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

In the matter of an application for Revision or Restitutio-in-Integrum in terms of Articles 138 and 145 of the Constitution of Sri Lanka against the judgment of the High Court of Civil Appeal of Negombo case bearing No. WP/HCCA/NEG/12/2021 (F) dated 21.03.2022 and District Court of Negombo judgment of the case bearing No. P/3221 dated 19.01.2021.

CA/RII/15/2022
WP/HCCA/NEG/12/2021 (F)
DC Negombo Case No. 3221/P

P.M. Shiroma Nilanthi Perera
74/A/12,
Central Garden,
Raddolugama.

Plaintiff

Vs.

W.T. Sujeewa Nilantha Fernando,
59, Central Niwasa,
Kaswalagalla,
Raddolugama.

Defendant

AND

W.T. Sujeewa Nilantha Fernando,
59, Central Niwasa,
Kaswalagalla,
Raddolugama.

Defendant-Appellant

Vs.

P.M. Shiroma Nilanthi Perera
74/A/12,
Central Garden,
Raddolugama.

Plaintiff- Respondent

AND NOW BETWEEN

P.M. Shiroma Nilanthi Perera
219/C,
Dagonna via Negombo.

Plaintiff-Respondent-Petitioner

Vs.

W.T. Sujeewa Nilantha Fernando,
59, Central Niwasa,
Kaswalagalla,
Raddolugama.

Defendant-Appellant-Respondent

Before: **D.N. Samarakoon, J.**

B. Sasi Mahendran, J.

Counsel: J.M. Wijebandara with Kavindya Kuruwita Arachchi for the Plaintiff-Respondent-Petitioner
Prabath de Silva Instructed by Miss Nadeeka Kularathna for the Defendant-Appellant-Respondent

Written Submissions On 13.10.2022 (by the Defendant-Appellant-Respondent)

Supported On: 13.09.2022

Order On : 15.11.2022

B. Sasi Mahendran, J.

The Defendant-Appellant-Respondent (hereinafter referred to as "the Respondent") raised a preliminary objection as to the jurisdiction of this Court to hear and determine the application of the Plaintiff-Respondent-Petitioner (hereinafter referred to as "the Petitioner"). As this is a threshold issue pertaining to jurisdiction, we heard the parties' oral submissions and directed them to file written submissions on this point of law. This Order deals with the merits of the preliminary objection.

In the instant application, dated 4th May 2022, made under Article 138 of the Constitution for restitutio-in- integrum and/or revision, the Petitioner is seeking to revise and set aside the judgment of the High Court of Civil Appeal holden at Negombo dated 21st March 2022 ("X21"); to affirm the judgment of the District Court of Negombo dated 19th January 2021 ("X8") or in the alternative to order a trial-de-novo allowing parties to raise the actual point of contest arising out of the dispute.

The facts in brief, as narrated in the Petition, are as follows. The Petitioner was formerly married to the Respondent. Prior to their nuptials, they jointly purchased a land, by Deeds of Transfer Nos. 852 and 922 (dated, respectively, 26th August 1998 and 17th

December 1998). Following the dissolution of their marriage, they sought to partition the land. The District Court of Negombo decreed to partition the land in equal shares to both parties. The Respondent- husband, appealed to the High Court of Civil Appeal holden at Negombo, and by judgment dated 21st March 2022 the learned High Court Judges set aside the judgment of the District Court. It was concluded that the Petitioner-wife holds her share of the land on a Constructive Trust in favour of the Respondent- husband (while the Respondent was absolutely entitled to the remaining share of the land) as the attendant circumstances signified that the Respondent-husband did not intend to dispose of the beneficial interest in the land to the Petitioner-wife when the said Deeds of Transfer were executed. The Petitioner's grievance is that this judgment ("X21") is erroneous in fact and law as it has not appreciated certain material particulars.

The Respondent raised a preliminary objection disputing the jurisdiction of this Court to revise and set aside the judgment of the High Court of Civil Appeal (hereinafter also referred to as "High Court of the Provinces" or "Provincial High Court") and to grant restitution as prayed for by the Petitioner. The objection is that this Court has no revisionary or restitutionary jurisdiction in respect of judgments and orders of the High Court of the Provinces exercising civil appellate and revisionary jurisdiction in respect of the judgments and orders of the District Courts. Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006, provides for a specific right of appeal for those aggrieved by the judgments and orders of the High Court of the Provinces exercising civil appellate and revisionary jurisdiction. This Section reads:

(1) An appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction granted by Section 5A of this Act, with the leave of the Supreme Court first had and obtained. The leave requested for shall be granted by the Supreme Court, where in its opinion the matter involves a substantial question of law or is a matter fit for review by such Court.

The Petitioner did not avail herself of the right of appeal granted by the aforesaid Act, within the prescribed time. The reason for not doing so as averred by the Petitioner in paragraph 14 of the Petition is that "considering the special circumstances of the case the Petitioner was advised and then opted to invoke this Court's revisionary and/or restitutionary jurisdiction to restore the status of the parties giving due consideration to

the pertinent fact that the said partition action was contested between ex-husband and ex-wife to the property jointly owned during the marriage".

The Respondent contends that by permitting this application:

a. The legislative intention in establishing the High Court of the Provinces by the Thirteenth Amendment to the Constitution and the enactment of the High Court of the Provinces Acts will be defeated.
b. The floodgates will be opened for litigants who have failed or neglected to exercise their right of appeal under Section 5C and for litigants who may use this opportunity as "a delaying machination".

Before delving into the jurisdictional objection, we are of the view that the 'floodgate' argument is not defensible. To this end, we would like to quote a statement of his Lordship Ananda Coomaraswamy J. in Abeywardene v. Ajith De Silva [1998] 1 SLR 134 which met this argument head-on:

"At the outset I must say that these three decisions are right and that if in consequence of these decisions there would be an undesirable increase of litigation, that is the matter for the legislature."

We will now address the jurisdictional objection.

Although not cited to us, the objections that the Respondent raised were succinctly dealt with by his Lordship Mahinda Samayawardhena J. in Rizleigh Bertram Grand v. Portia Kekulwala CA/RI/06/2016 decided on 24.06.2019, in which his Lordship laid out those concerns. The following excerpt (on page 6) is relevant to the instant application:

".....But the argument of the learned counsel seems to be that, nevertheless, a party can come before this Court against the Judgment or Order of the High Court of Civil Appeal by way of revision and/or restitutio in integrum in terms of Article 138 of the Constitution.

If that argument is accepted, section 5C becomes meaningless, and the intention of the legislature will blatantly be defeated, as any party dissatisfied with any Judgment or Order of the High Court of Civil Appeal can come before this Court by way of revision and/or restitutio in integrum. Then the party dissatisfied with the Judgment or Order of the District Court will have three appeals—first to the High Court of Civil Appeal, second to the Court of Appeal, and third to the Supreme Court. That was obviously never the intention of the legislature. One of the main

objectives of setting up High Courts of Civil Appeal is to curb laws delays in civil litigation and not to expand it."

(A view espoused by his Lordship in an earlier decision as well. Vide CA/RI/15/2018 decided on 02.11.2018.)

His Lordship cited the case of Stephan Gunaratne v. Thushara Indika Sampath CA/PHC/APN/54/2013 decided on 23.09.2013. In that case, his Lordship A.W.A. Salam J. (with his Lordship Sunil Rajapaksha J. agreeing) concluded that a litigant is not entitled to maintain a revision application in the Court of Appeal to revise a judgment of the High Court of the Provinces in the exercise of its appellate jurisdiction. In arriving at this conclusion their Lordships held:

"Appreciably, Section 5A of Act No 54 of 2006 quite specifically states that all relevant written laws applicable to an appeal, in the Court of Appeal are applicable to the High Court as well. This undoubtedly demonstrates beyond any iota of doubt that the scheme provided by Act No 54 of 2006 to facilitate an appeal being heard by the Provincial High Court is nothing but a clear transfer of jurisdiction and ***in effect could be said that as far as appeals are concerned both the High Court and the Court of Appeal rank equally and are placed on par with each other.*** *Arising from this statement of law, it must be understood that if the Court of Appeal cannot act in revision in respect of a judgment it pronounces in a civil appeal, then it cannot sit in revision over a judgment entered by the High Court in the exercise of its civil appellate jurisdiction as well, for both courts are to be equally ranked when they exercise civil appellate jurisdiction."* [emphasis added]

His Lordship Samayawardhena J. applying the reasoning in Stephan Gunaratne, which dealt with this Court's revisionary jurisdiction in respect of the judgments and orders of the High Court of the Provinces in the exercise of its civil appellate jurisdiction, went further by observing that this Court cannot exercise its restitutionary jurisdiction in respect of judgments and orders of the High Court of the Provinces in the exercise of its civil appellate jurisdiction.

Therefore, the question that we are faced with is whether this Court can exercise its revisionary or restitutionary jurisdiction in respect of judgments and orders of the High Court of the Provinces in the exercise of its civil appellate jurisdiction.

Availability of Revision

When the High Court of the Provinces was created by the Thirteenth Amendment to the Constitution, Article 154P of the Constitution set out the jurisdiction of those Courts. Article 154P (3) which dealt with civil and criminal jurisdiction reads:

(3) 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;

(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;

(c) exercise such other jurisdiction and powers as Parliament may, by law, provide.

The High Court of the Provinces (Special Provisions) Act No. 19 of 1990 was enacted to make provisions regarding the procedure to be followed and the right to appeal to, and from the High Courts established under Article 154P of the Constitution. (Vide S.C.(SD) Nos. 07/2018 to 13/2018 – Special Determination of the Supreme Court on the Judicature (Amendment) Bill) It is seen that the said Act, as it was originally enacted, provided for appeals from a Provincial High Court to the Court of Appeal or Supreme Court, depending on the jurisdiction which it exercised. If the Provincial High Court was exercising its jurisdiction under Article 154P(3)(b) appeal lied to the Supreme Court. If the Provincial High Court was exercising its jurisdiction under Article 154P(3)(a) an appeal lied to the Court of Appeal. However, those procedures dealt with criminal cases.

It was by an amendment to the 1990 Act (the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006) that Sections 5A to 5D were inserted. Sections 5A, and 5B provide for the hearing of appeals from the District Court and Family Courts, and Section 5C provides for an appeal to the Supreme Court from the decision of the Provincial High Court. This, as held in the aforementioned Special Determination of the Supreme Court, conferred "additional jurisdiction on the High Court of Provinces under Article 154P(3)(C)".

Therefore, we will first examine the approach that our Courts have adopted when the Court of Appeal exercises revisionary jurisdiction in respect of judgments and orders of the High Court of the Provinces in the exercise of its **criminal appellate or revisionary jurisdiction**.

The High Court of the Provinces shall have and **exercise appellate and revisionary jurisdiction** in respect of convictions, sentences and orders entered or imposed by the Magistrates Courts and the Primary Courts within the province (Vide **Article 154P(3)(b)** of the Constitution). In terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended, any person aggrieved by "a final order, judgment, decree or sentence of a High Court established under Article 154P of the Constitution in the **exercise of the appellate jurisdiction** vested in it by **paragraph (3)(b) of Article 154P** of the Constitution…" can appeal to the Supreme Court with leave obtained. The cursus curiae as derived from a host of judgments examining the relevant statutory provisions are as follows:

- If the High Court of the Province is exercising an **appellate jurisdiction** in respect of convictions, sentences and orders entered or imposed by the Magistrates Courts and the Primary Courts within the province a direct appeal lies to the Supreme Court. (Vide **Muththusamy Balaganeshan v OIC, Seeduwa** SC.SPL/LA 79/2015 decided on 01.04.2016)

- If the High Court of the Province is exercising its **appellate jurisdiction** in respect of convictions, sentences and orders entered or imposed by the Magistrates Courts and the Primary Courts within the province a litigant may file a revision application in the Court of Appeal (Vide **Wijesiri Gunawardane & Others v. Chradsena Muthukumarana & Others, Jayarathna v. OIC, Mount Lavinia & Others, Dr. Ama Weeratunga v. Sepala Ekanayake & Others** SC Appeal Nos. 111, 113, 114 /2015 decided on 27.05.2020) - provided there are "exceptional circumstances".

- If the High Court of the Province is exercising its **revisionary jurisdiction** in respect of convictions, sentences and orders entered or imposed by the Magistrates Courts and the Primary Courts within the province an appeal lies to the Court of Appeal (**Abeywardene v. Ajith De Silva** (supra))

Thus, when one examines the criminal context, the Supreme Court has jurisdiction when the Provincial High Court exercises appellate jurisdiction but not when the Provincial High Court exercises its revisionary jurisdiction. In the latter scenario, an appeal lies to the Court of Appeal. For example, presently, when the Provincial High Court exercises its revisionary jurisdiction in a Section 66 application or State Land Recovery matter, an appeal is made to the Court of Appeal.

In respect of the High Court of the Provinces' **civil appellate and revisionary jurisdiction**, the statutory provisions are different. **Article 154P(3)(c)** of the Constitution provides that the High Court of the Province shall, "exercise such other jurisdiction and powers as Parliament may, by law, provide." Such "law" includes Section 5A of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006. **Section 5A(1)** provides that a High Court of the Province established by Article 154P of the Constitution "shall have and **exercise appellate and revisionary** jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case maybe." **Section 5C(1)** provides that "an appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154P of the Constitution in the **exercise of its jurisdiction granted by Section 5A of this Act**, with leave of the Supreme Court first had and obtained."

The words "in the exercise **of its jurisdiction**" will logically mean in the exercise of its "appellate and revisionary jurisdiction" as set out in Section 5A(1). If that is so, then two matters can be clarified at ease. Those are,

- If the High Court of the Province is exercising an **appellate jurisdiction** in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province a direct appeal lies to the Supreme Court, and
- If the High Court of the Province is exercising its **revisionary jurisdiction** in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province an appeal lies to the Supreme Court.

However, **if the High Court of the Province is exercising its appellate jurisdiction** in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province **can a litigant file a revision application in the Court of Appeal, against a judgment or order of the High Court of the Provinces**? This is a question that arises in the instant case.

His Lordship Salam J. in Stephan Gunaratne (supra) reasoned that the relevant statutory provisions have transferred jurisdiction that was previously exercised by the Court of Appeal and thereby since both Courts rank equally the Court of Appeal cannot act in revision when the High Court of the Provinces exercises civil appellate jurisdiction as the Court of Appeal cannot act in revision of its own judgment pronounced in a civil appeal.

His Lordship Nawaz J. in Seylan Bank PLC v. Christobel Daniels CA PHC APN 58/2014 decided on 14.12.2016 observed (albeit in the context of Section 31DD of the Industrial Disputes Act by which a direct appeal lies to the Supreme Court from a final Order of the High Court in the exercise of its appellate or revisionary jurisdiction in relation to an order of a Labour Tribunal):

"The invocation of the revisionary jurisdiction in these circumstances would be tantamount to indirectly maintain an appeal to this court (an appeal notwithstanding lapse of time) when the sole and exclusive appellate jurisdiction from High Court Labour Appeals is vested in the Supreme Court. Such an exercise of jurisdiction by this Court will also be contrary to Article 138 of the Constitution……."

Additionally, his Lordship reasoned:

"The structure of Article 138 would also prevent this Court exercising revisionary jurisdiction when the sole and exclusive jurisdiction has been vested in the Supreme Court. It is crystal clear beyond any scintilla of doubt that the revisionary power of this Court lies only against orders made by such High Court, Court of First Instance, tribunal or other institution when they have taken cognizance of causes, suits, actions, prosecutions, matters and things. The words "such High Court, Court of First Instance, tribunal or other institution" must be read ejusdem generis and such collocation of words read together with the words causes, suits, actions, prosecutions, matters and things clearly indicates that these Courts exercise original jurisdiction. Only when the High Court of First Instance, tribunal or other institution has exercised original jurisdiction,

revision lies to this court. In other words only when the High Court has exercised original jurisdiction, the revisionary jurisdiction of this Court can be invoked. In my view Article 138 intentionally suggests such a deliberate intendment of Parliament and when the High Court has sat in its appellate jurisdiction as has happened in this case, no revision lies to this Court."

Respectfully, we are unable to agree with the proposition that this Court is forbidden from exercising its revisionary jurisdiction in respect of judgments and orders of the Provincial High Court exercising civil appellate jurisdiction. The main reason is that fundamentally an "appeal" is distinct from "revision". That distinction has not been appreciated.

This distinction has been made abundantly clear in the following judgments of the Supreme Court, which have illustratively laid out previous judgments that recognised the same distinction.

Her Ladyship Shirani Bandaranayake J. (as she then was) in Wickramasekera v. Officer- In-Charge, Police Station Ampara [2004] 1 SLR 257 held:

"Unlike an appeal which could be made by any party who is dissatisfied with any judgment, decree or order pronounced in a Lower Court except when such right is expressly disallowed, ***the power in revision is an extra ordinary power which is quite distinct from the appellate jurisdiction.*** *"* [emphasis added]

Her Ladyship cited the celebrated passage from the judgment of his Lordship Sansoni C.J. in Mariam Beebee v. Seyed Mohamed 68 NLR 36:

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that unless the power is exercised injustice will result."

His Lordship Priyantha Jayawardena P.C. J. in Lakshman Ravendra Watawala v. Chandana Karunathilake SC Appeal 31/2009 decided on 06.07.2018 observed that:

"it is evident that in appropriate instances, the Court has entertained Revision Applications when there was no right to appeal."

In Wijesiri Gunawardane (supra) his Lordship Aluwihare P.C. J. observed:

".....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.....

This is particularly because the revisionary jurisdiction, unlike the appellate jurisdiction, does not depend on a parallel statutory right. It is well established in our law that an appellant cannot prefer an appeal against an order, judgment or sentence unless there is a 'right' created by statute. As Justice Jameel stated in Martin v. Wijewardena (1989) 2 SLR 409, at page 419, "Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or to take advantage of the jurisdiction is governed by several statutory provisions in various legislative enactments." An appeal could only result pursuant to the intersection of a forum jurisdiction and right of appeal.

In contrast, the Revisionary Jurisdiction is a remedy which lies at the discretion of the court. It does not require a concomitant right in this regard. There only needs to be provision conferring the forum jurisdiction. Revision is a discretionary remedy; it is not available as of right."

When there is a right of appeal available, this Court must be cautious only to exercise its revisionary jurisdiction when there are "exceptional circumstances". These are circumstances that shock the conscience of the court. The very high threshold an applicant must satisfy itself evinces the fact that an applicant is not welcomed in this Court with open arms, as if the applicant is entitled as of right to file the revision application. Quite the contrast to when an applicant exercises a right to appeal, in which case there is no "exceptional circumstances" threshold to cross. In the absence of such circumstances, this Court cannot exercise its revisionary jurisdiction. This is because the existence of revision is not a statutory creation, unlike a right to appeal.

If revision applications are permitted when there is no right of appeal granted by statute, they must then logically be accepted when there is a right of appeal as well. This is because revision has no concomitant statutory right. This would result in a situation that would be interpreted by some to mean an opening of a floodgate of endless litigation. In Abeywardene v. Ajith de Silva (supra) his Lordship Ananda Coomaraswamy J. set out the position thus:

"If a litigant invokes the revisionary jurisdiction of the Court of Appeal, he has one chance for an appeal to the Supreme Court, whereas if he invokes the revisionary jurisdiction of the High Court he will have two chances of appeal, one to the Court of Appeal and then to the Supreme Court, except when the revisionary jurisdiction of the High Court is invoked in relation to an order of a Labour Tribunal, in which case there is only one appeal and that too to the Supreme Court only."

The supposed 'unfairness' that may be occasioned to a litigant (as observed by his Lordship Salam J.) who has opted to file a direct appeal in the Supreme Court (with no prospect of an appeal thereafter), in contrast to a litigant who opts to file a revision application (with a prospect of an appeal to the Supreme Court or a "second bite" of the cherry as his Lordship held), cannot disenfranchise a litigant who opts to do the same. This choice of procedure is created as a result of an absence of express exclusion of the revisionary jurisdiction of this Court. It is not for us to deprive a litigant of that choice that the Legislature has not expressly excluded. To do so, would be to blur the distinction between appeal and review to a vanishing point.

Thereby, this cannot amount to a usurpation of the exclusive jurisdiction conferred on the Supreme Court, as wiping out revisionary jurisdiction must be done so by express provision of law. As his Lordship Soza J. in Somawathie v. Madawela [1983] 2 SLR 15 at 29 stated, "Nothing less than an express removal of these powers would be required to achieve such a result".

Further, we are unable to agree with the reasoning of his Lordship Nawaz J. that revision exists only when the Provincial High Court exercises original jurisdiction. We are mindful that Article 138 as amended by the Thirteenth Amendment, includes errors committed by the High Court, in the exercise of its appellate or original jurisdiction. As the language is plain and clear and does not lead to absurdity, there is no other rule of interpretation but the literal rule that must be followed as, for example, espoused by his Lordship Priyantha Jayawardena P.C. J. in Lakshman Ravendra Watawala v. Chandana Karunathilake (supra).

The Constitution appears to confer further jurisdiction by including the words **"in the exercise of its appellate jurisdiction**" instead of only original jurisdiction. On that

basis, the Court of Appeal's revisionary jurisdiction is expanded to include revisionary jurisdiction when the Provincial High Court exercises civil appellate jurisdiction. The insertion of the words "**such High Court**" will include the Provincial High Court exercising its appellate or original jurisdiction, as mentioned in the earlier part of the Article, and not merely only an original jurisdiction.

Article 138 before and after the Amendment (without the proviso) are juxtaposed for the purpose of convenience:

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 any Court of First Instance, 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 Court of First Instance, tribunal or other institution may have taken cognizance.	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**, 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** tribunal or other institution may have taken cognizance. [emphasis added]

Thus, an expansion of this Court's revisionary jurisdiction, in the light of the creation of the Provincial High Courts with appellate and revisionary jurisdiction appears to be envisaged.

We are of the view that this Court can entertain a revision application when the Provincial High Court is exercising civil appellate jurisdiction, provided that exceptional circumstances have been made out. We adopt the reasoning of the Supreme Court in Wijesiri Gunawardane (supra):

"Thus, it is clear that the existence of right of appeal does not uniformly and blanketly result in undermining the revisionary jurisdiction. The right of appeal, is no doubt, a determining factor which the Court takes into account when considering a revisionary application. However, having recourse to an appeal does not ipso facto act as an ouster of the revisionary jurisdiction. On the contrary, it is the Court's prerogative to decide, at its discretion, to refuse a revisionary application where it appears that the existence of a parallel right of appeal does not give rise to an exceptional circumstance. Thus, where these jurisdictions are separate but complementary to each other, a negation or the express provision of right of appeal does not result in ousting the revisionary jurisdiction."

In Rasheed Ali v. Mohamed Ali [1981] 1 SLR 262 his Lordship Wanasundera J. opined:

"… the powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. ***When, however, the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstance****. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action,* ***except when non-interference will cause a denial of justice or irremediable harm****".* [emphasis added]

Availability of Restitution

The remedy of restitutio-in-integrum is an exceptional one conferred on this Court by virtue of Article 138 of the Constitution. Despite the creation of the High Court of the Provinces, it appears that the restitutionary jurisdiction of this Court remains exclusively within the 'province' or domain of the Court of Appeal. (Vide Sajith Dilhan v. Victor [2012] 2 SLR 286). A view recently affirmed by his Lordship Dr. Ruwan Fernando J. in CA RII 0003 – 2016 decided on 23.06.2020:

*"The Petitioner has not made any application to the High Court of Civil Appeal against the order made by the District Court refusing to entertain her application****. Even if she had failed to make any application to the High Court of Civil Appeal, it does not prevent her from coming before this Court by way of restitutio in integrum as this Court has sole and exclusive jurisdiction to entertain an application by way of restitutio in integrum in terms of Article 138 of the Constitution****."* [emphasis added]

The minority view in Ama Weeratunga v. OIC Talangama CA (PHC) APN No. 204/2006 decided 02.09.2014 is also pertinent. On appeal, the Supreme Court (in Wijesiri Gunawardane (supra)) reached the same conclusion as the minority view. Although the Supreme Court did not allude to the following observation made by his Lordship K.T. Chitrasiri J. in the minority judgment, the observation is relevant for the present purposes:

"However the Parliament has thought it fit not to grant the power to have and maintain the applications in the nature of restitutio in integrum to such High Courts exercising civil appellate powers though the very purpose of filing an application of restitutio in integrum also is to review decisions made by District Courts. The said power to entertain restitutio in integrum applications still remains with the Court of Appeal despite the power to review decisions by way of an appeal and a revision is given to another forum."

For this reason, the above judicial dicta espousing the view that this Court cannot entertain a restitution application in respect of judgments and orders of the High Court of the Province exercising civil appellate jurisdiction must be distinguished. There is no express legislative provision that confers parallel exercise of restitutio-in-integrum on the High Court of the Provinces. Although Section 5D (2) of the Act provides for the President of this Court, in consultation with the Chief Justice, to issue directions pertaining to appeals, applications in revision, and restiutio in integrum pending in the Court of Appeal to be removed for hearing to appropriate High Court, Section 5A has only conferred "appellate" and "revisionary" jurisdiction on the High Court of the Provinces.

In addition to this, the Constitutional Articles itself, especially Article 154P, has not conferred the power to exercise restitution, although it has enabled the exercise of revisionary jurisdiction.

The term "revisionary" cannot be taken to encompass restitution. Revision and restitution are distinct, just as an appeal is distinct from both revision and restitution. In Sri Lanka Insurance Corp v. Shanmugam [1995] 1 SLR 55, his Lordship Ranaraja J. held:

"The power of restitution differs from revisionary power of this court in that the latter is exercised where the legality or propriety of any order or proceedings of a lower court is questioned. Restitution reinstates a party to his original legal condition which he has been deprived of by the

operation of law. Thus, it follows, the remedy can be availed of only by one who is actually a party to the legal proceeding in respect of which restitution is desired."

An appeal, in contrast, to use the words of her Ladyship Shiranee Tilakawardane J. in Abeynayake v. Richard Pathirana [2003] 1 SLR 362, (albeit in relation to the distinction between appeal and judicial review):

"An appeal deals inter alia with the merits of the proceedings appealed against."

Thus, respectfully we are unable to agree with the dicta of his Lordship Samayawardhena J. in Rizleigh Bertram Grand v. Portia Kekulwala (Supra) and CA/RI/15/2018 (supra) in so far as it holds that this Court is deprived of exercising its restitutionary jurisdiction over judgments or orders of the High Court of the Provinces exercising appellate jurisdiction in respect of judgments and orders of the District Court.

A caveat that is worth reiterating is that found in the judgment of his Lordship Nawaz J. in Rajapakse Mudiyanselage Karunaratne v. Iluktenna Arachchilage Piyasena CA Case No. 02/2016 decided on 23.05.2017. That is when the Supreme Court has acted in its jurisdiction touching upon an issue and if a Petitioner seeks to revive and revisit that issue in this Court, this Court cannot usurp a jurisdiction which it does not have, in the guise of restitutio in integrum. This is because the Supreme Court is the highest and final superior Court of record.

We are of the view that when a High Court of the Provinces exercises appellate jurisdiction in respect of judgments, decrees, and orders delivered and made by any District Court or a Family Court within such Province, this Court continues to exercise its restitutionary jurisdiction, provided that the grounds for invoking the same have been made out to Court and that the Petitioner is not disentitled from claiming the relief.

The allegation that an interpretation such as this would result in a multiplicity of proceedings and thus contribute to the law's delays, as alluded to above, is not novel. It has been flatly rejected by the Supreme Court in Gunaratne v. Thambinayagam [1993] 2 SLR 355. Their Lordships of the Supreme Court observed: "If the multiplicity of litigation in this sphere is felt to be an anomaly, it is a matter for the legislature."

For those reasons, we overrule the objection.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL