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

In the matter of an application for a Revision and Restitutio-in-Integrum under Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA/RII/40/2023**
**D.C. Colombo Case No:**
**DRE (S) 41/23**

Raguwan Sandanam
No.12, Dehiwala Road,
Maharagama.
And
No.18/1 and 18/2,
Sellamuttu Avenue,
Colombo 03.

**Defendant -Petitioner**

**-Vs-**

China Great Wall Hospital
Private Limited
No.32, Park Road,
Colombo 05.

And

No.21, Upatissa Road,
Bambalapitiya,
Colombo 04.

**Plaintiff -Respondent**

**Before:** Hon. D.N. Samarakoon, J.
Hon. Neil Iddawala J.

**Counsel:** Mr. Mahinda Nanayakkara instructed by Mr. Niluka Dissanayake for the Defendant-Petitioner.
Mr. Boopathy Kahathuduwa with Ms. Kushendi Edirisinghe, for the Plaintiff-Respondent.

**Argued on:** 03.11.2023

**Written submission tendered on:** 06.11.2023 by the Defendant-Petitioner.
06.11.2023 by the Plaintiff-Respondent

**Decided on:** 19.12.2023

**D. N. Samarakoon J.,**

Section 02 (1) and (2) of RECOVERY OF POSSESSION OF PREMISES GIVEN ON LEASE ACT, No. 1 OF 2023 says,

> "2. (1) Where any premises has been given on lease by a lessor, such lessor may, subject to the provisions of subsection (2), institute action for the recovery of possession of such premises in the Court having jurisdiction over the local limits within which
>
> (a) the premises given on lease is situated;
>
> (b) the lessee resides;
>
> (c) the cause of action arises; or
>
> (d) the lease agreement sought to be enforced was made.
>
> (2) An action shall not be instituted by a lessor under the provisions of this Act for the recovery of possession of a premises given on lease or for any

relief specified in subsection (2) of section 5 unless possession of such premises has been given to the lessee by a lease agreement".

Section 04(1) says,

> "4. (1) The lessor (hereinafter referred to as the "plaintiff") shall institute an action by presenting a plaint in the form specified in the Civil Procedure Code and shall file with such plaint
>
> (a) an affidavit to the effect that the possession of the premises given on lease which is the subject matter of the action (hereinafter referred to as the "premises") is lawfully due to the plaintiff from the lessee (hereinafter referred to as the "defendant");
>
> (b) a draft decree nisi together with the applicable stamps as required by law, for the decree nisi and service thereof; and
>
> (c) such number of copies of the plaint, affidavit and lease agreement, together with any document relied on by the lessor, as is equal to the number of defendants in the action, if there are more than one defendant".

Section 05, among other things, says,

> "…the Court shall enter a decree nisi in the form set out in the First Schedule to recover the possession of the premises described in the plaint, together with any of the reliefs specified in subsection (2)".

Section 08(1) says,

> "8. (1) A decree nisi shall be served on the defendant to recover possession of the premises as asserted by the plaintiff while giving the defendant a reasonable opportunity to make an application to seek leave to appear and show cause, in respect of his position".

Section 11(1) and (2) says,

"11. (1) The date to be specified in the decree nisi as the date on which the defendant is to make an application seeking leave to appear and show cause, if any, against the decree nisi shall be as early a date as can conveniently be specified, regard being had to the distance from the defendant's residence to the Court. In any such instance, the said date to be specified shall not be later than six weeks from the date of the decree nisi.

(2) The Court shall not grant the defendant any further time to make an application to enable the defendant to seek leave to appear and show cause against such decree nisi".

The learned Additional District Judge has entered decree nisi on 11.08.2023.

The notice returnable date was 14.09.2023.

On 14.09.2023, the learned Attorney at Law who appeared for the defendant stating that the defendant is in remand custody and moved for two weeks time to file to file petition and affidavit to obtain leave to appear and defend, as per section 12 of the Act, the relevant parts of which reads,

"12. (1) In an action instituted under this Act, the defendant shall not appear and show cause against the decree nisi unless he first obtains leave to appear and show cause from the Court which issued the decree nisi.

(2) The defendant shall, for the purpose of subsection (1), file an application by way of a petition for leave to appear and show cause against the decree nisi supported by an affidavit and such petition and affidavit shall deal specifically with the plaintiff's case and state clearly and concisely what the defence to the plaintiff's case is and what facts are relied upon to support it".

However, the learned Additional District Judge on the basis, among other things, that section 11(2) does not permit her to permit the defendant to do so "Ehi 11(2) waganthiyata anuwa nisi awasara laba deema sandaha prathipadanayak

wyawasthadayakaya wisin adhikaranayata labaadee netha", refused that application and made the decree nisi absolute.

Two of the reliefs claimed by the defendant petitioner before this Court is to set aside the order dated 14.09.2023 and to set aside the order absolute.

There is no dispute, that, the defendant was in remand custody from 06.09.2023 to 20.09.2023.

This matter was supported on 02.10.2023 ex parte, on the basis of urgency and the Court satisfied on a prima facie basis issued (formal) notice and a stay order staying the execution of the writ in case No. DRE(S).41/2023 until the next date of this case.

On 10.10.2023, the notice returnable date, the learned counsel for the plaintiff respondent moved to file objections by 12.10.2023 (within 02 days) and both learned counsel agreed to file Counter Affidavits on 31.10.2023 and to argue the matter on 03.11.2023.

Court heard submissions of both the learned counsel on Friday the 03rd November 2023 and they agreed to file written submissions on Monday the 06th November 2023, thus working during the weekend.

The judgment was fixed for 27th November 2023.

On that day or the next date for judgment, which was, 08th December 2023, it could have been given, if not for the fact that I have to sit on a Specially Constituted Bench in regard to Writ 685/2023, which concerned the Sri Lanka Cricket and which continued up to 13th and 15th December for which I had to sit on eight different occasions, which case was ultimately terminated.

As a mark of respect to both learned counsel, who cooperated to conclude this case within the above tight time schedule, without prolonged and unnecessary legal positions raised in certain other cases in the name of advocacy (especially to Mr. Boopathy Kahathuduwa for the plaintiff respondent who did not raise the

preliminary objection he had relied upon earlier) this Court determined to give its judgment within this term and year refixed the date of the judgment from 15th December to today, 19th December, which is within the period colloquially referred to as the "Court Vacation".

It is appropriate to note, as I have done in certain other judgments too, that, on 04th June 2023, delivering the Keynote address at the National Law Conference held at Nuwara Eliya, His Lordship Justice Priyantha Jayawardane, Judge of the Supreme Court said,

> "During this conference we will be discussing the Ease of Doing Business and Enforcement of Contracts within a Conducive Legal Framework and related topics.....
>
> Another contributing factor is the raising of preliminary objections on trivial matters resulting in the delay of disposing of cases. In this regard, it is worthy of mention that there is currently a new trend of going before the Court of Appeal and objecting to the issuing of notices on the Respondents. Sometimes even the Respondents file limited objections in support of their preliminary objections. Thereafter, both parties file written submissions on the matter.
>
> **I am at a loss to understand as to how anyone can object to the issuing of notices in such circumstances, because the Respondents are present in court having taken notice of the case.**
>
> The situation worsens if the Court of Appeal issues notices on the Respondents, as they then come to the Supreme Court challenging that order. Now see the predicament of the Petitioners and the courts. The courts are overburdened with writing judgments over frivolous objections and the litigants are saddled with unnecessarily protracted litigation. I recall when I was at the Attorney-General's Department, we were advised, not to take up technical objections. Even if the action was prescribed, we

were advised not to take up the objection of prescription, unless, the facts of the case did not warrant adjudication by court.

I think it is high time that we stop these new practices that are outside the law. In this regard I must mention that in developed countries, the courts award actual Costs. Further, if a lawyer files a frivolous case, the Costs should be paid by the respective lawyer".

This Court wishes to humbly add, that, if the above actions deprecated by Justice Jayawardane is done, it would be a step in the direction of this country achieving better position in the Index of "Ease of Doing Business and Enforcement of Contracts".

Although a preliminary objection was not taken, as both parties have referred to the availability of revision and restitutio in integrum, this Court wishes to say the following in regard to the revisionary jurisdiction of this Court.

It is pertinent to examine the origin of the revisionary jurisdiction.

BUGALO MARIPE, of South Africa in his Doctoral Thesis **"THE REVISIONARY JURISDICTION OF THE HIGHER COURTS OF BOTSWANA AND ENGLAND IN THE REVIEW OF DECISIONS OF PRIVATE BODIES"** dated February 2022, dealing with **"History of revisionary powers in England",** says,

> "It appears from the brief account above that from the very beginning there was no separate independent exercise of revisionary power by any designated body. Such powers were subsumed under the whole gamut of governmental power that the King exercised over decisions of public bodies. In time, however, with the intensification of bodies which fell directly under the royal supervision, it was felt necessary, for reasons of convenience and expediency, that some of the powers be decentralised, and be exercised by other bodies on behalf of the King. When the de-centralisation of power from the King occurred, the court of King's Bench became the deliberate repository of powers of control over statutory bodies.

**From the seventeenth century it developed to a point where it exercised supervisory powers over the actions of government bodies, and in particular, bodies created by statute.** This power, which today expresses itself in the process of judicial review, was in the nineteenth century cemented through the pronouncements of the courts. It was held in R v Local Government Board that:

> **[W]here the legislature entrusts to anybody of persons other than to the superior courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies.**

The power of control that is given to the courts is stated to be excisable 'as widely as they can.' But this case in which orders of prohibition were sought by a local authority against a central government body, is but one example of the exercise of the courts' powers over the actions of statutory or administrative bodies. In this case the court did not lay down the parameters for control. **It would not have been advisable to lay down specific parameters given the range of possible circumstances that could require the intervention of the courts."** (page 59)

Therefore, the writer has considered the origin of revisionary jurisdiction with that of judicial review.

This Court agrees with this view for revision and review are nothing but the two sides of the same coin.

**When the legislature has not provided a right of appeal, for it is a universally applied rule that there cannot be an appeal without a specific right being given by a statute, which principle is based on the finality of a decision (it is not final only if there is a statutory right of appeal) the courts intervened to examine the "legality" of the decision not the merits of it. But on the other hand, if a court sees a miscarriage of justice it intervened**

**to review merits too in revision, which is a residuary jurisdiction of the court.**

This Court fully agrees with the 01st respondent when he submits at paragraph 3.17 of the above Written Submission that revisionary jurisdiction is distinct from appellate jurisdiction. In fact, that is exactly what the above paragraph says.

As the immortal words of **Chief Justice Melani Claude Sansoni,** who once presided as the Judge of the District Court of Tangalla and rose to become the 32nd Chief Justice of this country in **Marian Beebee vs. Mohamed and others 68 NLR 36** says,

> "The power of revision is an extraordinary power which is quite independent of and distinct from appellate jurisdiction of this Court. Its object is the due administration of the justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriage of justice".

Taking the word "extraordinary" it is sometimes argued and in fact even held, that, it is a power that should be used only sparingly.

As it would be seen, following an American case came the phrase "which shocks the conscience of the court." It is worthwhile to examine this history which, in the view of this Court was contrary to the first principles in English, American or South African law.

In **Gunewardane vs. Orr 2 Appeal Court Reports 172,** Hutchinson C. J., said, '...here the party aggrieved might have obtained leave to appeal notwithstanding the lapse of time that has expired'. In **Perera vs. Silva 4 Appeal Court Reports 79,** Hutchinson C. J., said, 'This is a case in which the applicant had another remedy provided by the legislature; and it is not a case in which the order is obviously wrong '. In **Ameen vs. Rasheed 6 C. L. W. 8,** Abrahams C. J., said, 'I can see no reason why the petitioner should expect us to exercise our

revisional powers in his favour when he might have appealed,...' In **AlimaNatchiya vs. Marikar 47 N. L. R. 82,**Keuneman S. P. J., stated, '..we should be slow to exercise our discretion to allow an application in revision in view of the fact that no appeal has been taken in this case'.

In **Rustom vs. Hapangama& Co. 1978-79-80 (1) S. L. R. 352,** Ismail J., in the Supreme Court said,

> 'It is only in very rare instances where exceptional circumstances are present that the Courts would exercise powers of revision in cases where an alternative remedy has not been availed of by an applicant'.

It is seen, that, it was in support of aforesaid dictum, Ismail J., then referred to, Gunewardane vs. Orr,Ameen vs. Rasheed,Perera vs. Silva,and AlimaNatchiya vs. Marikar, referred to above, together with another case decided by Bonsor C. J.

In **Thilagaratnam vs. E. A. P. Edirisinghe 1982 (1) S. L. R. 56,** which is a case decided in 1982, and hence after Rustom vs. Hapangama& Co. decided in 1980, L. H. de Alwis J., in the Court of Appeal said,

> 'The Leave to Appeal application No. 50/81 as stated earlier, is admittedly out of time. Counsel for the petitioner however invited this Court to exercise its powers of revision ex mero motuor in application No. 1265/81 and grant the petitioner relief under section 759(2) of the Civil Procedure Code'.

Hence that was a case in which the interlocutory appeal was out of time, and the court was invited to exercise revisionary powers, by its own motion or in application No. 1265/81, which was a revision application, but which the court decided belated. L. H. de Alwis J., further stated,

> 'No exceptional circumstances thus have been made out by the petitioner as to why this Court should exercise its powers of revision ex mero motu. As regards the Revision Application No. 1265/81 itself, it has been made very belatedly. According to the motion dated 12.10.81 filed by the

Attorney-at-Law for the respondent, it was pointed out by Counsel for the respondent in open Court on 5.8.81 that the application for Leave to Appeal was out of time. This statement has not been denied by the petitioner, so that even though the petitioner was well aware that her application for Leave to Appeal was out of time, she took no prompt steps to file an application for revision until the 23rd October, 1981. The order sought to be revised is dated 6.3.81 and in view of the inordinate delay of over seven months to file the application for revision No. 1265/81, it must be dismissed'.

Conversely, it seems to mean, that had a petitioner, having some defect in his leave to appeal application, filed an application for revision without such delay he may have a possibility of succeeding.

In the case of Bank of Ceylon vs. Kaleel and others 2004 (1) S. L. R. 284, too Justice Wimalachandra observed,

'The plaintiff has not chosen to apply for leave to appeal from the said order as provided by section 754(2) of the Civil Procedure Code. Nor has he set out in this petition for revision any exceptional circumstances why he failed to file leave to appeal application as provided by law'.

**Hence it is seen that the afore cited cases are basically those either in which the applicants have not availed of the other remedy or instituted belated applications for revision when the appeal was found to be subject to some defect. It was in such cases, the court has observed that it would have been intervening, notwithstanding the lapse on the part of the applicant, had the order been ex facie wrong or which shocks the conscience of court**.

It seems to this court that the phrase ' shocks the conscience ' came to be used in United States of America and Canada. It is stated that the term originally entered into the United States case law with the decision in Rochin v. California

in 1952. It is **Rochin v. California, 342 U.S. 165[1],** decided by the Supreme Court of the United States that added behavior that "shocks the conscience" into tests of what violates due process. This balancing test is often criticized as having subsequently been used in a particularly subjective manner. Justice Felix Frankfurter, wrote the opinion of the court, with which no one dissented, only one Justice abstaining, which overturned the decision of California Supreme Court, which said illegally obtained evidence is admissible on a criminal charge in this state. Today, the phrase ' shocks the conscience of court ' is defined in United States as something that invokes which is the court's equitable power to decide issues based on notions of fairness and justice. The **Black's Law Dictionary,** online edition, defines conscience of court as 'This occurs when a matter of equity is decided by the court and it uses its conscience to decide the issue'. Law Dictionary: What is CONSCIENCE OF THE COURT? definition of CONSCIENCE OF THE COURT (Black's Law Dictionary)

However, in Rustom vs. Hapangama& Co., itself, Ismail J., considered decisions that said that in appropriate cases revisionary powers will be exercised whether the other remedy was availed or not or if that fails on some technicality. For example the Supreme Court referred to the judgment of T. S. Fernando J., in **Sinnathangam v. Meera Mohideen, 60 NLR 393** where it was stated, that,

> 'The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security'.

Ismail J., further referred to the dictum of Pulle J., in **Abdul Cader v. Sittinisa 52 NLR 536,** which said,

[1] https://supreme.justia.com/cases/federal/us/342/165/case.html.

'The respondents have not been in any manner prejudiced by the fact that the appellant in applying for the typed-written copy paid only Rs. 20/- instead of Rs. 25/-. Nonetheless we have in mind that the hearing was, as a matter of indulgence, by way of revision. In the ultimate result we have the satisfaction of knowing that we have interfered with the judgment of the Learned District Judge substantially on a point of law only'.

It was seen that the 'shocking the conscience of court' test, and considerations whether the order is ex facie wrong have been often applied when the petitioner failed to avail himself of the other remedy or when that fails on a technicality. However, as Ismail J., says in Rustom vs. Hapangama& Co.,

'The trend of authority clearly indicates that where the revisionary 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 this Court to exercise these powers in revision. If the existence of special circumstances does not exist then this Court will not exercise its powers in revision'.

Standing alone, not coming within the aforesaid mainstream cases, there is at least one other decided case, which adopted a different approach. But it was based on section 753 of the Civil Procedure Code itself.

Quite apart from aforesaid reasons, it may also be noted that in **FERNANDO v. CEYLON BREWERYS LTD. (1997) 1998 (03) S. L. R. 61,** decided by Upali de Z. Gunewardane J., in Court of Appeal, it was observed,

'It is to be observed that, if as argued by the counsel for the defendant-respondent, an application in revision in respect of an order is precluded by or in virtue of the fact that an appeal too lies in respect of the same order, then that would entail a dismissal or rejection of the application in revision and the two grounds, stated therein ie (a) and (b) above, impeaching the

correctness of the order of the learned District Judge, would not arise for consideration'.

Having considered the dictum of Abrahams, CJ in Ameen v. Rasheed, that ' I can see no reason why the petitioner should expect us to exercise our revisional powers in his favour when he might have appealed and I would allow the preliminary objection and dismiss the application with costs ', His Lordship Gunewardane J., further observed,

'But the validity of the above reason for denying the relief in revision can no longer be accepted with favour inasmuch as the Court of Appeal in consequence of the amendment of section 753 by Act No. 79 of 1988 is now clothed with greater amplitude of power in making orders and is not confined, as formerly, ie before the aforesaid amendment, to making the same order which it might have made had the matter been brought before it by way of appeal. Since, prior to the amendment of section 753 the court could whilst acting in revision only make the same order as it could have made in the exercise of its appellate jurisdiction - the right of appeal and right in revision were justifiably treated as more or less, alternative remedies - available, more or less, in such a way that when one was accepted or made available the other had to be rejected or refused. When, as was the case prior to the amendment of section 753 of the Civil Procedure Code, the reliefs available or the orders that could be made by the court, by way of appeal and revision, were conterminous or the same - it could legitimately and even logically be inquired or queried, as had been done by His Lordship, Abrahams, CJ, in the excerpt of the judgment cited above, as to why the revisionary process, which may be described as a privileged procedure, was invoked in preference to that of appeal,several advantages or benefits being attendant on the revisionary process which would not be available to one who seeks relief by way of an appeal (for instance one need not furnish security or keep to certain prescribed time-limits as in the case when one

appeals against an order) - the recourse to revision was treated as an extraordinary procedure in contradistinction to the procedure of appeal which was considered to be the normal remedy, when the order in question was appealable - as is the order in this case before me'. Page 66

The amendment to which His Lordship referred to was that to section 753 made by Amendment Act No. 79 of 1988. Justice Gunewardane observed,

'The essence of the difference between the two forms of section 753 ie in its original and amended form is this: as the said section stood originally, the Court of Appeal or the Supreme Court in the exercise of its revisionary powers could have only made the same order which it might have made had the case been brought before it by way of an appeal**whereas in the amended form the section empowers** the Court of Appeal, in the exercise of its powers of revision, **to make any order as the interests of justice may require'.** Pages 64,65

His Lordship concluded,

'Thus it would be noticed that the amended section enables the court to be more flexible and less legalistic in its means and in approach in dealing with a matter for section 753 in its amended form seems to exalt not so much the rigour of the law but unalloyed justice, in the sense of good-sense and fairness. So that the basis of the rationale for insistence on the requirement of special circumstances as a condition - precedent to the exercise of revisionary powers had disappeared as a consequence of the amendment of section 753 of the Civil Procedure Code by virtue of which amendment the Court of Appeal is now freed from the duty or rather the necessity of making the same order as it would have made in appeal and is empowered to make any order as the interests of justice may require'. Page 65

In deciding FERNANDO v. CEYLON BREWERYS LTD., in 1997, Justice Gunewardane lamented that he has not been referred to any decision of superior courts on this question made after the aforesaid amendment.

The judgment in Rustom vs. Hapangama& Co. 1978-79-80 (1) S. L. R. 352, in which several other cases they also cite, had been referred to by Ismail J., was decided in 1980. The decision in Bank of Ceylon vs. Kaleel and others 2004 (1) S. L. R. 284, although decided in 2003, has not considered FERNANDO v. CEYLON BREWERYS LTD. It is so in several other cases such as Somindra vs. Surasena and others 2000 03 S.L.R. 159, Leslie Silva vs. Perera 2005 02 S.L.R. 184 and also in BengamuweDhammalokaThero vs. Dr. Cyril Anton Balasuriya S.C. Appeal No. 09/2002, S.C. spl. L.A. No. 242/2001 cited on behalf of the plaintiffs in favour of availability of revision too.

**It appears to this court hence, that in addition to reasons given for the aforesaid decision to exercise revisionary powers, based on considerations of traditional views requiring exceptional or special circumstances, including the existence of important question of law or possible existence of an error in the decision, the judgment in FERNANDO v. CEYLON BREWERYS LTD., is a strong persuasive authority in favour of availability of revision, especially as the decision is based on the very construction of the words in the amended legal provision enacted by the legislature in its wisdom.**

Though the decision in The Ceylon Brewery Limited vs. Jax Fernando, Proprietor, Maradana Wine Stores, 2001 decided in the Supreme Court by Mark Fernando J., overruled the above decision of U. de Z. Gunewardane J., it was done only in respect of the decision in the latter that an application made under section 86(2) of Civil Procedure Code can be allowed even if that was made one day after the stipulated time of 14 days. The Supreme Court said, " I therefore set aside the judgment of the Court of Appeal on that point". The decision pertaining to wider powers given by amended section 753, the ability of the court to make a

justifiable order in revision and hence revision not being only an additional remedy granted on mere discretion was hence not set aside.

But, under the new approach which was suggested in **FERNANDO v. CEYLON BREWERYS LTD. (1997) 1998 (03) S. L. R. 61,** by Upali de Z. Gunewardane J., which was not set aside by the Supreme Court in The Ceylon Brewery Limited vs. Jax Fernando, Proprietor, Maradana Wine Stores, 2001, as it is not the same order that the court would have made in an appeal a court can make under the amended section 753, this court is of the opinion that even if there is no blatant error or circumstances that shock conscience of court, revisionary jurisdiction can be exercised in the present application.

The answer lies in the dicta of Chief Justice Sansoni.

> ""The power of revision is an extraordinary power which is quite independent of and distinct from appellate jurisdiction of this Court. Its object is the due administration of the justice **and the correction or errors,** sometimes committed by this Court itself, in order to avoid miscarriage of justice".

**To correct an error should the conscience of a court be shocked? The answer is no, because whether the court's conscience is shocked or not an error thereby does not become right. It must be corrected by a court.**

It is true that the new section 753 of the Civil Procedure Code does not apply to this application presently before this Court. But it shows the trend and the development of the law and Article 138 of the Constitution which just confers revisionary jurisdiction on this Court without any limitation except "subject to the provisions of the Constitution or of any law" is wide enough.

It is true that the Right to Information Act has provided for an appeal and until the rules are made rules made in respect of an application for revision applies. But by that provision the revisionary jurisdiction of this Court is not excluded.

In **SC/Revision/02/2019 decided on 25.03.2022,** the Supreme Court said,

"Under the Administration of Justice Law, No.44 of 1973, the Supreme Court is vested with the Revisionary Jurisdiction. Under Section 11, where it was expressly provided that, jurisdiction for the correction of all errors in fact or in law committed by any subordinate court by way of revision is vested in the Supreme Court".

Therefore the power of correction of errors was vested in the Supreme Court and after the 1978 Constitution it vests in the Court of Appeal.

In the case of Sinnathangam v. Meera Mohideen, 60 NLR 393, T. S. Fernando J., said,

'The first of these is the case of Abdul Cader v. Sittinisa [1(1951) 52 N.L.R. 536.], where this Court, notwithstanding that an appeal had abated, heard the appellant by way of revision observing that it did so as a matter of indulgence and interfered with the judgment appealed from on a point of law. The other is a more recent and hitherto unreported decision- S. C. 309/D. C. Colombo 36064/M- S. C. Minutes of 17th March 1958-in which this Court while rejecting an appeal for non-compliance with the provisions of sections 755 and 756 of the Civil Procedure Code stated that it would be prepared to deal with the questions raised by way of revision as important questions of law arose on the appeal'.

The same thing learned T. S. Fernando J., said in Sinnathangam v. Meera Mohideen, 60 NLR 393, could be said about this case too, as the application of section 11(2) of the Act No. 01 of 2023 too raises an important question of law in this application.

In regard to its jurisdiction on restitutio in integrum this Court whishes to say the following.

**Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983** was an application filed in respect of an alleged violation of a fundamental right, where Mrs. Vivionne

Gunawardena alleged, among other things, that she was unlawfully arrested by the OIC of Kollupiya Police Station. The IGP, the 02nd respondent filed an affidavit from one Vinayagam Ganeshananthem, Sub Inspector, to the effect that he and not the 01st respondent who arrested Mrs. Vivionne Gunawardena because she had no "permit" to go in a procession. Although Mrs. Vivionne Gunawardane countered this position, the Supreme Court consisting of a three Judge bench did not believe her, but believed the affidavit of Vinayagam Ganeshananthem and decided that the petitioner's fundamental rights have been violated as Vinayagam Ganeshananthem is "guilty" of unlawfully arresting her.

Vinayagam Ganeshananthem then petitioned to the Supreme Court requesting to set aside the said decision of the Supreme Court itself, as he was only a witness (on affidavit) and he was not informed before finding him "guilty" and therefore the rule audi alteram partem is violated. This second case was decided by a Seven Judge bench of the Supreme Court, including the incumbent learned Chief Justice. The decision was divided 05 to 02 and the majority decided against Vinayagam Ganeshananthem.

The learned Chief Justice, who wrote the leading judgment of the majority said,

> "He submits that this caption read with prayer (a) to the petition invokes a jurisdiction in revision which this Court does not have. One has to look at the legislation which created this Court to find an answer to this dispute. That legislation is to be found in the second Republican Constitution of 1978. **The Supreme Court which existed up to the time of the first Republican Constitution of 1972 and which continued to exist under that Constitution ceased to exist when the 1978 Constitution became operative.** (Vide Article 105 (2) of the Constitution). **Its place was taken by the Court of Appeal** (Vide Article 169 (2) of the 1978 Constitution). A new Supreme Court has been constituted which is the highest and final Superior Court of Record. (Article 118 of the Constitution)."

The relevant portion of Article 169(2) says,

> "Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal".

Ranasinghe J., despite being in the minority of the 07 Judge bench judgment referred to a case decided by Dias S.P.J. in 1950 which was on restitutio in integrum and said,

> "The real basis upon which relief is given and the precise nature of the relief so given by the Supreme Court upon an application made to it for relief against an earlier Order made by the Supreme Court itself was very lucidly and very effectively expressed by Dias S.P.J. way back in the year 1951 in the case of Menchinahamy v. Muniweera, (40). In that case, about six weeks after an appeal to the Supreme Court from an interlocutory decree in the District Court was dismissed by the Supreme Court, an application was made to the Supreme Court, on 23.3.1949, " for revision or in the alternative for restitutio-in-integrum" by the heirs of a party defendant, who had died before the interlocutory decree was entered but whose heirs had not been substituted in his place before the interlocutory decree was so entered. It was contended on behalf of the respondents: that there was no merit in the application: that if the relief sought is granted then the Supreme Court would in effect be sitting in judgment on a two-Judge decision of the Supreme Court which had passed the Seal of the Court that the Supreme Court cannot interfere with the orders of the Supreme Court itself. In rejecting these objections, Dias S.P.J., placed this matter in its proper setting quite convincingly in the following words:
>
> > "In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. **We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of**

**natural justice** which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. "

Ranasinghe J., referring to the judgment of Menchinahamy vs. Muniweera (1950) 52 NLR 409, while being on the minority will not diminish its value. It shows how the then Supreme Court, exercised the power of restitutio in integrum, ***even*** against a judgment of its own. Today, such a power is vested, hence, not only under Article 138 of the Constitution, but also **empirically**, so to say, in the arrangement of the powers of Courts, referred to by the learned Chief Justice, in the present Court of Appeal.

Ranasinghe J., further said in the said judgment,

> "The Supreme Court, as constituted under the 1978 Constitution, is not vested with the revisionary powers as exercised by the Supreme Court which was created by the aforesaid Courts Ordinance (Chapter 6)".

Despite this view being expressed in a minority judgment in that case, the judgment of the learned Chief Justice in the majority, drew a similarity between the present Court of Appeal and the former Supreme Court, to say that the present Supreme Court does not have revisionary powers. The majority of the Supreme Court also decided that "there is no justification for exercising any of the inherent powers of the Court in this case".

Thus it appears, that,

(a) The power of restitutio in integrum, as exercised by Dias S.P.J. in Menchinahamy vs. Muniweera (1950) in the then Supreme Court is now vested in the present Court of Appeal,
(b) The power of revision is also vested with the present Court of Appeal,
(c) The present Supreme Court has, with respect, exercised its inherent powers very rarely (vide., the 07 Judge bench judgment referred to)

Hence, the petitioner in this case seems to be having no remedy other than seeking redress in the power of restitutio in integrum in this court.

Coming back to the facts of the case, although the plaintiff respondent has stated in its Statement of Objections, that, the defendant signing a proxy while in remand custody shows, that, he could have given instructions to his lawyer to file papers to obtain leave to appear, this Court is of the view, that, whereas a proxy could be send to the remand prison for the signature, it is not only a difficult thing but an almost impossible thing to obtain meaningful instructions while the defendant was in the remand custody.

Therefore the defendant had a valid reason to move for time on 14.09.2023.

Now the section 11(2) says,

"(2) The Court shall not grant the defendant any further time to make an application to enable the defendant to seek leave to appear and show cause against such decree nisi".

This was the main reason which led to the learned Additional District Judge to refuse to grant time. Whereas she is not at fault on the face of the section, under the powers of revision and restitutio in integrum this Court can consider whether the Legislature intended the abrogation of the Rules of Natural Justice, in that, the Rule "Audi Alteram Partem" in enacting the above provision.

On the basis of the references to the "RULE OF LAW" and "INDEPENDENCE OF JUDICIARY" in capital letters in the Preamble to the Constitution of 1978, this Court is of the view that the Parliament will not intend and therefore a legislation would not be interpreted to shut out a party from legal proceedings pending against him when he has a valid and reasonable reason to move for further time.

**Since Megarry J., in John vs. Rees, has explained to the hilt, the elusive nature of the concept of "Natural Justice", what is relevant from the next twelve passages will be quoted. <u>For the reader who might decry the extensive quoting, this Court would answer, that it is because, the question of "Natural Justice", forms the basis of this determination.</u>**

Megarry J., said,

"**However that may be, what matters here is, in my judgment, not the terminology but the substance and the reality: and looking at that, it seems plain that the principles of natural justice prima facie apply.** Mr. Sparrow sought to avoid this conclusion by urging that what was done bore generally on P.D.L.P. and was not directed against individuals. He further contended that the principles of natural justice did not apply because the acts were administrative, because there had been no dismissal of any disaffiliates, and because these principles did not apply to unpaid offices".

"**I do not find any of these contentions persuasive**.... **I look to the realities and not to the labels**...."

"....**Accordingly, I must consider what are the principles of natural justice which prima facie are applicable, and whether or not there is anything to oust their application.** In doing this, it is convenient to refer to a case concerning an avowed expulsion from a political party which came before me some three weeks after the conclusion of the argument in this case, namely, **Fountaine v. Chesterton....**".

**"In that case I said:**

"**The expression 'the principles of natural justice' is, I think, now a technical term. As Maugham J. pointed out in Maclean v. Workers' Union [1929] 1 Ch. 602, 624, among most savages there is no such thing as justice in the modern sense. In a state of nature, self-interest prevails over any type of justice known to civilisation; the law of the jungle is power, not justice. Nor am I clear what the word 'natural' adds to the word 'justice.' It cannot be intended to indicate the antithesis of 'unnatural justice,' which would indeed be an odd concept; <u>I imagine that it is intended to suggest justice that is simple</u>**

**or elementary, as distinct from justice that is complex, sophisticated and technical**.

"The term 'natural justice' has often been used by eminent judges, and although Maugham J. said (at p. 624) that it 'is, of course, used only in a popular sense,' **I would prefer to regard it as having become something of a term of art. To extract the quintessence of the process of justice is, indeed, notoriously difficult. 'The ideas of natural justice,' said Iredell J., 'are regulated by no fixed standard; the ablest and the purest men have differed on the subject': Calder v. Bull (1798) 3 U.S. 386, 399. In Ridge v. Baldwin [1964] A.C. 40, 132, Lord Hodson referred to a 'certain vagueness' in the term, but rejected the view that because the requirements of natural justice depended upon the circumstances of the case, this made natural justice so vague as to be inapplicable. He added: 'No one, I think, disputes that three features of natural justice stand out - (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges.' I do not think that I shall go far wrong if I regard these three features as constituting in all ordinary circumstances an irreducible minimum of the requirements of natural justice. I need only add that all these requirements are essentially procedural in nature; I regard natural justice as a distillate of due process of law.**"

"I then turned to consider a submission based on the judgment of Denning L.J. in **Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 329, 342** to the effect **that public policy would invalidate any stipulation excluding the application of the rules of natural justice to a domestic tribunal**, and said that although I respectfully inclined to the same view, **it seemed to have been expressed obiter and was not mentioned by the other members of the court, so that I would hesitate**

**to decide the case on that ground**. I went on to refer to the rule which was said to justify the expulsion, and then said:

> "It is trite law that the rules of an unincorporated association form a contract between all the members of that association. It is, indeed, a somewhat special form of contract; but subject to that, what I am required to do is to construe the terms of a contract. Where the terms in issue deal with the exercise of a power of peremptory suspension or termination of the rights of one of the parties to such a contract, **then I think that the common expectation of mankind would be that the power would be exercised only in accordance with the principles of natural justice unless the contrary is made plain**. This expectation rests upon high and ancient authority. When a member of a university was deprived of his degrees without being given an opportunity to defend himself, Fortescue J. said: 'The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also': Rex v. Cambridge University (1723) 1 Stra. 557, 567. **Even if the law permits the principles of natural justice to be effectually excluded by suitable drafting, I would not readily construe the rules as having achieved this result unless they left me in no doubt that this was the plain and manifest intention**. **Put a little differently, I would say that if there is any doubt, the applicability of the principles of natural justice will be given the benefit of that doubt**. The cry 'That isn't fair' is to be found from earliest days, in nursery, street and school alike; and those who wish

to confer upon the committee or other governing body of a club or association a power to act unfairly or arbitrarily in derogation of common and universal expectation must make it plain beyond a per adventure that this has been done. This view is, I think, at least consistent with the approach of Romer L.J. in **Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 329, 349, C.A.** on a not dissimilar point, where he said that it would require 'the use of clear language' before he was satisfied that the members of any body such as the trade union in question had agreed to leave the construction of the trade union's rules to the committee, to the exclusion of the courts."

"Having now had the opportunity of reconsidering the language that I used in that case, I must say that I can see no reason for resiling from it. **Before resorting to public policy, let the rules of the club or other body be construed: and in the process of construction, the court will be slow to conclude that natural justice has been excluded**. Only if the rules make it plain that natural justice was intended to be disregarded will it be necessary for the courts to resolve the issue of public policy. In this case, accordingly, I approach both clause 8 (2) of the Labour Party constitution and the resolution of the N.E.C. dated April 24, 1968, as provisions requiring to be construed strictly, and as not excluding the processes of natural justice except in so far as this is made plain. Nothing that I can see in clause 8 (2) even begins to exclude the process of natural justice. **The phrase "to take any action it deems necessary" cannot, in my judgment, be read as if it continued "however contrary to natural justice it may be"; nor, in my judgment, are the words "disaffiliation," "expulsion" or even "or otherwise" to be qualified in any such way. These things may be done: but they must be done fairly and justly, and not unfairly or unjustly**……."

"....Whatever may be said about the right to an unbiased tribunal, the process of giving notice of the charges and giving those concerned the right to be heard in answer to the charges was plainly not followed....."

"Mr. Sparrow did contend that sending out the form amounted to affording the members an opportunity of being heard: but not even his considerable powers of advocacy sufficed to give any life to as barren a contention as I have heard....."

**At the apotheosis of this narrative, Megarry J., came to the passage which is so often quoted from his judgment, which is also quoted in the appellant's written submissions dated 27.07.2022, and said,**

"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events".

On the basis of audi alteram partem referred to and explained above, this Court sets aside the order of the learned Additional District Judge dated 14.09.2023 and sets aside the decree absolute, exercising the powers of revision and restitutio in integrum and allows the defendant petitioner to file papers in terms

of section 12(2) of the Act within 06 weeks from the date of this judgment, subject to the depositing in the District Court of a sum of Rs. 11,795,506.00 either in cash or upon a bank guarantee or an acceptable security.

Once the defendant so enters the case and files his papers, the learned Additional District Judge will consider, among other things, objections raised by the defendant in regard to the constitution and the maintainability of the action of the plaintiff respondent.

Judge of the Court of Appeal

Hon. Neil Iddawala J.,

I agree.

Judge of the Court of Appeal.