The Journal shall also carry Case Laws and Book Reviews. The Authors of Law Books are kindly invited to submit a copy of their publication to Colombo Law Society in advance to enable for review in the next publication.

This is a bi-annual Journal. The present publication consists of two issues. However, the Colombo Law Society will make every endeavor to publish two separate issues from next year onwards.

The authors of Articles are kindly required to submit their contributions for publication well in time.

In order to maintain uniformity it was decided to have the same fonts and photograph on cover page however, with different colours.

I desired to bring out the HULFTSDORP LAW JOURNAL in 2007 when I was the Editor of the Colombo Law Society but my desire was frustrated due to my active involvement in the publication of the 'Hulftsdorp News', a News Letter of the Colombo Law Society.

Though I am not the official Editor of the Colombo Law Society for 2008, I secured approval from the Society to be the Editor for the HULFTSDORP LAW JOURNAL only.

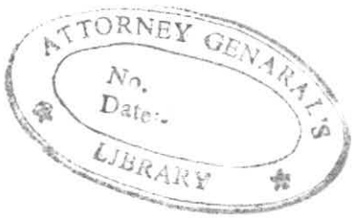
The Colombo Law Society appreciated the need for the publication of a Journal by the Society and accommodated my request to be the Editor for the Hulftsdorp Law Journal.

I welcome constructive criticism, to improve the Journal: it lends inspiration and encouragement to bring out a high standard Journal in the future.

Finally, I implore that this Journal needs not only your participation by way of contribution of articles and other materials but also by way of purchasing a copy of the Journal, as the Hulftsdorp Law Journal does not seek funding by advertisements.

> ".....Whoever it be, no matter how powerful, the law should provide a remedy for the abuse or misuse of power, else the oppressed will get to the point when they will stand it no longer. They will find there own remedy there will be anarchy." – *Lord Denning in 'What Next in the Law'.*

Editor - V. Puvitharan



(2008) HLJ Vol. 1, Part 1&2
pp. 1–11

Civil Appellate Jurisdiction of Provincial High Court

W. Iranganie Perera*

Our Court system had been well structured during the British colonial period by Courts and Their Powers Ordinance No. 1 of 1890, which came in to operation on 2nd August 1890. In terms of Section 3 thereof, there were four courts established for the ordinary administration of justice which included the Supreme Court, District Court, Courts of Request and Magistrates' Courts. The said Court system continued even during the period where the Soulbury Constitution was in operation and until it was repealed by the Republican Constitution on 22nd May 1972. The National State Assembly established under and by virtue of the Republican Constitution was entrusted with all powers to make laws and to create institution to exercise judicial power of the people.[1]

The National State Assembly acting under the power vested in it by the Constitution enacted the "Administration of Justice Law" No. 44 of 1973. The said Law introduced High Courts and High Courts Zones for the first time.[2] Appointments of the High Court Judges were made by the President of the Republic.[3] The High Court was empowered to hear, try and determine all prosecutions upon indictments instituted therein in respect of offences committed wholly or in part within its jurisdiction and on high seas where such offence is piracy by the Law of the Nations.

When the Republican Constitution was replaced by 1978 Constitution, the structure of the courts were changed and it introduced the Supreme Court and the Court of Appeal as the Superior Courts for the administration of justice and

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1 Article 5 of the Republican constitution.

2 Section 16 of Administration of Justice Law.

3 Section 18 of Administration of Justice Law.

the High Court of first instance[4]. Powers of the Supreme Court and Court of Appeal are defined in the Constitution itself.[5] Under the powers vested by the Constitution, the legislature enacted the Judicature Act No. 2 of 1978 which came into operation on 2nd July 1979 by empowering the jurisdiction to the Courts of first instance for the administration of justice. Section 2 referred to five courts of first instance as follows.

a) The High Court of the Republic of Sri Lanka.
b) The District Court
c) The Family Court
d) The Magistrates' Court
e) The Primary Court

The High Court shall be a court of record and it is vested with the power and authority to hear, try and determine the matters in respect of criminal offences referred to therein[6]. In addition to that it also was vested with Admiralty Jurisdiction[7]. All appeals derived from the judgments of High Courts were taken up in the Court of Appeal. Therefore it is clear that the High Court exercised only original criminal jurisdiction in respect of grave offences until a recent time where several enactments had empowered the High Courts to expand its jurisdiction including the appellate jurisdiction.

With the introduction of the 13th Amendment in 1987 there was a clear departure from the established system and the High Court were empowered to exercise appellate and reversionary jurisdiction which was earlier entrusted to the Court of Appeal in terms of Article 138 of the Constitution. This change was made as a result of the establishment of Provincial Councils. Article 154(P) reads thus:

154(P) (1) There shall be a High Court for each province with effects from the date on which this Chapter comes into force. Each such High Court shall be designated as the High Court of the relevant Province.

(2) The Chief Justice shall nominate, from among Judges of the High Court of Sri Lanka, such member of Judges as may be necessary to each such High Court. Every such Judge shall be transferrable by the Chief Justice

(3) 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 with the province;

b) 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 Courts and Primary Courts within the province;

c) exercise such other jurisdiction and powers as Parliament may, by law, provide.

In addition to the appellate and revisionary jurisdiction in respect of convictions, sentences and orders by the Magistrate Courts and Primary Courts within the Province, the jurisdiction of the High Court was further expanded by entrusting the jurisdiction to issue orders in the nature of Writs of *habeas corpus, certiorari, prohibition, procedendo, mandamus and quo warranto* against any person within the Province, any power under any law or any statute made by Provincial Councils established for that Province. That jurisdiction was confined to the matters devolved on the Provincial Councils as reflected in the Provincial Council list in the 13th Amendment[8]. One other significant feature in the Amendment is that the Judicial Service Commission is empowered to delegate to such High Courts, the power to inspect and report on the administration of any Court of First Instance within the Province.[9]

High Court of the Provinces (Special Provisions) Act No. 10 of 1990 also made provisions to empower the Provincial High Court to entertain and hear appeals and revision applications from the Magistrate Courts and also the appeal from the Labour Tribunals within the Province. Powers were vested with it to entertain appeals against the orders made under the Agrarian Services Act too[10].

In 1995 the Arbitration Act No. 11 of 1995 was enacted as an alternative dispute resolution and the High Court was vested with the power to hear and determine all applications arising out of arbitration clauses and awards in arbitration proceedings[11].

4 Article 105 of 1978 Constitution.
5 Respectively Article 118 to 131 and 138 to 145 in the Constitution.
6 Section 9 of the Judicature Act.
7 Section 13 of the Judicature Act.
8 Article 154(P)(4) of the Constitution.
9 Article 154(P)(5) of the Constitution.
10 Section 3 of the High Court of the Provinces(Special Provisions) Act.
11 Section 7,31 and 32 of the Arbitration Act No. 11 of 1995.

Subsequently the legislature passed High Courts of Province(Special Provisions) Act No. 10 of 1996 to establish a special Provincial High to hear and determine litigations in which the commercial transactions were involved and exceeding a sum of Rupees 3 million in value. So far such a High Court is established only in Colombo in the Western Province.

High Courts of the Provinces (Special provinces) Act was amended by Act No 54 of 2006 empowering the jurisdiction to hear appeals and revision applications from the District Courts and Family Courts. Section 5A (1) reads thus;

> "A High Court established by Article 154(P) of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be."

The provisions of Sections 23 to 27 of the Judicature Act, No. 2 of 1978, Sections 753 to 760 and Sections 765 to 777 of the Civil Procedure Code and of any written law applicable to the exercise of the jurisdiction referred to in Section 5A(1) of this Act the by Court of Appeal, shall be read and construed as including a reference to the High Court established by Article 154(P) of the Constitution for a Province and any person aggrieved by any judgment, decree or order of a District Court or a Family Court may invoke the jurisdiction in the High Court established in that Province.

