WICKRAMASEKERA
v
OFFICER-IN-CHARGE, POLICE STATION AMPARA

SUPREME COURT
BANDARANAYAKE, J.
YAPA, J., AND
JAYASINGHE, J.
S.C. REFERENCE NO. 1/2003
C.A. (PHC) NO. 75/96
H.C. AMPARAI APPEAL NO. 6/95
M.C. AMPARAI NO. 48650
28 JANUARY, 19 AND 20 FEBRUARY, 2004

Constitutional Law – Article 125 of the Constitution – Jurisdiction of the Court of Appeal under Article 138(1) of the Constitution to entertain an appeal from a decision of the Provincial High Court made in the exercise of the appellate jurisdiction of the High Court under Article 154P(3)(b) of the Constitution – Section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

The Magistrate convicted the accused-appellant (the accused) for contravention of a regulation published in the Gazette dated 26.3.1992 and ordered a fine and the forfeiture of 75 cubic feet of timber from the accused.The accused appealed to the High Court under the Code of Criminal Procedure Act. The appeal was dismissed. From that order the accused sought to appeal to the Court of Appeal. The question arose whether in view of section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, the Court of Appeal has jurisdiction to entertain the appeal under Article 138 of the Constitution, read with Article 154P(6) of the Constitution.

It was argued that the Court of Appeal and the Supreme Court have concurrent jurisdiction to entertain the appeal from the Provincial High Court.

Held:

1. Article 138(1) is an enabling provision which distinctly states that:

   "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law an appellate jurisdiction....."

2. The Court of Appeal does not have appellate jurisdiction under Article 138(1) of the Constitution read with Article 154(P) 6 in respect of the decisions of the Provincial High Court made in the exercise of its appellate jurisdiction and it is the Supreme Court that

has appellate jurisdiction in respect of appeals from the Provincial High Court as set out in section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

Cases referred to:

1. *Abeygunasekera* v *Setunga* – (1997) 1 Sri LR 62
2. *Sumanadasa* v *Hathurusinghe* – (1995) 2 Sri LR 17
3. *Martin* v *Wijewardane* – (1989) 2 Sri LR 409
4. *Swastika Textile Industries Ltd* v *Thantirige Dayaratne* – (1993) 2 Sri LR 348
5. *Weragama* v *Eksath Lanka Wathu Kamkaru Sangamaya and others* – (1994) 1 Sri LR 293
6. *Thottuvarambath Velyaudhan* v *Pottanyil Abuoobackeer Haji* (1980) MAD LJ (Cr) 54
7. *Mariam Beebee* v *Seyed Mohamed* – (1965) 68 NLR 36
8. *Gunaratne* v *Thambinayagam and others* – (1993) 2 Sri LR 355
9. *Abeywardane* v *Ajith de Silva D.B.* – (1998) 1 Sri LR 134 at 139

Reference under Article 125 of the Constitution

Ranjith Abeysuriya P.C. with *Kumarasiri Iddamalhena* and *Thanuja Rodrigo* for accused-appellant

P.P. Surasena, Senior State Counsel for respondent

Cur.adv.vult

March 30, 2004

SHIRANI BANDARANAYAKE, J.

The Court of Appeal has referred this matter in terms of Articles 125 of the Constitution as it involves interpretation of the provisions of the Constitution.

The question in issue relates to a matter, where the accused-appellant-appellant (hereinafter referred to as the appellant) was charged in the Magistrate's Court of Ampara having contravened Regulation 4 of Gazette No. 01 of 1992 dated 26.03.1992. The Magistrate by his order, dated 02.05.1995 convicted the accused and sentenced him to a fine of Rs. 100,000/-. Further, 2000 cubic centimeters (75 cubic feet) of timber he had under his control was confiscated. From that order the appellant appealed to the High

Court in terms of Article 154 and section 320 of the Code of Criminal Procedure Act, No. 15 of 1979. The Judge of the High Court, by his order dated 30.05.1996, dismissed the appeal and affirmed the conviction and sentence. Thereafter the appellant appealed to the Court of Appeal against the order of the High Court in terms of Article 154P of the Constitution.

In the Court of Appeal, learned Senior State Counsel for the complainant-respondent-respondent (hereinafter referred to as the respondent) took up a preliminary objection that the Court of Appeal has no jurisdiction to entertain the appeal preferred by the appellant as it is a matter that has to be referred to the Supreme Court in terms of section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 1990. Accordingly the Court of Appeal referred to following question to be considered by the Supreme Court.

> "Does the Court of Appeal have appellate jurisdiction in terms of Article 138(1) of the Constitution read with Article 154(P) 6 in respect of decisions of the Provincial High Court made in the exercise of its - appellate jurisdiction, or is it the Supreme Court that has jurisdiction in appeals from the Provincial High Court as set out in section 9 of the High Courts of the Provinces (Special Provisions) Act, No. 19 of 1990."

Learned President's Counsel for the appellant submitted that the Court of Appeal as well as the Supreme Court will have concurrent jurisdiction to hear and determine appeals from the Provincial High Court in the exercise of appellate jurisdiction.

The contention of the learned President's Counsel for the appellant was that in terms of Article 154(P) 6 of the Constitution, a person who is aggrieved by a decision of the Provincial High Court would have a right of appeal to the Court of Appeal. Learned President's Counsel submitted that in terms of the amendment to Article 138 of the Constitution, the Court of Appeal could hear an appeal from the High Court of the Provinces, "in the exercise of its appellate or original jurisdiction". In support of this contention, learned President's Counsel cited the decision in *Abeygunasekera* v *Setunga*[1] and *Sumanadasa* v *Hathurusinghe*[2].

Article 138 of the Constitution provides for the appellate jurisdiction to the Court of Appeal. In terms of Article 138(1) of the Constitution,

> "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 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 Court of First Instance, tribunal or other institution may have taken cognizance:
>
> Provided that no judgment, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

Article 138 of the Constitution was amended by the Thirteenth Amendment to the Constitution by the substitution of the words "committed by any Court of First Instance" of the words "committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance," thus incorporating the decisions of the High Court in the exercise of its appellate or original jurisdiction, being amenable to the appellate jurisdiction of the Court of Appeal.

The Thirteenth Amendment to the Constitution enabled the High Courts to be established in the provinces by virtue of Article 154(P) of the Constitution. However, no provision was made with regard to the procedure to be followed in such High Courts. In order to provide for the lacuna in the law with regard to the procedure to be followed in at the High Court of the Provinces, the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 was enacted which made provision "regarding the procedure to be followed in, and the right to appeal to and from, the High Court established under Article 154(P) of the Constitution".

This Act also made provision for the appeals to be brought in

before the Court of Appeal as well as the Supreme Court from the High Court. Whilst section 9 of the Act refers to appeals to Supreme Court from High Court, section 11 provides for appeals to Court of Appeal from the High Court.

Section 9 of the Act is in the following terms:

> "Subject to the provisions of this Act or any other law, any person aggrieved by–
>
> (a) a final 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 paragraph (3) of Article 145(P) of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings:....."

Article 154(P)(3) of the Constitution refers to the power of the High Court and paragraph 3(b) of the said Article reads as follows:

> "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;"

Section 11 of the High Court of the Provinces (Special Provinces) Act, No. 19 of 1990 on the other hand refers to paragraph 3(a) or 4 of Article 154(P) of the Constitution.

Paragraph 3(a) of Article 154P of the Constitution reads as follows:

> "Every such High Court shall –
>
> (a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;"

Learned President's Counsel for the accused-appellant in his submission relied on the decision in *Abeygunasekera* v *Setunga* (*supra*) and *Sumandasa* v *Hathurusinghe* (*Supra*) where the Supreme Court and the Court of Appeal respectively had taken the view that the Court of Appeal has the jurisdiction to hear an appeal against a decision of the High Court whether by way of appeal or revision.

Jurisdiction of the Court of Appeal to hear an appeal was derived in terms of Article 138 read with Article 154(P) (6) of the Constitution. Article 154(P)(6) states that,

> "Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgement or sentence of any such Court, in the exercise of its jurisdiction under paragraphs (3)(b) or (3)(c) or (4) may appeal therefrom to the Court of Appeal in accordance with Article 138".

The decision in *Abeygunasekera's* case *(supra)* was based on the premise that the authority to entertain appeal in terms of Article 154(P)(6) is restricted under Article 138 of the Constitution, which spells out the jurisdiction of the Court of Appeal and the manner of its exercise.

