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

In the matter of an application for restitutio in intergrum and/or revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Gonapinuwalage Suguna Manjula,
No. 52/2, Wajirawansha Mawatha,
Obeysekerapura, Rajagiriya.

And Now

No. 104/12, Cooray Place, Staneley Thilakaratne Mawatha, Nugegoda.

Defendant-Petitioner

Case No. : CA/RII/0011/2021

Vs

DC Nugegoda, Case No. RE/193/20

1. Yasarathna De Silva
   Pinnaduwage,

2. Preethi Manohari Pinnaduwage,

   Both of No. 181/15, Polhengoda Road, Kirulapone.

Plaintiff-Respondent

Before: Hon. D.N. Samarakoon, J

Counsel : Mr. Mahinda Nanayakkara with Mr. Manoj Sanjeewa instructed by Ms. Sudharma C. Gamage for Defendant-Petitioner.

Mr. Pradeep Fernando instructed by Ms. G.G.S. Maheshika for Plaintiff-Respondents.

Argued on: 28.02.2022

Written submissions tendered on: 14.03.2022 by Defendant-Petitioner.

14.03.2022 by Plaintiff-Respondent.

Decided on: 31.03.2022

D.N. Samarakoon, J.

Order

The question to be decided by this order is whether on the application of the defendant petitioner, notice and an interim order staying the further proceedings in the original court should be issued.

The translation of the Journal Entry dated 30.04.2021 reads as below,

"For Plaintiff : Mr. Jagath Thalgaswattage

For 01st defendant : Mr. Malith Pitipanaarachchi

Vide J.E. 04 replication is due.

Replication is due.

It is moved to withdraw the action.

(vide. Proceedings)

Notes by Mrs. Chanchala.

Application allowed.

Submissions are made with regard to proceeding with the claim in reconvention.

Date is moved for written submissions.

For 10.00 a.m. at 07.05.2021

Record to be signed before the Registrar with regard to the withdrawal.

Call 06.07.2021….."

The plaintiff respondent has submitted that the defendant is an overholding lessee and the action was withdrawn because only 18 days notice, but not one months notice has been given.

As per the proceedings, the defendant had moved that the action may be withdrawn subject to the condition that if the plaintiff institutes a fresh action taxed costs may be paid and an application has been made to fix the case for pre trial on the claim in reconvention.

But the court has given a date for written submissions. The position of the defendant is that no application was made for written submissions.

Furthermore, P.03A which is the "order" of the learned Judge says,

> "Parties move to file written submissions on the application made today in the replication and therefore a date is given…"

Hence it is also contended for the defendant that written submissions are to be tendered on a non existing replication.

Although parties have made extensive written submissions, what is relevant only for the issue of notice and interim order will be considered.

The plaintiff has submitted, among other things, that the defendant had a remedy of preferring a leave to appeal application to the Civil Appellate High Court. The plaintiff has cited **Ameen vs. Rasheed 38 NLR 288** which said,

> "It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have a discretion to act in revision. It has been said in this court often enough that revision of an appealable order is an exceptional proceeding and in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal".

The plaintiff also cites **A.R.G. Fernando vs. W.S.C. Fernando 72 NLR 549** which said,

> "Where a right of appeal lies an application in revision will not be entertained unless there are exceptional circumstances which require the intervention of the court by way of revision".

In **FERNANDO v. CEYLON BREWERYS LTD., 1997,** U. de Z. Gunawardane J., in the Court of Appeal considered the difference between the present section 753 of the Civil Procedure Code, with the older section 753 of the same Code. The older section said in revision the Court of Appeal "***could have only made the same order which it might have made had the case been brought before it by way of an appeal***". But in the present section says, the Court of Appeal "***in the exercise of its powers of revision, [can] make any order as the interests of justice may require***". Regarding this difference in the two sections, Justice Gunewardane said,

> "Thus it would be noticed that the amended section enables the court to be more flexible and less legalistic in its means and in approach in dealing with a matter for section 753 in its amended form seems to exalt

not so much the rigour of the law but unalloyed justice, in the sense of good-sense and fairness. So that the basis of the rationale for insistence on the requirement of special circumstances as a condition - precedent to the exercise of revisionary powers had disappeared as a consequence of the amendment of section 753 of the Civil Procedure Code by virtue of which amendment the Court of Appeal is now freed from the duty or rather the necessity of making the same order as it would have made in appeal and is empowered to make any order as the interests of justice may require.

A party seeking relief by way of revision cannot now, ie after the amendment of section 753 of the Civil Procedure Code be asked what special reasons or circumstances justify his seeking the same order and consequently the same relief when, in fact, he can obtain the same order (and consequently the same relief) by the ordinary method of appeal, for the order that the Court of Appeal can now make in the exercise of its revisionary jurisdiction is substantially different from the order that it could have made formerly. When the order that could be made in appeal prior to introduction of the amendment to section 753 of the Civil Procedure Code was the same as that could be made in revision - there was good reason for thinking that the procedure in revision was, more or less, alternative to procedure in appeal or vice versa and the two remedies were available in such a way that when one is available - particularly when the right of appeal was open to a party, the other remedy in revision must be refused, - except in exceptional circumstances. That being so, the present state of the law is such that existence of special circumstances need not be shown as a condition - precedent to the invocation of the relief by way of revision".

The aforesaid decision was appealed to the Supreme Court (**Ceylon Breweries Ltd. vs. Jax Fernando**) and Mark Fernando J., repealed, but specifically and

only the portion of the judgment which decided that a party who has been served with an ex parte decree can make a valid application on the 15th day after the service. Justice Mark Fernando did not set aside what Gunawardane J., said in comparison of the two sections.

The defendant has cited a large number of judgments on revision, which this court will not refer at this juncture because it is not deciding the application on merits, but coming to a decision on a prima facie basis whether notice and interim order should be issued.

In the very recent case of **SC/Revision/02/2019**[1] decided on 25.03.2022, three Judges of the Supreme Court has made a very vital observation with regard to the revisionary jurisdiction of the Court of Appeal. It said,

> "Even so, according to the present constitution in 1978, the revisionary powers vested in the Supreme Court by the Administrative Justice Law was removed to the Court of Appeal by the Article 169(2) of the Constitution.
>
> Article 169(2) provides that;
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> > "the Supreme Court established by the Administration of Justice Law, No.44 of 1973, shall, on the commencement of the Constitution, cease to exist and accordingly the provisions of that Law relating to the establishment of the said Supreme Court, Shall be deemed to have been repealed. 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."
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> Further, According to the Article 169(3) of the Constitution, all the appellate proceedings including proceedings by way of revision, case stated and restitutio in integrum pending in Supreme Court established

[1] Indika Roshan Francis vs. Bulathsinghalage Lal Coorey and another.

under the Administration of Justice Law, No.44 of 1973, on the day preceding the commencement of the Constitution, shall stand removed to the Court of Appeal and Court of Appeal shall have jurisdiction to take cognizance of and to hear and determine the same, and **the judgements and the orders of the Supreme Court aforesaid delivered or made before the commencement of the Constitution in appellate proceedings shall have the same force and effect as they had been delivered or made by the Court of Appeal**". (page 05)

The Supreme Court further said,

> "Accordingly, the revisionary powers are explicitly vested in the Court of Appeal by the present Constitution, not in the Supreme Court. Therefore, in light of the statutory provisions discussed above, it is clear to this court that, the views expressed on the Supreme Court's revisionary jurisdiction in cases decided in the era before the enactment of the present Constitution in 1978, cannot be applied to the present Application". (page 07)

In the circumstances, satisfying on a prima facie basis, this court issues notice and an interim order staying the proceedings of the original case until the final determination of this application.

Judge of the Court of Appeal.