KAROLIS

VS.

DHARMARATHANA THERO AND OTHERS

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CALA 12/2004.
DC GALLE 14287/L (REVISION).
DECEMBER 5, 2005.

Civl Procedure Code, sections 18 and 754(2) – Application to be added as a party – Refused – Leave to appeal or revision ? – Exceptional circumstances not pleaded – Onus on whom ?

The intervenient petitioner is seeking to revise an order of the trial Judge rejecting his application to have himself added as a party defendant.

HELD:

(1) The petitioner was seeking to get himself added as a party in terms of section 18 of the Civil Procedure Code which application was rejected. His remedy as laid down in section 754(2) was to file a leave to appeal application against the impugned order of the learned District of Judge refusing his application.

per Somawansa, J. (P/CA) :

"I am not at all impressed with the explanation given as to why he did not follow the statutory remedy that was available to him in terms of section 754(2) nor has he explained his laches for moving in Revision after three months from the delivery of the order....."

(2) The onus is on the person to be added and not on the respondent to show that he is entitled in terms of section 18 to obtain an order to be added.

Peter Jayasekera with *Kosala Senadheera* for intervenient peitioner.
Rohan Sahabandu for plaintiff respondent.

Cur.adv.vult.

February 17, 2006.

ANDREW SOMAWANSA, J. (P/CA)

This is an application seeking to revise and set aside the order of the learned District Judge of Galle dated 22.10.2003 rejecting the application of the intervenient-petitioner seeking to have himself added as a party defendant and for an order that he be added as a party defendant and allow him to file an answer. Intervenient-petitioner (hereinafter called the petitioner) sought a stay order staying further proceedings in the original Court which of consent was granted and has been extended from time to time.

After the pleadings were completed and when the application was taken up for argument both counsel agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are the plantiff-respondent (hereinafter called the respondent) instituted the instant action for declaration of title to the land morefully described in paragraph 02 of the plaint and to define the boundaries of the said land. At the survey the petitioner had protested that his land is being surveyed and had given a letter to the Surveyor marked P3 requesting that he be made a party on the basis that he is the owner of lot 01 in plan marked P2. Thereafter he had sought to get himself added as a party in terms of section 18 of the Civil Procedure Code. The petition and affidavit of petitioner is marked P4 and P4(a). Thereafter as per journal entry 19 dated 23.07.2003 marked P6 parties had agreed to resolve the matter by way of written submissions and at the conclusion of the inquiry into the

application of the petitioner the learned District Judge made the aforesaid order which the petitioner is seeking to revise and set aside.

In the written submissions tendered counsel for the respondent has taken up certain preliminary objections to the maintainability of this application and it would be in order to consider them before we consider the merits of this application. Counsel for the respondent submits that as the petitioner is not a party to the instant action and thus made an application in terms of section 18 of the Civil Procedure Code to get himself added as a party which was rejected. In the circumstances he had a statutory remedy of appealing against the said order in terms of section 754(2) of the Civil Procedure Code, The aforesaid section 754(2) of the Civil Procedure Code reads as follows:

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

As adverted to earlier, in this action the petitioner was seeking to get himself added as a party in terms of section 18 of the Civil Procedure Code which application was rejected by the learned District Judge. In the circumstances his remedy as laid down in section 754(2) was to file a leave to appeal application against the impugned order of the learned District Judge refusing his application. However, the petitioner without having recourse to his statutory remedy available to him under section 754(2) of the Civil Procedure Code has come by way of revision. In the circumstances the contention of counsel for the petitioner that this objection taken by the respondent has no merit for revision as the mode of relief available as the petitioner was never a party to the action in the lower Court cannot be sustained and has to be rejected. I am not at all impressed with the explanation given as to why he did not follow the statutory remedy that was available to him in terms of section 754(2) nor has he explained his laches for moving in revision after Three months from the delivery of the

order which he is seeking to challenge. I would say there is force in the objection taken by counsel for the respondent.

It is contended by counsel for the petitioner that the learned District Judge has not addressed his mind to the relevant issues and has directed his mind to irrelevant and trivial matters, in that the learned District Judge has not observed that the northern boundary described in the plan quoted in paragraph 02 of the plaint is a VC road. However, the Surveyor who prepared plan No. 989 marked P2 shows the VC road not as the northern boundary but as running across lot 01 of his plan and.the lot to the north of the road has been claimed by the petitioner before the Surveyor. On an examination of plan No. 989 marked P2 the aforesaid statement of counsel for the petitioner appears to be an incorrect statement for the plan shows that the northern boundary of the land in suit is the VC road from Massala to Poddala and there is no VC road running across the middle of lot 01 as alleged by counsel for the petitioner.

Counsel for the petitioner also contends that as per the plaint the respondent has prayed for a declaration of title only and has not asked for ejectment. The resulting position would be that even if the respondent succeeds in the action he has to file a fresh action to obtain a declaration of title against the petitioner and also ask for ejectment. Thus if the petitioner is made a party to the action it would enable the Court effectually and completely to adjudicate on all question involved in the action and there would be no multiplicity of action. However as material placed before the learned District Judge which I would proceed to consider later would show that the petitioner had no enforceable right.

When the inquiry was taken up before the learned District Judge, it appears that the petitioner agreed to resolve the matter by way of written submissions and now he cannot be heard to say that he was denied of an inquiry. Now we will consider the important document marked P11 submitted with the statement of objections as averred in paragraph 15 thereof. At no time was this letter marked P11 denied by the petitioner which is dated 22.10.1970. In this document marked P11 given by one W. H. K. David, it is admitted that he is a lessee of the temple at a rental of Rs. 650. The petitioner did not deny the contents of this letter. In fact in the written

submissions of the petitioner in the District Court marked P7 the petitioner accepted the position that David his brother was running a business under the name 'Anura Stores' and now the petitioner is running the aforesaid business, *vide* paragraph 08 of the petitoner's petition and the corresponding paragraph in the affidavit and also paragraph 08 of his written submissions. If the aforesaid statements are read with P11 the resulting position would be an admission by the petitioner that he came into the property as a lessee of the High Priest when he took over the business from his brother David and then continued to be a lessee of the temple. This document marked P11 was referred to by the learned District Judge in his order. The petitioner in his application to this Court has taken up the position that his brother David always signed his name in English and not in Sinhala as shown in the document marked P11. In proof of this fact he produces a deed of transfer carrying his brother's signature marked P13.(a) and the signature of his brother in the post office savings bank book as P14(a). However, these documents were not placed before the learned District Judge. On a consideration of his objections, affidavit and written submissions tendered in the District Court his position that his brother David always signed in English appears to be an after thought.

The onus is on the person to be added and not on the respondent to show that he is entitled in terms of section 18 of the Civil Procedure Code to obtain an order to be added. It is to be seen that other than his claim before the Surveyor there is no other evidence forthcoming to establish his claim. While the document marked P11 had negated this claim.

In the circumstances on a balance of probability the learned District Judge was correct in making the impugned order, having given cogent reasons for his order. The petitioner has failed to show any exceptional circumstances for this Court to exercise its extraordinary powers of revision. Accordingly the application is dismissed with costs fixed at Rs. 10,000.

WIMALACHANDRA, J. – *I agree.*

Application dismissed.