

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

In the matter of an application for
revision under and in terms of Article
138 of the Constitution read with the
High Court of the Provinces (Special
Provisions) Act No.19 of 1990.

Officer in Charge,
Police Station,
Welikada.

Complainant

**CA (PHC) APN 47/ 2015
High Court Colombo
Revision Application
No. HCRA 122/2014
M.C. Case No.3787/4/2014**

VS.

01. Done Lakshmi Ranasinghe,
No. 615/06A, Rajagiriya Garden,
Nawala Road,
Rajagiriya.

1st Party Respondent

02. Dilshan Nerious Roger Fernando,
No. 24B, Fairmount Flats,
Buthgamuwa Road,
Rajagiriya.

2nd Party Respondent

AND BETWEEN

Done Lakshmi Ranasinghe,
No. 615/06A, Rajagiriya Garden,
Nawala Road,
Rajagiriya.

**1st Party Respondent-
Petitioner**

VS.

Officer in Charge,
Police Station,
Welikada.

Complainant-Respondent

Dilshan Nerious Roger Fernando,
No.24B, Fairmount Flats,
Buthgamuwa Road,
Rajagiriya.

**2nd Party Respondent-
Respondent.**

AND NOW BETWEEN

Dilshan Nerious Roger Fernando,
No.24B, Fairmount Flats,
Buthgamuwa Road,
Rajagiriya.

**2nd Party Respondent-
Respondent- Petitioner**

VS.

Done Lakshmi Ranasinghe,
No. 615/06A, Rajagiriya Garden,
Nawala Road,
Rajagiriya.

**1st Party Respondent –
Petitioner – Respondent**

Officer in Charge,
Police Station,
Welikada.

**Complainant – Respondent –
Respondent**

BEFORE : **W.M.M. Malinie Gunaratne, J. and
P.R. Walgama J.**

COUNSEL : **Asthika Devendra with Lilan Warusuvithana
for the Petitioner.**

**Saliya Pieris
for the Respondent.**

Argued on : 03.07.2015

Written submissions
filed on : 21.07.2015

Decided on : 08.02.2016

Malinie Gunaratne, J.

The 2nd Party – Respondent – Petitioner (hereinafter referred to as the Petitioner) has invoked the jurisdiction of this Court to intervene by setting aside the Order of the learned High Court Judge of Colombo dated 15.07.2014.

The facts that need to be mentioned in brief to appreciate the issue involved in this application are as follows:-

Pursuant to information filed by the Officer in Charge of Welikada Police Station, in the Magistrate's Court of Colombo in terms of Section 66 of the Primary Court Procedure Act, the notice was displayed at the place of dispute and a date was fixed for affidavits of parties.

When the case was called on the next date (02.06.2014) Counsel for the Respondent sought a further date to submit her affidavit. The learned Primary Court Judge refused the said application and the matter was concluded before the Primary Court.

Aggrieved by the said Order of the learned Magistrate dated 02.06.2014, the 1st Party Petitioner – Respondent (hereinafter referred to as the Respondent) preferred a Revision Application to the Provincial High Court of Colombo to have the Order of the learned Magistrate set aside.

The learned High Court Judge revised the said Order of the Magistrate dated 15.07.2014 and as a result, the proceedings of the Primary Court recommenced. Upon an application made by the Respondent, the learned

Magistrate has issued an interim order dated 05.11.2014, against the Petitioner preventing him altering the disputed premises adverse to the Respondent's rights until the final determination of the case.

After receiving notices of the said interim order, the Petitioner appeared before the Court and contended that since the dispute is being considered in the District Court of Colombo, the learned Primary Court Judge lacks jurisdiction to determine the dispute preferred under the Section 66 of the Primary Court Procedure Act.

The learned Primary Court Judge by her Order dated 16.03.2015 rejected the aforesaid objection. In this backdrop, the Petitioner has preferred this application after ten months challenging the Order made by the learned High Court Judge dated 15.07.2014.

This application was listed for support on 03.07.2015. Before this application was supported by the Counsel for the Petitioner, the learned Counsel for the Respondent raised four preliminary objections on the maintainability of this application and objected to the issuance of notice and to granting interim reliefs and moved to have rejected and dismissed the application *in limine*.

