IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

CA(PHC)APN 54/2013 (REV)

High Court Civil- Sabaragamuwa.SP/HCCA/RAT/124/09(FA)

D.C. Ratnapura-3351/P

G.K.D. Stephan Gunaratne
Kirindigala, Balangoda.

Plaintiff-Respondent-
Petitioner.

Vs.

5A. Maddumage Thushara Indika Sampath, No.344, Kirindigala, Balangoda.

6. A.V. Hemachandra, No. 320/14, Kirindigala, Balangoda.

8. Rupasinghe Dhanawathie, No.350, Kirindigala, Balangoda.

5A. 6th and 8th Defendant-Appellat-Respondent.

1. B.M. Heenmanike
(deceased) Kirindigala,
Balangoda.

1A.B.M.Hurathlhamy,
Kirindigala, Balangoda.

And 5 others.
Defendant-Respondent-
Respondent.

Before : A.W.A. Salam, J & Sunil Rajapakshe, J.
Counsel : Lal Matarage for the Plaintiff-Respondent-Petitioner and Rohan Sahabandu PC with S. Kumarawadu for the 5A, 6, 8 Defendant-Appellant-Respondents.
Argued on : 29.07.2013
Written submissions tendered on: 09.09.2013
Decided on: 23.09.2013

A.W.A. Salam, J.

This is an application to revise the judgment of the High Court of Sabaragamuwa Province holden at Ratnapura delivered in the exercise of appellate jurisdiction.

When the application was taken up initially for support the learned President's Counsel appearing for the 5A, 6, 8 defendant-appellant-respondents (who are for sake of convenience referred to in this judgment later as the

"respondents") opposed the revision application being entertained, on a fundamental jurisdictional issue. Maintainability of the application, thus revolved around the elementary question as to whether this Court is vested with jurisdiction to hear and determine the same. This judgment pertains to the said preliminary objection.

The background to the revision application needs to be put it in a nutshell emphasizing the endeavour of the plaintiff-respondent-petitioner (who is referred to in the rest of this judgment for purpose of convenience as the "petitioner") to invoke the revisionary jurisdiction of this Court to revise a judgment pronounced by the High Court in the exercise of its appellate jurisdiction in respect of a civil matter, which to my knowledge is probably the first application filed in this Court, ever since the enactment of No 54 of 2006.

The chronological order in which the events relevant to this application, took place are required to be set out at this stage. The petitioner instituted a partition action in the District Court seeking the cessation of co-ownership of the corpus. The partition action culminated in favour of the plaintiff and the corpus was directed to be partitioned among the co-owners as prayed for in the plaint. Consequently, the claim made by 5A, 6 and 8 defendant-respondents was rejected.

Aggrieved by the judgment and interlocutory decree the respondents duly preferred an appeal, in the exercise of their unfettered statutory right, to the civil appellate High Court of Sabaragamuwa Province. The civil appellate High Court in the

exercise of its appellate jurisdiction set aside the judgment of the learned District judge.

In terms of Section 5(c)(1) of Act No 54 of 2006, a direct appeal lies to the Supreme Court from the a judgment delivered in appeal by the High Court, with the leave of the Supreme Court first had and obtained.

It is somewhat important at this stage to bear in mind the criteria applicable in the grant of such leave, under Section 5A (supra). Invariably, the grant of leave depends on the (i) involvement of the substantial question of Law arising from the appeal OR (2) Whether the matter is fit for **REVIEW** by the Supreme Court. (Emphasis added)

It is common ground that the petitioner has not availed of such right of appeal. Instead, he has now filed the present application purportedly under Article 138 of the Constitution read with Section 11 (1) of Act No 19 of 1980.

The petitioner has attempted to invoke the revisionary jurisdiction of this Court vested in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka based on the premise that the revisionary jurisdiction so vested is a distinct, independent and exclusive power. Article 138 of the Constitution as amended provides as follows...

> (1) 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 of First Instance, tribunal or other institution may have taken cognizance ;

(2) The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain.

The Counsel for the petitioner maintains that the powers of this Court are quite independent of the appallate jurisdiction and the wide power of revision conferred on this Court by the Constitution, cannot simply be taken away by mere assumption. However, it must be understood that on a reading of Article 138 the revisionary powers vested in the High Court although appear to be wide in its scope, such powers have be construed and exercised **subject to the Provisions of the Constitution or of any law**. (Emphasis added)

The jurisdiction to hear appeals is vested in the High Court by the High Court of Provinces (Special Provisions) Act No.19 of 1990, as amended by Act No.54 of 2006. Section 5(a) provides that a High Court established by Article 154(P) of the Constitution for a Province shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or 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 may be.

Act No 54 of 2006 gave appellate and revisionary jurisdiction in respect of the judgments of the District and Family Courts within a Province, to the respective High Court. Section 5A (2) provides that written law applicable to the exercise of jurisdiction by the Court of Appeal shall be read and construed as including a reference to a High Court and laid down that an appeal from an order of the District Court would be challenged in the High Court.

The pivotal question that arises for consideration in this application is whether the Court of Appeal can act in revision when the judgment has been pronounced by a High Court in terms of the Provisions contained in Act No 54 of 2006, when the proper remedy is to prefer a direct appeal to the Supreme Court.

It may serve some useful purpose to look back at the nature of the right of appeal and the procedure that prevailed prior to the creation of the present Court of Appeal by the 1978 Constitution. Prior to 1978, an appeal from a District Court had to be preferred to the Supreme Court. The Court of appeal as is presently constituted being the creation of the 1978 Constitution was conferred with exclusive civil appellate jurisdiction with a special right of appeal to the Supreme Court, at the instance of an aggrieved party, subject to the leave of the Court of appeal or the Supreme Court first had and obtained.

Article 127 of the Constitution, *inter alia* provides for entertainment of appeals and the manner in which they would be disposed of by the Supreme Court. According to article 127, subject to the Constitution, the Supreme Court shall be the final Court of civil appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance. The Supreme Court shall also in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgment, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court.

Article 136 (1) of the Constitution empowers the Supreme Court to frame Rules regulating the practice and procedure of the Court of Appeal including the procedure for the hearing of such appeals. By virtue of the Rule making powers vested in it, the Supreme Court Rules of 1990 were promulgated providing *inter alia* as to the mode of preferring an appeal to the Supreme Court. Accordingly, an appeal to the Supreme Court has to be preferred with the prior leave obtained, within a period of 42 days. When this Rule was originally promulgated the appeals from the District Court were preferred to the Court of Appeal.

After Act No 54 of 2006 was passed by the Legislature as an amendment to Act No 19 of 1990 and Section 5A of the Act gave both appellate and **revisionary** jurisdiction in respect of judgments of the District Court within a Province to the respective High Court. Section 5A (2) of that Act provides that

the written law applicable to the exercise of jurisdiction by the Court of Appeal shall be read as including a reference to a High Court which Provision of the Law now enables that an appeal from an order of the District Court be made to the Provincial High Court. Section 5 D of the Act No 54 of 2006 provides that where an appeal from the District Court is filed in the Court of Appeal, such appeal shall be transferred to the appropriate High Court.

The question that now arises for consideration is whether the Court of Appeal can exercise its revisionary powers under Article 138 of the Constitution in respect of a judgment of the High Court pronounced under the Provisions of Act No 54 of 2006 when the proper remedy is to appeal to the Supreme Court.

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.

The learned President's Counsel has cited the judgment in the case of Senanayaka Vs Koehn 2002 3 SLR 381. The judgment in that case concerned the powers of the Court of Appeal to revise an impugned judgment of the High Court of the Western Province holden at Colombo (Commercial High Court) which exercised civil jurisdiction, conferred on it by the Provisions of the High Court of the Provinces (Special Provisions) (Amendment) Act No 10 of 1996.

In terms of Section 5 of Act No. 10 of 1996 an appeal from an order or judgment of the Commercial High Court shall be made to the Supreme Court. The Court of Appeal has no appellate jurisdiction in respect of orders or judgments of the Commercial High Court. However, the petitioner sought to invoke the revisionary jurisdiction of this Court without exercising the right of appeal to the Supreme Court. The question that was considered in that revision application by this Court was the extent to which this Court has revisionary powers in respect of a judgment of the Commercial High Court.

Quite significantly, the Court of Appeal considered the question as to whether the revisionary jurisdiction vested in that Court can be exercised where the law states that the appellate powers in respect of orders and judgments of the Commercial High Court are with the Supreme Court. In this context, I am of the opinion that by enacting Section 5 of the High Court of the Provinces (Amendment) Act, No. 10 of 1996,

the intention of the Legislature was to allow only one chance of appeal against an order or a judgment of the Commercial High Court.

As has been held in that case scheme of appeal against the order of the Commercial High Court being the same as in the case of an order pronounced by the High Court exercising civil appellate jurisdiction, to allow a revision application to be maintained against the judgment of the High Court exercising civil appellate jurisdiction would amount to usurping the exclusive appellate jurisdiction conferred on the Supreme Court.

It is well settled law that a thing which cannot be done directly, cannot be allowed to be done indirectly. The petitioner to the present application in my opinion is seeking to impugn the judgment delivered by the learned High Court Judge in an indirect manner than provided for in the law, which he cannot achieve directly by reason of his right to challenge the propriety of the said judgment in the Supreme Court by way of a direct appeal. Further, if the petitioner is held to enjoy such a right, a judgment pronounced on the revision application would be appealable to the Supreme Court in terms of article 127 of the Constitution. This would undoubtedly lead to absurdity and above all, the petitioner will have a second bite at the cherry, which is not available to a person who has already exercised the right of appeal to the Supreme Court.

In the circumstances, it is my considered view that the petitioner is not entitled to maintain the revision application and therefore it would be a futile exercise to issue notice of

the application. As such, I formally refuse notice on the revision application filed by the petitioner.

The respondents who were represented by the learned President's Counsel are entitled to the costs of these proceedings.

Judge of the Court of Appeal

Sunil Rajapakha

I agree.

Judge of the Court of Appeal

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