

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

In the matter of an application in Revision from the Orders of the learned High Court Judge of the Central Province (Holden in Kandy) dated 27<sup>th</sup> March 2017 and 11<sup>th</sup> April 2017 in Case No: Rev/112/2013 under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the provisions in the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

Officer in Charge

Police Station,

Sigiriya.

**Complainant**

**Case No: CA(PHC) APN 117/2017**

**H.C. Kandy Case No: Rev.112/2013**

**Vs.**

**M.C. Dambulla Case No: 55472**

1. Imbulana Bandarage Tissa  
Sudarshana Perera  
Wild Grass Nature Resort,  
Kumbukkandanwala,  
Sigiriya.
2. Ekanayake Mudiyanseilage Neil  
Bandara  
No.143, Kumbukkandanwala,

Mahakapuyayawatta,  
Kimbissa.

**Respondents**

**AND BETWEEN**

Ekanayake Mudiyanseilage Neil  
Bandara  
No.143, Kumbukkandanwala,  
Mahakapuyayawatta,  
Kimbissa.

**2<sup>nd</sup> Respondent-Petitioner**

**Vs.**

Officer in Charge  
Police Station,  
Sigiriya.

**Complainant-Respondent**

Imbulana Bandarage Tissa  
Sudarshana Perera  
Wild Grass Nature Resort,  
Kumbukkandanwala,  
Sigiriya.

**1<sup>st</sup> Respondent-Respondent**

**AND BETWEEN**

Sarath Andarahennadi

No.26, Thurunusaviyagama,

Pallekele,

Kundasale.

**Petitioner**

**Vs.**

Officer in Charge

Police Station,

Sigiriya.

**Complainant-Respondent-  
Respondent**

Imbulana Bandarage Tissa

Sudarshana Perera

Wild Grass Nature Resort,

Kumbukkandanwala,

Sigiriya.

**1<sup>st</sup> Respondent-Respondent-  
Respondent**

Ekanayake Mudiyanseilage Neil  
Bandara  
No.143, Kumbukkandanwala,  
Mahakapuyayawatta,  
Kimbissa.

**2<sup>nd</sup> Respondent-Petitioner-**  
**Respondent**

**AND NOW BETWEEN**

Sarath Andarahennadi  
No.26, Thurunusaviyagama,  
Pallekele,  
Kundasale.

**Petitioner-Petitioner**

**Vs.**

Officer in Charge  
Police Station,  
Sigiriya.

**Complainant-Respondent-**  
**Respondent-Respondent**

Imbulana Bandarage Tissa  
Sudarshana Perera

Wild Grass Nature Resort,  
Kumbukkandanwala,  
Sigiriya.

**1<sup>st</sup> Respondent-Respondent-  
Respondent-Respondent**

Ekanayake Mudiyanseilage Neil  
Bandara  
No.143, Kumbukkandanwala,  
Mahakapuyayawatta,  
Kimbissa.

**2<sup>nd</sup> Respondent-Petitioner-  
Respondent-Respondent**

**Before:** K.K. Wickremasinghe J. (Acting P/CA)

Janak De Silva J.

**Counsel:**

Prasanna Goonetilleke for Petitioner-Petitioner

Kuvera De Soyza P.C., with Kamran Aziz for the 1<sup>st</sup> Respondent-Respondent-Respondent-Respondent

**Written Submissions tendered on:**

Petitioner-Petitioner on 04.01.2019

1<sup>st</sup> Respondent-Respondent-Respondent-Respondent on 28.11.2018

**Argued on:** 08.11.2018

**Decided on:** 27.03.2019

**Janak De Silva J.**

This matter arises from an information filed under section 66(1)(a) of the Primary Courts Procedure Act (Act) by the Officer-in-Charge of the Sigiriya Police Station in the Magistrates Court of Dambulla. The learned Magistrate after inquiry directed that possession of the land in dispute be handed over to the 1<sup>st</sup> Respondent-Respondent-Respondent-Respondent (1<sup>st</sup> Respondent).

The 2<sup>nd</sup> Respondent-Petitioner-Respondent-Respondent (2<sup>nd</sup> Respondent) aggrieved by the said order filed a revision application in the High Court of the Central Province holden in Kandy which was dismissed on 27.03.2017.

The Petitioner-Petitioner (Petitioner) thereafter filed papers in the High Court seeking to be added as a Petitioner and also filed an appeal against the order dated 27.03.2017. The learned High Court Judge made order in chambers rejecting both applications. Hence this revision application by the Petitioner.

This matter has not been supported for notice as yet although an undertaking was given by the 1<sup>st</sup> Respondent-Respondent-Respondent-Respondent (1<sup>st</sup> Respondent). On 08.11.2018 the learned President's Counsel for the 1<sup>st</sup> Respondent informed court that he wishes to raise certain preliminary objections to the application and court granted him permission to do so. Parties have filed written submissions on the preliminary objections and this order is on the preliminary objections raised by the 1<sup>st</sup> Respondent which are:

- (1) The Petitioner was not a party to the original case and is therefore prevented in law from making this application by way of revision.
- (2) The 2<sup>nd</sup> Respondent has not utilized his statutory right of appeal to this Court.
- (3) The petition of the Petitioner does not plead any exceptional circumstances for the invocation of the discretionary jurisdiction of this Court.
- (4) The Petitioner is guilty of inordinate delay/laches.

Before examining the four issues identified by the 1<sup>st</sup> Respondent as "preliminary objections" it is apposite to examine what is a preliminary objection given that often such objections are raised before Court when sometimes they are not in fact preliminary objections. Furthermore, Court

must be extremely cautious in entertaining such objections unless they are truly preliminary objections as inevitably it leads to a splitting of the case and the ensuing appeals or revisions thereon contributes to laws delay.

I shall begin by considering the following statement of Thilakawardena J. in *Jathika Sevaka Sangamaya vs. Sri Lanka Ports Authority and another* [(2003) 3 Sri.L.R. 146 at 148]

***“The first matter that has to be determined by this Court is the limitation of matters that can be taken as "Preliminary Objections" without going into the merit of the pleadings filed in the case.*** A preliminary objection can be on a pure question of law, a determination of which obviates or makes unnecessary, any consideration of the facts contained in the pleadings and/or the merits of the case. As for instance, a matter of law which is canvassed relating to the patent lack of jurisdiction. There is no dispute that such a matter can be disposed of, on that question of law alone. Therefore, matters pertaining to jurisdiction would be canvassed by way of preliminary objection and be determined by the Court specially in the circumstances where the matter of jurisdiction is placed on a pure question of law. The patent lack of jurisdiction, matters relating to prescription etc. especially when they are based on facts that are not contested are matters that can be disposed of in this manner.

The advantage of a preliminary objection is the possibility to dispose of a matter expeditiously which can lead to a resolution of the dispute between parties with a minimum amount of expense or delay, for the convenience of all parties including the Court.

A preliminary objection could also be based on a mixed question of law and facts and even on a question of fact alone but, only in situations where there are ex facie either no dispute or a frivolous dispute on the fundamental facts that are being urged before the Court and contained in the pleadings that have been filed, such matters can be decided as a preliminary objection.” (emphasis added)

Upon a careful consideration of the above statement with which I am in respectful agreement, the following points can be made:

- (1) A preliminary objection is a matter that can be decided without going into the merits.
- (2) A preliminary objection can be on a pure question of law such as a patent lack of jurisdiction. It can also be a mixed question of fact and law as well as a question of fact alone but, only in situations where there is ex facie either no dispute or a frivolous dispute on the fundamental facts that are being urged before the Court and contained in the pleadings that have been filed,
- (3) A preliminary objection must be distinguished from an objection on any point of law, which can be raised at any part of the trial unlike the preliminary objections, which by its nature is expected to be raised at the beginning of the proceedings prior to the beginning of the arguments in the case.

To that list I wish to add the following definition in Venkataramaiya's Law Lexicon Page 1875:

"The epithet "preliminary" is inappropriate as regards this objection because a **preliminary objection is one that is raised to the sustainability of an application or action on the basis of the assumption of the truth of all the averments of fact made by the suitor**, in the application or plaint and is not therefore, one that can be taken in argument though not raised in the written defence. The objection here is obviously and entirely different and is not one which can be taken in argument without raising it in the written defence so as to given an opportunity to the opponent to state his answer or explanation - Prabhakar Gerald Walter v Chief Secretary." (emphasis added)

Applying the above criteria to the four questions raised as "preliminary objections" by the learned President's Counsel, in my view only the first and second issues, namely whether the Petitioner can file this revision application as he was not a party to the original case and whether the 2<sup>nd</sup> Respondent has not utilized his statutory right of appeal to this Court, are preliminary objections which can be considered at this stage.



The other two objections require a consideration of the merits of the application.

For example, admittedly the petition at paragraph 13 identifies what are said to be exceptional circumstances but whether they in fact amount to exceptional circumstances requires a consideration of the merits of the case. In my view it is inappropriate for a court to consider whether exceptional circumstances exist in a revision application at the stage of notice for if that is the correct approach the issue of exceptional circumstances ends there. There is no further matter to be considered at the stage of argument on exceptional circumstances. At the stage of support Court need only to consider whether the petitioner has made out a prima facie case for notice.

The question of inordinate delay/laches also requires an examination of the merits of the case as it depends on the circumstances of each case.

The 1<sup>st</sup> Respondent is free if so advised to raise the above two issues at the appropriate stage.

The answer to the first issue, namely whether the Petitioner who was not a party to the original case and is therefore prevented in law from making this application by way of revision is in my view straightforward, as judicial precedent clearly states that even a person who was not a party to the original case can file an application in revision if he is aggrieved by the order of the lower court.

In *Mariam Beebee vs. Seyed Mohamed* (68 N.L.R. 36 at 38) Sansoni C.J. held:

“The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result.”

Although this was in relation to a partition action and a revision application made thereon, this principle has been recognized by our courts in other applications as well. Amaratunga J. in *Caderamanpulle and others vs. Caderamanpulle and others* [(2005) 1 Sri.L.R. 397] in *obiter* reiterated this principle.

However, *Kayas vs. Nazeer and others* [(2004) 3 Sri.L.R. 202] is exactly on point where Weerasuriya J. recognized the right of a person who was not a party to proceedings under Part VII of the Act to make an application in revision.

For the foregoing reasons, I dismiss the first preliminary objection raised on behalf of the 1<sup>st</sup> Respondent.

On the second preliminary objection, namely whether the 2<sup>nd</sup> Respondent has not utilized his statutory right of appeal to this Court, admittedly the answer is in the negative. However, it is trite law that revision is available even where an appeal was taken but was abated on technical grounds [*Rustom vs. Hapangama* (1978-79) 2 Sri.L.R. 225]. Accordingly, I overrule the second preliminary objection as well.

The 1<sup>st</sup> Respondent shall pay the costs of this application to the Petitioner which is fixed at Rs. 10,000/=.

This application will in due course be fixed for support for notice before the relevant Court.

Judge of the Court of Appeal

K.K. Wickremasinghe J. (Acting P/CA)

I agree.

Judge of the Court of Appeal