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

In the matter of an appeal made in terms of Article 154P (6) read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Assistant Commissioner of Agrarian Development

Kaluthara.

2nd Respondent-Appellant

Vs.

Case No. CA(PHC) 168/2013

H.C. Kaluthara Case No. Rev. 33/2010

Sepala Francis Perera

No.69/10, Old Road,

Kalutara South.

Defendant-Petitioner-Respondent

Vs.

W.Norman Appuhamy

Pannipitiya Road,

Nugegoda,

Waskaduwa.

Plaintiff-Respondent-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

H.P. Ekanayake State Counsel for 2nd Respondent-Appellant

Boopathy Kahathuduwa for Plaintiff-Respondent-Respondent

W. Premathilaka for Defendant-Petitioner-Respondent

Written Submissions tendered on:

2nd Respondent-Appellant on 06.08.2018

Plaintiff-Respondent-Respondent on 07.08.2018

Defendant-Petitioner-Respondent on 20.08.2018

Argued on: 21.06.2018

Decided on: 30.11.2018

Janak De Silva J.

This is an appeal against the judgment of the learned High Court Judge of the Western Province holden in Kaluthara dated 09.10.2013.

The Plaintiff-Respondent-Respondent ('Plaintiff') lodged a complaint with the Agricultural Development Officer of Morontuduwa on 30.09.2009 stating that he is the tenant cultivator of a two roods portion of agricultural land described as 'Mananduwa Pawula Kumbura'. The Plaintiff further stated that he had been unable to cultivate the said portion of agricultural land for a period of 3 years and that he had previously informed the Morontuduwa Agricultural Services Office and the Kaluthara Agricultural Services District Office about the said issue. The Plaintiff requested the relevant authorities to take steps to preserve his cultivation rights. The dispute was thereafter referred by the Agricultural Development Officer of Morontuduwa to

the 2nd Respondent – Appellant ('Appellant') who is the Assistant Commissioner of Agrarian Development for Kaluthara.

Upon the dispute being referred to him, the Appellant decided to inquire into the matter. (Vide page 63 of the Appeal Brief) The two parties who were present at the inquiry were the Plaintiff (tenant cultivator) and the owner of the agricultural land the Defendant-Petitioner- Respondent ('Defendant'). Consequent to the inquiry and site inspection, the Appellant made an order dated 27.10.2010 (Vide page 77 of the Appeal Brief). The Appellant concluded that the Defendant had prevented the Plaintiff from entering and using the two roods portion of the agricultural land and that this was in violation of section 7(1) read with section 7(14) of the Agrarian Development Act. The Appellant also made an order in terms of section 90(1) Agrarian Development Act directing that an obstruction on an agricultural road preventing the Plaintiff from entering the two roods portion of the land be removed.

Being aggrieved by the said order dated 27.10.2010, the Defendant preferred a revision application to the Provincial High Court of the Western Province holden in Kaluthara. In the said revision application, the Defendant sought to revise and annul the order made by the Appellant on a number of grounds. These were as follows:

a. The Appellant had misdirected himself in law by deciding to inquire into the complaint instead of referring the matter to the Agrarian Tribunal in terms of section 7(3) of the Agrarian Development Act
b. The Appellant's order was contrary to the provisions of section 90(1) of the Agrarian Development Act
c. The Appellant had given the impugned order without an adequate evaluation of evidence on record and in violation of rules of natural justice

The Appellant filed his statement of objections and took up a preliminary objection that the application should be dismissed *in limine* as the High Court did not have revisionary jurisdiction to nullify the order made under section 90(1) of the Agrarian Development Act.

The learned High Court Judge by order dated 09.10.2013 overruled the preliminary objection taken by the Appellant and nullified the Appellant's order dated 27.10.2010 by exercising the court's inherent powers.

Being aggrieved by the said order, the Appellant has filed the present appeal seeking to set aside the order of the learned High Court judge. The Appellant contends that the High Court laboured under a patent lack of jurisdiction and did not have the capacity to entertain the revision application.

Is the Provincial High Court vested with revisionary jurisdiction to review the instant matter in terms of the Constitution or law?

The scope of a Provincial High Court's revisionary jurisdiction is set out in the Constitution, the High Court of the Provinces (Special Provisions) Act No 19 of 1990 and the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006. The relevant provisions are reproduced below.

Article 154P (3) (b) of the Constitution –

> *Every such High Court shall – notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province*

High Court of the Provinces (Special Provisions) Act No 19 of 1990

> **Section 3** - *A High Court established by Article 154P of the Constitution for a Province shall, subject to any law, exercise appellate and* ***revisionary jurisdiction in respect of*** *orders made by Labour Tribunals within that Province and* ***orders made under section 5 or section 9 of the Agrarian Services Act, No. 58 of 1979, in respect of any land situated within that Province.*** (Emphasis added)
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> **Section 5** - *The Provisions of written law applicable to appeals to the Court of Appeal, from convictions, sentences or orders entered or imposed by a Magistrate's Court, and to applications made to the Court of Appeal for revision of any such conviction, sentence or order shall, mutatis mutandis, apply to appeals to the High Court established by Article 154P of the Constitution for a Province, from convictions, sentences or orders entered or imposed by Magistrate's Courts, Primary Courts and Labour Tribunals within that Province and from orders made under section 5 or section 9 of the Agrarian Services Act, No. 58 of 1979, in respect of land situated within that Province* ***and to applications made to such High Court, for revision of any such conviction, sentence or order.*** (Emphasis added)

High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006

> *Section 5A (1) - A High Court established by Article 154P 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 a 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*

Accordingly, it can be seen that a Provincial High Court has been vested with revisionary jurisdiction to review orders made under section 5 and 9 of the Agrarian Services Act, as long as such order has been made in respect of a land situated within the Province.

The Appellant – in his written submissions filed before the High Court (Vide pages 190 – 191 of the Appeal Brief) – has sought to argue that Provincial High Courts no longer exercise this revisionary jurisdiction as the Agrarian Services Act was repealed by the Agrarian Development Act which came into force in the year 2000. The Appellant contends that the references to the Agrarian Services Act in section 3 and 5 of the High Court of the Provinces (Special Provisions) Act of 1990 are now of no consequence due to the repeal of the Agrarian Services Act.

I am unable to agree with this contention having regard to section 16 of the Interpretation Ordinance. Section 16 of the Interpretation Ordinance with the side note 'Reference to Repealed Enactments' reads as follows:

> *16 (1)* ***Where in any written law*** *or document* ***reference is made to any written law which is subsequently repealed, such reference shall be deemed to be made to the written law by which the repeal is effected or to the corresponding portion thereof***
>
> *(2) This section shall apply to written laws and documents made as well before as after the commencement of this Ordinance.*

Accordingly, the reference to section 5 of the Agrarian Services Act that is found in section 3 and 5 of the High Court of the Provinces (Special Provisions) Act of 1990 must now be read as referring to section 7 of the Agrarian Development Act. Section 7 of the Agrarian Development Act is the section which corresponds to section 5 of the repealed Agrarian Services Act. This is clear as the side notes to the two sections are identical and reads as follows:

> *Right of tenant cultivators; provision in regard to certain evicted tenants of paddy lands; and restriction of eviction of tenants of paddy lands*

At this stage it would be pertinent to refer to case law which has dealt with the scope of the Provincial High Court's revisionary jurisdiction *vis a vis* the repealed Agrarian Services Act. In *Abeysiri* v *Premaratne* [(2000) 3 Sri. L. R. 373, 375] the Court of Appeal made the following observation:

> *In view of the above provisions of law* ***a High Court of the province has appellate and revisionary jurisdiction only in respect of orders made under Section 5 and Section 9 of the Agrarian Services Act. Therefore, the High Court has no appellate and revisionary jurisdiction in respect of orders made under the other Sections of the Agrarian Services Act. As far as the Agrarian Services Act is concerned the only appellate and revisionary jurisdiction which a High Court has is in regard to orders made under Section 5 or Section 9 of the Agrarian Services Act.*** *In the instant case the Assistant Commissioner of the Agrarian Services has made his order under Section 56(1) of the Agrarian Services Act. Against such an order a provincial High Court has no appellate, revisionary or writ jurisdiction.* (Emphasis added)

The above statement of law suggests two things. Firstly, the revisionary jurisdiction of the Provincial High Court *vis a vis* the Agrarian Services Act was strictly limited to section 5 and 9 of the Agrarian Services Act. Secondly, the aforementioned revisionary jurisdiction could only have been exercised in respect of **orders** made under section 5 or 9 of the Agrarian Services Act.

This reasoning is equally applicable to the Agrarian Development Act. It is a well-known principle of statutory construction that when the words of an old statute are made part of a new statute, the legal interpretation which has been put upon the former by courts of law is applicable to those same words in the new statute. [*Nilamdeen v. Nanayakkara* (76 N.L.R. 169), *Hewaperuma Kapugamage Champika Jayanath v. P. Manamperi, Assistant Co-operative Commissioner* (CA(PHC) 237/2004, C.A.M. 31.05.2018][1] . Therefore, in terms of the High Court

[1] See also *Bindra's Interpretation of Statutes*, 10th ed., page 235
"The legislature must be presumed to know the course of the legislation, as well as the course of judicial decisions in the country, *a fortiorari* of the superior courts of the country. It is a well-settled rule of construction that when a statute is repealed and re-enacted, and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them in the repealed Act, because the legislature is presumed to be acquainted with the construction which courts have put upon the words, when they

of the Provinces Act No. 19 of 1990, a Provincial High Court's revisionary power when it comes to the Agrarian Development Act is restricted to orders made under section 7 of the Agrarian Development Act as section 7 is the corresponding provision to the old section 5.[2]

A perusal of section 7 of the Agrarian Development Act shows that there are only three types of orders contemplated by that section. The first is an order made by the Commissioner General of Agrarian Services directing a party in occupation of a paddy land to vacate it. (Section 7(7) (b) (ii)) The second is an order made under section 7(9). The third is an order made by the Commissioner General of Agrarian Services directing a sub tenant cultivator who is in occupation of a paddy land without the owner's consent to vacate the land. (Section 7(10) – second proviso) A perusal of the revision application before the Provincial High Court shows that the Defendant has not attempted to challenge an order made under either Section 7(7) (b) (ii), section 7(9) or the second proviso to Section 7(10). In fact, the revision application (Vide pages 22 – 26 of the Appeal Brief) indicates that the Defendant is impugning,

i. An order made by the Appellant under section 90(1) of the Agrarian Development Act and
ii. A failure by the Appellant to refer the present dispute to an Agrarian Tribunal under section 7(3) of the Agrarian Development Act

Therefore, the Defendant cannot rely on the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 to establish that the Provincial High Court can exercise revisionary jurisdiction over either of the above two matters.

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repeat the same words, they must be taken to have accepted the interpretation put on them by the court as correctly reflecting the legislative mind."

[2] It should be noted that there is no corresponding provision to section 9 of the Agrarian Services Act in the Agrarian Development Act of 2000.

Is the Provincial High Court vested with inherent revisionary jurisdiction to review the instant matter?

A perusal of the order of the learned High Court judge indicates that he has opted to nullify the Appellant's order dated 27.10.2010 by resorting to the inherent powers of the High Court. According to the learned judge, there is no specific provision in the Agrarian Development Act which provides a remedy to a party who is confronted with an illegal order/decision of a Commissioner General as in the instant matter. Accordingly, the learned judge states that he is resorting to the inherent powers of the High Court to fill this purported lacuna although the application before him was clearly one made purportedly invoking its revisionary powers. It is appropriate at this stage to consider whether Provincial High Courts have a general revisionary power which could be invoked in this manner.

In *Sunil Chandra Kumar* v *Veloo* [(2001) 3 Sri. L. R. 91], a revision application had been filed before the Court of Appeal challenging an order made by a Provincial High Court in terms of Article 154P (4) i.e. in the exercise of its writ jurisdiction. A preliminary objection was taken against the maintainability of the revision application. The counsel taking up the objection argued that Article 154P (6) of the Constitution only gave a right of appeal against an order made by a Provincial High Court under Article 154P (4) and did not specify revision as a remedy. The counsel contended that revision should have been specifically provided for under Article 154P (6) for the application to be successful. The Court of Appeal disagreed with this reasoning as the availability of revision was not governed by the same rules which governed the availability of an appeal. It observed as follows:

> *Revision is a discretionary remedy; it is not available as of right.* ***This power that flows from Article 138 of the Constitution is exercised by this Court on application made by a party aggrieved or ex mero motu;*** *this power is available even where there is no right of appeal as for instance Section 74 (2) of the Primary Courts Procedure Act. 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. I am unable to see any such impediment as observed by Mark Fernando, J. in Weragama (Supra).

Thus, the core of the learned judge's reasoning in *Veloo* (supra) was that the revisionary powers of the Court of Appeal 'flowed' or originated from a Constitutional article i.e. Article 138. Since Article 138 was 'subject to the provisions of the Constitution or of any law' the revisionary jurisdiction could be restricted by another part of the Constitution or ordinary legislation. (*Weragama v Eksath Lanka Wathu Kamkaru Samithiya* [(1994) 1 Sri. L. R. 293].

In the absence of such restrictions, the Court of Appeal could exercise the full scope[3] of its revisionary jurisdiction **under Article 138**. The aforementioned judgment militates against the view that there exists a general power of revision in a court that is not referable to either the Constitution or law. Accordingly, in as much as the Court of Appeal's revisionary jurisdiction originates from Article 138; the Provincial High Court's revisionary jurisdiction originates from Article 154P (3) (b). As Article 154P (3) (b) includes the phrase 'subject to any law' the scope of a Provincial High Court's revisionary jurisdiction can be modified by ordinary legislation [*Weragama v Eksath Lanka Wathu Kamkaru Samithiya* (supra)]. This modification has been carried out by section 3 of the High Court of the Provinces Act No. 19 of 1990 and section 5A of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006. In sum, a Provincial High Court has revisionary jurisdiction in respect of:

- convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province (Article 154P (3) (b))
- orders made by Labour Tribunals within that Province and orders made under section 5 or section 9 of the Agrarian Services Act, No. 58 of 1979[4], in respect of any land situated within that Province. (by section 3 of the High Court of the Provinces Act of 1990)

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[3] The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law..... 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] tribunal or other institution may have taken cognizance**

[4]To be read now as referring to section 7 of the Agrarian Development Act in light of the reasoning made in the previous section of this judgment

- judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province (section 5A of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006)

The learned High Court judge in the instant matter has gone beyond this and exercised revisionary jurisdiction to nullify an order made under section 90(1) of the Agrarian Development Act. This revisionary jurisdiction has been exercised purportedly under the inherent powers of the High Court.

It is trite law that inherent powers of court cannot be invoked to disregard express statutory provisions [*Abeygunesekera v Wijesekera* (2002) 2 Sri. L. R. 269; *Kamala v Andris* (41 N.L.R. 71].) If this be the case, the learned High Court judge in the instant matter could not have invoked the High Court's inherent powers in order to exercise a revisionary jurisdiction which goes above and beyond Constitutional provisions and law conferring a Provincial High Court its revisionary jurisdiction.

The Constitution allows a Provincial High Court's revisionary jurisdiction to be modified, expanded or restricted by law. It however does not envisage a Provincial High Court unilaterally expanding its own revisionary jurisdiction. To allow such unilateral modification of a Provincial High Court's revisionary jurisdiction to take place through the inherent powers of such court would be wholly unconstitutional. In *Sriyawathie v Superintendent Hapugastenne Estate and Others* [(1997) 1 Sri. L. R. 1] the court notified counsel for the Appellant in the course of those proceedings that the Appellant could not have directly appealed to the Supreme Court from an interlocutory order made in revision by the Provincial High Court. The counsel for the appellant sought to argue that the Supreme Court could entertain the appeal by relying on its 'inherent jurisdiction'. The Supreme Court categorically stated that it could not entertain the appeal in terms of its inherent jurisdiction. (At page 4) The logic behind this reasoning was that inherent powers of the court could not be used to create a wholly new jurisdiction.

This is a reflection of the well-known principle that inherent powers of courts are adjuncts to existing jurisdiction that are there to remedy injustice **but cannot be made the source of new jurisdictions** [*Ganeshananthan v. Goonewardena* (1984) 1 Sri. L. R. 321].

Accordingly, I am of the opinion that neither the Constitution, law nor the inherent powers of the Provincial High Court afford a basis for either the Appellant's order under section 90(1) of the Agrarian Development Act or his purported failure to refer the matter to an Agrarian Tribunal in terms of section 7(3) therein to be challenged by way of revision. Accordingly, the learned High Court judge was not entitled to entertain the revision application and ought to have dismissed it *in limine.*

For the foregoing reasons, I allow the appeal and set aside the judgment of the learned High Court Judge of the Western Province holden in Kaluthara dated 09.10.2013. I also dismiss the revision application dated 19.11.2010 filed by the Defendant in the High Court of the Western Province.

Appeal allowed with costs payable by the Defendant to the Appellant and Plaintiff.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal