

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 207/2014

SC/ HCCA/LA/ 426/2014

NWP/HCCA/KURU/17/2013[Rev]

DC Kurunegala No/7316/T

In the matter of the intestate property of the late J.M. Ukkubanda of Alawwa.

J. M. Appuhamy,
No. 89, Main Street,
Alawwa.

Petitioner

Vs.

1. M. M. Bandaramenike,
No. 89, Main Street,
Alawwa.
2. J. M. Yasapala,
'Yasasiri', Indigaha Dowa,
Lunuwatta, Bandarawela.
3. J. M. Sudu Menike,
DIV Rampitiye Gedara, Idamegama,
Bambarapana, Bandarawela.

4. J. M. Sudu Banda,
Suduwatura Ara,
Kumbukkana, Monaragala.
5. J. M. Jayasekera,
No. 107, Sewwandi Textiles,
Main Street, Alawwa.
6. J. M. Gunathilake,
No. 89, Main Street, Alawwa.
7. J. M. Punchi Banda,
Bandarawela Textiles,
Main Street, Alawwa.

Respondents

AND BETWEEN

J. M. Gunathilake,
No. 89, Main Street,
Alawwa.

6th Respondent Petitioner

Vs.

J. M. Appuhamy,
No. 89, Main Street,
Alawwa.

Petitioner Respondent

1. M. M. Bandaramenike,
No. 89, Main Street,
Alawwa.
2. J. M. Yasapala,
'Yasasiri', Indigaha Dowa,
Lunuwatta, Bandarawela.
3. J. M. Sudu Menike,
DIV Rampitiye Gedara, Idamegama,
Bambarapana, Bandarawela.
4. J. M. Sudu Banda,
Suduwatura Ara,
Kumbukkana, Monaragala.

5. J. M. Jayasekera,
No. 107, Sewwandi Textiles,
Main Street, Alawwa.
7. J. M. Punchi Banda,
Bandarawela Textiles,
Main Street, Alawwa.

1st to 5th and 7th Respondent-
Respondents

AND NOW BETWEEN

2. J. M. Yasapala,
'Yasasiri', Indigaha Dowa,
Lunuwatta, Bandarawela.
5. J. M. Jayasekera,
No. 107, Sewwandi Textiles,
Main Street, Alawwa.

2nd and 5th Respondent
Respondent Appellants

Vs.

J. M. Gunathilake,
No. 89, Main Street,
Alawwa.

6th Respondent Petitioner Respondent

J. M. Appuhamy,
No. 89, Main Street,
Alawwa.

Petitioner Respondent-Respondent

1. M. M. Bandaramenike,
No. 89, Main Street,
Alawwa.
3. J. M. Sudu Menike,
DIV Rampitiye Gedara, Idamegama,
Bambarapana, Bandarawela.

4. J. M. Sudu Banda,
Suduwatura Ara,
Kumbukkana, Monaragala.

7. J. M. Punchi Banda,
Bandarawela Textiles,
Main Street, Alawwa.

1st 3rd 4th 7th Respondent
Respondent- Respondents

BEFORE : B. P. ALUWIHARE, PC, J.
UPALY ABEYRATHNE, J.
ANIL GOONARATNE, J.

COUNSEL : Lakshman Perera PC with Upendra
Walgampaya for the 2nd and 5th Respondent-
Respondent Appellants
W. Dayaratne PC with Nadeeshan
Kekulawala for the 6th Respondent
Petitioner Respondent

WRITTEN SUBMISSION ON: 05.01.2015 (2nd and 5th Respondent
Respondent Appellants)
06.02.2015 (6th Respondent Petitioner
Respondent)

ARGUED ON : 18.07.2016

DECIDED ON : 14.12.2016

UPALY ABEYRATHNE, J.

When this matter was taken up for hearing on 10th September, 2015, both parties intimated to Court that the matter could be disposed of on written submissions. Accordingly this matter was fixed for judgment. Thereafter the Counsel for The 2nd and 5th Respondent-Respondent Appellants (hereinafter referred to as the Appellants) by way of a motion dated 26.10.2015 sought permission of this Court to have the matter fixed for rehearing enabling them to make oral submissions. Accordingly this matter was taken up for hearing on 18.07.2016. After the hearing, both parties were given opportunity to file further written submissions.

The 2nd and 5th Appellants sought leave to appeal from the order of the High Court of Civil Appeal of the North Western Province holden at Kurunegala dated 23.07.2014. The leave was granted on the following questions of law set out in paragraph 19(i), (ii), (vi) and (vii) of the petition dated 26.08.2014.

- 19(i) Has the High Court of Civil Appeal failed to consider the failure of the 6th Respondent Petitioner Respondent to exercise his right of appeal in terms of Section 722 of the Civil Procedure Code?
- (ii) Has the High Court of Civil Appeal failed to consider that the 6th Respondent Petitioner Respondent has failed to give a valid explanation for having not exercised his right of appeal in terms of Section 722 of the Civil Procedure Code?

- (vi) Is the 6th Respondent Petitioner Respondent entitled to explain the reasons for the delay in his counter affidavit after the Appellant has raised preliminary objections?
- (vii) Has the High Court of Civil Appeal erred in law in accepting the explanation given for the delay in filing the Revision Application?

Upon an application made by J. M. Appuhamy, the Petitioner Respondent-Respondent the learned District Judge of Kurunegala granted Letters of Administration to the said Petitioner to administer the estate of the deceased Jayasundara Mudiyansele Ukkubanda. Thereafter, disputing the inventory of the deceased's estate, the 6th Respondent Petitioner Respondent (hereinafter referred to as the 6th Respondent) made an application to exclude "Dharshana Textiles" from the inventory of the deceased estate claiming him to be the sole owner of the said business. The Appellants and the 7th Respondent-Respondent-Respondent raised objections against the said claim on the basis that the deceased was the owner of half a share of the said business. Thereafter an inquiry was held upon raising the points of contests by the parties and the learned District Judge by his judgment dated 28.04.2005 concluded that the deceased was the owner of ½ shares of the said "Dharshana Textiles" and the profits of the said business should be brought in to the case. Also the learned District Judge answered the issues 3 to 7 which were raised by the 2nd and 5th Appellants and the 7th Respondent-Respondent-Respondent against their interests and refused the claim made by them. Neither the 6th Respondent nor the Appellants canvassed the said judgment by way of an appeal.

Afterwards upon a request made by the Administrator J. M. Appuhamy, the Petitioner Respondent-Respondent due to his old age and ill health, the learned District Judge, by order dated 23.08.2007, had recalled the grant of Administration and revoked the grant and subsequently, by order dated 26.08.2008, with consent of the parties had granted fresh Letters of administration of the said estate to the 6th Respondent.

According to the journal entry No. 82 the 5th Appellant had filed a motion supported with an affidavit seeking to support the same on 15.05.2009. According to journal entry No. 83 on 15.05.2009 the 5th Appellant had supported the said application and the trial judge had made an order to issue notice on the Respondents to the said application under Section 724A of the Civil Procedure Code directing to show cause.

Upon the receipt of the notice of the said application under Section 724A the 6th Respondent administrator had filed a statement of objection and after an inquiry the learned District Judge had made the order dated 10.10.2011 requiring the 6th Respondent that the assets mentioned therein namely the sums of money mentioned in item 1, 2, 3, and 4 under movable property of the final account dated 16.01.2005 to be brought to the credit of the case before 18.11.2011 and the final account as is prescribed by Section 551 to be filed and in default thereof cause to be shown as to why he should not be attached. In the said order the learned trial judge has concluded that the 6th Respondent being the administrator of the deceased's estate had not credited a sum of Rs. 174,984/- as described under item 4 of the said final account dated 16.01.2009. Accordingly the court made order requiring the 6th Respondent to file a final account in terms of Section 551 of the Code before 18.11.2011 after taking steps to recover the sums of money described under the heading of movable property of the said final account. Also the

learned District Judge has concluded that an order under Section 724A(2) of the Code to be served on the 6th Respondent administrator requiring him to file a final account and in default thereof to show cause why he should not be attached.

It is important to note that as reflected from the said order dated 10.10.2011 moneys to be recovered from the 5th Appellant had been set out under items 1 and 2 and moneys to be recovered from the 2nd Appellant had been set out under item 3 of the said final account.

Neither the 6th Respondent nor the Appellants canvassed the said findings of the learned District Judge in an appropriate forum.

Upon the receipt of the said notice and the order under Section 724A(2), the 6th Respondent had appeared before the District Court on 31.10.2012. The 5th Respondent Appellant also had happened to appear before court on the same date since he had been cited to attend an inquiry under Section 712 of the Civil Procedure Code. At the inquiry in to the said matters the 5th Appellant had taken up the position that the said sums of money described in the said final account was not a part of the estate of the deceased as the income has generated after the death of the deceased. The learned District Judge after hearing the submissions of both parties made the impugned order dated 08 01 2013.

