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

In the matter of an Application for Revision and Restitutio in Integrum in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

National Savings Bank,
No. 255, Galle Road,
Colombo 03

C.A. RII/21/2022

PETITIONER

CHC/83/2021/CO

1. **HNB FINANCE PLC**
   having its registered office at No. 168, Nawala Road, Nugegoda.

PETITIONER- RESPONDENT

2. **Entrust Securities PLC**
   The Company Sought to be wound up
   431/A2, E.W. Perera Mawatha
   Pitakotte

THE COMPANY WOUND UP-RESPONDENT

3. **Mercantile Investments and Finance PLC**
   236, Galle Road, Colombo 03

4. **E.R. Gnanam**
   No. 31, Collinwood Place,
   Colombo 06.

5. **C.N.S. Mendis**
   No. 7B, Bagattale Road,

Colombo 03.

6. <u>Monetary Board of Central Bank of Sri Lanka</u>

Central Bank of Sri Lanka
No.30, Janadhipathi Mawatha
Colombo 1

<u>RESPONDENTS</u>

Before: Hon. Justice D. N. Samarakoon

Hon. Justice Mayadunne Corea

Counsel: Eraj de Silva with S. Janagan instructed by Kanchana Marasinghe for the petitioner

Indumini Bandaranayake instructed by Malin Rajapakshe for the petitioner respondent

Nishan Prematiratne with Nadun Wijrsiriwardane instructed by Julius and Creasy for the 04th respondent

M. Jayasinghe, D. S. G., for the 06th respondent

Written Submissions on: 29.03.2023 by the petitioner

29.03.2023 by 04th respondent

Date: 01.09.2023

D. N. Samarakoon J.

Order

The 04th respondent (*although the Journal Entry of 27.01.2023 says 04th and 05th respondents*) (*E. R. Gnanam*) has moved to dismiss the application of the

petitioner (*National Savings Bank*) and or to dissolve the interim order (*as per paragraph d(ii) of the prayer, "that the petitioner has the right to be heard in these winding up proceedings*) by filing a motion on 20.01.2023, which was supported on 27.01.2023.

The learned counsel for the 04th respondent and for the petitioner were extensively heard and both parties have filed written submissions.

The 03rd respondent (*Mercantile Investments and Finance PLC*) and the 06th respondent, (*Monetary Board of the Central Bank of Sri Lanka*) have informed on that date itself that they do not file objections to petitioner's application.

The grievance of the petitioner, whose position is that in the national interest it stepped into manage **Entrust Securities PLC**, is that, the learned Judge of the Commercial High Court by order dated 20.09.2022 in case No. CHC/83/2021/CO prevented it from appearing.

The said part of the order reads,

> "Winding up order has been made on this case on 17th June 2022. Therefore, now Liquidator has to be appointed and the learned counsel has no status quo to appear for the company sought to be wound up. Therefore date for objections is granted regarding two applications made by Dr. Harsha Cabral and the other application made by the petitioner [*petitioner in that case is HNB Finance*] No status quo to appear learned counsel Mr. Eraj de Silva for the company sought to be wound up, as the winding up order has been already made".

It was on the above order that this court issued notice and the above interim order.

The 04th respondent wants to dismiss the notice [*this application*] and or dissolve the interim order mainly on the following basis,

(01) As per the proxy, NSB does not appear qua NSB but as "managerial agent" of Entrust Securities PLC (*formerly Ceylinco Sri Ram Securities Ltd.*,)

(02) As a Liquidator has been appointed NSB has no status to appear

(03) The Liquidator is in charge of the company sought to be wound up

(04) Hence if NSB too is allowed to appear there will be two managerial bodies, which is not envisaged in law

In this regard the 04th respondent basically cites two cases. They are,

(i) Okanda Finance Pvt Ltd., vs. The Commissioner General of Inland Revenue and others C. A. Writ 93/2008 and

(ii) Re Union Accident Insurance Co. Ltd., (1972) 1 All E R 1105

According to the written submissions of the 04th respondent, what was decided in (*and relevant to this case*) in the first case decided by Chithrasiri J., is as follows,

> "It is important to note that the business of a company comes to a standstill when a winding up order is made. Board of Directors of such a company then ceases to function. Then the liquidators take over the management and the control of the company. Basically their duty is to distribute the assets of the company. Such a distribution of assets are to be made according to law and it should take place in the manner stipulated in law. As such, a company under liquidation cannot perform or act on its own. In this instance, application by the liquidators to intervene into this case has also been refused. Therefore, it is clear that the petitioner company in this instance is not entitled in law to proceed with this action in view of Section 279 (1) of the Company Act No.7 of 2007. Moreover, Section 290 of the Companies Act also stipulates that the liquidator or the provisional liquidator shall take into his control, of the property and things in action, to which the company is entitled to when a winding up order has been made. Furthermore, under Section 292 (1) of the Companies Act

the liquidator in a winding up by the Court shall have the power to bring or to defend any action or other legal proceedings in the name and/or on behalf of the company. Those two provisions in the Companies Act also show that the liquidators are the persons in authority to take over the control of all matters on behalf of a company under liquidation and therefore the company cannot proceed with an action under its registered name. In the circumstances, it is clear that the law does not allow the petitioner company to proceed with this action". [paragraph 22 of written submissions]

The above passage does not say anything with regard to an appearance in a case or a right to be heard, which is the main and perhaps the only grievance of NSB.

The 04th respondent has not quoted any part of the English case. But what was basically decided in that case was,

> "A provisional liquidator cannot be appointed on a baseless petition. There are two conditions to be met. The first was that the petition must disclose a prima facie case, the second was that there were circumstances that require that a provisional liquidator ought to be appointed. The circumstances were not limited. The fact that the petition was not opposed was one of them. In this case, a prima facie case was established because it was shown that the company could not meet the level of solvency required of insurance companies by statute. The circumstances here required that a provisional liquidator ought to be appointed, and it was in the interest of the public in the fact that sums retained by brokers amounting to a large sum of andpound;300,000 be collected from them. A provisional liquidator was correctly appointed.
>
> It is inappropriate to limit the exercise of the power to appoint a provisional liquidator by restricting it to fixed categories or classes of circumstances or fact, as commercial affairs are complex and circumstances will vary

greatly.

Nevertheless, before a winding up order is made, a company's Board of directors retained certain residuary powers which included the authority to instruct solicitors and counsels to oppose the petition, notwithstanding the appointment of provisional liquidators to the company.

Plowman J explained the twofold approach that he proposed to adopt: 'There are two matters though, which seem to be relevant for me to consider. The first is whether the department has made out a good prima facie case for a winding-up on the hearing of the petition. Any views I express about the matter now are of course provisional only because I am not trying the petition at the present time. If the department has not made out a good prima facie case for a winding-up order then clearly I think it would not be right to appoint a provisional liquidator. On the other hand, if the department has made out a good prima facie case for a winding-up order then the second matter for my consideration arises, namely, whether in the circumstances of this case it is right that a provisional liquidator should have been appointed.'

With respect, it does not cover the situation at hand, the four main propositions of the 04th respondent.

Another argument of the 04th respondent is that NSB wants a right to be heard on what?

This court does not think that this is a sound argument.

It was said in the case of *Cooper v Wandsworth Board of Works (1863) 14 CB(NS) 180,* as far back as 1863, that,

- **"**"I apprehend that a tribunal which is by law invested to affect the property of one of Her Majesty's subjects, is bound to give such subject an

opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice." [190]

- "I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, by way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them that they should hear the party before they inflict upon him such a heavy loss." [189]

A party cannot predict beforehand as to what will be the need or the advantage of that party being represented in court.

As it was said above, the authorities relied upon by the 04th respondent do not show that a party who has been in the capacity of "managerial agent" cannot appear in the court which ordered liquidation or before the Liquidator.

