1954 *Present:* **Nagalingam S.P.J. and de Silva J.**

S. WASEELA UMMA, Petitioner, *and* C. S. M. SALLY *et al.*, Respondents.

S. C. (*Application*) *214—D. C. Matara, 22,166.*

Revision—Order of Supreme Court calling for record—Jurisdiction of lower Court thereafter to continue proceedings.

When, in an application in revision, the Supreme Court calls for the record of the proceedings in question, the Judge of the lower Court must forward the record immediately and has no jurisdiction to continue the proceedings; a judgment or order pronounced by him thereafter in contravention of this rule is *ultra vires*.

APPLICATION to revise certain proceedings of the District Court, Matara.

H. W. Tambiah, for the 6th defendant petitioner.

Vernon Wijetunge, for the 1st defendant respondent.

Cur. adv. vult.

December 21, 1954. NAGALINGAM S.P.J.—

This is an application for the exercise of the powers of revision vested in this Court in regard to certain proceedings had in a partition action before the learned District Judge of Matara.

The petitioner who makes this application is the 6th defendant in the action. She was represented by a Proctor but no answer on her behalf was filed. On the date of the trial she was absent but her Proctor entered appearance on her behalf. She relies upon deeds to establish the claim that she is entitled to about 1/5th of the land sought to be partitioned, but the deeds do not appear to have been in the custody of the Proctor on the date of the trial and in fact the Proctor for the 6th defendant, beyond entering appearance on her behalf, seems to have done little or nothing for her.

The plaintiffs' pedigree set out a devolution of title which allotted to the 6th defendant certain shares, and though the intermediate deeds were not produced by the plaintiffs, the 1st plaintiff did however produce the deed in favour of the 6th defendant and a perusal of that deed would have

shown that the 6th defendant had been conveyed the interests which the plaintiffs had allotted to the 2nd, 3rd, 4th and 5th defendants. Even the learned Judge's attention does not seem to have been called to the contents of the deed marked 6D1. That deed on a perusal would have disclosed the earlier deed on the basis of which title was conveyed and to which the plaintiffs in their pedigree had made reference. At the conclusion of the trial the learned Judge reserved his judgment.

The petitioner explains her default at the trial has been due to her serious ailment about that period and on her recovery it was that she made this application to this Court to have the proceedings of the trial vacated and to permit her an opportunity of proving her claim. That the learned Judge himself could have given the petitioner no relief is obvious. An appearance had been entered by Proctor on her behalf and on the record at any rate there is nothing to indicate that she was in default and in fact, in law, she was not in default. What she seeks to set right by her application is the somewhat detrimental appearance put in on her behalf by her Proctor, although, no doubt, he did it in her best interests.

The application made by the petitioner came up before this Court and on the 29th May this Court ordered notice to issue and directed the record to be called for. On the 30th May the Registrar sent a letter to the learned District Judge calling for the record, but the record was not forwarded till the 16th June. Judgment had not been pronounced in this case at the date the letter of the Registrar calling for the record was received by the learned Judge, but he appears to have delivered judgment on the 12th June and thereafter forwarded the record.

An interesting question arises whether the learned Judge had jurisdiction to enter judgment after this Court had ordered notice on the parties and called for the record. I think it is axiomatic to say that it is the duty of every Judge of a lower Court to comply with and carry out the orders of this Court. I do not think the learned Judge was aware that this Court had called for the record of the case at the date he delivered his judgment. It seems to me that the record probably was with the learned Judge, he having reserved his judgment, but the letter calling for the record may have remained in the office without the fact that such a letter had been received being brought to his notice, and only after the learned Judge had delivered judgment and returned the record to the office, were steps taken to conform to the order of this Court.

Mr. Wijetunge sought to contend at one stage of his argument that the learned Judge had jurisdiction to continue the proceedings though this Court may have called for the record, but cited no authority in support of his contention. Though there is no express authority in point, the case of *Edward v. de Silva* [1] is one which sheds some light on this question. In regard to the question of jurisdiction of an inferior Court to continue proceedings after a petition of appeal addressed to this Court had been filed, Soertsz A. C. J. expressed himself thus :—

> " Now, the ordinary rule is that once an appeal is taken from the judgment and decree of an inferior Court, the jurisdiction of that Court

[1] *(1945) 46 N. L. R. 342.*

in respect of that case is suspended except, of course, in regard to matters to be done and directions to be given for the perfecting of the appeal and its transmission to the Court of Appeal. As Lord Westbury, *Lord Chancellor* (1864), observed in *Attorney-General v. Sillem*[2] ' the effect of a right of appeal is the limitation of the jurisdiction of one Court and the extension of the jurisdiction of another '. It follows as a corollary that on that right being exercised the case should be maintained *in statu quo* till the appellate Court has dealt with it and given its decision. "

It is contended by Mr. Wijetunge however that in the case of an appeal while the position set out in the passage cited cannot be but regarded as the true one, yet in the case of an application for revision the principle would be different. I cannot see that a distinction in principle can be made out. When this Court by its order of the 29th May, 1953, directed notice to issue and directed the Registrar to call for the record, this Court had acquired seisin over the case and acquired jurisdiction over it, immediately effecting thereby a limitation of the jurisdiction of the District Judge to continue subsequent proceedings.

That this principle cannot be doubted would be apparent if one examines it in relation to a criminal case. It will be manifest that where this Court in the exercise of its revisionary powers calls for a record in a criminal case, should the Magistrate not forward it immediately but retain the record in order to enable him to continue further proceedings, any attempt on the part of this Court to control and direct the proceedings in the lower Court would be nullified. In fact this Court has laid down the principle that where a sale ordered by the District Judge is stayed by this Court, and before the order staying the sale could have been communicated to the auctioneer carrying out the sale, or even to the Court, the sale had in point of fact been carried out, the sale was nothing more than a nullity.

I am therefore of opinion that the judgment pronounced by the learned Judge on the 12th June was *ultra vires* and must be set aside. In the result the true position would be that there is no final judgment pronounced in this case.

The next question is whether the petitioner has made out a sufficient case to entitle her to the relief she claims. She has filed an affidavit setting out that she was seriously ill on the date of trial and has supported her averment by the production of a medical certificate in which a medical practitioner says that the petitioner was critically ill. This is a land case and she has produced the deeds upon which her title is based. No reason has been suggested why she should have deliberately refrained from attending Court after she had retained a Proctor and when she was in possession of the document which prima facie established her title. She could have gained nothing by delaying the proceedings. There is no counter-affidavit filed tending to impeach any of the averments made by her in her affidavit.

[2] *11 Eng. Repts. at p. 1208.*

It was however suggested by Counsel for the respondent that though she may have been ill, her husband should have at least informed the Proctor of her illness and caused the Proctor to move for a postponement of the trial. While I am not prepared to say that that would have been a very proper course of conduct to have been pursued, there is nothing in these proceedings to indicate that the husband was in fact living in the house at the relevant date. Besides, I am not sure that where the wife is a *feme sole*, as in the Muslim Law, the laches on the part of the husband could be taken into consideration for the purpose of denying the wife her legal rights. I do not think the argument would have been advanced had the husband himself been seriously ill, by contending that the wife in those circumstances should have herself gone about and sought the protection for her husband of his rights.

It is not denied that if the petitioner is not given relief in these proceedings she can obtain no relief whatsoever. She would have lost her property and not even had the right to institute an action for damages.

In all the circumstances I am satisfied that this is a fit case for the exercise of the powers of revision of this Court and in the exercise of those powers I would set aside the proceedings had on the date of trial as well as the judgment and remit the case to the learned Judge for a fresh adjudication.

The petitioner, however, will pay to the plaintiffs the costs of the abortive trial, but she will be entitled to the costs of this application.

DE SILVA J.—I agree.

Application allowed.