It is important to note that by the said order dated 08.01.2013 the learned Additional District judge has dealt with the claim of the Appellants which had already been dealt with and refused by the said judgment dated 28.04.2005.

It is also an admitted fact that none of the said parties had exercised their right of appeal against the said order dated 08.01.2013. Section 722 of the Civil Procedure Code stipulates that every order or decree made under the

provisions of chapter LIV, in which Section 712 to 722 contained, shall be subject to an appeal to the Court of Appeal.

However the 6th Respondent about 06 months and 18 days after the said order dated 08.01.2013, by way of a petition dated 26th July 2013 supported with an affidavit made an application in revision in the Provincial High Court of Civil Appeal of the North Western Province holden at Kurunegala seeking to:

- ❖ Revise and set aside the order of the learned Additional District Judge of Kurunegala dated 08.01.2013, and
- ❖ Affirm the judgment of the learned District Judge of Kurunegala dated 28.04.2005 and also the subsequent order of the learned Additional District Judge of Kurunegala dated 10.10.2011.

As transpired from the Journal Entry dated 21.03.2014 and also from the order of the High Court of Civil Appeal dated 23.07.2014, when the said Revision Application was taken up for argument on 21.03.2014 the Appellants raised the following preliminary objections;

- The Appellants had not exercised right of appeal under Section 722 of the Civil Procedure Code,
- There are no exceptional circumstances,
- Approximately delay of 07 months in making the Revision Application.

The High Court of Civil Appeal by order dated 23.07.2014 has refused the said preliminary objections and has fixed the matter for argument. The present appeal before this court is from the said order of the High Court of Civil Appeal.

It must be noted that in paragraph 15 of the written submission of the Appellants dated 15th of December 2014, they have stated that the Appellants filed a statement of objection in the High Court of Civil Appeal. But a copy of the said written submission has not been tendered to this court. Also the Appellants have not tendered a copy of the final account dated 16.01.2009. Needless to state that said documents are material to the instant appeal.

In paragraph 15 of the said written submission the Appellants have stated that the following preliminary objections had been raised by them.

- The Respondent has failed to exercise the right of appeal and has failed to give any explanation as to why the Respondent has failed to follow the mandatory provisions of Section 722 of the Civil Procedure Code,
- The Respondent has failed to exercise the mandatory provisions of Chapter LX of the Civil Procedure Code for appeal notwithstanding laps of time,
- The Respondent has failed to explain the delay in filing the revision application.

It is clear from the said order that the High Court of Civil Appeal was of the view that irrespective of the said preliminary objections the Respondent's application in revision should be entertained due to the contradictory nature of the order made in the case and as a result by order dated 08.01.2013 the Petitioner has been placed in a dilemma whether he should act in accordance with the judgment dated 28.04.2005 or subsequent order dated 08.01.2013.

It is clear from the page 3 of the said order of the learned Additional District Judge that the order dated 08.01.2013 has been made without holding a

proper inquiry. It is also clear that the 6th Respondent has made the said application seeking the Appellants to be cited to attend an inquiry and to examine about the income derived from the said final account dated 16.01.2009.

It is well settled law that upon the attendance of a person in obedience to such citation the trial judge should follow the procedure laid down in Section 714 of the Code in order to reach the correct conclusion upon the matter before him. Section 714 reads thus;

714.(1) Upon the attendance of a person in obedience to such citation and order, he shall be examine fully and at large on oath or affirmation, respecting any money or other property of the testator or intestate, or of which the testator or intestate was in possession at the time of or within two years preceding his death.

(2) A refusal to be sworn or to answer any question allowed by the court is punishable in the same manner as a like refusal by a witness in a civil case.

(3) In case the person cited put in an affidavit that he is the owner of any of the said property, or is entitled to the possession thereof by virtue of any lien thereon, or special property therein, the proceedings as to such property so claimed shall be dismissed.

In the present case before us the learned Additional District Judge has failed to follow the mandatory provisions contained in Section 714 of the Code prior to making the order dated 08.01.2013. I am of the view that these are exceptional circumstances irrespective of the delay in making the application in revision for an appropriate appellate court to exercise discretion and to grant relief by way of revision. In such instances Section 722 of the Civil Procedure Code does

not place a limitation on the powers of the appropriate appellate court to deal with an application in revision in a manner although the matter had not been brought up by way of appeal.

The long line of authorities relating to this issue clearly indicates that the revisionary powers of the Appellate Courts will be exercised only if exceptional circumstances are urged before courts notwithstanding the availability of alternative remedy. The Appellate Courts will not exercise its powers in revision, if exceptional circumstances cannot be placed before courts.

I shall now deal with some of the cases which deal with this aspect of the matter. In the case of *Atukorale Vs Samynathan 41 NLR 165* Soertsz J. stated. "The powers by way of revision conferred on the Supreme Court of Ceylon are very wide indeed, and clearly this Court has the right to revise any order made by an original Court whether an appeal has been taken against that order or not. Doubtless that right will be exercised in a case in which an appeal is already pending only in exceptional circumstances. For instance this jurisdiction will be exercised in order to ensure that the decision given on appeal is not rendered nugatory."

The judgment of Soertsz J. was considered by Wijewardene J. in the case of *Silva v. Silva 44 NLR 494* and the reasoning of Soertsz J. was adopted by him with approval and he stated, "I am in respectful and full agreement with the view expressed in that case. It must take some time for the appeal to be heard. Even after the appeal is perfected and sent to this Court, it has to remain on the list of pending appeals for, at least, fourteen days before it is heard and I think, therefore, that this is a matter in which our revisionary powers should be exercised."

In *Sinnathangam Vs. Meera Mohideen* 60 NLR 393 T. S. Fernando J. stated, "The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security."

Similarly in *Abdul Cader Vs. Sittinisa*, 52 NLR 536 the facts were, an objection had been taken in appeal under Rule 4(a) of the Civil Appellate Rules that the appeal abated in consequence of the failure by the appellant to tender the proper sum of Rs. 25/- which was the appropriate sum according to the Schedule under Rule 2 of the Civil Appellate Rules of 1938 in respect of typed-written copies. Palle J. in the course of his judgment held, "The respondents have not been in any manner prejudiced by the fact that the appellant in applying for the typed-written copy paid only Rs. 20/- instead of Rs. 25/-. Nonetheless we have in mind that the hearing was, as a matter of indulgence, by way of revision. In the ultimate result we have the satisfaction of knowing that we have interfered with the judgment of the Learned District Judge substantially on a point of law only."

In the case of *Rustom Vs Hapangama* [1978/79] 1 SLR 352 (SC) Ismail J observed that "It is therefore clear from the authorities that the general rule is that while the power of revision available to the Supreme Court is a discretionary power the courts have consistently refused to exercise this power when an alternative remedy which was available to the applicant was not availed of before the applicant sought to avail of a remedy by way of revision. Nevertheless in a series of decided cases the courts have indicated that this was not an invariable rule and in certain instances where exceptional circumstances are shown the Court would exercise this discretionary power even when an alternative remedy which is

available has not been availed of. These instances are few and far between and is often exercised in order not to render a decree of Court nugatory.”

In the case of *Gnanapandithan Vs Balanayagam* [1998] 1 SLR 286 (SC) it was held that “The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and exceptional circumstances of the case the appellants were entitled to the exercise of the revisionary powers of the Court of Appeal.”

In the case of *Finnegan Vs Galadari Hotels (Lanka) Ltd.* [1989] 2 SLR 272 (SC) Kulatunga J observed that “The facts of this case are different. As discussed above, the plaintiff is impeaching the legality or propriety of the order of the District Judge on fundamental issues including the failure to hold a fair inquiry. Considerations of urgency and the balance of convenience demanded an immediate review of the Judge's order; there were thus exceptional circumstances warranting the exercise of the revisionary jurisdiction of the Court of Appeal.”

In the case of *Mariam Beebee Vs. Seyed Mohamed* [1965] 68 NLR 36 Sansoni C. J. delivering the majority decision of the Divisional Bench that heard this case said as follows at page 38: "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result.”

In view of the forgoing reasons, I hold that it is necessary that the appropriate Appellate court shall intervene with the said order dated 08.01.2013 to

examine whether the said order of the learned Additional District Judge has caused any impact on the previous orders and/or judgment of the present case before me. Hence the Appeal of the Appellant is dismissed with costs. The High Court of Civil Appeal of the North Western Province holden at Kurunegala is directed to hear and conclude the matter expeditiously according to law.

Appeal dismissed.

Judge of the Supreme Court

B. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court