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

In the matter of an appeal against the Order made on 27.10.2016 by the Saouthern Provincial High Court holden in Tangalle in High Court/revision Case No. 04/2015.

Officer in Charge,
Police Station,
Katuwana.

Complainant

Court of Appeal Case No:
CA (PHC) No: 138/2016

PHC of Southern Province holden in Tangalle Case No:
HCRA/04/2015

MC Walasmulla Case No:
24027

Vs.

1. Weerappulige Ashoka Weerasinghe,
   Indumina, Watthehena, Karametiya,
   Kirama.
   [1st Party]

2. Wijamunige Charlis
   Godalhena, Karametiya,
   Kirama.
   [2nd Party]

Parties

AND

Wijamunige Charlis
Godalhena, Karametiya,
Kirama.

2nd Party-Petitioner

Vs.

Weerappulige Ashoka Weerasinghe,
Indumina, Watthehena, Karametiya,
Kirama.

1st Party-Respondent

AND NOW BETWEEN

Wijamunige Charlis
Godalhena, Karametiya,
Kirama.
[Deceased]

2nd Party-Petitioner-Appellant

1. Ilandarige Yasawathie,
   Godalhena, Karametiya,
   Kirama.

2. Gaman Kithsiri Kulasinghe,
   No. 205/8/H/3, Galabada Isuru Mawatha,
   Rathna Mawatha, Dulanmahara,
   Piliyandala.

3. Sandhaya Kumudini Kulasinghe,
   No. 85, Cemetery Road, Depanama,
   Pannipitiya.

4. Selton Rathnasiri Kulasinghe,
   No.174/1/A/9, School Lane,
   Ekamuthu Mawatha, Halpita,
   Polgasowita.

5. Anura Pathmasiri Kulasinghe,
   Godalhena, Karametiya,
   Kirama.

6. Dilshi Chathurani Kulasinghe,
   "Sithumini", Temple Road,
   Walasmulla.

7. Rasika Darshani Kulasinghe,
   No. 95/2/D, Court Road,
   Homagama.

8. Sandhaya Rohini Kulasinghe,
   No. 23/1, Uda Peekwella Road,
   Matara.

Substituted 2nd Party-Petitioner-Appellants

Vs.

Weerappulige Ashoka Weerasinghe,
Indumina, Watthehena, Karametiya,
Kirama.

1st Party-Respondent-Respondent

Before:	**Prasantha De Silva, J.** **K.K.A.V. Swarnadhipathi, J.**
Counsel:	Heshali Pieris AAL instructed by Hashan Gunaratne AAL for the 2nd Petitioner-Appellant. Rasika Dissanayake AAL with Himal Hewage AAL for the 1st Party-Respondent-Respondent.
Written Submissions: filed on	Written submissions filed on 23.03.2021 by the 2nd Party-Petitioner-Appellant. Written submissions filed on 23.03.2021 and 21.02.2022 by the1st Party-Respondent-Respondent.
Delivered on:	08.08.2023

Prasantha De Silva, J.

Judgment

The Officer-in-Charge of the Police Station-Katuwana, being the Complainant, had filed an information in terms of Section 66 of the Primary Courts' Procedure Act in case bearing No. 24027 in the Magistrate's Court of Walasmulla against the 1st Party-Respondent-Respondent and the 2nd Party-Petitioner-Appellant.

The learned Magistrate following the procedure stipulated under section 66 of the said Act allowed Parties to file affidavits, counter affidavits and written submissions. After the conclusion of the proceedings the learned Magistrate held in favour of the 1st Party-Respondent-Respondent [hereinafter sometimes referred to as the 1st Respondent] and had held that the 1st Respondent is entitled to possession of the disputed land by order dated 21.01.2013.

Being aggrieved by the said order, the 2nd Party-Petitioner-Appellant [herein after sometimes referred to as the Appellant] had invoked the revisionary jurisdiction of the Provincial High Court of Tangalle in case bearing No. 03/2013, seeking to revise or set aside the said order.

Apparently, the learned High Court Judge by his order dated 31.7.2014 sent the case back to the Magistrate's Court of Walasmulla to re-hear the matter and to make an appropriate order by taking into consideration all the evidence and documentation produced by either party.

Upon the matter being sent back to the Magistrate's Court of Walasmulla, the learned Magistrate who acted as the Primary Court Judge after taking into consideration all the evidence placed before him, delivered the order dated 20.02.2015 in favour of the 1st Respondent, on the premise that the 1st Respondent was in possession of the disputed land two months prior to the date of filing of the information in terms of Section 68 (1) of the Primary Courts' Procedure Act.

Being dissatisfied with the said order, the Appellant had preferred a revision application bearing No. HCRA/04/2015 to the Provincial High Court of Southern Province holden in Tangalle, seeking to revise or set aside the said order dated 20.02.2015.

