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

Director General,
Commission to Investigate
Allegations of Bribery or
Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.
Complainant

SC/TAB/04/2023
HC/PTB/02/01/2019

Vs.

Rathnayake Mudiyanselage
Chandrasiri Thennakoonwela,
No. 14, 5th Lane,
Jambugasmulla Mawatha,
Nugegoda.
Accused

AND NOW BETWEEN

Rathnayake Mudiyanselage
Chandrasiri Thennakoonwela,
No. 14, 5th Lane,
Jambugasmulla Mawatha,
Nugegoda.
Accused-Appellant

Vs.

Director General,
Commission to Investigate
Allegations of Bribery or
Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.
Complainant-Respondent

Before: Hon. Justice P. Padman Surasena
Hon. Justice Yasantha Kodagoda, P.C.
Hon. Justice Kumudini Wickremasinghe
Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando

Counsel: Rienzie Arseculeratne, P.C. with Chamindri Aresculeratne, Thejitha Koralage, Thilina Punchihewa, Himasha Silva for the Accused-Appellant.

Ayesha Jinasena, P.C., Solicitor General with Sudarshana De Silva, Senior Deputy Solicitor General, Udara Karunathilake, Senior State Counsel and Disna Gurusinghe, Assistant Director-General for the Complainant-Respondent.

Argued on: 25.03.2024

Written Submissions:

By the Accused-Appellant on 02.05.2024
By the Complainant-Respondent on 10.05.2024

Decided on: 07.10.2024

Samayawardhena, J.

Introduction

The appellant was indicted before the Permanent High Court at Bar of the Western Province holden in Colombo by the Director General of the Commission to Investigate Allegations of Bribery or Corruption on six charges under the Bribery Act, No. 11 of 1954, as amended. At the close of the case for the prosecution, an application was made on behalf of the appellant under section 200(1) of the Code of Criminal Procedure Act, No. 15 of 1979, as amended, seeking to acquit the appellant without calling for the defence. By order dated 29.05.2023, the Permanent High Court at Bar refused to acquit the appellant at that stage on the basis that the prosecution had established the commission of the offences/some of the offences on the indictment.

The appellant filed a final appeal by way of a Petition of Appeal dated 21.06.2023 before this Court against the order "*in terms of section 12B of the Judicature Act No. 2 of 1978 as amended by the Judicature (Amendment) Act No. 9 of 2018 read with the provisions of the Code of Criminal Procedure Act No. 15 of 1979 as amended*" seeking to set aside the said order and acquit the appellant. Alternatively, the appellant sought an order directing the Permanent High Court at Bar to acquit him of the charges not proved by the prosecution and to call for the defence only in respect of the charges that have been established by the prosecution.

At the commencement of the argument, this Court *ex mero motu* raised a threshold issue as to whether the appellant could file a final appeal against the said interlocutory order of the Permanent High Court at Bar. Both parties made oral submissions followed by written submissions on this issue.

Permanent High Court at Bar

According to Article 105 of the Constitution, in the judicial hierarchy, after the Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka, the Constitution recognizes the High Court of the Republic of Sri Lanka. Article 105 makes no reference to the High Courts for the Provinces established under Article 154P of the Constitution.

Article 154P of the Constitution introduced by the 13th Amendment to the Constitution certified on 14th November 1987 provided for the establishment of a High Court for each Province, commonly known as the Provincial High Court, to exercise jurisdiction within the Province. Article 154P of the Constitution reads as follows:

> *154P (1) There shall be a High Court for each Province with effect from the date on which this Chapter comes into force. Each such High Court shall be designated as the High Court of the relevant Province.*
>
> *(2) The Chief Justice shall nominate from among Judges of the High Court of Sri Lanka such number of Judges as may be necessary to each such High Court. Every such Judge shall be transferable by the Chief Justice.*
>
> *(3) Every such High Court shall—*
>
> > *(a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;*
> >
> > *(b) 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;

(c) exercise such other jurisdiction and powers as Parliament may, by law, provide.

(4) Every such High Court shall have jurisdiction to issue, according to law—

(a) orders in the nature of habeas corpus, in respect of persons illegally detained within the Province; and

(b) order in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against any person exercising, within the Province, any power under—

(i) any law; or

(ii) any statutes made by the Provincial Council established for that Province, in respect or any matter set out in the Provincial Council List.

(5) The Judicial Service Commission may delegate to such High Court, the power to inspect and report on, the administration of any Court of First Instance within the Province.

(6) Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgment or sentence of any such Court in the exercise of its jurisdiction under paragraphs (3)(b) or (3)(c) or (4), may appeal therefrom to the Court of Appeal in accordance with Article 138.

According to section 2 of the Judicature Act, No. 2 of 1978, as amended by Judicature (Amendment) Act, No. 34 of 2022, both the High Court of

the Republic of Sri Lanka and the High Courts for the Provinces established under Article 154P of the Constitution are designated as Courts of First Instance, with the High Courts for the Provinces positioned after the High Court of the Republic of Sri Lanka. However, it is relevant to note that the 11th Amendment to the Constitution, certified on 6th May 1987, introduced the term "High Court of Sri Lanka" in place of "High Court of the Republic of Sri Lanka", by repealing Article 111(1) of the Constitution and replacing it with a new sub-Article.

Section 12 of the Judicature Act provides for "Trials at Bar" with three Judges of the High Court of the Republic of Sri Lanka nominated by the Chief Justice to each such High Court specifying the judicial zone where such trial shall be held to hear cases punishable under the Penal Code and other laws.

The Judicature (Amendment) Act, No. 9 of 2018, amended section 12 by adding sections 12A, 12B, and 12C to establish and make provisions for "Permanent High Courts at Bar" with three Judges nominated by the Chief Justice from among the Judges of the High Court of the Republic of Sri Lanka to each such High Court.

Section 12A of the Judicature Act reads as follows:

> *12A(1)(a) Notwithstanding anything in any other written law, the High Court established by Article 154P of the Constitution for a Province shall, in terms of sub-paragraph (c) of paragraph (3) of Article 154P of the Constitution hear, try and determine in the manner provided for by written law and subject to the provisions of subsection (4), prosecutions on indictment against any person, in respect of financial and economic offences specified in the Sixth Schedule to this Act, and any other offence committed in the course of the same transaction of any such offence, with three Judges*

sitting together nominated by the Chief Justice from among the Judges of the High Court of the Republic of Sri Lanka (hereinafter referred to as the "Permanent High Court at Bar").

(b) The Minister may, with the concurrence of the Chief Justice increase, by order published in the Gazette, the number of such Courts of the Permanent High Court at Bar.

(2)(a) Notwithstanding anything to the contrary in any other written law, the Permanent High Court at Bar shall have jurisdiction in respect of offences referred to in subsection (1)

> *(i) committed by any person wholly or partly in Sri Lanka; or*
>
> *(ii) wherever committed by a citizen of Sri Lanka in any place outside the territory of Sri Lanka or on board or in relation to any ship or aircraft of whatever category.*

(b) For the avoidance of doubt it is hereby declared that the jurisdiction of any other Court in respect of the offences referred to in the Sixth Schedule, shall continue to be in force.

(3) The jurisdiction of such Permanent High Court at Bar shall—

(a) if such Court is the Court established for the Western Province, be exercised by that Court sitting in Colombo and where necessary in any other place within the Western Province, as may be designated by the Minister by Order published in the Gazette, with the concurrence of the Chief Justice; or

(b) if such Court is the Court established for any other Province, be exercised by that Court sitting in such place within that Province, as may be designated by the Minister by Order published in the Gazette, with the concurrence of the Chief Justice.

(4)(a) The Attorney General or, the Director General for the Prevention of Bribery and Corruption on the direction of the Commission to Investigate Allegations of Bribery or Corruption, as the case may be, shall, taking into consideration -

(i) the nature and circumstances;

(ii) the gravity;

(iii) the complexity;

(iv) the impact on the victim; or

(v) the impact on the State,

of the offence, referred to in subsection (1), refer the information relating to the commission of such offence to the Chief Justice for a direction whether criminal proceedings in respect of such offence shall be instituted in the Permanent High Court at Bar.

(b) Where the Chief Justice is of the opinion that any one or more of the criteria specified in paragraph (a) has been satisfied in referring information under that paragraph, he may by order under his hand direct that the criminal proceedings in respect of such offence be instituted in the Permanent High Court at Bar.

(5) Where the Chief Justice so directs, a trial before such Permanent High Court at Bar shall—

(a) be held upon indictment by the Attorney General, or the Director General for the Prevention of Bribery and Corruption on the direction of the Commission to Investigate Allegations of Bribery or Corruption;

(b) be held and concluded expeditiously; and

(c) unless in the opinion of the Court, exceptional circumstances exist which shall be recorded, be heard from day to day, to ensure the expeditious disposal.

(6)(a) Where any Judge of the Permanent High Court at Bar, dies or resigns or requests to be discharged from hearing the whole or part of any trial, before or after its commencement, or refuses or becomes unable to act, or otherwise ceases to be a Judge of the High Court, the Chief Justice shall, not later than two weeks of such death, resignation, discharge, refusal, inability or other cause, which causes such Judge to cease to be a Judge of such High Court, nominate another Judge of the High Court of the Republic of Sri Lanka in his place, to hear the whole or any part of such trial.

(b) Where a new Judge has been nominated under paragraph (a), it shall not be necessary for any evidence taken prior to such nomination to be retaken and the Permanent High Court at Bar shall be entitled to continue the trial from the stage at which it was immediately prior to such nomination, subject to the proviso to section 48 of this Act.

(7) The provisions of the Code of Criminal Procedure Act, No.15 of 1979 and the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994 or any other written law, shall, mutatis mutandis, apply to the institution of proceedings and trials before the Permanent High Court at Bar.

Right of appeal from orders of the Permanent High Court at Bar

Section 12B of the Judicature Act provides for the right of appeal from judgments, sentences and orders of the Permanent High Court at Bar.

> *12B(1) An appeal from any judgment, sentence or order pronounced at a trial held by a Permanent High Court at Bar under section 12A shall be made within twenty eight days from the pronouncement of such judgment, sentence or order to the Supreme Court and shall be heard by a Bench of not less than five Judges of that Court nominated by the Chief Justice. It shall be lawful for the Chief Justice to nominate himself to such Bench.*
>
> *(2) The provisions of the Code of Criminal Procedure Act, No. 15 of 1979 and the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994, or of any other written law governing appeals to the Court of Appeal from judgments, sentences or orders of the High Court in cases tried without a Jury shall, mutatis mutandis, apply to the appeals to the Supreme Court under subsection (1) from judgments, sentences or orders pronounced at a trial held before the Permanent High Court at Bar under section 12A.*
>
> *(3) Any appeal made under this section shall be heard and disposed of expeditiously.*

This sub-section provides for a direct appeal to the Supreme Court, bypassing the Court of Appeal, thereby ensuring the speedy disposal of appeals. Such appeals shall be heard by a Bench of not less than five Judges of the Supreme Court. This section further stipulates that the provisions of (1) the Code of Criminal Procedure Act, (2) the Commission to Investigate Allegations of Bribery or Corruption Act, or (3) any other written law related to appeals to the Court of Appeal from judgments, sentences and orders of the High Court in cases tried by a Judge without a Jury would *mutatis mutandis* apply to such appeals. It is important to note that it is not the law governing appeals to the Supreme Court from judgments and orders of the Court of Appeal, but rather the law governing appeals to the Court of Appeal from judgments and orders of

the High Court that applies to appeals from the Permanent High Court at Bar to the Supreme Court.

Let me now consider the provisions of the Code of Criminal Procedure Act, the Commission to Investigate Allegations of Bribery or Corruption Act, and any other written laws governing appeals to the Court of Appeal from judgments, sentences or orders of the High Court in cases tried without a Jury. This will help to understand the appellate procedure against judgments, sentences or orders pronounced by the Permanent High Court at Bar, with particular emphasis on appeals against orders.

Although section 12B(1) of the Judicature Act appears to confer a right of appeal from any judgment, sentence or order pronounced by a Permanent High Court at Bar to the Supreme Court, it is important to emphasize that, as section 12B(2) states, such a right must be understood in light of other written laws governing appeals to the Court of Appeal from judgments, sentences or orders of the High Court in cases tried without a Jury. This includes the provisions of the Judicature Act, the Commission to Investigate Allegations of Bribery or Corruption Act, the Code of Criminal Procedure Act and the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. When so considered, it is the view of this Court, unless there is an amendment to explicitly reflect the intention of the legislature, the term "order" in section 12B(1) shall be understood, insofar as an accused is concerned, as referring to a final order having the effect of a final judgment, but does not include an interlocutory order.

According to section 12A(5) of the Judicature Act, a trial before the Permanent High Court at Bar shall be heard from day to day and concluded expeditiously. If there is a right of appeal against each and every order made by the Permanent High Court at Bar to the Supreme Court, this is not practically possible. Such an interpretation could also

lead to abuse of the process of the Court, because in terms of section 333(1) of the Code of Criminal Procedure Act, once an appeal is accepted, all further proceedings in such case shall be stayed and the appeal together with the case record and eight copies thereof shall be forwarded to the Court of Appeal as quickly as possible.

Judicature Act

As the long title of the Judicature Act states, it is "*An Act to provide for the establishment and constitution of a system of Courts of First Instance in terms of Article 105(1) of the Constitution, <u>to define the jurisdiction of and to regulate the procedure in and before such courts</u>, and to provide for matters connected with or incidental to the matters aforesaid.*"

Sections 14, 15, and 16 of the Judicature Act create and confer the right of appeal from the judgments and orders of the High Court to the Court of Appeal by the accused, the Attorney General, and an aggrieved party. These provisions delineate the scope of appellate jurisdiction, ensuring that specific parties have a defined avenue to challenge the decisions of the High Court.

> *14. Any person who stands convicted of any offence by the High Court of the Republic of Sri Lanka or the High Court for the Province established by Article 154P of the Constitution may appeal therefrom to the Court of Appeal—*
>
> > *(a) in a case tried with a jury—*
> >
> > > *(i) against his conviction on any ground which involves a question of law alone; or*
> > >
> > > *(ii) against his conviction on any ground which involves a question of fact alone, or a question of mixed law and fact; or*

(iii) with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law;

(b) in a case tried without a jury, as of right, <u>from any conviction or sentence</u> except in the case where—

(i) the accused has pleaded guilty; or

(ii) the sentence is for a period of imprisonment of one month of whatsoever nature or a fine not exceeding one hundred rupees;

Provided that in every such case there shall be an appeal on a question of law or where the accused has pleaded guilty on the question of sentence only.

15. The Attorney-General may appeal to the Court of Appeal in the following cases:-

(a) <u>from an order of acquittal</u> by a High Court of the Republic of Sri Lanka or a High Court for the Province established by Article 154P of the Constitution—

(i) on a question of law alone in a trial with or without a jury;

(ii) on a question of fact alone or on a question of mixed law and fact with leave of the Court of Appeal first had and obtained in a trial without a jury;

(b) in all cases <u>on the ground of inadequacy or illegality of the sentence</u> imposed or <u>illegality of any other order of the High</u>

<u>Court</u> of the Republic of Sri Lanka or the High Court for the Province established by Article 154P of the Constitution.

16(1) A person aggrieved by a judgment, order or sentence of the High Court of the Republic of Sri Lanka or the High Court for the Province established by Article 154P of the Constitution in criminal cases may appeal to the Court of Appeal with the leave of such court first had and obtained in all cases in which the Attorney-General has a right of appeal under this Chapter.

(2) In this section "a person aggrieved" shall mean any person whose person or property has been the subject of the alleged offence in respect of which the Attorney-General might have appealed under this Chapter and shall, if such person be dead, include his next of kin namely his surviving spouse, children, parents or further descendants or brothers or sisters.

(3) Nothing in this section shall in any way affect the power of the Court of Appeal to act by way of revision in an appropriate case.

Section 14 confers on a convicted person the right of appeal/the right to file a leave to appeal application against a conviction or sentence. Section 15 confers on the Attorney General the right of appeal/the right to file a leave to appeal application against an acquittal, sentence or illegality of any other order of the High Court. Section 16 confers on an aggrieved party the right to file a leave to appeal application in all cases in which the Attorney General has the right of appeal. A proper interpretation of section 16(2) reveals that the term "a person aggrieved" does not extend to include an accused or convicted person.

<u>Sections 14, 15 and 16 of the Judicature Act do not provide for a right of appeal to an accused, whether by direct appeal or by leave of the Court</u>

of Appeal first had and obtained, against orders made by the High Court prior to conviction.

Bribery Act

In terms of section 13(2) of the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994, the Director General has similar rights as those of the Attorney General regarding appeals.

> *13(2) Where proceedings are instituted in the High Court by an indictment signed by the Director-General, such Director-General shall have the right to appeal against a judgment, order or sentence of such High Court in all cases in which the Attorney-General would have had the right to appeal against such judgment, order or sentence had an indictment for such offence been presented to such Court by the Attorney-General. An officer appointed to assist the Commission shall be entitled to appear in any Court in support of such appeal.*

Code of Criminal Procedure Act

Chapter XXVIII of the Code of Criminal Procedure Act, comprising sections 316-368, deals with "Appeal, Reference and Revision". Sections 331-352 primarily deal with appeals from the High Court to the Court of Appeal and applications for leave to appeal.

Section 316 of the Code of Criminal Procedure Act enacts:

> *An appeal shall not lie from any judgment or order of a criminal court except as provided for by this Code or by any other law for the time being in force.*

Section 331 of the Code of Criminal Procedure Act reads as follows:

331(1) An appeal under this Chapter may be lodged by presenting a petition of appeal or application for leave to appeal to the Registrar of the High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced:

Provided that a person in prison may lodge an appeal by stating within the time aforesaid to the jailer of the prison in which he is for the time being confined his desire to appeal and the grounds therefor and it shall thereupon be the duty of such jailer to prepare a petition of appeal and lodge it with the High Court where the conviction, sentence or order sought to be appealed against was pronounced.

(2) In computing the time within which an appeal may be preferred, the day on which the judgment or final order appealed against was pronounced shall be included, but all public holidays shall be excluded.

Sections 340-342 of the Code of Criminal Procedure Act deal with applications for leave to appeal. Section 340 reads as follows:

An application for leave to appeal may be lodged by presenting it to the Registrar of the Court of Appeal within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced and the provisions of the proviso to subsection (1) of section 331 and subsections (2), (3) and (4) of that section shall mutatis mutandis apply to such application.

It is relevant to note that the Code of Criminal Procedure Act, as its short and long titles indicate, is an Act introduced to regulate the procedure of the criminal Courts. Although section 331(1) of the Code of Criminal Procedure Act appears to grant the right to file a direct appeal or an application for leave to appeal against any conviction, sentence or order

to the Court of Appeal, subsection (2) clarifies that "*in computing the time within which an appeal may be preferred, the day on which the judgment or final order appealed against was pronounced shall be included, but all public holidays shall be excluded.*" This qualifies the term "order" in section 331(1) as a "final order".

In *Ravi Karunanayake v. The Attorney General* (CA (PHC) APN 66/2010, CA Minutes of 26.05.2010), after the indictment was read out, the accused took up a jurisdictional objection, which was overruled by the High Court. The accused filed a final appeal against the order and moved to stay the proceedings in the High Court. The High Court forwarded the Petition of Appeal to the Court of Appeal but refused to stay the proceedings stating that the impugned order was not a final order. On appeal, De Abrew J. in the Court of Appeal upheld the view taken by the High Court and stated that an appeal can only be filed against a final order, not against any order.

> *[The counsel] further contended that where a party dissatisfied with an order of trial court files a petition of appeal against such order, High Court Judge is bound to stay the proceedings and forward the original case record to the Court of Appeal. If this argument is correct, whenever a party is dissatisfied with an order of the trial court whether it is a final order or not files a petition of appeal, the proceedings of the trial court must be stayed. If this procedure is adopted it will lead to an absurd situation and the public faith in the judicial system of this country will start eroding. Adoption of the said procedure will undoubtedly frustrate the smooth functioning of the trial court. Therefore, if a party dissatisfied with an order of the High Court files a petition of appeal, the order appealed against, in my view, must be a final order. This contention is strengthened by*

provisions of Section 331(2) of the CPC which contemplates of a final order.

In *Saunderaraj and Another v. Attorney General* (CA/10/2011, CA Minutes of 05.08.2016), the appellants were indicted before the High Court and at the commencement of the trial the defence challenged the voluntariness of the confession made to the Magistrate. After an inquiry, the High Court ruled it to be voluntary. Malalgoda J. as the President of the Court of Appeal held that the final appeal filed against the said order was misconceived in law as the impugned order was not a final order.

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

As evident from section 12A of the Judicature Act, Permanent High Courts at Bar are a species of Provincial High Courts established by Article 154P of the Constitution. The impugned order was pronounced by the Permanent High Court at Bar of the Western Province in the exercise of its original criminal jurisdiction. Permanent High Courts at Bar do not have appellate jurisdiction.

As the long title of the Act indicates, the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, was enacted "*to make provision regarding the procedure to be followed in, and the right to appeal to, and from, the High Court established under Article 154P of the Constitution; and for matters connected therewith or incidental thereto*".

Section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, reads:

9. Subject to the provisions of this Act or any other law, any person aggrieved by–

(a) a final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the

appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court ex mere motu or at the instance of any aggrieved party to such matter or proceedings:

Provided that the Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree or sentence made by such High Court, in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act, or any other law where such High Court has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided further that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance; and

(b) a final order, judgment or sentence of a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction conferred on it by paragraph (3) (a), or (4) of Article 154P of the Constitution may appeal therefrom to the Court of Appeal.

Sections 9 and 10 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, have been drafted in terms similar to Articles 128 and 127 of the Constitution, respectively. Section 9(a) of Act No. 19 of 1990 *prima facie* deals with appeals to the Supreme Court from final orders, judgments, decrees or sentences of the High Court. However, what is relevant to the instant appeal is section 9(b), which deals with

appeals to the Court of Appeal from final orders, judgments, decrees or sentences of the High Court. In terms of section 9(b), any person aggrieved by a final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction conferred on it by paragraph (3)(a), or (4) of Article 154P of the Constitution may appeal therefrom to the Court of Appeal. Paragraphs (3)(a) and (4) of Article 154P of the Constitution deal with the instances where the Provincial High Court exercises original jurisdiction within the province.

It is important to emphasize that when the Provincial High Court exercises original jurisdiction, an appeal lies to the Court of Appeal from a final order, judgment or sentence. No appeal lies to the Court of Appeal against interlocutory orders.

Appellate jurisdiction of the Court of Appeal

Given that the law governing appeals to the Court of Appeal from judgments and orders of the High Court in cases tried without a Jury is applicable to appeals to the Supreme Court from judgments and orders of the Permanent High Court at Bar, I shall further explore the nature of the appellate jurisdiction of the Court of Appeal.

A party dissatisfied with any judgment or order of the High Court cannot, as of right, invoke the appellate jurisdiction of the Court of Appeal under Article 138 of the Constitution.

> *138(1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and 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:

Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

(2) The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain.

As Article 138(1) expressly states, the appellate jurisdiction of the Court of Appeal shall be exercised "*subject to* <u>*the provisions of the Constitution*</u> *or* <u>*of any law*</u>". It is in this context, Surasena J., in *Chairman, Public Service Commission v. Wickramasinghe and Others* (SC/APPEAL/29/2022, SC Minutes of 23.02.2023) stated:

Article 128(2) of the Constitution has also conferred jurisdiction on the Supreme Court to grant Special Leave to Appeal to the Supreme Court. Closer comparison of Article 128(1) with Article 128(2) of the Constitution clearly reveals that the jurisdiction conferred by the Constitution on the Court of Appeal to grant leave to appeal to the Supreme Court is a restricted jurisdiction than that conferred on the Supreme Court to grant Special Leave to Appeal to the Supreme Court. This is manifest from the sections themselves. Article 128(1) has only conferred Court of Appeal with jurisdiction to grant leave to appeal to the Supreme Court only from any final order of the Court of Appeal whereas Article 128(2) has conferred on the Supreme Court much wider jurisdiction to grant Special Leave to Appeal both

> *from any final or interlocutory order of the Court of Appeal. The fact that Article 128(2) has included 'from any final or interlocutory order' and the fact that Article 128(1) has included only 'any final order' and had dropped 'or interlocutory order' is significant. This means that the Court of Appeal has jurisdiction to grant leave to appeal to the Supreme Court only in respect of any final order it has made as per Article 128(2). This also means that the Court of Appeal has no jurisdiction to grant leave to appeal to the Supreme Court from any interlocutory order it has made. It is only the Supreme Court which has jurisdiction to grant Special Leave to Appeal from any interlocutory order made by the Court of Appeal.*

It was held in the landmark case of *Martin v. Wijewardena* [1989] 2 Sri LR 409 that Article 138(1) only defines the jurisdiction of the Court of Appeal and does not create or confer new rights of appeal to persons. It is now well-settled law across jurisdictions that the right of appeal is a creature of statute, not an inherent or common law right. Such a right must be explicitly and expressly conferred by statute, not implied or inferred. As observed in *The People's Bank v. Camillus Perera* [2003] 2 Sri LR 358 at 360, if there is no right of appeal, unless expressly provided for, there is no right to make an application for leave to appeal, as the granting of such leave would effectively make the application a final appeal. What cannot be achieved directly, cannot be achieved indirectly.

In *V.C. Shukla v. State Through C.B.I.* (AIR 1980 SC 962), the Supreme Court of India held that "*It is a well settled proposition of law that there is no inherent or common law right of appeal in a subject and the appeal is the creature of statute and therefore the right to appeal can only be enjoyed within the strictly demarcated limits conferring such right of appeal.*" In a similar vein, in *Shankar Kerba Jadhav and Others v. State of Maharashtra* (AIR 1971 SC 840) the Supreme Court of India observed that "*An appeal*

is a creature of a statute and the powers and jurisdiction of the appellate court must be circumscribed by the words of the statute."