Learned Counsel for the parties made submissions and subsequently tendered written submissions.

Counsel for the Respondent submitted that this application should be rejected and dismissed *in limine* for the following reasons:

- (a) The Petitioner had acquiesced and / or accepted the Order of the Provincial High Court and thereby estopped from seeking any

relief from this Court against the said Order of the Provincial High Court dated 15.07.2014;

- (b) There is delay and or / laches on the part of the Petitioner and that no acceptable explanation has been given;
- (c) the Petitioner has suppressed and/or misrepresented material facts;
- (d) the Petitioner has failed to tender material documents and exhibits and therefore failed to comply with the Court of appeal (Appellate Procedure) Rules 1990.

The first objection on which the learned Counsel for Respondent relied is acquiescing and/or accepting the Order of the learned High Court Judge dated 15.07.2014. Elaborating the said objection the learned Counsel contended, knowing that the learned High Court Judge had made an order, the Petitioner disregarding it, on 18.12.2014 made an application before the learned Magistrate to raise a preliminary objection on the next date. Further contended, before making that application the Petitioner was present and / or represented by a Counsel on several dates. The stance of the Counsel is, since 18.12.2014 the Petitioner was present and / or represented by a Counsel without challenging the order made by the learned High Court Judge dated 15.07.2014, and thereby the Petitioner had acquiesced and / or accepted the said Order of the learned High Court Judge. His contention is that by reason of his acquiescence, the Petitioner is precluded in law from invoking the Revisionary Jurisdiction of this Court.

It is the contention of the Counsel for the Petitioner, whether the impugned order was challenged or not, a party cannot acquiesce to an order which is on the face of it a nullity. Then a question arises, having knowledge of the said impugned order at that time why the Petitioner did not challenge it. Instead of that the Petitioner has raised a preliminary objection with regard to the jurisdiction of the Primary Court. It is relevant to note that the Petitioner has not given a plausible answer for the question.

In support of the submissions made by the learned Counsel for the Respondent, the attention of the Court has been drawn to several decided cases. It was decided in *Nagalingam vs. Lakshman de Mel* 78 NLR 231, if a party, having participated in a prolonged proceedings without any objection and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection. Further, it was held, the jurisdictional defect, if any, has been cured by the Petitioner's consent and acquiescence.

In *Alagappa Chitty vs. Arumugam Chitty* (2 C.L. Rep.202) it was held, "Where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round to challenge the legality of proceedings **due to his own invitation or negligence.**"

It is to be noted, that the consent or lack of objection prevents the Petitioner from relying on the irregularity and from complaining the illegality of the Order. The Petitioner had not objected to the proceedings continuing after he appeared or / represented before the Magistrate's Court after on 18.12.2014, on the basis that the purported Order made by the learned High Court Judge on 15.07.2014. Instead, the Petitioner raised a

preliminary objection with regard to the jurisdiction of the Magistrate's Court, complaining that since the dispute is being considered in the District Court of Colombo the learned Primary Court Judge lacks jurisdiction to determine the dispute. When the said preliminary objection was overruled and dismissed, the Petitioner has decided to invoke the revisionary jurisdiction of this Court.

As has been contended by the Counsel for the Respondent, I have no difficulty in upholding the contention that by reason of the acquiescence, the Petitioner is precluded in law from invoking the Revisionary Jurisdiction of this Court.

The next objection that has to be considered is namely, undue delay in filing this application. Counsel for the Petitioner submitted that there is no undue delay in the present application and even if there may be a short delay that too has been explained by the Petitioner.

It is relevant to note, that the Petitioner is seeking by an application filed in the Court of Appeal Registry on the 12th of May 2015, to claim from this Court discretionary relief in respect of an alleged order made on 15.07.2014. As such, there was a delay of over ten months since the making of the order for these papers to be filed, in the Court of Appeal. In the case of *The Attorney General Vs. Kunchitambu* 46 N.L.R. 401, the delay of three months was held to disentitle the Petitioner for relief.

Where there has been a delay in discretionary relief, it is essential that reasons for the delay should be set out in the Petition. (*Dasanayake vs. Fernando* 71 N.L.R. 356.)

Now it is necessary to consider, whether the explanation of the Petitioner with regard to his delay is acceptable.

It is stated in Paragraph 14 of the Petition, since the owner of the premises in question has already sought to resolve the dispute with the Respondent before the District Court, he did not seek to challenge the Order of the learned High Court Judge dated 15.07.2014. He further stated that since the preliminary objection has been overruled by the learned Magistrate he was compelled to challenge the said Order of the learned High Court Judge dated 15.07.2014. In the written submissions filed in this Court by the Respondent, it was contended that, since the matter in dispute has being considered in the appropriate forum, Petitioner bonafide advised himself not to challenge the order of the learned High Court Judge at that juncture and sought to take up a preliminary objection before the Primary Court with regard to the maintainability of the action.

The stance of the Counsel for the Petitioner is when the Court is invited to dismiss a revisionary application on the ground of delay, the same should be carefully considered. To substantiate this position the learned Counsel for the Petitioner has drawn the attention of this Court to several decided cases.

The Court must carefully consider the explanation adduced for the delay. The question whether the delay is fatal to an application in revision depends on the particular facts and circumstances of the case.

The Petitioner has been silent over the application for over ten months without any reasonable reason. It was revealed at the hearing of this case, that before filing this application the Petitioner had made an application after

ten months to the High Court seeking to set aside the said impugned order made by the learned High Court Judge on 15.07.2014 on the basis that the order made by the learned High Court Judge was *per inquiram*. That application has been dismissed.

It is relevant to note upon an application made by the Respondent, the learned Magistrate has issued an interim order dated 05.11.2014 against the Petitioner preventing him from altering the disputed premises adverse to the Respondent's rights, until the final determination of the case. The Respondent after complaining to the Magistrate's Court that the Petitioner has violated the interim order the Petitioner had been charged for contempt of Court. I am of the view, that the reason for filing this belated application is because the Petitioner had been charged for contempt of Court.

The long period of inaction and failure to seek relief on the part of the Petitioner was fatal to an application in Revision. The Court has discretion to refuse the application on the ground of undue delay in commencing the proceedings. As such on this ground alone this application should be rejected.

The next objection that has to be considered is whether the Petitioner is guilty of suppression or misrepresentation of facts. It is the contention of the Counsel for the Respondent that, the Petitioner in his Petition has not stated that he acquiesced in the proceedings before the Magistrate's Court, which is significant in this case. Since I have already dealt with that issue it is not necessary to consider it again.

The Revisionary Power of this Court is a discretionary power and its exercise cannot be demanded as of right unlike the statutory remedy of

Appeal. It was held in T. Varapragasam and Another vs. S.A. Emmanuel C.A. (Rev) – 931/84 – C A M 24.07.91 that the following tests have to be applied before the discretion of the Court of Appeal is exercised in favour of a party seeking the revisionary remedy.

- (a) The aggrieved party should have no other remedy. (Already a civil case has been filed).
- (b) The aggrieved party must come to Court with clean hands and should not have contributed to the current situation. (The Petitioner has been charged for contempt of Court).
- (c) The aggrieved party should have complied with the law at that time. (The impugned order has not been challenged at the proper time).
- (d) The acts complained of should have prejudiced his substantial rights.
- (e) The acts of circumstances complained of should have occasioned a failure of justice.
- (f) There should not be any unreasonable delay in filing the application. (There is a delay)
- (g) There should be full disclosure of material facts and show *uberime fides* as non disclosure is fatal.
- (h) As the conduct of the Petitioner is intensely relevant to the granting of relief, such conduct should not be repellant to the attractions of exercise of revisionary power.

The view of the Court is that the Petitioner has not fulfilled the aforesaid requisites and therefore this is not a fit and proper case to invoke the revisionary powers of this Court.

Accordingly, I hold that the Petitioner who is seeking relief in this revision application to set aside the order of the learned High Court Judge, is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief still the Court has a discretion to deny his relief having regard to his conduct, delay, laches, waiver and submission to jurisdiction are all valid impediments which should stand against the grant of relief.

For the reasons stated above, I uphold the preliminary objections raised by the Counsel for the Respondent. This application is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Application dismissed.