IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka pursuant to the grant of Special Leave to Appeal under and in terms of Section 9(a) of The High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

SC Appeal 31/2009 and
SC Appeals 35/2009 – 78/2009
SC Spl LA No. 237/2008
HC Kegalle No. 2901/Appeal
MC Warakapola No. 37925

Lakshman Ravendra Watawala
Chairman/ Director General,
Board of Investment of Sri Lanka,
26th Floor,
West Tower,
World Trade Centre,
Echelon Square, Colombo 01.

Applicant

- Vs -

Chandana Karunathilake
B02, Textile Factory Housing Complex,
Thulhiriya.

Respondent

AND

Chandana Karunathilake
B02, Textile Factory Housing Complex,
Thulhiriya.

Respondent-Appellant

- Vs -

Lakshman Ravendra Watawala,
Chairman/Director General,
Board of Investment of Sri Lanka,
26th Floor,
West Tower,
Echelon Square,
Colombo 01.

Applicant-Respondent

AND NOW

1. Lakshman Ravendra Watawala,
Chairman/Director General,
Board of Investment of Sri Lanka,
26th Floor,
West Tower,
Echelon Square,
Colombo 01.

Applicant-Respondent-Appellant

1B. Kulappuarachchige Don Dhammika Perera,
Chairman/Director General,
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26th Floor,
West Tower,
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1C. Jayampathy Divale Bandaranayake,

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1D. Mahavidanalage Munidasa Charlce Ferdinando
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1E. Vithanage Upul Priyantha de Silva Jayasuriya,
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1F. Duminda Rathnayake,
Chairman,
Board of Investment Sri Lanka,
26th Floor, West Tower,
Echelon Square,
Colombo 01.

Added Applicant – Respondent – Appellants

- **Vs** -

1. Chandana Karunathilake
B02, Textile Factory Housing Complex,
Thulhiriya.

Respondent-Appellant-Respondent

Argued Before: Priyantha Jayawardena PC, J
Nalin Perera, J
Vijith Malalgoda, PC, J

Counsel: S. A. Parathalingam PC with Nishken Parathalingam for the Appellant
Sanath Singhage instructed by Varners for the Respondent- Petitioner-Respondent

Argued on: 19th September, 2017

Decided on: 6th July, 2018

Priyantha Jayawardena PC, J

This is an appeal filed against a Judgment of the High Court of the Sabaragamuwa Province holden in Kegalle setting aside an Order of Ejectment made by the Magistrate's Court of Warakapola under the provisions of the State Lands (Recovery of Possession) Act No.07 of 1979 as amended.

At the commencement of the hearing of this Appeal, the parties in SC Appeal Nos. 35/2009 to 78/2009 agreed to abide by the judgment of this appeal since the questions of law where leave was granted in this appeal and all the said appeals are identical. The grounds of appeal, *inter alia*, are as follows:

a) *Did the Respondent not have a right of appeal in respect of the Order of the Magistrate overruling the preliminary objections dated 15th February, 2007 and the Order of Ejectment dated 1st March, 2007 in view, inter alia, of the provisions of Section 10(2) of the State Lands (Recovery of Possession) Act as amended?*
b) *Did the High Court act without jurisdiction and/or err in law by entertaining the appeal and giving Judgment thereon?*
c) *Did the High Court err in law by giving Judgment on the merits of the appeal without first considering and making an order on the aforesaid preliminary objections raised by the Appellant?*

d) *Did the High Court err by not considering the aforesaid preliminary objection raised and maintained by the Appellant and in rejecting/overruling the said objections?*

e) *Did the High Court err in law by holding that the learned Magistrate should have considered/ determined the questions of:*

   i. *Whether the Appellant was a 'Competent Authority'; and*

   ii. *Whether the land in question was 'State Land';*

   in view, inter alia, of Section 9 of the State Lands (Recovery of Possession) Act?

Factual Matrix

The Applicant instituted Application No. 37925 and another fifty applications in the Magistrate's Court of Warakapola against the Respondent and others (hereinafter collectively referred to as 'the Respondents') in terms of Section 5 of the State Lands (Recovery of Possession) Act No.07 of 1979 as amended for the ejectment of the Respondents from the lands described in the Schedule to the said applications.

The Counsel for the Respondents appearing before the Magistrate's Court raised the preliminary objection in all cases stating that the land in question was not a 'State land' and the Applicant was not a 'Competent Authority' in terms of the State Lands (Recovery of Possession) Act No. 07 of 1979 as amended.