In the Privy Council decision of *Cono Cono and Co Ltd v. Veerasamy and Others* [2017] UKPC 11, Lord Sumption acknowledged that there is no inherent or implied right of appeal but there must be a statutory basis for a right of appeal to be invoked.

In *Healey v. Ministry of Health* [1954] 3 All ER 449 at 453, Morris L.J. observed "*[T]he Courts cannot invent a right of appeal where none is given. The Courts will not usurp an appellate jurisdiction where none is created.*"

The High Court of Australia in *Conway v. The Queen* [2002] HCA 2 at para 68 and *Kench v. Bailey* (1926) 37 CLR 375 at 380 reiterated that the right of appeal is a creature of statute and not an inherent right.

In our jurisdiction, the Full Bench decision of the Supreme Court in the case of *In re Wijesinghe* (1913) 16 NLR 312 declared "*It is well-established principle of law that an appeal never lies to a party to a legal proceeding from an order made in it unless the right is expressly given by statute*".

In *Martin v. Wijewardena* (*supra*), Jameel J. (with the concurrence of Ranasinghe C.J. and Amerasinghe J.) stated at 419: "*An Appeal is a Statutory Right and must be expressly created and granted by statute. It cannot be implied.*" Jameel J. further elaborated at 413:

> *Article 138 is an enabling provision which creates and grants jurisdiction to the Court of Appeal to hear appeals from Courts of First Instance, Tribunals and Other Institutions. It defines and delineates the jurisdiction of the Court of Appeal. It does not, nor indeed does it seek to, create or grant rights to individuals viz-a-viz appeals. It only deals with the jurisdiction of the Court of Appeal and*

> *its limits and its limitations and nothing more. It does not expressly nor by implication create or grant any rights in respect of individuals. Article 139 makes it quite clear that the Court of Appeal is an appellate tribunal in respect of the Orders, Judgments, Decrees or Sentences of the Courts of First instance, Tribunals or Other Institutions. In the case of the Courts of First instance, referred to above, it is the Judicature Act which creates and institutes them.*

Martin v. Wijewardena has been consistently followed in later cases: (*Gamsewa v. Maggie Nona* [1989] 2 Sri LR 250, *Gunaratne v. Thambinayagam* [1993] 2 Sri LR 355, *Malegoda v. Joachim* [1997] 1 Sri LR 88, *Bandara v. People's Bank* [2002] 3 Sri LR 25, *The People's Bank v. Camillus Perera* (*supra*), *Wickramasekera v. Officer-in-Charge, Police Station, Ampara* [2004] 1 Sri LR 257, *Jayawardena v. Sampath Bank* [2005] 2 Sri LR 83, *Bakmeewewa, Authorised Officer of People's Bank v. Konarage Raja* (*supra*), *Hatton National Bank v. Thejasiri Gunethilake* [2016] 1 Sri LR 276, *DFCC Bank v. Rajitha Fernando* (SC/APPEAL/33/2019, SC Minutes of 26.02.2024)

In *Weragama v. Eksath Lanka Wathu Kamkaru Samithiya and Others* [1994] 1 Sri LR 293 at 299, Mark Fernando J. stated:

> *The jurisdiction of the Court of Appeal under Article 138 is not an entrenched jurisdiction, because Article 138 provides that it is subject to the provisions "of any law"; hence it was always constitutionally permissible for that jurisdiction to be reduced or transferred by ordinary law (of course, to a body entitled to exercise judicial power).*

Subsequent cases such as *Sunil Chandra Kumara v. Veloo* [2001] 3 Sri LR 91 and *Gunawardane and Others v. Muthukumarana and Others* [2020] 3 Sri LR 306 followed *Weragama*.

In the Supreme Court case of *Wickramasekera v. Officer-in-Charge, Police Station, Ampara* (*supra*), Bandaranayake J. (as she then was), while emphasizing at 265 that Article 138 is an enabling provision, which distinctly states that the Court of Appeal shall exercise appellate jurisdiction subject to the provisions of the Constitution or of any law, concluded at 267:

> *The Court of Appeal does not have appellate jurisdiction in terms of Article 138(1) of the Constitution read with Article 154(6) in respect of decisions of the Provincial High Court made in the exercise of its appellate jurisdiction and it is the Supreme Court that has the jurisdiction in respect of appeals from the Provincial High Court as set out in section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.*

Although there is only one Court of Appeal for the whole island and there is one or more Provincial High Courts for each province, the Court of Appeal and Provincial High Courts exercise concurrent jurisdiction (*Gunaratne v. Thambinayagam* [1993] 2 Sri LR 355, *Swasthika Textile Industries Ltd v. Thantrige Dayaratne* [1993] 2 Sri LR 348, *Balaganeshan v. OIC, Police Station, Seeduwa* (SC/SPL/LA/79/2015, SC Minutes of 01.04.2016). Hence, the principles stated above are also applicable to the Provincial High Courts.

In *Malegoda v. Joachim* [1997] 1 Sri LR 88, G.P.S. De Silva C.J. stated at 90:

> *It is true that Article 154P(3)(b) of the Constitution enacts that a High Court for each Province 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". But the point to be noted is that while Article 154P confers appellate jurisdiction on the High Court (forum jurisdiction) yet it does not create a corresponding right in any person to invoke the appellate jurisdiction. It is well settled law "that a right of appeal is a statutory right and must be expressly created and granted by Statute."*

Referring to the dicta in *Martin v. Wijewardena* that I quoted above, G.P.S. De Silva C.J. further held at 91:

> *This reasoning would apply with equal force to the conferment of jurisdiction on the High Court established by Article 154P.*

In the case of *Swasthika Textile Industries Ltd v. Thantrige Dayaratne* (*supra*), Mark Fernando J. stated at 352:

> *The jurisdiction of the High Court under Article 111, originally and after the Thirteenth Amendment, was neither defined nor entrenched and had to be conferred by Parliament, by ordinary law. Article 154P(3)(b) conferred jurisdiction on the High Court "notwithstanding anything in Article 138", thus avoiding any possibility of an argument that these provisions were contradictory, and manifesting an intention to confer a concurrent jurisdiction. That jurisdiction was also "subject to any law", and therefore (as in the case of Article 138) was not entrenched, and was liable to alteration by Parliament by ordinary law.*

In *Balaganeshan v. OIC, Police Station, Seeduwa* (SC/SPL/LA/79/2015, SC Minutes of 01.04.2016), Dep J. (as he then was) held:

> *When the Provincial High Court exercises appellate jurisdiction, it exercises appellate jurisdiction hitherto exclusively vested in the Court of Appeal. It exercises a parallel or concurrent jurisdiction with*

> *the Court of Appeal. The High Court when it exercises appellate jurisdiction it is not subordinate to the Court of Appeal. That is the basis for conferring jurisdiction on the Supreme Court under section 9 of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 to hear appeals from the judgments of the High Court when it exercises appellate jurisdiction. I hold that the Accused Appellant–Petitioner should have filed a Special Leave to Appeal application against the judgment of the High Court exercising Appellate Jurisdiction to the Supreme Court in the first instance instead to the Court of Appeal.*

There appears to be a difference of opinion regarding the invocation of the revisionary jurisdiction of the Court of Appeal against orders and judgments delivered by the Provincial High Courts in the exercise of their appellate jurisdiction. However, it is unnecessary to address this issue here, as the matter under consideration in the present appeal involves an order made by the Permanent High Court at Bar in the exercise of its original jurisdiction.

In the post-argument written submissions, learned President's Counsel for the appellant submits that there is no provision in law to file a leave to appeal application against the impugned order of the Permanent High Court at Bar. That cannot form the basis to file a final appeal against the impugned order unless such right has been expressly and unambiguously created. However, no submission acceptable to this Court was made to assert that a final appeal lies against the impugned interlocutory order. The sole argument presented was that section 12B of the Judicature Act, in conjunction with the provisions of the Code of Criminal Procedure Act, permits a final appeal against any judgment, sentence or order of the Permanent High Court at Bar. In light of the aforementioned analysis, this contention is unsustainable in law.

Appellate jurisdiction of the Supreme Court

According to Article 118(c) of the Constitution, the Supreme Court of the Republic of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall, subject to the provisions of the Constitution, exercise, *inter alia*, final appellate jurisdiction. In *Wadigamangawa and Others v. Wimalasuriya* [1981] 1 Sri LR 287 at 303, Wanasundera J. stated that the provisions relating to the exercise of appellate jurisdiction of the Supreme Court, "*namely the manner of appealing and the nature of the powers of the Supreme Court in regard to such appeals, are found in Articles 127 and 128 of the Constitution.*" Articles 127 and 128 of the Constitution are couched in broad terms granting "the plenitude of power" to the Supreme Court.

Article 127 of the Constitution delineates the scope of the appellate jurisdiction of the Supreme Court. In terms of Article 127(1), the appellate jurisdiction of the Supreme Court extends, subject to the Constitution, for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution. The jurisdiction is not confined to the correction of errors committed only by the Court of Appeal.

It needs to be highlighted that the appellate jurisdiction of the Supreme Court is subject only to the Constitution, unlike the appellate jurisdiction of the Court of Appeal, which, in terms of Article 138, is subject to "*the provisions of the Constitution or of any law.*" As the apex Court, the Supreme Court is vested with plenary jurisdiction, exercising its powers to correct errors made by all subordinate courts.

Article 127 reads as follows:

> *127(1) The Supreme Court shall, <u>subject to the Constitution</u>, be the <u>final Court</u> of <u>civil and criminal</u> appellate jurisdiction for and within*

the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.

(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgement, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court and it may affirm, reverse or vary any such order, judgement, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance.

Article 128 of the Constitution deals with the right of appeal to the Supreme Court. Article 128(1) and (2) read as follows:

128(1) An appeal shall lie to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings.

(2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgement, decree, or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of

> *Appeal has refused to grant leave to appeal to the Supreme Court or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:*
>
> *Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.*

In terms of Article 128(1) and (2), an appeal does not lie directly to the Supreme Court without first obtaining leave to appeal. There is no absolute right to appeal to the Supreme Court. The leave of the Supreme Court or of the Court of Appeal is a *sine qua non* for a person to come before the Supreme Court by way of appeal.

However, in terms of Article 128(4), "*An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament.*"

There are several avenues to invoke the appellate jurisdiction of the Supreme Court.

Article 128(1) is one avenue. According to Article 128(1), leave can be obtained from the Court of Appeal against any final order, judgment, decree or sentence of the Court of Appeal. The Court of Appeal can grant leave to appeal *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings only if the question is a substantive question of law. If the Court of Appeal decides to grant leave to appeal *ex mero motu*, it was held in *Mendis v. Abeysinghe* [1989] 2 Sri LR 262 at 265-266 that there is no necessity for the Court of Appeal to hear the parties on that point.

It is also noteworthy that leave to appeal may be sought not only by a party to the action but also by any aggrieved party.

In *Mendis v. Dublin De Silva* [1990] 2 Sri LR 249, an objection was taken before the Supreme Court in an appeal against a partition judgment that the appellant was not an aggrieved person within the meaning of Article 128(1) of the Constitution. Dheeraratne J. at 251, upheld the objection and cited with approval *In re Sidebottam* (1880) 14 Ch. Div. 458 at 465 where James L.J. stated:

> *A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which wrongly deprived him of something, or wrongly affected his title to something.*

In *Bandaranaike v. Jagathsena* [1984] 2 Sri LR 397, Colin-Thome J. held at 406 that the wide discretion vested in the Supreme Court allows it to entertain appeals even from persons who were not parties to the proceedings before the Court of Appeal.

> *Under Article 128(2), the Supreme Court has a wide discretion to grant special leave to appeal to the Supreme Court from a judgment of the Court of Appeal where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court. Under Article 128(2) you do not have to be a party in the original case.*

The second avenue for invoking the appellate jurisdiction of the Supreme Court is articulated in Article 128(2) of the Constitution, which is couched in more liberal terms than Article 128(1), as evidenced by several key aspects.

The Court of Appeal can grant leave to appeal, but the Supreme Court can grant special leave to appeal or leave to appeal.

The Court of Appeal can grant leave to appeal *inter alia* against any final order of the Court of Appeal, but the Supreme Court can grant special

leave to appeal *inter alia* against any final or interlocutory order of the Court of Appeal.

The Court of Appeal can grant leave to appeal on a substantive question of law, but the jurisdiction of the Supreme Court is not so circumscribed.

The terms "any matter or proceedings" and "the case or matter" used in Article 128 have broader implications. As Samarakoon C.J. observed in *Wadigamangawa's* case at 294, "*These are of wider import than a civil suit or action.*" As Gunawardena J. explained in *Kulatilake v. Karunaratne and Others* [1989] 1 Sri LR 303 at 305, the phrase "*any matter or proceedings*" can encompass matters "*other than from a final order, judgment, decree, or sentence of the Court of Appeal.*"

The final appellate jurisdiction of the Supreme Court extends to "*any matter or proceedings, whether civil or criminal*". In this regard, Samarakoon C.J. in *Wadigamangawa's* case stated at 301:

> *It is to be noted that Article 118 states that "the Supreme Court shall be the highest and final superior court of record and shall exercise final appellate jurisdiction." In my view, the Constitution intended the dichotomy of "civil and criminal jurisdiction" to be exhaustive and that between them embraced all proceedings of whatever nature.*

Article 128(2) comprises three parts:

(a) the first part of Article 128(2);
(b) the second part of Article 128(2); and
(c) the proviso.

Under Article 128(2), the Supreme Court can grant special leave to appeal:

(a) where the Court of Appeal has refused to grant leave to appeal to the Supreme Court;

<u>or</u>

(b) where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court.

The coordinating conjunction used is "or", not "and", which indicates that (a) and (b) are distinct and independent grounds. If the intention were to require that both conditions must be met as part of a single process, the drafters would have used the conjunction "and" instead of "or".

The term used in (b) above is "fit for review", which is different from "revision" or "revisionary jurisdiction" as used in other Articles including Article 138 of the Constitution. The Sinhala term for "review" as used in Article 128(2) is "සමාලෝචනය", as opposed to "ප්‍රතිශෝධනය" or "පරිශෝධනය", which means "revision".

The fact that "revision" is different from "review" is made abundantly clear by adverting to section 51(1) of the Courts Ordinance, No. 1 of 1889, which reads as follows:

> *It shall be lawful for the Chief Justice to make order in writing in respect of any case brought before the Supreme Court by way of appeal, **review or revision**, that it shall be heard by and before all the Judges of such Court or by and before any five or more of such Judges named in the order, but so that the Chief Justice shall always be one of such five or more Judges. The decision of such Judges when unanimous, or of the majority of them in case of any difference of opinion, shall in all cases be deemed and taken to be the judgment of the Supreme Court.*

In terms of sections 19, 36, 37 and 51 of the Courts Ordinance of 1889, the Supreme Court had revisionary jurisdiction. Similarly, sections 11

and 354 of the Administration of Justice Law No. 44 of 1973 vested the Supreme Court with revisionary jurisdiction. However, under the 1978 Constitution, the Supreme Court no longer possesses revisionary jurisdiction. In *Francis v. Cooray* (SC/REVISION/2/2019, SC Minutes of 25.03.2022), Dehideniya J. referring to *Peoples Merchant PLC v. Udaya Saman Subasinghe* (SC/CHC/APPEAL/14/2014, SC Minutes of 23.06.2021) and *Mahesh Agri Exim (Pvt) Ltd v. Gaurav Imports (Pvt) Ltd and Others* (SC/REVISION/2/2013, SC Minutes of 30.07.2019) stated that although under section 11 of the Administration of Justice Law, the Supreme Court was vested with the revisionary jurisdiction, according to the present Constitution of 1978, the revisionary powers vested in the Supreme Court by the Administration of Justice Law was removed to the Court of Appeal by Article 169 of the Constitution. This was reiterated in *Ajith Dissanayake v. Sri Lanka Savings Bank Limited* (SC/REVISION/10/2016, SC Minutes of 22.09.2023). In *Ganeshananantham v. Vivienne Goonewardene and Three Others* [1984] 1 Sri LR 319 at 328, Samarakoon C.J. stated that the "*Supreme Court has no jurisdiction to act in revision in cases decided by itself.*"

The third avenue to seek leave to appeal (not special leave to appeal) from the Supreme Court is embodied in the proviso to Article 128(2) of the Constitution, which empowers the Supreme Court to "*grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.*"

In *Bandaranaike v. Jagathsena* (*supra*) at 406, this Court held that when there are questions of law and fact to be decided, which are of public and general importance, there is a case fit for review by the Supreme Court.

In *Ranbanda v. People's Bank* (SC/SPL/LA/229/11, SC Minutes of 17.07.2014 at 8), Dep J. (as he then was) observed:

> *However it should be observed that there is a subtle difference between a leave to appeal and special leave to appeal applications. High Court could grant leave to appeal if it involves a substantial question of law. On the other hand though granting of special leave to appeal by the Supreme Court is discretionary, it has a wide discretion. The criterion is that the matter or case in the opinion of the Supreme Court is fit for review by the Supreme Court. Further the Supreme Court shall grant leave in every matter of proceeding in which it is satisfied that the question to be decided is of public or general importance.*

In general terms, the principles governing the interpretation of Constitutions differ from those applicable to other statutes. On this subject, Samarakoon C.J. in *Wadigamangawa*, observed at 293:

> *As was stated by Lord Wilberforce in Minister of Home Affairs v. Fisher (1973) 3 All ER 21 at 26 a Constitution is a document sui generis "calling for principles of interpretation of its own, suitable to its character…, without necessary acceptance of all the presumptions that are relevant to legislation of private law.*

N.S. Bindra, *Interpretation of Statutes*, 13th Edition (2023), page 656 states:

> *Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which, they seek to achieve. A Constitution is not just a document in solemn form, but a living framework for the government of the people exhibiting a sufficient degree of cohesion*

> *and its successful working depends upon the democratic sprit underlying it being respected in letter and in sprit. Hence, the Supreme Court is not bound to accept an interpretation which retards the progress or impedes social integration.*

In *Union of India v. Naveen Jindal* (AIR 2004 SC 1559), the Supreme Court of India stated:

> *Constitution being a living organ, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time. Interpretation of the Constitution is a difficult task. While doing so, the constitutional courts are not only required to take into consideration their own experience over the time, the international treaties and covenants but also keeping the doctrine of flexibility in mind.*

The scope and ambit of Article 128 have been the subject of several celebrated decisions.

In the case of *Sri Lanka Ports Authority v. Pieris* [1981] 1 Sri LR 101 at 108, Sharvananda J. (as he then was) exemplified the amplitude of powers the Supreme Court possesses in the exercise of its appellate jurisdiction as the final Court in the Republic. It was held that when Articles 127 and 128 are considered together the Supreme Court has the authority to correct all errors, whether in fact or in law, in both civil and criminal matters, committed by the Court of Appeal or any Court of first instance.

> *Article 128(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka provides that an appeal shall lie to the Supreme Court from any final order or judgment of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a*

substantial question of law if the Court of Appeal grants leave to the Supreme Court ex mero moto, or at the instance of any aggrieved party to such matter or proceeding. Article 128(2) provides for the Supreme Court granting special leave to appeal to this Court.

Article 127 spells the appellate jurisdiction of this Court. The appellate jurisdiction extends to the correction of all errors in fact and/or in law which shall be committed by the Court of Appeal or any court of first instance. There is no provision inhibiting this Court from exercising its appellate jurisdiction once that jurisdiction is invoked. On reading Articles 127 and 128 together, it would appear that once leave to appeal is granted by the Supreme Court or the Court of Appeal and this Court is seised of the appeal, the jurisdiction of this Court to correct all errors in fact or in law which had been committed by the Court of Appeal or court of first instance is not limited but is exhaustive. Leave to appeal is the key which unlocks the door into the Supreme Court, and once a litigant has passed through the door, he is free to invoke the appellate jurisdiction of this Court "for the correction of all errors in fact and/or in law which had been committed by the Court of Appeal or any court of first instance".

However, Sharvananda J., in the same breath, emphasized that this power must be exercised in accordance with sound principles of law to uphold the broader tenets of justice.

This Court, however, has the discretion to impose reasonable limits to that freedom, such as refusing to entertain grounds of appeal which were not taken in the court below and raised for the first time before this Court. This Court in the exercise of its discretion will, however, look to the broad principles of justice and will take judicial

> *notice of a point which is patent on the face of the proceedings and discourage mere technical objections.*

In *Kulatileke v. Karunaratne and Others* [1989] 1 Sri LR 303 at 305, Gunawardene J. elaborated the scheme of Article 128 in clearer terms:

> *In Article 128(1) where provision is made for leave to appeal to the Supreme Court to be granted by the Court of Appeal the words used are, "final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law." This in my view restricts the power of the Court of Appeal to grant leave to appeal only where substantial questions of law arise from such, "final order, judgment, decree or sentence." This becomes clear when one examines Article 128(2) where the power of the Supreme Court to grant special leave is dealt with. The amplitude of the provisions there appears to be much wider. The said sub-section provides for special leave to appeal to be granted, "from any final or interlocutory order, judgment, decree or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal." In addition, and importantly, the Supreme Court is vested with the power to grant such special leave "where in the opinion of the Supreme Court, a case or matter is fit for review by the Supreme Court." The words 'case' or 'matter', in my view enlarges the scope of the power of the Supreme Court to grant special leave to appeal even other than from a "final order, judgment, decree or sentence of the Court of Appeal." Furthermore, the proviso to the said article states that "the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance." It is therefore seen that the power vested in the Supreme Court to grant special leave to appeal is more extensive*

than the power granted to the Court of Appeal to permit leave to appeal to the Supreme Court.

In *Attorney General v. Bandaranayake and Others* (SC/APPEAL/67/2013, SC Minutes of 28.06.2013 at 12), Marsoof J. summarized the key features of Article 128 in the following manner:

Article 128(1) of the Constitution of Sri Lanka seeks to confer the power to the Court of Appeal to grant leave to appeal ex mero motu or at the instance of any aggrieved party to any matter or proceedings before it, from any final order, Judgment, decree or sentence of that Court in any matter civil or criminal, which involves a substantial question of law. It is manifest that Article 128(2) differs from 128(1) in many ways. Firstly, the Supreme Court may grant special leave to appeal in terms of 128(2) even where the Court of Appeal has refused to grant leave to appeal or where regardless of whether the Court of Appeal has allowed or refused leave, the Supreme Court is of the opinion the matter is fit for review by the Supreme Court. Secondly, Article 128(2) contemplates the grant of special leave to appeal even against interlocutory orders of the Court of Appeal, which did not fall within the purview of Article 128(1). Thirdly, not only an "aggrieved party", but any person whomsoever who can satisfy Supreme Court that the matter is fit for review by it, may succeed in obtaining special leave to appeal under Article 128(2) of the Constitution. Fourthly, the Supreme Court has a broad discretion to grant special leave to appeal where it considers the matter fit for review by it, except where as provided in the proviso to Article 128(2), it is satisfied that the matter is of public or general importance, in which event the Supreme Court is bound to grant leave to appeal. In my view, the submission of learned Counsel for the 11th and 12th Respondents that Article 128(2) should be read in

> *the light of Article 128(1) which confines the right to appeal to an "aggrieved party" is bereft of merit.*

Article 133 of the Indian Constitution addresses the appellate jurisdiction of the Supreme Court in civil matters, while Article 134 addresses its appellate jurisdiction in criminal matters. Article 136, which deals with "*Special leave to appeal by the Supreme Court*", is similar to Article 128 of our Constitution. Article 136 of the Indian Constitution quoted below grants the Supreme Court of India the broadest conceivable plenary appellate jurisdiction over all Courts and Tribunals in India.

> *136(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.*

The Supreme Court of India in the case of *Durga Shankar Mehta v. Thakur Raghuraj Singh* (AIR 1954 SC 520) held:

> *The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way.*

However, no power or discretion is unlimited, unbridged or unfettered. This is equally applicable to the Supreme Court as well. In the seminal case of *Roberts v. Hopwood* (1925) AC 578, Lord Wrenbury at 613 stated that "*A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought.*" The Supreme Court has set limits to itself within which to exercise this wide power. In *Arunachalam v. Sadhanantham* (AIR 1979 SC 1284), the Supreme Court of India declared:

> *Before proceeding to discuss the evidence and the findings of the High Court we remind ourselves of the confines of our jurisdiction to deal with appeals by special leave against judgments of acquittal by the High Court. Article 136 of the Constitution of India invests the Supreme Court with a plentitude of plenary, appellate power over all Courts and Tribunals in India. The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the Court for set limits to itself within which to exercise such power. It is now the well established practice of this Court to permit the invocation of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the Court. But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact making no distinction between judgment of acquittal and conviction, if the High Court, in arriving at those findings, has acted "perversely or otherwise improperly".*

A fuller Bench of the Supreme Court in *Sadhanantham v. Arunanchanalam and Another* (AIR 1980 SC 856) whilst stating that "*Article 136 is a special jurisdiction. It is residuary power; it is extra*

ordinary in its amplitude, its limit, when it chases injustice, in the sky itself. This Court functionally fulfils itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136", further added:

> *Is it merely a power in the Court to be exercised in any manner it fancies? Is there no procedural limitation in the manner of exercise and the occasion for exercise? Is there no duty to Act fairly while hearing a case under Art. 136, either in the matter of grant of leave or, after such grant, in the final disposal of the appeal? We have hardly any doubt that there is procedure necessarily implicit in the power vested in the Supreme Court. It must be remembered that Art. 136 confers jurisdiction on the highest Court. The founding fathers unarguably intended in the very terms of Art. 136 that it shall be exercised by the highest judges of the land with scrupulous adherence to judicial principles well-established by precedents in our jurisprudence. Judicial discretion is canalised authority, not arbitrary eccentricity. Benjamin Cardozo, The Nature of the Judicial Process, Yale University Press (1921), with elegant accuracy, has observed:*
>
> *"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains."*

In *Pritam Singh v. The State* (AIR 1950 SC 169), Fazal Ali J. observed that while the Supreme Court possesses wide discretionary power, it will only grant special leave to appeal in cases where grave injustice and exceptional circumstances warrant the intervention of the Court.

> *On a careful examination of article 136 along with the preceding article, it seems clear that the wide discretionary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article. (….) Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.*

In the case of *Albert v. Veeriahpillai* [1981] 1 Sri LR 110 at 113, Sharvananda J., while reaffirming the broad powers of the Supreme Court cautioned that, in the interest of ensuring justice between the parties, the Court may refuse to permit a party to raise a new point if the opposing party would suffer prejudice due to the belated stage at which it is raised.

> *Articles 118 of the constitution provides that "the Supreme Court shall be the highest and final court of record in the Republic and shall, subject to the provisions of the Constitution, exercise, inter alia, final appellate jurisdiction." Appellate jurisdiction may be exercised by way of appeal or revision. Article 128 of the Constitution prescribes how the appellate jurisdiction of this Court is invoked by way of appeal. The leave of this Court or of the Court of Appeal is a sine qua non for a party to come to this Court by way of*

> *appeal. But once leave is granted, on whatever ground it be, the appeal is before this court and this Court is seised of the appeal. Its appellate jurisdiction extends to the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance (vide Art. 127 of the Constitution). Therefore, it is competent for this Court to permit parties to bring to its notice errors of law or of fact and raise new contentions or new points of law, or sue motu to raise them if there is proper foundation for them in the record. Thus, this Court will allow an appellant to urge before it grounds of appeal not set out in the application for leave if the material on record warrants the determination of same. This Court is not hamstrung by the fact that the Court of Appeal had not granted leave to appeal on the ground urged before the Supreme Court. This Court however, doing justice between the parties, may not permit a party to raise a new point if the other party has had no proper notice of the new ground, or would suffer grave prejudice by the belated stage at which it is raised. The appellate jurisdiction of this Court is very wide in its amplitude, as it should be, it being the final Court of Appeal. The narrow construction contended for by Counsel erodes its width and usefulness. What I stated in Sri Lanka Ports Authority v. Peiris [1981] 1 Sri LR 101 is apposite in this context: "Leave to appeal is the key which unlocks the door to the Supreme Court, and once the litigant has passed through that door, he is free to invoke the appellate jurisdiction of this Court for the correction of all errors in fact and/or in law which have been committed by the Court of Appeal or any Court of First Instance. This Court, however, has the discretion to impose reasonable limits to that freedom."*

Citing with approval the judgments of Sharvananda J. in *Sri Lanka Ports Authority v. Pieris*, *Albert v. Veeriahpillai*, and the powers conferred on the

Supreme Court by Article 127 of the Constitution, Aluwihare J. in *Karunaratne v. Attorney General* [2020] 3 Sri LR 273 at 295 held:

> *Thus, it is evident that there are clear precedents for this court to act uninhibited suo motu in the interest of justice where the Court of Appeal or the court of first instance has clearly misdirected itself which has resulted in a serious miscarriage of justice, as in the present case.*

At this juncture, it may be necessary to briefly refer to the procedure adopted by the Supreme Court in regulating the appellate procedure. Prior to the Supreme Court Rules of 1990 came into force, the practice and procedure relating to special leave to appeal and leave to appeal were governed by the Supreme Court Rules of 1978, published in the Gazette Extraordinary No. 9/10 of 08.11.1978, which were repealed later.

Under Article 136(1) of the Constitution, the Chief Justice, along with three Judges of the Supreme Court nominated by him, may make rules regulating the practice and procedure of the Supreme Court, subject to the Constitution and any law. These rules may include: (a) procedures for hearing appeals, terms for entertaining appeals to the Supreme Court and Court of Appeal, and provisions for dismissing appeals for non-compliance; and (b) procedures for matters brought before the Supreme Court and Court of Appeal, including time limits and dismissal for failure to comply with the rules.

It is pertinent to note that following the promulgation of the Supreme Court Rules of 1990, when leave is granted by either the Supreme Court or the Court of Appeal, the questions of law must be specified in the order granting leave to appeal or special leave to appeal (*vide* Rules 11 and 19 of the Supreme Court Rules of 1990). This new requirement, which did not exist previously, has streamlined and regulated the appellate

procedure in the Supreme Court, as submissions of the counsel and the reasoning of the Court are now focused on the specific questions of law for which leave was granted.

When questions of law are identified, this Court is guided by established legal principles. As a general principle, for instance, a party to an action cannot take up new positions, which are not pure questions of law, for the first time before the Supreme Court. In *Nevil Fernando and Others v. Sanath Fernando and Others* (SC/APPEAL/180/2015, SC Minutes of 19.07.2024) this Court held:

> *A party to an action is subject to specific constraints in presenting his case before Court. There must be consistency in how the case is presented from the original Court to the final Court. He cannot keep changing his position to suit the occasion. There must be an end to litigation. Firstly, a party cannot, by way of issues, present a case different from what was pleaded in his pleadings. Secondly, once issues are raised and accepted by Court, a party cannot present a different case at the trial from what was raised by way of issues. Thirdly, once the judgment is pronounced by Court, the losing party cannot present a different case before the appellate Court from what was presented in the Court below, unless the new ground is a pure question of law and not a question of fact or a mixed question of fact and law. However, a practice has developed in our Courts to entertain questions of fact for the first time on appeal subject to strict conditions.*

In general, the role of the Supreme Court is not to rehear appeals on the merits unless circumstances cry aloud for its intervention to prevent what would otherwise have been a grave miscarriage of justice. In *Sivathasan v. Attorney General* (SC/APPEAL/208/2012, SC Minutes of 15.12.2021 at 47-48), Kodagoda J., after reviewing the aforesaid

authorities, rightly cautioned against raising "strategy based" questions disguised as "questions of law", which would invite this Court to rehear cases on questions of fact.

> *The following avenues would pave the way for the Supreme Court to exercise its appellate jurisdiction:*
>
> *(i) In terms of Article 128(1) of the Constitution, where the Court of Appeal either ex-mero motu or at the instance of any aggrieved party to a matter or proceedings, grants leave to appeal to the Supreme Court.*
>
> *(ii) In terms of Article 128(2) of the Constitution, where the Supreme Court in its discretion grants special leave to appeal to the Supreme Court, in instances where the Court of Appeal has refused to grant leave to appeal to the Supreme Court or where in the opinion of the Supreme Court, the case is fit for review by the Supreme Court.*
>
> *(iii) In terms of the proviso to Article 128(2) of the Constitution, where the Supreme Court grants leave to appeal in a matter or proceedings as it is satisfied that the question to be decided is of public or general importance.*
>
> *It would be seen that the instant Appeal has come up through the second avenue enumerated above, due to the reason that the Supreme Court in the exercise of its discretion has deemed it fit to grant special leave to appeal to the Supreme Court on the premise that in view of the three questions of law identified by this Court (referred to at the outset of this judgment) this matter is fit for review by the Supreme Court. It must be noted that the entitlement granted by the Constitution to prefer an appeal to the Supreme Court, should necessarily be with leave first having been obtained (which is a pre-condition to be satisfied), and exercised founded upon a substantial*

> *question of law which arises out of the impugned judgment of the Court of Appeal. It is important to bear in mind that raising a question of law should not be strategy based, with the view to causing the Supreme Court to re-assess and re-determine fundamental testimony-related issues such as credibility of witnesses and testimonial trustworthiness of evidence contained in testimonies of witnesses.*

In *Collettes Limited v. Bank of Ceylon* [1984] 2 Sri LR 253, Sharvananda J. (as he then was) stated at 264-265 that while this Court undeniably has the jurisdiction to revise concurrent findings of fact made by the lower courts in appropriate cases, it will generally refrain from interfering with the findings of fact unless special circumstances exist. Such circumstances include instances where relevant evidence has been overlooked, irrelevant matters have been considered, the conclusion is based on erroneous reasoning or the decision is not supported by sufficient evidence. Sharvananda J. stated that when the judgment of the lower Court is replete with such shortcomings, *"this court not only may but is under a duty to examine the supporting evidence and reverse the findings."*

> *Article 127 of our Constitution spells out the appellate jurisdiction of this court. It provides that this court (Supreme Court) is a final court of civil and criminal appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any court of first instance, tribunal or other institution and that this court may, in the exercise of its appellate jurisdiction, affirm, or reverse or vary any judgment or decree of the Court of Appeal. It will thus be seen that the appellate jurisdiction of this court is all embracing and unfettered. On leave being granted under Article 128 to appeal to this court, this court is vested with the*

power, as a final Court of Appeal to consider the correctness of the decision appealed against on any ground, whether on questions of fact or law. This is a court of re-hearing. Silva v. Swaris (1904) 1 Bal 61, Sansoni, J. in Nawadun Korale Co-operative Stores Union Ltd. v. Premaratne (1954) 55 NLR 505. The leave granted under Article 128, though it is a precondition for the maintainability of an appeal to this court, cannot circumscribe the scope of the appeal Sri Lanka Ports Authority v. Pieris [1981] 1 Sri LR 101. Thus this court undoubtedly has the jurisdiction to revise the concurrent findings of fact reached by the lower court in appropriate cases. However, ordinarily it will not interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. When the judgment of the lower court exhibits such shortcomings, this court not only may but is under a duty to examine the supporting evidence and reverse the findings.

The view of Soza J. in the Supreme Court case of *Attorney General v. Seneviratne* [1982] 1 Sri LR 302 at 323-324 is no different:

When does an appeal lie in law to the Supreme Court from a decision or order of the Court of Appeal? The answer is found in Article 128:

1. If the Court of Appeal grants leave to appeal from a final order, judgment, decree or sentence made by it on any matter or proceedings whether Civil or criminal, which involves a substantial question of law (subsection 1).

2. If the Supreme Court in its discretion grants special leave to appeal from any final or interlocutory order, judgment, decree or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where

(i) the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or
(ii) in the opinion of the Supreme Court, the case or matter is fit for review by it (subsection 2).

The Supreme Court must grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance (proviso to subsection 2). It might be added that an appeal shall lie directly to the Supreme Court where it is specifically so provided by statute (subsection 4).

It will be seen that it is only when the Court of Appeal grants leave to appeal, that the appeal is confined to substantial questions of law. When the Supreme Court in its discretion grants special leave to appeal the scope of review is not limited to substantial questions of law. It must be remembered that the Supreme Court has jurisdiction to correct errors of fact or law committed by any Court. An occasion for the exercise of this jurisdiction is when it grants special leave to appeal. So when the Supreme Court grants special leave it is open to it to review the case so far as it is pertinent to the question to be decided. Accordingly I am of the view that in the instant case this Court should consider the matters complained of in the petition of appeal as well as matters raised at the hearing before it on behalf of the accused.

As the final arbiter, the Supreme Court serves as the guardian of the people's rights. Even if the Court anticipates that the question of law

raised may be answered against the petitioner, it may still grant leave to appeal if it deems that the question is of significant importance and should be authoritatively resolved in the broader interest of society. In *Wickremasinghe and Others v. Cornel Perera and Others* [1996] 1 Sri LR 294, Mark Fernando J. observed at 299-300:

> *Leave to appeal to the Supreme Court can be granted either by the Court of Appeal under Article 128(1) or by this Court under Article 128(2). Counsel argued that when the Court of Appeal granted leave, it did so in the exercise of its appellate jurisdiction. But that seems misconceived. Under Article 138 the appellate jurisdiction of the Court of Appeal is to correct errors by inferior Courts. When it grants leave, it does not purport to correct errors either of inferior Courts or of its own. Obtaining leave is a condition precedent to invoking the appellate jurisdiction of this Court, and the grant of leave only involves considering whether the matter is fit for review. It is thus distinct from the appellate jurisdiction of the Court of Appeal. In the same way, when the Supreme Court grants leave under Article 128(2), it exercises a jurisdiction which is anterior to and distinct from its appellate jurisdiction. The proceedings in respect of leave are thus distinct from the appeal itself. In any event, even if in a broader sense they can loosely be regarded as being part of the appellate jurisdiction, yet it has two distinct stages, involving two distinct issues: the first is whether leave ought to be granted, and that depends on whether the question is important enough to merit adjudication by the highest Court, and the second is, at the appeal stage, to find the right answer to that question. Thus it may happen that even if this Court thinks that probably the question raised must be answered adversely to the petitioner, yet the Court may grant leave because it is in the public interest that that question should be finally and authoritatively decided by this Court.*

In the instant case, the appellant filed a final appeal before the Supreme Court against the impugned interlocutory order of the Permanent High Court at Bar, which, as I have already stated, is not permissible.

Interlocutory orders

Before I part with this order, I wish to stress one more point. During the course of a suit, a Judge makes several interlocutory orders before pronouncing the judgment. It is neither practically possible nor desirable to challenge every order that a suitor may consider himself aggrieved by, unless the order complained of shatters the fundamental basis of his case. Our Courts have always discouraged appeals against interlocutory orders when an appeal may effectively be taken against the order disposing of the matter under consideration at the final appeal. Every suitor has the right to invite the Appellate Court to consider, on the final appeal, any interlocutory order wrongfully made against him, even if he did not directly challenge it at the time when it was made. (*Abubakker Lebbe v. Ismail Lebbe* (1908) 11 NLR 309 at 312-313, *Perera v. Battaglia* (1956) 58 NLR 447 at 449, *Mudiyanse v. Punchi Banda Ranaweera* (1975) 77 NLR 501 at 508-509, *Anushka Wethasinghe v. Nimal Weerakkody* [1981] 2 Sri LR 423 at 426, *Cornel & Company Ltd v. Mitsui and Company Ltd* [2000] 1 Sri LR 57 at 76, *Dominic v. Jeevan Kumaratunga* [2011] BLR 503 at 509)

However, as stated by Gaudron, McHugh and Hayne JJ. in the High Court of Australia in *Gerlach v. Clifton Bricks Pty Ltd* [2002] HCA 22 at para 6, it is not sufficient to merely show that the interlocutory order is wrong; it must also be demonstrated that the erroneous order has a bearing on the final outcome of the case.

> *The proposition that any interlocutory order can be challenged in an appeal against the final judgment in the matter is often stated in*

> *unqualified terms. The better view, however, is reflected in the formulation adopted in Spencer Bower, Turner and Handley, The Doctrine of Res Judicata, 3rd ed (1996) at 79-80, par 170 where it is said that "on an appeal from the final order an appellate court can correct any interlocutory order which affected the final result".*

The injustice that could be caused by filing interlocutory appeals was highlighted by Kirby and Callinan JJ. in the same case, at para 49, as follows:

> *However, the rule permitting adverse interlocutory orders to be contested in an appeal against a final judgment should not be narrowly confined. This approach is sanctioned by one and a half centuries of judicial practice spanning virtually the entire period since appeal, as a creature of statute, became common to our legal system. The principle is also supported by many practical considerations. Interlocutory appeals can often cause great injustice to parties who are less well-resourced than those who pursue them. They can be misused by those with "a long purse" to prevent others from securing justice in an early trial of the substantive issues. They can lead to a plethora of appeals and further interlocutory hearings that needlessly raise the costs and delay the conclusion of litigation.*

Although sections 11 and 354 of the repealed Administration of Justice Law empowered the Supreme Court with revisionary jurisdiction, a Five Judge Bench of this Court in *Attorney General v. Gunawardena* [1996] 2 Sri LR 149 at 164-165 emphasized that the Court will not entertain applications for revision that would interrupt a High Court trial.

> *We wish to state that this Court will not exercise its powers of revision in regard to proceedings of a High Court, save in very*

exceptional circumstances. In particular, this Court will not entertain an application which will have the effect of interrupting the proceedings of a trial in a High Court. For example, no application will be entertained by this Court at the instance of either the prosecution or the defence in respect of an order made by a High Court as to the admission or rejection of evidence. Generally, in respect of all matters which take place during the course of a trial, the parties should await the final verdict as an acquittal or a conviction, as the case may be, may render unnecessary an application for the intervention by this Court.

Conclusion

The questions of law formulated by the Court and the answers to them are as follows:

Q. Should not the appellant in this case have come before this Court against the impugned order by way of leave to appeal instead of final appeal?

A. Against the impugned order of the Permanent High Court at Bar, the appellant could not have come before this Court by way of final appeal.

Q. If the answer to the above question is in the affirmative, should this appeal be dismissed *in limine*?

A. Yes.

The impugned order against which a final appeal was filed is not a final order having the effect of a final judgment but indisputably an interlocutory order made in the exercise of the original jurisdiction of the

Permanent High Court at Bar. The final appeal filed against the impugned interlocutory order is misconceived in law.

The appeal is accordingly dismissed but without costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court