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

In the matter of an Application under and in terms of Section 34 of the Right to Information Act No. 12 of 2016 read together with Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/RTI/REV/04/2022
RTIC Appeal No: 600/2021

The Institute of Chartered Accountants of Sri Lanka
No.30A, Malalasekara Mawatha,
Colombo 07.

PETITIONER

-Vs-

1. Lional Dissanayake,
   No.3/211, 3rd Lane,
   Colombo Road, Bandiyamulla,
   Gampaha.

2. Right to Information Commission
   Room No. 203-204, BMICH,
   Bauddhaloka Mawatha,
   Colombo 07.

3. Justice Upaly Abeyratne (Retired)
   Chairman,
   Right to Information Commission.

4. Kishali Pinto- Jayawardena
   Commissioner,

Right to Information Commission.

5. Justice Rohini Walgama (Retired)
   Commissioner,
   Right to Information Commission

6. Jagath Liyanaarachchi
   Commissioner,
   Right to Information Commission

7. S.R.W.M.R.P. Sathkumara,
   Director General (Acting)
   Right to Information Commission

All of Room No. 203-204, BMICH,
Baudhhaloka Mawatha,
Colombo 07.

RESPONDENTS

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

Counsel: Mr. Kushan De Alwis, P.C. instructed by Mr. Hiran Jayasuriya with Ms. Maithrika Kurukulasuriya for the Petitioner.

Mr. Harith De Mel, P.C. instructed by Ms. Hasini Rupasinghe for the 1st Respondent.
Ms. Himalee Kularathna for the 7th Respondent.

Argued on: 06.09.2023

Written submission tendered on: 06.10.2023 by the Petitioner

Decided on: 14.12.2023

D. N. Samarakoon J.,

The preliminary objection of the 01st respondent, who is the person who sought the intervention of the Right to Information Commission, is that the petitioner "The Institute of Chartered Accountants of Sri Lanka" cannot maintain the present application since it is not an appeal which is provided in section 34 of the Right to Information Act but a revision application.

Section 34(1) says,

> "A citizen or public authority who is aggrieved by the decision of the Commission made under section 32 may appeal against such decision to the Court of Appeal within one month of the date on which such decision was communicated to such citizen or public authority".

It is also submitted for the 01st respondent, that, the reference to the rules made under Article 136 of the Constitution pertaining to revision applications to be applied in respect of every appeal clearly show the intention of the legislature to limit the section to appeals and to exclude revision from a decision made in terms of section 32 of the Act. (paragraph 3.8 of Written Submissions of the 01st respondent)

It is also submitted, that, in fact the intention of the legislature was to exclude revision as a remedy under the law by only providing for a right to appeal in section 34(1). (paragraph 3.23 of the above Written Submission)

The 01st respondent also submits, that, **although applications by way of revision against a decision of the 2nd respondent Commission is not expressly prohibited in section 34,** the express provision of the right to appeal in terms of section 34(1) and the express provision for the application of the rules

of the Court of Appeal pertaining to revision applications to applications filed by way of appeal under section 34(2) clearly indicates the intention of the legislature to exclude revisionary jurisdiction of the Court of Appeal in respect of decisions made under section 32 of the Right to Information Act by law". (paragraph 3.34 of the above Written Submissions)

Having cited several cases too, the crux of the objection of the 01st respondent is that the Right to Information Act in giving a right of appeal has effectively excluded the revisionary jurisdiction of this Court.

