SUMANADASA
v.
HATHURUSINGHE

COURT OF APPEAL
GUNASEKERA, J.,
YAPA, J.
C.A. NO. 66/93
H.C. (N.W.P.) NO. 246/93
M.C. GALGAMUWA 7023/M
DECEMBER 15, 1994 AND JANUARY 13,1995.

Maintenance – Appeal to Provincial High Court – Order set aside – Appeal to the Court of Appeal – Jurisdiction of the Court of Appeal to hear such appeals – Thirteenth amendment to the Constitution, Articles 138(1), 154P3, 154P3 (b), 154P6 – High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, S. 9.

An application for maintenance was dismissed by the Magistrate's Court, Galgamuwa. On appeal to the Provincial High Court of the North Western Province, the High Court set aside the Order.

Thereafter an appeal was lodged in the Court of Appeal. It was contended that, as the High Court exercised its powers under Article 154P 3(b) of the Constitution, the appellant had no right of appeal.

Held:

(1) On a proper construction of Article 154P (3)(b), Article 154P(6) and Article 138(1), it is clear that a right of Appeal to the Court of Appeal has been expressly created. Article 154P3 (b) confers appellate and Revisionary jurisdiction on the High Court and Article 154 P(6) provides that any person aggrieved by a decision of the High Court in the exercise of its jurisdiction under paragraph 3(b) may appeal therefrom to the Court of Appeal in accordance with Article 138.

(2) Article 154 (P)(6) itself has not limited the right of Appeal given by it to orders made by the High Court by way of appeal.

Cases referred to:

1. *Piayadasa Guneratne v. Alan Thambinayagam* 1992 S.C. Appeal No. 21/92, S.C. Minutes 25.11.1992 (B.A.L.J.) Vol. IV Part II, Page I.
2. *Abeygunasekera v. Setunga*, S.C. Reference 1/94. C.A. 18/92 (P.H.C.) H.C. Colombo No. 22/91 M.C. Mount Lavinia No. 68129. Decided on 8.6.1994.

APPEAL from the Provincial High Court of the North Western Province.

Sanath Jayatileka for appellant.
Sunil F. A. Cooray for respondent.

Cur. adv. vult.

May 12, 1995.
YAPA, J.

In this case the respondent filed an application for maintenance for herself and the child on 28.10.91 in the Magistrate's Court of Galgamuwa. After the evidence was taken on behalf of the respondent and the appellant, the Learned Magistrate by his order dated 25.08.93 dismissed the application for maintenance by the respondent, and gave two reasons for his finding. Firstly, Learned Magistrate stated that the application for maintenance was not filed within 12 months of the birth of the child and that there was no evidence before Court to prove that the child was maintained by the appellant at any time within the 12 months period. Secondly, the Learned Magistrate stated that there was no evidence to corroborate the evidence of the respondent.

Being aggrieved by this order of dismissal the Respondent appealed to the provincial High Court of the North Western Province to have the order of the Learned Magistrate set aside. After the appeal was argued by Counsel the Learned Provincial High Court Judge by his judgment dated 18.10.93 set aside the order of the Learned Magistrate and directed the appellant to pay the Respondent a sum of Rs. 500/- per month as maintenance to the child. The Learned High Court Judge in his judgment stated that the Learned Magistrate was in error when he held that he could not entertain the application, for the reason that he had already entertained it, and had proceeded to inquire into it, and further the Learned High Court Judge held that there was material to corroborate the evidence of the Appellant-Respondent. It is from this judgment of the Learned Provincial High Court Judge that the Appellant has appealed to this Court.

When this appeal was taken up for hearing on 06.12.94 the Learned Counsel for the Respondent raised a preliminary objection and stated that this Court has no jurisdiction to hear and determine this appeal, as the appellant had no right of appeal to this Court in

this case. Thereafter both the Counsel for the Appellant and the Respondent agreed to submit written submissions to this Court, so that this Court would be able to make an order in regard to the preliminary objection taken.

In the written submissions filed with regard to the preliminary objection raised by the Learned Counsel for the Respondent, it was stated that when the High Court heard the appeal in the present case, it was exercising its powers under Article 154 P(3)(b) of the constitution and that under the law the appellant had no right of appeal under any provision of law, to the Court of Appeal, against the said judgment of the Provincial High Court dated 18.10.93. Further it was submitted that under Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 the right of appeal against the judgment of the Provincial High Court lies to the Supreme Court and that under Section 10 of said Act the jurisdiction of the Supreme Court is an exclusive jurisdiction. In support of this contention the Learned Counsel has cited the case of *Piyadasa Guneratne v. Alan Thambinayagam* [1]. The Learned Counsel for the Appellant on the other hand, argued that in view of Article 154 P(6) of the Constitution and that as the appeal has been lodged according to the rules made by the Supreme Court, under Court of Appeal (Procedure for appeals from the High Courts established by Article 154 P of the Constitution) and therefore the Court of Appeal has jurisdiction to hear the appeal. It was also submitted that the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 does not take away the right of appeal granted by the Constitution and further it was contended that the decision in the case of *Piyadasa Guneratne v. Alan Thambinayagam* (*Supra*) has no bearing on the question at issue. Finally the learned Counsel referred to the case of *Abeygunasekera v. Setunga* [2], where it has been held that an appeal lies to the Court of Appeal from an order of the Provincial High Court made in the exercise of its revisionary jurisdiction.

It is to be noted that in the case of *Piyadasa Guneratne v. Alan Thambinayagam* (*Supra*) what was held by the Supreme Court was that Section 9 of Act, No. 19 of 1990 would not confer a right of

appeal in respect of revisionary orders of the High Court. In doing so the Court had regard to the fact that the power of revision is an extraordinary power distinct from the appellate jurisdiction of the Court which is a statutory right and must be expressly created and granted by statute, and further that Section 9 of Act, No. 19 of 1990 refers to orders made in the exercise of the appellate jurisdiction of the High Court.

In the present case we are concerned with the question whether the Court of Appeal has the right to entertain and hear an appeal from an order of the High Court excising its appellate jurisdiction. To determine the question in issue it is necessary to examine whether the appellate jurisdiction of the Court of Appeal provided under Article 138(1) of the Constitution to entertain appeals lodged in the exercise of the right of appeal granted by Article 154 P(6) of the Constitution has any limitations. To decide this matter one has to interpret the provisions of Article 154 P(3)(b), Article 154 P(6) and Article 138(1) of the Constitution.

Article 154 P(3) says . . .

"Every such High Court shall –

(a) . . . . . .

(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 Magistrate's Courts and Primary Courts within the Province."

Article 154 P(6) says . . .

"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 paragraph (3)(b) . . ., may appeal therefrom to the Court of Appeal in accordance with Article 138".

Article 138(1) says . . .

"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".

On a proper construction of these relevant provisions it is clear that a right of appeal to the Court of Appeal from an order of the High Court has been expressly created and granted by virtue of Article 154 P(6) and Article 138(1) of the Constitution. Further it is to be noted that as submitted by the learned Counsel for the respondent, this right to the Court of Appeal has not been affected or limited by virtue of Section 9 or 10 of the High Court of the provinces (Special Provisions) Act, No. 19 of 1990.

These provisions of the Constitution referred to above were considered recently by the Supreme Court in the case of *Abeygunasekera v. Setunga* (*Supra*) cited by the Learned Counsel for the appellant. In that case it was stated that "Article 154 (3)(b) conferred "appellate and revisionary" jurisdiction on the High Court. Article 154 P(6) provides that any person aggrieved by a decision of the High Court **in the exercise of its jurisdiction** *inter alia,* under paragraph (3)(b) may appeal therefrom to the Court of Appeal in accordance with Article 138. Thus Article 154 (P)(6) itself has not limited the right of appeal given by it to orders made by the High Court by way of appeal. However, that Article refers back to Article 138 which spells out the jurisdiction of the Court of Appeal and the manner of its exercise." The Supreme Court thereafter interpreting these provisions decided that the Court of Appeal has jurisdiction to hear an appeal against the decision of the High Court, whether given by way of an appeal or in the exercise of its revisionary jurisdiction.

Therefore we hold that the appellant in this case has the right to appeal to this Court from the judgment of the Provincial High Court heard by way of an appeal from the Magistrate's Court. Accordingly we overrule the preliminary objection raised by the learned Counsel for the respondent and we direct that this case be fixed for argument on a date suitable to Counsel.

GUNASEKERA, J. – I agree.

Preliminary objection overruled. Case fixed for argument.