

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

In the matter of an application for Revision in
terms of Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka

Court of Appeal case no. CA/PHCAPN/141/16

H.C. Panadura case no. Rev. 10/2016

M.C. Panadura case no. 30696

Abdul Hassan Mohamed Kaleel

**Party of the Second Part Petitioner –
Petitioner**

1. Mohamed Kaleed Mohamed Rifka
2. Mohamed Nizam Mohamed Rizvi

All of No. 116/1, Horana Road, Eluvila,
Pananadura

**Intervenient Petitioners on behalf of the
Party of the Second Part.**

Vs.

Mohamed Kaleel Mohamed Imthiyas

**Party of the First Part Respondent –
Respondent**

1. Mohamed Amir Fathima Fazeena
2. Mohamed Kaleel Fathima Muzail

All of No. 116/1, Horana Road, Eluvila,
Pananadura

**Intervenient Petitioners on behalf of the
Party of the Second Part.**

Before : H.C.J.Madawala J.

: L.T.B. Dehideniya J.

Counsel : R.C.Gunarathene for the Party of the Second Part Petitioner
- Petitioner.

: M. Farooj Thaheer for the Party of the First Part
Respondent - Respondent.

Supported on : 30.11.2016

Written submissions filed on 17.01.2017

Decided on : 25.01.2017

L.T.B. Dehideniya J.

This case originated by information filed by the Panadura police in the Magistrate Court of Panadura on a land dispute likely or threatening the breach of the peace. The Party of the First part Respondent Respondent (the Respondent) including the intervenient parties of the party of the first part complained that the 7 foot wide road way used by them to come to their house was obstructed by the Party of the Second Part Petitioner Petitioners (the Petitioners). After filing the relevant affidavits and documents, the learned Magistrate inspected the disputed road way and determined that the roadway used by the Respondents have been obstructed by zinc sheets and ordered to remove the said obstruction.

Being dissatisfied, the Petitioners moved in revision against the said determination in the High Court of Panadura. The application was dismissed on the basis that no exceptional circumstances. The petitioners appealed against the said order of the learned High Court Judge and moved in revision too.

The learned Counsel for the Respondents raised several preliminary objections on the maintainability of this application, that is, the prayer (b) of the petition refers to a non existing order because there is no order made on the date referred in the prayer, that this Court cannot intervene by way of revision while an appeal is pending challenging the same order where there are no exceptional circumstances, and Court cannot entertain a revision application against an order made on a revision application, i.e., no revision over revision.

I will consider the availability of revision while pending an appeal. It has been held in a series of authorities that the revisionary power conferred on the appellate courts are very wide and the Court can exercise that power whether an appeal is taken or not, but it can be exercised only on exceptional circumstances, not as of a right.

In the case of *Muttukrishna v. Hulugalle*. 43 NLR 421 at 422 Howard C.J. considered the availability of revision in criminal and civil cases referring to certain authorities and held that;

There remains for consideration the question as to whether an order made by a District Judge under section 133 of the Companies Ordinance, 1938, can be the subject of an application to this Court by way of revision. In The King v. Noordeen[13 N.L.R 115.], it was stated by Wood-Renton J. as follows:

Under section 357 (1) of the Criminal Procedure Code, the Supreme Court is empowered, in any case, the record of the proceedings of which has been called for by itself or which otherwise comes to its knowledge, to exercise its revisionary powers at its discretion. It appears to me that the language of that section invests the Supreme Court with full powers of revision in all criminal cases. "

Hence, the Supreme Court is empowered to act in revision in all criminal cases, whether or not an appeal lies. Does the same principle apply with regard to civil cases? In Atukorale v. Samynathan[14 C. L. W. 109.], Soertsz J. stated as follows:-

"The power of revision conferred on the Supreme Court of Ceylon by sections 29 and 37 of the Courts Ordinance and by section 753 of the Civil Procedure Code are very wide indeed and clearly 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. "

In the case of *A. R. G. Fernando v. W. S. C. Fernando* 72 NLR 549 availability of revision in Matrimonial actions where the appeal lies has been considered and it was held that;

Where a right of appeal lies, an application in revision will not be entertained unless there are exceptional circumstances which require the intervention of the Court by way of revision.

In the case of *Ameen v. Rasheed*. 38 NLR 288 the revision application has been dismissed for not having exceptional circumstances in an appealable order.

It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have a discretion to act in revision. It has been said in this Court often enough that revision of an appealable order is an exceptional proceeding, and in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal.

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.

It has been held in *Rustom v. Hapangama* [1978/79] 2 Sri L R 225 that the revision is available whether an appeal is taken or not but the power is available only on exceptional circumstances.

1)The powers by way of revision conferred on the Appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original Court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are is dependent on the facts of each case.

In the case of *Sunil Chandra Kumara v. Veloo* [2001] 3 Sri L R 91 it has been held that the revision is available even where there is no right of appeal, but not as of a right, only on the indulgence of Court to remedy a miscarriage of justice.

Per Jayasinghe, J.

"Revision is a discretionary remedy, it is not available as of right. This power that flows from Art. 138 is exercised by the Court of

Appeal, on application made by a party aggrieved or ex mero motu, this power is available even where there is no right of appeal.

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."

4. S. 753 of the Civil Procedure Code and S. 364 of the Code of Criminal Procedure confer power on the Court of Appeal to call for the records, these sections cannot be construed as provisions which confer rights on parties to make Revision Applications. The Supreme Court rules set out the procedure for making Revision applications.

In the case of *Dharmaratne and another v Palm Paradise Cabanas Ltd and others* [2003] 3 Sri L R 24 at page 29 Gamini Amarathunga J. after considering several authorities expressed the view that;

*The requirement of exceptional circumstances for the exercise of revisionary jurisdiction is not a requirement statutorily laid down anywhere. As Gunawardana J, himself has referred to, Abrahams CJ. in *Ameen v Rashid (supra)* has explained the rationale for insisting on the existence of exceptional circumstances for the exercise of revisionary jurisdiction. According to Abrahams CJ. revision of an appealable order is an exceptional proceeding and a person seeking this method of rectification must show why this extra-ordinary method is sought rather than the ordinary method of appeal. As Hutchinson CJ. has stated in *Perera v Silva (supra)* it is not possible to contend that the power ought to be exercised or*

that the legislature could have intended that it should be exercised so as to give the right of appeal practically in every case. Thus the existence of exceptional circumstances is the process by which the Court selects the cases in respect of which this extra-ordinary method of rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this Court will become a gateway for every litigant to make a second appeal in the garb of a revision application or to make an appeal in situations where the legislature has not given right of appeal.

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. The words used by the legislature do not indicate that it ever intended to interfere with this 'rule of practice'.

In the case of Milton Gunawardana v. The Commissioner of Co-operative and others CA PHC APN 195/2006 CA Minutes dated 27.10.2009 Sisira de Abrew J. held that the following tests should be applied before exercising the discretionary remedy of revision;

- a) The aggrieved party should not have any other remedy.*
- b) If there were another remedy available to the aggrieved party then revision would be available if special circumstances be shown to warrant it.*
- c) The aggrieved party must come to Court with clean hands and should not have contributed to the current situation.*
- d) They should have complied with the law at the time.*
- e) There should have been prejudice of his substantial rights by acts complained of.*

f) The acts or circumstances complained of have occasioned a failure of justice.

Abrew J further held in the same case citing the case of Sirisena v. Richard Arsala and others CA application 5366/84 decided on 24.10.90 that *“the urgency of the matter and the likelihood of delay in hearing of the appeal which are common to most actions are not by themselves exceptional circumstances that warrant the invoking of the discretionary remedy.”*

When there is an appeal pending before this Court, the exceptional circumstances have to be considered seriously to avoid a second appeal in the guise of a revision application.

The only ground averred by the Petitioner in paragraph 16 of his petition dated 08.11.2016 is that the learned Magistrate has exceeded the jurisdiction in making the determination. The Petitioner’s contention is that the learned Magistrate ceases jurisdiction to make an order under section 66 of the Primary Court Procedure Act once a party files an action in the District Court on the same subject matter.

The section 68 (2) of the Primary Court Procedure Act provides that when an order pronounced by the Primary Court on a land dispute under section 68 (1) of the Act, he is entitled to the possession of the land or the part in the manner specified in such order until such person or persons are evicted there from under an order or decree of a competent Court. In the same way if the dispute relates to a right and the order was delivered under section 69 (1), section 69(2) provides that such person is entitled to such right until such person is deprived of such right by virtue of an order or decree of a competent Court.

The two sections read thus;

68.(1) Where the dispute relates to the possession of any land or part thereof it shall be the duty of the Judge of the Primary Court holding the inquiry to determine as to who was in possession of the land or the part on the date of the filing of the information under section 66 and make order as to who is entitled to possession of such land or part thereof.

(2) An order under subsection (1) shall declare any one or more persons therein specified to be entitled to the possession of the land or the part in the manner specified in such order until such person or persons are evicted therefrom under an order or decree of a competent court, and prohibit all disturbance of such possession otherwise than under the authority of such an order or decree.

(3).....

(4).....

69.(1) Where the dispute relates to any right to any land or any part of a land, other than the right to possession of such land or part thereof, the Judge of the Primary Court shall determine as to who is entitled to the right which is the subject of the dispute and make an order under subsection (2).

(2) An order under this subsection may declare that any person specified therein shall be entitled to any such right in or respecting the land or in any part of the land as may be specified in the order until such person is deprived of such right by virtue of an order or decree of a competent court, and

prohibit all disturbance or interference with the exercise of such right by such party other than under the authority of an order or decree as aforesaid.

These two sections provide that the determination of the Judge of the Primary Court is valid until the competent civil court pronounces a decree or an order. Filing a civil action does not deprive the Primary Court from making the determination. This is further cleared by the section 74 (1) of the Act. It provides that an order under the Part VII of the Primary Court Procedure Act shall not affect or prejudice any right or interest in any land or part of a land which any person may be able to establish in a civil suit. If the Legislature intended a civil action to be a bar for a Primary Court to proceed under Part VII of the Act, it would not have enacted that an order of a Primary Court shall not affect or prejudice the civil action.

Under these circumstances, I hold that the Petitioner was unable to present any exceptional circumstance to invoke the revisionary jurisdiction of this Court.

The other objection of the Respondent is that the prayer (b) of the petition is to set aside a non existing order and therefore this application cannot be maintained. The prayer (b) of the petition is to set aside the order of the Learned High Court dated 02.05.2016.

The High Court has not made any order on 02.05.2016. The order was made on 24.05.2016. The Petitioner does not dispute this fact. The Petitioner relies on the maxim that "*falsa demonstratio non nocet, cum de corpora constat*" which means that "*mere false demonstration does not vitiate if there be sufficient certainty as to the object*" The learned Counsel cited several authorities in support of his argument, but those

authorities refer to false descriptions in the documents, not to a wrongly pleaded prayer.

This revision application is against an order of the learned High Court Judge of Panadura. Unless the Petitioner correctly pleads what is the order that he is challenging, he cannot maintain this revision application. The order that he is moving to set aside by this revision application is a non existing order.

I uphold the said two preliminary objections raised by the Respondent and dismiss the application.

Judge of the Court of Appeal

H.C.J.Madawala J.

I agree.

Judge of the Court of Appeal