

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

In the matter of an application for revision made under and in terms of Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Revision) Application No.  
CA (PHC) APN 58/2014

HC Appeal No. HC ALT 43/2012  
HC ALT 44/2012  
LT Application No. 2/109/2010

Seylan Bank PLC,  
No. 90, Galle Road,  
Colombo 03.

RESPONDENT-RESPONDENT-  
PETITIONER

-Vs-

Christobel Daniels,  
No. 38, San Michelle Gardens,  
Battakethera,  
Madapatha 10306.

APPLICANT-APPELLANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Ronald Perera, P.C. for the Petitioner  
Suren Fernando for the Respondent

Written Submissions on : 12.06.2016 (For the Petitioner)  
20.06.2016 (For the Respondent)

Decided on : 14.12.2016

A.H.M.D. NAWAZ, J.

When the matter was taken up for support, Counsel for the Respondent raised the following preliminary objections, namely:

1. Non-compliance with Rule 2(1)(a) of the Court of Appeal (Appellant Procedure) Rules 1990 – absence of a valid / lawful affidavit supporting the Petition;
2. The Petition not demonstrating valid reasons for the invocation of the revisionary jurisdiction of Court;
3. Laches;

Before one deals with the preliminary objections, let me in a nutshell give a conspectus of the background of this application.

The Respondent preferred an application to the Labour Tribunal of Colombo in Application No. LT 2/109/2010 seeking re-instatement with back-wages or alternatively for reasonable compensation for the loss of employment at the petitioner bank.

The Labour Tribunal awarded limited compensation, and the Respondent appealed seeking enhancement of compensation, and the Petitioner appealed seeking that the Order of the Labour Tribunal be set aside.

The High Court dismissed both appeals and upheld the Order of the Labour Tribunal.

The Petitioner has sought to invoke the revisionary jurisdiction of the Court in terms of Article 138 of the Constitution.

The first preliminary objection raised by the respondent engages the question of the absence of a valid affidavit before this Court. Rule 3(1)(a) of the Court of Appeal Rules is germane to this objection.

### **Rule 3(1)(a) of the Court of Appeal Rules: Absence of a Valid Affidavit**

In terms of Rule 3(1)(a) of the Court of Appeal Rules, every application made to the Court of Appeal shall be by way of a petition together with an affidavit in support of the averments in the Petition.

The pertinent objection as raised by the respondent can now be summed up.

- the Commissioner of Oaths who has attested the Affidavit supporting the Petition is one 'Sandamali Bharathiratne';
- Sandamali Bharathiratne is the Legal Officer – Human Resources of the Bank (as borne out by documents X3 annexed to the Petition)

In order to buttress the argument that an invalid affidavit has been filed, the respondent relies on the proviso to section 12 (2) of the Oaths and Affirmations Ordinance.

**Section 12(2) of the Oaths and Affirmations Ordinance** provides that:

*“A Commissioner for Oaths appointed under this Ordinance may administer any oath or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a Justice of the Peace is authorized by law so to do, and in all cases in which an oath, affirmation, or affidavit is commonly administered or taken before a Justice of the Peace; and any oath or affirmation or affidavit administered or taken by a Commissioner for oaths shall in all legal proceedings and for all other purposes have the same effect as an oath, affirmation, or affidavit administered or taken before a Justice of the Peace; and all enactments relating to oaths, affirmations, and affidavits administered or taken before a Justice of the Peace shall, with the necessary modifications, apply thereto:*

**Provided that a Commissioner for Oaths shall not exercise the powers given by this section in any proceedings or matter in which he is attorney-at-law to any of the parties, or in which he is otherwise interested”.**

One has to agree with the contention of Respondent that there is a prohibition against a Commissioner for Oaths attesting an Affidavit if;

- he is attorney-at-law to any of the parties; or
- if he is 'otherwise interested' in the matter

The Respondent has cited the case of *Airport and Aviation Services (Sri Lanka) Limited v. Buildmart (Lanka) Pvt. Ltd.* (2010) 1 Sri. L.R. 292, wherein their Lordships of the Supreme Court interpreting the aforesaid section of the Oaths and Affirmations Ordinance held that:

