

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

S.C.Appeal 81/2010
SC/SPL LA: 35/10
CA Revision No:81/2006 (PHC) APN
Commercial High Court Case No:40/9(1)

Merchant Bank of Sri Lanka Limited
Bank of Ceylon Merchant Tower,
No 28, St. Michael's Road,
Colombo 3.

Plaintiff

Vs

1. Francisge Dona Violet Perera,
No. 103, St Joseph's Street,
Grandpass,
Colombo 14.
2. Francisge Dona Mildred Salgado
No. 140/46 Aramaya Road,
Dematagoda,
Colombo 9.

Defendants

AND

1. Jatila Punyasiri Wijayawardena,
No. 43, Olcott Mawatha,
Colombo 11.
2. Liyanaarachchige Ranjith Asoka
Gunathilake
No. 45, Olcott Mawatha,
Colombo 11.
3. Suppiah Sivasubramanium
No. 47, Olcott Mawatha,
Colombo 11.
4. M J Dharmadasa
No. 49, Olcott Mawatha,
Colombo 11.
5. Fuji Color Foto Keena
Alias Foto Keena Ltd.,
No. 51 and 53, Olcott Mawatha,
Colombo 11

Petitioners

Vs

Merchant Bank of Sri Lanka Limited
Bank of Ceylon Merchant Tower,
No 28, St. Michael's Road,
Colombo 3.
(formerly of No. 189, Galle Road,
Colombo 3)

Plaintiff-Respondent

1. Francisge Dona Violet Perera,
No. 103, St Joseph's Street,
Grandpass,
Colombo 14.
2. Francisge Dona Mildred Salgado
No. 140/46 Aramaya Road,
Dematagoda,
Colombo 9.

Defendants – Respondents

AND

Merchant Bank of Sri Lanka Limited
Bank of Ceylon Merchant Tower,
No 28, St. Michael's Road,
Colombo 3.
(formerly of No. 189, Galle Road,
Colombo 3)

Plaintiff-Respondent - Petitioner

1. Jatila Punyasiri Wijayawardena,
No. 43, Olcott Mawatha,
Colombo 11.
Presently of
118/17, Airport Road,
Ratmalana.

2. Deceased

Liyanaarachchige Ranjith Asoka
Gunathilake
No. 45, Olcott Mawatha,
Colombo 11.

- 2A. Kahandakoralalage
Karunawathi,

No.202/63, Isurupura,
Kesbewa
Substituted 2nd Petitioner -
Respondent

3. M J Dharmadasa
No. 49, Olcott Mawatha,
Colombo 11.
4. Fuji Color Foto Keena
Alias Foto Keena Ltd.,
No. 51 and 53, Olcott Mawatha,
Colombo 11
Presently of
No.543, Sri Sangaraja Mawatha,
Colombo 10.

Petitioner – Respondents

1. Francisge Dona Violet Perera,
No. 103, St Joseph's Street,
Grandpass,
Colombo 14.
2. Francisge Dona Mildred Salgado
No. 140/46 Aramaya Road,
Dematagoda,
Colombo 9.

Defendants – Respondents –
Respondents

AND NOW BETWEEN

Merchant Bank of Sri Lanka Limited
Bank of Ceylon Merchant Tower,
No 28, St. Michael's Road,
Colombo 3.
(formerly of No. 189, Galle Road,
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Plaintiff-Respondent – Petitioner -
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Petitioner – Respondents -
Respondents

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Colombo 14.

2. Francisge Dona Mildred Salgado
No. 140/46 Aramaya Road,
Dematagoda,
Colombo 9.

Defendants – Respondents –
Respondents - Respondents

**Before: Marsoof J,
Ekanayake J,
Suresh Chandra J.**

Counsel:

Ikram Mohamed PC with Sagara Kariyawasam instructed by Ms. M Abdeen for Plaintiff-Respondent-Petitioner -Appellant

S.L. Gunasekara with Ms. S. Amarasekara and Dhammika Welagedara instructed by Ms. Anoma Goonatillake for Petitioner-Respondent-Respondent

Argued on : 27.01.2011

Decided on : 15.02.2012

Suresh Chandra J,

This is an appeal from an order of the Court of Appeal dated 21st January 2010 refusing an application made by the Plaintiff- Respondent –Appellant to the Court of Appeal to revise an Order made by the High Court of the Western Province (Holden in Colombo exercising Civil Jurisdiction) in terms of S.328 of the Civil Procedure Code.

This case originated in the District Court and was transferred to the Commercial High Court. The ‘Victoria Building’ Pettah was constructed on state Land which had been leased to J.A.D.Victoria for 99 years in 1928. The said J.A.D.Victoria had assigned his leasehold rights to the 1st Defendant-Respondent-Respondent in or around the year 1992. The 1st, 2nd, 3rd and 4th Respondents were the tenants of the said Victoria and they became the tenants of the 1st Defendant upon the said assignment. The 1st Defendant mortgaged the said leasehold rights to the Appellant on 18th December 1992. In or around 1993, the 1st Defendant instituted actions in the District Court against the 1st to 4th Respondents who were in occupation of the different parts of the said Victoria building and sought to have them ejected. The 1st Defendant also sought and obtained enjoining orders and corresponding interim injunctions restraining the said respondents from obstructing the 1st Defendant from carrying out repairs to the said building. Pursuant to the obtaining of the said enjoining orders the 1st Defendant ejected the Respondents from the said building. Shortly thereafter there had been a fire in the said building. Thereupon the District court had suspended the said enjoining orders and the Respondents had been restored to possession. Thereafter all four actions had been dismissed and in the actions filed against the 1st and 2nd Respondents, they were declared to be the tenants of their respective premises and damages were awarded to them for wrongful dispossession.

In the meantime as the 1st Defendant had defaulted in the payments due on the mortgage and the Petitioner instituted action against the 1st defendant for the recovery of the monies due on the said mortgage and for the enforcement of the mortgage bond. The mortgage action was transferred to the Commercial High court and the 1st and 2nd Defendants consented to judgment therein and thereafter the petitioner purchased the said premises at the sale conducted consequent to the said judgment. On being made aware of the said mortgage decree, the Respondents sought to intervene in the said action to safeguard their rights, but their application to intervene was refused. The Registrar of the High court was notified by the Attorney-at-Law for the 1st, 2nd and 3rd Respondents about the judgments that had been given in their favour by the District Court in respect of their tenancy in the said building and that any steps to have them ejected would be resisted by the said Respondents. The Appellant by way of a motion made an application for an order to eject those persons who were residing in the said premises and for delivery of possession thereof to the Appellants. The High court allowed the said application and writ was executed on 14.10.2005 and the Appellant obtained vacant possession of the premises by ejecting the Respondents.

Thereafter the Respondents made applications for restoration of possession and damages under section 328 of the Civil Procedure Code which was allowed by the High Court on 15th June 2006 restoring the Respondents to possession of the premises and with damages in their favour. The Appellant being aggrieved by the said Order of the Learned Judge of the Commercial High Court filed a Revision Application No. CA Rev (PHC) APN 81/2006 in the Court of Appeal to have the said order revised.

A preliminary objection was taken on behalf of the Respondents at the hearing of the Revision Application before the Court of Appeal on the ground that the said Application could not be maintained in law as a right of Appeal was available to the Petitioner against the said order to the Supreme Court under S.5 of the High Court of the Provinces (Special Provisions) Act No.10 of 1996 which right of appeal had not been exercised by the Appellant. Written submissions were tendered by both parties in relation to the said preliminary objection and the Court of Appeal delivered the Order dismissing the Revision Application of the Petitioner on 21st January 2010 holding that the Right of Appeal granted to the Apex Court by the said Act No.10 of 1996 cannot be offended by S.329 of the Civil Procedure Code which states that there is no Right of Appeal against orders made under S.326 or S.327 and that the Petitioner had failed to exercise the said Right of Appeal to the Supreme Court and that the Court of Appeal could not exercise Revisionary Jurisdiction against the said Order. The Court of Appeal in the course of its judgment cited the decision in Australanka Exporters Pvt Ltd v Indian Bank 2001 (2) S.L.R. 156 where it was held that the Appellate jurisdiction in respect of Judgments and orders of the High court of the Provinces made in the exercise of its civil jurisdiction was vested exclusively in the Supreme Court.

The Appellants made an application for special leave to appeal against the said Order of the Court of Appeal and leave was granted to the Appellant on the following questions :

- i) Are the provisions contained in S.5 of the High Court of the Provinces (Special Provisions) Act No.10 of 1996 which grant a right of appeal against any order made by such High Court a general provision which should be interpreted subject to the provisions set out in S.329 of the Civil Procedure Code when Order is made by such a High Court under S.326 or S.327 or S.328 of the Civil Procedure Code?
- ii) Does S.5(2) of the said Act No.10 of 1996 grant a right of appeal in law contrary to the provisions of S.329 of the Civil Procedure Code when an Order is made by such a High Court under S.326 or S.327 or S.328 of the Civil Procedure Code?
- iii) Is the said Order of the Court of Appeal wrong in law?
- iv) Does S.329 of the Civil Procedure Code have no application to the right of appeal granted by S.5 of the said Act No.10 of 1996?
- v) If so, is the judgment of the Court of Appeal correct in law?

Before the enactment of Act No.10 of 1996 it was the District Court that exercised jurisdiction in respect of civil matters and the Civil Procedure Code laid down the procedure to be followed in the District Courts regarding original jurisdiction and by the Court of Appeal regarding appellate and revisionary jurisdiction. By the High Court of the Provinces (Special Provisions) Act No.10 of 1996, High Courts were conferred Civil Jurisdiction to hear and determine certain Civil actions and matters. It would be pertinent to examine the relevant provisions of the said Act regarding the jurisdiction conferred on the High Court and the review of orders and judgments of such Courts.

S.2(1) : Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the Gazette

appoint, in respect of such High Court have exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the First Schedule to this Act, if the party or parties defendant to such action reside or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceedings under the Companies Act, No.17 of 1982 the registered office of the Company is situated with the Province for which such High Court is established.

S. 2(3) The High court established by Article 154P of the Constitution for the Western Province shall with effect from such date as the Minister by order published in the Gazette appoint, have exclusive jurisdiction and shall have cognizance of, and full power to hear and determine in the manner provided for by written law, all matters set out in the Second Schedule to this Act.

The expression “in the manner provided for by written law” would bring in the provisions of the Civil Procedure Code in respect of the invocation of original jurisdiction and the procedure relating to the exercise of that jurisdiction. The question would then arise as to whether the whole of the Civil Procedure Code has been incorporated impliedly regarding the civil jurisdiction of the High Court. The other provisions of Act No.10 of 1996, namely S. 4, 5(3) and 6 would show that it is not so. S.4 makes the provisions of Chapter XXI of the Civil Procedure Code relating to the award of costs applicable to the High Court. S.5(3) makes the provisions of S.754(5) of the Civil Procedure Code applicable and S.6 in laying down the procedure for appeals to the supreme Court from the High Court provides that every appeal and every application for leave to appeal under S.5 shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code. Thus only certain provisions of the Civil Procedure Code have been expressly incorporated in Act No.10 of 1996.

The Right of Appeal from a judgment or order of the High Court exercising civil jurisdiction is laid down in S.5 of the said Act.

S.5(1) Any person who is dissatisfied with any judgment pronounced by a High court established by Article 154P of the constitution, in the exercise of its jurisdiction under section 2 in any action, proceeding or matter to which such person is a party may prefer an appeal to the Supreme Court against such judgment, for any error in fact or in law.

S.5 (2) of the said Act No.10 of 1996 provides that:

“Any person who is dissatisfied with any order made by a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under S.2 in the course of any action, proceeding or matter to which such person is, or seeks to be, a party, may prefer an appeal to the Supreme Court against such Order for the correction of any error in fact or law, with the leave of the Supreme Court first had and obtained.”

Thus it would be seen that S.5(1) provides for an appeal to the Supreme Court against a judgment of the High court while S.5(2) provides for an appeal to the Supreme Court with the leave of the Supreme court first had and obtained.

A comparison of the provisions of Chapter LVIII of the Civil Procedure Code with Section 5 and 6 of Act No.10 of 1996 would show that the provisions of S.754(1) and (2) have not been incorporated into the said Act and have been replaced by Sections 5(1) and (2) while Sections 753(3), 753(4), 754(5) and Sections 755-760A of the Civil Procedure Code, which lay down the procedure regarding appeals , have been incorporated into the Act by S.6 by stating that

such procedure shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure code.

It would be seen therefore that in conferring civil jurisdiction on the High Court by Act No.10 of 1996, that the entirety of the Civil Procedure Code has not been incorporated into the said Act and that only specific provisions of the Civil Procedure code have been incorporated into the said Act. Of particular relevance is the fact that section 329 of the civil Procedure code has not been referred to in the said Act No.10 of 1996.

Section 329 of the Civil Procedure Code provides that :

“No appeal shall lie from an order made under S.326 or S.327 or S.328 against any party other than the judgment-debtor. Any such order shall not bar the right of such party to institute an action to establish his right or title to such property.”

Prior to 1996 an Appeal was possible from the District Court (except where excluded like S.329) to the Court of Appeal and then to the Supreme Court. After the enactment of Act No.10 of 1996, an appeal in relation to judgments and orders of the High Court in the exercise of its civil jurisdiction is granted only to the Supreme Court under S.5 of Act No.10 of 1996.

For the purposes of the present case, it would be necessary to consider the effect of S.329 of the Civil Procedure Code on S.5 of the High Court Act. S.329 placed a limitation on the right of appeal granted by Sections 754(1) and (2) but as far as S.5 of the Act is concerned S.329 does not place any such limitation as stated above. Ss.754(1) and (2) have not been incorporated in to the Act and have in fact been replaced by Sections 5(1) and (2) of the Act.

The Appellants submit that since there is no right of appeal possible in terms of S.329 of the Civil Procedure Code that a Revision application would be possible to the Court of Appeal. In support of that contention the Petitioners submit that the maxim “Generalia Specialibus non derogant” would apply. As far as S.754 of the Civil Procedure Code is concerned this maxim would apply in proceedings before the Court of Appeal, being the same statute as S.329 takes away the right of appeal to the Court of Appeal granted by S.754. However, when section 329 of the Civil Procedure Code is viewed against S.5 of the High Court of Provinces (Special Provisions) Act No. 10 of 1996 the maxim would not apply as two different Statutes, namely the Civil Procedure Code and Act No.10 of 1996 are involved.

Bindra on Interpretation of Statutes, 10th Edition points out at pg 555 and 556 that

“Where two Acts are inconsistent or repugnant, the latest expressions of the will of the Legislature must prevail provided that the Court is satisfied that the repeal of the prior enactment must flow from necessary implication.”

In the judgment of Lord Langdale MR, in *Dean of Ely v Bliss* (1842) 11 LJ Ch 351, p354 it was held that

“If two inconsistent Acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must give way. Every Act of Parliament must be considered with reference to the state of law subsisting when it came into operation, and when it is to be applied, it cannot otherwise be rationally construed. Every act is made either for the purpose of making a change in law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment.”

The Maxim - *expressio unius est exclusion alterius* - "the express mention of one thing excludes all others", fortifies the conclusion that review is available only from the Supreme Court in terms of S.5 of the High Court Act.

It is observed that Ss. 88,329 and 692(3) of the Civil Procedure Code are special provisions which deny the Right of Appeal. These are situations where inquiries are done in the Preliminary Courts in special circumstances conferring rights to the individuals and from these inquiries the right to appeal has been denied apparently as the Court is required to inquire into the matter before Court twice over. In those circumstances the remedy available was that of Revision. But with the introduction of the High Court Act conferring civil jurisdiction to the High Court in certain matters the mode of review in such situations would be in accordance with the provisions of S.5.

The sequence of the enactment of the Acts makes it evident that in relation to a matter in the District Court the Right to Appeal from a judgment would be to the Court of Appeal and then if leave is granted an appeal would lie to the Supreme Court. By the enactment of Act No.10 of 1996 it is clear that in any civil matter dealt with in the High Court, the Right of Appeal lies only to the Supreme Court. This seems to be the clear intention of the Legislature with regard to matters dealt in the High Court. When the above special provisions are being considered in the High Court, if revisionary jurisdiction to the Court of Appeal is given then it would give the party applying for revision in a situation as in the present case a favourable position by granting an additional opportunity of review as against a party who comes within the purview of the civil jurisdiction of the High Court regarding other matters as they will be entitled only to the right to appeal to the Supreme Court. This would be due to the fact that if the revisionary jurisdiction to the Court of Appeal is allowed then if need be the party would have the option to go further to the Supreme Court by way of canvassing the judgment of the Court of Appeal in such instances. This would give the party in such circumstances two opportunities of review of the preliminary judgment when the clear intention of the Legislature is that there should be only an appeal to the Supreme Court from any judgment or order of the High Court in the exercise of its Civil Jurisdiction in terms of Sections 5(1) and 5(2). Further it would be illogical to consider that a party is entitled to have recourse to the Court of Appeal to exercise its Revisionary jurisdiction (and consequently an appeal therefrom to the Supreme Court) if it is in relation to a matter under S.329 where an appeal is denied, while an appeal is available to a party only to the Supreme Court in other matters where the High Court has been granted civil jurisdiction.

The Court of Appeal expressed a similar view as above in Australanka exporters case in relation to S.88 of the Civil Procedure Code where again a right of appeal is denied. There a hypothecary action was instituted in the Commercial High Court of Colombo to recover a sum of money lent to the defendant. The defendant defaulted in appearing before the court and an ex parte decree was entered. The application to purge the default was dismissed. Thereafter the defendant made an application to the Court of the Appeal to have the order of the High Court revised. It was held that the Appellate Jurisdiction in respect of judgments and orders of the High Court of the Provinces made in the exercise of its civil jurisdiction is vested exclusively in the Supreme Court.

Therefore the questions of law on which leave was granted by this Court are answered as follows:

Question 1: The provisions of S.5 of the High Court of the Provinces (Special provisions) Act No.10 of 1996 is not subject to the provisions of S.329 of the Civil Procedure Code when an order is made by such a High Court under S.326 or S.327 or S328 of the Civil Procedure Code.

Question 2: S.5(2) of the said Act No.10 of 1996 grants a right of appeal to the Supreme Court with leave from an order made by such a High Court under s.326 or S.327 or s.328 of the Civil procedure Code and is not contrary to S.329 of the Civil Procedure code.

Question 3: The Order of the Court of Appeal is not wrong in law as it is in keeping with the objective of the provisions of High Court Act No.10 of 1996 of granting an appeal only to the Supreme Court when conferring civil jurisdiction on certain matters to the High Court.

Question 4: S. 329 of the Civil Procedure Code has no application to the right of appeal granted by S.5 of the said Act No.10 of 1996.

Question 5: The judgment of the Court of Appeal is correct in law as it has held that the exclusive right of appeal from an order or judgment of the High Court exercising civil jurisdiction is vested with the Supreme Court.

In the above circumstances the appeal of the Appellants is dismissed with costs fixed at Rs.31,500/-.

**JUDGE OF THE
SUPREME COURT**

MARSOOF J.

I agree.

**JUDGE OF THE SUPREME
COURT**

EKANAYAKE J.

I agree.

COURT

JUDGE OF THE SUPREME