The learned Magistrate by his Order dated 15th February, 2007 amalgamated all the applications (Nos. 32925 to 37944, 37946 to 37969, and 37980 to 37985) and overruled the said preliminary objections and granted a date for the Respondents to show cause as to why the Respondents and their dependents, if any, should not be ejected from the land.

Thereafter, the Respondents filed Petitions of Appeal on 22nd February, 2007 against the said Order of the learned Magistrate. However, these Appeals were not pursued by the Respondents.

As there was no stay order to stay the proceedings, the Magistrate's Court took up the said applications for inquiry on 1st March, 2007 and issued Orders of Ejectment as the Respondents failed to produce a valid permit or other written Authority of the State granted in accordance with any written law.

The Respondents appealed to the High Court of the Sabaragamuwa Province Holden in Kegalle against the Judgment of the learned Magistrate made on 1st March, 2007 issuing the Order of Ejectment on the Respondents. The appeals in this Court stem from these appeals.

Further, in addition to the said Appeals, the Respondents subsequently filed Revision Applications dated 13th March, 2007 praying for the revision of the Order made on 1st March, 2007 and to have the said Order set aside.

When the said Appeals were taken up for hearing before the High Court, the Applicant-Respondent raised the preliminary objection that the Respondent-Appellants had no right of appeal in terms of the State Lands (Recovery of Possession) Act.

However, the High Court by its Judgment dated 9th September, 2008 overruled the said preliminary objections and held that the Order of the learned Magistrate dated 15th February 2007 overruling the preliminary objections and the Order of Ejectment dated 1st March, 2007 were contrary to the law and set aside the said Judgment. The High Court further held that the said Judgment was applicable to the other connected Appeals.

Later, the High Court dismissed the abovementioned Applications for Revision on 23rd September, 2008 as the High Court had already entertained the appeals and set aside the Orders of the learned Magistrate.

Being aggrieved by the Judgment of the High Court dated 9th September, 2008, the Applicant-Respondent had filed the instant appeals against the said Judgment and leave was granted by this Court on the aforementioned questions of law.

Submissions of the Appellant

At the hearing, the learned President's Counsel for the Applicant-Respondent-Appellant (hereinafter 'the Appellant') submitted that as the right of appeal has been taken away by Section 10(2) of the State Lands (Recovery of Possession) Act, the only remedy available to those who are adversely affected is to institute actions against the State for vindication of title under Section 12 of the Act. In support of his submission, he cited *Farook v Gunewardene, Government Agent, Amparai* (1980) 2 SLR 243 at 247 wherein the Court of Appeal held that:

"*When the Legislature has made express provision for any person who is aggrieved that he has been wrongfully ejected from any land to obtain relief by a process described in the Act itself, it is not for this Court to grant relief on the ground that the petitioner has not been heard. Where the structure of the entire Act is to preclude investigations and inquiries and where it is expressly provided (a) the only defence that can be put forward at any stage of the proceedings under this Act can be based only upon a valid permit or written Authority of the State and (b) special provisions have been made for the aggrieved parties to obtain relief, I am of the opinion that the Act expressly precludes the need for an inquiry by the competent authority before he forms the opinion that any land is State land.*"

Submissions of the Respondent

The Counsel for the Respondent-Appellant-Respondent (hereinafter 'the Respondent') stated that the Legislature would never have intended to deprive litigants of the right of appeal with regard to Orders, particularly from Orders made by the lower courts. In support of his submission, he cited Section 31 of the Judicature Act No. 2 of 1978 which states:

"*Any party aggrieved by any <u>conviction, sentence or order</u> entered or imposed by a Magistrate Court may subject to the provisions of any law appeal therefrom to the Court of Appeal in accordance with any law, regulation or rule governing the procedure and manner for so appealing.*" [Emphasis added]

He further cited Article 154P(3) of the 1979 Constitution of the Democratic Social Republic of Sri Lanka (hereinafter referred to as 'the Constitution') which states:

"*Every such High Court shall –*

(a) …

(b) Notwithstanding *anything in Article 138 and subject to any law, exercise, <u>appellate</u> and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates' Courts and Primary Courts within the Province…*" [Emphasis added]

The Respondent further submitted that in the light of the aforementioned provisions of legislation, the Respondents were entitled to appeal to the High Court as the abovementioned legislation conferred the right of appeal against the Orders and Judgments of the Magistrate's Court.

Now I shall consider the questions of law where the leave was granted by this Court.

Did the Respondent not have a right of appeal in respect of the Order of the Magistrate overruling the preliminary objections dated 15th February, 2007 and the Order of Ejectment dated 1st March, 2007 in view, *inter alia,* of the provisions of section 10(2) of the State Lands (Recovery of Possession) Act?

This Court is called upon to consider whether the Respondent had a right of appeal against the Orders of the learned Magistrate made on 15th February, 2007 overruling the said preliminary objections and the Order of Ejectment dated 1st of March, 2007 to eject the Respondents under the State Lands (Recovery of Possession) Act.

Is There a Right of Appeal Under the State Lands (Recovery of Possession) Act?

Section 10 of the State Lands (Recovery of Possession) Act No.7 of 1979 as amended states:

> "*(1) If after inquiry the Magistrate is not satisfied that the person showing cause is entitled to the possession or occupation of the land he shall make order directing such person and his dependents, if any, in occupation of such land to be ejected forthwith from such land.*
>
> *(2) No appeal shall lie against any order of ejectment made by a Magistrate under subsection (1).*" [Emphasis added]

Therefore, I shall now consider whether a party can file an appeal against an Order of Ejectment made by a Magistrate's Court and under Section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

Restrictions on Appellate Jurisdiction

Section 10(2) of the said Act states that no appeal shall lie against an order of ejectment made by the Magistrate under Section 10(1) of the Act. Such clauses are referred to as ouster clauses.

The purpose of an ouster clause is to oust the jurisdiction of the courts. Ouster clauses can be broadly split into two types, namely:

(a) public law ouster clauses; and
(b) jurisdictional ouster clauses.

Ouster Clauses in Public Law

Public law ouster clauses are clauses that oust the supervisory jurisdiction of the courts regarding administrative decisions made by administrative bodies. These clauses preclude the judicial review of such decisions. In public law, a clause which states "shall not be called into question in any court" is known as a finality clause or an ouster clause.

In light of the doctrine of separation of powers, ousting the jurisdiction of the court undermines the principle of checks and balances as judicial review has often been considered an integral part of the democratic system. However, ouster clauses have been recognised as a necessary provision of law because such clauses offer finality. Hence, the Legislature, in its own wisdom, introduces ouster clauses in appropriate instances when enacting legislation. However, our Courts entertain Revision Applications if a grave prejudice has been caused to a litigant even if there is an ouster clause. Such instances will be considered later in this judgment.

Section 22 of the Interpretation Ordinance No. 21 of 1901 as amended enshrines an ouster clause applicable to matters of administrative law. However, the proviso to the abovementioned section enables a party to invoke the writ jurisdiction of the Court of Appeal under Article 140 and 141 of the Constitution.

Jurisdictional Ouster Clauses

I shall now consider jurisdictional ouster clauses. Jurisdictional ouster clauses partially or as a whole oust the jurisdiction of court to review an order or judgment of a lower court and make the decisions of the lower courts final.

Jurisdictional ouster clauses may be categorised into the following two categories:

(a) partial ouster clauses; and
(b) total ouster clauses.

(a) Partial Ouster Clauses

Partial ouster clauses retain the jurisdiction of courts subject to imposing certain restrictions on jurisdiction; such as by limiting the grounds of appeal or by providing a specific procedure of appeal.

More often than not, similar provisions are found in Sri Lankan legislation and some of those provisions are considered below.

Further, Section 317 of the Code of Criminal Procedure Act No. 15 of 1979 as amended states as follows:

> "*(1) An appeal shall not lie from a conviction –*
>
> > *(b) Where an accused has under section 183 made an unqualified admission of his guilt and been convicted by a Magistrate's Court.*
>
> *(2) An appeal upon a matter of law shall lie in all cases*." [Emphasis added]

The abovementioned section ousts the jurisdiction of the Appellate Courts if the accused had been convicted by a Magistrate's Court consequent to an unqualified admission of guilt.

A similar ouster clause can also be found in Section 318 of the Code of Criminal Procedure which states:

> "*An appeal shall not lie from an acquittal by a Magistrate's Court except at the instance or with the written sanction of the Attorney-General*."

In this instance, an appeal against an acquittal can be lodged only after obtaining the sanction of the Attorney General.

Further, Section 31D of the Industrial Disputes Act No. 30 of 1950 as amended restricts the right to appeal to only on questions of law. Section 31D states:

> "*(2) Save as provided in subsection (3) an order of a labour tribunal shall be final and shall not be called in question in any court.*
>
> *(3) Where the workman who, or the trade union which, makes an application to a labour tribunal, or the employer to whom that application relates is dissatisfied with the order of the tribunal on that application, such workman, trade union or employer may, by written petition in which the other party is mentioned as the respondent, appeal from that order <u>on a question of law</u>."*
> [Emphasis added]

Thus, an appeal against a Labour Tribunal Order is restricted only to a question of law arising out of a Labour Tribunal order. Similar provisions are found in Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended; Section 5 of the Arbitration Act No. 11 of 1995 and Article 128(1) of the 1979 Constitution of Sri Lanka.

