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

In the matter of an appeal under the provisions of Section 154p(3) (b) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 9 of the High Court (Special Provisions) Act No. 19 of 1990.

W.A. Nelum Kumari
Jayaratne Niwasa,
KolambageAra.

CA (PHC) 94/2014

High Court Embilipitiya
Case No. HCRA 06/2014

M.C. Embilipitiya Case No. 77534/12

Applicant

Vs.

W.A.Dhammika Kumara,
Anura Florists,
97 1/2, Boddhiyamaluwa,
Embilipitiya.

Defendant

And between

W.A.Dhammika Kumara,
Anura Florists,
97 1/2, Boddhiyamaluwa,
Embilipitiya.

Defendant-Petitioner

Vs.

W.A. Nelum Kumari
Jayaratne Niwasa,
KolambageAra.

Applicant-Respondent

And now Between

W.A.Dhammika Kumara,
Anura Florists,
97 1/2, Boddhiyamaluwa,
Embilipitiya.

Defendant-Petitioner-Appellant

Vs.

W.A. Nelum Kumari
Jayaratne Niwasa,
KolambageAra.

Applicant-Respondent-Respondent

Before : **H.C.J. Madawala , J**

&

L.T.B. Dehideniya, J

Counsel : A.K. Chandrakantha for the Respondent-Petitioner-Appellant.
Vijaya Niranjan Perera for the Applicant-Respondent-Respondent

Argued On : 29 /08 /2016

Written Submissions On : 29 /09 /2016

Decided on : 16 / 12 /2016

H. C. J. Madawala , J

The Applicant-Respondent-Respondent this action case No 77534/12 in the Magistrate's Court of Embilipitiya on 17/09/2012 under the Maintenance Act No. 37 of 1999 against her husband the Petitioner Appellant seeking an order for maintenance for herself and for the child known as Visul Uthara born as a result of the wedlock between the Petitioner-Appellant and the Respondent. Since the Respondent was 6 months pregnant at the time of this application she also requested a maternity allowance from the Petitioner.

The Petitioner-Appellant consented to pay maintenance only to the child and declined to pay maintenance or maternity allowance to the Respondent as he denied the paternity of the fetus. The Learned Magistrates ordered interim monthly payment of Rs.5000/- to the child and Rs.2000/- to the Respondent respectively.

The Respondent thereafter by her application dated 18/02/2013 stated that she gave birth to a baby girl on 13/01/2013, named her as Vihanga Uthare and requested an order to pay Rs.20000/- monthly for the maintenance of newly born daughter and for enhancement of interim payments of maintenance for the elder son and herself.

The Petitioner- Appellant again denied the paternity of the newly born child. As both parties were ready for a DNA test, the court ordered a DNA test on 19/06/2013. The Report of the paternity test carried out by GENETECH received on 30/10/2013 was pronounced by the Learned Magistrate on 20/11/2013. The Petitioner-Appellant vehemently objected to the findings of the report and requested the court for afresh

DNA test. The Learned Magistrate declined this request, accepted the report and made a ruling that the Petitioner- Appellant is the biological father of the newly born child and ordered to pay interim payment of Rs.5000/- from the month of birth – January 2013.

Being aggrieved by the orders the Petitioner-Appellant preferred a revision application RA 06/2014 in the Provincial High Court of the Sabaragamuwa Province Holden in Embilipitiya. The Learned High Court Judge of the Provincial High Court having heard the said application made order dated 21/08/2014 and dismiss the revision application of the Petitioner.

Being aggrieved by the order the Petitioner- Appellant preferred the present petition of appeal bearing No CA (PHC) 94/2014 against the order of the Hon. Judge of the Provincial High Court. Subsequently he has preferred an application for revision bearing No. CA (PHC) APN 120/2014. When the revision application was taken up for argument court decided to take both the appeal and the revision application together.

On the date of the argument the counsel for the Respondent raised a preliminary objection that the Petitioner Appellant filled both applications in a wrong forum and the Petitioner-Appellant should have preferred this applications before the Supreme Court. He further pleaded that this court does not have jurisdiction to entertain both applications and that they should be dismiss in limine.

Both parties were directed to file written submissions which has been done. We have considered submissions made by both parties.

Sec. 14 of the Maintenance Act No 37 of 1999 read as follows,

14 . (1) " *Any person who shall be dissatisfied with any order made by a Magistrate under section 2 or section 11 may prefer an appeal to the relevant High Court established by Article 154 P of the constitution in like manner as if the order was a final order pronounced by Magistrate's Court in a Criminal case or matter, and sections 320 to 330 (both inclusive) and sections 357 and 358 of the Code of Criminal Procedure Act No 15 of 1979 shall, mutatis mutandis, apply to such appeal :*

Provided however, notwithstanding anything to the contrary in section 323 of the Criminal Procedure Code Act No 15 of 1979 such order under section 2 shall not be stayed by reason of such appeal, unless the High Court directs otherwise for reasons to be recorded :

Provided further that the Magistrate in forwarding the record to the High Court shall retain a copy of his order for purposes of enforcement.

(2) Any person dissatisfied with an order made by a High Court in the exercise of its appellate jurisdiction under this section, may prefer an appeal therefrom to the Supreme Court, on a question of law, with the leave of the High Court, and where such leave is refused, with the special leave of the Supreme Court, first had an obtained."

It was contended by the defendant Petitioner Appellant that he preferred a revision application and not an appeal to the Provincial High Court against the order of the Learned Magistrate. The impugned order is not in respect of maintenance ordered but the acceptance of the DNA report as conclusive proof of the paternity and

thereby shutting down any opportunity of challenging the findings of the DNA test at the formal inquiry. Order of the Provincial High Court is against the Appellant.

This is an appeal CA(PHC) 94/14 and according to Section 14 (1) and (2) of the Maintenance Act No 37 of 1999 we hold that this court have no jurisdiction to entertain this appeal CA(PHC) 94/14, it is the Supreme Court that has jurisdiction. As regards Section 9 of Act No 19 of 1990 provides for an appeal to the Supreme Court from any order, Judgment, decree or sentence of a Provincial High Court established by Article 154 P of the Constitution in the exercise of the Appellate Jurisdiction vested in it by Article 154 P (3)(b) or section 3 of the Act or any other law.

Section 9 is read 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 :

In the case of The Bank of Ceylon Vs. Kaleel 2004 (1) SLR 284, read as follows,

The Court of Appeal held :

(i) The court will not interfere by way of revision when the law has given the Plaintiff an alternative remedy S.754(2) and when the Plaintiff has not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction.

" In any event to exercise revisionary jurisdiction the order challenged must be occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it- the order complained of is of such a nature which would have shocked the conscience of court."

In the case of **Abeywardene V. Ajith De Silva 1998 1 SLR 134** was held that a direct appeal does not lie to the Supreme Court from the order of the High Court in the exercise of its revisionary jurisdiction. An appeal of such order should be made to the Court of Appeal. This case is not applicable to present case on it is a judgment delivered prior to Maintenance Act No. 37 of 1999.

In the judgment of W. M. A. Janakasiri Fernando Vs. M. M. Deepthi Lakmali decided on 16/06/2012 by Ratnayake PC J, Suresh Chandra J, Dep PC J read 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 involved 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 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 the Article 154 p 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:.."

Hence we uphold the preliminary objections of the Respondent and dismiss this appeal CA(PHC) 94/14 and the connected revision application bearing No CA(PHC) APN 120/14 without cost.

Judge of the Court of Appeal

L.T.D.Dehideniya, J

I agree.

Judge of the Court of Appeal