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

In the matter of an Appeal in terms of Section 11 (1) of the High Courts of the Provinces (Special Provisions) Act, No. 19 of 1990 read with Article 154 P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A Case No. **CA/PHC/37/2017**

Balapitiya High Court Case
No. HCRA 913/2015

Commissioner of Co-operative
Development of the Southern Province/
Registrar Southern Province Co-operative
Development Department,
147/3, Pettigalawatta,
Galle.

Complainant

Vs.

1. Don Rohana Ranjith Mahawithana,
   Chairman,
   Bentota Multipurpose Co-operative Society Ltd.
2. Niroopa Wittachchi,
   Rural Bank Manager,
   Bentota Multipurpose Co-operative Society Ltd.
3. Thalagala Arachchige Dona Lalitha Harriet,
   Secretary and General Manager,
   Bentota Multipurpose Co-operative Society Ltd.

Accused

AND

4. Don Rohana Ranjith Mahawithana ,
   Chairman,

Bentota Multipurpose Co-operative Society Ltd.

5. Niroopa Wittachchi,
   Rural Bank Manager,
   Bentota Multipurpose Co-operative Society Ltd.
6. Thalagala Arachchige Dona Lalitha Harriet,
   Secretary and General Manager,
   Bentota Multipurpose Co-operative Society Ltd.

Accused-Petitioners

Vs.

Commissioner of Co-operative
Development of the Southern Province/
Registrar Southern Province Co-operative
Development Department,
147/3, Pettigalawatta,
Galle.

Complainant-Respondent

AND

1. Don Rohana Ranjith Mahawithana ,
   Chairman,
   Bentota Multipurpose Co-operative Society Ltd.
2. Niroopa Wittachchi,
   Rural Bank Manager,
   Bentota Multipurpose Co-operative Society Ltd.
3. Thalagala Arachchige Dona Lalitha Harriet,
   Secretary and General Manager,
   Bentota Multipurpose Co-operative Society Ltd.

Accused-Petitioners-Appellants

Vs.

Commissioner of Co-operative
Development of the Southern Province/
Registrar Southern Province Co-operative
Development Department,

147/3, Pettigalawatta,
Galle.

Complainant-Respondent-Respondent

Before : **Prasantha De Silva J.**

S.U.B Karalliyadde J.

Counsel: Mr. Anil Silva P.C with Mr. Mark Anton A.A.L for the Accused-Petitioner-Appellants.

Mr. Dilan Ratnayake D.S.G for the Complainant-Respondent-Respondent.

Written Submissions tendered on: 22.04.2020. by the Accused-Petitioner-Appellant.
24.02.2021. by the Complainant-Respondents.

Decided on: 09.07.2021.

Prasantha De Silva, J.

Order

The Co-operative Development Commissioner and the Registrar of Southern Province Co-operative Development Department being the Complainants, instituted action bearing No. 17278 in the Magistrate's Court of Balapitiya on 18.06.2009. against the 1st Accused, Don Rohana Ranjith Mahavitharana, in terms of Section 72 (2) of the Co-operative Societies Act, No. 05 of 1972 (hereinafter referred to as the Act) for committing an offence punishable under Section 72 (2) of the Act.

The action was fixed for trial and on the 5th date of trial, on 30.11.2011, the counter Magistrate discharged the 1st Accused as the prosecution witnesses and the Counsel for the Prosecution was not present in Court.

Thereafter, on the Application made by the State Counsel on behalf of the Prosecution, the Learned Magistrate set aside the Order of discharge made on 30.11.2011. and fixed the case for trial on 16.05.2012.

Being aggrieved by the said Order, the 1st Accused-Appellant preferred a Petition of Appeal on 22.12.2011. in the Magistrate's Court of Balapitiya addressed to the Provincial High Court of Balapitiya on the grounds that;

a) Order discharging the Appellant cannot be made in the absence of the Accused.
b) The Complainant had not adduced any evidence as to why this case should be reinstated.
c) The Appellant should be given an effective opportunity of satisfying the Court on why the said Order of discharge should not be set aside.

It appears that on the same day [22/12/2011], the Learned Magistrate called the case in open Court and explained to the Counsel for the 1st Accused since no Judgment was pronounced in the instant case on Merit, no appeal lies against the Order made on 14.12.2011, thus the remedy available to the Accused is to invoke the Revisionary Jurisdiction of the Provincial High Court.

