IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Article 138 of the Constitution for Revision.

R.G.C. Wijesiri,
Lanka Filing Station,
Girithale, Polonnaruwa.

CA Revision No.13/18

Plaintiff

DC Polonnaruwa Case No. L/5380

-Vs -

1. Gamini Duhulwela
2. Sarathchandra Duhulwela
3. Mahinda Duhulwela

All of Mahinda Welandasela,
20th Mile Post, G
iritale.

Defendants

AND NOW

(Deceased) 1. K.G.D. Gamini Duhulwela

1A. Herath Mudiyanselage Kamalawathie Mahinda Welandasela,
20th Mile Post,
Giritale.

Substituted 1A Defendant-Petitioner

Vs

R.G.C. Wijesiri,
Lanka Filing Station,
Girithale, Polonnaruwa.

Plaintiff-Respondent

2. Sarathchandra Duhulwela
3. Mahinda Duhulwela

2nd and 3rd Defendant-Respondent

Before:	**Janak De Silva J.**
	&
	N. Bandula Karunarathna J.
Counsel:	W.D Weerarathna AAL for the 1A substitute-Defendant-Appellant-Petitioner Plaintiff-Respondent in person.
Written Submissions:	By the 1A substitute-Defendant-Appellant-Petitioner on 18.10.2019 and 05.12.2019 By the Plaintiff-Respondent on 16.12.2019 and 03.01.2020
Argued on:	**23/10/2019**
Judgment on:	**16/11/2020**

N. Bandula Karunarathna J.

The Plaintiff-Respondent filed the above action against the Defendants for possession of the land described in the schedule to the plaint and for damages at the rate of Rs.7500/- per season from 1990.09.15. The Defendants filed answer denying the averments in the plaint and stating that the Defendants had taken possession of the said land on payment of a sum of Rs. 240,000/- to the plaintiff's brother who was the rightful possessor and the said Defendants were in possession of the said land. The Defendants' possession had been confirmed in Primary Court Polonnaruwa Case No. 58574 by order dated 20.05.1991.

The defendants further stated in their answer that the plaintiff had neither ownership nor possession of the said land and that therefore he could not validly pray for a decree of court for possession. They claimed a sum of Rs. 240,000/- in reconvention in the event of possession being given to the plaintiff.

The factual setting to this case as illustrated by the Petitioner is as follows.

> Petitioner states that on 10.05.2012 original 1st Defendant's Appeal was dismissed for failure of the Appellant to Deposit brief fees. However, the substituted-1A-Defendant's appeal successfully got the said dismissed appeal re-listed. After the inquiry finding that the original appellant had died as far back as on 15.03.2007. Accordingly, when the appeal brief fees were paid and briefs were ready Court, fixed the appeal for argument on 19.01.2018.

On 19.01.2018 an objection was taken up by the Plaintiff-Respondent that the appeal of the Appellant is defective, in as much as the petition of appeal has been signed not by the Attorney at Law who signed the notice of Appeal. Thereafter, Court granted time for the parties to file written submissions in lieu of the inquiry and the case was fixed for judgment on 29.06.2018.

The Petitioner states that, in the above circumstances, petitioner thought it fit to file a Revision-Application Pending the Appeal for the correction of errors of the orders dated 10.11.1993 (page 17 of the brief) 25.10.1995 (page 64, 65) and 01.12.1999 (page 66) which have occasioned a miscarriage of justice on the following exceptional circumstances among other Questions and grounds of law to revise the said orders by exercising the extraordinary jurisdiction of this Court.

a. The said orders are contrary to law.

b. The said orders are erroneous both procedurally and substantively.

c. The said orders shock the conscience of court.

d. The said orders are violative of rules of Natural Justice.

e. The said orders have positively occasioned a miscarriage of justice.

f. The said orders have violated fundamental rule of procedure.

g. The said orders offered the principles of law that 'No Litigan should be non-suited.'

The Petitioner states that in the event the Appeal gets dismissed on the procedural defect without adjudicating on the merits, great and irreparable prejudice will cause and a miscarriage of justice will be occasioned.

The Petitioner submits the necessity to file the revision application arose only when the Plaintiff-Respondent objected to the Appeal on a procedural irregularity. Hence the delay. Plaintiff-Respondent did not raise the said objection when the 1A Defendant-Petitioner filed the application for re-listing. The Petitioner states that in the meantime the appeal bearing no. CA 1151/99(F) was dismissed on a procedural irregularity and without adjudicating the Appeal on merits. Petitioner has already filed the said judgment on the 10th day of July 2018 and it is now filed of record.

It was argued by the Petitioner that the Attorney-at-Law stated in open court that, he has no instructions. It is further submitted vide Journal Entry 2 all 3 defendants filed proxy and vide Journal Entry 5 Defendants had filed their answer and the Plaintiff also had filed his replication vide Journal Entry 6. The Petitioner states that Learned District Judge on hearing

'No Instructions', case was fixed for ex-parte which is wrong as held in, Jayawardena vs. Cicilin Nona CA Appeal 249/1999 F-27.1.2012 reported in 2012 (BLR) 361.

The Petitioner says that when the very fixing of the case for ex-parte is erroneous and questionable, the nature of evidence placed before Court to set-aside the ex-parte decree becomes irrelevant.

The Petitioner further states that all the subsequent steps taken thereafter becomes erroneous, illegal and shocks the conscience of any prudent man.

The Petitioner states as per Journal Entry No 16 dated 1995.10.25 and the proceedings dated 95.08.02 at Page 63 of the Appeal Brief, the Learned District Judge has fixed the case for ex-parte trial for 25.10.1995, against all 1, 2 and 3 Defendants. The Petitioner states that fixing for ex-parte 2nd time is also wrong in terms of the aforesaid CA 249/1999 (F) dated 27.01.2012 (2012 BLR 361) case all the subsequent steps becomes defective.

The Petitioner further embarks on the fact that it is settled law that even in writing an ex-parte judgment should be in compliance with Section 187 of the Civil Procedure Code.

The Petitioner states by the said order, Learned District Judge covered all the facts and made order dismissing the application to purge the default and granting relief to the Plaintiff.

a) But in fact, case was not considered on merits.

b) The Learned District Judge had based the order on the defective steps.

The Petitioner states that there is another vital point as to why the order dated 99.12.01 should be set aside. When the aforesaid judgment was drafted in 1999 December, Section 86(1) of the Civil Code had been amended, and now there is no S 86(1) of the Civil Procedure Code. Learned District Judge has erroneously resorted to that Section 86(i) which is not existing when this judgment was being drafted.

As opposed to the aforementioned submissions of the Petitioner, the Plaintiff-Respondent raises following objections against the present Revision application of the Petitioner. The Plaintiff Respondent states that the Petitioner ought to have filed this application before the Provincial High Court of the North Central Province exercising Civil Appellate jurisdiction under and in terms of the provisions stipulated in Section 5A of the High Court of the Provinces (Special Provisions) (Amendment) Act No: 54 of 2006, read with Section 5A of the High Court of the Provinces (Special Provisions) Act No: 19 of 1990 and Article 154(P) of the Constitution. Thus, it is the position of the Plaintiff-Respondent that the present Application of the Petitioner should be dismissed.

The Plaintiff-Respondent also embarks on the fact that the Petitioner has filed this application seeking to revise two decisions made by the District Court of Polonnaruwa in the years 1993 and 1999 respectively and the Petitioner has not averred any satisfactory reason to mitigate the inordinate delay. Thus Plaintiff-Respondent states that the Petitioner is guilty of laches and therefore the Application of the Petitioner is liable to be dismissed in limine.

The Plaintiff-Respondent also states that the Petitioner has not averred exceptional circumstances to justify the invoking of the Revisionary Jurisdiction of this Court and that the Application of the Petitioner is misconceived of law and even the caption to the Petition is seriously defective. In the abovementioned circumstances the Plaintiff-Respondent submits that the application of the Petitioner should be dismissed.

Subsequent to a thorough analysis of the facts of the case, it could be noted that the Plaintiff-Respondent instituted a possessory action in the District Court of Polonnaruwa seeking an order for ejectment of the Defendants from the paddy field in dispute and restore him in possession. In addition to the said relief the Plaintiff sought damages from the Defendants for the period he was out of possession. The Defendants filed their Answer and set up a claim in reconvention against the Plaintiff purportedly on the basis that they have entered in to possession by paying sum of money to the brother of the Plaintiff and therefore they are entitled to possess the land in dispute.

It is pertinent to note that when the relevant case was called on the 10th of November 1993 the Defendants were not present in Court and the Registered Attorney of the said Defendants informed Court that he has no instructions. Thereafter the learned District Judge fixed the trial ex-parte against the Defendants.

I further note that, thereafter the 1st Defendant-Respondent made an application purportedly under and in terms of Section 86(2) of the Civil Procedure Code before the delivery of the judgment and the Application of the 1st Defendant is misconceived of law since such an application cannot be made under and in terms of Section 86(2) of the Civil Procedure Code unless the Plaintiff consents to vacate the order for ex-parte trial.

Thereafter the ex-parte trial was taken up and the judgment was given in favour of the Plaintiff. The 1st Defendant-Petitioner has contended that the said trial commenced without recording admissions and issues and therefore there is a procedural defect in the entire process. However, there is no necessity to record admissions and issues in case if it proceeded for ex-parte trial and there was no necessity in recording admission and issues as an inter parte trial.

It is also pertinent to note that, thereafter the 1st Defendant had filed an Application under and in terms of Section 839 of the Civil Procedure Code and the learned District Judge dismissed the said application. The Application of the 1st Defendant under and in terms of

Section 839 of the Civil Procedure Code is also misconceived of law. The 1st Defendant has preferred an appeal to this Court against the abovementioned order. The appeal was dismissed on 29.06.2018 by the Court of Appeal.

It is important to note that, Revision is a discretionary remedy and will be exercised only in exceptional circumstances [Fernando v. Fernando (72 N.L.R. 549), Rustom v. Hapangama & Co. (1978-79) 2 Sri.L.R. 2 Sri.L.R. 225, Caderamanpulle v. Ceylon Paper Sacks Ltd. (Case No. 2) (2001) 3 Sri.L.R. 112, Senaratne and Another v. Wijelatha (2005) 3 Sri.L.R. 76].

The Defendant Respondent submits that since the petition filed does not specifically states that there are exceptional circumstances. It was liable to be dismissed in limine.

It was decided in Elangakoon v. Officer-in-Charge, Police Station, Eppawala and another [(2007) 1 Sri.L.R. 398] where the headnote states that it is abundantly clear that the Petitioner has not specifically or expressly pleaded such exceptional circumstances in the body of the petition other than the substantial questions of law. The headnote is misleading. Sarath De Abrew J. (at page 408) after noting that Biso Meniea v. Ranbanda and others [CA 95/98; C.A.M. 09.01.2002] and Urban Development Authority v. Ceylon Entertainments Ltd. and Another [CA 1319/2001; C.A.M. 05.04.2002] applied a rigid test to this issue in holding that in order to justify the exercise of revisionary jurisdiction of the Court of Appeal either the petition or affidavit must reveal a specific plea as to the existence of special circumstances, went on to observe with approval that in Dharmaratne and Another v. Palm Paradise Cabanas Ltd. and Others [(2003) 3 Sri.L.R. 24] this Court adopted a much less rigid approach in holding that the Petitioner in a revision application should plead or establish exceptional circumstances warranting the exercise of revisionary powers.

In Welikakala Withanage Shantha Sri Jayalal and Another v. Kusumawathie Pigera and Others [CA(PHC)APN 69/2009; C.A.M. 23.07.2013] Salam J. held (at page 5-6):

> "It does not mean, that the petitioner who invokes the revisionary powers of the court should in his petition state in so many words that "exceptional grounds exist" to invoke the revisionary jurisdiction in addition to pleading the grounds on which the revision is sought...
>
> It is actually for the court find out whether the circumstances enumerated in the petition constitute exceptional circumstances."

It is not necessary in a revision application for the Petitioner to specifically state in so many words that "exceptional grounds exist". The Court can examine whether the circumstances pleaded in a petition and affidavit filed in a revision application constitutes exceptional circumstances.

I will now consider whether the grounds urged by the Petitioner amounts to exceptional circumstances. Whether there are exceptional circumstances depends on the facts of each case. However, Sarath De Abrew J. in Elangakoon v. Officer-in-Charge, Police Station, Eppawala and another (supra) stated (at page 408) that exceptional circumstances could broadly be categorized under three limbs as follows:

(a) Circumstances exceptional in fact bound to lead to a miscarriage of justice
(b) Circumstances exceptional in law, such as an error or illegality on the face of the record bound to lead to a failure of justice.
(c) Circumstances exceptional in both fact and law, which would be a mixture of both (a) and (b) above, having the same result.

It is important to note that there no Circumstances exceptional in facts or there no Circumstances exceptional in law, raised by the Petitioner in the present case.

In the case of Rasheed Ali vs. Alohamed Ali (1981) 1 S.L.R. 262, Wanasundara,J. observed that, "ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy except when noninterference will cause denial of justice". It means, that this Court will exercise, its revisionary powers if there are exceptional circumstances such as there was something illegal about the order made by the learned District Judge or when the application discloses circumstances which shocks the conscience of the Court.

Therefore, in the absence of exceptional circumstances, the mere fact that the trial Judge's order is wrong is not a ground for the exercise of the Revisionary powers of this Court.

Accordingly, I refuse and dismiss the petitioner's application in revision with costs.

Application dismissed.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal