1946 *Present :* **Nagalingam A.J.**

PERERA, Petitioner, *and* AGIDAHAMY *et al.*, Respondents.

528—Application for revision in C. R. Colombo, 94,410.

Revision—Jurisdiction of Supreme Court to act in revision where no appeal lies—Civil Procedure Code, s. 753.

Court of Requests—Amendment of pleadings at any time before trial—Special provision in Civil Procedure Code, s. 816.

Section 753 of the Civil Procedure Code does not put a limitation on the powers of the Supreme Court to deal with an application in revision in a matter which cannot be brought up by way of appeal.

Section 816 of the Civil Procedure Code specially provides that the Court of Requests should allow pleadings to be amended at any time before trial if substantial justice can be promoted thereby.

APPLICATION to revise an order of the Commissioner of Requests, Colombo.

Colvin R. de Silva (with him *K. C. de Silva*), for the plaintiff, petitioner.

G. T. Samarawickreme, for the 1st and 3rd defendants, respondents.

S. R. Wijayatilake, for the 2nd defendant, respondent.

December 3, 1946. NAGALINGAM A.J.—

This is an application by the plaintiff to revise an order of the learned Commissioner refusing an amendment to the plaint.

A preliminary objection was taken by Mr. Samarawickreme to the application on the ground that under section 753 of the Civil Procedure Code it was only where a matter could have been brought up by way of appeal that it could be dealt with in revision, and that as there was no appeal from an interlocutory order in the Court of Requests, application by way of revision did not lie. I do not think that section 753 is capable of such a narrow interpretation as that contended for. The words of the section relied upon by learned Counsel for the 1st and 3rd defendants deal with the nature of the order that may be made in revision and not with the

question of the circumstances in which an application for revision may be made; the words are " . . . . and may upon revision . . . . *pass any judgment or make any order* which it might have made had the case been brought before it in due course of appeal instead of by way of revision". The words italicised by me if taken note of can only lead to the conclusion that they do not prescribe the scope or put a limitation on the powers of this Court to deal with an application in revision. The limitation that is imposed by this clause is as regards the order the Court may pass, namely, if it could not have passed a particular order on an appeal then such an order could not be made even if the matter be brought before it by way of revision. The case of *Sabapathippillai v. Arumugasamy*[1] has been cited as supporting the proposition contended for but I have little doubt, as expressly stated in the judgment itself, the observations of Soertsz J. must be confined to the facts of the case before him. That was a case where even if an appeal had been preferred this Court could have given no relief and it was held that on revision the Court could not act otherwise. I therefore overrule the preliminary objection.

In regard to the merits of the application itself, it would appear that the plaintiff filed his plaint on March 9, 1944, claiming relief against all the defendants upon a cause of action which is set out in paragraph 3 of the plaint as the wrongful and unlawful prevention by the defendants of the flow of water *into* the plaintiff's land by blocking the water-course. The plaintiff states that the word " into " is incorrect and that the words " out of " should be substituted therefor as only then his cause of action would be set out correctly.

The defendants filed two separate answers and in both answers they have expressly stated that the plaintiff was making an attempt to find ways and means of draining out the water from Wilkoladeniya which gets filled with water during the rainy season, and clearly establish that they appreciated quite properly the cause of action upon which the plaintiff came into Court. Admittedly, even at the inspection when the learned Commissioner visited the land the only topic of discussion was not whether the plaintiff's field became dried and uncultivable because the flow of the water into the field had been stopped but whether as a result of the water being prevented from flowing out of the plaintiff's field, the field became water-logged and thereby became uncultivable. The plaintiff sought to amend his plaint by motion dated January 22, 1945, by substituting the words " out of " for the word " into " in paragraph (3) of his plaint. The Proctor for the 1st and 3rd defendants received notice " subject to any objection at the trial ". The Proctor for the 2nd defendant had received notice "subject to any objection". Where a party receives notice " subject to objection at the trial " it means that he has no objection to the amendment being allowed subject to any objection that may be taken at the trial as a result of the amendment being allowed. The motion was never dealt with although a date was given for its consideration. The plaintiff states that he was under the impression that the motion had been allowed. Various steps were taken in the case from time to time without the question of amendment being dealt with and the case was

[1] *(1944) 27 Ceylon Law Weekly 5.*

set down for trial on October 16, 1946. On October 4, 1946, the plaintiff filed a motion asking that the motion of amendment dated January 22, 1945, be allowed. After hearing arguments the learned Commissioner refused the application.

It is quite obvious to my mind that the parties well knew from the commencement, however imperfect the language the plaintiff used in his plaint may have been, that the wrong in respect of which the plaintiff came into Court claiming damages was the blocking of the outlet from his field thereby preventing the water from flowing out of his field. In view of this circumstance alone the amendment should have been allowed. More so, in the Court of Requests where in regard to amendments, there is special provision in section 816 of the Code which lays down that the Court should allow pleadings to be amended at any time before trial if substantial justice can be promoted thereby.

I would set aside the order of the learned Commissioner and allow the application to amend the plaint. The plaintiff will be entitled to the costs of appeal and of the inquiry in the lower Court.

Application allowed.