

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

In the matter of an application for Revision
under Article 138 and 145 of the Constitution
of the Democratic Socialist of Sri Lanka and
Section 753 of the Civil Procedure Code.

Court of Appeal No:

CA (REV) 05/2021

Thambiraja Mahendran

158/18, Sri Saranankara Road

Dehiwala.

Plaintiff

Vs.

1. Alora Pharmaceuticals (Private) Limited

118, Temple Road,

Mt. Lavinia.

2. Asanka Emard Ruwanaal Mathes

3. Lynette Veena Mathes

Both

118, Temple Road.

Mt. Lavinia.

And 17, St, Paul's Avenue, Castle Hill,
NSW 2154, Australia.

4. Ruhunu Kumara Gunadasa
SenARATHNE
259A, Baseline Road,
Dematagoda.

Defendant

AND NOWE BETWEEN

1. Asanka Emard Ruwanaal Mathes
2. Lynette Veena Mathes

Both

118, Temple Road.

Mt. Lavinia.

And 17, St, Paul's Avenue, Castle Hill,
NSW 2154, Australia.

2nd and 3rd Defendant- Petitioners

Vs.

Thambiraja Mahendran

158/18, Sri Saranankara Road, Dehiwala.

Plaintiff-Respondent

Alora Pharmaceuticals (Private) Limited
118, Temple Road,
Mt. Lavinia

1st Defendant-Respondent

Ruhunu Kumara Gunadasa Senarathne
259A, Baseline Road,
Dematagoda.

4th Defendant- Respondent

Before: N.Bandula Karunarathna P/CA,J.
B.Sasi Mahendran, J.

Counsel: Zafry Sakkaf for the Petitioners
Ishan Alawathurage for the Plaintiff-Respondent

Argued On: 30.07.2024

Written

Submissions: 06.09.2024(by the Plaintiff- Respondents)

On:

Judgment On: 27.09.2024

B.Sasi Mahendran, J.

The 2nd and 3rd Defendant-Petitioners filled the revision application on 26th October 2021, seeking the following reliefs;

- a) Issue notices on the Respondents;
- b) Grant Leave to Appeal from the said Order marked as “X3”;
- c) Grant and issue a stay order staying any further proceedings of the Commercial High Court in case no. CHC/174/2018/MR until the final determination of this Application;
- d) Clarify and/or Rectify and/or Vary the Order dated 25.11.2019 marked “X3”;
- e) In the alternative to (d) above, set aside the Order dated 25.11.2019 and direct that a fresh hearing be conducted on the application made by way of Motion dated 03.10.2018;
- f) Grant costs; and
- g) Grant such other and further relief as to this Court may seem meet.

The Plaintiff-Respondent (hereinafter referred to as “the Plaintiff”) has instituted an action bearing case no. CHC/174/2018/MR in the Commercial High Court of Colombo against the 1st to 4th Defendant-Petitioners to recover a sum of Rs. 5,030,000/- due on a loan given to the 1st Defendant-Respondent Company.

The said Company is incorporated under and in terms of the Companies Act of Sri Lanka. The 2nd and 3rd Defendant-Petitioners are the Directors of the said Company. The 4th Defendant is the guarantor.

On or around 05.06.2015, an agreement was entered into between the Plaintiff and the 1st Defendant Company. According to the said agreement, the Plaintiff has given financial

facility amounting to Rs. 2,500,000/- for a duration of 2 years. In the said agreement, the Defendant Company has agreed, in the event of default, a default interest of Rs.10,000/- per day for the delay of payment. However, the Defendant Company has failed to repay the loan. Therefore, on or around 09.08.2017, a Letter of Demand was sent to the Defendant Company that they have defaulted an amount totaling to Rs. 5,030,000/-. Since the Defendants have failed to pay the amount, Plaintiff filed an action in the Commercial High Court.

When the matter was taken up on 10.10.2018, a motion was filed on behalf of the 2nd and 3rd Defendants to the effect that, the 2nd and 3rd Defendants should be struck off in terms of Section 18 of the Civil Procedure Code as the Directors are not parties to the agreement. Thereafter, the Learned High Court Judge has directed to file written submissions.

On 25.11.2019, the Order was delivered directing the Plaintiff to take steps to issue summons on the 4th Respondent. Thereafter, when the case was called on 25.02.2020, the Court directed the 1st to 3rd Respondents to file the answer. Thereafter, after many attempts, they have obtained a certified copy of the order delivered on 25.11.2019.

When they perused the said Order, they discovered that, the particular order does not indicate whether the said motion was accepted or not. The said order was supposed to be whether the application made by the 2nd and 3rd Defendants is allowed or dismissed. For easy reference, an excerpt of the order made on 25.11.2019 is reproduced.

“The Plaintiff in the 3rd paragraph of his Complaint admits that the alleged debtor of the transaction that is in dispute is the 1st Defendant Company.

Nowhere in the Complaint has the Plaintiff stated that the 2nd and 3rd Defendants are the alleged debtors of the transaction that is in dispute.

The Plaintiff admits in paragraph 4 of the Complaint that the 2nd and 3rd Defendants are the Directors of the 1st Defendant Company. (vide paragraph 4 of the Complaint)

The 2nd and 4th Defendants have signed the agreement under dispute as Agents of the 1st Defendant Company and not in their personal capacity.”

When they made an application before the same Court, the Learned Commercial High Court Judge informed that, the said order dated 25.11.2019 does not clearly state the fact that, the application to discharge the 2nd and 3rd Defendants has been rejected. Further, he informed that, he lacks jurisdiction to clarify the said order and if they wish, they can seek clarification by invoking the jurisdiction of the Court of Appeal.

On that premises, the 2nd and 3rd Defendant-Petitioners have invoked the revisionary jurisdiction of this Court.

We are mindful that, this is a revision application. Our Courts have considered that, the revisionary jurisdiction is exercised especially to prevent the miscarriage of justice being done to a person.

In *Kulatilake v. Attorney General* 2010 (1) SLR 212 His Lordship Chitrasing J. held: “It is trite Law that the revisionary jurisdiction of this Court would be exercised if and only if exceptional circumstances are in existence to file such an application. Moreover, it must be noted that the Courts would exercise the revisionary jurisdiction, it being an extraordinary power vested in Court, especially to prevent miscarriage of justice being done to a person and/or for the due administration of justice.”

In *Geethani Nilushika Samarawickrama v. Waruni Harshani Samarawickrama and Others*, SC Appeal No: SC/Appeal/93/2017, decided on 18.06.2021, his Lordship Mahinda Samayawardhena, J held that;

“The purpose of revisionary jurisdiction is to promote the due administration of justice and correct miscarriage of justice. But it is well to remember that unlike in an appeal, not every error of fact or law may be corrected in revision. In short, the general ground that the Judgment is incorrect, which is sufficient to invoke the statutory right of appeal, does not per se constitute an exceptional ground to invoke the extraordinary jurisdiction of revision. The error complained of shall shock the conscience of the Court.”

The said order made on 25.11.2019 does not reflect the decision of the Learned Judge, that is to say, whether he has accepted the position of the 2nd and 3rd Defendant Petitioners that whether to release them from the proceedings or not.

For the above-said reasons, we set aside the order made on 25.11.2019 and direct the Learned Commercial High Court Judge to have a fresh hearing to be conducted on the application made by way of motion dated 03.10.2018.

No order for cost.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna (P/CA), J.

I AGREE

PRESIDENT OF THE COURT OF APPEAL