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

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

> "It appears from the brief account above that from the very beginning there was no separate independent exercise of revisionary power by any designated body. Such powers were subsumed under the whole gamut of governmental power that the King exercised over decisions of public bodies. In time, however, with the intensification of bodies which fell directly under the royal supervision, it was felt necessary, for reasons of convenience and expediency, that some of the powers be decentralised, and be exercised by other bodies on behalf of the King. When the de-centralisation of power from the King occurred, the court of King's Bench became the deliberate repository of powers of control over statutory bodies. **From the seventeenth century it developed to a point where it exercised supervisory powers over the actions of government bodies, and in particular, bodies created by statute.** This power, which today expresses itself in the process of judicial review, was in the nineteenth century cemented through the pronouncements of the courts. It was held in R v Local Government Board that:

> **[W]here the legislature entrusts to anybody of persons other than to the superior courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies.**
>
> The power of control that is given to the courts is stated to be excisable 'as widely as they can.' But this case in which orders of prohibition were sought by a local authority against a central government body, is but one example of the exercise of the courts' powers over the actions of statutory or administrative bodies. In this case the court did not lay down the parameters for control. **It would not have been advisable to lay down specific parameters given the range of possible circumstances that could require the intervention of the courts."** (page 59)

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

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

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

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

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

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

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

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

In **Gunewardane vs. Orr 2 Appeal Court Reports 172,** Hutchinson C. J., said, '...here the party aggrieved might have obtained leave to appeal notwithstanding the lapse of time that has expired'. In **Perera vs. Silva 4 Appeal Court Reports 79,** Hutchinson C. J., said, 'This is a case in which the applicant had another remedy provided by the legislature; and it is not a case in which the order is obviously wrong '. In **Ameen vs. Rasheed 6 C. L. W. 8,** Abrahams C. J., said, 'I can see no reason why the petitioner should expect us to exercise our revisional powers in his favour when he might have appealed,...' In **AlimaNatchiya vs. Marikar 47 N. L. R. 82,**Keuneman S. P. J., stated, '..we should be slow to exercise our discretion to allow an application in revision in view of the fact that no appeal has been taken in this case'.

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

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

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

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

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

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

'No exceptional circumstances thus have been made out by the petitioner as to why this Court should exercise its powers of revision ex mero motu. As regards the Revision Application No. 1265/81 itself, it has been made very belatedly. According to the motion dated 12.10.81 filed by the Attorney-at-Law for the respondent, it was pointed out by Counsel for the respondent in open Court on 5.8.81 that the application for Leave to Appeal was out of time. This statement has not been denied by the petitioner, so that even though the petitioner was well aware that her application for Leave to Appeal was out of time, she took no prompt steps to file an application for revision until the 23rd October, 1981. The order sought to be revised is

dated 6.3.81 and in view of the inordinate delay of over seven months to file the application for revision No. 1265/81, it must be dismissed'.

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

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

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

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

It seems to this court that the phrase ' shocks the conscience ' came to be used in United States of America and Canada. It is stated that the term originally entered into the United States case law with the decision in Rochin v. California in 1952. It is **Rochin v. California, 342 U.S. 165[1],** decided by the Supreme Court of the United States that added behavior that "shocks the conscience" into tests of what violates due process. This balancing test is often criticized as having subsequently been used in a particularly subjective manner. Justice Felix Frankfurter, wrote the opinion of the court, with which no one dissented, only one Justice abstaining, which overturned the decision of California Supreme

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

Court, which said illegally obtained evidence is admissible on a criminal charge in this state. Today, the phrase ' shocks the conscience of court ' is defined in United States as something that invokes which is the court's equitable power to decide issues based on notions of fairness and justice. The **Black's Law Dictionary,** online edition, defines conscience of court as 'This occurs when a matter of equity is decided by the court and it uses its conscience to decide the issue'. Law Dictionary: What is CONSCIENCE OF THE COURT? definition of CONSCIENCE OF THE COURT (Black's Law Dictionary)

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

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

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

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

It was seen that the 'shocking the conscience of court' test, and considerations whether the order is ex facie wrong have been often applied when the petitioner

failed to avail himself of the other remedy or when that fails on a technicality. However, as Ismail J., says in Rustom vs. Hapangama& Co.,

> 'The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise these powers in revision. If the existence of special circumstances does not exist then this Court will not exercise its powers in revision'.

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

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

> 'It is to be observed that, if as argued by the counsel for the defendant-respondent, an application in revision in respect of an order is precluded by or in virtue of the fact that an appeal too lies in respect of the same order, then that would entail a dismissal or rejection of the application in revision and the two grounds, stated therein ie (a) and (b) above, impeaching the correctness of the order of the learned District Judge, would not arise for consideration'.

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

'But the validity of the above reason for denying the relief in revision can no longer be accepted with favour inasmuch as the Court of Appeal in consequence of the amendment of section 753 by Act No. 79 of 1988 is now clothed with greater amplitude of power in making orders and is not confined, as formerly, ie before the aforesaid amendment, to making the same order which it might have made had the matter been brought before it by way of appeal. Since, prior to the amendment of section 753 the court could whilst acting in revision only make the same order as it could have made in the exercise of its appellate jurisdiction - the right of appeal and right in revision were justifiably treated as more or less, alternative remedies - available, more or less, in such a way that when one was accepted or made available the other had to be rejected or refused. When, as was the case prior to the amendment of section 753 of the Civil Procedure Code, the reliefs available or the orders that could be made by the court, by way of appeal and revision, were conterminous or the same - it could legitimately and even logically be inquired or queried, as had been done by His Lordship, Abrahams, CJ, in the excerpt of the judgment cited above, as to why the revisionary process, which may be described as a privileged procedure, was invoked in preference to that of appeal,several advantages or benefits being attendant on the revisionary process which would not be available to one who seeks relief by way of an appeal (for instance one need not furnish security or keep to certain prescribed time-limits as in the case when one appeals against an order) - the recourse to revision was treated as an extraordinary procedure in contradistinction to the procedure of appeal which was considered to be the normal remedy, when the order in question was appealable - as is the order in this case before me'. Page 66

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

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

His Lordship concluded,

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

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

The judgment in Rustom vs. Hapangama& Co. 1978-79-80 (1) S. L. R. 352, in which several other cases they also cite, had been referred to by Ismail J., was decided in 1980. The decision in Bank of Ceylon vs. Kaleel and others 2004 (1) S. L. R. 284, although decided in 2003, has not considered FERNANDO v. CEYLON BREWERYS LTD. It is so in several other cases such as Somindra vs.

Surasena and others 2000 03 S.L.R. 159, Leslie Silva vs. Perera 2005 02 S.L.R. 184 and also in BengamuweDhammalokaThero vs. Dr. Cyril Anton Balasuriya S.C. Appeal No. 09/2002, S.C. spl. L.A. No. 242/2001 cited on behalf of the plaintiffs in favour of availability of revision too.

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

Though the decision in The Ceylon Brewery Limited vs. Jax Fernando, Proprietor, Maradana Wine Stores, 2001 decided in the Supreme Court by Mark Fernando J., overruled the above decision of U. de Z. Gunewardane J., it was done only in respect of the decision in the latter that an application made under section 86(2) of Civil Procedure Code can be allowed even if that was made one day after the stipulated time of 14 days. The Supreme Court said, " I therefore set aside the judgment of the Court of Appeal on that point". The decision pertaining to wider powers given by amended section 753, the ability of the court to make a justifiable order in revision and hence revision not being only an additional remedy granted on mere discretion was hence not set aside.

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

error or circumstances that shock conscience of court, revisionary jurisdiction can be exercised in the present application.

The answer lies in the dicta of Chief Justice Sansoni.

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

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

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

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

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

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

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

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

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

There is no doubt that the Right to Information Commission comes under the term “other institution” in the words “[of which such High Court, Court of First Instance], tribunal or other institution” in Article 138.

Therefore despite the petitioner not calling himself an appellant, which is regarding the form, but not the substance of this application, which has obviously caused due to the reference in section 34 to revisionary rules, this Court overruling the preliminary objection decides to hear the matter in the application.

Judge of the Court of Appeal

Hon. Neil Iddawala J.,

Judge of the Court of Appeal.