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

In the matter of an Application for Special Leave to Appeal in terms of Article 128 of the Constitution of the Republic of Sri Lanka

SC Appeal No. 111/2015 with
SC Appeal No. 113/2015 and
SC Appeal No. 114/2015

1. Wijesiri Gunawardane
   No. 122/05, Indipokunagoda, Tangalle.
   1st Respondent-Respondent-Petitioner-Petitioner-Appellant

2. Lanka Deepani Muthukumarana
   No. 129, Beliatta Road, Tangalle.
   2nd Respondent-Respondent-Petitioner-Petitioner-Appellant

3. Mahanama Dissanayakalage Sumanalatha
   No. 117/23, Beliatta Road, Tangalle.
   5th Respondent-Respondent-Petitioner-Petitioner-Appellant

Vs.

1. Chandrasena Muthukumarana (deceased)
   Pearlin Hotel, Tangalle.
   4th Respondent-Appellant-Respondent-Respondent-Respondent

1A. Asith Nimantha Muthukumarana
No. 127, Beliatta Road, Tangalle.
Substituted 4A Respondent-Appellant-Respondent-Respondent-Respondent

2. Officer-in-Charge
Police Station, Tangalle.
Plaintiff-Respondent-Respondent-Respondent- Respondent

3. Palliyaguruge Nandasiri
No. 122/1, Indipokunagoda, Tangalle.
3rd Respondent-Respondent-Petitioner-Respondent- Respondent

4. Urban Council, Tangalle.
Added 6th Respondent-Respondent-Respondent- Respondent

5. Hon. Attorney-General
Attorney-General's Department,
Colombo 12.
Added 7th Respondent-Respondent-Respondent- Respondent

Parties of:

(SC Appeal No. 111/2015

SC/ (SPL) LA. No. 190/14

CA (PHC) APN No. 107/09

Provincial High Court of Hambantota Case No. HCA/13/2008

MC Tangalle Case No. 63486)

Muththettuwagama Athiralalage
Jayarathna
No 27/2, 3rd Lane, Rathmalana.

Accused-Appellant-Petitioner-
Petitioner-Appellant

Vs.

1. Officer in Charge
   Special Crimes Investigations Unit,
   Mount Lavinia.

2. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

Respondents-Respondents-
Respondents-Respondents

Parties of:

(SC Appeal No. 113/2015

SC/ (SPL) LA. No. 185/14

CA (PHC) APN No. 185/2010

Provincial High Court of Colombo Case No. MCA/123/2009

MC Mount Lavinia Case No. 39758)

Dr. (Mrs.) Ama Weeratunga
No. 368/18, Pipeline Road,
Thalangama North.

Virtual Complainant~Petitioner~
Petitioner~Appellant

Vs.

Sepala Ekanayake
No. 369B, Pipeline Road,
Thalangama North.

Accused~Appellant~Respondent~
Respondent~Respondent

1. Officer in Charge
   Police Station, Thalangama.

2. The Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

Respondents~Respondents~
Respondents~Respondents

Parties of:

(SC Appeal No. 114/2015
SC/ (SPL) LA. No. 178/14
CA (PHC) APN. No. 204/2006)
Provincial High Court of Avissawella Case No. 69/2005
MC Kaduwela Case No. 36421)

Before: Buwaneka Aluwihare, PC. J.

Vijith K. Malalgoda, PC. J.

L.T.B. Dehideniya, J.

Counsel: Niranjan de Silva with Kalhara Gunawardena for the 1st, 2nd and 5th Respondent-Respondent-Petitioner-Petitioner-Appellants in SC Appeal 111/2015.

Saliya Peiris PC with Lisitha Sachintha for the substituted 4A Respondent-Appellant-Respondent-Respondent-Respondent in SC Appeal 111/2015.

Amila Palliyage with Eranda Sinharage for the Accused-Appellant-Petitioner-Petitioner-Appellant in SC Appeal 113/2015.

Anil Silva PC with Dhanaraja Samarakoon for the virtual complainant-Petitioner-Petitioner-Appellant in SC Appeal 114/2015.

Amila Palliyage with Eranda Sinharage for the Accused-Appellant-Respondent-Respondent-Respondent in SC Appeal 114/2015.

Rohantha Abeysuriya Senior DSG for the Attorney General.

Argued on: 04.07.2018

Decided on: 27.05.2020

JUDGEMENT

Aluwihare PC. J.,

Introduction

1. The Petitioner-Appellants (hereinafter referred to as "Appellants") have come before this court challenging an order made by the Court of Appeal on 02.09.2014 upholding a preliminary objection which resulted in the refusal of their Revision applications.

2. At the outset of the hearing of this matter, the learned counsel representing the respective parties agreed to abide by a single judgement in all three appeals.

The Issue

3. The Court granted special leave to appeal on the following question of law;

   "Having failed to exercise the right to file an appeal in terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, could a person invoke the revisionary jurisdiction of the Court of Appeal referred to in Article 138 of the Constitution of the Republic of Sri Lanka in order to canvass a decision made by a Provincial High Court exercising its appellate powers?"

4. The question which this Court is invited to answer is as above. For the purposes of this judgment, it would not be necessary to narrate all the facts antecedent to the question. Suffice it to say, that the Appellants have filed revision applications in the Court of Appeal against judgments made by the High Courts of the respective Provinces, whereupon the applications were dismissed *in limine* on the basis that the Court of Appeal is ***not vested with revisionary jurisdiction*** over judgments and orders made by the High Court in the ***exercise of its appellate powers***.

5. The question of law elaborated above, inquires whether Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, (hereinafter also referred to as "the Act") could result in ousting the revisionary jurisdiction of the Court of Appeal

in respect of orders, judgments and sentences given by a Provincial High Court in the exercise of its appellate jurisdiction.

6. **Section 9 of the said Act reads;**

"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 mero motu or at the instance of any aggrieved party to such matter or proceedings."*

(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.*** " (emphasis added)

7. For the reasons set out in this judgement the said question of law is answered as follows; **Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, does not oust the Revisionary jurisdiction of the Court of Appeal in respect of decisions made by a Provincial High Court exercising its appellate powers. Therefore, the revisionary jurisdiction of the Court of Appeal referred to in Article 138 of the Constitution of the Republic of Sri Lanka can be invoked in order to canvass a decision made by a Provincial High Court exercising its appellate powers.**

The Reasoning

8. The crux of the Respondent's argument is that by virtue of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, the Court of Appeal has **no 'appellate'** powers over matters where the High Court has **exercised 'its appellate' powers.** It was the contention on behalf of the Respondents, that Section 9 of the said

Act has vested that power in the Supreme Court, thereby completely ousting the jurisdiction of the Court of Appeal in respect of such matters. They contend that the specific use of the term '*appeal*' in Section 9 of the Act, indicates that the legislature only intended to vest appellate jurisdiction with the Supreme Court in respect of such matters where the High Court has exercised its appellate powers, and not revisionary jurisdiction.

9. They seek to fortify this contention by referring to Article 138 of the Constitution which uses the term '*subject to any law*'. Accordingly, their contention is that under Section 9, there is only one recourse, which is the right of appeal to the Supreme Court; if a litigant fails to utilize the provision, they cannot seek to circumvent the procedure by resorting to a revisionary step. The Respondents have cited the cases **Merchant Bank of Sri Lanka v. Wijewardena** *S.C. Appeal 81/2010 [2010 BLR 233]* and **Australanka Exporters Private Ltd v. Indian Bank** (*2001) 2 SLR 156* in support of the said contention. Both these cases had dealt with the issues pertaining to appeals arising out of matters where the Provincial High Court had exercised its *original* jurisdiction, whereas the case before us raises issues with regard to its *appellate* jurisdiction. Therefore, I am of the opinion that these decisions do not have a direct bearing on the matter at hand.

10. The above argument is firstly premised on the assumption that the revisionary jurisdiction and the appellate jurisdiction are one and the same. It is only if the former is a subset of the latter, could the taking away of the appellate power results in automatically suspending the revisionary powers. However, historically, it has been the opinion of our Courts that the revisionary jurisdiction is distinct from appellate jurisdiction. One basic distinction would be that while the appellate rights are statutory, the exercise of revisionary power is discretionary. Although revisionary jurisdiction shares characteristics with the appellate jurisdiction, they are not one and the same.

11. In **Mariam Beebee v. Seyed Mohamed** *(1965) 68 NLR 36* at page 38*,* the Supreme Court observed that, "*The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result."* This was later approved by a Divisional Bench in **Somawathie v. Madawela** (*1983) 2 SLR 15* and in **Gunarathna v. Thambinayagam** *(1993) 2 SLR 355.*

12. Furthermore, time to time, Courts in Sri Lanka have observed that an appellant could invoke the revisionary jurisdiction even when there is a right of appeal available (*vide* **Attorney General v. Podisingho** *(1950) 51 NLR 385)* and when there is no right of appeal available (*vide* **Sunil Chandra Kumar v. Veloo** *(2001) 3 SLR 91*) or when the said right of appeal has been exercised (*vide* **K. A. Potman v. Inspector of Police, Dodangoda** (1971) *74 NLR 115*). This in itself is sufficient evidence to sustain the claim that appellate jurisdiction and revisionary jurisdiction are two distinct jurisdictions.

13. Article 154P(3)(b) of the Constitution which confers appellate powers on the High Court of the Provinces itself makes separate reference to the term '*Appellate and Revisionary jurisdiction'*. Accordingly, there can be no confusion that appellate and revisionary powers are two distinct powers.

14. Where this is the case, *i.e.* that the appellate and revisionary jurisdiction are two separate jurisdictions, the next question that needs to be answered is whether the removal of one jurisdiction could result in the negation of the other? Or, in the context of the present appeal, whether the '*express provision of the right of appeal ousts the revisionary jurisdiction of the Court of Appeal'*. Here again I observe that historically our Courts have considered these two jurisdictions to be complementary

to each other and not necessarily antagonistic. This is amply demonstrated by the tendency of the Courts to allow revisionary applications irrespective of the right of appeal.

15. In **Podisingho** (*supra*) at page 390, the Supreme Court observed that *"the powers of revision of the Supreme Court (under the Courts Ordinance) are wide enough to embrace a case where an appeal lay but was not taken*". In **Potman** (*supra*) at page 115, it was stated that "*although the Supreme Court would be extremely hesitant and cautious before it makes any order in revision which is contrary to an order which it has already made upon appeal, relief would be granted in a case of an obvious error of fact based on an all important item of evidence not having been brought to the notice of Court at the hearing of the appeal"*. In **Veloo** (*supra*) at pages 102 and 103, the Court stated that "*Revision is a discretionary remedy, it is not available as of right. This power that flows from Art. 138 is exercised by the Court of Appeal, on application made by a party aggrieved or ex mero motu, this power is available even where there is no right of appeal.*"

16. Thus, it is clear that the existence of right of appeal does not uniformly and blanketly result in undermining the revisionary jurisdiction. The right of appeal, is no doubt, a determining factor which the Court takes into account when considering a revisionary application. However, having recourse to an appeal does not *ipso facto* act as an ouster of the revisionary jurisdiction. On the contrary, it is the Court's prerogative to decide, at its discretion, to refuse a revisionary application where it appears that the existence of a parallel right of appeal does not give rise to an exceptional circumstance. Thus, where these jurisdictions are separate but complementary to each other, a negation or the express provision of right of appeal does not result in ousting the revisionary jurisdiction.

17. I pause at this point to emphasize that the above construction must not be confused as a pronouncement giving untrammeled and unfettered revisionary jurisdiction to the Court of Appeal. The Appellants in their written submissions have sought to

argue to this effect. They have cited **Atapattu v. People's Bank** *(1997) 1 SLR 208*, where Justice Mark Fernando prudently observed that an ouster clause in an ordinary law will not prevail over the Constitutional provision conferring writ jurisdiction on the Superior Court. However, I am of the view that the position enunciated in that case cannot be blindly applied to the case at hand as, unlike Article 140, Article 138 expressly refers to the words "*subject to the provisions of any law*".

18. **The said Article 138 of the Constitution reads;**

"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."* (emphasis added)

19. In this regard I tend to agree with the decision in **Weragama v. Eksath Lanka Wathu Kamkaru Samithiya** *(1994)1 SLR 293,* where it was held (at page 299) that "*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…*" I also observe that this distinction between Article 140 and Article 138 was appreciated by Justice Mark Fernando in **Atapattu** (*supra*) where his Lordship stated that "*Where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to "any law"* (at page 223).

20. However, an attendant concern that arises at this point is whether the phrase *"subject to the provisions of any law"* in Article 138 must be interpreted to mean 'express provisions' or whether even an implied ouster could fall within the said

words. The answer to this question is as much about Constitutional interpretation as it is about the nature of the revisionary jurisdiction.

21. At the outset, it must be borne in mind that the Revisionary Jurisdiction of the Court of Appeal is a Constitutional mandate. Its genesis lies in Article 138 of the Constitution. There is no question that the Constitution is the supreme law of the land (*vide* **In re reference under Article 125(1) for the Constitution** (2008) BLR 160 SC). In those circumstances, any ouster or restriction of a Court's jurisdiction which is founded on the Constitution, in so far as it is permitted under the Constitution, must be made in express language. In **Re the Nineteenth Amendment to the Constitution** *(2002) 3 SLR 85*, a bench of 7 judges unequivocally opined that "*This manifests a cardinal rule that applies to the interpretation of a Constitution, that there can be no implied amendment of any provision of the Constitution*" (at page 110). Therefore, it is only right and befitting that this Court insists that every provision which restricts or modifies a Court's Constitutional mandate are express and are set out in no uncertain terms.

22. In the context of all the peripheral questions that I have inquired into above, I proceed to examine whether, as contended by the Respondent, Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 could result in ousting the revisionary jurisdiction of the Court of Appeal in respect of orders, judgments and sentences given by a Provincial High Court in the exercise of its appellate jurisdiction.

23. It is clear that Section 9 of Act No. 19 of 1990 follows the scheme of Article 154P of the Constitution. It stipulates the appeals in respect of final orders, judgments or sentence decided under Article 154P(3)(a) and 154P(4) must be directed to the Court of Appeal, while appeals in respect of final orders, judgments or sentences decided under Article 154P(3)(b) must be directed to the Supreme Court.

24. I also wish to draw attention to **Section 11** of the said Act which reads;

"(1) ***The Court of Appeal*** *shall have and exercise, subject to the provisions of this Act or any other law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under* ***paragraph (3)(a), or (4) of Article 154P*** *of the Constitution and sole and exclusive cognizance by way of* ***appeal, revision*** *and restitution interim of all causes, suits, actions, prosecutions, matters and things of which such High Court may have taken cognizance: Provided that, no judgment, decree or order of any such High 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."* (emphasis added)

25. Section 11 in my opinion is an elaboration of Section 9(b) of the same Act, by virtue of which right of appeal in respect of orders, judgments and sentences given in the Provincial High Court's *original jurisdiction* is vested in the Court of Appeal.

26. The contention of the Respondents is that Section 9 of the Act read together with Section 11 of the same Act, rules out the Court of Appeal's revisionary powers in respect of decisions arrived under Article 154P(3)(b); i.e. orders, judgments and sentences given in the exercise of Provincial High Court's appellate jurisdiction. To put it simply, they argue that **there can only be an appeal** from an instance where the High Court has exercised appellate jurisdiction.

27. Respondents further argue that the Court of Appeal's revisionary powers are specifically referred to in Section 11 of the Act, which limits itself to an order, judgment or sentence given by the Provincial High Court pursuant to Article 154P(3)(a) and (4), exercising its original jurisdiction. They submit that the absence of any reference to Article 154P(3)(b) in Section 11, is illustrative of the legislative intent to oust the Court of Appeal's revisionary jurisdiction with regard to Provincial High Court's appellate jurisdiction.

28. The strength of this argument depends on the maxim *expressio unius est exclusio alterius* which means that the express mention of one thing implies the exclusion of another. However, it is my considered opinion that this maxim does not have absolute universal application. It is no doubt a widely used aid of interpretation. Nevertheless, as observed in **Somawathie v. Madawela and others** *(1983) 2 SLR 15* at page 29*,* quoting **Colquhoun v. Brooks** *(1888) 21 QBD 52, 65, "It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice.*"

29. Particularly in relation to the revisionary jurisdiction, which exists to remedy miscarriage of justice, greater care must be exercised when employing the maxim. As I observed earlier, the revisionary jurisdiction of the Court of Appeal is a Constitutional mandate which, undoubtedly is subject to the provision of statutory law. Nevertheless, owing to its genesis in the Constitution, any restriction or modification which the Legislature seeks to introduce must be introduced by way of express wording. The omission to refer to 'revisionary jurisdiction' in Section 9 of Act No. 19 of 1990 cannot be taken as reducing the Court of Appeal's plenitude of powers under Article 138. Nothing less than an express removal of these powers would be required to achieve such a result.

30. This is particularly because the revisionary jurisdiction, unlike the appellate jurisdiction, *does not depend on a parallel statutory right.* It is well established in our law that an appellant cannot prefer an appeal against an order, judgment or sentence unless there is a 'right' created by statute. As Justice Jameel stated in **Martin v. Wijewardena** *(1989) 2 SLR 409,* at page 419, "*Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or to take advantage of the jurisdiction is governed by several*

statutory provisions in various legislative enactments." An appeal could only result pursuant to the intersection of a forum jurisdiction and right of appeal.

31. In contrast, the Revisionary Jurisdiction is a remedy which lies at the discretion of the court. It does not require a concomitant right in this regard. There only needs to be provision conferring the forum jurisdiction. Revision is a discretionary remedy; it is not available as of right. This power that flows from Article 138 of the Constitution is exercised by the Court of Appeal, on application made by a party aggrieved or *ex mero motu*, this power is available even where there is no right of appeal.

32. The Court of Appeal has on a previous occasion specifically dismissed an attempt to restrict the revisionary jurisdiction to a corresponding statutory right. It was observed "*The Petitioner in a Revision application only seeks the indulgence of Court to remedy a miscarriage of justice. He does not assert it as a right. Revision is available unless it is restricted by the Constitution or any other law*" (*vide* **Veloo** (*supra*) at page 103). Although the Supreme Court is not bound by the said decision, I see no reason to disagree with the principle enunciated there. In my opinion, if the revisionary jurisdiction was also to be subject to a statutory right there would not be any difference between the two jurisdictions.

33. Since the revisionary jurisdiction is not dependent on a concomitant statutory right, I fail to observe how the maxim *expressio unius est exclusio alterius* could be applied to the present circumstances. If historically, a Court needed only the forum jurisdiction to take cognizance of a revisionary application, the assertion that the provision of only the right of appeal in Section 9 and the failure to mention 'revision' in the same Section, ousts the revisionary jurisdiction of the Court of Appeal, cannot be sustained. Indeed, there was never an 'omission' in the first place.

34. I must not be miscomprehended as advocating an unfettered conferment of revisionary jurisdiction on the Court of Appeal. For reasons adumbrated above, such a construction extending unfettered revisionary jurisdiction cannot stand, in view of

the clear reference to '*subject to the provisions of any law'* in Article 138 of the Constitution. However, the only way in which the restriction or an ouster could be introduced in this regard, is by way of an 'express removal' of the same and not by resorting to purported or implied omissions. In fact, the Legislature where it intended to oust the revisionary jurisdiction has expressed the same in unequivocal terms.

35. This is gleaned from <u>Section 37 of the Arbitration Act No. 11 of 1995;</u>

"(1) Subject to subsection (2) of this Section, ***no appeal or revision shall lie*** *in respect of any order, judgment or decree of the High Court in the exercise of its jurisdiction under this Act except from an order, judgment or decree of the High Court under this Part of this Act."*

<u>Section 13 of the Transfer of Offenders Act No. 5 of 1995;</u>

"The sentence of imprisonment imposed in any specified country upon any offender who is a citizen of Sri Lanka ***shall not be subject to any appeal or revision in any court in Sri Lanka****, notwithstanding the fact that the order, decision or judgment imposing such sentence is deemed to be an order, decision or judgment imposed by a court of competent jurisdiction in Sri Lanka."*

36. Therefore, I hold that Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, **does not** oust the Revisionary Jurisdiction of the Court of Appeal in respect of decisions made by a Provincial High Court exercising its appellate powers.

37. At the hearing, the counsel for the Respondents drew our attention to many pragmatic complications that could arise with such a construction. As observed by the Court in **Gunaratne v. Thambinayagam** (1993) 2 SLR 355 at page 361, "*if the multiplicity of litigation in this sphere is felt to be an anomaly, it is a matter for the legislature*" to resolve by way of amendment. This Court cannot, in the guise of interpretation, usurp the legislative function to give effect to what many would

believe a more desirable outcome. Such concerns must be resolved by resorting to the democratic process of the country.

38. In those circumstances, I answer the question of law in the affirmative.

Appeals allowed.

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH K. MALALGODA PC.

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA

I agree.

JUDGE OF THE SUPREME COURT