*“Referring to the preliminary objection raised, learned President’s Counsel for the respondent submitted that when the matter in dispute was referred to arbitration, Malpethi Ratnasinghe, Attorney-at-Law and Assistant Legal Officer of the petitioner, viz., Airport and Aviation Services, was present at the arbitral hearing as an employee and Attorney-at-Law. Thereafter when the matter proceeded to the High Court, the said Malpethi Ratnasinghe had been the instructing Attorney-at-Law of the petitioner. Later when the petitioner preferred an application to the Supreme Court against the judgment of the High Court seeking leave to appeal, the Commissioner for Oaths, who had admitted the affirmation in the purported affidavit, filed together with the petition in the Supreme Court was the said Malpethi Ratnasinghe.*

*By section 12(2) of the Oaths and Affirmations Ordinance, provision has been made for a Commissioner for Oath to administrate any oath or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a Justice of the Peace is authorized by law. The proviso to section 12(2) of the said Ordinance however has restricted this function as a Commissioner for Oath shall not exercise the power enumerated in section 12(2) in any proceeding or matter in which he is Attorney-at-Law to any of the parties or in which he is otherwise interested.*

*Considering the totality of the aforementioned circumstances thus it is apparent that the said Malpethi Ratnasinghe, being the Assistant Legal Officer of the petitioner Company and the Attorney-at-Law for the petitioner at the arbitration proceedings and in the High Court, is a person, who has an interest in the leave to appeal application before the Supreme Court. Accordingly the affidavit filed along with the petition is not in compliance with the proviso to section 12(2) of the Oaths and Affirmations Ordinance. In such circumstances considering all the aforementioned, the affidavit filed by the petitioner had to be rejected.*

*For the reasons aforesaid, I uphold the preliminary objection raised by the learned President's Counsel for the respondent and this leave to appeal application is dismissed in limine. I make no order as to costs".*

Thus it is crystal clear that if one is an attorney-at-law of a party or even if not the attorney-at-law of the party, if one has any other interest in the matter, such person is disabled from attesting the affidavit in terms of Section 12(2).

The words '*otherwise interested*' are indicative of the width and scope of the prohibition contained in Section 12(2).

It has been urged before this Court by counsel for the respondent that in the case at bar Sandamali Bharathiratne has attested the supporting affidavit and is also the 'legal officer – human resources' of the Bank, and also acted as its lawyer in applying for certified copies from the High Court. Thus the legal officer of the bank falls within the prohibited categories of attorneys-at-law who cannot attest the supporting affidavit filed on behalf of the petitioner bank and this Court holds that in the absence of a valid supporting Affidavit, the application must be dismissed *in limine*.

### **Jurisdictional Objection**

The second objection is premised on the ground that when there is a right of appeal available to the Petitioner to appeal to the Supreme Court, the Petitioner cannot invoke the revisionary jurisdiction of this Court. In other words the pith and substance of this objection is that having failed to exercise the right of appeal

specifically provided for in Section 31DD of the Industrial Disputes Act as amended by Act No. 11 of 2003, the Petitioner cannot have recourse to the revisionary jurisdiction of this Court in terms of Article 138(1) of the Constitution.

### **Right of Appeal to the Supreme Court**

Section 31DD of the Industrial Disputes Act as amended by Act No. 11 of 2003 provides as follows:

- (1) Any workman, trade union or employer who is aggrieved by any final order of a High Court established under Article 154P of the Constitution, in the exercise of the appellate jurisdiction vested in it by law or in the exercise of its revisionary jurisdiction vested in it by law, in relation to an order of labour tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had an obtained.*
- (2) The Supreme Court shall, have sole and exclusive cognizance by way of appeal from any order made by such High Court, in the exercise of the jurisdiction vested in such High Court by subsection (3) of section 31D, and it may affirm, reverse or vary any such order of such High Court and may issue such directions to any labour tribunal or order a new trial or further hearing in any proceedings as the justice of the case may require and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by such High Court or any labour tribunal.*

When the Supreme Court has thus been vested with the sole and exclusive jurisdiction with regard to appeals from High Court Labour Appeals, would it be possible for a party who has missed an opportunity to appeal or failed to appeal, to invoke the revisionary jurisdiction of the Court of Appeal? In my view the answer to this question would be in the negative and before I expatiate on this let me advert to the reasons cited by the petitioner to invoke the jurisdiction of the Court of Appeal.

The Petition recites at paragraph 12 that *“for the reasons as set out below the Respondent Bank states that this is a fit and proper case to invoke the revisionary jurisdiction of the Court*

*notwithstanding the lapse of 42 days...*”. The lapse of 42 days is attributed to the non-receipt of the certified copy of the High Court Order in time and the Petitioner has further sought permission (paragraph 15 of the Petition) to tender a certified copy of the High Court brief at a later stage. The Respondent contends that this is not a reason that will sustain the invocation of the revisionary jurisdiction. As the Respondent has contended, the Petitioner was free to file an Appeal before the Supreme Court, while reserving the right to amend papers and/or tender a copy of the High Court Order/Judgment at a later stage.

The invocation of the revisionary jurisdiction in these circumstances would be tantamount to indirectly maintain an appeal to this court (**an appeal notwithstanding lapse of time**) when the sole and exclusive appellate jurisdiction from High Court Labour Appeals is vested in the Supreme Court. Such an exercise of jurisdiction by this Court will also be contrary to Article 138 of the Constitution which reads thus:-

*“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 the High Court, in the exercise of its appellate or original jurisdiction or 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 which such High Court, Court of First Instance tribunal or other institution may have taken cognizance”*

It is quite apparent upon a reading of Article 138 that if the appellate jurisdiction has been vested by any law in any other forum, the Court of Appeal cannot exercise any kind of appellate jurisdiction over a particular matter. It is axiomatic that Article 138 is not entrenched in that it is subject to the provisions of the Constitution and any law and thus the forum jurisdiction created by Article 138 can be transferred or modified by the Constitution or any law-see the Supreme Court determination on the Agrarian Services (Amendment) Bill (the determination reported at page

177 of the book known as Judicial Pronouncements on the 13<sup>th</sup> Amendment edited by Lakshman Marasinghe and Jayampathy Wickremaratne) wherein the Court distinguished between 'entrenched' jurisdiction clauses of the Constitution such as Article 140 and 141 and 'ordinary' jurisdiction clauses such as Article 138 which are "liable to alteration by Parliament by ordinary law" - see the comments of the Supreme Court on the ability of Parliament to alter ordinary jurisdictions "it is open to Parliament to abolish, amend, transfer jurisdictions, so long as such jurisdiction remains vested in and exercisable by judicial officers" page 182. It is in the circumstances that the law namely section 31DD of the Industrial Disputes Act as amended by Act No. 11 of 2003 created the sole and exclusive jurisdiction in the Supreme Court and this Court cannot seek to correct errors of law and fact inherent in orders of the High Court over labour tribunal appeals.

The structure of Article 138 would also prevent this Court exercising revisionary jurisdiction when the sole and exclusive jurisdiction has been vested in the Supreme Court. The revisionary jurisdiction is bestowed in the Court of Appeal thus in Article 138 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 which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance"*

It is crystal clear beyond any scintilla of doubt that the revisionary power of this Court lies only against orders made by such High Court, Court of First Instance, tribunal or other institution when they have taken cognizance of *causes, suits, actions, prosecutions, matters and things*. The words "such High Court, Court of First Instance, tribunal or other institution" must be read *ejusdem generis* and such collocation of words read together with the words *causes, suits, actions, prosecutions, matters and things* clearly indicates that these Courts exercise original jurisdiction. Only when the High



Court of First Instance, tribunal or other institution has exercised original jurisdiction, revision lies to this court. In other words only when the High Court has exercised original jurisdiction, the revisionary jurisdiction of this Court can be invoked. In my view Article 138 intentionally suggests such a deliberate intendment of Parliament and when the High Court has sat in its appellate jurisdiction as has happened in this case, no revision lies to this Court.

In the circumstances I uphold the jurisdictional objection to the exercise of revisionary jurisdiction and hold that this Court cannot usurp a jurisdiction which it doesn't have to revise orders of the High Court over Labour Tribunal appeals.

Accordingly these two objections are determinative of the fate of this application for revision and I proceed to dismiss the Petitioner's application with costs.

**JUDGE OF THE COURT OF APPEAL**