factor that had contributed towards the rejection of the revisionary application.

Similarly, in **Seylan Bank v Thangaveil** (2004) 2 SLR 101 at p. 105 held that*: "It appears that there is a delay of one year and four months in respect of the order dated 07.03.2002 and a delay of seven months from the order dated 10.01.2003. The petitioner has not explained the delay. Unexplained and unreasonable delay in seeking relief by way of revision, which is a discretionary remedy, is a factor which will disentitle the petitioner to it. An application for judicial review should be made promptly unless there are good reasons for the delay. The failure on the part of the petitioner to explain the delay satisfactorily is by itself fatal to the application."*

Having thus explained the law relating to assessment of delay, this Court now turn to the facts of the case. The petition has not averred any explanation for the delay of close to 4 ½ years in filing the present revision application. The delay in coming before this Court is inordinate which is not justified or explained by the petitioner. The revisionary powers vested in the Court of Appeal are very wide and Court can, in a fit case, exercise that discretionary power whether or not an appeal lies, if exceptional circumstances are established. Nevertheless, this Court will not exercise its discretionary powers to assist the ones who sleep over their rights - *Vigilantibus non dormientibus aequitas subvenit.*

In fact, it was only upon an inquiry made by this Court on the day the application was supported, did the Counsel for the petitioner reveal that an appeal has been filed against the same High Court Judgment. To compound the matter further, Counsel was unable to furnish any details of the said appeal let alone any proof of such an appeal. Petitioner has failed to mention the same even in the petition.

It is the view of this court that the non-disclosure of a material fact such as a filing of an appeal prior to filing a revision application, tantamount to breach in observing *uberrima fides* on the part of the petitioner.

In **Jayasinghe v The National Institute of Fisheries and Nautical Engineering (NIFNE) and Others** (2002) 1 SLR 277 at p. 286 the duty to disclose material facts before Court was discussed in length*: "the conduct of the petitioner in withholding these material facts from court shows a lack of uberrima fides on the part of the petitioner. When a litigant makes an application to this court seeking relief, he enters into a contractual obligation with the court, this contractual relationship requires the petitioner to disclose all material facts correctly and frankly. This Is a duty cast on any litigant seeking relief from court*". In the case of **Blanca Diamonds (Pvt) Ltd. v Wilfred Van Els and two Others** 1997 1 SLR 360 the court highlighted this contractual obligation. Requiring the need to disclose *Uberrima fide* and disclose all material facts fully and frankly to court. In such instances, court will not go into merits of the case. The failure to make a full and frank disclosure of all materials facts renders this application liable to be dismissed.

Further, in **Gas Conversions (Pvt) Ltd and 3 Others v Ceylon Petroleum Corporation & 3 others** SC FR 91/2002 at p. 4 Dr. Shirani Bandaranayake J (as she was then) *had* held that *"a series of judgements of our court have enunciated the requirement of 'complete' disclosure' and uberrima fides with regard to the applications before court. It is now a well-established principle that when an applicant has suppressed or misrepresented the facts material to an application stand when there is no complete and truthful disclosure of all material facts the court will not go into merits of the relevant application but will dismiss it in limine."*

In **Siripala v Lanerolle and Another** (2012) 1 SLR 105 Per Sarath de Abrew J*: "…it is a cardinal principle in revisionary jurisdiction that in order to invoke the discretionary, revisionary powers the petitioner shall make a full disclosure of material facts known to her and there by show uberrima fides towards court.*

Deliberate non-disclosure is fatal. E.g., **Sirisena v Richard Arsala and Others CA** 536/84 Court of Appeal Minute dated 24.10.1990"

Similarly, in **Dahanayake and others v Sri Lanka Insurance Corporation Ltd**. **and others** (2005) 1 SLR 67, it was held that *"If there is no full and truthful disclosure of material facts, the Court would not go into the merits of the application but will dismiss it without further examination".*

As such, in view of the callous disregard of the petitioner in averring exceptional circumstances to invoke the revisionary jurisdiction, omission to render an explanation for the inordinate delay attached to the application and non-disclosure of material facts, this Court will not go into an examination of the merits of the case.

Hence, this is not a fit and proper case to invoke the discretionary revisionary powers of this Court. Taking into consideration all of the above, I see no reason to issue notice of this application on the Respondents. This application is accordingly dismissed, without costs.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I Agree.

JUDGE OF THE COURT OF APPEAL