RUSTOM
v.
HAPANGAMA & CO.

SUPREME COURT
ISMAIL J., SHARVANANDA J. AND WANASUNDERA J.
S.C. APPEAL No. 67/79
C.A. APPLICATION No. 412/78
JULY 15, 1980.

Revision — Right to apply in revision when right to appeal was available — Circumstances in which revisionary powers will be exercised — Section 754(2) C.P.C.

The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available, only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise its powers in revision.

The appellant has not indicated to Court that any special circumstances exist which would invite this Court to exercise its powers of revision, particularly since the appellant had not availed himself of the right of appeal under section 754(2) which was available to him.

Cases referred to:

(1) *Gunawardene v. Orr* 2 Appeal Court Reports 172

(2) *Ameen v. Rasheed* 6 CLW 8

(3) *Perera v. Silva* 4 Appeal Court Reports 79

(4) *Alima Natchiya v. Marikar* 47 NLR 82

(5) *In re the Insolvency of Hayman Thornhill* 2 NLR 105

(6) *Atukorale v. Samynathan* 41 NLR 165

(7) *Silva v Silva* 44 NLR 494

(8) *Sinnathangam v. Meera Mohideen* 60 NLR 393

(9) *Abdul Cader v. Sittinisa* 52 NLR 536

APPEAL from judgment of Court of Appeal reported in [1978-79] 2 Sri L.R. 225

D. R. P. Goonetilleke with *K. S. Tillekeratne* for plaintiff-appellant.

C. Thiagalingam, Q.C. with *S. A. Parathalingam* for defendant-respondent.

Cur. adv. vult

11th August 1980.
ISMAIL, J.

The plaintiff-appellant is the landlord of premises No. 104/22 and 104/40 Grandpass Road, Colombo 14 rented out to the respondent at a monthly rental of Rs. 6000/-. The appellant had

filed action in the District Court in consequence of notice on the respondent to quit and deliver possession after 30th September 1977, on the ground that the respondent was in wrongful and unlawful occupation of the premises in suit. The appellant had also asked for damages at Rs.12,000/- per month.

It would appear that summons had issued in this case requiring the respondent to enter an appearance within fifteen days of service. The summons was reported to have been served on 9th November 1977, but the respondent had failed to appear within the fifteen days stipulated by the Administration of Justice (Amendment) Law No. 25 1975, Section 399(1) as indicated in the summons issued in this case. Subsequently the appellant's Attorney-at-Law had filed a motion on 6.12.78 moving the case be fixed for *ex parte* trial in conformity with section 416(1) of the said law. This was minuted to be mentioned on 17.1.78. Before that date the respondent's Attorney-at-Law had filed motion bearing the date 22.12.67 moving to call this case in Court to enable the proxy and answer of the respondent to be filed. The Court had ordered that this matter also be mentioned on 17.1.1978.

On 17.1.1978 the respondent's proxy was filed and further time was moved to file papers on behalf of the defendant. This application has been allowed and the case was called on 21.2.78. On this latter date a petition had been filed by the respondent together with an affidavit from the Managing Director of the respondent company, claiming that the summons in this case had been served on an unknown person who had thereafter delivered the said summons at the respondent's office during the middle of December 1977. The respondent asked for further time to file his answer to which the petitioner's Attorney had objected. Accordingly the matter was fixed for inquiry on 28.2.78. and the inquiry was held on that date. Officials of the District Court and Postal Department had given evidence on behalf of the appellant as to the issue of summons and delivery of the same. The postal peon who delivered the postal article containing the summons had also given evidence to the effect that it had been delivered at the respondent company's registered address, at 344, Grandpass Road, Colombo 14. No evidence had been called on behalf of the respondent. Written submission had also been filed both by the appellant and the respondent. Thereafter the District Judge by his order dated 5th May 1978 had held that the appellant's application for *ex parte* trial should not be allowed and that the respondent should be allowed an opportunity to file his answer. It

would appear that this order has been made in view of an amendment made to the Civil Procedure Code by Law No. 20 of 1977. Thereafter the appellant had filed an application on 29.5.78 for revision of the District Judge's order under Section 753 of the Civil Procedure Code.

The application of the appellant had been argued in the Court of Appeal on 1st of November 1978 and the Court of Appeal had delivered its order on 1st December 1978. The appellant avers that at the hearing of the revision application the respondent had taken a preliminary objection, that the appellant could not invoke the revisionary powers of the Court of Appeal as the appellant had a right of appeal against the order of the District Judge and that the appellant not having availed himself of this right could not invoke the revisionary powers of the Court of Appeal. The Court of Appeal upheld this preliminary objection and dismissed the application on the ground that there were no exceptional circumstances which warranted the exercise of the revisionary powers of the Court of Appeal and in the circumstances of this case the petitioner was not entitled to have the benefit of the indulgence of the Court of Appeal by way of revision.

Subsequently application had been made for leave to appeal to the Supreme Court and leave had been refused by the Court of Appeal by an order dated 29.2.79. Thereafter the appellant had filed papers for special leave to appeal both against the order refusing leave by the Court of Appeal and against the order of the Court of Appeal itself. This application for special leave had been allowed and the matter was thereafter argued before us.

The appellant had filed the application for revision on 29.5.78. The District Judge had made his order in respect of this revision application on 5.5.78. Section 754(2) of the Amended Civil Procedure Code reads,

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

Section 756(4) indicates the time limiit imposed for an appeal against an order made by a District Judge and reads,

> "An application for leave to appeal shall be presented to the Supreme Court for this purpose by the party appellant or his registered Attorney within a period of fourteen days from the date when the order appealed against was pronounced exclusive of the day of that date itself and of the day when the application is presented and of Sundays and Public Holidays and the Supreme Court shall receive it and deal with it as hereinafter provided and if such conditions are not fulfilled, the Supreme Court shall reject it."

The appellant without availing himself of the remedy by way of an application for leave to appeal within the stipulated time had instead filed application for revision.

Counsel for respondent contended that if the appellant had filed papers for leave to appeal under section 754(2), then under Section 756(5) the Judge, to whom the application for leave had been submitted, would have made one of the orders under section 756(5) (a) or (b) either fixing a date for hearing of the application and order notice thereof to be issued on the respondent ; or in the alternative requiring the application to be supported in open Court by the petitioner or Attorney-at-Law on his behalf on a date fixed by such Judge and the Court on hearing the appellant may reject such application or fix the date for hearing of the application and order notice thereof to be issued on the respondent. Thereafter when the application came up for hearing the respondent would be heard in opposition to the application. Counsel for respondent stated that he had been denied this opportunity of objecting to an appeal and such objection by him, if sustained, would have finally disposed of the appeal.

He further submitted that in terms of Section 756(7) proceedings in the original Court shall be stayed unless the Court otherwise directs, when leave to appeal is granted. He properly pointed out that the propriety of such stay would be relevant ground on which respondent could resist the application for leave. He stated that this opportunity to object to stay would be denied to him in proceedings for revision as Court directs stay of proceedings on an *ex parte* application of the petitioner.

The respondent's Counsel further submitted that the appellant could only invoke the revisionary powers of the Court of Appeal if he had no other remedy available to him in law or unless there were some exceptional circumstances which he urged to invoke the indulgence of the Court of Appeal to act by way of revision. In

the present case he submits there are no such circumstances present. In view of this submission of Counsel for appellant it is necessary to consider certain authorities where courts have considered the exercise of revisionary powers in cases where an applicant has an alternative statutory remedy.

The power of revision vested in the Supreme Courts is a discretionary power as is quite apparent when one considers the working of Section 753. Numerous authorities have indicated that this power will only be exercised when there is no other remedy available to a party and such remedy has not been availed of by such authority. It is only in very rare instances where exceptional circumstances are present that the Courts would exercise powers of revision in cases where an alternative remedy has not been availed of by an applicant.

In the case of *Gunawardene v. Orr* (1) after discussing the facts of that case Hutchinson, C.J. held,

> "I see an expression of opinion by Acting Justices, Pereira and Grenier in 2 Balasingham page 86 which I think I ought to follow. The effect of it is that the practice is not to exercise the power of revision unde sec. 753 where the remedy of appeal is open ; and here the party aggrieved might have obtained leave to appeal notwithstanding the lapse of time that has expired. The powers given by section 753 ought not be exercised in such a case. I dismiss the application with costs."

Again in *Ameen v. Rasheed* (2) Abraham, C.J. discussing the facts of that case where,

> An application had been made for revision of an order of the District Judge postponing an action, pending the decision of an appeal which he considered as having an important hearing on the case. A preliminary objection was taken that as the order made was appealable, the application should be rejected,

Abrahams C.J. stated,

> "It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have a discretion to act in revision. It has been said in this Court

> often enough that revision of an appealable order is an exceptional proceeding, and in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal.
>
> I can see no reason why the petitioner should expect us to exercise our revisional powers in his favour when he might have appealed, and I would allow the preliminary objection and dismiss the applicaion with costs."

Similarly in the case of *Perera v. Silva et al* (3) Hutchinson, C.J. in the course of a very short judgment considered the question whether the revisionary powers of the Court should be exercised when there was another remedy available. I shall reproduce the entire judgment of Hutchinson, C.J.

> "I do not feel in the least able to say in what cases the Court ought, and in what cases the Court ought not, to exercise the power of revision under sec. 753. I know that it often does exercise that power where the applicant has no other remedy. But I do not think that the power ought to be exercised, or that the Legislature could have intended that it should be exercised, so as to give the right of appeal, practically, in every case, large or small, simple or difficult. This is a case in which the applicant had another remedy provided by the legislature ; and it is not a case in which the order is obviously wrong. Therefore, I do not think it right to call on the respondent to argue it.
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> I refuse to exercise the power of revision, and dismiss the application with costs."

Wendt, J. agreed with this judgment and added,

> "Unlike an appeal, which is a matter of right, relief by way of revision is placed by sec. 753 in the discretion of the Court, and I think I may say, as a result of the decided cases, that the Court has been unwilling to exercise the power of revision where another remedy as of right is open to the applicant.
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> In the present case I do not think it can be said, an applicant's counsel wished to say, that the order complained of is *ex facie* bad ; and, without limiting our right to interfere to cases of that description, I agree that we ought not to interfere in the present instance."

Similarly in *Alima Natchiya v. Marikar* (4) Keuneman S.P.J. with whom Rose J. agreed stated :

> "We think that Mr. Jayewardene for the 2nd respondent is right in arguing that a right of appeal lay to correct an error of law committed by the District Judge. In the circumstances we should be slow to exercise our discretion to allow an application in revision in view of the fact that no appeal has been taken in this case."
>
> The application for revision is dismissed with costs."

The scope and object of the exercise of revisionary powers by the Supreme Court is succinctly stated by Bonser C.J. in the case of *In re the insolvency of Hayman Thornhill* (5) as follows :

> "The Supreme Court has the power of revising the proceedings of all inferior courts. This power . . . . . The object at which the Supreme Court aims in exercising its powers of revision is the due administration of justice ; and whether any particular person has complained against an order proposed to be revised, or is prejudiced by it, is not to be taken into account in the exercise of such power."

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.

I shall now deal with some of the cases which deal with this aspect of the matter. In the case of *Atukorale v. Samynathan* (6) 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* (7) 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 v. Meera Mohideen* (8) 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 v. Sittinisa,* (9) 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. Pulle 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."

The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise these powers in revision. If the existence of special circumstances does not exist then this Court will not exercise its powers in revision. In the present case the appellant has not indicated to Court that any special circumstances exist which could invite this Court to exercise its power of revision, particularly, since the appellant had not availed himself of the right of appeal under Section 754(2) which was available to him.

In passing it might be noted that Vythialingam J. in his judgment in the Court of Appeal had made certain observations with regard to the claim for damages in Rs. 12,000/- per mensum when the agreed rental was only Rs. 6000/- per mensum. This is a matter that should be left open to be canvassed in the District Court when the trial is gone through particularly since the land values and rentals have gone up considerably in the last few years and the District Judge would be unfettered in his discretion to assess the damages.

I have also considered the facts in this case. The Appellant has not urged any excuse why he did not apply for leave to appeal in terms of Sec. 754(2) and 756(2). I am of opinion that this is not a case in which the Court of Appeal should have exercised its powers of revision under section 753 of the Civil Procedure Code. I would accordingly dismiss the appeal with costs fixed at Rs. 525/-.

SHARVANANDA, J. —I agree.

WANASUNDERA, J. —I agree.

Appeal dismissed.