Thereafter, the 1st Accused filed a revision application bearing No. 864/12 in the Provincial High Court of Balapitiya. After supporting the application, the Learned High Court Judge of Balapitiya issued notice and stayed the Order of the Magistrate dated 06.08.2012. Thereafter, the Complainant-Respondent appeared in the Provincial High Court of Balapitiya and moved for a date to file objections. The Court granted the date, 15.01.2013 to file objections.

On 16.11.2012, the State Counsel who appeared in the Magistrate's Court had made an application to withdraw the Magistrate's Court Case bearing No. 17278, while the matter pertaining to the said revision application was pending in the High Court.

In this instance, the Learned State Counsel has informed Court that another case has been already filed on the same incident and also stated that the Complainant would be filing one more case against the Accused on the same cause of action.

Apparently, the Learned Magistrate allowed the Application for the withdrawal of case bearing No. 17278 and discharged the Accused.

It is seen that the Complainant-Respondent filed Case bearing No.56035 in the Magistrate's Court of Balapitiya against the 1st Accused-Appellant [hereinafter referred to as the Appellant] and two others.

It was submitted by the Appellant that the charge in the Plaint against the Appellant in the said case bearing No.56035 was identical to the charge in the Magistrate's Court bearing No.17278, which was withdrawn prior to the institution of the Magistrate's Court case bearing No. 56035.

It was further submitted that on 24.07.2013, the Appellant appeared in the Magistrate's Court of Balapitiya in case bearing No 56035 and tendered to Court a written document containing Preliminary Objections inter alia, that,

a. The Co-operative Development Commissioner of the Southern Province has no power to institute actions in terms of Section 72 (2) of the Co-operative Societies Act No.5 of 1972.
b. In terms of Section 67 (a) of the Co-operative Societies Act No. 5 of 1972, the Co-operative Development Commissioner of the Southern Province has power only to conduct the prosecution and does not have power to institute a case.
c. The Commissioner is not a public servant in terms of Section 136 (1) (b) of the Code of Criminal Procedure Act, No. 15 of 1979. The Appellant also took up the position that it was specifically stated under which subsection of Section 136 (1) of the Code of Criminal Procedure Act, No. 15 of 1979 the case was instituted.
d. While the Case No. ෂඊ 864/12 was pending in the High Court, against the Order made by the Learned Magistrate in Case No. 17278 dated 14.12.2012 and while there was an Order staying the proceeding of the Magistrate's Court, the Commissioner of

the Co-operative Development Commission of the Southern Province could not withdraw the Case bearing No. 17278.

e. In respect of the matter which was before the High Court of Balapitiya, another case cannot be instituted in the Magistrate's Court.
f. The Case No. 56035 cannot be instituted in the Magistrate's Court of Balapitiya on 16.01.2013 as the offence is prescribed.

After filing Counter-Objections by the Complainant-Respondent, the Learned Magistrate delivered the Order on 10.11.2014, overruling the Preliminary Objections raised by the Appellant and fixed the case for trial.

Being aggrieved by the said Order dated 10.11.2014, the Appellant moved in by Revision application bearing No. 913/15 on 10.02.2015. at the Provincial High Court of Balapitiya.

Since the Learned High Court Judge dismissed the said Revision Application on 14.03.2017, the 1st Accused-Petitioner-Appellant had filed a Petition of Appeal on 28.03.2017, in terms of Article 154 (P) (6) of the Constitution in the Provincial High Court of Balapitiya addressed to the Court of Appeal.

When the said Appeal came up before us for argument, the Counsel for the Complainant-Respondent-Respondent [hereinafter referred to as the Respondent] has raised two Preliminary Objections. Firstly, the Appellants have cited an incorrect provision of the Law in their caption, when filing the instant Appeal thus they have no right of Appeal against the Order of the High Court Judge dismissing the revision application.

Secondly, it was the contention of the Respondent that the Appellants had failed to comply with the mandatory requirement in naming the Attorney General as a party to the Appeal as set out in section 360 (1) of the Criminal Procedure Code.

In this respect, it was submitted on behalf of the Appellants that the Respondent had misconceived the concept of the right to appeal and the naming of a party. It is to be noted that in the Magistrates' Court Case bearing No. 17278, the Attorney General was not a party. The Complainant was the Commissioner/Registrar of Co-operative Development of the Southern Province. The accused who was dissatisfied with the Order

of the Learned Magistrate of the said case, invoked the Revisionary Jurisdiction of the High Court.

The parties to a Revision Application should be the parties in the original application in the said Magistrates' Court case. It is observable that the Commissioner/ Registrar – Cooperative development in the Southern Province qua Public Officer and in terms of the provision of the Establishment Code would seek the assistance of the Attorney General to defend him.

As such, the Attorney General is not a necessary party to be named as an Additional Respondent to the Revision Application to the High Court. Therefore, the Attorney General need not be made a party Respondent to the Appeal preferred by the Appellants against the Order of the High Court. Hence, I hold that non mentioning the Attorney General as Respondent in this appeal is not fatal to the maintainability of the instant appeal. Thus, the said Preliminary objection is overruled.

Apparently, the Appellants had invoked the jurisdiction of the Court of Appeal in terms of Article 154 P (6) of the Constitution but had inadvertently mentioned Section 11 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, which is not the applicable provision.

However, it is settled in Law, that if a Court has jurisdiction to hear and determine a case but due to inadvertence or negligence, the Appellant refers to a wrong section, the jurisdiction of the court is not ousted.

In the case of *LCH Peiris Vs Commissioner of Inland Revenue (65 N.L.R 453 at 457) and Ratnayake and another Vs Mediwake – Deputy Inspector General of Police – Kandy and others* [2005 (1) S.L.R Pg 323 at 331]. The Supreme Court emphasized that mere citing of the wrong provision of Law does not vitiate the act performed there under. Hence, we reject the said objection.

However, it was submitted on behalf of the Complainant-Respondent-Respondents that the Appellants filed their Application in Revision before the High Court of Balapitiya in terms of Section 4/5 of the High Courts of the Provinces (Special Provisions) Act, No. 19

of 1990 read with Article 154 P of the Constitution. Article 154 P 3 (b) of the Constitution reads thus;

"Every such High Court shall, notwithstanding anything in Article 138 and subject to any Law exercise Appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrate's Court and Primary Court within the Province."

The right of Appeal in respect of an Appeal or Revision filed in terms of Article 154 P (23) (b) is set out in Article 154 P (6) which reads thus;

Article 154 P (6): 'Subject to the provision of the Constitution and any Law, any person aggrieved by a final order, judgment or sentence of any such Court in the exercise of its jurisdiction under paragraphs 3 (b), 3 (c) or (4) may appeal there from to the Court of Appeal in accordance with Article 138.'

Thus, if it is a final order of the High Court, the provisions of Article 154 P cannot be invoked whether it is an appeal or revision. If it is a 'final order' there shall lie an appeal to the Court of Appeal and the final appeal shall thereafter be to the Supreme Court.

In the case of **Nalaka Dayawansha Vs OIC, Colombo Crimes Division CA (PHC) 149/13** decided on 19/10/2018, the Court of Appeal distinguished between the two phrases 'order' and 'final order' upon a discussion of two analytical approaches ('order approach' and 'application approach') referred in several authorities. Accordingly, the order of the High Court Judge dated 14/03/2017 does not finally determine the action as decided in **Salaman Vs Warner (189) O.B.D 734** which is cited in **Nalaka Dayawansa's** case, which relied on the 'application approach' as follows – "*The question must depend on what would be the result of decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules, it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."*

It is seen that in the case of **Pathirana V. Goonerwardena and others** [CA (PHC) 16/2016] that this Court had dealt with an identical legal issue, whether an order of a

Provincial High Court refusing to issue notice, was a final Order or Interlocutory Order. The Court of Appeal observed that the High Court's order was made upon an application by the Petitioner to issue notice on the Respondents. It was held that although the Order refusing to issue notice on the Respondents finally determined the matter, if the High Court decided to issue notice, the matter would not have been finally determined. On this basis, the Court of Appeal regarded an Order refusing to issue notice as an Interlocutory Order that did not come within the scope of Article 154P (6) of the Constitution.

The Learned President's Counsel for the Appellant and the Learned Deputy Solicitor General for the Respondents concede that the Appeal made against the Order of the Learned High Court Judge, refusing to issue notice on the Respondents.

Nevertheless, it was submitted on behalf of the Appellant that the impugned Order finally disposes of the matter as far as the Court of Appeal is concerned in the peculiar circumstances of the instant Appeal. Thus, it should not be considered as a final Order.

In such an instant, it is relevant to apply the Application approach test as well as the Order approach test in order to determine whether the impugned Order is a final Order or not.
In this respect, it is noteworthy that the approach taken in the Case of **Pathirana Vs Goonewardene [supra]** and determine that the impugned Order made by the Learned High Court Judge on 14.03.2017 was an Interlocutory Order on the basis that if the High Court decided to issue notice, the matter would not have been finally determined. As such, it is relevant to note that the impugned Order is an interlocutory Order.

Therefore, it is clear that the impugned Order Appeal against is not a final Order. Thus, no Appeal shall lie-against the Order dated 14.03.2017 by the Learned High Court Judge refusing to issue Notice. Hence, the Court has to uphold the said Preliminary Objection; However, the Appellants have sought, that in such circumstances to consider the impugned Appeal as a Revision Application and *ex mere motu* exercise the Revisionary Jurisdiction of this Court.

There are instances where the Court exercised the Revisionary Jurisdiction in the event of appeals preferred when there is no right of Appeal or no proper Appeal.

In the Case of **Sheila Seneviratne Vs. Shreen Dharmaratne [1997 (1) S.L.R 76]**; "the Defendants" appeal to the Court of Appeal was resisted on the ground that the Defendant had failed to hypothecate security for costs of Appeal, which default the Court of Appeal purported to excuse in terms of Sec 759 (2) of the Civil Procedure Code. In the end the Court of Appeal set aside the *ex parte* decree in the exercise of Revisionary Jurisdiction for the reason that the said decree was based on a Judgement given on the basis of hearsay evidence.

In **King Vs. Seeman Alias Semma [9 C.L.W 76]** it was held that the Supreme Court has power to treat an Appeal which is out of time as an Application in Revision.

Similarly, in the case of **Nissanka Vs. The State [2001 (3) S.L.R 78]** ***Kulatilake J.*** emphasized that "Revisionary Jurisdiction is not faltered by the fact that the Accused-Appellant has not availed of the Right of Appeal within the specified time.

It has been held in **Sunil Chandra Kumara Vs. Veloo [2001 (3) S.L.R 91]** that the Revision is available even where there is no Right of Appeal, but not as of a Right, only on the indulgence of Court to remedy a miscarriage of justice.

This power flows from Article 138 of the Constitution which is exercised by the Court of Appeal, on Application made by a party aggrieved or *ex mero motu.*

The Court draws the attention to the following Indian authorities which dealt with the question of conversion of an Appeal into a Revision Application.

In **Bahari ……. Applicant Vs Vidya Ram…. Opp. Party, [AIR 1978 Alld 299],** the Court opined that though there is no specific provision for conversion of Appeal into Revision or Vice Versa but the Court in the exercise of Inherent Power under Section 151 C.P.C may permit such conversion in the interest of Justice.

It is significant to note that, Section 839 of Civil Procedure Code which deals with Inherent Jurisdiction is a verbatim reproduction of Section 151 of the Indian Code of Civil Procedure of 1908.

It was held in the case of **Reliance Water Supply Service of India Vs Union of India [1972 (4) SCC 168, AIR 1971 SC 2083]**, that the High Court was right in converting the Appeal into Revision.

Similarly, in the case of **Bar Council of India**, **New Delhi Vs Manikant Tiwari [AIR 1983 Allahabad 357]**, it was held that rejecting the Appeal on the ground of maintainability would mean to call upon the Appellant to challenge the impugned Order by means of a Revision and this will not serve any purpose and the Court permitted the Appeal to be converted into a Revision.

In view of the aforesaid decisions, it is apparent that the Court in exercising inherent Jurisdiction has full authority of Law and discretion to convert an Appeal into a Revision provided that the interest of justice so demands.

In this premise, it is imperative to note that, if an Appeal is preferred where there is no Right of Appeal or the Order against the Appeal was made is not an appealable Order, in such circumstances the Court has a discretion to convert the Appeal to a Revision Application since there is a miscarriage of justice.
It is worthy to note that in the instant case, before the proceedings of the Magistrate's Court, there were some irregularities occurred which seems to be a miscarriage of justice.

As such, in the interest of justice we hold that this is a fit case to convert an Appeal to a Revision Application *ex mere motu.*

Hence, the Court is inclined to fix this matter for inquiry to decide the merits of the case.

JUDGE OF THE COURT OF APPEAL

S.U.B Karaliyadde J.

I agree.

JUDGE OF THE COURT OF APPEAL