GUNARATNE
v.
THAMBINAYAGAM AND OTHERS

SUPREME COURT.
G. P. S. DE SILVA, C. J.,
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. SPL. APPL. NO. 14/92
H.C. COLOMBO (RA) NO. 68/91
M.C. MOUNT LAVINIA NO. 69279
(WITH S.C. APPEAL NO. 21/92)
OCTOBER 12 & 13, 1992.

Appeal – Supreme Court Jurisdiction–Judgment of High Court of a Province Exercising Revisionary Jurisdiction – Constitution – Article 154 P (3) (b) – Act No. 19 of 1990.

The petitioner in application No. 14/92 and the appellant in Appeal No. 21/92 each sought to canvass by way of direct appeal to the Supreme Court a judgment of the High Court of Western Province made in the exercise of its revisionary jurisdiction vested in it by Article 154 (3) (b) of the Constitution. For this purpose they invoked the provisions of S. 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 which provides for a direct appeal to the Supreme Court from any final or interlocutory order, judgment, decree or sentence of a High Court established by Article 154 p of the Constitution in the exercise of the appellate jurisdiction vested in it by Article 154 (3) (b) or S. 3 of the Act or any other law.

Held :

(1) The right of appeal is a statutory right and must be expressly created and granted by statute.

(2) S. 9 of Act No. 19 of 1990 does not give a right of appeal to the Supreme Court from an order of the High Court in the exercise of its revisionary jurisdiction.

Cases referred to :

1. *In Re the Thirteenth Amendment to the Constitution* (1987) 2 Sri LR 310, 323.
2. *Mariam Beebee v. Seyed Mohamed* 68 NLR 36, 38.
3. *Somawathie v. Madawela* (1983) 2 Sri LR 15, 26.
4. *Attorney - General v. Podisingho* 51 NLR 385, 388.
5. *Thameena v. Koch* 72 NLR 192.
6. *S. L. B. C. v. de Silva* (1981) 2 Sri LR 228 (CA).
7. *Nadarajah v. Tilagaratnam* (1986) 3 CALR 303 (CA).
8. *Bakmeewewa v. Raja* (1989) 1 Sri LR 231 (SC).
9. *Martin v. Wijewardena* (1989) 2 Sri LR 250.
10. *Gamhewa v. Maggie Nona* (1989) 2 Sri LR 250.
11. *Mudiyanse v. Bandara* SC Appeal 8/89 S.C. mins of 15.03.91.

Preliminary objection to entertainment of appeal.
W. Dayaratne with *Sarathchandra Liyanage* for 3rd respondent – respondent – petitioner.

S. Mahenthiran with *Sampathy Welgampola* for the 1st respondent – petitioner – respondent.

Other respondents absent and unrepresented.

Cur. adv. vult.

November 25, 1992.

KULATUNGA, J.

In this application and in SC Appeal No. 21/92, it is sought to canvass by way of appeal a judgment of the High Court of Western Province made in the exercise of its *revisionary jurisdiction* vested in it by Article 154 P (3) (b) of the Constitution. A preliminary objection was taken in each of these cases that there is no right of appeal to this Court from such judgment as the direct appeal provided to this Court by S. 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 is limited to any order, judgment, decree or sentence of a High Court of a Province made in the exercise of its *appellate Jurisdiction* and hence this Court has no jurisdiction to grant leave to appeal in this application or to hear and determine the appeal in SC Appeal No. 21/92. Of consent, both these cases were listed together as they involve the same point which can be disposed of by a single judgment. At the hearing, learned Counsel for the parties in each case made submissions and subsequently tendered written submissions as directed by us.

In each of these cases a dispute relating to land had been referred to a Magistrate (exercising the powers of the Primary Court) in terms of S. 66 (1) (b) of the Primary Courts Procedure Act No. 44 of 1979. After due inquiry, the Magistrate made his determination, the object of which is to maintain the status quo until final adjudication of the rights in a civil suit. S. 74 (2) of the Act provides that an appeal shall not lie against such determination. Prior to the 13th Amendment to the Constitution, a party aggrieved with such a determination used to apply to the Court of Appeal to have it set aside by way of revision in the exercise of the power of that Court under Article 138 of the Constitution read with Article 145. S. 5 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 read with Article 145 P (3) (b) of the Constitution (enacted by the 13th Amendment) entitled him to file such application in the High Court of the Province. The jurisdiction of the High Court in the matter is concurrent. *In Re the Thirteenth Amendment to the Constitution* [1] . In the result, he may file his application in the Court of Appeal or in the High Court.

Article 154 P establishes a High Court for each Province. Article 154 P (3) (b) states :

> " Every such High Court shall –
> 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 Magistrates Courts and Primary Courts within the Province "

> Article 154 P (6) provides :
> " 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 paragraphs (3) (b)..... may appeal to the Court of Appeal in accordance with Article 138 "

The Court of Appeal (Procedure for appeals from High Courts established by Article 154 P of the Constitution) Rules, 1988 made by the Supreme Court were published in Gazette (Extraordinary) No. 549/6 of 13.03.89. The said Rules provide the procedure to be followed in making appeals to the Court of Appeal, inter alia, from orders made by a High Court in the exercise of its appellate or revisionary jurisdiction under Article 154 P (3) (b).

This was followed by Act No. 19 of 1990 which by S. 4 thereof gave a person *the right* of invoking the appellate jurisdiction of the High Court established by Article 154 P and provided the procedure, inter alia, for making appeals to that Court and for invoking its revisionary jurisdiction under Article 154 P (3) (b).

S. 12 of Act No. 19 of 1990 makes provision for resolving some of the anomalies arising by reason of the provisions of Article 154P which vested new jurisdictions in the High Court, but concurrently with the existing jurisdiction of the Court of Appeal in the same sphere. Thus, where an appeal or an application in respect of the same matter is filed in the Court of Appeal and in the High Court and the hearing of such application by the High Court has not commenced, the Court of Appeal may proceed to hear and determine such appeal or application or where it considers it expedient to do so, direct such High Court to hear and determine such appeal or application. Provided, however, where an appeal or application which is within the jurisdiction of a High Court established by Article 154 P of the Constitution is filed in the Court of Appeal, the Court of Appeal may if it considers it expedient to do so, order that such appeal or application be transferred to such High Court and such High Court shall hear and determine such appeal or application.

S. 9 of the Act (with the marginal note " Appeals to Supreme Court from High Court *in certain cases* ") provides for a direct appeal to the Supreme Court from any final or interlocutory order, judgment, decree or sentence of a High Court established by Article 154 P of the Constitution in the exercise of the *appellate jurisdiction* vested in it by Article 154 P (3) (b) or S. 3 of the Act or any other law. S. 10 provides that the Supreme Court shall be the final Court of Appeal over the High Court exercising such *appellate jurisdiction* and further provides that the new jurisdiction vested in the Supreme Court shall be sole and exclusive.

The learned Counsel for the petitioner and the appellant in SC Appeal No. 21/92 submitted that particularly in the background of legislative provision existing prior to the 13th Amendment, (viz. The Courts Ordinance, The Administration of Justice Law, Article 138 of the Constitution and the relevant statutes on Civil and Criminal Procedure) the expression " appellate jurisdiction " (as opposed to " original jurisdiction ") would ordinarily include the power to review decisions by way of appeal, revision or restitution in integrum; that Article 154 P (3) (b) enacted by the 13th Amendment vested "

appellate jurisdiction " in the High Court limited to *appeal* and *revision* of the decisions of the Magistrates Courts and Primary Courts ; that S. 3 *of* Act No. 19 of 1990 extended the exercise of such jurisdiction to orders made by Labour Tribunals and orders made under Sections 5 and 9 of the Agrarian Services Act No. 58 of 1979 ; and that in the context, the expression " appellate jurisdiction in S. 9 of the Act should not be limited to an appeal made 'eo nomine' but should be interpreted to include the power of review by way of revision.

Learned Counsel for the respondents, and particularly Mr. Mahenthiran in this application argued :

(a) that whilst " appellate jurisdiction " would conceptually include appeal and revision, yet the power of revision is distinct from appellate jurisdiction. He cited the dicta of Sansoni C.J. who delivered the majority decision of the Divisional Bench in *Mariam Beebee v. Seyed Mohamed* [2].

" The power of revision is an exraordinary power which is quite independent of and distinct from the appellate jurisdiction of the Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriage of justice "

These dicta were cited with approval by Soza J. in a Divisional Bench decision of this Court in *Somawathie v. Madawela* [3].

These were cases in which the power of the former Supreme Court and this Court to set aside a decree nisi in a partition action by revision was considered. Much earlier in *Attorney–General v. Podisingho* [4] (an application for the revision of the order of a Magistrate in a criminal case), Dias J. said that this power (which is a discretion) is exercised "where there is a positive miscarriage of justice in regard either to the law or to the Judge's appreciation of the facts " (P 388). It was held that this power is not limited to cases where there is no appeal; and that " it is wide enough to embrace a case where an appeal lay but which for some reason was not taken " (P 390).

(b) (i) That prior to the enactment of S. 3 of Act No. 19/ 1990, the remedy by way of revision was not available against the order of a Labour Tribunal. *Thameena v. Koch* [5] in which

Tennakoon J. said " I do not think the revisionary powers of this Court extends to orders of Labour Tribunals " presumably for the reason that S. 753 of the old Civil Procedure Code and S. 356 of the Criminal Procedure Code to call for and examine records was limited to examine records of only a Court. This limitation was continued by S. 354 of the A.J.L. In terms of Article 145 of the 1978 Constitution the revisionary power of the Court of Appeal is limited to examine and inspect records of only a Court of First Instance. It was, therefore, held in *S. L. B. C. v. De Silva* (6) and *Nadarajah v. Tilagaratnam* (7) that the Court of Appeal has no power to review the order of a Labour Tribunal by revision.

(b) (ii) That S. 3 of Act No. 19/1990 vested in the High Court (in addition to appellate jurisdiction) revisionary jurisdiction in respect of the orders of Labour Tribunals and orders made under Sections 5 and 9 of the Agrarian Services Act. Learned Counsel submits that this " revisionary jurisdiction " is a new jurisdiction vested in the High Court and that S. 9 of the Act which provided for direct appeals to the Supreme Court expressly limits such appeals to any order, judgment, decree or sentence of a High Court in the exercise of its *appellate jurisdiction* vested in it by Article 154 P (3) (b) of the Constitution (or S. 3 of the Act). As such, S. 9 does not touch the appellate power of the Court of Appeal under Article 154P (6) in respect of orders of the High Court in the exercise of its *revisionary jurisdiction* ; and the remedy of the appellant was to have appealed to that Court in terms of the relevant Court of Appeal Rules.

(c) That the right of appeal is a statutory right and must be expressly created and granted by statute. Mr. Mahenthiran has cited in support the decisions in –
Bakmeewewa v. Raja (8), *Martin v. Wijewardena* (9), *Gamhewa v. Maggie Nona* (9), *Mudiyanse v. Bandara* (10).

It is the contention of Counsel that S. 9 does not give appellant a right of appeal to the Supreme Court from an order of the High Court in the exercise of its revisionary jurisdiction. In contrast S. 31D of the Industrial Disputes Act as amended by Act No. 32 of 1990 (which also provides for direct appeals to the Supreme Court) provides :

" Any workman, trade union or employer who is aggrieved by any final order of a High Court established under Article 154P of the Constitution, in the exercise of the *appellate jurisdiction* vested in it by law *or* in the exercise of its *revisionary jurisdiction* vested in it by law, in relation to an order of a Labour Tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained"

Although during the hearing, it appeared that there was some absurdity or injustice resulting from limiting appeals to this Court to the orders of a High Court in the exercise of its jurisdiction by way of appeal, having considered the above submissions I now have no difficulty in accepting the submission the S. 9 imposes such a limitation. S. 9 of the Act and the authorities would not permit the conferment of a right of appeal in respect of revisionary orders of the High Court ; And hence there is no absurdity or injustice which this Court is empowered to cure by interpretation.

If the multiplicity of litigation in this sphere is felt to be an anomaly, it is a matter for the legislature. In fact, in a number of other situations under the system introduced by the 13th Amendment and subsequent legislation, the incidence of multiplicity of litigation is inevitable. Thus it appears –

(a) that in the light of the concurrent jurisdiction of the Court of Appeal and the High Court which still exists, which fact is confirmed by S. 12 of Act No. 19/1990, the identical dispute may be decided by the Court of Appeal or by the High Court. A decision in the High Court would permit two appeals whilst a decision in the Court of Appeal would permit one more appeal;

(b) that under S. 5 of the Agrarian Services Act No. 58 of 1979 as amended by Act No. 4 of 1991, appeals on decisions on eviction of a tenant cultivator from a paddy land have now to be made to the Board Review ; but appeals under S. 9 of that Act may be made either to the Court of Appeal (as provided in that section) or to the High Court as provided by S. 3 of Act No. 19 of 1990. In respect of certain other orders under the Agrarian Services Act, a Writ application may be made to the Court of Appeal under Article 140 or to the High Court under Article 154 P (4) of the Constitution. The number of appeals in such cases would vary depending on whether

(c) that under S. 31 D of the Industrial Disputes Act as amended by Act No. 32 of 1990, an appeal from the order of a Labour Tribunal may be made to the High Court with a second appeal to the Supreme Court. Under S. 3 of the Act No. 19 of 1990, a revision application in respect of such order may be made to the High Court in which event parties will be entitled to appeal to the Court of Appeal from the order of the High Court and then to the Supreme Court.

For the foregoing reasons, I uphold the preliminary objection taken on behalf of the Respondent and refuse leave to appeal, with costs.

G. P. S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Preliminary
Objection upheld