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

Wanasundara Muhandiramlage
Dayalatha Wanasundara
Watapotha Road,
Nivithigala.

Plaintiff.

Case No. CA 315/2000(F)
Ratnapura Case No. 5643/L

Vs.

1. Medagoda Dasilikamage Mottihami
(Deceased)
Nivithigala.

Defendant.

1A. Walawatta Lekamlage Saumyawathi.

1B. Medagoda Dasilikamage Somalatha
Podi Menike.

1C. Medagoda Dasilikamage Anula
Malathi.

1D. Medagoda Dasilikamage
Wickramasinghe.

1E. Medagoda Dasilikamage Upali
Wijeratna.

1F. Medagoda Dasilikamage Indrani.

1G. Medagoda Dasilikamage Kamani
Chandrika.

1H. Medagoda Dasilikamage Sunethra.

Substituted Defendants.

AND NOW
Medagoda Dasilikamage Indrani.
Sirinimal Road, Arakawela,
Handapangoda.

1F Substituted Defendant-Petitioner-Appellant.

Vs.

Wanasundara Muhandiramlage
Dayalatha Wanasundara of Watapotha
Road, Nivithigala.

Plaintiff-Respondent-Respondent.

2. 1A. Walawatta Lekamlage
   Saumyawathi
   Nivithigala.

3. 1B. Medagoda Dasilikamage
   Somalatha
   Podi Menike.

4. 1C. Medagoda Dasilikamage Anula
   Malathi.

5. 1D. Medagoda Dasilikamage
   Wickramasinghe.

6. 1E. Medagoda Dasilikamage Upali
   Wijeratna.

7. 1G. Medagoda Dasilikamage Kamani
   Chandrika.

8. 1H. Medagoda Dasilikamage
   Sunethra.

Substituted Defendants.

Before: **Prasantha De Silva, J.**
K.K.A.V. Swarnadhipathi, J.

Counsel: Anuruddha Dharmaratne Attorney-at-Law with F.Z. Hassim Attorney-at-Law for the 1F Substituted Defendant-Petitioner-Appellant.

Janani Peiris Attorney-at-Law for the Plaintiff-Respondent.

Decided on: 06.01.2022

Prasantha De Silva, J.

Order

The instant appeal bearing No. 315/2000 (F) was preferred by 1F Substituted Defendant-Petitioner-Appellant. It appears that the 1F Substituted Defendant-Petitioner-Appellant had not prayed to vacate or set aside any Order or Judgment made by the District Judge.

Apparently, the petition of appeal reveals that this appeal is preferred being aggrieved by the Order dated 09.03.2000 made by the learned District Judge of Ratnapura in Case bearing No. 5643/Land.

It is seen that the learned District Judge by the said Order, rejected the application made by the 1F Substituted Defendant-Appellant, who sought an Order from the District Court to suspend the execution of the writ in the aforesaid Case bearing No. 5643/Land.

When this appeal was taken up for argument, the Plaintiff-Respondent had raised a preliminary objection that the Appellant had erroneously preferred this appeal instead of an application for leave to appeal, since the Order appeal against is an interlocutory Order and not a final Order.

Hence, the Plaintiff-Respondent argued that the Appellant cannot maintain this appeal since he has preferred a direct appeal against an Interlocutory Order without invoking the jurisdiction of this Court by way of leave to appeal and had sought a dismissal of this appeal *in limine*.

However, the Court of Appeal upheld the preliminary objection raised by the Plaintiff-Respondent on the basis that the impugned Order relevant to this appeal is an interlocutory Order, thus no right for a direct appeal.

Consequently, the Appellant argued that this is a suitable Case to hear and determine to exercise revisionary jurisdiction. As such, the Court had given an opportunity to the parties to substantiate their respective positions, whether this appeal could be converted to a revision application or not.

There are instances where the Court exercised revisionary jurisdiction in the event of appeals preferred when there is no right of appeal or no proper appeal.

It was held in the Case of ***King Vs. Seeman Alias Semma [9 C.L.W 76],*** 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 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 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 ***Bahori Vs. Vidya Ram [AIR 1978 Alld. 299],*** the Court opined that though there is no specific provision for conversion of an appeal into revision or vice versa but the Court in the exercise of inherent power under Section 151 Civil Procedure Code 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, the Case of ***Bar Council of India, New Delhi Vs. Manikant Tiwari [AIR 1983 Allahabad 357],*** 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.

In this respect, it is a duty of Court to ascertain whether there is a miscarriage of Justice or any injustice caused to the 1F Substituted Defendant-Appellant in the instant Case.

Apparently, the Plaintiff [Plaintiff-Respondent in this appeal], instituted action bearing No. 5643/L on 25.10.1982, against the original Defendant for a declaration of title and ejectment of the Defendant to obtain vacant possession at the premises in dispute in the District Court of Ratnapura.

While the trial was pending, the original Defendant had passed away and thereafter his widow and children were substituted as 1(ඇ) to 1(ඡ) Substituted Defendants.

It appears that proxy was filed by Mr. Nihal Wettasinghe Attorney-at-Law on behalf of all the Substituted Defendants on 24.08.1981 and it was informed to Court that no summons were required on behalf of the said Substituted Defendants.

According to the journal entry No. 36, dated 13.09.1989, the Attorney-at-Law for the Defendant moved for a date on personal grounds to re-fix the Case for trial and thereafter the Court fixed the matter for trial on 17.01.1990. On this day the Case was taken up for trial and issues were framed on behalf of both parties and the Case was fixed for further trial for 30.05.1990.

However, it was not taken up for trial on 30.05.1990 since the learned District Judge was on duty leave and it was re-fixed for 25.10.1990.

In view of the journal entry No. 41, dated 25.10.1990, since the defence was not ready for trial, the Counsel for the Substituted Defendants moved for a date to re-fix trial. Accordingly, it was fixed for further trial on 03.04.1991 and thereafter also the Case was re-fixed for further trial for 12.09.1991, 30.11.1992, 03.06.1993, 10.11.1993 and for 01.06.1994.

It appears that according to the journal entry No. 54 dated 01.06.1994, the Court granted a date for further trial to the Defendant subject to cost fixed at Rs. 1000/- and re-fixed for 22.09.1994.

Apparently, on 22.09.1994, when this Case was taken up for trial, one Mr. Hennayake Attorney-at-Law appeared on behalf of the defence and had informed Court that Registered Attorney for the Substituted Defendants, Mr. N.Weththasinghe, had passed away and therefore proxy on behalf of the Defendants would be filed on the next day. Thereafter, the Court fixed the instant Case for trial on 15.06.1995.

According to the journal entry No.57 dated 15.06.1995, Mr. P.Bamunuarachchi Attorney-at-Law filed proxy and appeared on behalf of the Defendant and moved for a further date for trial and consequently the Case was fixed for trial on 05.10.1995. The said journal entry indicates that "නීතිඥ බමුණුආරච්චි මයා විත්තිකරුගේ නව පෙරකලාසිය ඉදිරිපත් කරයි". It is to be observed that Mr**.** P.Bamunuarachchi Attorney-at-Law filed proxy on behalf of the 1A Substituted Defendant only although there were 1B-1H Substituted Defendants.

When this matter was called on 12.12.1996 in Court to take up for trial, Attorney-at-Law for the Defendant, Mr. P.Bamunuarachchi had informed Court that since he has no instructions he is not appearing for the Defence, (විත්තිය වෙනුවෙන් උපදෙස් ලැබී නොමැති හෙයින්, පෙනී නොසිටින බව නීතිඥ බමුණුආරච්චි මයා කියා සිටියි) It is observable that on the proceedings dated 12.12.1996- "මෙම නඩුව විත්තිකරුට විරුද්ධව ඒකපාර්ශ්විකව විභාගයට ගනිමි". The instant Case was taken up for *ex-parte* trial and concluded and the *ex-parte* Judgment was entered. Subsequently, Court ordered to enter the decree and served on all Substituted Defendants.

It is seen that 1ඒ Defendant had made an application on 07.04.1998 in terms of Section 86(2) of the Civil Procedure Code to set aside the ex-parte Judgment and decree entered in the instant Case. The said application was taken up for inquiry and after the conclusion of the inquiry, the learned District Judge dismissed the said application and affirmed the ex-parte Judgment entered against the defendants on 22.06.1999.

Subsequently, the Plaintiff-Respondent sought to execute the writ of possession on or about 18.08.1999. Apparently,on or about 06.10.1999, petition and affidavit were filed on behalf of the 1F Substituted Defendant-Petitioner to obtain reliefs as prayed for in the prayer to her petition inter alia;

a) Vacation of the *ex parte* decree entered already and annulment of proceedings from 22.09.1994, the date it was transpired to Court that the Registered Attorney of the 1F Substituted Defendant, had passed away.
b) A declaration that the 1F Substituted Defendant is not bound by the said Judgment and decree already delivered and entered.
c) Recall the writ of execution issued to the fiscal until this application is decided.

However, the learned District Judge refused to grant the said reliefs prayed by 1F Substituted Defendant-Petitioner and dismissed the said application by Order dated 09.03.2000 and was ordered to execute the writ.

Being aggrieved by the said Order, 1F Substituted Defendant-Petitioner-Appellant has preferred an appeal to this Court.

The attention of Court was drawn to the journal entry No. 56 dated 22.09.1994, where one Mr. Hennayake Attorney-at-Law appeared on behalf of the Defence and had informed Court that the Registered Attorney for the 1A-1F Substituted Defendants, Mr. Nihal Weettasinghe Attorney-at-Law had passed away, and he had undertaken to file proxy on behalf of all 1A-1F Substituted Defendants.

It appears that the Court allowed the said application of the Attorney Mr. Hennayake and fixed the Case for trial on 15.06.1995

It is relevant to note that in terms of Section 28 of the Civil Procedure Code, upon a death of a Registered Attorney, no further proceedings can be taken in the action against the party for whom he appeared until 30 days after notice to appoint another Registered Attorney has been given to that party either personally or in such other manner as the Court directs.

It is to be noted that, Mr. Hennayake Attorney-at-Law has no authority to appear on behalf of the Defendants without a proxy. In such a situation, it is the duty of Court to comply with Section 28 of the Civil Procedure Code to give 30 days' notice to appoint another Registered Attorney. Instead, Court without complying Section 28 of the Civil Procedure Code, fixed the Case for further trial.

It is to be observed that no notice of the death of the Registered Attorney Mr. Nihal Weettasinghe has been given to any of the Substituted Defendants, including the 1F Substituted Defendant-Petitioner-Appellant in this appeal.

It is worthy to note that failure to send notice in terms of Section 28 of the Civil Procedure Code to the 1F Substituted Defendant-Petitioner-Appellant is a fatal defect and had caused grave injustice to the 1F Substituted Defendant-Petitioner-Appellant.

According to journal entry No. 57 dated 15.06.1995, Mr. P.Bamunuarachchi Attorney-at-Law filed proxy on behalf of 1A Substituted Defendant, but other Substituted Defendants were neither present nor represented by an Attorney-at-Law.

It appears that the learned trial Judge erroneously held in the Order dated 09.03.2000, ''එසේ වුවද නීතිඥවරයා මියගියාට පසුව ආදේශිත විත්තිකරුවන් වෙනුවෙන් නීතිඥ බමුණුආරච්චි මහතා පෙරකලාසි කැඳවා, ඉන්පසු නඩු විභාගය පවත්වා, වැඩිදුර විභාගයට තැබූ 12.12.1996 දින විත්තියෙන් උපදෙස් නොමැති බව නීතිඥ බමුණුආරච්චි මහතා දන්වා සිටි හෙයින් ඒක පාර්ශ්වික තීන්දු ප්‍රකාශයක් දී ඇත'', considering that the Registered Attorney for the 1A Substituted Defendant had filed the proxy on behalf of the other Substituted Defendants as well.

On 12.12.1996, the Registered Attorney for the 1A Substituted Defendant Mr. P.Bamunuarachchi had informed Court that he has no instructions, ''විත්තිය වෙනුවෙන් උපදෙස්

ලැබී නොමැති හෙයින්, පෙනී නොසිටින බව නීතිඥ බමුණුආරච්චි මයා කියා සිටියි". As a result of which, the Case was taken up for *ex parte* trial.

It is to be noted that nowhere in the journal entry or proceedings, it has been stated that the matter was fixed for *ex parte* against the 1B-1H Substituted Defendants.

In view of the foregoing reasons, it is imperative to note that the failure to comply with Section 28 of the Civil Procedure Code is a fatal irregularity where the Court is at fault.

According to the legal maxim *'Actus curiae neminem gravabit'*, no man would be prejudiced by an Act of Court. As such, I hold that, there is a miscarriage of justice, where a great injustice was caused to the 1F Substituted Defendant-Petitioner-Appellant.

Hence, in the interest of justice, Court wishes to exercise its inherent jurisdiction to convert this appeal into a revision application.

So that the Plaintiff-Respondent is allowed to file objections if necessary and the matter to be fixed for inquiry accordingly.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.
I agree.

JUDGE OF THE COURT OF APPEAL