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

In the matter of an application for restitutio in integrum/revision under Article 138 of the Constitution of the Republic of Sri Lanka.

Aussee Oats Milling (Private) Limited
28 BOI EPZ, Mirigama – 11200,
Sri Lanka.

1st Respondent-Petitioner

CA. Application No. : CA/RII/0006/2022

Vs

Case No. HC(Civil) 02/2022/CO

Future Consumer Limited,
(Previously known as Future
Consumer Enterprises Limited),
Kowledge House, Shyam Nagar,
Off JVLR, Jogeshwari (East) Mumbai
– 400 060, Maharashtra, India.

Petitioner-Respondent

1. SVA India Limited, 162C, Mittal Tower, Nariman Point, Mumbai 400 021, India.

And 04 Others

Respondent-Respondents

Before: Hon. D.N. Samarakoon, J

Hon. Sasi Mahendran, J.

Counsel : Mr. Upul Jayasuriya PC., with Ms. Erandi Jayasuriya and Mr. Kalana Jayasuriya for the 1st Respondent-Petitioner.

Dr. Kanag – Iswaran PC., with Mr. Anil Thiththawella PC., Mr. Milinda Jayatilake and Mr. Dulanga Kumaranatunga for the Petitioner-Respondent.

Mr. Avindra Rodrigo PC., with Mr. K. Jayaweera for the 2nd Respondent-Respondent.

Argued on: 25.02.2022, 04.03.2022, 09.03.2022

Written submissions tendered on: 18.03.2022 by the petitioner respondent

18.03.2022 by the 01st respondent petitioner

28.03.2022 by the 02nd respondent respondent

Decided on: 30.03.2022

D. N. Samarakoon, J.

Order

(1) How this court heard the applications of parties:

The petition of the 01st respondent petitioner dated 14th February 2022 is accompanied with a motion which bears the date stamp of this court on 15th February 2022 at 10.00 a.m. As the case record (*which apparently was being*

prepared at that time) did not come to court at the end of the roll for the morning session of this court that day, **the learned President Counsel for the petitioner was informed that he can support the matter at 1.30 p.m.** on that day itself since the court assembles at that time for a case in the afternoon. Accordingly, it was supported and this court issued notice and an interim order restraining the interim orders (n),(o) and (p) issued by the Commercial High Court of Colombo on 26th January 2022 in case No. CHC 02/2022 CO.

The petitioner respondent has filed its statement of objections and other documents accompanied with a motion bearing the date stamp of this court dated 21st February 2022 at 3.00 p.m. This was minuted on the Journal Sheet in the case record on 21st February 2022 and the court (in chambers on 22nd February 2022 itself) allowed the application of the respondent to be supported on 22nd February 2022, **since it was the earliest day requested for support**.

When the case was called in open court on 22nd February 2022, however, there was no appearance for the respondent in court and no application was made. The time as recorded was 10.27 a.m. But the court directed that it be mentioned on 23rd February 2022, **the following day** since the motion stated that there is an urgency.

On 23rd February 2022, when the case was called in open court, the learned President's Counsel for the respondent Future Consumer Limited sought to support the matter with regard to his objections. The learned President's Counsel for the petitioner Aussee Oats Milling (Private) Limited objected to the same since it was a "mention" date. But the court observing, that on the previous day when it was for "support" no one has appeared for the respondent, decided that it could be supported on 23rd February 2022, notwithstanding the journal says "mention" and upon the learned President's Counsel for the petitioner informing that he was before the Supreme Court on

that day, the matter of the objections of the respondent was fixed for support for **the shortest possible day**, 25th of February 2022, at 1.30 p.m. This fact is borne out by the journal entry dated 23rd February 2022.

Thus, this court has extended the same courtesy it granted for the petitioner Aussee Oats Milling (Private) Limited, to the respondent, Future Consumer Limited when the rival parties sought to support their respective applications on 15th February 2022 and on 23rd February 2022 (despite the fact that there was no appearance or application for a postponement by the Future Consumer Limited on 22nd, a date requested by them, granting the very next date) because anyone who has anything to do with practice in courts must do so, in the spirit of practice in courts.

In fact, the respondent Future Consumer Limited has noted this in their written submissions dated 18th March 2022 as below,

"41. Your Lordships would appreciate that,

(a) On 15th February 2022, Your Lordships Court made an ex parte interim order without notice to the respondent;
(b) This respondent filed its limited Statement of Objections dated 21st February 2022;
(c) Aussee Oats and 02nd respondent both appeared on 23rd February 2022 and stated they were not ready for diverse reasons and Your Lordships were gracious in exercising Your Lordships discretion to hear the parties on 25th February 2022;......."

Having said the aforementioned, the respondent Future Consumer Limited continued as reproduced below to underscore its action in submitting to the process of this court, so far in proceedings, without seeking recourse to a higher forum. Thus it continued,

(d) The hearing continued on 25th February, 04th March 2022 and 09th March 2022;

(e) During this period, the interim orders issued by Your Lordships have been in force and this respondent, understanding the practical difficulties of litigation, did not take any steps whatsoever to disturb Your Lordships from making an order on this respondent's position vis-à-vis jurisdiction;

(f) Having heard the parties on three dates, Your Lordships fixed the matter for order on 30th March 2022;

(g) That is, with respect, the normal course of due process in Sri Lanka;

(h) The oft quoted saying is that "justice delayed is justice denied";
It is respectfully submitted that, similarly and equally important is that "justice hurried is justice buried";

(i) In that context, for purposes of argument, is this respondent entitled to take up the position that, the interim orders issued by Your Lordships are causing hardship and that the hearing being adjourned to two dates and then the order being reserved for 30th March 2022 as grounds to petition the Hon. Supreme Court by way of revision against the ex parte order of Your Lordships Court?

Very respectfully, the only answer is a very straightforward and emphatic NO!

(j) Parties, whoever they may be and whoever may represent them, must be respectful to the administration of justice according to law and permit the law and due process to take its course;

(k) Short circuiting this time honoured process, for whatever reason or excuse, will surely result in the destruction of what should be held sacred, the rule of law".

Paragraphs (d) to (f) and paragraph (i) indicates as to how this court went onto hear both parties. While acknowledging that during its course, the respondent, was free as free can be, to go before a higher forum, considering its alleged hardship due to the order made by this court on 15th February 2022, this court with equanimity notes that it has so far not so gone.

However, as evident by the few opening paragraphs of this order and paragraphs 41 (a) to (k) of the said written submissions, this court has been hearing the applications of both parties, if it may say so, giving dates sooner than later as far as the circumstances permitted[1].

(2) The grievance of the petitioner:

The grievance of the petitioner for coming before this court, is the exact opposite, that the Commercial High Court did not allow its application to be supported urgently.

In fairness to that court, however, it must be stated that the said court had taken the case for hearing on the motion of the petitioner on 14th February 2022. However, the learned President's Counsel for the petitioner was then, (*according to the affidavit of Raghav Gupta of Aussee Oats Milling (Private) Limited dated 14th of February 2022*), before Court No. 404 of the Supreme Court appearing in SC/FR/123/16 and his junior counsel sought permission of the Commercial High Court to take the matter later. The said affidavit further states that since there were no other matters pending before that court it ordered to mention the matter on 24th February 2022. It was stated from the Bar that when this happened the time was 10.25 a.m. The said affidavit further states that a motion was filed on 14th February 2022 itself in the said court requesting to call the case on 15th February 2022 but that motion was not

[1] At the last hearing on 09th March 2022, it intended to give only one week (07 days) for the parties to file written submissions, despite it being extended to 10 days on the application for the petitioner Aussee Oats Milling (Private) Limited.

allowed. It was said from the Bar that a matter concerning the same subject, case No. CHC 78/2021 CO was to be heard on 15th February 2022.

As per the paragraph 02 of the aforesaid written submissions of the respondent, it instituted the case No. CHC 02/2022/CO on 26th January 2022 and in terms of section 224 and 225 of the Companies Act No. 07 of 2007 read with section 520 obtained ex parte interim orders. As per its paragraph 04, the petitioner has made an application on 09th February 2022, under section 521(1) of Companies Act to set aside and or revoke or vary the said orders.

It appears that this second application made by the petitioner Aussee Oats Milling (Private) Limited was the one that came for support on 14th February 2022 and the aforesaid incident narrated in the affidavit of Raghav Gupta took place.

The petitioner, Aussee Oats Milling (Private) Limited has further stated in its aforesaid affidavit that in case No. CHC 78/2021 CO, the same learned High Court Judge has granted certain interim orders against the respondent.

It must be said that in case No. CHC 78/2021 CO, the present 01st respondent petitioner, Aussee Oats Milling (Private) Limited is the petitioner and the present petitioner respondent, Future Consumer Limited is the 01st respondent.

The said affidavit further states that the Attorney at Law of the respondent has sent letters, to the State Bank of India and Hatton National Bank PLC and others on 11th February 2022 based on the interim orders dated 26th January 2022 and informed the said banks to refrain from acting upon any instructions issued by the petitioner, in effect freezing the accounts of the petitioner, upon the threat of legal action against the said banks if they carry out any instructions of the petitioner.

The petitioner states in the said affidavit that this has brought the operations of the petitioner into a grinding halt causing grave loss and damage to the petitioner, thereby effectively destroying the petitioner and the livelihood of its over 200 employees and their families.

The petitioner has also stated that certain interim orders granted by the Commercial High Court on 26th January 2022 are contrary to interim orders it granted earlier in case No. CHC 78/2021 CO.

It was in these circumstances that the petitioner failed to support its application in case No. CHC 02/2022 CO on 14th February 2022 and as it was said in arguments, without knowing whether it will be able to support the matter on 24th February 2022 (*the date the Commercial High Court granted*) as it is a "mention" date, came (*in a manner of speaking "rushing"*) to this court.

(3) <u>The respondent's case:</u>

It was in the same circumstances that the respondent, having filed a "limited" statement of objections (*as it styled its document in the aforesaid written submissions*) seeking from this court to vacate the interim orders it issued, restraining the operation of interim orders (n),(o) and (p) and to dismiss petitioner's application. Hence this order will not consider the facts, except for the very brief allusion to those hereinbefore in this order.

The respondent has based its present application mainly on 02 grounds. The first is that the conduct of the petitioner is contrary to a principle deeply ingrained in the legal system of this country and the second is the alleged lack of jurisdiction of this court. On both grounds the respondent alleges that this court's order dated 15th February 2022 is per incuriam.

(3)(i) **<u>The first ground:</u>**

The oldest case cited on the first ground is **Habibu Lebbe vs. Punchi Etana 1894 03 CLR 85** decided by Sir Winfield Bonser C.J., in which case it was

held, that it has long been the expressly approved practice by the Supreme Court, if an order or judgment has been made in the absence of a party, that party must first apply to the court that pronounced the judgment for same to be set aside and it is **only if that court refuses to set it aside** that there should be an appeal against such refusal.

This principle was followed in the other cases cited for the respondent which are **Caldera vs. Santiagopillai 22 NLR 155**, **Loku Menika vs. Selenduhamy 48 NLR 353**, **Fernando vs. Dias and others 1980 (2) SLR 48** and **Hotel Galaxy (Private) Limited and others vs. Mercantile Hotels Management (Private) Limited 1987 (1) SLR 5.**

However, the petitioner has gone before the court which issued the ex parte order. The letters sent to the Banks by the Attorney at Law of the respondent being on 11th February 2022, by 14th February 2022 03 days have gone. When the matter was postponed from 14th February 2022 to 24th February 2022 it will be further 10 days and altogether about 14 days or two weeks the petitioner will not be able to function. The court did not allow the application to call the case for support on 15th February 2022, despite the existence of the other case also on that day. Thus it was not going to change the date for 24th February 2022. Besides 24th February 2022 was also a "mention" date and there was a reasonable doubt (*since the court refused to give an audience despite a motion being filed*) whether the matter will be allowed to support on that date. It was in those circumstances the petitioner came before this court. In most cases of revision and restitutio in integrum relief is refused because parties come to the court of appeal after delay. Should the petitioner be punished for being alive in the matter of safeguarding its rights?

(3)(ii) **The second ground:**

The second ground of the respondent is that the appellate jurisdiction in respect of an order or judgment of the Commercial High Court being vested in

the Supreme Court. It argues that hence this court has no power to exercise a revisionary or restitutio in integrum jurisdiction in respect of such an order or judgment.

The respondent has particularly referred to 05 cases to advance its aforesaid contention. They are,

(1) Australanka Exporter Pvt. Ltd. Indian Bank 2001 (2) SLR 156 in which case the Court of Appeal refused to exercise revisionary jurisdiction, in respect of an order made by the Commercial High Court in terms of section 88(2) of the Civil Procedure Code as the appellate jurisdiction over the Commercial High Court was vested exclusively in the Supreme Court.

(2) Senanayake and others vs. Koehn and others 2002 (3) SLR 381 in which the Court of Appeal in a case under section 753 of the Civil Procedure Code (Revision) refrained from examining the legality of an order made by the Commercial High Court since it considered the same as an indirect usurpation of the exclusive jurisdiction of the Supreme Court in appeal.

(3) Merchant Bank of Sri Lanka vs. Wijayawardene and others 2012 (2) SLR 01 in which the Supreme Court decided that in a matter concerning section 328 of the Civil Procedure Code if revisionary jurisdiction is given to the Court of Appeal there will be two opportunities of review available whereas the legislature has intended only one appeal from the High Court in the exercise of its civil jurisdiction.

(4) Global Rubber Industries vs. Ceylinco Insurance PLC & others CA (PHC) APN No. 18/2015, CA minutes dated 18th November 2015, a case in which the petitioner had filed a leave to appeal application in the Supreme Court from a judgment/order of the Commercial High Court and also filed a revision application in the Court of Appeal on the basis that the appeal in the Supreme Court is subject to long delay and there is an urgency and exceptional circumstances and if not heard without delay

grave, irremediable damage and prejudice will be caused, the Court of Appeal refused to issue notice.

(5) Kosala Bandara Bakmeewewa vs. L.B. Finance PLC CA (PHC) APN No. 97/2007, CA minutes dated 13th June 2016, a case in which a revision application was made to the Court of Appeal against a settlement entered in the Commercial High Court, the Court of Appeal said that it has "no appellate jurisdiction including revisionary jurisdiction and restitutio in integrum in respect of orders and judgments of the High Court exercising civil jurisdiction established under the High Court of Special Provisions Act No. 10 of 1996".

In all those cases, there was a judgment or an order of the Commercial High Court. But in this case there is only an ex parte order of the Commercial High Court and an uncertain prospect of it being resolved at least for the next 10 days when already 03 days have lapsed in which the petitioner was unable to function as it was prevented from engaging in any monetary transaction. The petitioner is a limited liability company. Thus its main or only function is entangled with executing monetary transactions in an inseparable manner. The inability to engage in any monetary transaction, even for a day, therefore threatened its very existence.

(4) The petitioner not waiting until the Commercial High Court making its order:

The argument of the respondent appears to be as to why the petitioner could not wait until 24th February 2022. The aforesaid passage also offers some explanation as to why it could not have been done.

But in addition in **Marukku Kankanamalage Jayathilake and others vs. Somapala Mayadunne and another CA Case No. RI/264/2013**, CA minutes dated 28th June 2018, the Court of Appeal said,

> "No doubt inordinate delay was held out against the petitioner – see Menchinahamy vs. Muniweera 52 NLR 429 it was held that the remedy by way of restitutio in integrum is an extraordinary remedy and is given only under very exceptional circumstances. It is only a party to a contract or legal proceeding who can ask for this relief. The remedy must be sought forthwith or with the utmost promptitude. It is not available if the applicant has any other remedy open to him".

The petitioner has sought the remedy forthwith or with the utmost promptitude.

The petitioner's first and foremost application is for restitutio in integrum and not revision. All 05 cases referred to and discussed hereinbefore are on revision. Revision lies with or without the same forum having appellate jurisdiction also. But when the appellate jurisdiction is with another forum, it is a question whether revision lies. But as the aforesaid passage too says restitutio in integrum is not available when another remedy lies. Could the petitioner go before the appellate forum for the Commercial High Court when it had only an ex parte order against it and an uncertain prospect of it being varied at least for the next 10 days? The answer is a very straightforward and emphatic No.

(5) <u>The jurisdiction of restitutio in integrum:</u>

Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983 was an application filed in respect of an alleged violation of a fundamental right, where Mrs. Vivionne Gunawardena alleged, among other things, that she was unlawfully arrested by the OIC of Kollupiya Police Station. The IGP, the 02nd respondent filed an affidavit from one Vinayagam Ganeshananthem, Sub Inspector, to the effect that he and not the 01st respondent who arrested Mrs.

Vivionne Gunawardena because she had no “permit” to go in a procession. Although Mrs. Vivionne Gunawardane countered this position, the Supreme Court consisting of a three Judge bench did not believe her, but believed the affidavit of Vinayagam Ganeshananthem and decided that the petitioner’s fundamental rights have been violated as Vinayagam Ganeshananthem is “guilty” of unlawfully arresting her.

Vinayagam Ganeshananthem then petitioned to the Supreme Court requesting to set aside the said decision of the Supreme Court itself, as he was only a witness (on affidavit) and he was not informed before finding him “guilty” and therefore the rule audi alteram partem is violated. This second case was decided by a Seven Judge bench of the Supreme Court, including the incumbent learned Chief Justice. The decision was divided 05 to 02 and the majority decided against Vinayagam Ganeshananthem.

The learned Chief Justice, who wrote the leading judgment of the majority said,

> “He submits that this caption read with prayer (a) to the petition invokes a jurisdiction in revision which this Court does not have. One has to look at the legislation which created this Court to find an answer to this dispute. That legislation is to be found in the second Republican Constitution of 1978. **The Supreme Court which existed up to the time of the first Republican Constitution of 1972 and which continued to exist under that Constitution ceased to exist when the 1978 Constitution became operative.** (Vide Article 105 (2) of the Constitution). **Its place was taken by the Court of Appeal** (Vide Article 169 (2) of the 1978 Constitution). A new Supreme Court has been constituted which is the highest and final Superior Court of Record. (Article 118 of the Constitution).”

The relevant portion of Article 169(2) says,

"Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal".

Ranasinghe J., despite being in the minority of the 07 Judge bench judgment referred to a case decided by Dias S.P.J. in 1950 which was on restitutio in integrum and said,

"The real basis upon which relief is given and the precise nature of the relief so given by the Supreme Court upon an application made to it for relief against an earlier Order made by the Supreme Court itself was very lucidly and very effectively expressed by Dias S.P.J. way back in the year 1951 in the case of Menchinahamy v. Muniweera, (40). In that case, about six weeks after an appeal to the Supreme Court from an interlocutory decree in the District Court was dismissed by the Supreme Court, an application was made to the Supreme Court, on 23.3.1949, " for revision or in the alternative for restitutio-in-integrum" by the heirs of a party defendant, who had died before the interlocutory decree was entered but whose heirs had not been substituted in his place before the interlocutory decree was so entered. It was contended on behalf of the respondents: that there was no merit in the application: that if the relief sought is granted then the Supreme Court would in effect be sitting in judgment on a two-Judge decision of the Supreme Court which had passed the Seal of the Court that the Supreme Court cannot interfere with the orders of the Supreme Court itself. In rejecting these objections, Dias S.P.J., placed this matter in its proper setting quite convincingly in the following words:

"In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. **We are merely declaring that, so far as the**

petitioner is concerned, there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. "

Ranasinghe J., referring to the judgment of Menchinahamy vs. Muniweera (1950) 52 NLR 409, while being on the minority will not diminish its value. It shows how the then Supreme Court, exercised the power of restitutio in integrum, ***even*** against a judgment of its own. Today, such a power is vested, hence, not only under Article 138 of the Constitution, but also **empirically**, so to say, in the arrangement of the powers of Courts, referred to by the learned Chief Justice, in the present Court of Appeal.

Ranasinghe J., further said in the said judgment,

> "The Supreme Court, as constituted under the 1978 Constitution, is not vested with the revisionary powers as exercised by the Supreme Court which was created by the aforesaid Courts Ordinance (Chapter 6)".

Despite this view being expressed in a minority judgment in that case, the judgment of the learned Chief Justice in the majority, drew a similarity between the present Court of Appeal and the former Supreme Court, to say that the present Supreme Court does not have revisionary powers. The majority of the Supreme Court also decided that "there is no justification for exercising any of the inherent powers of the Court in this case".

Thus it appears, that,

(a) The power of restitutio in integrum, as exercised by Dias S.P.J. in Menchinahamy vs. Muniweera (1950) in the then Supreme Court is now vested in the present Court of Appeal,
(b) The power of revision is also vested with the present Court of Appeal,
(c) The present Supreme Court has, with respect, exercised its inherent powers very rarely (vide., the 07 Judge bench judgment referred to)

Hence, the petitioner in this case seems to be having no remedy other than seeking redress in the power of restitutio in integrum in this court.

(6) CA(PHC) APN No. 25/2019:

The respondent, to say that this court has no power to exercise the powers of restitutio in integrum in regard to a proceeding in the Commercial High court, has relied upon the order in CA (PHC) APN No. 25/2019[2] decided on 18.06.2019 so much so that its copy was attached to the Limited Statement of Objections.

In that case, the Court of Appeal refused to exercise revisionary jurisdiction upon an order made by the Permanent High Court at Bar in Western Province in its criminal jurisdiction.

The Court of Appeal said,

> "In view of these submissions, the fundamental issue before the Court is whether the reference to the "....High Court...." As found in Article 138, is meant to include the Permanent High Court at Bar as well among the already recognized group of inferior Courts which are subject to the appellate jurisdiction of the Court of Appeal.
>
> This Court has no power to provide an interpretation to the said reference to "High Court" as found in Article 138, in view of the "sole and exclusive jurisdiction" conferred upon the Supreme Court by Article 125, by which only the apex Court could hear and determine any question related to the interpretation of the Constitution. Whether the said reference includes the High Court of the Republic, the High Court of the Western Province established under Article 154P, the High Court exercising jurisdiction under Special Provisions Act No. 10 of 1996 and

[2] Nandasena Gotabaya Rajapakse vs. Attorney General and others.

54 of 2006 or the Permanent High Court at Bar as the petitioner contends therefore lies beyond the jurisdiction of this Court....

The only statutory clue on this issue would be that the appeals against the determinations of the Trial at Bar, the High Courts that exercise jurisdiction under Act Nos. 10 of 1996 and 54 of 2006, should be made to the Supreme Court. Appeals from the High Court of the Republic are made to the Court of Appeal through section 14 of the Judicature Act and section 331 of the Code of Criminal Procedure Act and apparently not under Article 138.

When viewed in this perspective, it would appear that the term "High Court" in Article 138, appears to be in relation to the High Court of the Province established under Article 154P(1) when it exercises its appellate jurisdiction". (page 15-16)[3]

Hence the Court of Appeal, having said that deciding the meaning of the term "High Court" in Article 138, lies beyond its jurisdiction, has nevertheless gone into deciding the said question on the basis of the designated appellate forum.

The Court of Appeal then (at page 17)[4] referred to the decision of the Supreme Court in the determination of the Bill on the Judicature (Amendment) Act No. 09 of 2018 and said,

"It could well be that the Supreme Court had considered the Permanent High Court at Bar as another division of the High Court of the Province established under Article 154P and therefore the said Court could not be considered as a new Court and is merely conferred with additional jurisdiction as the situations that are contemplated in the Act Nos. 10 of 1996 and 54 of 2006". (page 17-18)[5]

[3] Of the copy filed of record.
[4] Of the copy filed of record.
[5] Of the copy filed of record.

The Court of Appeal continued,

> "In these circumstances, even if the contention of the learned President's Counsel that the said Permanent High Court at Bar is another division of the High Court of the Province and not a distinct Court, is found to be legally correct, then the provisions contained in Article 154P indicates a contrary position. As already noted Article 154P(3)(a) confers original criminal jurisdiction to a High Court established under Article 154P. However, Article 154P(6) left out mentioning subsection (3)(a) when it made provisions to the effect that "….any person aggrieved by a final order, judgment or sentence of any such Court, in the exercise of its jurisdiction under paragraph 3(b) or 3(c) or (4) may appeal therefrom to the Court of Appeal". The legislative gap is filled by the provisions of section 12B of the Judicature (Amendment) Act No. 09 of 2018, with the conferment of a right to appeal to the Supreme Court.
>
> In view of this clear statutory limitation, no appeal lies to the Court of Appeal, when a High Court of the Provinces, established under Article 154P, exercises its original criminal jurisdiction". (page 18)[6]

(6)(i) **<u>A defect in the said order:</u>**

As aforesaid, the Court of Appeal has said,

> *"The only statutory clue on this issue would be that the appeals against the determinations of the Trial at Bar, the High Courts that exercise jurisdiction under Act Nos. 10 of 1996 and 54 of 2006, should be made to the Supreme Court. Appeals from the High Court of the Republic are made to the Court of Appeal through section 14 of the Judicature Act and section 331 of the Code of Criminal Procedure Act and apparently not under Article 138".*

[6] Of the copy filed of record.

Section 14 of the Judicature Act says,

> "Any person who stands convicted of any offence by the High Court may appeal therefrom to the Court of Appeal-...."

Section 331 of the Criminal Procedure Code is under the Title "Appeals from the High Court to the Court of Appeal and applications for leave to appeal".

The Court of Appeal as aforequoted also said,

> *"As already noted Article 154P(3)(a) confers original criminal jurisdiction to a High Court established under Article 154P. However, Article 154P(6) left out mentioning subsection (3)(a) when it made provisions to the effect that "....any person aggrieved by a final order, judgment or sentence of any such Court, in the exercise of its jurisdiction under paragraph 3(b) or 3(c) or (4) may appeal therefrom to the Court of Appeal".*

Article 154P(3)(a) says,

> "Every such High Court shall (a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;...."

The Court of Appeal in aforequoted passage in italics further said, "*However, Article 154P(6) left out mentioning subsection (3)(a)....*"

The answer is "Yes". In Article 154P(6) the subsections mentioned are, 3(b), 3(c) and (4). They are respectively,

> "3(b) 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 Magistrates Courts and Primary Courts within the Province;
>
> 3(c) exercise such other jurisdiction and powers as Parliament may, by law, provide.

(4) (The writ jurisdiction)"

Thus, the Court of Appeal concludes that when the High Court of the Province exercises its "original criminal jurisdiction" the appeal does not come to the Court of Appeal.

The Court of Appeal has in the aforequoted passage has further said,

> *"The legislative gap is filled by the provisions of section 12B of the Judicature (Amendment) Act No. 09 of 2018, with the conferment of a right to appeal to the Supreme Court".*

But section 12B of the Judicature (Amendment) Act No. 09 of 2018 did not, with respect, deal with an appeal from the High Court of the Province, in the exercise of its "original criminal jurisdiction". The said section 12B deals with an appeal from a judgment of the Permanent High Court at Bar. It says,

> "An appeal from any judgment, sentence or order pronounced at a trial held by a Permanent High Court at Bar under section 12A, shall be made within twenty eight days from the pronouncement of that judgment, sentence or order to the Supreme Court and shall be heard by a Bench not less than five Judges of that Court nominated by the Chief Justice...."

Hence, it appears, with respect, that section 12B of the Judicature (Amendment) Act No. 09 of 2018 did not fill any gap in the designation of an appellate forum for any judgment, sentence or order made by the High Court of the Province in the exercise of its "original criminal jurisdiction".

In view of the aforesaid, this court cannot agree with the Court of Appeal when it said in the aforementioned case that,

> *"In view of this clear statutory limitation, no appeal lies to the Court of Appeal, when a High Court of the Provinces, established under Article 154P, exercises its original criminal jurisdiction".*

The Court of Appeal further said at page 19[7] in the said case,

> "Not only in the said Judicature (Amendment) Act No. 09 of 2018 does one find similar provisions which mandates that such right of appeal should be exercised by the Supreme Court. In respect of any judgment, sentence or order of the High Court at Bar, the right of appeal is conferred upon the Supreme Court by virtue of section 451(3) of the Code of Criminal Procedure Act No. 15 of 1979 as amended".

This is correct. The original Criminal Procedure Code in Act No. 15 of 1979 referred to trials at Bar before the High Court in its section 450. It provided in section 451(2),

> "Anything to the contrary in this Code or any other law notwithstanding an accused person may appeal from any judgment, sentence or order pronounced at a trial held under section 450. Such appeal shall be to the Court of Appeal and shall be heard by a Bench of not less than five Judges of that Court nominated by the President of the Court of Appeal. It shall be lawful for the President of the Court of Appeal to nominate himself to such Bench".

This section was repealed and replaced by section 03 of Criminal Procedure Code (Amendment) Act No. 21 of 1988. The present section 451(3) reads,

> "Anything to the contrary in this Code or any other law notwithstanding an appeal shall lie from any judgment, sentence or order pronounced at a trial under section 450. Such appeal shall be to the Supreme Court and shall be heard by a Bench of not less than five Judges of that Court nominated by the Chief Justice. It shall be lawful for the Chief Justice to nominate himself to such Bench".

[7] Of the copy filed of record.

However, for the reasons adduced earlier, the statement reproduced below from the Court of Appeal judgment already referred to cannot be accepted.

> *"In view of this clear statutory limitation, no appeal lies to the Court of Appeal, when a High Court of the Provinces, established under Article 154P, exercises its original criminal jurisdiction".*

The reason appears to have been contained in Article 154P(3)(a) itself, for it says,

> "Every such High Court shall (a) exercise according to law, **the original criminal jurisdiction of the High Court of Sri Lanka** in respect of offences committed within the Province;"

Hence the said High Court of the Province exercises "**the original criminal jurisdiction of the High Court of Sri Lanka**" and such jurisdiction is subject to an appeal to the Court of Appeal (even as the said judgment has mentioned) under section 14 of the Judicature Act and section 331 of the Criminal Procedure Code.

Hence there is a defect, with respect, in the way the said judgment of the Court of Appeal has analysed the powers of the Court of Appeal vis-à-vis the exercise of the "original criminal jurisdiction" by the High Court of the Province.

(7) <u>The Court of Appeal thought revision is ancillary to appeal:</u>

The Court of Appeal in the said case said at page 09[8]

> "In view of the nature of the objection raised by the learned Additional Solicitor General, this Court must therefore decide at the outset whether it has been invested with appellate jurisdiction over the Permanent High

[8] Of the copy filed of record.

Court at Bar under Article 138 and whether it could entertain an application for revision against an order of the said Court".

Thus, the Court of Appeal proceeded on the basis that the power of revision is ancillary to the appellate power and it is due to that, it went on, as referred to earlier, in analysing the power of appeal of the Court of Appeal in respect of the "High Court" referred to in Article 138, with the question whether the said word "High Court" includes a Permanent High Court at Bar.

The said order of the Court of Appeal can be distinguished from the present case on 04 main reasons which are,

(i) In that case there was an order made against the petitioner, whereas in the present case there is only an uncertainty whether his application will be heard on a proximate date, because the petitioner has been restrained from taking any decision which has given rise to the urgency in the matter,

(ii) In that case, the petitioner had already lodged a petition of appeal in the Permanent High Court at Bar and another petition No. SC Misc. No. 04/2019 directly to the Supreme Court whereas in this case the petitioner has not gone before any other forum (in fact, it appears that the petitioner cannot go before the Supreme Court),

(iii) In that case, the petitioner has invoked only the revisionary jurisdiction of the Court of Appeal, whereas in the present case the petitioner has invoked the power of restitutio in integrum,

(iv) Since the petitioner was prevented from taking any decision, there appears to be an urgency in this case

(8) <u>The phrase "or of any law":</u>

Article 138(1) of the Constitution reads,

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution **or of any law**, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance][9], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things [of which such High Court, Court of First Instance][10] tribunal or other institution may have taken cognizance".

The words "or of any law" is sometimes sought to be interpreted to mean that when there is any law which provides for an appeal to a different forum, the Court of Appeal cannot exercise any power under Article 138(1).

But this was explained in **SC Appeal No. 111/2015 with 113/2015 and 114/2015** by Justice Aluwihare in the Supreme Court. Paragraph 29 of that judgment says,

> "Particularly in relation to the revisionary jurisdiction, which exists to remedy miscarriage of justice, greater care must be exercised when employing the maxim[11]. As I observed earlier, the revisionary jurisdiction of the Court of Appeal is a Constitutional mandate which, undoubtedly is subject to the provision of statutory law. **Nevertheless, owing to its genesis in the Constitution, any restriction or modification which the Legislature seeks to introduce must be introduced by way of express wording.** The omission to refer to 'revisionary jurisdiction' in Section 9 of Act No. 19 of 1990 cannot be taken as reducing the Court of Appeal's plenitude of powers under Article 138. **Nothing less than an**

[9] Substituted by the Thirteenth Amendment to the Constitution. Section 3(a) for "committed by any Court of First Instance".

[10] Substituted by the Thirteenth Amendment to the Constitution. Section 3(b) for "of which such Court of First Instance".

[11] expressio unius est exclusio alterius.

express removal of these powers would be required to achieve such a result".

The question raised in that case was similar to the argument taken by the respondent in the present case. That is to say that when the Supreme Court has been given appellate powers the Court of Appeal has no jurisdiction on revision. The only difference is that in the present case not only revision, but also the power of restitutio in integrum is in question. His Lordship said at paragraph 08,

> "….It was the contention on behalf of the Respondents, that Section 9 of the said Act has vested that power in the Supreme Court, thereby completely ousting the jurisdiction of the Court of Appeal in respect of such matters. They contend that the specific use of the term 'appeal' in Section 9 of the Act, indicates that the legislature only intended to vest appellate jurisdiction with the Supreme Court in respect of such matters where the High Court has exercised its appellate powers, and not revisionary jurisdiction".

It was further said at paragraph 09,

> "They seek to fortify this contention by referring to Article 138 of the Constitution which uses the term 'subject to any law'. Accordingly, their contention is that under Section 9, there is only one recourse, which is the right of appeal to the Supreme Court; if a litigant fails to utilize the provision, they cannot seek to circumvent the procedure by resorting to a revisionary step…."

The Supreme Court did not accept that the revisionary powers are ancillary to appellate powers or is a subset of the appellate powers. It said at paragraph 10,

> "The above argument is firstly premised on the assumption that the revisionary jurisdiction and the appellate jurisdiction are one and the

same. **It is only if the former is a subset of the latter, could the taking away of the appellate power results in automatically suspending the revisionary powers**. **However, historically, it has been the opinion of our Courts that the revisionary jurisdiction is distinct from appellate jurisdiction.** One basic distinction would be that while the appellate rights are statutory, the exercise of revisionary power is discretionary. **Although revisionary jurisdiction shares characteristics with the appellate jurisdiction, they are not one and the same**".

It was further said at paragraph 12,

"Furthermore, time to time, Courts in Sri Lanka have observed that an appellant could invoke the revisionary jurisdiction even when there is a right of appeal available (vide Attorney General v. Podisingho (1950) 51 NLR 385) and when there is no right of appeal available (vide Sunil Chandra Kumar v. Veloo (2001) 3 SLR 91) or when the said right of appeal has been exercised (vide K. A. Potman v. Inspector of Police, Dodangoda (1971)74 NLR 115). This in itself is sufficient evidence to sustain the claim that appellate jurisdiction and revisionary jurisdiction are two distinct jurisdictions".

Not only that the revisionary jurisdiction is not a subset of the appellate jurisdiction, but also when the appellate jurisdiction vests in another forum, revisionary jurisdiction could vest in the Court of Appeal. The judgment said at paragraph 21,

"At the outset, it must be borne in mind that the Revisionary Jurisdiction of the Court of Appeal is a Constitutional mandate. Its genesis lies in Article 138 of the Constitution. There is no question that the Constitution is the supreme law of the land (vide In re reference under Article 125(1) for the Constitution (2008) BLR 160 SC). **In those**

circumstances, any ouster or restriction of a Court's jurisdiction which is founded on the Constitution, in so far as it is permitted under the Constitution, must be made in express language. In Re the Nineteenth Amendment to the Constitution (2002) 3 SLR 85, a bench of 7 judges unequivocally opined that "This manifests a cardinal rule that applies to the interpretation of a Constitution, that there can be no implied amendment of any provision of the Constitution" (at page 110). **Therefore, it is only right and befitting that this Court insists that every provision which restricts or modifies a Court's Constitutional mandate *are express and are set out in no uncertain terms***".

The Supreme Court, as it seems to be, in orbiter said at paragraph 23,

> "It is clear that Section 9 of Act No. 19 of 1990 follows the scheme of Article 154P of the Constitution. It stipulates the appeals in respect of final orders, judgments or sentence decided under Article 154P(3)(a) and 154P(4) must be directed to the Court of Appeal, while appeals in respect of final orders, judgments or sentences decided under Article 154P(3)(b) must be directed to the Supreme Court".

Although this is not directly relevant to the question in this case, the Supreme Court's observation that judgments, sentences or final order decided under Article 154P(3)(a) or those judgments, sentences or orders made in the exercise of the "original criminal jurisdiction" of the High Court of the Province shall be directed to the Court of Appeal shows that the argument by the Court of Appeal in the aforequoted judgment that section 154(3)(a) not being included in Article 154(6), the appellate power in regard to judgments, sentences or orders made in the exercise of "original criminal jurisdiction" does not lie with the Court of Appeal is incorrect. However, with great respect, although the Supreme Court has said that the appellate power in regard to judgments, sentences and orders made under Article 154(3)(b) [*this is the appellate and revisionary jurisdiction*

exercised by the High Court of the Province in regard to convictions, sentences and orders imposed by Magistrates Courts and Primary Courts within the Province] lies with the Supreme Court, it is noted, with great respect, that Article 154(6) includes judgments, sentences and orders made under Article 154(3)(b) within the appellate power of the Court of Appeal.

However, it must be hastily added that the Supreme Court here referred not to Article 154(6) but to section 11 of Act No. 09 of 1990.

The Supreme Court further expressed the views reproduced below at paragraph 32,

> "The Court of Appeal has on a previous occasion specifically dismissed an attempt to restrict the revisionary jurisdiction to a corresponding statutory right. It was observed "The Petitioner in a Revision application only seeks the indulgence of Court to remedy a miscarriage of justice. He does not assert it as a right. Revision is available unless it is restricted by the Constitution or any other law" (vide Veloo (supra) at page 103). **Although the Supreme Court is not bound by the said decision, *I see no reason to disagree with the principle enunciated there*. In my opinion, if the revisionary jurisdiction was also to be subject to a statutory right there would not be any difference between the two jurisdictions**".

The Supreme Court adding a cautionary remark said at paragraph 34,

> "I must not be miscomprehended as advocating an unfettered conferment of revisionary jurisdiction on the Court of Appeal. For reasons adumbrated above, such a construction extending unfettered revisionary jurisdiction cannot stand, in view of the clear reference to 'subject to the provisions of any law' in Article 138 of the Constitution. **However, the only way in which the restriction or an ouster could be introduced in this regard, is *by way of an 'express removal' of the***

same and not by resorting to purported or implied omissions. In fact, the Legislature where it intended to oust the revisionary jurisdiction has expressed the same in unequivocal terms".

The Supreme Court gave some examples from Arbitration Act No. 11 of 1995 and Transfer of Offenders Act No. 05 of 1995, regarding express removals.

It is often heard in regard to supposed practical difficulties or anomalies that can take place when the appellate power and revisionary jurisdiction lie distinct to each other as the Supreme Court in this case decided. The Supreme Court finally referring to such supposed instances said at paragraph 37,

> "At the hearing, the counsel for the Respondents drew our attention to many pragmatic complications that could arise with such a construction. As observed by the Court in Gunaratne v. Thambinayagam (1993) 2 SLR 355 at page 361, "***if the multiplicity of litigation in this sphere is felt to be an anomaly, it is a matter for the legislature" to resolve by way of amendment***. ***This Court cannot, in the guise of interpretation, usurp the legislative function to give effect to what many would believe a more desirable outcome.*** **Such concerns must be resolved by resorting to the democratic process of the country**".

(9) Conclusion:

Hence this court holds that it has the power of restitutio in integrum in the circumstances of this application, notwithstanding the appellate power being vested in the Supreme Court. It is further decided that the interim orders made by this court in this application were not made per incuriam. Therefore this court refuses the application of the respondent to vacate those interim orders. The said interim orders issued to restrain the orders (n), (o) and (p) granted by the Commercial High Court are extended until the final determination of this application.

Judge of the Court of Appeal

Hon. Sasi Mahendran

I agree

Judge of the Court of Appeal.