In effect the jurisdiction of the Court of Appeal in respect of such appeals now stands transferred to the newly established High Courts of Provinces and such appeals and applications shall be heard by not less than two Judges of such court sitting together.[12] Interim arrangements have been made in respect of pending Appeals, applications of revision and *restitutio in integrum* pending in the Court of Appeal on the date of coming into operation of the said Amendment Act and thereby the President of the Court of Appeal in consultation with the Chief Justice may issue direction from time to time to transfer the pending matters to respective High Courts.[13] Accordingly arrangements have already been made to transfer appeals, applications in revision and *restitutio in integrum* filled after 1st of January 2001 to be transferred to respective High Courts for hearing and determination.

As a result of this amendment, another significant change that has taken place is, if any party is aggrieved by any judgment, decree or order of the High Court in exercising its appellate jurisdiction has to appeal to the Supreme Court after special leave of the Supreme Court being obtained.

12 Section 5B of the High Court of Provinces(Special Provinces) (Amendment) Act No. 54 of 2006.

13 Section 5D(2) of the High Courts of Provinces(Special Provinces) (Amendment) Act No. 54 of 2006.

> "An appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154(P) of the Constitution in the exercise of its jurisdiction granted by section 5A of this Act, with leave of the Supreme Court first had and obtained. The leave requested for shall be granted by the Supreme Court, where in its opinion the matter involves a substantial question of law or is a matter fit for review by such Court[14]."

It is important to note that the section 5D(2) refers to appeals, applications in revision and *restitutio in integrum* pending in the Court of Appeal which could be transferred to Provincial High Courts. But section 5A(1) of the Amendment Act has omitted to include applications in the nature of *restitutio in integrum*. This omission may create an ambiguity and to be resolved either by way of an amendment to the Act or by interpretation of the existing statute by the Supreme Court

The Court of Appeal (Appellate Procedure) Rules 1990 are applicable to all appeals and applications to be filled the High Court in the same manner as they applicable to the Court of Appeal.

By virtue of the provisions in the said Amendment Act No. 54 of 2006 the Appellate High Courts are now empowered to exercise the jurisdiction in respect of;

1. appeals from the District Courts and Family Courts,[15]
2. applications for leave to appeal,[16]
3. application in revision,[17]
4. appeals notwithstanding lapse of time,[18]

Instead of the two tiered Court structure, namely the appellate and original, existed in early era is now replaced with much more complex a multi-tiered court structure.

Appeals

The Court of Appeal after hearing an appeal empowered to affirm reverse, correct or modify any judgment, decree or order, according to law or to pass such judgment, decree or order therein between and as regards the parties, or to give such direction to court below or to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit or if need be, to receive and admit new evidence addition to, or supplementary of the evidence already taken in the Court of First

14 Section 5C of the High Courts of Provinces (Special Provinces) (Amendment) Act No 54 of 2006.

15 Section 754 and 755 of Civil Procedure Code.

16 Section 757 of Civil Procedure Code.

17 Section 753 of Civil Procedure Code.

18 Section 765 of Civil Procedure Code.

Instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trail on the ground of discovery of fresh evidence subsequent to the trial[19]. Now it shall be understood as the Provincial High Courts.

An appeal shall lie only against a judgment or an order which shall have the final disposal of the matters in a case in between the parties. The right of appeal is a statutory right which has been expressly created and granted by statute[20]. The procedure for preferring an appeal is stipulated in Section 755 of Civil Procedure Code and notice of appeal shall be filed within 14 days from the date of the judgment and petition of appeal shall be filed within 60 days from the date of the judgment or decree appeal against. Once an appeal has been perfected the District Judge has no right to delay the forwarding of the case to the Court which exercises the appellate jurisdiction[21].

When a proctor has filed a proxy for a client he cannot delegate his authority to another proctor. A petition of appeal signed by a proctor on behalf of a registered attorney is invalid[22]. When the notice of appeal signed by the appellant himself when he had a registered attorney on record, the lapse is fatal and it is not curable in terms of the Section 759(2) of the Civil Procedure Code[23].

It has been held that the petition filed on Monday the next working day after the last day was within time[24]. It has been held that in terms of Section 753(3) of the Civil Procedure Code and Section 14(a) of the Interpretation Ordinance, in calculating 60 days period the date of the delivery of the judgment has to be excluded[25]. Our Courts have consistently held that the appellate rules are mandatory and the failure to comply with Rules is a fatal irregularity which would disable the parties from maintaining their appeals/ applications.

Apart from the general rule the parties should not be allowed to bolster up their cases by adding fresh evidence in appeals, it is obviously dangerous to allow an important witness to be called after the pinch of the case has been ascertained, the precise point located at which the effect of fresh evidence might be expected to be decisive.[26] Reception of fresh evidence in a case at the stage of appeal may be justified if the following three conditions are fulfilled, viz:

19 Section 773 of Civil Procedure Code.

20 Gunarathna v. Thambinayagam, 1993(2) S.L.R 355.

21 Hoyman Thornhil Insolvent. 1 NLR 243.

22 Agiris Appu v. David Appu 6 NLR 223.

23 Fernando v. Fernando 1997 3 SLR 1.

24 Nirmala De Mel v. Senaviratna 1982 (2) SLR 569.

25 Sarath Perera v. Karunawathi, unreported C.A No. 536/94(F), C.A. minute dated 30.01.2004.

26 Muttar Vs Kathirasapillai 14 NLR 144.

1. it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trail,
2. the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive,
2. the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.[27]

It is not possible to raise an issue on pure question of facts or question of facts or question of law mixed with facts, but a pure question of law could be permitted to be raised even for the first time in appeal.[28]

A party cannot be permitted to present in appeal a case different from that presented in the trial court where a matters of fact are involved which were not in issue at the trial, such case not being one which raises a pure question of law.[29]

A trail judge's finding of facts is liable to set-aside in appeal if it was influenced by irrelevant consideration. Parties to an action are entitled to a judgment written without exaggeration or passion. The vary circumstances that absolute privilege attaches to judicial pronouncements imposes a correspondingly high obligation on a Judge to be guarded and restrained in his comments, and to refrain from needless invective.[30]

Revision and *Restitutio in Integrum*

The Appellate High Court has the power of its own motion or on an application made, call for and examine the record of any case, whether already tried or pending trial, in any court subordinate to such High Court, tribunal or other institution for the purpose of satisfying itself as to the legality or propriety of any judgement or order passed therein, or as to the regularity of the proceedings of such court, tribunal or other institution, and may upon revision of the case brought it pass any judgment or make any order therein, as the interests of justice may require.[31]

To exercise reversionary jurisdiction the order challenged must have occasioned a failure of justice and manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it. In other words the order complained of is of such a nature which would have shocked the conscience of Court.[32]

27 Ratwatte v. Bandara 70 NLR 231, Rev.Kiralagama Sumanattisa Thero v. Aluwihare, 1985 1 SLR 19.

28 Talagala v. Gangodawilla- Ltd 48 NLR 472, Silva v. Weerakoon, 49 NLR 225, Jayawickrama v. Silva 76 NLR 427.

29 Candappa v. Ponnampalampillai 1993(1) SLR 184.

30 Narthupana Tea and Rubber Estates Ltd v. Perera 66 NLR 135.

31 Section 753 of the Civil Procedure Code.

32 Bank of Ceylon v. Kaleel 2004(1) SLR 284.

The reversionary jurisdiction of the Court of Appeal stipulated in Article 138 of the Constitution extends to reversing or varying an *exparte* judgment against the defendant upon default of appearance on the ground of manifest error or perversity or the like. A default judgment can be canvassed on the merits in the Court of Appeal in revision, though not in appeal and not in the District Court itself. The Supreme Court held that the defendant had failed to purge its default does not amount to an affirmation to an affirmation of such *exparte* judgment, so as to preclude the exercise by the Court of Appeal of its reversionary jurisdiction. Section 88 must be read with Section 753 of the Civil Procedure Code. The fact that Section 88(1) bars an appeal against an *exparte* default judgment restricts the right of appeal conferred by Section 754 of the Civil Procedure Code, but does not affect the reversionary jurisdiction by Section 753, if anything it confirms that jurisdiction. From the fact that Section 88(2) confers a right of appeal one cannot possibly infer an exclusion of revisionary jurisdiction on the same matter[33]

The power given to a superior court by way of revision is wide enough to give it the right to revise any order made by an original court. Its object is the due administration of justice and the correction of errors sometimes committed by the court itself in order to avoid miscarriage of justice.[34]

In an application for revision it is necessary to urge exceptional circumstances warranting the interference of the Appellate Court by way of revision. Filing an application by way of revision to set aside an order made by the District Court 3 ½ years before the institution of the revision application is considered as inordinate delay and the application is dismissed on the ground of lashes.[35]

Even if the order is appealable still the court has the discretion to act in revision provided the petitioner shows exceptional circumstances. Where there is no exceptional circumstances a petitioner who has failed to appeal against a final order cannot invoke revisionary jurisdiction.[36] The revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice.[37]

In terms of Section 11, 13 and 54 of the Administrative Justice Law, the Supreme Court (then the court with appellate jurisdiction) appears to have the widest powers of revision in respect of the proceedings of the High Court. By its nature revision involves the supervision by a superior court of the proceedings of subordinate court to ensure the due and orderly administration of justice, and prima facie its

33 Mrs Sirimavo Bandaranaike v. Times of Ceylon Ltd 1995(1) SLR 22.

34 Soyza v. Silva 2000(2) SLR 235.

35 Lokuthuttirripitiyage Nandawathei v. Madapathage Dona Gunawathi, unreported C.A 769/2000, DC Mount Lavinia 33/92/P.

36 Jayasekara v. Arsakularatna, 1999 BLR Vol VII part 1, p 61.

37 Vanik Incorporation Ltd. v. Jayasekare 1997(2) SLR 365.

exercise is particularly called for in cases in which no remedy such as an appeal is available. Revision like an appeal is directed towards the correction of errors but it is supervisory in nature and its object is the due administration of justice and not primarily and solely the reliving of grievances of a party. In exercising powers of revision by the Appellate Court is not trammelled by technical rules of pleadings and procedure. In doing so the court has power to act whether it is set in motion by a party or not and even *ex mero motu.*[38]

The trend of authority clearly indicates that where the reversionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available, only if the existence of special circumstances are urged necessitating the indulgence of the court to exercise its powers of revision. In a case where the appellant has not indicated to court that any special circumstances exists which would invite the appellate court to exercise its powers of revision, particularly when the appellant had not availed himself of the right of appeal under Section 754(2) which as available to him cannot succeed in an application in revision.[39]

The remedy by way of *restitutio in intergrum* is an extraordinary remedy and is given only under very exceptional circumstances. It is only a party to a contract or legal proceedings who can ask for this relief. The remedy must be sought forthwith the utmost promptitude. It is not available if the applicant has any other remedy open to him.[40] But in recent judgments court has held that this remedy is available to persons who are not even parties to the proceedings provided that the requisite grounds including exceptional reasons are established.[41]

Leave to Appeal

A party aggrieved by any order made by the original court in the course of any civil action may make an application within fourteen days to Provincial High Court in that province seeking to set-aside it on the grounds of illegality or caused an injustice to that party or erroneous.[42] Those appeals succinctly stated as interlocutory appeals. This jurisdiction cannot be invoked in respect of orders which would have an effect of final disposal of a case. These appeals are not entertained until the court is satisfied to grant leave at the first instance.

Interlocutory appeals are appeals from interlocutory orders. In law interlocutory order is one which is made or given during the progress of an action, but which does not thereby dispose of the rights of the parties. It is incidental to the principle object of the action, namely the judgment. Viewed in this light the definition of an

38 38.A.G Vs.Gunawardene, 1996(1) SLR 149.

39 Rustom v. Hapangama & Co. 1978/79/80(1) SLR 352.

40 Menchinahami Vs.Muniweera, 52 NLR 409.

41 Somawathie v. Madawala, 1983(2) SLR 15.

42 Section 757(1) of the Civil Procedure Code.

order in Section 754(5) of the Civil Procedure Code of 1977 applies to interlocutory orders.[43]

The granting of leave to appeal depends on the circumstances of each case. The guidelines are:

a) The court will discourage appeal against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage.

b) Leave to appeal will not be granted from every incidental order relating to the admission or rejection of evidence for to do so would be to open the floodgates to interminable litigation. But if the incidental order goes to the root of the matter it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage, then leave to appeal will be granted.

c) Another test is, will the decision of the appellate court on the incidental order obviate the necessity of a second trail?

d) The main consideration to secure finality in the proceedings without undue delay or unnecessary expenses.[44]

An application to execute writ pending appeal is a special procedure. It is incidental to the principle object of the action. The rights of parties have not been finally disposed of. It is an interlocutory order.[45]

Appeals Notwithstanding Lapse of Time

A court exercising the appellate jurisdiction may admit and entertain a petition from a decree of any original court notwithstanding lapse of time provided the court is satisfied that the petitioner was prevented by causes not within his control for making an appeal proper within time.[46]

A mistake or oversight on the part of the proctor of a party to a suit is not a cause within the meaning of Section 765 of the Code as would entitle such party to the relief of leave to appeal notwithstanding the lapse of time.[47]

Where a party fails to appeal in time owing to the absence of his proctor from the station, such party is not entitled to leave to appeal notwithstanding the lapse of time, the failure not being due to any cause beyond his control, but to default on the part of his proctor. Miscalculation of time or some other mistake or the failure was due to the proctor's neglect is not a ground to grant leave notwithstanding lapse of time.[48]

43 Brooke Bond Ltd v. Stassan Exports Ltd 1990(1) SLR 61.

44 Anushka Wethasinghe v. Nimal Weerakkody, 1981 (2) SLR 423.

45 Cadiramanpulle v. Ceylon Paper Sacks Ltd, 2001 (3) SLR 1.

46 Section 765 of the Civil Procedure Code.

47 Rankira v. Silindu 10 NLR 376.

48 Julius v. Hodgson 11 NLR 25.

When a proper appeal is not filed against a judgment it becomes final. The effect of granting leave to appeal notwithstanding lapse of time is to take away the finality already attaching to that judgment. In view of this the leave to appeal notwithstanding lapse of time shall not be lightly granted.[49]

In an application for leave to appeal notwithstanding lapse of time the petitioner shall satisfy the court that he was prevented from complying with the provisions in Section 755 of the Civil Procedure Code by causes not within his control.[50]

Re Listing

Where an appeal is heard *ex parte* in the absence of a party, the party was absent may make an application for re-listing and such an application will be allowed only if the court is satisfied that there had been a sufficient cause such a default. The default resulted from the negligence of the party or his Attorney-at-Law, is not a ground accepted for such a relief. If it was due to the negligence of the Attorney-at-Law, his client is obliged to suffer for it. Although a mere mistake is generally excused, but not negligence. The decision will depend on the fact and circumstances of each case. The Court is granting relief shall ensure that its order will not condone or in any manner encourage the neglect of professional duties expected of Attorney- at- Law.[51]

The death of the party's counsel is a good and sufficient cause for the reinstatement of a matter, if it occurred during the hearing, or so near the date of hearing, that it is not feasible to retain a substitute attorney through whom the right to be heard is exercised.[52]

49 Kusumawathi v. Thilakaratne, C.A application No 1943/2001, NWLT D.C Kagalle 24794/P, C.A minute dated 04.06.2004(unreported).

50 Jagath Banadara v. Seelawathi CA No 821/2001, D.C Hatton No 112/L, C.A. minute dated 13.01.2004(unreported).

51 Pakiyanathan v. Singarajah, 1991 (2) SLR 205.

52 Jinadasa v. Sam Silva, 1994(1) SLR 232.