(b) Total Ouster Clauses

These ouster clauses completely oust the jurisdiction of the courts.

The Exercise of Revisionary Jurisdiction in the Presence of Ouster Clauses

Notwithstanding the provision of total ouster clauses, the courts exercise revisionary powers where they deem fit.

In *Sirimavo Bandaranaike v Times of Ceylon* [1995] 1 SLR 22, the Supreme Court held that Section 88(1) of the Civil Procedure Code merely excluded appeals and could not be taken to infer an exclusion of revisionary jurisdiction. Further, the Court held that the express exclusion of an appeal justified the inference that other remedies, such as revision, were permitted.

Moreover, in *Rasheed Ali v Mohamed Ali and Others* [1981] 1 SLR 262, the Supreme Court held that the removal of the right of appeal does not prevent the exercise of revisionary jurisdiction in exceptional circumstances. The Court held at 265:

> "*... the powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. When, however, the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstance. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm."* [Emphasis added]

In the early case of *Ranesinghe v Henry et al* 1 NLR 303, Chief Justice Bonser held that while there can be no appeal from a claim order, the Court can exercise its revisionary powers when the matter comes up on appeal and exercised its powers in revision to quash the order of the District Court judge.

This principal was followed in *The King v Seeman Alias Seema* 9 CLW 76 wherein the court held that where the appeal was out of time by one day, it could be treated as an Application for Revision.

Moreover, in *Nissanka v The State* [2001] 3 SLR 78, the Court of Appeal considered a Petition of Appeal that was filed out of time as an Application for Revision on the basis that the revisionary powers that had been conferred by Section 364 of the Code of Criminal Procedure Act No. 15 of 1979 as amended is wide enough to permit the exercise of revisionary powers in this instance as it is warranted to meet the ends of justice.

Therefore, it is evident that in appropriate instances, the Court has entertained Revision Applications when there was no right to appeal.

However, in the instant appeal, the Revision Applications against the Orders of the learned Magistrate were dismissed by the High Court as the High Court had entertained the appeals and set aside the judgment. Further, the appeals before this Court arose from the judgments delivered in the appeals filed before the High Court. Thus, the above proposition of law shall not apply to the instant appeal.

Furthermore, I am of the opinion that where the right of appeal is taken away by explicit words, it is not possible to consider an appeal filed in such an instant as a Revision Application as the court has no jurisdiction to entertain such appeals.

The Nature of the Right of Appeal

There are several Acts that have conferred the right to appeal. Section 754 of the Civil Procedure Code states:

> *"(1) Any person who shall be dissatisfied with any judgment, pronounced by any original Court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.*
>
> *(2) Any person who shall be dissatisfied with any order made by an original Court in the course of any civil action, proceeding or matter to which he is, or seeks to be a party, may prefer an Appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained."*

Section 4 of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 as amended provides a general right of appeal as follows:

> "*A party aggrieved by any conviction, sentence or order, entered or imposed, by a Magistrate's Court … may, subject to the provisions of any written law applicable to the procedure and manner for appealing and the time for preferring such appeals, appeal therefrom to the High Court established by Article 154P of the Constitution for the Province within which such court or tribunal is situated …*"

In instances where the Act is silent with regard to the right of appeal, the courts have held that there can be no right of appeal as the right of appeal is a substantive right. In *Re Wijesinghe* 16 NLR 312, the Court held, *"it is a well-established principle of law that an appeal never lies to a party to a legal proceeding from an order made in it <u>unless the right is expressly given by statute</u>."* [Emphasis added]

The Supreme Court in *The Indian Bank Ltd v Sri Lanka Shipping Company Limited* 79 NLR 1 followed the judgment of Morris LJ in *Healey v Minister of Health* (1954) 3 WLR at page 821 wherein it was held, "*the Court cannot invent a right of appeal where none is given*" as there was no explicit right of appeal given to the court from the determination of the Minister and held that since there was no right to appeal under the Administration of Justice Law except in limited circumstances, a right of appeal "*can be taken away by statute either expressly or by necessary intendment*" and the Court had no power to confer upon themselves a jurisdiction that they did not possess.

However, with the subsequent enactment of other Acts which confer jurisdiction on appellate courts to hear appeals in the absence of a specific provision for appeal in the principle enactment, our courts have interpreted the law to enable such appeals to be entertained.

In the recent case of *Mallawarachchige Kanishka Gunawardhana v H K Sumanasena* SC Appeal No. 201/2014, where the Supreme Court held that although there was no right of appeal in the Sri Lankan Bureau of Foreign Employment Act No. 21 of 1985 (hereinafter the 'SLBFE') by applying Section 4(2) of the International Covenant on Civil and Political Rights Act No. 56 of 2007 which provided a general right of appeal against convictions in respect of criminal offences by the Magistrates' Courts. The court held that a right of appeal exists regarding such convictions notwithstanding the fact that the SLBFE Act has no specific provision of appeal.

The Effect of Section 10(2) of the State Lands (Recovery of Possession) Act

The preamble of the State Lands (Recovery of Possession) Act states that it is an Act to make provision for the Recovery of Possession of State Lands from person in unauthorised possession or occupation.

Since the language of Section 10(2) is plain and clear, it can be interpreted by applying the literal rule of interpretation. It is clear from a plain reading of Section 10(2) of the State Lands (Recovery of Possession) Act No. 7 of 1979 that the Legislature intended that the ouster clause should effectively remove the right of appeal in respect of Orders of Ejectment made under Section 10(1) of the State Lands (Recovery of Possession) Act.

Prior to the enactment of the State Lands (Recovery of Possession) Act in 1979, an encroachments survey was carried out in 1979 which revealed that 951,000 acres of State land were encroached by over 600,000 persons; thus, the Act was proposed to provide an expeditious procedure for the State to regain control of these lands (as referred to in the Hansard of 8th August, 1981). As ordinary civil action may result in protracted litigation, the expedited recovery process in the Magistrates' Courts were implemented. This highlighted the intention of Parliament to expedite the recovery of State land occupied by encroachers or occupation of such lands.

When the Supreme Court restricted the powers of the State under the said Act by its judgment in *Senanayake v Damunapola* (1982) 2 SLR 621, the Legislature amended the said Act by enacting Act No. 29 of 1983 to express where the Competent Authority is of the opinion that a land is State land and a person is in unauthorised possession or occupation of such land, the Competent Authority may serve a notice on such person to vacate the said land with his dependents and deliver vacant possession to the Competent Authority. Moreover, Section 1A was added to state that no person could make any representation or be entitled to a hearing regarding the abovementioned notice.

Further, by Act No. 29 of 1983, Section 5(a)(ii) and Section 5(a)(iv) of the principal enactment was amended by replacing the following words "*application is State land*" and "*application is in unauthorised possession or occupation*"; and substituting them with the words "*application is in his opinion State land*" and "*application is in his opinion in unauthorised possession or occupation*", respectively.

Thus, it was ensured that the recovery procedure is expedited. Therefore, the ouster clause which removed the right to appeal must be considered in this context.

The State Lands (Recovery of Possession) Act was enacted prior to the present Constitution and was preserved by Article 168(1) of the 1978 Constitution. Thus, when interpreting such Acts that have been preserved by the Constitution, they must be interpreted in a manner harmonious with the present Constitution and the legislation enacted under the said Constitution.

Section 10(2) specifically removes the right of appeal against the Orders of Ejectment by the Magistrates' Courts. Thus, when there is a specific ouster clause enshrined in an Act, it is not possible to read such an Act along with another Act which provides a right of appeal

against an Order or Judgment of a particular Court. Therefore, these acts have no application to the instant case.

In light of the above, I am of the opinion that the questions of law posed to the Court should be answered as follows:

(a) Did the Respondent not have a right of appeal in respect of the Order of the Magistrate overruling the preliminary objections dated 15th February, 2007 and the Order of Ejectment dated 1st March, 2007 in view, *inter alia*, of the provisions of Section 10(2) of the State Lands (Recovery of Possession) Act as amended?

Yes.

In view of the foregoing answer, the question of considering the other questions of law will not arise.

Hence, I am of the opinion that the High Court lacked jurisdiction to entertain the appeal. Accordingly, I allow the appeal and set aside the judgment of the High Court dated 9th September, 2008.

This judgment is applicable to SC Appeal Nos. 35/2009 to 78/2009 and therefore, I allow the SC Appeal Nos. 35/2009 to 78/2009.

I order no costs.

Judge of the Supreme Court

Nalin Perera, J

I agree **Judge of the Supreme Court**

Vijith K. Malalgoda, PC, J

I agree **Judge of the Supreme Court**