

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

In the matter of an Application for Revision  
under and in terms of Article 138 of the  
Constitution read with the High Court of the  
Provinces (Special Provisions) Act No. 190  
of 1990.

C.A. Revision Application  
No.CA/PHC/APN/141/2014  
High Court of Kandy  
No. HC 31/2013

The Hon. Attorney General,  
Attorney General's Dept.  
Colombo 12.

**Vs.**

1. Ekanayaka Mudiyanseelage Priyanga  
Ekanayaka
2. Muthukuda Wijesuriya Arachchige  
Jayanath Nishantha Wijesuriya.

**Accused**

**AND NOW BETWEEN**

Muthukuda Wijesuriya Arachchige  
Jayanath Nishantha Wijesuriya  
(Presently at Bogambara Dumbara  
Prison)

**2<sup>nd</sup> Accused Petitioner**

**Vs.**

The Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

**Respondent**

**BEFORE : W.M.M. Malinie Gunaratne, J. &**

**P.R. Walgama, J.**

**COUNSEL : Nihal Jayawardane P.C. with A.R.P. Bandara  
for the 2<sup>nd</sup> Accused - Petitioner**

**Anoopa de Silva, S.S.C. with H. Jayanetti S.C.  
for the Respondent**

Argued on : 15.5.2015

Decided on : 30.07.2015

**Malinie Gunaratne, J.**

The 2<sup>nd</sup> Accused – Petitioner was indicted along with one other accused before the High Court of Kandy, alleging that they have committed the following offences:-

- (1) Between the 25<sup>th</sup> of June 2011 and 18<sup>th</sup> of August 2011, in Kandy, committed the offence punishable in terms of Section 453 read with Section 113 B and 102 of the Penal Code by conspiring to prepare forged documents in respect of a land called Kadirana Estate, for the purpose of cheating.
- (2) On or about the 25<sup>th</sup> of June 2011, within the course of the same transaction and in Kandy, committed the offence punishable under Section 456 of the Penal Code by placing your signature to a deed

of transfer bearing No. 2651, attested by J.C. Wijetunga, Notary Public, being a valuable security knowing that the said deed had not been signed by the persons named Lillian Victoria de Silva Amarasekara Jayawardena and Nihal Dunstan Ranasinghe.

(3) On or about the 9<sup>th</sup> of August 2011, within the course of the same transaction and in Kandy, committed the offence punishable under Section 456 of the Penal Code, placing your signature to a deed of transfer bearing No. 3004, attested by J.C. Wijetunga, Notary Public, being a valuable security knowing that the said deed had not been signed by the persons named Lillian Victoria de Silva Amarasekara Jayawardena and Nihal Dunstan Ranasinghe.

(4) On or about the 18<sup>th</sup> of August 2011, within the course of the same transaction and in Kandy, committed the offence punishable under Section 456 of the Penal Code, by placing your signature to a deed of transfer bearing No. 3012, attested by J.C. Wijetunga Notary Public, being a valuable security knowing that the said deed had not been signed by the persons named Lillian Victoria de Silva Amarasekara Jayawardena and Nihal Dunstan Ranasinghe.

When the matter was taken up on the 20<sup>th</sup> of August 2014, upon reading over the respective indictments, to the Petitioner and to the 1<sup>st</sup> Accused, the 1<sup>st</sup> Accused pleaded guilty to all four counts in the indictment and he was sentenced on each count for six months rigorous imprisonment suspended for 5 years, a fine of Rs.10,000/- and a default sentence of 06 months.

The Petitioner opted for trial, pleaded not guilty to the 04 counts in the indictment and the trial commenced on the 20<sup>th</sup> August 2014. At the end of

the trial learned High Court Judge of Kandy found the Petitioner guilty of all 04 counts and convicted the Petitioner.

The learned High Court Judge sentenced the Petitioner to 05 years rigorous imprisonment in respect of count No.1, 15 years of rigorous imprisonment each in respect of counts No. 2, 3 and 4, in addition a fine of Rs.50,000/- each was also imposed in respect of counts 2, 3 and 4 coupled with a default sentence of 01 year each in the event of non-payment of the fines.

Being aggrieved by the purported judgment and the sentence the 2<sup>nd</sup> Accused - Petitioner lodged an appeal against the judgment and the sentence. Having done that the Petitioner has filed this Revision Application in seeking to set aside the judgment and the sentence of the learned High Court Judge of Kandy. Thus the Petitioner is seeking similar reliefs that had been prayed for in the appeal by this application.

When this case was called on 15/05/2015 to support for interim relief referred to in sub paragraph (v) of the prayers to the Petition, the learned Senior State Counsel objected to the Petitioner's application. Further, the Senior State Counsel raised the following two preliminary objections with regard to the maintainability of the instant Revision Application.

- (1) With the instant Revision Application being filed by the Petitioner in the Court of Appeal subsequent to having lodged a final appeal, the Petitioner is not in a position to have and maintain the instant Revision Application (with the final appeal pending in the Court of Appeal).

(2) The Petitioner has failed to plead exceptional circumstances that are necessary for the invocation of the Revisionary Jurisdiction of this Court, which is a discretionary remedy.

On the question of the aforesaid preliminary objections, both parties have filed written submissions with case law authorities and have also tendered oral submissions when the matter was taken up on 15.05.2015. I have perused the entirety of the Petition and Affidavit of the Petitioner and the written submissions and case law authorities filed by both parties.

The first question which arises for decision is as to whether the Petitioner can invoke the powers in revision of this Court, if he had appealed against the judgment made by the learned High Court Judge.

The Senior State Counsel for the Respondent submitted, in the event this Court allows the Petitioner to pursue the instant Revision Application, it would result in two applications being filed by a petitioner in the same forum, seeking similar reliefs, where in one he exercises his statutory right and in the other he seeks the indulgence of this Court to exercise the discretionary powers of revision.

In the written submissions filed in this Court by the learned President's Counsel for the Petitioner, it was contended that, a revision should be allowed only in exceptional circumstances when the Petitioner had a right of appeal and particularly when it exercised. I do agree with the learned President's Counsel and it is not an arguable issue. The trend of authority clearly indicates that the revisionary powers of the Court of Appeal will be exercised if the exceptional circumstances exist only.

In the case of Atukorala vs Samyanathan (1939) 18 C.L. Rec. 200; 41 N.L.R. 165, 14 C.L.W. 109, Soertsz, J. pointed out at page 201 “This Court has the right to revise any order made by an original Court, **whether an appeal has been taken against that order or not.** Doubtless, that right will be exercised in a case in which an appeal is already pending **only in exceptional circumstances.**” These observations were approved and followed by Wijewardana, J. with Mosely, J. agreeing in the case of Silva vs. Silva 44 N.L.R. 49; 26 C.L.W. 3.

In Rasheed Ali vs. Mohamed Ali 1981 (1) S.L.R. 262, it was held that 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.**

In Thilagarathnam vs. E.A.P. Edirisinghe 1982 (1) S.L.R. 56, L.H. de Alwis, J. remarked thus: “Though the Appellate Courts’ powers to act in revision were wide and would be exercised **whether an appeal has been taken against the order of the original court or not.**”

Dr. Ranaraja, J. commenting on the requirement of exceptional circumstances in a revisionary application held as follows: “Thus the general principle is that revision will not lie where an appeal or other statutory remedy is available. **It is only if the aggrieved party can show exceptional circumstances, for seeking relief by way of revision, rather than by way of appeal when such appeal is available to him as of right,** that the court will exercise its revisionary jurisdiction in the interests of due administration of justice”.

It was held in Attorney General vs. Herath, C.A. revision 2060/2004, D.C. Colombo 6842/ M.C.A. minute dated 12<sup>th</sup> December 2004, **that the**

**existence of an appeal would not be an impediment to the filing of a revision application** provided there are exceptional circumstances and there is no delay on the part of the Petitioner.

In Potman vs I.P. Dodanwela 74 N.L.R. 115 and Abdul Cader vs. Sitty Nisa 52 N.L.R. 546, it was held, that the revisionary jurisdiction should be exercised only in exceptional circumstances in circumstances where a right of appeal is available to a party.

On a consideration of the above authorities, it is abundantly clear that revisionary power would be exercised by this Court whether an appeal has been filed against the order of the original court or not. But the revisionary jurisdiction should be exercised only in exceptional circumstances. Hence I reject the contention of the learned Senior State Counsel, that having lodged a final appeal, the Petitioner is not in a position to have and maintain the instant revision application but powers of revision should only be exercised in exceptional circumstances.

Hence, this Court has the power to act in revision even though the procedure of appeal is available in appropriate cases. The question which has to be decided is whether the instant case is an appropriate case in which this court should exercise discretionary powers of revision.

The learned President's Counsel for the Petitioner also conceded that revision is a discretionary remedy and it would not be made available if there are no exceptional circumstances shown in the petition. The 2<sup>nd</sup> preliminary objection raised by the Senior State Counsel is, that the Petitioner has failed to plead exceptional circumstances that are necessary for the invocation of the revisionary jurisdiction.

The learned President's Counsel for the Petitioner has submitted, in paragraphs 45, 46, 47, 48 and 49 of the Petition, that the Petitioner has pleaded exceptional grounds, reasons and circumstances. I have examined the contents in paragraphs 45, 46, 47, 48 and 49 of the Petition filed in this Court where he alleges that the Petitioner has exceptional circumstances to file this application. The learned President's Counsel has brought to our notice irregularities which has taken place in the course of the trial.

On a perusal of paragraph 3.5.6 of the written submissions filed by the learned President's Counsel, explicit it is that the denial of fair trial is one main ground in which revision is sought in this matter. Further, paragraph 4.3 explains the attitude of the learned High Court Judge in carrying out his duties in a biased and a manner focused to see that this accused is found guilty by any means is one of the main exceptional circumstances. Has the Petitioner specifically or expressly pleaded such exceptional circumstances in the body of the Petition? Answer is "No".

In the case of Peter Fernando vs Asia Umma (1938) 13 C.L.W. 25, Poyser, S.P. J., refused to exercise the discretion because the point was taken up for the first time only in the application and he stated, "I am consequently asked to exercise revisionary powers on the ground that the Petitioner's legal advisors were mistaken as to the procedure to raise a point of law at the trial. I do not consider that these are grounds for granting this application; it would in my opinion be establishing a very bad precedent, if I were to hold otherwise".

In the submissions of the learned Senior State Counsel for the respondent, she has stressed that the alleged "mistrial offending all



principles of administration of criminal justice” cannot at any event be deemed to be a circumstance which warrant the petitioner to have and maintain the instant revisionary application.

I am also of the view that the matters referred to in paragraphs 45, 46, 47, 48 and 49 of the Petition is not amount to exceptional circumstances as required by law. It is abundantly clear that the Petitioner has not specifically or expressly pleaded such exceptional circumstances in the body of the Petition other than the substantial questions of law and irregularities which have taken place in the course of the trial.

In *Biso Menika v. Ran Banda and Others*, CA 95/98 – CAN 09.01.2002 and followed by *Urban Development Authority vs. Ceylon Entertainments Ltd. And Another* (Supra) it was held, that in order to justify the exercise of revisionary jurisdiction of the Court of Appeal, on examination of either the Petition or Affidavit must reveal a specific plea as to the existence of special circumstances. In that case Nanayakkara J. observed that the presence of exceptional circumstances by itself would not be sufficient if there is no express pleading to that effect in the Petition whenever an application is made invoking the revisionary jurisdiction of this Court.

The revisionary powers of this Court is a discretionary power and its exercise cannot be demanded as of right unlike the statutory remedy of appeal. Existence of exceptional circumstances is the process by which the Court should select the cases in respect of which the extraordinary power of revision should be adopted.

In *Atukorale vs. Saminathan* 41 N.L. R. 165 Soertsz, J. stated that the right of the Court to revise any order made by an original Court will be exercised only in exceptional circumstances. In *Caderamanpulle vs. Ceylon Paper Sacks* 2001 (3) S.L.R. 172, the Court has held the existence of exceptional circumstances is a pre-condition for the exercise of the powers and the absence of such circumstances in any given situation results in refusal of granting remedies. In *Ameen vs. Rasid* (Supra) Abraham C.J. has explained the rationale for insisting on the existence of exceptional circumstances for the exercise of revisionary jurisdiction. According to Abraham C.J. revision of an appealable order is an exceptional procedure and a person seeking this method of rectification must show why this extraordinary method is sought rather than the ordinary method of appeal.

Thus, the existence of exceptional circumstances is a process by which the method of rectification should be adopted. In *Perera vs. Silva* (Supra), Hutchinson C.J. has stated that if such selection process is not available, then revisionary jurisdiction of the Court will become a gateway for every litigant to make a second appeal in the garb of a revision application to make the appeal in situations where the legislature has not given the right of appeal.

Furthermore, in *Dharmarathne and Another vs. Palm Paradise Cabanas Ltd.* 2003 (3) SLR 24, Gamini Amaratunga J. stated that the practice of Court to insist on the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed.

Having referred to the authorities above and to the facts and circumstances of this case it is my view that the Petitioner has failed to disclose exceptional circumstances in order to invoke the jurisdiction of this Court.

Therefore taking into consideration the entirety of the submissions adduced by both parties, this Court upholds the preliminary objections raised by the respondents and refuse to grant interim relief prayed for in the prayer (v) of the Petition.

This is not a fit and proper case to invoke the discretionary revisionary powers of this Court. Accordingly I dismiss the application of the Petitioner.

**JUDGE OF THE COURT OF APPEAL**

P.R. Walgama, J.

I agree

**JUDGE OF THE COURT OF APPEAL**

Petition is dismissed.