It has been argued that restitutio in integrum is only available to a party. Whether NSB is a party, because there could be degrees in involvement as a party, is a question for mature considerations.

The petitioner is attempting to invoke not only restitutio but also revision.

A large number of authorities have been cited to say as to why revision is not available, from the requirement to have exceptional circumstances onwards.

Paragraph 64 of the written submissions rely heavily upon *Siripala vs. Lanerolle and another, 2012 (1) SLR Part 04*. This will be referred to later.

Interestingly, the 04th respondent refer to **CA/RII/0006/2022, Aussie Oats Milling (Private) Limited vs. Future Consumer Limited** to say,

> "Although revisionary jurisdiction shares characteristics with the appellate jurisdiction, they are not one and the same" (at page 26) [Emphasis in the written submissions of the 04th respondent]

This is an order written by me on 31.03.2022. In that case I have relied upon **SC Appeal No. 111/2015 with 113/2015 and 114/2015** decided by Justice Aluvihare to substantiate the availability of revision.

My reasoning on that case was based on Article 138(1) of the Constitution, which 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".

Although the reasoning in **Aussie Oates** case mainly addressed the phrase "or of any law" in the above article, as the quotations extensively used from the above Supreme Court case decided by Justice Aluvihare tends to answer many a question on the availability of revision, they are again quoted as follows,

> "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[1]. 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 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,

[1] expressio unius est exclusio alterius.

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".*

This Court further added, in **Aussie Oates case**, also quoting from the same case of the Supreme Court,

> *"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".

This court, in **Aussie Oates case**, was mindful of a cautionary remark added by the Supreme Court too. It was said,

"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".

In SIRIPALA V. LANEROLLE AND ANOTHER, 2012 too, relied upon for the 04th respondent, it was said,

"Failure to avail himself of the alternative remedy of appeal would not necessarily be a bar to invoking the revisionary powers provided there are exceptional circumstances".

The present section 753 of the Civil Procedure Code, which was inserted by Amendment Act No. 79 of 1988, section 49, is as follows,

"The Court of Appeal may, of its own motion or on any application made, call for an examine the record of any case, whether already tried or pending

trial, in any Court, tribunal or other institution for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such Court, tribunal or other institution and may upon revision of the case brought before it **pass any judgment or make any order thereon, as the interests of justice may require**".

In **Fernando vs. Ceylon Breweries Ltd., 1998, 03, SLR 61**, Justice U. De Z. Gunewardane in the Court of Appeal compared the old section 753 of the Civil Procedure Code with the present one **introduced by Act No. 79 of 1988** and said,

" 'The essence of the difference between the two forms of section 753 ie in its original and amended form is this: as the said section stood originally, the Court of Appeal or the Supreme Court in the exercise of its revisionary powers could have only made the same order which it might have made had the case been brought before it by way of an appeal **whereas in the amended form the section empowers** the Court of Appeal, in the exercise of its powers of revision, **to make any order as the interests of justice may require'.** Pages 64,65

His Lordship concluded,

'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'. Page 65

Though the decision in The Ceylon Brewery Limited vs. Jax Fernando, Proprietor, Maradana Wine Stores, 2001 decided in the Supreme Court by Mark Fernando J., overruled the above decision of U. de Z. Gunewardane J., it was done only in respect of the decision in the latter that an application made under section 86(2) of Civil Procedure Code can be allowed even if that was made one day after the stipulated time of 14 days. The Supreme Court said, " I therefore set aside the judgment of the Court of Appeal on that point". **The decision pertaining to wider powers given by amended section 753, the ability of the court to make a justifiable order in revision and hence revision not being only an additional remedy granted on mere discretion was hence not set aside**.

Having considered the dictum of Abrahams, CJ in Ameen v. Rasheed, that ' I can see no reason why the petitioner should expect us to exercise our revisional powers in his favour when he might have appealed and I would allow the preliminary objection and dismiss the application with costs ', His Lordship Gunewardane J., further observed,

'But the validity of the above reason for denying the relief in revision can no longer be accepted with favour inasmuch as the Court of Appeal in consequence of the amendment of section 753 by Act No. 79 of 1988 is now clothed with greater amplitude of power in making orders and is not confined, as formerly, ie before the aforesaid amendment, to making the same order which it might have made had the matter been brought before it by way of appeal. Since, prior to the amendment of section 753 the court could whilst acting in revision only make the same order as it could have

made in the exercise of its appellate jurisdiction - the right of appeal and right in revision were justifiably treated as more or less, alternative remedies - available, more or less, in such a way that when one was accepted or made available the other had to be rejected or refused. When, as was the case prior to the amendment of section 753 of the Civil Procedure Code, the reliefs available or the orders that could be made by the court, by way of appeal and revision, were conterminous or the same - it could legitimately and even logically be inquired or queried, as had been done by His Lordship, Abrahams, CJ, in the excerpt of the judgment cited above, as to why the revisionary process, which may be described as a privileged procedure, was invoked in preference to that of appeal, several advantages or benefits being attendant on the revisionary process which would not be available to one who seeks relief by way of an appeal (for instance one need not furnish security or keep to certain prescribed time-limits as in the case when one appeals against an order) - the recourse to revision was treated as an extraordinary procedure in contradistinction to the procedure of appeal which was considered to be the normal remedy, when the order in question was appealable - as is the order in this case before me'. Page 66

There might be an argument that section 753 is in the Civil Procedure Code, whereas, the matter at hand is under the Companies Act No. 07 of 2007.

But, section 753 deals with the revisionary jurisdiction of the Court of Appeal, which is this Court and section 753, which was reproduced above, was considered by U. de Z. Gunewardane J., in relation to the powers of this court and not in relation to a matter under the Civil Procedure Code.

In any event, whether exceptional circumstances are a must and if so are they present is a matter for mature consideration.

The 04th respondent has submitted that the 04th respondent is not an interloper. That is exactly why he has been added a party respondent.

It is submitted in paragraph 90 of the written submissions of the 04th respondent, that,

> "…if NSB is allowed to continue as a party in the said legal proceedings, it would constitute a major interference with the activities of the liquidator of Entrust Securities PLC and such would seriously jeopardize and endanger E. R. Gnanam's chances of recovering her funds".

However, as per the written submissions of the petitioner the petitioner was appointed as the Central Bank noticed that there had been some dubious transactions and there are question marks whether actually the money came in by some purported creditors, which are matters to be investigated.

Neither the Monetary Board of the Central Bank, nor the other purported creditors, or HNB Finance PLC, the petitioner in the winding up case have objected to the NSB being heard.

The petitioner has further submitted that there is no clear demarcation as to who is not a party to winding up proceedings. As said already the 04th respondent's purported authorities too do not show that a person who has been in the capacity of a "managerial agent" is prevented from being heard.

It is also submitted that NSB is an interested and vital party which has much information to share both with the court and the Liquidator and it must not be shut out.

The petitioner also cites, at paragraph 22 of the written submissions, the case of Budhdadasa Kaluarachchi vs. Nilamani Wijewickrema and another [1990] 1 SLR 262, at 268, that,

> "The trend of recent decisions is that the Court of Appeal has the power to act in revision eventhough the procedure by way of appeal is available in appropriate cases".

In the circumstances, this Court overrules the preliminary and other objections raised for the 04th respondent by way of the above motion dated 20.01.2023 and this court extends the interim order granted in this case to be in force until the final determination of the case.

The 04th respondent is at liberty to file comprehensive objections.

Finally as said in "Re Union Accident Insurance Co. Ltd., (1972) 1 All E R 1105" by Plowman J.,

> "Any views I express about the matter now are of course provisional only because I am not trying the petition at the present time",

is applicable to what is said above in regard to the right of the petitioner to be heard in the High Court and in Liquidation proceedings, as that matter was not fully decided.

Judge of the Court of Appeal

Hon. Mayadunne Corea, J.

I agree.

Judge of the Court of Appeal