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 Attorney General
Attorney General's Department,
Colombo 12

Complainant

Court of Appeal
Revision Application No:
CA/ PHC/APN 135/16

High Court of Kandy
Case No: HC 28/14

Vs.

Rajapakselage Sunil Shantha
Jayasuriya
Hapugahalanda Road,
Piliudugolla
Naulla

Accused

And now between

The Attorney General
Attorney General's Department,
Colombo 12

Complainant-Petitioner

Vs.

Rajapakselage Sunil Shantha
Jayasuriya
Hapugahalanda Para,
Piliudugolla
Naulla

Accused-Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Wasantha Perera SSC for the Complainant-Petitioner Nalinda Indatissa P.C. with Charith Thuduwage for the Accused-Respondent.
Argued on	:	05.10.2021
Written Submissions	:	01.11.2021
Decided on	:	07.12.2021

Iddawala – J

This order is delivered in response to a preliminary objection raised by the Senior State Counsel (SSC) for the complainant petitioner as to the maintainability of revision application CA/PHC/APN 135/2016. The SSC for the complainant petitioner argued that the present court is *functus officio* and as such, is barred from pursuing the application CA/PHC/APN 135/2016 any further.

Prior to dealing with the legal issue at hand, this Court will set out the facts of the case.

A revisionary application was filed on 21.10.2016 by the Attorney General (complainant petitioner) against an order and sentence by the High Court of Kandy in Case No. HC 28/14. The impugned order dated 14.12.2015 imposed, *inter alia* a sentence of 2-year

imprisonment (suspended for 15 years) upon conviction under two counts of grave sexual abuse of a 11-year-old victim. The basis of the revisionary application was that the sentence imposed by the High Court was manifestly illegal as the sentence prescribed for the offence under Section 365B(2)(b) of the Penal Code carries a mandatory minimum term of 7-year imprisonment. The application was supported on 15.05.2017 and the court issued notice on the accused respondent returnable for 19.06.2017. However, a perusal of the case brief reveals that Notice has not being served on the accused respondent.

Journal Entry dated 28.01.2019 states that according to the Fiscal report, the accused respondent is not to be found in the given address and that the counsel for the complainant petitioner has undertaken to furnish the correct address in due course. Subsequent Journal Entries record the counsel for the complainant petitioner moving for more time to find the whereabouts of the accused respondent.

On 4.10.2019 an Inquiry was held in the absence of the accused respondent (Notice yet to be served), after which an *ex parte* order was delivered in favour of the complainant petitioner. It set aside the order dated 14.12.2015 of Case No 28/2014 and enhanced the sentence imposed by the High Court of Kandy, imposing the minimum mandatory sentence of 7 years Rigorous Imprisonment. According to the case brief, this order was dispatched to the Registrar of the High Court of Kandy on 25.10.2019.

Subsequently, on 09.06.2020, the accused respondent filed an application for re-listing the same revision application CA/PHC/APN 135/16 praying, *inter alia,* to stay the execution of the *ex parte* order dated 4.10.2019. The accused respondent petitioner filed this relisting application on the basis that he was never served with Notice under application CA/PHC/APN 135/ 16 and therefore, could not appear on his behalf and /or retain an Attorney at Law to appear in his defence.

On 22.06.2020, Notice was issued on complainant-petitioner-respondent the Attorney General. When the matter was taken up for support on 28.07.2020, the application of the accused-respondent-petitioner was allowed in the presence of the Deputy Solicitor General appearing on behalf of the complainant-petitioner-respondent.

Having revision application CA/PHC/APN 135/16 thus re-listed, the matter was mentioned on 02.09.2020 where accused respondent filed objections. The matter was mentioned on 16.03.2021 and 28.07.2021 respectively.

Thereafter it was taken up for Inquiry on 05.10.2021 and the Senior State Counsel appearing for the complainant petitioner raised an objection as to the maintainability of the re listed application CA/PHC/APN 135/2016. It was submitted on behalf of the complainant petitioner that considering the order delivered on 14.10.2019, the present court was rendered *functus officio.*

Having thus set out the facts of the case, this Court will now turn to assess the merits of the objection raised by the complainant petitioner.

At this juncture, it is pertinent to note that the counsel for the complainant petitioner did not raise the same objection when the application for re listing was supported by the accused respondent on 28.07.2020, albeit being present. It was only on 05.10.2021, after objections were filed by the accused respondent, and the matter mentioned on two subsequent days, did the counsel for the complainant petitioner deem it appropriate to raise a serious jurisdictional objection.

When examining a defect or objection raised by a party to an application, its nature and importance should be considered within the context of administration of justice.

In Elias v Gajasinghe SC Appeal No 50/2008 SC Minute dated 28.06.2011 Their Lordships observed that: "*For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that courts of law are Court of Justice and not academics of law*"

The effect of an ill-timed objection has been discussed in G. D. Sriyani Mallika Weerasinghe v Galktiyahena Dewage Mania CA Rev 168/07 CA Minute dated 12.06.2018 where His Lordship Justice Janak De Silva observed that the failure of the defendant to raise a preliminary objection sans delay amounts to a waiver of objection. As such, the Judgment proceeded to quote the Honourable Chief Justice Sharvananda in Abeywickrema v Pathirana and others (1986) 1 SLR 120, which held: "*A waiver would debar a person from raising a particular defence to a claim against him arising when wither he agrees with the particular claimant not to raise that particular defence or so conducts himself as to be estopped from raising it*"

The application for re-listing was filed on 09.06.2020 and this Court allowed such application on 28.07.2020 in the presence of petitioner's counsel. More than a year has passed since then (the complainant petitioner raised their objections on 05.10.2021). It is the contention of this Court that for the sake of avoiding delay in the due administration of justice, ill-timed objection such as the present one raised by the complainant petitioner must be thoroughly discouraged.

Having said that, this court will now contend the merits of the objection raised by the complainant petitioner. The task before this court is to ascertain the effect of the order delivered on 4.10.2019 and whether such order renders this court *functus officio* in an instance where an application for re-listing has been allowed.

While court has issued an order on 4.10.2019 for CA/PHC/APN 135/2016, the same court has later allowed an application which prayed for the execution of the said order to be stayed thereby re listing CA/PHC/APN 135/2016. When the application for re-listing was allowed, this Court did in fact adjudicate on the effect of their own *ex parte* order delivered previously. In the presence of both counsel for the parties, the court has re-listed application CA/PHC/APN 135/2016 as the court deemed it necessary in the context of natural justice. Such a conclusion is supported by the facts of the case and the case law analysis contained in the ensuing discussion.

Ittepana v Hemawathie (1981) 1 SLR 476 concerned a revisionary application filed by a petitioner who claimed *inter alia* that summons were not served on her in a divorce

action. In this case, the divorce has been granted in a context where a counsel alleging to represent the petitioner has stated 'no contest'. While the facts of the case are not relevant to the present matter, the observations made by the Supreme Court regarding the principles of natural justice and the inherent powers of the court is of guiding value. Whilst the judgment refers to section 839 of the civil procedure code, the following observations are fitting to the present circumstances before this court:

"……the principles of natural justice are the basis of our laws of procedure. The requirement that the defendant should have notice of the action either by personal service or substituted service is a condition precedent to the assumption of jurisdiction against the defendant...it is only by the service of summons on the defendant that the court gets jurisdiction over the defendant…."

Speaking of inherent power, the judgment further observed *"every court, in the absence of express provision in the Civil Procedure Code for the purpose, possesses, ad inherent in its constitution, all such powers as are necessary to undo a wrong in the course of the administration of justice… thus when a complaint is made to court that injustice has been caused by the default of the Court not serving summons, it is the duty of the Court to institute a judicial inquiry into the complaint… it should declare the ex parte order null and void and vacate it"*

In Jinadasa and Another v Sam Silva and Others (1994) 1 SLR 232, His Lordship Justice Amerasinghe pronounced that since there is no legislation governing the matter, the power to restore the application to re-list is in the exercise of the court's inherent jurisdiction.

In The Ceylon Ceramics Corporation v Premadasa 1984 2 SLR 250, it was held that *"although the Court has no power to reinstate a criminal appeal dismissed in this absence of the appellant unless the Order has been made per incuriam yet the Court is not powerless to rectify a wrong committed by its own act. The Court has inherent power to repair the injury done to a party by its own act. Further the appeal had been heard in breach of the principle of natural justice which requires that appellant be afforded an opportunity of presenting his case"*

Hence, the act of allowing application CA/PHC/APN 135/2016 to be re-listed is well within the inherent powers of this Court in light of the denial of a fair hearing to the accused respondent. By virtue of such re-listing, the present court has assumed jurisdiction. Yet it must be stressed that this inherent power is utilised on a case-by-case basis, depending on the peculiar facts and circumstances of each case before the Court .

The re listed case CA/PHC/APN 135/16 concerns the freedom of an individual, which, if decided against him, would increase an imprisonment of 2 years to a rigorous imprisonment of 7 years for an offence committed in 15.6.2013. The gravity of the outcome cannot be overstated. In such a context, delivering an order in the absence of the individual whose fate would be decided, cannot be lightly regarded. This Court, knowing the seriousness of the matter, has allowed the re-listing application, thereby according to the accused respondent, the rights of a fair hearing.

As held in Sivayanam and another Vs People's Bank 2009 1 SLR 180 a decision of a Court of Law should be based on a fair hearing of the matters before Court and cannot contain orders of issues where parties were not given an opportunity to be heard. Her Ladyship Justice Shirani Bandaranayake (as she was then) observed that *"a decision of a Court of law should be based on a fair hearing of the matters before the Court and cannot contain orders of issues, where parties were not given an opportunity to be heard. The generality of the application of the maxim audi alteram partem, commonly known as the rule that no man is to be condemned unheard, and its flexibility in its operations were succinctly pronounced by Lord Loreburn L. C. in the well-known decision of Board of Education v. Rice (1911) A.C. 179,* where it was stated that it applied to *'everyone who decides anything'"*

Hence, this opportunity is taken to reinstate the importance of the application of natural justice in a matter such as the present one. Whichever the conclusion that may be drawn on an evaluation of the merits of the case, every party involved must be granted a fair hearing at each level of a judicial determination. Whenever the liberty of a person is to be interfered with, such party must be given an occasion to defend themselves. Any person charged with an offence shall be entitled to be heard in person or by an attorney-at law at a fair trial by a competent court. (Article 13 (3) of the Constitution)

Having considered all the matters presented before court and the relevant judicial precedent, this Court dismisses the preliminary objections raised by the complainant petitioner and matter is re-fixed for argument.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL