

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

In the matter of an application under
Article 154P (6) of the Constitution read
with Article 138 thereof

J. M. C. Priyadarshani,
Plantation Monitoring Officer,
Plantation Management Monitoring
Division, Ministry of Plantation &
Industries, 11th Floor, Sethsiripaya,
Stage Two,
Baththaramulla.

APPLICANT

CA PHC 0200-2016
PHC Ratnapura No. 44-2016 Revision
MC Ratnapura 58349/16

Vs-

Ella Addara Gedera Dasanayake,
Harmitigala,
Rasagala,
Balangoda.

RESPONDENT

AND BETWEEN

Ella Addara Gedera Dasanayake,
Harmitigala,
Rasagala
Balangoda.

RESPONDENT-PETITIONER

Vs-

J. M. C. Priyadarshani,
Plantation Monitoring Officer,
Plantation Management Monitoring
Division, Ministry of Plantation &
Industries, 11th Floor, Sethsiripaya,
Stage Two,
Baththaramulla.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Ella Addara Gedera Dasanayake,
Harmitigala,
Rasagala
Balangoda.

RESPONDENT-PETITIONER-
APPELLANT

Vs-

J. M. C. Priyadarshani,

Plantation Monitoring Officer,
Plantation Management Monitoring
Division, Ministry of Plantation &
Industries, 11th Floor, Sethsiripaya,
Stage Two,
Baththaramulla.

APPLICANT-RESPONDENT-
RESPONDENT

BEFORE	:	Shiran Gooneratne J. & Dr. Ruwan Fernando J.
COUNSEL	:	Chandrasiri Wanigapura with Nirmani de Silva for the Respondent-Petitioner- Appellant
		Maithri Wickremasinghe, P.C. with Rakitha Jayatunga for the Applicant- Respondent-Respondent

ARGUED ON : 30.01.2020

WRITTEN SUBMISSIONS

: 28.08.2019 & 03.06.2020 (by the
Respondent-Petitioner-Appellant)

04.09.2019, 06.03.2020 & 08.06.2020 (by
the Applicant-Respondent-Respondent)

DECIDED ON : 19.06.2020

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal from the Order of the learned Provincial High Court Judge of the Sabaragamuwa Province dated 05.12.2016 refusing to issue Notice in a revision application filed by the Respondent-Petitioner-Appellant against the order of ejectment made by the learned Magistrate of Ratnapura under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

Background

[2] The Applicant-Respondent-Respondent (hereinafter referred to as the Respondent) filed an application in the Magistrate's Court of Ratnapura under section 5 of the State Lands (Recovery of Procession) Act No. 7 of 1979 as amended, for the ejectment of the Respondent-Petitioner-Appellant (hereinafter referred to as the Appellant) from the land morefully described in the schedule to the said application. The learned Magistrate issued notice to be served on the Appellant by registered post returnable on 26.02.2016 and when the Appellant was absent and unrepresented on 26.02.2016, the learned Magistrate issued an order of ejectment of the Appellant from the relevant land.

[3] Upon the application made on behalf of the Respondent seeking for the execution of the order of ejectment, the learned Magistrate directed the Fiscal to eject the Appellant and accordingly, the Fiscal on 29.09.2016 had delivered possession of the relevant land to the Respondent.

Application in Revision to the Provincial High Court of the Sabaragamuwa Province

[4] Being aggrieved by the said order of the learned Magistrate of Ratnapura, the Appellant preferred an application in revision to the High

Court of the Sabaragamuwa Province to have the said order of ejection set aside or be varied. The learned High Court Judge by his order dated 05.12.2016 refused to issue notice on the ground that in view of the judgment of the Supreme Court in *Superintendent, Stafford Estate and two others v. Solaimuttu Rasu* (2013) 1 Sri LR 25, the Provincial High Court has no jurisdiction to entertain the revision application as the subject matter of the application is a State land.

Appeal to the Court of Appeal

[5] Being aggrieved by the said order of the learned Provincial High Court Judge, the Appellant has preferred this appeal to this Court in terms of Article 154P (6) read with Article 138 of the Constitution.

Preliminary Objections

[6] When this appeal was taken up for argument on 30.01.2020, the learned President's Counsel for the Respondent raised the following two Preliminary Objections to the maintainability of this appeal filed by the Appellant:

1. The High Court of the Provinces does not have revisionary jurisdiction under Article 154P(3)(b) of the Constitution in respect of an order made by a Magistrate for ejection under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended;
2. There is no right of appeal to the Court of Appeal under Article 154P (6) of the Constitution against the order of the Provincial High Court refusing notice in an application in revision filed under Article 154P (3) (b) of the Constitution.

Preliminary Objection 1

Revisionary Jurisdiction of the Provincial High Court under Article 154P (3) (b) of the Constitution in respect of an order of ejectment made by a Magistrate's Court under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

[7] The Appellant had sought to invoke the revisionary jurisdiction of the Provincial High Court of the Sabaragamuwa Province in terms of Article 154P (3) (b) of the Constitution in respect of the order of ejectment made by the learned Magistrate under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

[8] Mr. Maithri Wickremasinghe, the learned President's Counsel for the Respondent submitted that the word 'orders' is preceded by the words 'convictions, sentences' and is followed by the words 'entered or imposed' in Article 154 (3) (b) of the Constitution. He submitted that the word 'orders' in Article 154 (3) (b) of the Constitution must be read in *ejusdem generis* with the words 'convictions, sentences' entered or imposed by Magistrates Courts and Primary Courts within the Province.

[9] Mr. Wickremasinghe strenuously argued that the word 'orders' in Article 154P (3) (b) of the Constitution should be limited to the genus to which 'convictions and sentences' are entered or imposed by Magistrates Courts and Primary Courts within the Province, which entail criminal sanctions. His contention was that an 'order of ejectment' made by the Magistrate of Ratnapura under section 10 of the State Lands (Recovery of Possession) Act is not an order of a criminal nature that entails any penal consequences as contemplated by Article 154P (3) (b) of the Constitution.

[10] Mr. Wickremasinghe further argued that though the revisionary jurisdiction in respect of an order of ejectment made by the Magistrate under section 10 of the State Lands (Recovery of Possession) Act is vested

in the Court of Appeal under Article 138 (1) of the Constitution, the High Court of the Provinces has no revisionary jurisdiction under Article 154P (3) (b) of the Constitution in respect of an order of ejectment made by a Magistrate's Court under section 10 of the State Lands (Recovery of Possession) Act. No. 7 of 1979.

[11] The determination of this question first involves a survey and analysis of Article 154P (3) (b) of the Constitution and any other law, if any, that has conferred revisionary jurisdiction on the Provincial High Court in respect of convictions, sentences and orders entered or imposed by Magistrates Court and Primary Courts within the Province in the context of Article 138 of the Constitution.

(a) Jurisdiction conferred on the Provincial High Court by the 13th Amendment to the Constitution

[12] Section 10 (2) of the State Lands (Recovery of Possession) Act. No. 7 of 1979 provides that no appeal shall lie against any order of ejectment made by a Magistrate under subsection (1) of the Act. Prior to the introduction of the 13th Amendment to the Constitution, the Court of Appeal enjoyed exclusive appellate and revisionary jurisdiction under Article 138 of the Constitution, exclusive "writ jurisdiction" under Article 141 and full power to issue other prerogative writs under Article 140 and the Constitution. These jurisdictions applied *inter alia*, to the High Courts, District Courts, Magistrates Courts, Primary Courts and Labour Tribunals.

[13] Article 138 (1) of the 1978 Constitution prior to the introduction of the 13th Amendment to the Constitution reads as follows:

"138- (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other

institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance (emphasis added)

.....”

[14] The 13th Amendment to the Constitution by Article 154P established the Provincial High Court and the sole jurisdiction conferred on the Court of Appeal by Article 138 was expanded to Provincial High Courts by Article 154P (3) and (4) of the Constitution. Article 154P (3) (b) of the Constitution conferred on the Provincial High Court appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province. Article 154P (3) (b) reads as follows:

“(3) Every such High Court shall—

(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 Magistrates Courts and Primary Courts within the Province”.

[15] Thus, the Court of Appeal ceased to enjoy the sole and exclusive appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by the Magistrates Courts and Primary Courts.

(b) Concurrent Appellate and Revisionary Jurisdiction of the Court of Appeal and the Provincial High Court

[16] However, the powers of the Court of Appeal to take cognizance by way of appeal, revision, restitutio in integrum of ‘all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance,’ are

vested exclusively in the Court of Appeal (see- the Amended Article 138). The appellate and revisionary jurisdiction of the Provincial High Court conferred by Article 154P (3) (b) of the Constitution has thus been limited to convictions, sentences and orders entered or imposed by the Magistrates Courts and Primary Courts within the Province. The appellate and revisionary jurisdiction conferred on the Provincial High Court is, thus, exercised by the Provincial High Court, '**notwithstanding anything in Article 138** and subject to any law'.

[17] Article 154P (3) (c) of the Constitution enacts that every such High Court shall "exercise such other jurisdiction and powers as Parliament may, by law, provide". This paved the way for Parliament to confer further jurisdiction (other than those set out in Article 154P (3) (a) and (b) and 154P (4) (a) and (b)) on the Provincial High Court by other laws. The High Court of the Provinces (Special Provisions) Act No. 19 of 1990 was enacted by Parliament and section 3 of the said Act, subject to any law, conferred appellate and revisionary jurisdiction on the Provincial High Court in respect of orders made by Labour Tribunals and within the Province and orders made under section 5 or section 9 of the Agrarian Services Act, No. 58 of 1979, in respect of any land situated within the Province.

[18] It is seen, however, that the scheme of the Article 138 and 154P of the Constitution and the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 clearly indicates that Article 154P of the Constitution did not take away the powers of the Court of Appeal under Article 138 of the Constitution. Thus, in the case of *Swasthika Textile Industries Ltd v. Thantrige Dayaratne* (1993) 2 Sri LR 348, Fernando J. observed at page 352:

"Apart from jurisdictions constitutionally vested and entrenched, directly or indirectly, Parliament may, by ordinary legislation,

abolish, alter or transfer jurisdictions: Parliament may create a new jurisdiction or transfer an existing jurisdiction, so long as such jurisdiction is vested in a person or body constitutionally entitled to exercise the juridical power of the people.

The appellate and revisionary jurisdiction of the Court of Appeal is not entrenched, as it is “Subject to the provisions of the Constitution or of any law”, it may therefore be abolished, amended or transferred. By contrast, its jurisdiction under Article 140 and 141 are entrenched; but for the proviso inserted by the First Amendment, its jurisdiction under Article 140 cannot be transferred even to the Supreme Court.

The jurisdiction of the High Court under Article 111, originally and after the Thirteenth Amendment, was neither defined nor entrenched and had to be conferred by Parliament, by ordinary law, Article 154P (3) (b) conferred jurisdiction on the High Court ‘notwithstanding anything in Article 138’, thus avoiding any possibility of an argument that these provisions were contradictory, and manifested an intention to confer a concurrent jurisdiction. That jurisdiction was also ‘subject to the law’ and therefore (as the case of Article 138) was not entrenched, and was liable to alteration by Parliament by ordinary law.”

[19] It is crystal clear that Article 154P (3) (b) conferred appellate and revisionary jurisdiction on the Provincial High Court “notwithstanding anything in Article 138 and subject to any law” in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province. Although the Court of Appeal thus, ceased to enjoy sole and exclusive jurisdiction under Article 138 in respect of convictions, sentences and orders made by Magistrates Courts and Primary Courts, Article 154P (3) (b) did not take away the powers exercised by the Court of Appeal under Article 138 of the Constitution (*Sharif and others v. Wickremasuriya and others* (2010) 1 Sri LR 255, at p. 262). Thus, the Court of Appeal and the High Court of the Provinces enjoy concurrent appellate and revisionary jurisdiction in respect of the

convictions, sentences and orders entered or imposed by the Magistrates Courts and Primary Courts.

[20] The concurrent revisionary jurisdiction of the Court of Appeal and the Provincial High Court in respect of an order made by the Primary Court Judge under Part VII of the Primary Courts Procedure Act, No. 44 of 1979 was recognized by Kulatunga J., G.P.S. de Silva C.J. and Ramanathan, J. agreeing in *Gunaratne v. Thambinayagam*, (1993) 2 Sri LR 355). Kulatunga J. observed at page 357:

"Prior to the 13th Amendment to the Constitution, a party aggrieved with such a determination used to apply to the Court of Appeal to have it set aside by way of revision in the exercise of the power of that Court under Article 138 of the Constitution read with Article 145. S. 5 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 154P (3) (b) of the Constitution (enacted by the 13th Amendment) entitled him to file such application in the High Court of the Province. The jurisdiction of the High Court in the matter is concurrent. In Re the 13th Amendment to the Constitution (1987) 2 Sri LR 310, 323). In the result, he may file an application in the Court of Appeal or in the High Court" (emphasis added).

[21] In this context, Kulatunga J. stated at page 361 that the concurrent jurisdiction of the Court of Appeal and the High Court is further confirmed by section 12 of Act No. 19 of 1990 which provides that the identical dispute may be decided by the Court of Appeal or by the Provincial High Court. The reasoning of Kulatunga J. in *Gunaratne v. Thambinayagam* was reaffirmed by Ananada Coomaraswamy, J. in *Abeywardene v. Ajith De Silva* (1998) 1 Sri LR 134. Ananada Coomaraswamy, J. observed at page 137:

"There is no right of appeal from an order of the Primary Court Judge by reason of the provisions of section 74 (2) of the Primary Courts Procedure Act, No. 44 of 1979. However, parties appeal to

the Court of Appeal by way of revision under Article 138 of the Constitution read with Article 145 to have the order set aside. After the 13th Amendment, section 5 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 154P (3)(b) of the Constitution (enacted by the 13th Amendment) entitled him to file such application in the High Court of the Province. The jurisdiction of the High Court in the matter is concurrent. In Re the 13th Amendment to the Constitution (1987) 2 Sri LR 310, 323). In the result, he may file an application in the Court of Appeal or in the High Court....." (emphasis added).

[22] The existence of concurrent jurisdiction of the Court of Appeal and the Provincial High Court is further confirmed by section 12 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990. Section 12 has empowered the Court of Appeal, in the event of identical appeal or application being filed in the Court of Appeal and the High Court, to transfer such appeals or applications to the High Court or to hear and determine such applications by the Court of Appeal (*Ramalingam v. Parameswary* (2002) 2 Sri LR 340).

[23] It is crystal clear from these observations that Article 154P(3)(b) of the Constitution conferred concurrent appellate and revisionary jurisdiction on the Provincial High Court in respect of convictions, sentences and orders entered or imposed by the Magistrates Courts and Primary Courts within the Province. In the result, any person aggrieved by a conviction, sentence or order entered or imposed by Magistrates Courts and Primary Courts has an option to file an application in revision, either in the Court of Appeal in the exercise of the revisionary powers under Article 138 of the Constitution or in the High Court of the Province under Article 154P(3)(b) of the Constitution.

[24] The Appellant had filed the application in revision invoking the revisionary jurisdiction of the Provincial High Court under Article 154P (3)

(b) of the Constitution in respect of the order of ejectment made by the Magistrate's Court of Ratnapura under section 10 of the State Lands (Recovery of Possession) Act. It is therefore beyond argument that notwithstanding anything in Article 138 of the Constitution, Article 154P (3) (b) of the Constitution has conferred concurrent revisionary jurisdiction on the High Court in respect of the order of ejectment made by the Magistrate of Ratnapura under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

(c) Does the scope of the word ‘orders’ in Article 154P (3) (b) limit to the orders of a criminal nature?

[25] In this context, I shall now proceed to consider the argument advanced by Mr. Wickremasinghe that the jurisdiction of the Provincial High Court conferred by Article 154P (3) (b) is limited to orders of a criminal nature by the application of the *ejusdem generis* rule and therefore, the “order of ejectment” made by the Magistrate under section 10 of the State Lands (Recovery of Possession) Act is not an order of a criminal nature contemplated by Article 154P (3) (b) of the Constitution.

Applicability of *Ejusdem generis* Rule

[26] The *ejusdem generis* or “of the same genus” is a rule that operates to restrict the meaning of general words by reference to specific words in their immediate vicinity (Langan Maxwell Interpretation of Statutes, 12th Ed. P. 297 and Bennion Statutory Interpretation, 4th Ed. p. 828). In Halsbury’s Laws of England, the said rule has been defined thus:

*"As a rule, where in a statute, there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified, although this, as a rule of construction, must be applied with caution, and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. For the *Ejusdem Generis* rule to apply, the*

specific words must constitute a category, class or genus, then only things which belong to that category, class or genus fall within the general words."

[27] Where the terms listed are similar enough to constitute a class or genus, the courts will presume, in interpreting the general words that follow, that they are intended to apply only to things of the same genus as the particular items listed. (Legislative Drafting-Shaping the Law for the new Millennium, pp 254-255).

[28] The rule recognises and gives effect to both the specific and general words by using the class indicated by the specific words to extend the scope of the statute with the general words include additional terms of object within the class (*Archbishop of Canterbury's case*: 1596 Singer 47:17 of 272-73). Thus, it is a well-established rule in the construction of statutes, that general terms following ones apply only to such persons or things as are *ejusdem generis* with those contemplated in the language of the Legislature (*R v. Cleworth* (1864) 4 B. & S. 927). Thus, unless there is a genus or category, there is no room for the application of the *ejusdem generis* doctrine (supra).

[29] In *Amar Chandra Chakraborty v. The Controller of Excise, Govt of Tripura, Agartala and others*, AIR 1972SC 1863, Justice Dua, observed on the principle of *ejusdem generis* as follows:

"The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects of the enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) there is no indication of a different legislative intent."

[30] According to Sutherland in his 'Statutory Construction' (3rd Edition, Vol. II, p. 395) the *ejusdem generis* has no application in the following cases:

- a. where the general term is followed by another general term;
- b. where particular and specific terms exhaust the whole genus, then the general words are construed as embracing a larger genus;
- c. where specifically enumerated objects are essentially diverse in character;
- d. where the ordinary legislative intent is plain, such intent being gathered from a recognised source of assistance, aids to construction.

[31] In *Tillmanns & Co. v. SS. Knutsford, Limited* (1908) 2 KB 385 (CA), Farwell L.J. observed at 403 that there is no room for the application of the *ejusdem generis* doctrine where the words are clearly wide in their meaning and they ought not to be qualified on the ground of their association with other words. Thus, unless there is a genus or class or category, there is no room for the application of the *ejusdem generis* doctrine.

[32] It is imperative to note that the Court's primary goal in interpreting statutes is to give effect to the legislative intent and the best evidence of that intent is the statute's plain language. "The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context that intention, and therefore, the meaning of the statute, is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous be applied as they stand" (*Doypack Systems Pvt. Ltd. Etc v. Union Of India & Ors., Etc* [1998 (2) SCC 299].

[33] It would be important to refer to the following passage of Sripavan J. (as he then was) in *Herath v. Morgan Engineering (Pvt) Limited* SC Appeal No. 214/2012-SC Minutes of 27.06.2013:

"If the language of the enactment is clear and unambiguous, it would not be legitimate for the Courts to add words by implication into the language. It is a settled law of interpretation that the words are to be interpreted as they appear in the provision, simple and grammatical meaning is to be given to them, and nothing can be added or subtracted. The Courts must construe the word as they find it and cannot go outside the ambit of the section and speculate as to what the legislature intended. An interpretation of section 9 which defeats the intent and purpose for which it was enacted should be avoided."

[34] Thus, the Courts look at a statute and determines what it means. The most important thing to be determined is the intent of Parliament. **The language of the statute cannot, however, be distorted under the guise of construction, or so limited by construction as to defeat the manifest intent of Parliament** (*United States v. Raynor*, 302 U.S. 540 (58 S.Ct. 353, 82 L.Ed. 413)). Thus, in the construction of statutes, addition or substitution of words or which results in rejection of words have to be avoided. The Privy Council held in *Crawford v. Spooner* [1846] 6 Moore PC 1] that:

"The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature. We cannot aid the Legislature's defective phrasing of an Act. We cannot add or mend and, by construction make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly, much more, if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet within the words of the test (aiding their construction of the text, always, of course, by the contest), it is not for them so to supply a meaning, for, in reality, it would be supplying it, the true way in these cases is to take the words as the Legislature

has given them and to take the meaning which the words given naturally imply....”

[35] It is a well settled principle in law that the Court cannot attempt to substitute anything into a statutory provision which is plain and unambiguous as the language employed in a statute is the determinative factor of legislative intent. Thus, the question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the Statute would be self-defeating (*I. S. Nayak v. A. R. Antulay* AIR 1984 SC 684). Again, in *CIT v. Sundaradevi*, (1957) 32 ITR 615) (SC), it was held by the Indian Supreme Court that (i) unless there is an ambiguity, it would not be open to the Court to depart from the normal rule of construction which is the intention of the legislature; (ii) It should be primarily to gather from the words which are used; and (iii) it is only when the words used are ambiguous that they would stand to be examined and considered on surrounding circumstances and constitutionally proposed practices.

[36] In *Grasim Industries Ltd. v. Controller of Customs, Bombay*, Appeal (Civil) 1951 of 1998 SC, 4 April, 2002, the Court has explicitly observed that:

“Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the Court to take upon itself the task of amending or altering the statutory provisions.....”

[37] It is clear from these observations that if the words of a statute are clear and unambiguous and the ordinary legislative intent can be gathered from the plain meaning or the language used in the statutory text, no need of interpretation would arise by the application of the rule *eiusdem generis*.

[38] At this stage, it becomes necessary for this Court to identify the range of ordinary and accepted meanings of the words in Article 154P (3) (b) of

the Constitution that can convey the meaning of the said words. Article 154P (3) (b) demonstrates that notwithstanding anything in Article 138 and subject to any law, the legislature intended to confer the appellate and revisionary jurisdiction on the Provincial High Court in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province.

[39] The plain and ordinary meaning of the word “conviction” is a finding of a person guilty of an offence by a Judge or Jury in a Court of Law after trial. A plain and ordinary meaning of the word “sentence” is the punishment assigned to an accused/defendant found guilty by a Court, or Jury and fixed by law for a particular offence. On the other hand, the plain and ordinary meaning of the word “order” is a direction issued by a Court or a Judge requiring a person to do or not do something- it may be a final order (one that concludes the court action) or an interim order (one during the action).

[40] Ordinarily, the words “convictions and sentences” are read together and used in proceedings of a criminal nature in respect of or in connection with any offence which entail penal sanctions. The word “orders” in Article 154P (3) (b) however, in my view cannot be limited to the genus to which the words “convictions” and “sentences” are intended in proceedings of a criminal nature. The word “order” may include a direction entered by a judge requiring a person to do or not to do something in both proceedings of criminal or civil nature.

[41] Article 154P (3) (b) of the Constitution has not limited the scope of the revisionary jurisdiction of the Provincial High Court to “convictions, sentences and orders” of a criminal nature with penal sanctions made by a Magistrate or a Primary Court Judge in respect of or in connection with any offence. The revisionary jurisdiction of the Provincial High Court may

extend to “any order” entered by Magistrates Courts or Primary Courts within the Province, regardless of the nature of the proceedings, provided however, that such Courts have jurisdiction to make such orders in terms of the law.

[42] I am of the view that this Court cannot overstep the constitutional mandate conferred on the Provincial High Court by Article 154P (3) (b) of the Constitution by unnecessarily and unduly limiting and distorting the clear and unambiguous language of Article 154P (3) (b) of the Constitution. The Legislature has chosen carefully and advisedly the terms “convictions”, “sentences” and “orders” in their plain, ordinary and recognised meanings in court proceedings. The meaning of the words used in Article 154P (3) (b) is perfectly clear and there is no inconsistency, ambiguity, absurdity or injustice in the plain and clear language of Article 154P (3) (b) that justifies any further modification of the language.

[43] If the Legislature’s intent in Article 154P (3) (b) is limited to orders of a criminal nature, it would clearly fail to give effect to the legislature’s choice in Article 154P (3) (b) of the Constitution. Article 154P (3) (b) cannot, by any process of interpretation, be treated as limiting the word “orders” to genus to which “convictions” and “sentences” are intended in proceedings of a criminal nature. The rule of *eiusdem generis* has, therefore, no application.

[44] I am of the view that the appellate or revisionary jurisdiction of the Provincial High Court conferred by Article 154P (3)(b) cannot, by any process of interpretation, be limited to orders of a criminal nature that entail penal sanctions. I hold that Article 154P (3) (b) of the Constitution has conferred revisionary jurisdiction on the Provincial High Court in respect of the order of ejection made by a Magistrate’ s Court under section 10 of the State Lands (Recovery of Possession) Act as amended.

(d) Relevance of the Supreme Court Judgment in *Superintendent, Stafford Estate and two others v. Solaimuthu Rasu*

[45] Mr. Wickremasinghe then submitted that the High Court correctly refused notice since the Provincial High Court does not have revisionary jurisdiction under Article 154P (3) (b) of the Constitution in respect of the matters arising under the State Lands (Recovery of Possession) Act as decided by the Supreme Court in *Superintendent, Stafford Estate and two others v. Solaimuthu Rasu* (supra).

[46] In view of this submission, it is important to consider whether the Supreme Court has imposed any restriction to the scope of the revisionary jurisdiction of the Provincial High Court in respect of an order made by a Magistrate's Court within the Province under section 10 of the State Lands (Recovery of Possession) Act.

[47] In *Superintendent, Stafford Estate and two others v. Solaimuthu Rasu* (supra), the Competent Authority initiated proceedings in the Magistrate's Court of Nuwara Eliya under section 5 of the State Lands (Recovery of Possession) Act seeking an order of ejectment of the Respondent-Petitioner from the State land described in the schedule to the application. The Respondent-Petitioner filed an application in the Provincial High Court of Kandy praying for a writ of certiorari to quash the quit notice filed in the case. The Applicant-Respondent raised a preliminary objection that as the subject matter of the action pertains to a State Land which does not fall within the Provincial Council List, the Provincial High Court had no jurisdiction to hear and determine the matter.

[48] The Provincial High Court upheld the objection and dismissed the application. On appeal, the Court of Appeal, however, held that the "State Land" becomes a subject of the Provincial Council List and therefore, the

Provincial High Court has jurisdiction to hear and determine the writ application.

[49] A perusal of the Supreme Court judgment reveals that the questions of law upon which the special leave to appeal granted were as follows:

- 1- Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State lands is/are in issue?
- 2- Did the Court of Appeal err by failing to consider whether there is a right of appeal against the order of the High Court dismissing the application *in limine* for want of jurisdiction?

[50] Having considered the Constitutional Provisions and the judicial precedents to determine whether the Provincial High Court could exercise **writ jurisdiction in terms of Article 154P (4) (b) of the Constitution** in respect of a quit notice issued under the Provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979, the Supreme Court held that the Provincial High Court has no writ jurisdiction in respect of quit notices issued under the State Lands (Recovery of Possession) Act No. 7 of 1979.

[51] Article 154 (4) (b) of the Constitution confers on the Provincial High Courts to issue, “according to law-

- (a) orders in the nature of *habeas corpus*, in respect of persons illegally detained within the Province; and
- (b) orders in the nature of writs of *certiorari*, *prohibition*, *procedendo*, *mandamus* and *quo warranto* against any person exercising within the Province, any power under-
 - (i) Any law; or

- (ii) Any statute made by the Provincial Council established for that Province;

in respect of any matter set out in the Provincial Council List.”

[52] The main issue that arose for the determination by the Supreme Court was whether the Provincial High Court could exercise writ jurisdiction under Article 154P (4) of the Constitution to quash a quit notice issued under the Provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979. Their Lordships of the Supreme Court determined the two questions formulated in the affirmative and His Lordship the Chief Justice, Mohan Pieris, at page 22 observed:

“When one transposes this interpretation of the phrase ‘any matter set out in the Provincial Council List’ that is determinative on the ingredient necessary to issue a writ in the Provincial High Court in relation to State Land, the vital precondition which is found in Article 154P (4) (b) of the Constitution is sadly lacking in the instant case. In terms of that Article, a Provincial Council is empowered to issue prerogative remedies, according to law, only on the following grounds-

(a) There must be a person within the province who must have exercised power under

(b) Any law or

(c) Any statute made by the Provincial Council

(d) In respect of any matter set out in the Provincial Council List.”

[53] The Supreme Court clearly determined that the Provincial High Court has no jurisdiction to issue a writ of certiorari under Article 154 (4) (b) of the Constitution in respect of a quit notice issued under the State Lands (Recovery of Possession) Act. His Lordship the Chief Justice Mohan Pieris, at pages 22-23 observed:

“No doubt, the competent authority in the instant exercised his power of issuing a quit notice under a law, namely State Lands (recovery of Possession) Act as amended. But was it in respect of

any matter set out in the Provincial Council List? Certainly, the answer to the question must respond to the qualifications contained in 1.2 of Appendix II, namely administering, controlling and utilising a State Land made available to a Provincial Council. The power exercised must have been in respect of these activities. The act of the competent authority issuing a quit notice for ejectment does not fall within the extents of matters specified in the provincial council list and therefore the provincial High Court would have no jurisdiction to exercise writ jurisdiction in respect of notices issued under the state lands recovery of possession at as amended” (emphasis added)

[54] On the other hand, there is no reference whatsoever, in the Supreme Court judgment to Article 154P (3) (b) of the Constitution, which confers revisionary jurisdiction on the Provincial High Court in respect of any order made by Magistrates Court or Primary Courts within the Province. Having examined Constitutional provisions, including Article 154P (4) (b), Provincial Council List (List I), Reserved List (List II), Appendix II and the judicial precedents, the Supreme Court held at page 23 that:

“In the circumstances, the Court of Appeal erred in law in holding that the Provincial High Court of Kandy had jurisdiction to issue a writ of certiorari in respect of the notice issued under state lands recovery opposition act as amended”.

[55] The Supreme Court has only decided in *Superintendent, Stafford Estate and two others v. Solaimuthu Rasu*, that a Provincial High Court has no writ jurisdiction under Article 154P (4) (b) of the Constitution in respect of a quit notice issued under the State Lands (Recovery of Possession) Act No. 7 of 1979. Accordingly, the Supreme Court has not excluded the power of the Provincial High Court to exercise its revisionary jurisdiction under Article 154P (3) (b) in respect of an order of ejectment made by a Magistrate under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

[56] In the present case, the Appellant invoked the revisionary jurisdiction of the Provincial High Court in terms of Article 154P (3) (b) of the Constitution and not under Article 154P (4) of the Constitution and therefore, the decision in *Superintendent, Stafford Estate and two others v. Solaimuthu Rasu* has no application to the present case.

[57] During the hearing, our attention was drawn to the recent decision of the Court of Appeal in *S.S.B.D.G. Jayawardene, Chairman, Tea Research Institute v. K.N. Deen C. A* (PHC) No. 149/2014 decided on 17.06.2015. In the said case, the Court of Appeal held that (i) Article 154P (3) (b) of the Constitution has not excluded the power of the Provincial High Court to exercise revisionary jurisdiction regarding State Lands under the Provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979; and (ii) the Supreme Court has only decided in *Superintendent Stafford Estate and two others v. Solaimuthu Rasu* that the Provincial High Court had no jurisdiction to issue writs under Article 154P(4) of the Constitution in relation to any matter concerning State Lands. The Leave to Appeal against the said judgment was refused by the Supreme Court in S.C. SPL. L.A No. 111/2015 on 19.02.2016.

[58] Mr. Wickremasinghe however, submitted that the decision of the Supreme Court in *Superintendent Stafford Estate and two others v. Solaimuthu Rasu* was reaffirmed by the Supreme Court in *W. K. Mahinda v. H.M. Nandasena, Divisional Secretary, Meegahakivula S.C* (SP) LA 211/2013 SCM 20.01.2014. He submitted that the Special Leave to Appeal Application to the Supreme Court against the order of dismissal of the revision application filed in the Provincial High Court against an order of the Magistrate made under section 10 of the State Lands (Recovery of Possession) Act was dismissed by the Supreme Court for the reasoning

behind the decision made in *Superintendent Stafford Estate and two others v. Solaimuthu Rasu*.

[59] He further submitted that the decision of the Supreme Court in *W. K. Mahinda v. H.M. Nandasena, Divisional Secretary, Meegahakivula* (supra) was not brought to the notice of their Lordships of the Court of Appeal in *S.S.B.D.G. Jayawardene, Chairman, Tea Research Institute v. K.N. Deen* (supra) when it held that *Superintendent Stafford Estate and two others v. Solaimuthu Rasu* (supra) did not apply to an application in revision against an order of a Magistrate under Section 10 of the State Lands (Recovery of Possession) Act. The short order of the Supreme Court in *W. K. Mahinda v. H.M. Nandasena, Divisional Secretary, Meegahakivula* (supra) refusing to grant special leave reads as follows:

"We have heard Counsel for the Petitioner. We have also heard learned State Counsel who appears for the Respondent.

In view of the judgment of this Court in Supreme Court Appeal 21/13, the High Court of Badulla has no jurisdiction to hear and determine this matter. These proceedings are misplaced in law. The application is dismissed".

[60] The reference to Case No. 21/13 in the said Supreme Court order appears to be the case decided by the Supreme Court in *Superintendent Stafford Estate and two others v. Solaimuthu Rasu*, which has only determined that the Provincial High Court has no jurisdiction under Article 154P (4) (b) of the Constitution to issue a *writ of certiorari* in respect of a quit notice issued under the State Lands (Recovery of Possession) Act.

[61] The question whether the Provincial High Court had revisionary jurisdiction under Article 154P (3) (b) was not considered in the said case by the Supreme Court. In the result, the order of the Supreme Court in

W. K. Mahinda v. H.M. Nandasena, Divisional Secretary, Meegahakivula (supra) should be read and understood in the context of the above-mentioned ratio in *Superintendent Stafford Estate and two others v. Solaimuthu Rasu*, which is based on the interpretation of Article 154P (4) and not Article 154P (3) (b) of the Constitution.

[62] As described, Article 154P (3) (b) of the Constitution has not excluded the power of the Provincial High Court to exercise its revisionary jurisdiction in respect of an order of ejectment made by a Magistrate's Court under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended. In the circumstances, I hold that the Provincial High Court of Ratnapura had revisionary jurisdiction under Article 154P (3) (b) of the Constitution in respect of an order of ejectment made by the Magistrate's Court of Ratnapura under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended. Hence, the learned High Court has clearly erred in holding that the Provincial High Court had no revisionary jurisdiction under Article 154P (3) (b) of the Constitution in respect of an order of ejectment made by a Magistrate under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979.

[63] For those reasons, the First Preliminary Objection raised on behalf of the Respondent is overruled.

Preliminary Objection 2

Right of Appeal to the Court of Appeal from the order refusing notice by the Provincial High Court under Article 154P (6) of the Constitution

[64] I will come to the second preliminary objection raised by Mr. Wickremasinghe, namely that the Appellant has no right of appeal to the Court of Appeal under Article 154P (6) of the Constitution against the

order refusing notice by the Provincial High Court in the exercise of its revisionary jurisdiction under Article 154P (3) (b) of the Constitution.

(a) Right of appeal to the Court of Appeal from High Court in the exercise of its Revisionary Jurisdiction under Article 154 (3) (b) of the Constitution

[65] The Appellant has filed this appeal in terms of Article 154P (6) of the Constitution read with Article 138 of the Constitution (Vide-Caption to the Petition of Appeal dated 16.12.2016). Article 154 (6) of the Constitution provides that, **subject to the provisions of the Constitution and any law**, any person aggrieved by a **final order, judgment or sentence** of any such Court in the exercise of its jurisdiction under Article 154P (3) (b) or 3 (c) or (4), may appeal to the Court of Appeal in accordance with article 138. It reads as follows:

"Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgment or sentence of any such Court, in the exercise of its jurisdiction under paragraphs (3) (b) or 3 (c) or (4), may appeal therefrom to the Court of Appeal in accordance with Article 138."

[66] The vital question for consideration by this Court is whether the order made by the learned Judge of the Provincial High Court refusing notice is a **final order or a judgment** within the meaning of Article 154P (6) of the Constitution.

[67] Mr. Wickremasinghe submitted that the Legislature has deliberately limited the right of appeal to the matters specified in Article 154P (6) of the Constitution, namely to ‘**final orders, judgments and sentences**’ and the order refusing notice is not a final order or judgment within the meaning of Article 154P (6) of the Constitution. He submitted that on a proper construction of Article 154P (6), the Court of Appeal cannot entertain the

appeal and the Appellant's remedy for refusing notice is possibly by way of revision to the Court of Appeal under Article 138 of the Constitution.

[68] Article 154P (6) of the Constitution has granted a **right of appeal** to a person who is aggrieved by any final order, judgment or sentence of the High Court in the exercise of its jurisdiction under paragraphs (3) (b) or (3) (c) or (4) of Article 154P. It is, however, subject to the provisions of the Constitution and any law and in accordance with Article 138. It is significant, therefore, to consider whether the words "subject to the provisions of the Constitution and any law" and "in accordance with Article 138" referred to in Article 154P (6) could be construed to mean that Article 154P (6) is subject to limitations in the Constitution, various Legislative Enactments and the Procedural Laws, which had also created a right of appeal to the Court of Appeal.

[69] Article 138 of the Constitution is only an enabling provision which, subject to the provisions of the Constitution or of any law, creates and grants **jurisdiction** to the Court of Appeal to hear appeals *inter alia*, from the High Court, Courts of First Instance, Tribunals and other Institutions. However, Article 138 "does not, nor indeed does it seek to, create or grant rights to individuals viz-a-viz appeals. It only deals with the jurisdiction of the Court of Appeal and its limits and its limitations and nothing more. It does not expressly nor by implication create or grant any rights in respect of individuals" (*Martin v. Wijewardena* (1989] 2 Sri LR 409, 413).

[70] The words "subject to the provisions of the Constitution or of any Law" in Article 138 of the Constitution are only limitations on the powers of the Court of Appeal, but they do not constitute a limitation on the rights of an Appellant (*Martin v. Wijewardena* (supra, p. 414). One such limitation placed on the powers of the Court of Appeal is to be seen in the proviso to Article 138 (supra).

[71] Article 138 of the Constitution enables the Court of Appeal to receive and entertain, hear and dispose of appeals from the High Courts, Courts of First Instance, tribunals and other institutions. Sections 13 (3), 14, 15 and 16 of the Judicature Act have, however, created a **right of appeal** to the Court of Appeal in **admiralty cases and criminal cases** either directly or with the leave of the Court first had and obtained, from the Judgments and Orders respectively of the High Court subject to certain limitations.

[72] Sections 14, 15 and 16 of the Judicature Act have created a right of appeal with limitations and designated the persons who are entitled to appeal to the Court of Appeal from any judgment, conviction, sentence or order of the High Court in the exercise of its original criminal jurisdiction under Article 154P (3) (a) of the Constitution. The **right of appeal** to the Court of Appeal from the High Court in the exercise of the original criminal jurisdiction conferred by Article 154P (3) (a) has been expressly created by section 14, 15 and 16 of the Judicature Act with limitations.

[73] Further, section 9 (b) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 has provided that subject to the provisions of the Act No. 19 of 1990 or any other law, any person aggrieved by a final order, judgment or sentence of a High Court in the exercise of its jurisdiction conferred on it by Article 154P (3) (a) or Article 154P (4), may appeal therefrom to the Court of Appeal.

[74] An Appeal is a Statutory Right and must be expressly created and granted by statute and it cannot be implied (*Bakmeeewwa v. Raja* (1989) 1 Sri LR 231 (SC), *Martin v. Wijewardena* (supra), *Gamhewa v. Maggie Nona* (1989) 2 Sri LR 250) and *Mudiyanse v. Bandara* (SC Appeal 8/89 S.C. minutes of 15.03.1991). The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various

Legislative Enactments (e.g. Judicature Act) and the Procedural Laws pertaining to those Courts (*Martin v. Wijewardena* (supra, p. 419).

(b) Right of Appeal under the Procedural Law- The Court of Appeal (Procedure for Appeals from High Courts) Rules

[75] I shall now consider the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988 published in the Gazette Extraordinary No. 549/6 dated 13.03.1989. Rule 2 clearly refers to appeals from orders made by a High Court in the exercise of its jurisdiction under Article 154P (3) (b) of the Constitution. It is significant to note that the marginal note to Article 138 reads "Right of Appeal". Rule 2 reads as follows:

"2 (1) Any person who shall be dissatisfied with any judgment or final order or sentence pronounced by a High Court in the exercise of the appellate or revisionary jurisdiction vested in it by Article 154P (3) (b) of the Constitution may prefer an appeal to the Court of Appeal against such judgment for any error in law or in fact-

(a) by lodging within fourteen days from the time of such judgment or order being passed or made with such High Court, a petition of appeal addressed to the Court of Appeal; or

(b) by stating within the time aforesaid to the Registrar of such court or to the jailer of the prison in which he is for the time being

(2) The Attorney-General may prefer an appeal to the Court of Appeal against any judgment or final order pronounced by the High Court in the exercise of the appellate or revisionary jurisdiction vested in it by Article 154P (3) (b) of the Constitution, and where he so appeals, or where he sanctions an appeal, the time within which the petition of appeal must be preferred shall be twenty eight days."

[76] It seems to me, therefore, that in addition to Article 154P (6) of the Constitution, the procedural law contained in the Court of Appeal (Procedure for Appeals from High Courts) Rules also governs the right of a person to appeal to the Court of Appeal, aggrieved by any final order,

judgment or sentence pronounced by a High Court in the exercise of the appellate or revisionary jurisdiction vested in the High Court by Article 154P(3)(b) of the Constitution.

(c) Appeals to the Court of Appeal from High Court under the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

[77] It is significant to note that the marginal note to section 11 of the High Court of the (Special Provisions) Act reads “**Appeal to Court of Appeal**” and thus, section 11 has granted jurisdiction to the Court of Appeal (forum jurisdiction) to hear certain appeals from the High Court. Section 11 of the High Court of the Provinces (Special Provisions) Act reads as follows:

1. The Court of Appeal shall have and exercise, subject to the provisions of this Act or any other law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3) (a), or (4) of Article 154P of the Constitution and sole and exclusive cognizance by way of appeal, revision and restitutio in integrum of all causes, suits, actions, prosecutions, matters and things of which such High Court may have taken cognizance:

Provided that, no judgment, decree or order of any such High Court, shall be reversed or varied on account of any error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

- 2. The Court of Appeal may in the exercise of its jurisdiction, affirm, reverse, correct or modify any order, judgment, decree or sentence according to law or it may give directions to any High Court established by Article 154P of the Constitution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit;*
- 3. The Court of Appeal may farther receive and admit new evidence additional to, or supplementary of, the evidence already taken in any High Court established by Article 154P of the Constitution touching*

the matters at issue in any original case, suit, prosecution or action, as the justice of the case may require.

[78] Thus, under section 11 (1) of the Act No. 19 of 1990, the Court of Appeal shall have and exercise, subject to the provisions of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 or any other law:

1. An **appellate jurisdiction** for the correction of all errors committed by the **High Court established by Article 154P in the exercise of its jurisdiction under Article 154P (3) (a) or Article 154P (4)** of the Constitution; and
2. **Sole and exclusive cognizance by way of appeal, revision and restitution interim of all causes, suits, actions, prosecutions, matters and things of which such High Court may have taken cognizance;**

[79] The first part of section 11 enables the Court of Appeal to receive and exercise, subject to the provisions of the Act or any other law, **an appellate jurisdiction** for the correction of errors in fact or in law which shall be committed by any High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3)(a) or (4) of Article 154P. This section has created and granted **jurisdiction** to the Court of Appeal to hear appeals from the High Court established by Article 154P in the exercise of its jurisdiction under paragraphs **(3)(a) and or (4) of Article 154P of the Constitution.**

[80] The first part of section 11 (1) however, does not expressly or by implication grant a **right of appeal** to any individual aggrieved by any error committed by the High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3) (b) of Article 154P of the Constitution. It has only granted appellate jurisdiction to the Court of Appeal in respect of errors committed by the High Court

in the exercise of its jurisdiction under paragraph (3) (a) or (4) of Article 154P of the Constitution.

[81] The second part of section 11 (1) also gives the Court of Appeal “sole and exclusive cognizance by way of appeal, revision and *restitutio in integrum* of all causes, suits, actions, prosecutions, matters and things of which such High Court may have taken cognizance”. However, the second part is complementary to the first part and proceeds to give the Court of Appeal sole and exclusive cognizance over all the matters referred to in section 11 (1). It further spells out the manner of the exercise of the appellate jurisdiction of the Court of Appeal (by way of appeals or revisions or restitution integrum) in respect of all those matters referred to in section 11 (1) (see the interpretation of the second part of Article 138 by Kulatunga J. in *Abeygunasekera v. Setunga and others* (1997) 1 Sri LR 62).

[82] However, the first part of section 11 (1) is limited to paragraph (3) (a) or (4) of Article 154P and paragraph (3) (b) of Article 154P is excluded from the exercise of the jurisdiction of the Court of Appeal under section 11 (1) of the Act.

(d) Powers of Court of Appeal under Section 11 (2) of the Act No. 19 of 1990

[83] Subsection (2) and (3) of section 11 of the Act No. 19 of 1990 only refers to the powers of the Court of Appeal in the exercise of its jurisdiction (whether by way of appeals or revisions or *restitutio in integrum*). It does not expressly or by implication grant a right of appeal to any individual aggrieved by any error committed by the High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3) (b) of Article 154P.

[84] In terms of subsection (2) of section 11, the Court of Appeal has power, in the exercise of its jurisdiction under section 11 (1) to affirm, reverse, correct or modify any order, judgment, decree or sentence according to law and give directions referred to in subsection (2) to the High Court established by Article 154P or exercise any other power referred to in subsection 3.

[85] In my view, the words in section 11 (2) cannot be read in isolation and therefore, it should be read with the words in section 11 (1) of the Act. The powers of the Court of Appeal under section 11 (2) are limited to the matters referred to in section 11 (1) in the exercise of its jurisdiction- whether appellate or revisionary, under paragraph (3) (a) or (4) of Article 154P of the Constitution. Section 11 cannot be dissected into two parts and held that in addition to subsection (1) of section 11, subsection (2) of section 11 has further created a separate jurisdiction to the Court of Appeal for the correction of ‘**any order**’ made by the High Court in the exercise of its appellate or revisionary jurisdiction under Article 154P (3) (b).

[86] Section 11 of the Act No. 19 of 1990 in any event, has not expressly or by implication granted a **right of appeal** to the Court of Appeal in respect of any order made by the High Court in the exercise of its revisionary or appellate jurisdiction under Article 154P (3) (b) of the Constitution.

[87] In the result, the powers of the Court of Appeal to affirm, reverse or modify **any order, judgment, decree or sentence** of a High Court under section 11 (2) of the High Court of the Provisions (Special Provisions) Act should be read in the context of **any order, judgment, decree or sentence** entered or imposed by the High Court in the exercise of its jurisdiction under paragraph (3) (a) or (4) of Article 154P of the Constitution.

[88] In the result, the right of appeal against a final order, judgment or sentence made by the High Court in the exercise of its revisionary jurisdiction under paragraph (3) (b) of Article 154P of the Constitution is governed by Article 154P (6) of the Constitution. I hold that it is Article 154P (6) of the Constitution that has granted a **right of appeal** to the Court of Appeal and thus, any person aggrieved by **any final order or judgment or sentence** of any High Court, made in the exercise of its jurisdiction under Article 154P (3) (b) is entitled to appeal to the Court of Appeal against such **final order or judgment or sentence**.

(e) Is the order refusing notice a “final order or judgment” within the meaning of Article 154P (6) of the Constitution?

[89] Mr. Wickremasinghe submitted that Article 154P (6) has limited the right of appeal to a **final order, judgment or sentence** of a High Court of a Province exercising its jurisdiction under paragraph (3) (b) or (3) (c) or (4) of Article 154P. His contention was that the order refusing notice by the High Court is not a **final order, judgment or sentence** within the meaning of Article 154P (6) of the Constitution and as such, no appeal could have been filed by the Appellant against such order under Article 154P (6) of the Constitution.

[90] He referred to the ‘order approach’ adopted by the Supreme Court in *Siriwardana v. Air Ceylon Ltd* (1984) 1 Sri LR 286, ‘application approach’ adopted by the Supreme Court in *Ranjit v. Kusumawathie and others* (1998) 3 Sri LR 232 and ‘application approach’ adopted by the Divisional Bench of the Supreme Court in *S. Rajendra Chettiar and others v. S. Narayanan Chettiar and others* (2011) 2 Sri LR 70 to determine what constitutes a final order or judgment. He further relied on the decision of a Bench of Seven Judges of the Supreme Court in *Dona Padma Priyanthi v. H.G. Chamika Jayantha and two others* S.C. Appeal 41/2015 S.C.

Minutes of 04.08.2017 which has refused to depart from the judgment in *S. Rajendra Chettai and others v. S. Narayanan Chettiar and others* (supra).

[91] His submission was that the Supreme Court had followed the decisions of the English Courts to determine what constitutes a “final order” or “judgment” and on the basis of those judgments, the impugned order of the High Court of the Province did not result in the determination of the rights of the parties and thus, it is not a final order under Article 154P (6) of the Constitution.

[92] Our attention has been drawn by Mr. Wickremasinghe to the recent decision of this Court in *Jayasinghe Kodithuwakkulage Nuwan Pathirana v. Sujith Harshana Manamperi Goonewardena, Palmgarden Estate, Ratnapura and two others* CA (PHC) 15/2016 CAM 14.07.2016). The question that arose in the said case was whether the order of the High Court refusing notice in a revision application filed in respect of an order made by a Primary Court Judge under Part VII of the Primary Courts Procedure Act was a “final order” under Article 154P(6) of the Constitution and if so, whether an appeal lies against such an order. Dehideniya J. having followed the decision of the Supreme Court in *S. Rajendra Chettiar and two others v S. Narayanan Chettiar and others* (supra) held:

“In the present case, the learned High Court Judge has refused to issue notice in a revision application. This appeal is against that decision. If the Court decided to issue notice, it will not determine the case. The action/proceeding has to be proceeded. Therefore, according to the principle of the law pronounced in the case of Chettiar v. Chettiar (supra), the decision of the High Court not to issue the notice is not a final order. Accordingly, no appeal lies”.

[93] However, Mr. Wanigapura submitted that all the aforesaid decisions of the Supreme Court, including *S. Rajendra Chettiar and others v. S. Narayanan Chettiar and others* (supra) and *Dona Padma Priyanthi Senanayake v. H. G. Chamika Jayantha and others* (supra) had been pronounced under Chapter LVIII of the Civil Procedure Code. He submitted that Chapter LVIII of the Civil Procedure Code refers to appeals against orders and judgments of the original Courts whereas the present appeal has been filed against an order of the Provincial High Court in the exercise of its revisionary jurisdiction. His contention was that Article 154P (6) does not speak about a finality of an order or a judgment like Chapter LVIII of the Civil Procedure Code and, thus, an appeal lies to the Court of Appeal against the impugned order under Article 154P (6) of the Constitution.

[94] In the result, he submitted that Chapter LVIII of the Civil Procedure Code or the decisions of the Supreme Court in *S. Rajendra Chettiar and others v. S. Narayanan Chettiar and others* (supra) and *Dona Padma Priyanthi Senanayake v H. G. Chamika Jayantha and others* (supra) would not apply to the present appeal filed under Article 154P (6) of the Constitution.

[95] The learned Counsel for the Appellant did not, however, seek to base his argument that the impugned order was a "judgment" within the meaning of Article 154P (6) of the Constitution. The first question that calls for a decision under this part is as to what constitutes a "final order" for the purpose of Article 154P (6) of the Constitution and then, whether the order of the Provincial High Court refusing notice amounts a "final order" within the meaning of Article 154P (6) of the Constitution of Sri Lanka.

[96] The expression "final order" is obviously used in Article 154P (6) as opposed to the expression "interlocutory order". The expression

“interlocutory order” is used only in the proviso to section 9 of the High Court of the Provinces (Special provisions) Act No. 19 of 1990 in relation to a special leave to appeal to the Supreme Court. The crucial question that arises is: what is the test for determining whether an order is a “final order” within the meaning of Article 154P (6) of the Constitution.

[97] I shall first consider the argument of Mr. Wanigapura. Section 754 (5) of the Civil Procedure Code provides “Notwithstanding anything to the contrary in this Ordinance, for the purposes of this chapter-

“judgment” means any judgment or order having the effect of a final judgment made by any civil court; and

“order” means the final expression of any decision in any civil action, proceeding or matter which is not a “judgment”.

[98] A perusal of the above-mentioned judgments pronounced by the Supreme Court reveals that the English cases have not determined what constitutes a “judgment” or an “interlocutory order” under the Civil Procedure Code of Sri Lanka. However, it is absolutely clear that our Supreme Court has consistently followed English cases and judgments of the Privy Council as a guiding light in determining what constitutes a “judgment” and an “interlocutory order” under section 754 (5) of the Civil Procedure Code.

[99] In *Siriwardana v. Air Ceylon Ltd* (supra), the Supreme Court, in particular, had referred to the well-known English decisions in *Salaman v. Warner* (1891) 1 Q.B. 734, (C. A) and *Bozson v. Altringham Urban District Council* (1903) 1 K.B. 547 (C.A). The Supreme Court in *Siriwardana v. Air Ceylon Ltd* (supra) laid down the following guidelines which would help in determining whether a particular order has the effect of a final judgment under section 754 (5) of the Civil Procedure Code by

the application of the ‘order approach’ adopted in *Bozson v. Altrincham Urban District Council* (supra).

- (1) It must be an order finally disposing of the rights of the parties;
- (2) The order cannot be treated to be a final order if the suit or action is still left a live suit or action for the purpose of determining the rights and liabilities of the parties in the ordinary way;
- (3) The finality of the order must be determined in relation to the suit;
- (4) The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order, a final one.

[100] In *Ranjit Kusumawathie and others* (supra), Dheeratne J. also referred to the ‘order approach’ adopted in *Bozson v. Altrincham Urban District Council* (supra) which was adopted by Sharvananda J. (as he then was) in *Siriwardene v. Air Ceylon Ltd* (supra) but adopted the ‘application approach’ on the basis of the views expressed by Lord Esher, MR in *Salaman v. Warner & others* (supra). Dheeratne J. held that the final order is one made on such application or proceeding that, for whichever side the order was given, it will, if it stands, finally determine the matter in litigation.

[101] In *S. Rajendra Chettiar and others v. S. Narayanan Chettiar and others* (supra), the Supreme Court referred to the ‘order approach’ adopted in *Shubrook v. Tufnell* (1882) 9 Q.B.D. 621] and *Bozson v. Altrincham Urban District Council* (supra) and the ‘application approach’ adopted in *Salaman v. Warner* (supra). Having considered these English cases, the Supreme Court followed the decision of Denning, MR. in *Salter Rex and Co. V. Ghosh* (1971 2 AER 865) which has held that in determining whether an application is final or interlocutory, regard must be

had to the nature of the application and not to the nature of the order which the Court eventually makes. Thus, the Court held that an application for a new trial if granted would clearly be interlocutory and where it is refused, it is still interlocutory.

[102] In *Dona Padma Priyanthi v. H.G. Chamika Jayantha and two others* (supra), the two issues that were considered by a bench comprising seven Judges of the Supreme Court were (i) whether the judgment in *Rajendran Chettiar v. Narayan Chettiar* relied on by the Court of Appeal was wrongly decided; and (ii) whether the decision enunciated in *Chettiar v. Chettiar* that the ‘application approach’ test should be preferred over the order approach test in deciding whether an order is a final or interlocutory order in civil proceedings should be revisited in this appeal.

[103] In the said case, a preliminary issue was raised by the Defendants that the Plaintiff had failed to comply with section 40 (d) of the Civil Procedure Code when he failed to state in the Plaintiff as to where and when the cause of action arose. The District Judge Court upheld the preliminary issue raised by the Defendants and dismissed the Plaintiff’s action. His Lordship the Chief Justice Dep, having referred to ‘order approach’ adopted in *Shubrook v. Tufnell* (supra) and *Bozson v. Altrincham Urban District Council* (supra) and the ‘application approach’ adopted in *Salaman v. Warnar & others* (supra), followed the ‘application approach’ adopted by Lord Ester in *Salaman v. Warnar & others* (supra). His Lordship the Chief Justice Dep stated:

In order to decide whether an order is a final judgment or not. It is my considered view that the proper approach is the approach adopted by Lord Esher in Salaman vs. Warner (supra) which was cited with approval by Lord Denning in Salter Rex vs Gosh (1971) 2 ALL ER 865 and 866. It stated:

"If their decision, whichever way it is given, will if it stands finally dispose of the matter in dispute, I think that for the purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory".

[104] His Lordship the Chief Justice Dep thus, held that (i) if the preliminary objections were rejected, the cases would have proceeded to trial and as such, in both cases, at the time of dismissal, the rights of the parties were not determined; (ii) orders given in both cases are interlocutory orders and the proper course of action is to file leave to appeal application under section 754 (2) and not preferring an appeal under section 754 (1) of the Civil Procedure Code.

[105] Though the English Courts had not expressed their views in the context of the Civil Procedure Code of Sri Lanka, they had interpreted the expressions, "judgment" or "final order" for the purpose appeals to the Court of Appeal exercising appellate jurisdiction. The Supreme Court of Sri Lanka has repeatedly adopted English cases, while interpreting the expressions "judgment" or "interlocutory order" for the purpose of appeals to the Court of Appeal or the Civil Appeal High Court.

[106] In the circumstances, it would be apt to examine the rationale of the application approach adopted by the Privy Council in *Salaman v. Warner* (supra), *Bozson v. Altrincham District Council* (supra) and *Salter Rex v. Gosh* (supra) to determine what constitutes a "final order" under Article 154P (6) of the Constitution.

(f) A "final order" defined in three English Cases

[107] The term "final" is obviously used in Article 154P (6) as opposed to the term "interlocutory" and thus, the term "interlocutory order" is to be

understood and taken to mean converse of the term “final order”. The views expressed in the following English law cases have been considered by our Supreme Court as guiding lights to determine what constitutes a “final order” or an “interlocutory order”.

***Salaman* test-Application approach-when whichever way it went, it would finally determine the rights of the parties**

[108] In *Salaman v. Warner*, (supra), the question on appeal was whether the order dismissing the plaintiff’s action on the basis that the statement of claim filed by the plaintiff did not disclose any cause of action was a final order or an interlocutory one. Lord Esher, M. R. laid down the test for determining the question as follows:

“The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.”

[109] Fry, L. J. expounded the same test in the following words:

“I conceive that an order is ‘final’ only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is “interlocutory” where it cannot be affirmed that in either event the action will be determined. Applying this test to the present case, it is obvious that the order here was made on an application of which the result would not in one event be final. Therefore, this is an ‘interlocutory order.’”

[110] Lopes, L. J. enunciated the same test, thus:

"I think that a judgment or order would be final within the meaning of the rules, when whichever way it went, it would finally determine the rights of the parties."

Bozson Test-'order approach'-order finally disposing of the rights of the parties

[111] In *Bozson v. Altrincham Urban District Council*, (1903) 1 KB 547, Lord Alverstone, C. J. then proceeded to lay down the test in the following words:

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

Salter Rex & Co. v. Ghosh-Application Approach

[112] Denning L.J in *Salter Rex & Co. v. Ghosh* (supra) having considered varying approaches finally adopted the 'application approach' and stated at page 866:

"There is a note in the Supreme Court Practice 1970 under RSC Ord. 59. R4, from which it appears that different tests have been stated from time to time as to what, is final and what is interlocutory..... In Standard Discount Co. v. La Grange 18773 CPD 67 and Salaman v. Warner (supra), Lord Esher, MR said that the test was the nature of the application to the court and not to the nature of the order which the court eventually made.....So I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory....."

[113] It may be noted at this stage that the Supreme Court of Sri Lanka in *S. Rajendra Chettiar and others v. S. Narayanan Chettiar and others* and *Dona Padma Priyanthi v. H.G. Chamika Jayantha and two others* (supra), had adopted the ‘application approach’ followed in *Salaman v. Warner* (supra) and *Salter Rex & Co. v. Ghosh* (supra). The approach adopted by our Supreme Court in these two cases was that “when whichever way the order went, it would finally determine the rights of the parties, then, the order is final and if it would not, it is then, an interlocutory order”.

[114] It is apt to refer to Atkin’s Court Forms, Volume (2nd Edition), which distinguishes an interlocutory order from a final order at page 297 as follows:

“I refer in this regard to the decision of the Supreme Court in the case of Koranteng v. Amoako [2009] SCGLR, 185 at 194 where Georgina Wood CJ observed in the following words: In our view, a judgment or order which determines the principal matter in question is termed “final” whilst an “interlocutory” order has also been defined in Halsbury’s Laws of England (4th Ed) Vol. 26 paras 506 as “An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision; or (2) is made after judgment and merely directs how the declarations of right already given in final judgment are to be worked out, is termed “interlocutory”.}

[115] It is to be noted that expressions identical to Article 154 (6) of the Sri Lankan Constitution are used in Article 133 of the Indian Constitution, which provides that an appeal shall lie to the Supreme Court from ‘any judgment, decree or final order’ in a civil proceeding of a High Court. Article 134 provides that an appeal shall lie to the Supreme Court from any ‘judgment, final order or sentence’ in a criminal proceeding of a High Court. In interpreting the expressions in Article 133 (1), Chagla, C. J., held

in the Indian Case of *Jamnadas v. Commr. of Income-tax*, AIR 1952 Bom 479 at p. 481:

"60-The expression 'judgment, decree or final order' used in Article 133 (1) are used in its technical English sense, which means a final declaration or determination of the rights of parties and it also means a decision given on the merits. Judgment, decree or final order' is a compendious expression, and each one of the parts of this expression bears the same connotation, viz. that there is an adjudication by the Court upon the rights of the parties who appear before it. Judgment' must not be read in this context in contradistinction to 'decree or final order'."

[116] In *Savitri Devi v. Rajul Devi and others* (supra), Mootham, C.J. having adopted the above-mentioned different tests adopted in the aforesaid three English Cases observed:

"Article 133 of the Constitution of India is the representative of Section 205 of the Courts Ordinance It was, therefore, a product of the draftsmanship of Jurists steeped in English law. The framers of Article 133 of the Constitution of India must have had the provisions of Section 205 of the Government of India Act, 1935, present before their eyes. The Courts in India have, therefore, freely drawn on English cases, while interpreting these provisions of law."

[117] In the result, the order refusing notice, cannot be a "final order" according to the test laid down in *Salaman's* case, which was reaffirmed by Denning L.J in *Salter Rex & Co. v. Gosh* (supra), because although it went in favour of one of the parties, if the order was given in the other way, it would allow the application to go on rather than ending the application and finally disposing of the rights of the parties. The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make the order a final one.

[118] Mr. Wanigapura however, argued that in the absence of any legal provision either in the Constitution or the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, the Appellant could not have filed a leave to appeal application like under section 754 (2) of the Civil Procedure Code. The High Court of the Provinces (Special Provisions) Act No. 19 of 1990 lays down the procedure to appeal to the Supreme Court from any final judgment, final order, decree or sentence or any interlocutory order of the High Court in the exercise of the appellate jurisdiction vested in it by Article 154 (P (3) (b) of the Constitution.

[119] I find that the proviso to section 9 (a) of the High Court of the Provinces (Special Provisions) Act permits the Supreme Court to grant special leave to appeal from any **final or interlocutory order, judgment, decree or sentence** made by such High Court, in the exercise of its **appellate jurisdiction** vested in it by Article 154P (3) (b) or section 3 of the Act. Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 reads as follows:

"Subject to the provisions of this Act or any other law, any person aggrieved by

a) a final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings :

Provided further that the Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree or sentence made by such High Court, in the exercise of the appellate jurisdiction

vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act, or any other law where such High Court has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court.

Provided further that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance; and

b) A final order, judgment or sentence of a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction conferred on it by paragraph (3) (a), or (4) of Article 154P of the Constitution may appeal therefrom to the Court of Appeal".

[120] The High Court has made the order in question in the exercise of its **revisionary jurisdiction** under Article 154P (3) (b) of the Constitution and the Supreme Court has held in *Gunaratne v. Thambinayagam and others* (supra) that section 9 of Act No. 19 of 1990 does not give a right of appeal to the Supreme Court from an order of the High Court in the exercise of its revisionary jurisdiction.

[121] The Supreme Court in *Abeygunasekera v. Sethunga and others* (supra) has however, held that the Appellate jurisdiction of the Court of Appeal under Article 138(1) read with Article 154P(6) of the Constitution is not limited to correcting errors committed by the High Court only in respect of orders given by way of an appeal and the Court of Appeal has jurisdiction to hear an appeal against a decision of the High Court whether given by way of an Appeal or Revision.

[122] However, a bench consisting of 5 Judges of the Supreme Court did not follow this decision in *Abeywardene v. Ajith de Silva* (supra) and held that section 9 of the Act No. 19 of 1990 does not give a right of appeal to

the Court of Appeal from an order of the High Court in the exercise of its appellate jurisdiction. Ananda Coomaraswamy, J. held at page 139:

"The cumulative effect of the provisions of Article 154P (3) (b), 154P(6) and section 9 of Act No. 19 of 1990 is that, while there is a right of appeal to the Supreme Court from the orders, etc., of the High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by Article 154P (3) (b) or section 3 of the Act No. 19 of 1990 or any other law, there is no right of appeal to the Supreme Court from the orders in the exercise of the revisionary jurisdiction..."

[123] Similarly, in *Wickremasekera v. Officer-in-Charge, Police Station, Ampara* (2004) 1 Sri LR 264, Shirani Bandaranayake J. (as she then was) has taken the same view and held at page 267:

"The Court of Appeal does not have appellate jurisdiction in terms of Article 138(1) of the Constitution read with Article 154(6) in respect of decisions of the Provincial High Court made in the exercise of its appellate jurisdiction and it is the Supreme Court that has jurisdiction in respect of appeals from the Provincial High Court as set out in section 9 of the High Court of the Provinces (Special provisions) Act No. 19 of 1990."

[124] While confirming the position that when the High Court exercises appellate jurisdiction, an appeal lies to the Supreme Court after first having obtained leave, Priyasath Dep J. (as he then was) held in *Muththusamy Balaganeshan v. The Officer-in-Charge, Police Station, Seeduwa* S.C. SPL/LA No. 79/2015 decided on 01.04.2016 that "the Accused-Appellant should have filed a Special leave to Appeal application against the

judgment of the High Court exercising Appellate Jurisdiction of the Supreme Court in the first instance instead to the Court of Appeal..."

[125] In the present case, the High Court has made the impugned order while exercising its **revisionary jurisdiction** under Article 154P(3)(b) of the Constitution and thus, the Appellant could not have filed a Special Leave to Appeal application to the Supreme Court against the impugned interlocutory order made by the High Court in the exercise of revisionary jurisdiction under Article 154P(3)(b) of the Constitution. Hence, the Appellant in the present case could not have filed an Appeal to the Supreme Court against the order in question, with the leave of the High Court first had and obtained. On the other hand, the Appellant could not have filed a Special leave to Appeal application against the interlocutory order made by the High Court in the exercise of its revisionary jurisdiction.

(g) Part I of the Court of Appeal (Procedure for Appeals from High Courts) Rules is Complementary to Article 154P (6) of the Constitution

[126] Moreover, Part I of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988 is further complementary to Article 154P (6) of the Constitution as the marginal note to Rule 2 (1) clearly refers to the "**right of appeal**" to the Court of Appeal. Rule 2 (1) provides the procedure to be followed in making appeals to the Court of Appeal from **any judgment, final order or sentence** made by the High Court, in the exercise of its appellate or revisionary jurisdiction **under Article 154P (3)(b)** of the Constitution.

[127] It is to be noted that unlike Part I, Part II of the said Rules relates to the writ jurisdiction of the Provincial High Court. It provides that any person dissatisfied with "**any order**" made by the High Court, in the exercise of the jurisdiction vested in it by Article 154P (4) of the

Constitution, may prefer an appeal to the Court of Appeal against such order. “Any order” under Part II thus, includes any “**interlocutory order**” made by the High Court in the exercise of jurisdiction under Article 154P (4) of the Constitution.

[128] The term “final order” has been used in Article 154P (6) and Rule 2 (1) of the Court of Appeal (Procedure for Appeals from High Courts) Rules together with the term “judgment” and thus, some sort of finality must be present in the case of a “final order” as opposed to an “interlocutory order”, if it is to be appealable under Article 154P (6) of the Constitution.

[129] It is only a “final order, judgment or sentence” that is referred to in Article 154P (6) of the Constitution that is appealable and an interlocutory order would be excluded from the category of a final order or judgment referred to therein. Thus, an appeal against a High Court decision, in the exercise of its jurisdiction under Article 154P (3) (b) would lie to the Court of Appeal only when its decision amounts to a “final order or judgment”.

[130] An order of the High Court amounts to a “final order” only if the order puts to an end the suit and if after the order, the suit is still alive, i.e., in which the right is still to be determined, it will not be a “final order”. The order under appeal, whichever way it is given, does not stand finally dispose of the rights of the parties in dispute or ending the dispute, but the order leaves the rights of the parties to be determined by the Courts in the ordinary way.

[131] I am of the opinion that the order refusing notice dated 05.12.2016 made by the High Court is neither a “final order” nor a “judgment” within the meaning of the expressions used in Article 154 (6) of the Constitution of Sri Lanka. In the result, I hold that no appeal would lie to the Court of

Appeal under Article 154P (6) of the Constitution from any order refusing notice by the Provincial High Court in the exercise of its revisionary jurisdiction under Article 154P (3) (b) of the Constitution. Hence, the second preliminary objection is answered in favour of the Respondent as follows:

No appeal lies to the Court of Appeal from the order refusing notice by the Provincial High Court within the meaning of Article 154P (6) of the Constitution.

[132] Mr. Wickremasinghe invited us to reject the appeal and dismiss the application by upholding the second preliminary objection while conceding that the Appellant's only remedy against the order refusing notice would be a revision to the Court of Appeal under amended Article 138 of the Constitution (see-written submissions filed on behalf of the Respondent 06.03.2020 (pages 14-15). He submitted that the Court of Appeal in *Jayasinghe Kodithuwakkulage Nuwan Pathirana v. Sujith Harshana Manamperi Goonewardena, Palmgarden Estate, Ratnapura and two others* (supra) rejected the appeal under Article 154P (6), as no appeal lies to the Court of Appeal from an order refusing notice (see- further paragraph 92 of this judgment).

[133] However, Dehideniya J. acknowledged that the Court of Appeal did not have the opportunity of hearing the Appellant as the Appellant was absent and unrepresented. Dehideniya J. remarked at page 5 as follows:

"I like to place on record the fact that we did not have the opportunity of hearing the Appellant in this case. The Appellant was absent and unrepresented at the argument".

Indulgence of the Court of Appeal to exercise revisionary jurisdiction *ex mero motu* to remedy a miscarriage of justice

[134] When this matter was mentioned on 01.06.2020 in the presence of both Counsel, Mr. Wanigapura, sought indulgence of this Court, without prejudice to his earlier submissions, to remedy a miscarriage of justice caused to the Appellant due to fundamental rules of judicial procedure and rules of natural justice being violated by the Respondent and the Magistrate's Court by fraudulent acts and illegal orders.

[135] In support of the contention, he submitted that even in a situation where the appeal is rejected, still, the Court of Appeal is empowered to exercise its revisionary jurisdiction *ex mero motu*, even though the Appellant had not invoked the revisionary jurisdiction separately, as a grave miscarriage of justice had been caused to the Appellant warranting the intervention of the Court of Appeal under Article 138 of the Constitution. He had relied on the decisions in *Shaheeda Umma and another v. Hanifa and others* (1999) 1 Sri LR 150, *Mariam Bebee v. Seyed Mohamed* 68 NLR 36 and *Sunil Chandra Kumar v. Veloo* (2001) 3 Sri LR 91 (Vide-further written submissions filed on 03.06.2020).

[136] While conceding that the Court of Appeal has wide powers by way of revision where no appeal lies, Mr. Wickremasinghe however, submitted on 01.06.2020 that such powers could only be exercised in exceptional situations. He submitted that in the present case, this Court could not have exercised the power of revision conferred on it by Article 138 of the Constitution for the following reasons:

1. The Appellant could not have filed a revision application in the Provincial High Court as Article 154(3)(c) of the Constitution does not confer on the High Court revisionary jurisdiction in respect of

an order made by a Magistrate's Court under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979;

2. The Appellant could have filed a revision application under Article 138 of the Constitution in the Court of Appeal instead of an appeal which does not lie and the failure to invoke the revisionary jurisdiction disentitles the Appellant to seek the extraordinary remedy of revision from the Court of Appeal;
3. The Appellant could have filed a writ application in the Court of Appeal under Article 140 of the Constitution instead of filing an Appeal in the Court of Appeal, which does not lie under Article 154 (6) of the Constitution.

[137] He has submitted in the further written submissions filed on 08.06.2020 that (i) the circumstances relied on by the Appellant are not exceptional circumstances warranting the intervention of the Court of Appeal even where a proper revision application had been filed; (ii) as no revision application had been filed by the Appellant, the Court of Appeal cannot consider the circumstances relied on by the Appellant in an appeal; and (iii) the Appellant has failed to comply with the Court of Appeal (Appellate Procedure) Rules 1990 and hence, to accept the appeal as a revision will open floodgates.

[138] In this context, this Court is now invited to consider the following issues:

1. Can the Court of Appeal exercise its revisionary jurisdiction in appropriate cases where no statutory appeal lies to the Court of Appeal from an order of the Provincial High Court?

2. Can the Court of Appeal exercise its revisionary jurisdiction in appropriate cases where the Appellant had not invoked alternative remedies, including the revisionary or writ jurisdiction of the Court of Appeal separately in terms of the Court of Appeal (Appellate Procedure) Rules?
3. Has the Appellant pleaded exceptional circumstances in the Petition of Appeal filed in this Court and satisfy that they amount to a miscarriage of justice warranting the intervention of the Court of Appeal by way of revision?

[139] As noted, this Court has already held that Article 154 (3) (c) of the Constitution has conferred on the High Court revisionary jurisdiction in respect of an order made by a Magistrate's Court under section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979. In the result, the consideration of Mr. Wickremasinghe's first argument does not arise at this stage of the judgment.

[140] This Court further accepted the argument of the Respondent that Article 154(6) of the Constitution has not provided a right of appeal to the Court of Appeal from the order refusing notice in a revision application filed before the Provincial High Court. Now the question is whether the Appellant could indulge the revisionary powers of the Court of Appeal to remedy a miscarriage of justice where no appeal lies to the Court of Appeal from the impugned order made by the High Court.

Revisionary jurisdiction of the Court of Appeal where no statutory appeal lies

[141] The 13th Amendment to the Constitution amended Article 138 (1) of the Constitution and made the High Court of the Provinces subject to the appellate jurisdiction of the Court of Appeal as noted earlier. It is not in

dispute that subject to the provisions of the Constitution, or of any law, the Court of Appeal has powers to exercise its revisionary jurisdiction for the correction of all errors in fact or in law which are committed by the Provincial High Court in the exercise of its revisionary jurisdiction under Article 154P (3)(b) of the Constitution.

[142] In this connection, I shall consider important judicial authorities on the question whether a revision lies where no statutory right of appeal has been provided by the Legislature. It is trite law that the purpose of conferring revisionary jurisdiction on the Court of Appeal is supervisory in nature and that the object is the due administration of justice (*Attorney-General v. Gunawardena* [1996] 2 Sri L.R. 149) in order to correct grave failures or miscarriage of justice arising from erroneous or defective orders.

[143] Relief by way of revision had been granted by the former Supreme Court in cases where there was no appeal in the early case of *Ranasinghe v. Henry* 1 NLR 303 where the appeal was dismissed on the ground that no appeal lies from a claim order made by the District Court. The Supreme Court held that an order of the District Court, which is wrong *ex facie*, may be quashed by the Supreme Court in the exercise of its revisionary power, even though no appeal may lie against such order.

[144] In *Attorney-General v. Gunawardena* (supra), Samarawickrema, A.C.J. at page 156 stated:

"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 or solely, the relieving of grievances of a party. An appeal is a remedy, which a party who is entitled to it, may claim to have as of right, and its object is the grant of relief to a party aggrieved, by an order of a court, which is tainted by error. Revision is so much regarded as designed for cases in which an appeal does not lie.."

[145] It is to meet such a situation where the legislature has not granted a right of appeal to deal with proceedings which cannot be brought before the Court by way of an appeal- either by way of a direct appeal or a leave to appeal that Article 138 of the Constitution has conferred on the Court of Appeal revisionary jurisdiction by making necessary orders as may be necessary for the ends of justice where a miscarriage of justice has occurred.

Limitations to the exercise of revisionary powers-error in the order and exceptional Circumstances

[146] The revisionary powers, though, are quite wide, have been circumscribed by certain limitations. As the power of revision vested in this Court is discretionary, the power will be exercised in cases where an appeal or alternative remedies are available, only in exceptional cases. There have been a long line of cases which have held that the Court of Appeal will exercise its extraordinary powers of revision only in cases where exceptional circumstances are in existence warranting the exercise of such powers irrespective of whether an appeal has been taken or not from the judgment or order sought to be revised or the law provides alternative remedies.

[147] In *Rasheed Ali v. Mohamed Ali* (1981) 1 Sri LR 262 (CA) Soza J. referring to the decisions in *Atukorale v. Samynathan* (1939) 41 N.L.R. 165, *Silva v. Silva* (1943) 44 N.L.R. 4, *Fernando v. Fernando* (1969) 72 N.L.R. 549 and *Rustom v. Hapangama* (1978-79 (2) Sri LR 225) stated at page 34 that “it is well established that the powers of revision conferred on this Court are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal, where it lies, has been taken or not. But this discretionary remedy can be invoked only where

there are exceptional circumstances warranting the intervention of the Court.”

[148] On appeal to the Supreme Court, Wanasundera J. while affirming the views expressed by Soza J. stated in *Rasheed Ali v. Mohamed Ali* (1981) 1 Sri LR 262 (SC) at page 265:

“The powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. Where the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances... ”.

[149] In *Rustom v. Hapangama* 1978-79-80 1 Sri LR 352 (SC), Ismail J. at page 360 stated:

*“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 its powers in revision”.*

[150] In *Colombo Apothecaries Ltd and Others v. Commissioner of Labour* (1998) 3 Sri LR 320, Ranaraja J. stated at page 324:

*“Thus, the general principle is that revision would not lie where an appeal or other statutory remedy is available. Where the law provides an effective remedy to any person aggrieved by an order of a Magistrate's Court, this court will not exercise its revisionary jurisdiction. It is only if the aggrieved party can show **exceptional circumstances for seeking relief by way of revision**, rather than by way of appeal, when such an appeal is available to him as of right, that court will exercise its revisionary jurisdiction in the interests of due administration of justice”.*

[151] The Courts have also held that 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 the Court of Appeal (*Alima Natchiar v. Marikar* (1949) 47 N.L.R. 81). It is trite law that the Court of Appeal would exercise its revisionary powers, whether an appeal or other alternative remedy lies or not or **whether an appeal or alternative remedy lies**, but has been taken or not only where there are exceptional circumstances warranting the intervention of the Court.

Exceptional circumstances amounting to a positive miscarriage of justice

[152] The trends of authorities are also to the effect that where exceptional circumstances are in existence, this extraordinary power will be exercised by the Court of Appeal, especially to prevent a miscarriage of justice being done to a person and/or for the due administration of justice. In the matter of the *Insolvency of Hayman Thornhill* (1895) 2 N.L.R. 105 and *Sabapathy v. Dunlop* (1935) 37 N.L.R 113, it was held that where the interests of justice demand it, the Court will not hesitate to act in revision. In *Rustom v. Hapangama & Co.*, (supra) Vythialingam J. said “**where an order is palpably wrong and affects the rights of a party also**, this Court would exercise its powers of revision to set aside the wrong irrespective of whether an appeal was taken or was available.”

[153] In *Perera v. Muthalib* 45 NLR 412, the bond had been forfeited without an inquiry. Soertsz J. set out the revisionary powers of the former Supreme Court and held that revisionary powers of the Supreme Court are not limited to those cases in which appeal lies or in which no appeal has been taken for some reason. Soertsz, J. further stated at page 413 that the Court would exercise revisionary powers where there has been a **miscarriage of justice owing to the violation of a fundamental rule of**

judicial procedure, but that this power would be exercised only when a strong case is made out amounting to a positive miscarriage of justice.

[154] In *Finnegal v. Galadari Hotels (Lanka) Ltd* (1999) 2 Sri LR 272), it was urged *inter alia*, that the order suspending the enjoining order issued at the instance of the defendant, without giving the plaintiff an opportunity of being heard was an exceptional circumstance warranting the intervention of the Court of Appeal. The Supreme Court held that the plaintiff was questioning the **legality of that order on fundamental issues, including the failure to hold a fair inquiry** amongst other things and were exceptional circumstances warranting the exercise of the revisionary jurisdiction of the Court of Appeal.

[155] In *Attorney-General v Podisingho* 51 NLR 385, Dias S.P.J. identified certain exceptional circumstances under which revisionary jurisdiction is exercised. Dias S.P.J. at page 390 held that “an application in revision should not be entertained save in exceptional circumstances. In my view such exceptional circumstances would be-

- (a) where there has been a miscarriage of justice;
- (a) where a strong case for interference of this Court has been made out by the petitioner; or
- (b) where the applicant was unaware of the order made by the Court of trial.

these grounds are, of course, not intended to be exhaustive”. (*emphasis added*)

[156] In *Vanik Incorporation Ltd v. Jayasekera* (1997) 2 Sri LR 365, Edussuriya, J. held at page 369 that although some of the cases were decided long before the present Constitution was promulgated and amendment to section 753 of the Civil Procedure Code, the Pith and substance of the Supreme Court cases is that revisionary powers should be

execised where a positive miscarriage of justice has occurred due to a fundamental rule of judicial procedure being violated.

[157] In the Indian case of *Caetano Colaco v. Joao Rodrigues*, AIR 1966 Goa, Daman and Diu 32 (FB), the Court said as under 9:

"It is true that the scope of S. 435 of the Code is wider in so far that the High Court can consider the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceeding of an inferior court, but even so, this jurisdiction is not to be exercised in every case of impropriety or illegality, unless it causes failure of justice. As a broad proposition we may state that interference may be justified where (a) the decision is grossly erroneous;

- a. *where there is no compliance with the provisions of law;*
- b. *where the finding of fact affecting the decision is not based on the evidence;*
- c. *where the material evidence of the parties is not considered, and*
- d. *where judicial discretion is exercised arbitrarily or perversely.*

These instances are illustrative and not exhaustive. Each case must of necessity depend on the facts and circumstances of the particular case before the court."

[158] I am of the view that in a situation where no statutory appeal lies, the Court of Appeal has wide powers to exercise the revisionary powers in favour of the Appellant, if it appears to Court that a miscarriage of justice arising from the order complained of has occurred due to a fundamental rule of judicial procedure and rules of natural justice being violated.

Does the failure to invoke the revisionary jurisdiction with a formal application by an aggrieved party prevent the Court of Appeal from exercising its revisionary powers *ex mero motu*?

[159] Mr. Wickremasinghe concedes that the appropriate remedy for the Appellant is to come by way of revision but submits that the failure to file a

separate application and satisfy the existence of exceptional circumstances amounts to non-compliance with the Court of Appeal (Appellate Procedure) Rules 1990, that disentitles to the Appellant to seek indulgence of Court to exercise its revisionary powers.

[160] The practice followed is that unless the Court of Appeal acts *ex mero motu* in the interests of justice, it will ordinarily exercise its power of revision when an aggrieved party makes an application under Article 138 of the Constitution. This position is confirmed by Wanasundera J. in *Rasheed Ali v. Mohamed Ali* 1981 1 Sri LR 262 (SC) at page 265 as follows:

“Ordinarily, the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternative remedy such as the right to file a separate action **except when non-interference will cause a denial of justice or irremediable harm**”.

[161] The revisionary jurisdiction of the Court of Appeal flows from Article 138 of the Constitution and it will be exercised on application made by a party aggrieved or *ex mero motu* (on its own motion) in appropriate cases, as the interests of justice may require. This power is exercised where a fundamental rule of the judicial procedure or rules of natural justice being violated in regard to which it could have otherwise exercised its powers of revision even though the Appellant has not invoked the revisionary jurisdiction. Provided, however, this power will only be exercised where it appears that strong special circumstances exist amounting to a positive miscarriage of justice.

[162] It is settled law that the revisionary jurisdiction is supervisory in nature and therefore, it is exercised in some cases by a Judge of his own

motion, when it is satisfied that a miscarriage of justice has occurred and unless the power is exercised, injustice will result. The following judicial authorities confirm this position. In *Marian Beebee v. Seyed Mohamed* 58 NLR 36, Sansoni CJ had clearly stated the reasons for the exercise of the extraordinary power of revisionary jurisdiction by Appellate Courts as follows:

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that unless the power is exercised injustice will result."

[163] Further, in *Sunil Chandra Kumar v. Veloo (2001) 3 Sri LR 91, Jayasinghe J.* stated at pages 102 and 103:

*"Revision is a discretionary remedy; it is not available as of right. This power that flows from Article 138 of the Constitution is exercised by this Court on application made by a party aggrieved or ex mero motu; this power is available even where there is no right of appeal as for instance Section 74 (2) of the Primary Courts Procedure Act. The Petitioner in a Revision application only seeks the indulgence of Court to remedy a miscarriage of justice. He does not assert it as a right. Revision is available unless it is restricted by the constitution or any other law. I am unable to see any such impediment as observed by Mark Fernando, J. in Weragama (*supra*).*

[164] Mr. Wickremasinghe is asking us to strictly apply a degree of technicality in the exercise of its power of revision *ex mero motu* and refuse any remedy which could have otherwise been granted if a separate formal application had been filed by the Appellant in strict compliance with the Court of Appeal (Appellate Procedure) Rules.

[165] If that argument holds water, the Court of Appeal could not have exercised its revisionary power *ex more motu* in the interests of justice unless a formal revision application is filed and formal notice is issued in strict compliance with the Rules. In such case, *ex mere motu* powers conferred on the Court of Appeal under Article 138 of the Constitution to be exercised in the interests of justice is of no significance and the Court is powerless to remedy any flagrant miscarriage of justice.

[166] I am unable to agree with the submission of Mr. Wickremasinghe. I do not see any such impediment when the power of revision is exercised *ex mero motu* in a fit and proper case where a positive miscarriage of justice has occurred as observed by Dias S.P.J. in *Attorney General v. Podisingho* (supra) at page 331:

"In desire to point out that in exercising its powers of revision this Court is not trammeled by technical rules of pleading and procedure. In doing so, this Court has power to act, whether it is set in motion by a party or not, and even ex mero motu. A Judge of this Court has power to call for a record and in proper cases to revise the order of a Court of inferior jurisdiction. In doing so, of course, this Court will act on the principles laid down by learned Judges in the past. Whether the application in revision has been irregularly brought before this Court or not, once an irregularity has "come to the knowledge" of this Court, it can in a proper case act on such knowledge. I cannot agree with the submission of the learned counsel for the respondent that "The law was made for man, and not man for the law". If that means anything, learned counsel would have this Court to stand by powerless, while illegal orders are made by Magistrates and District Judges. This is a proposition to which I am unable to assent."

[167] The legal position in India appears to be the same. In *Popular Muthiah v. State Represented By Inspector of Police* (2006) 3 SCC (Crl.) 245, the Indian Supreme Court held at paragraphs 27, 29 and 30:

"27. While exercising its appellate power, the jurisdiction of the High Court, although is limited but, in our opinion, there exists a distinction, but a significant one being that the High Court can exercise its revisional jurisdiction and/or inherent jurisdiction not only when an application therefore is filed but also suo motu..."

29. The High Court while, thus, exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive as also procedural matters.

30. In respect of the incidental or supplemental power, evidently, the High Court can exercise its inherent jurisdiction irrespective of the nature of the proceedings. It is not trammelled by procedural restrictions in that:

(i) Power can be exercised suo motu in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused.

(ii) Such a power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed therefor.....

After perusal of the judgment of the Apex Court in the case of Popular Muthiah (Supra) and various judgments of the different High Courts, we find that the High Court in its discretion can exercise suo motu powers to do substantial and complete justice even when it is exercising its appellate powers both with respect to substantive as well as procedural matters and no formal application is required to be filed".

[168] Relief by way of revision had been granted by the former Supreme Court in cases where there is no appeal and even in the absence of a separate application for revision. In the early case of *Ranasinghe v. Henry* 1 NLR 303, the appeal was dismissed on the ground that no appeal lied from a claim order made by the District Court, but the Supreme Court took up the case in revision and quashed the order of the District Court, which is *ex facie* wrong, in the exercise of its revisionary power, even

though no appeal lied against such order and in the absence of a separate application for revision.

[169] In *A. Sinnathangam and another v. E. Meeramohaideen* 60 NLR 394, T.S. Fernando J. 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 correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security”.

[170] Similarly, in *Abdul Cader v. Sittinisa*, 52 NLR 588, the Supreme Court interfered with the judgment of the District Judge by way of revision **even in the absence of a separate application** where the appeal abated in consequence of the failure by the Appellant to tender the proper sum of Rs. 25/- which was the appropriate sum, according to the Schedule under Rule 2 of the Civil Appellate Rules of 1938 in respect of typed-written copies. Gratian J. stated at page 545:

“It is very much to be hoped that the Civil Appellate Rules will be amended at any early date so as to authorise Judges to grant relief to appellants where, as in this case, a technical breach of the rules has caused no prejudice to the other side. To my mind, it would be a travesty of justice if some mere technicality were to deprive a party of his right of appeal to the Supreme Court from a judgment which seriously affects his interests. Until the present rule is relaxed, I see no reason why the revisionary powers of this Court could not be exercised in appropriate cases”.

[171] In *Shaeeda Umma and Another v. Hanifa and Others* (1999) 1 Sri LR 150, the Court of Appeal acted in revision despite the fact that the application for restitutio in integrum filed by the Plaintiff failed as it was prescribed and set aside a void settlement entered in the District Court

even though the Plaintiff had not invoked the revisionary jurisdiction. De Silva J. (as he then was) held at 155:

"Since relief by way of restitutio in integrum is prescribed after 3 years, we hold that the objection of the defendant-respondents is valid and the plaintiff-petitioners are not entitled to get any relief under that. Nevertheless, the powers of revision of this Court are wide enough to embrace a case of this nature. Even though the plaintiff-petitioners have not invoked the revisionary jurisdiction, we propose to exercise the revisionary powers in favour of the 2nd plaintiff-petitioner".

[172] Recently, in *L. B. Finance Company v. M. K. Walisinghe and others* C.A. 191/1997 (F) decided on 27.10.2011, Gooneratne J. having held that there was no right of appeal to the Claimant-Appellant against an order made by the District Court under section 245 of the Civil Procedure Code, nevertheless, acted by way of revision in the absence of a separate application for revision. The Court of Appeal interfered with the order of the District Court when it appeared that there was a miscarriage of justice by the said order even though the Claimant-Appellant had an alternative remedy under section 247 of the Civil Procedure Code. Gooneratne J. in the course of his judgment at page 13 stated:

"As such, I have to take the view that there is no right of appeal to the Claimant-Appellant. However, he would not have been without a remedy since recourse to section 247 was available within a stipulated time (refer to Chettiar v. Coonghe). But if I take this case forward, I am convinced that revisionary powers of this Court could be exercised by the Court of Appeal in a given situation, in the interest of justice.

Therefore, the claimant cannot be deprived of his legal entitlement. In a situation as this and in these circumstances, the party litigant should not be deprived of his legal right merely by taking up a legal objection on his right of appeal (though cannot be faulted) and deny his rightful valid claim recognised by law. As such this Court could

use its inherent powers and act in revision. I would interfere with the judgment of the District Judge substantially on a point of law. It appears to me that there is a miscarriage of justice. As such wide powers of the Appellate Court should not be ignored or curtailed in a case of this nature".

[173] In my view, the Court of Appeal has wide power to exercise its revisionary jurisdiction in fit and a proper case *ex mero motu* as the interests of justice may require, without any formal application filed by any aggrieved party. I hold that when it is necessary to exercise such power in a fit and proper case in the interests of justice and to remedy a miscarriage of justice, the procedural and technical fetters cannot stop us from exercising its *ex meru motu* power of revision even if any party has not moved this Court therefor.

[174] In my view, the Court of Appeal will take up the matter on its own where there are strong exceptional circumstances amounting to a positive miscarriage of justice and its power by way of revision ought be exercised in order to remedy a miscarriage of justice being caused to an aggrieved party, even though such party has not invoked the revisionary jurisdiction.

Will the exercise of revisionary power amounts to a second appeal in a garb of revision where the appeal is rejected?

[175]. The question has also been raised in Court, whether the powers to act in revision by the Court of Appeal *ex mero motu* is an exercise so as to admit, by a side wind an appeal in a garb of a revision, when the legislature has not given a right of appeal. It is significant to refer to the following statement made by Samarakernam A.C.J. on the identical question in *Attorney-General v. Gunawardena* at pages 158 and 164 (supra):

"We are accordingly of the view that this Court has the power to act in revision in this matter, if it is satisfied that adequate grounds exist for the exercise of such powers. We are not unmindful, of the fact

that as there is no appeal in this matter, the power of revision must not be exercised by us so as to admit, by a side wind, an appeal. We think that there must be shown such clear and manifest error and/or material irregularity as calls for the intervention of the Court or prevent or remedy the breach of a fundamental rule relating to a criminal trial or the failure of justice(at 158).

As we have indicated earlier, we are not disposed to exercise our powers in revision to give, by a side wind, an appeal in a matter where there is no right of appeal. Accordingly, if what was involved was no more than an error, we should not have been disposed to interfere. But in this matter the contravention of Section 212 (2) was not technical but substantial and material, and it has led to a decision, which would have, as its effect or result, the breach of a fundamental rule relating to a criminal trial by Judge and Jury. Accordingly, we thought it right to intervene and act in revision, and at the end of the argument we made order setting aside all proceedings and directing a fresh trial on the same charge before another High Court Judge and another Jury". (at 164).

[176] The same principle has been lucidly explained by the *Indian Supreme Court in State of Kerala v. Puttumana Illath Jathavedan Namboodiri*(1999) 2 SCC 452, PATTANAIK,J., at paragraph 5 stated:

"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of Supervisory Jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an Appellate Court nor can it be treated even as a second Appellate Jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

[177] The High Court had not gone into the merits of the complaints of the Appellant on substantive matters and hence, the question of re-agitating or re-appreciating the finality of any order will not arise in this appeal. I hold that when this Court is exercising its revisionary powers *ex mero motu* where a positive miscarriage of justice has occurred, it cannot be construed as an attempt to admit by a side wind, an appeal in a grab of a revision or to allow the Appellant to have a second bite at the cherry to repair his case and present a fresh case.

Is there any express prohibition for the Court of Appeal to consider the present appeal as a revision?

[178] A further question has been raised in Court, whether there is any prohibition for this Court of Appeal to consider this appeal as a revision if the right of appeal to the Court of Appeal has been expressly taken away by the Legislature. If the right of appeal has been taken away by explicit words by the Legislature, it is not possible to consider an appeal as a revision as the Court had no jurisdiction to entertain such appeals that have been expressly prohibited (see- the judgment of Priyantha Jayawardena J. in *Lakshman Ravendra Watawala, Chairman/Director General, Board of Investment of Sri Lankas v. Chandana Karunathilake and Others* SC Appeal 31/2009 and Sc Appeals 35-2009-78/2009 decided on 06.07.2018).

[179] Section 10 (2) of the State Lands (Recovery of Possession) Act No. 7 of 1979 expressly prohibits an appeal from the decision of a Magistrate. This prohibition does not apply to the present appeal. Even though a right of appeal has not been granted to the Appellant against the impugned order, the Legislature has not expressly prohibited a right of appeal against the impugned interlocutory order.

[179] It is quite clear that there is no prohibition in the present case to consider an appeal as a revision if there are strong exceptional

circumstances amounting to a miscarriage of justice in order to remedy such a miscarriage of justice even though no formal application has been filed by an aggrieved party.

Are there any exceptional circumstances amounting to a miscarriage of Justice?

[180] The final question to be considered is whether there are exceptional circumstances amounting to a positive miscarriage of justice calling for the intervention of this Court by way of revision.

[181] Mr. Wanigapura drew our attention to a number of exceptional circumstances pleaded by the Appellant in the Petition filed in the High Court and the same pleaded in the Petition of Appeal addressed to the Court of Appeal. Perusal of the Petition filed in this appeal reveals that the Appellant had clearly pleaded a number of strong exceptional circumstances as follows:

- 01.02. 2018.12.03 වන දින වරින් වර් සංගෝධිත 1979 අංක 7 දුරණු රුධිම් (සහතකය ආපසු ලබා ගැනීමේ) පනතේ 5 වැනි වගන්තිය යටතේ ඇල ඇද්දර ගෙදර දැක්වා නැමැත්තාට එරෙහිව ඉල්ලම්පත්‍රකක් ගොනුකර ඇති මෙහි මතු වගලන්තරකාරීය යනුවෙන් හඳුන්වනු බෙන ඉල්ලම්කාර වගලන්තරකාරීය එකී දැක්වා නැමැත්තා වෙත ලියාපදිංචි තැපැලෙන් යටත දැන බිවත්....
- 01.03. එකී ඉල්ලම්පත 2016.02.12 වන දින අමතා ඇති අතර, එදින වගලන්තරකාර පාර්ශවයට ලියාපදිංචි තැපැල් මගින් සිතාසි නිඩුත් කර කැදුවීම් දිනය 2016.02.26 වැනි දින නියම කර ඇත.
- 01.04. 2016.02.26 වැනි දින "වගලන්තරකරු නැත" යනුවෙන් සටහන් කර ඇති උගත් මහේස්සාත්තාමා ලියාපදිංචි තැපැලෙන් සිතාසි යටා ඇති හෙයින් හා සිතාසි වාර්තා ආපසු ලැබේ නැති හෙයින් සිතාසි හාරදුන් බවට පූර්ව නිගමනය කර තෙරපිමේ නියෝග නිඩුත් කර ඇත. එහෙත් 2016.03.09 වැනි දින සිතාසි හාරදුන් බව සටහන් කරමින් ආපසු එටා ඇත.
- 01.05. ඉන්පසු 2016.09.30 වැනි දින තුක්තිය හාරදුමේ වාර්තාව ඉදිරිපත් කළ පිස්කල් නිලධරිය, එකී තුක්තිය හාරදුමට ගිය අවස්ථාවේද මෙහි මින්මතු පෙන්සම්කරු යනුවෙන් හඳුන්වනු බෙන වගලන්තරකාර-පෙන්සම්කරු ඉදිරිපත් වෙමින් ඔහුගේ වාසගම නිවැරදි වුවද නම වෙනස් බව පාවසු බවත්, එහෙත් වගලන්තරකාරීගේ නියෝජිතයින් නඩුවට අදාළ විෂය වස්තුව එකී ඉඩම බිවද, පෙන්සම්කරු එහි වගලන්තරකාර බිවද පවසා සිටි බවත්, දැක්වමින් තුක්තිය හාරදුන් බව පවසා ඇත.

- 01.06. පෙන්සම්කරදට අස්කිරීමේ දැන්වීමක් හෝ අධිකරණයේ සිතායි නොලැබුණු බවත්, මෙයේ විංචිකව තුළුත්තිය හාරගෙන ආක්කර එක හමාරක් පමණ වූ ඔහුගේ තේ ඉඩමේ තේ ගස් ගලවා ඉවත් කරමින් සිටින බවත් පවසා සිටියි.
- 01.10. පෙන්සම්කරද නෙරපා භාරීම පිළිස 2016.02.26 වැනි උගේ උගේ මහේස්ත්‍රාත්තුමා දී ඇති නියෝගයෙන් අන්පේරියට පත් පෙන්සම්කරද මෙම ඉල්ලම විවාදයට ගන්නා අවස්ථාවේද තම නිතිඥවරයා මගින් දැක්වීය හැකි අනෙකුත් සුවිශේෂී හේතු අතර පහත දැක්වෙන සුවිශේෂී හේතු මත එකී නියෝගය ඉවත් කරවා ගැනීම පිළිස ප්‍රතිශේෂාධන අධිකරණ බලය ක්‍රියාත්මක කරවා ගැනීමට නිමිකම් ලබා සිටියි.

එකී සුවිශේෂී හේතුන් නම්,

- i. එකී නඩුව පැවතීමට පෙර අනුගමනය කළ සුතු විධානාත්මක ප්‍රතිඵාන වගාන්තරකාරීය විසින් ඉටුකරනු නොලැබ ඇති හෙයින්, එනම් නිසි පුද්ගලයට අස්කිරීමේ දැන්වීම හාර දී නොමැති හෙයින් එකී නියෝගය නිතියට පටහැනි වීම.
- ii. උගේ මහේස්ත්‍රාත්තුමා ලියාපදිංචි තැපැල පිළිබඳ පුරුව නිගමනය යොදාගෙන නිබීම අවස්ථානුකූලව ගත්වීම නිතියට පටහැනි වීම.

[182] He submitted that there are serious violations of fundamental rules of judicial procedure and breach of rules of natural justice amounting to a miscarriage of justice and that the order of ejection had been made **without notice and knowledge** of the Appellant as apparent on the face of the record, in total disregard of the mandatory provisions of the State Land (Recovery of Possession) Act No. 7 of 1979.

[133] He further submitted that a grave miscarriage of justice has been caused to the Appellant by the failure of the learned High Court Judge to hear the Appellant on material points and consider the following strong exceptional circumstances specifically pleaded in the petition of appeal prior to the making of the manifestly erroneous order refusing notice by the learned High Court Judge:

1. The Respondent had not named the Appellant in the quit notice dated 21.09.2015 and the said quit notice had been sent to a person by the name of **Elaaddara Gedera Dasanayake** who is not the Appellant who is **Elaaddara Gedera Samaranayake** (pages 34 and 69 of the brief);

2. The Respondent had filed the application in the Magistrate's Court seeking to eject **Elaaddara Gedera Dasanayake** and no application for the ejectment of the Appellant had been made by the Respondent (pages 28, 33 and 55 of the brief);
3. The learned Magistrate had issued summons by registered post on the said **Elaaddara Gedera Dasanayake** and the said summons had been returned undelivered as per the minute of the Registrar (pages 29-30 and 70-72 of the brief);
4. The learned Magistrate had not issued summons on the Appellant **Elaaddara Gedera Samaranayake** as he had not been named in the application and the affidavit filed by the Respondent in the Magistrate's Court (pages 29, 44, 70-72 of the brief);
5. The order of ejectment had been made only against the said **Elaaddara Gedera Dasanayake** but the Appellant **Elaaddara Gedera Samaranayake** had been ejected by the Fiscal without any order of ejectment being made against the Appellant; (pages 44, 56 64-68 of the brief);
6. As the record demonstrates, **the Appellant was unaware of the order of ejectment** made by the Magistrate's Court prior to his ejectment by the Fiscal Officer of the Magistrate's Court.

[183] I have carefully examined the petition of appeal filed by the Appellant in this appeal and the identical petition filed by the Appellant in the High Court. I am satisfied that the Appellant has pleaded in the petition of appeal strong exceptional circumstances amounting to a positive miscarriage of justice due to fundamental rules of judicial procedure and rules of natural justice being violated.

[184] The Appellant had also brought to the notice of the learned High Court Judge that he had no knowledge of the order of ejectment made by the learned Magistrate until the time he was ejected by the Fiscal Officer and thus, it was a violation of the fundamental rule of judicial procedure that a person who sought to be affected by an order shall first be heard. The learned High Court Judge has failed to deal with any exceptional circumstances and consider whether they are capable of affecting the validity of the order of ejectment made by the learned Magistrate but refused notice on an erroneous assumption of law with regard to the principles laid down by the Supreme Court in *Superintendent, Stafford Estate and others v. Soliamuthu Rasu v.* (supra).

[185] I am of the view that the failure of the learned High Court Judge to consider any exceptional circumstances raised by the Appellant in his petition filed in the High Court has resulted in a flagrant miscarriage of justice affecting the substantive rights of the Appellant warranting the intervention of this Court by way of revision. In this context, I hold that the revisionary powers of the Court of Appeal are wide enough to embrace a case of this nature to remedy a miscarriage of justice.

[186] The Respondent has already conceded that the appropriate remedy for the Appellant is to make an application for revision to this Court under Article 138 of the Constitution and thus, the Respondent will not be in any manner prejudiced, when this Court is exercising revisionary jurisdiction *ex mero motu*, to remedy a miscarriage of justice.

[187] Accordingly, I am inclined to consider the appeal as a revision and exercise revisionary powers of this Court *ex mero motu* in favour of the Appellant, even though the Appellant has not invoked the revisionary jurisdiction by way of a formal application. The learned High Court Judge must now determine whether the exceptional circumstances pleaded in the

petition filed by the Appellant in the High Court are capable of affecting the validity of the order of ejectment made by the learned Magistrate in terms of the provisions of the State Land (Recovery of Possession) Act No. 7 of 1979.

Conclusion

[188] For those reasons, I set aside the order of the learned High Court Judge of the Sabaragamuwa Province dated 05.12.2016 and direct the learned High Court Judge to determine the Appellant's revision application filed in the Provincial High Court on its merits.

JUDGE OF THE COURT OF APPEAL

Shiran Gooneratne J.

I agree.

JUDGE OF THE COURT OF APPEAL