It has been decided by this Court that Article 138 which creates and grants jurisdiction to the Court of Appeal to hear appeals from Courts of First Instance, Tribunals and other Institutions is an enabling provision (*Martin* v *Wijewardane*[3]. Further the decisions in *Swasthika Textile Industries Ltd.* v *Thantrige Dayaratne*[4] and *Weragama* v *Eksath Lanka Wathu Kamkaru Sangamaya and others*[5] clearly referred to the fact that the jurisdiction of the Court of Appeal under Article 138 is not an entrenched jurisdiction as this Article is "subject to the provisions of the Constitution or of any law".

An enabling provision, permits the omitted details of importance to be carried out by means of a subsequent provision provided for that purpose. Bindra in his work in Interpretation of Statutes (Eight Edition, pg. 651) citing *Thottuvarambath Velayudhan* v *Pottanyil Abuoobacker Haji*[6] states that,

> ".....if a statute is passed for the purpose of enabling

> something to be done, but omits to mention in terms of some details of great importance (if not actually essential) to the proper and effectual performance of the work which the statute has in contemplation, it is beyond doubt that Courts are at liberty to infer that the statute by necessary implication empowers that the details be carried out."

Therefore the jurisdiction granted to Court of Appeal in terms of constitutional provisions could be exercised, in terms of the provisions of a subsequent amendment. The Thirteenth Amendment which brought in a new judicial dimension to the then existing judicial structure did not vary this situation as similar provisions were adopted in Article 154(P)(6) where it states that "subject to the provisions of the Constitution and any law", an appeal could be lodged in the Court of Appeal in accordance with Article 138. The additional provisions, which were necessary for the effective functioning of the High Courts of the Provinces were brought in by way of the Special Provisions Act, No. 19 of 1990.

Accordingly, the right of appeal to and from the High Courts established under Article 154(P) of the Constitution will have to be decided in terms of the provisions enlisted in High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, as provided by Article 138 as well as Article 154(P)(6) of the Constitution.

As adverted to earlier sections 9 and 11 refer to the appeals to the Supreme Court and the Court of Appeal respectively from the High Court of the Provinces. Section 10 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 which deal with the powers of the Supreme Court on appeals, clearly states that the Supreme Court would exercise appellate jurisdiction vested in it by paragraph (3)(b) of Article 154(P) of the Constitution or section 3 of the aforementioned Act.

It is to be noted that Article 154(3)(b) of the Constitution of which reference is made in section 9 of High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, provides for the appellate as well as revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrate's Courts and Primary Courts within the Province. However, section 9 of the High

Court of the Provinces (Special Provisions) Act does not make reference to revisionary jurisdiction and deals only with appellate jurisdiction.

Unlike an appeal which could be made by any party who is dissatisfied with any judgment, decree or order pronounced in a Lower Court except when such right is expressly disallowed, the power in revision is an extra ordinary power which is quite distinct from the appellate jurisdiction. In *Marian Beebee* v *Seyed Mohamed*[7] Sansoni, C.J., delivering the majority decision of the Divisional Bench stated that,

> "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that unless the power is exercised injustice will result."

In *Gunaratne* v *Thambinayagam and others*[8] the question that had to be decided was whether there is a right of appeal from the High Court to the Supreme Court in the exercise of its revisionary jurisdiction. This Court after considering the applicability of Articles 154(P)(3)(b), 154(P)(6) and sections 9 and 12 of the Act, No. 19 of 1990 correctly decided that section 9 of the 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.

In *Abeygunasekera* v *Setunga and others (supra)* the question in issue was whether the Court of Appeal has the appellate jurisdiction in terms of Article 138(1) of the Constitution as amended by the Thirteenth Amendment in respect of a decision of the Provincial High Court made in the exercise of its revisionary jurisdiction.

After considering Articles 154(P)(3), 154(P)(6) 138(1) of the Constitution and section 9 of Act, No. 19 of 1990, Kulatunga, J. held that the Court of Appeal had jurisdiction to hear an appeal against a decision of the High Court whether given by way of appeal or revision.

Discussing the aforementioned provisions in the Constitution and the Act, Kulatunga, J. was of the view that,

> "It is thus clear that the expression 'appellate jurisdiction' in section 9 of Act, No. 19 of 1990 has a restricted meaning. If so, this Court cannot enlarge the right of appeal granted by that section. It is a matter for Parliament. As such, I am unable to agree that the case of *Gunaratne* v *Thambinayagam (supra)* has been wrongly decided. In the instant case, we are not concerned with the question whether a statutory right of appeal granted by ordinary law is subject to any limitation. The question is here is whether the appellate jurisdiction of the Court of Appeal under Article 138(1) of the Constitution to entertain appeals made in terms of Article 154(P)(6) is restricted and excludes the power to entertain appeals from revisionary orders of the High Court. If it is so restricted then, it also means that the right of appeal granted by Article 154(P)(6) is restricted by Article 138(1)."

The Court of Appeal in *Sumanadasa* v *Hathurusinghe (supra)* had not taken into consideration the applicability of Article 125 where the Supreme Court has the sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution.

In *Abeygunasekera's* Case *(supra)* Kulatunga, J. has taken the view that 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, but that Article 154(p)(6) refers back to Article 138 which spells out the jurisdiction of the Court of Appeal and the manner of its exercise.

Be that as it may, it is to be borne in mind that Article 138 is an enabling provision, which distinctly states that,

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution **or of any law,** an appellate jurisdiction.....(emphasis added)."

More importantly, in *Abeygunasekera's* case the Court was of the view that the expression "appellate jurisdiction" in section 9 of

Act, No. 19 of 1990 has only a restricted meaning and therefore no consideration was given to the applicability and the effect of section 9 of the High Court of the Provinces Act, No. 19 of 1990.

As has been adverted to earlier, High Court of the Provinces (Special Provision) Act came into being in 1990 to make provision regarding the procedure to be followed in and the right to appeal to and from the High Court established under **Article 154(P)** of the Constitution.

Section 9 of the High Court of the Provinces (Special Provision) Act, No. 19 of 1990 clearly specifies that any person aggrieved by a final order, judgment, decree or sentence of a High Court established by Article 154(P) of the Constitution in the exercise of the appellate jurisdiction in terms of Article 154(P)(3)(b) of the Constitution or section 3 of the Act or any other law whether it is civil or criminal which involves a substantial question of law could appeal to the Supreme Court.Therefore it is of vital importance that in deciding the appellate jurisdiction from an order of the High Court, due consideration should be given to the provisions in section 9 of Act, No. 19 of 1990.

It is to be noted that the provisions in Article 154(P)(3)(b) and Article 154(P)(6) of the Constitution and the provisions in section 9 of Act, No. 19 of 1990 provides for a right of appeal from an order of the High Court to the Provinces.

The cumulative effect of the provisions of Article 154(P)(3)(b), 154(P)(6) and section 9 of Act, No. 19 of 1990 is that there is a right of appeal to the Supreme Court from the High Court established in terms of Article 154(P) of the Constitution in the exercise of the appellate jurisdiction. In fact in *Abeywardane* v *Ajith de Silva*[9] a five Judge Bench of this Court, while deciding that a direct appeal does not lie to the Supreme Court from the order of the High Court in the exercise of its **revisionary jurisdiction**, stated that,

> "The cumulative effect of the provisions of Articles 154(P)(3)(b), 154(P)(6) and section 9 of Act, No. 19 of 1990 is that, **while there is right of appeal to the Supreme Court from the orders, etc, of the High Court established by Article 154(P) of the Constitution in the exercise of the appellate juris-**

> **diction vested in it by Article 154(P)(3)(b) or section 3 of Act, No. 19 of 1990 or any other law**, there is no right of appeal to the Supreme Court from the orders in the exercise of the **revisionary jurisdiction** (emphasis added)."

For the foregoing reasons, the question referred to this Court by the Court of Appeal is answered as follows:

> "The Court of Appeal does not have appellate jurisdiction in terms of Article 138(1) of the Constitution read with Article 154(6) in respect of decisions of the Provincial High Court made in the exercise of its appellate jurisdiction and it is the Supreme Court that has the jurisdiction in respect of **appeals** from the Provincial High Court as set out in section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

In all the circumstances of this case, there will be no costs.

YAPA, J. – I agree

JAYASINGHE, J. – I agree

Reference answered in the negative.