Consequently, the learned High Court Judge of Tangalle after hearing both parties, affirmed the order dated 20.02.2015, by the learned Magistrate of Walasmulla and dismissed the said revision application by order dated 27.10.2016 with costs fixed at Rs. 10,500/-.

Against the said order dated 27.10.2016 of the Provincial High Court of Tangalle, the Appellant has preferred this appeal to the Court of Appeal.

This is an appeal preferred against an order of the Provincial High Court exercising revisionary jurisdiction. Since no appeal is provided in terms of section 74(2) of the Primary Court Procedure Act against the order of the learned Magistrate, the court of Appeal is empowered to evaluate the correctness of the exercising of revisionary jurisdiction by the Provincial high Court and it is not the task before the Court of Appeal to consider an appeal against an order made under and in terms of section 66 of the Primary Court Procedure Act.

It was emphasized by *Ranjith Silva J.* in the case of ***Nandawathi and another Vs. Mahindasena [(2009) 2 SLR 218]***,

> *"I am of the opinion that this particular right of appeal in the circumstances should not be taken as an appeal in the true sense, but in fact as an application to examine the correctness, legality or the propriety of the Order made by the High Court Judge in the exercise of revisionary powers. The Court of Appeal should not under the guise of an appeal attempt to re-hear or re-evaluate the evidence led in the main case".*

In the instant case, the Respondent had raised a preliminary objection in the Provincial High Court on the basis that Rule 3 of the Court of Appeal has not been complied with. Subsequently, the Petitioner had produced such documents together with Petitioner's counter objections.

However, the learned Provincial High Court Judge held that the Appellant had failed to comply with Rule 3(1) of the Court of Appeal rules.

Accordingly, to Rule 3(1) states as follows,

> 3. (1)(a) Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way

of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified-copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application.

(b) Every application by way of revision or restitutio in integrum under Article 138 of the constitution shall be made in like manner together with copies of the relevant proceedings (including pleadings and documents produced), in the Court of First Instance, tribunal or other institution to which such application relates.

In the case of ***Urban Development Authority V Ceylon Entertainments Limited And Others [2004] 1 SLR 95*** *at page 96* it was noted the Appellants application to the Court of Appeal was dismissed on the following grounds,

(1) failure to set out exceptional circumstances which attracted revision; and

(2) failure to annex to his application originals or certified copies of documents relied upon by the appellant.

In the above case Supreme Court further held that,

"(1) The appellant failed to file in the Court of Appeal duly certified copies of material documents as required by Rules 3(b) read with Rule 3(a) of the Supreme Court Rules.

(2) It is settled law that Rule 3 of the Supreme Court Rules must be adhered to.

(3) In view of the above finding it is not necessary to consider the question whether it is necessary to plead specifically special circumstances which warrant the exercise of revisionary jurisdiction of the Court of Appeal."

The learned Provincial High Court Judge had observed that the Appellant has failed to tender documents 1අ1 – 1අ11 and 2අ1 and 2අ24, along with the Petition. Petitioner had also not sought permission of court to tender those documents subsequently. Therefore, the learned High Court Judge had dismissed the revision application of the Appellant on the ground that the Appellant had failed to comply with Rule 3(1) of the Court of Appeal Rules.

It is the opinion of this court that the Learned Provincial High Court judge has acted within his jurisdiction in entertaining the preliminary objection filed by the Respondent against the revision application of the Appellant against the violation of Rule 3(1) of The Court Of Appeal (Appellate Procedure) Rules 1990.

The Judges have limited discretion in allowing certain procedural errors made by the litigants and Attorneys-at-law alike to be rectified such limited discretion is allowed in order to allow for manifest injustice to be prevented from a bona fide error being made by a Party, not to address the negligence of an attorney-at-law who come before court.

The importance of following procedural law was evident from the pertinent observations made by his lordship Dr. A.R.B. Amerasinghe J. in ***Fernando v. Sybil Fernando and others (1997) 3 Sri L.R. 1***

> *"There is the substantive law and there is the procedural law. Procedural law is not secondary: The maxim ubi ius ibi remedium reflects the complementary character of civil procedure law. The two branches are also interdependent. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives it remedy and effectiveness and brings it into action."*
>
> *[…]*
>
> *"Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly. On the contrary, as the indispensable vehicle for the appointment of justice, civil procedural law has a protective character. In its protective character, civil procedural law represents the orderly, regular and public functioning of the legal machinery and the operation of the due process of law. In this sense the protective character of procedural law has the effect of safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation except in accordance with the accepted rules of procedure."*

It has been established by our common law that the Supreme Court Rules are binding in a similar manner to that of our statutory law. Thus, the above observations regarding the binding nature of the procedural laws by Dr. A.R.B. Amerasinghe J. apply with equal merit to the Supreme Court Rules.

In the instant case, the Appellant had admitted that the failure to file the documents was due to a negligence of the registered attorney of the Appellant. The discretion of the court does not generally exist to cater to the negligence of the Parties. There maybe instances in which the court may allow parties to rectify bona fide errors made in filing a Petition and documents with prior permission being obtained from the court. However, the present case does not fall within the ambit of such discretion.

Furthermore, the learned Provincial High Court Judge had briefly considered the evidence placed before the learned Magistrate and had come to the conclusion that the learned Magistrate

had properly analysed and evaluated the evidence available and had come to a correct finding of fact and law and held with the 1st Respondent.

The learned Provincial High Court Judge held that the Appellant had failed expressly aver the existence of exceptional circumstances in the Petition for the revision application which shocked the conscience of court to exercise revisionary jurisdiction of the Provincial High Court.

It is trite law that existence of exceptional circumstance is a pre-condition for the exercise of revisionary powers of the court. In the instant case, Appellant had not specifically pleaded or established exceptional circumstances warranting the exercise of revisionary powers of the Provincial High Court, nor has the Appellant alleged the existence of exceptional circumstance in the Petition of Appeal filed before this court, as Petition of Appeal has only addressed the first ground for the dismissal of the case by the learned Provincial High Court Judge which was based on the preliminary objection and not the second ground, which was the fact that Appellant has failed to expressly set out the existence of exceptional circumstances for revisionary jurisdiction to be invoked in the Petition for the revision application.

The learned Provincial High Court Judge has noted the following in his judgement,

> *"එසේම මේ අවස්ථාවේදි පෙත්සම්කරු විසින් ඉදිරිපත් කර ඇති පෙත්සමෙහි 09 වන ඡේදයේ සඳහන් කර ඇති කරුණු කිසිවක් එකි 2015.02.20 වන දින දරණ උගත් ප්‍රාථමික අධිකරණ විනිසුරුතුමාගේ නියෝගය ප්‍රතිශෝධනය කිරීමට තරම් සුවිශේෂී කරුණු වශයෙන් සැලකීමට නොහැකි බවද සටහන් කරමි. එකී 09 වන ඡේදයේ සඳහන්ව ඇත්තේ* <u>***පහත දක්වනු ලබන තත්ත්වය සහ සිද්ධිමය කරුණු මෙම ප්‍රතිශෝධන ඉල්ලීම සඳහා පදනම් කර ගනී.***</u> *යනුවෙනි. එහි "සුවිශේෂී කරුණු" යන වචනය සඳහන්ව නැත. පහල අධිකරණයකින් දෙනු ලබන නියෝගයක් ප්‍රතිශෝධන කිරීම සළකා බැලිය යුත්තේ* <u>*සුවිශේෂී කරුණු ඉදිරිපත් කර ඇත්තේ නම් පමණි.*</u>*"*

As such, notwithstanding the preliminary objection, the Appellant has not expressly averred the existence of exceptional circumstances which shock the conscience of the court in the Petition filed before the Provincial High Court.

In ***Urban Development Authority Vs. Ceylon Entertainments Ltd. CA 1319/2001*** [CAM 05.04.2002] *Nanayakkara J.* held with *Udalagama J.* agreeing,

> "That presence of exceptional circumstances by itself would not be sufficient if there is no express pleading to the effect in the petition whenever an application is made invoking, the revisionary jurisdiction of the Court of Appeal".

Similarly, in ***Siripala Vs. Lanerolle [2012] 1 SLR 105***, *Sisira de Abrew J.* held that,

> "Even though the Petitioner attempts to justify the recourse to revision in his written submissions, it is well settled law that existence of such exceptional circumstances

should be amply and clearly demonstrated in the petition itself….in the instant application, the Petitioner has neither disclosed nor expressly pleaded exceptional circumstances that warrant intervention by way of revision."

It the considered opinion of this court that for exceptional circumstances to exist, it would require the Parties to establish a perversity in findings by the learned Magistrate that goes beyond a mere conclusion reached on the evidence or to establish a lack of jurisdiction by the Court. In this case, Appellant has alleged neither. Moreover, in this case, it seems to me that the Appellant had failed to state that the exceptional circumstances exist in the Petition submitted to the Provincial High Court for the revision application and had failed to set out the existence of such exceptional circumstances in the Petition of Appeal filed before this Court.

In view of the above, as the Petitioner is in violation of Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules and as the Petitioner has failed to expressly set out the existence of exceptional circumstances to invoke the revisionary jurisdiction of the Provincial High Court, we see no reason to interfere with the judgement of the learned Provincial High Court of Southern Province holden in Tangalle dated 27.10.2016. Thus, the judgement of the Learned Provincial High Court Judge is upheld.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.A.V.Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL