

**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 136 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No:  
**CA (PHC) 110/2013**  
HC Galle Case No:  
**HC (REV) 825/2011**  
MC Galle Case No:  
**AMC 68482**

1. KIEHORN GERD WALDEMAR,
2. KUDABADUGE RADIKA THAMALI  
KIEHORN,

The above named both of  
"Langeoog Inn"  
Ganahena,  
Unawatuna.

**Party of the 2<sup>nd</sup> Part 1<sup>st</sup> and 2<sup>nd</sup>  
Respondent-Petitioner-Petitioners**

-Vs-

NAGASINGHA ARACHCHIGE JAYANTHA,  
Palliyagoda,  
Henetigala,  
Thalpe.

**Party of the 1<sup>st</sup> Part Respondent-  
Respondent-Respondent**

OFFICER IN CHARGE,  
Habaraduwa Police Station.

**Complainant-Respondent-  
Respondent**

**Before : A.L. Shiran Gooneratne J.**

**&**

**Mahinda Samayawardhena J.**

**Counsel :** Uditha Egalahewa, PC appears with Amaranath Fernando and Vishwa Vimukthi and N.K. Ashokbharan for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioners.

Amrit Rajapaksha with Shihan Ananda and Jason Dias appears for the Respondent.

**Written Submissions:** By the Party of the 2<sup>nd</sup> Part 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioners on 27/02/2019

**Argued on :** 25/10/2019

**Judgment on :** 29/11/2019

**A.L. Shiran Gooneratne J.**

The officer in charge of the Habaraduwa Police filed information in terms of the provisions contained in Section 66(1)(a) of the Primary Courts Procedure Act No. 44 of 1979, (hereinafter referred to as the Act) in the Magistrates Court of Galle against the party of the 1<sup>st</sup> Part Respondent-Respondent-Respondent, (hereinafter referred to as the Respondent) and the Party of the 2<sup>nd</sup> Part 1<sup>st</sup> and 2<sup>nd</sup>

Respondent-Petitioner-Petitioners, (hereinafter referred to as the Petitioners) over the possession of business premises in dispute named "Langeoog Inn". The learned Magistrate by order dated 18/07/2011, held that the possession of the said disputed premises be handed over to the Respondent. The Petitioners being aggrieved by the said order filed a Revision application in the Provincial High Court of the Southern Province holden in Galle. By order dated 17/11/2016, the learned High Court Judge of Galle, dismissed the application on a preliminary objection based on delay, without considering the merits of the case. It is from that order the Petitioners are before this Court.

The learned High Court Judge upheld the preliminary objection, taking into consideration a delay of 3 months as undue delay on the part of the Petitioners and dismissed the application without going into the merits of the case.

The facts pertaining to this case briefly are, that the Respondent was appointed as manager by a contract marked 2R3, to conduct business affairs of "Langeoog Inn" by the 1<sup>st</sup> Petitioner and one Andrea Kendziora-Kuhn, acting as business partner. The said Andrea Kendziora-Kuhn, is not a party to this action. It is alleged that the dispute over possession arose, when the said Andrea Kendziora-Kuhn lodged a complaint in the Habaraduwa Police to restrain the Petitioners entering the property in dispute, which culminated in the filling of the information in the Magistrates Court of Galle.

The Petitioners submit that the learned Magistrate having come to a correct conclusion that the dispute was between the 1<sup>st</sup> Appellant and the said Andrea Kendziora-Kuhn has erred in law in the said order by handing over possession to the Respondent, who is an employee of the Petitioners. The Respondent admits that from mid-year 2000, he was the manager of the said hotel and is an employee of the Petitioners. It is also admitted that the 1<sup>st</sup> Petitioner is resident in Sri Lanka during the 'season'. Explaining the alleged delay, the Petitioners submit that due to circumstances beyond their control, the 1<sup>st</sup> Petitioner was out of the country, when the learned Magistrate delivered the order and therefore, the delay of 3 months should not be considered as fatal.

In the said circumstances, the Petitioners argue that the delay of 3 months will not operate as a bar for this Court to act in revision to set aside the order, which has caused a miscarriage of justice and which is ex facie wrong.

The learned President's Counsel for the Petitioners has referred to ***Priyanthi Perera Samarasinghe Vs. Dharmapala Colin Abeywardene CA (PHC) APN 64/2010***, decided on ***05/05/2011***, where ***Justice Sisira de Abrew at page 7***, held as follows;

*"Learned Counsel for the Respondent contended that the present Petition should be dismissed on the ground of delay (delay 2 ½ half years) and non-establishment of exceptional circumstances. In my view, delay in bringing a case before court will not operate as a bar for the Court of Appeal, in revision, to set aside an order*

*which is wrong. I have earlier held that the order of the learned High Court Judge is ex facie wrong and the Petitioner had suffered a miscarriage of justice. I hold that when a party has suffered a miscarriage of justice as a result of an order of the lower court which is ex facie wrong such facts can be considered as an exceptional ground to invoke the revisionary jurisdiction of the Superior Courts."*

At the hearing before us, the learned Counsel for the Respondent contended that the delay of 3 months is not explained. The learned Counsel in support cited the case of ***The Attorney-General Vs. Kunchihambu et al.*** 46 NLR 401. In this case the Supreme Court considered whether it should exercise its powers of revision under Section 357 of the Criminal Procedure Code, when Section 338 of the Criminal Procedure Code provided a right of Appeal, which should be resorted to. However, the case before this Court deals with the question whether, delay 'per se' is justified in dismissing an action, where the Petitioners allege that they have been denied of an opportunity to canvass the merits of the case. Therefore, the instant case can be clearly distinguished from the case cited by the learned Counsel.

In ***Lulu Balakumar Vs. Balasingham*** (1997) BLR 22 SC, ***Fernando J.*** held that "*the mere delay does not automatically amount to laches, and that the circumstances of the particular case, the reasons for the delay, and impact of the delay on the other party, must all be taken into account.*"

His Lordship further stated that;

*"In this case there was a delay of four months, which in the context of litigation in Sri Lanka is by no means unusual although, I hasten to add, undesirable and not to be encouraged."*

Therefore the question to be decided is twofold; ie, is the delay of 3 months justified and if so, should this matter be referred back to the learned High Court Judge to make a determination on the merits of the case.

It is observed that the Respondent was in the premises in his capacity as manager of the hotel, by virtue of a contract. It is also observed that the Special Power of Attorney given to the Respondent by the said Andrea Kendzior-Kuhn was restricted to manage and transact business affairs of the said Andrea Kendzior-Kuhn. The Respondent in his statement to the police clearly states that, he was the manager of the said hotel. Therefore, the facts and the circumstances clearly manifest that the learned Magistrate has erred in law by handing over possession of the hotel to the Respondent, who was acting under a contract of employment in the capacity of a licensee of the Petitioner.

In the circumstances, discussed above, I do not think that this is an application to be discontinued simply on the ground of delay.

Therefore, I find that the Petitioners are entitled to canvass the order of the learned Magistrate before the learned High Court Judge, on the merits of the application, if deprived, would cause grave injustice to the Petitioners.

Therefore, I set aside the impugned order of the learned High Court Judge dated 30/07/2013, and direct that this case be listed at the earliest possible date for argument and dispose of the application on its merits.

Application allowed.

**JUDGE OF THE COURT OF APPEAL**

**Mahinda Samayawardhena, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**