

**SENANAYAKE AND OTHERS**  
**v.**  
**KOEHN AND OTHERS**

COURT OF APPEAL  
AMARATUNGA, J. AND  
BALAPATABENDI, J.  
CA NO. 2083/02  
HC CIVIL NO. 12/2001 (2)  
DECEMBER 04, 09 AND 10, 2002

*High Court of the Provinces (Special Provisions) (Amendment) Act, No. 10 of 1996, section 5 – Companies Act, No. 17 of 1982, sections 210 and 211 – High Court granted relief – Appeal to Supreme Court – Application in revision – Prayer only for stay order – Maintainability – Constitution, Article 138 – Civil Procedure Code, section 753.*

The petitioner-respondent instituted action under sections 210 and 211 of the Companies Act in the Commercial High Court seeking certain relief. The High Court granted the relief prayed for. An appeal was lodged against that order in the Supreme Court.

The respondent-petitioner moved the Court of Appeal to make order staying the operation of the judgment; there was no prayer to revise the judgment.

**Held :**

- (1) It is not proper for the Court of Appeal to examine the legality of the judgment of the Commercial High Court even for the limited purpose of safeguarding itself that the petitioner is entitled to the relief prayed for.
- (2) If the Court of Appeal ventures into such an exercise it is an indirect usurpation of the exclusive jurisdiction conferred on the Supreme Court by the legislature.

**APPLICATION** in revision from the order of the Commercial High Court.

*S. L. Gunasekera with Denzil Guneratne, Aritha Wickremanayake and Dilan de Silva* for petitioner.

*Gamini Marapana, PC with S. Srikantha, Murshid Maharooof and Navin Marapana* for petitioner-respondent.

*Cur. adv. vult.*

December 18, 2002

**GAMINI AMARATUNGA, J.**

The caption of this application states that it is an application for revision. The subject-matter of this revision application is an order made by the High Court of the Western Province holden at Colombo which is vested with power to exercise civil jurisdiction conferred on that court by the provisions of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 10 of 1996. For convenience of reference the High Court which exercises civil jurisdiction given to it by the said Act is called the Commercial High Court, although a court by such name is not known to the law. For the sake of brevity the High Court of the Western Province situated in Colombo exercising civil jurisdiction will be referred to in this order as the 'Commercial High Court'.<sup>01</sup>

The petitioner-respondent has instituted action bearing No. HC Civil 12/2001(2) in the Commercial High Court under sections 210 and 211 of the Companies Act, No. 17 of 1982, seeking the reliefs set out in paragraph one of the amended petition. For the purposes of this order it is not necessary to set out in detail the relief sought in that action. On 24. 10. 2002 the learned High Court Judge has given his judgment for the petitioner-respondent granting him all the relief prayed for in the plaint.<sup>10</sup>

In terms of section 5 of Act, No. 10 of 1996 an appeal from an order or judgment of the Commercial High Court shall be made to the Supreme Court. The Court of Appeal has no appellate jurisdiction in respect of orders or judgments of the Commercial High Court. The present petitioner has filed an appeal against the said judgment in the Supreme Court. Having done that the petitioner has filed this revision application in this court.

When the learned senior counsel for the petitioner sought to support this revision application for notice, the learned President's Counsel appeared on behalf of the petitioner-respondent to oppose the application of the petitioner. 30

At that stage this court posed the following questions to both parties and sought their assistance for the court to answer those questions:

- (1) Whether this court has revisionary jurisdiction in respect of orders and judgments of the Commercial High Court?
- (2) Assuming that the revisionary jurisdiction of this court is wide enough to bring orders and judgments of the Commercial High Court within the purview of that jurisdiction, is it correct for this court, to exercise its powers in a situation where the law states that the appellate powers in respect of the orders and judgments of the Commercial High Court are with the Supreme Court? 40
- (3) It appears from section 5 of the High Court of the Provinces (Amendment) Act, No. 10 of 1996 that the intention of the legislature was to allow only one chance of appeal against an order or a judgment of the Commercial High Court. If this court decides to exercise revisionary jurisdiction in respect of an order or a judgment of the Commercial High Court, isn't it going to result in giving two opportunities to an aggrieved party to appeal against such order or judgment instead of the single appeal contemplated by the legislature? 5

- (4) If we decide to exercise our revisionary powers in respect of the orders and the judgments of the Commercial High Court isn't it an indirect way of usurping the exclusive appellate jurisdiction conferred on the Supreme Court by law?

On the questions I have set out above the learned senior counsel for the petitioner and the learned President's Counsel for the petitioner-respondent made submissions – orally and in writing – for which I and my brother take this opportunity to express our deep sense of gratitude for the assistance rendered to court by both of them. 60

When I had to prepare the order whether this court should 'formally' issue notice on the respondents accompanied by an order for interim relief as prayed for I turned my attention to the prayer to the amended petition of the petitioners which reads as follows:

Wherefore, the respondent-petitioners pray that Your Lordships' Court be pleased –

- (a) to make order staying the operation of the aforesaid judgment dated 24. 10. 2002 in the aforesaid action. . . until the final determination of the aforesaid appeal filed by the 2nd to 5th respondent-petitioners above-named; 70
- (b) to make an interim order staying the operation of the aforesaid judgment dated 24. 10. 2002 in the aforesaid action until the final determination of this application;
- (c) to award costs; and
- (d) such other and further relief as to Your Lordships' Court shall seem meet to the 2nd, 3rd, 4th and 5th respondent-petitioners above-named.

There is no prayer inviting this court to revise the judgment of the learned Judge of the Commercial High Court. The only substantive relief prayed for in the petition is a stay order, staying the operation of the order of the learned Judge of the Commercial High Court until the Supreme Court decides the appeal filed by the respondent-petitioners against the said judgment. The court then invited both parties to assist court by way of further written submissions on the question whether this court has the power to grant and if this court has the power whether the court should grant the main relief prayed for in a situation where the petitioners have not invited this court to revise the judgment of the learned Judge of the Commercial High Court. Both parties readily responded to the request made by this court and filed their further written submissions.

Article 138 of the Constitution in general terms confers revisionary jurisdiction on this court 'for the correction of any errors in fact or in law which shall be committed by any Court of First Instance . . .' Section 753 of the Civil Procedure Code, in particular sets out this court's revisionary powers in the following terms:

"The Court of Appeal may . . . on any application made, call for and examine the record of any case, whether already tried or pending in any court . . . for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein . . . and may upon revision of the case brought before it pass any judgment or make any order thereon as the interests of justice may require." [emphasis added].

In this instance the petitioners have invoked our revisionary jurisdiction by their application made to this court. The powers of revision conferred on us by the above quoted section 753 empowers us to call for and examine the record of any case for the purpose of satisfying ourselves as to the legality or the propriety of the judgment or the order. When the court's revisionary jurisdiction is invoked the

court has the power to make orders necessary in the interests of justice. If the court is satisfied that in the interests of justice it is necessary to suspend the operation of any order made by a Court of First Instance until this court examines the legality or the propriety of such order, the court may make an interim order suspending the operation or the effect of such order. 110

After the court examines the legality or the propriety of the judgment or order complained of, the court can pass any judgment or make any order as the interests of justice may require. This is the final relief in a revision application. In the first stage, interim relief is granted until the court examines the legality or the propriety of the impugned judgment or order. In the 2nd stage the court makes its order after examining the legality or the propriety of the impugned judgment or order. Thus, in both stages the court's power to make an appropriate order depends on the application of the petitioner to examine the legality or the propriety of the impugned judgment or order by this court. 120

The petitioner has not invited this court to examine the legality or the propriety of the judgment of the Commercial High Court. Even the petitioner concedes that it is a matter for the Supreme Court to decide in appeal. The petitioner's contention is that there is no provision to obtain a stay order from the Supreme Court in a situation where an appeal is made to the Supreme Court from a judgment of the Commercial High Court and therefore this court should stay the operation of the judgment until the Supreme Court decides the appeal. It is not for this court to decide whether there is any such provision or not. 130

In my opinion it is implicit in the provisions of section 753 of the Civil Procedure Code that this court's power to make orders, including interim orders, depends upon the necessity to examine the legality of the impugned order. In this case there is no such direct necessity as the petitioner has not invited this court to make a finding on the 140

legality of the judgment of the Commercial High Court. Then, is it the function of this court to examine the legality of the judgment of the Commercial High Court to satisfy itself that the petitioner is entitled to the relief prayed for? If this court ventures into such an exercise it is an indirect usurpation of the exclusive jurisdiction conferred on the Supreme Court by the legislature. It is, therefore, my considered view that it is not proper for this court to examine the legality of the judgment of the Commercial High Court even for the limited purpose of satisfying itself that the petitioner is entitled to the relief prayed for.

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No court shall stay the operation of any order made by any other court without examining the legality or the propriety of such order or at least without satisfying itself that there exists a necessity to examine such question. For the reasons I have set out above there is no necessity for this court to examine the legality or the propriety of the judgment of the Commercial High Court. In the circumstances this court cannot and shall not grant the relief sought by the petitioners. In view of this it is not necessary to decide questions No. 1 to 4 set out earlier in this order.

Accordingly, formal notice is refused and the application is dismissed without costs.

**BALAPATABENDI, J.** – I agree.

*Notice refused.*