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

In the matter of an Application for Revision in terms of Articles 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with sections 364 and 365 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No.

CA/CPA/0064/2023

High Court Colombo

Case No. HCB/115/2021

Director General for the Prevention of Bribery and Corruption,

Commission to Investigate Allegations of Bribery or Corruption,

No. 36, Malalasekara Mawatha,

Colombo 07.

COMPLAINANT

Vs.

1. Maldeniya Don Upali Gunaratne Perera

No. 372, Upper Karagahamuna,

Kadawatha.

2. Hewa Rajage Wasantha Wimalaweera

No. 59, Wilabada Road,

Gampaha.

3. Upali Senarath Wickramasinghe

No. 300, Godahena Road,

Athurugiriya.

4. Sudeera Parakrama Jinadasa

No. 65, Model Town,

Ratmalana.

ACCUSED

AND NOW BETWEEN

Director General for the Prevention of

Bribery and Corruption,

Commission to Investigate Allegations of

Bribery or Corruption,

No. 36, Malalasekara Mawatha,

Colombo 07.

COMPLAINANT-PETITIONER

Vs.

1. Maldeniya Don Upali Gunaratne Perera

No. 372, Upper Karagahamuna,

Kadawatha.

2. Hewa Rajage Wasantha Wimalaweera

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No. 300, Godahena Road,

Athurugiriya.

4. Sudeera Parakrama Jinadasa

No. 65, Model Town,

Ratmalana.

ACCUSED-RESPONDENTS

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Janaka Bandara, D.S.G. with Udara Karunathilake, S.S.C., Ms. Bandara, A.D.G. and Anusha Sammandapperuma, A.D.L. for the Complainant-Petitioner

: Ashan Nanayakkara instructed by NICLO Associates for the 1st Accused-Respondent

: Chamara Wannisekara with D. Kaushalya for the 2nd Accused-Respondent

: Dumesh Kariyawasam for the 3rd Accused-Respondent

: Maithri Gunaratne P.C. with Chan Godakumbura instructed by NICLO Associates for the 4th Accused-Respondent

Argued on : 09-11-2023

Decided on : 24-01-2024

Sampath B. Abayakoon, J.

The complainant-petitioner (hereinafter referred to as the petitioner) being the Director General for the Prevention of Bribery and Corruption of the Commission to Investigate Allegations of Bribery or Corruption, filed this application invoking the revisionary jurisdiction of this Court granted in terms of Article 138 of The Constitution in order to challenge and get set aside the order pronounced on 31-01-2023, and two other incidental orders dated 31-01-2023 and 01-02-2023 by the learned High Court Judge of Colombo in the High Court of Colombo Case No. HCB/115/2021.

Although the petitioner has sought a stay order pending determination of this application in the petition, the learned Deputy Solicitor General (DSG) who represented the petitioner informed the Court that he would no longer seek a stay order when this matter was taken up in the open Court on 07-07-2023. That was the very reason why the matter was allowed to be supported for notice without a notice being issued to the accused-respondents mentioned in the petition.

After having considered the petition, affidavit and the relevant supporting materials, and the submissions of the learned DSG, this Court decided to issue notice on the accused-respondents.

Accordingly, accused-respondents filed their objections through their Counsel and the petitioner also filed counter objections.

At the hearing of this application, the learned Counsel for the 1st accused-respondent raised several preliminary objections as to the maintainability of this application before this Court. It was his submission that this revision application shall stand dismissed on the preliminary objections raised by him by itself.

The learned Counsel raised following preliminary objections.

- The caption of the motion filed by the petitioner in order to get this matter mentioned before this Court refers to Supreme Court Rule 8 (6) of 1990, whereas, no such rules, and hence, the application was bad in law.
- Although the petitioner has sought interim reliefs, the petitioner has failed to follow the mandatory requirement of giving notice in that relation to the accused-respondents. There is nothing in the motion or the petition filed before the Court that this is a matter where interim relief should allow to be supported without notice on the basis of urgency and hence, the application was bad in law.
- Although the petition filed before the Court is dated 02-06-2023, the affidavit filed in support of the contents in the petition had been dated 29-05-2023, which was a date before the signing of the petition. Therefore, the petition is not supported by way of an affidavit as required in an application of this nature.

Before going into the merits of the application proper, I will now consider whether the above-mentioned preliminary objections have any merit.

In that regard, this Court heard the extensive submissions of the learned Counsel who represented the accused-respondents as well as the counter submissions of the learned DSG on behalf of the petitioner.

It is the view of this Court that any application before this Court which requires the exercise of a discretionary remedy granted to this Court in terms of Article 138 of The Constitution, shall, as much as possible considered sans deciding based on mere technical defects of such an application, unless those technical defects are defects that goes into the root of the matter, which have vitiating effect on the application before this Court, and if not accepted, it will cause a substantial prejudicial effect on the rights of the parties or occasioned a failure of justice.

The proviso of the very Article 138 (1) of The Constitution reads as follows;

> **Provided that no judgement, decree or order of any 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.**

In **Kiriwanthe and Another Vs. Navaratne and Another (1990) 2 SLR 393,** it was held:

Per Fernando, J.

> *"The weight of authority thus favours the view that while all these Rules (Rules 46,47,49,35) must be complied with, the law does not require r permit an automatic dismissal of an application or appeal of the party in default. The consequences of noncompliance (by reason of impossibility or any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation thereof, in the context of the object of the particular rule."*

Per Kulatunga, J.

> *"In exercising its discretion, the Court will bear in mind the need to keep the channel of procedure open for the justice to flow freely and smoothly and*

the need to maintain the discipline of the law. At the same time the Court will not permit mere technicalities to stand in the way of the Court doing justice."

The first preliminary objection relates to a defect in the motion filed by the petitioner to get the case mentioned before the Court. However, it is abundantly clear that the petitioner has stated in the caption of the motion as well as the petition that this is an application filed invoking the revisionary jurisdiction in terms of Article 138 of The Constitution reads with sections 364 and 365 of the Code of Criminal Procedure Act No. 15 of 1979. Although the petitioner may have mentioned a wrong rule in the motion, it is abundantly clear that the petitioner has a right to file an application of this nature, get the matter supported, and obtain a suitable order from the Court. I find that, a minute technical defect of such a nature shall not stand in the way of considering an application of this nature before the Court.

The 2nd preliminary objection raised was that the accused-respondents were not noticed despite an interim relief being sought in the petition. As I have mentioned earlier, although such a relief has been sought, the petition was not supported for an interim relief. When this matter was supported without notice, this Court only considered whether there was any basis to issue notice only, and after having satisfied, the relevant notices were issued to the accused-respondents along with the relevant documents. The accused-respondents can claim that they were prejudiced only if an interim relief was granted by this Court without them not being heard, which was not the case in this matter.

I am of the view that none of the above preliminary objections has caused any prejudice towards the accused-respondents and find no reason to consider the said objections in favour of them.

The learned Counsel for the accused-respondents relied on the Supreme Court judgement of **Roylin Fernando Vs. Christian Gamini Fernando And Others SC/Appeal No. 18A-09**, to support his contention that the application shall stand dismissed due to the affidavit filed in support of the application being an affidavit dated before the date of the petition.

No doubt that the affidavit filed before this Court in support of the averments in the revision application has been signed three days before the date of the petition.

It is my considered view that the mentioned judgement has been cited out of context to support the said objection. The cited judgement was a matter where an order by the learned Additional District Judge of Marawila dated 05-06-2008, where the learned Additional District Judge refused to accept an amended plaint in a District Court of Marawila case. When this order was appealed against, to the High Court of Civil Appeal of the North Western Province Holden in Kurunegala, the learned Civil Appellate High Court Judges of Kurunegala by their order dated 25-09-2008 had affirmed the order of the learned Additional District Judge, apparently on the basis of several procedural defects in relation to the affidavit filed in support of the application before the Court.

When this order was challenged before their lordships of the Supreme Court by way of a leave to appeal application, leave has been granted by the Supreme Court on following questions of law.

a. The said order is contrary to law and against the weight of the evidence.
b. The insertion of the wrong date by the Justice of Peace after attesting the affidavit cannot vitiate the affidavit.
c. That the insertion of the wrong date is clearly a clerical error.

It has been found that although the petitioners had sought to challenge an order pronounced by the learned Additional District Judge of Marawila dated 05-06-2008, the affidavit in support of the matters stated in the petition had been dated 20th June 2006, more than 2 years before the impugned order. Even the petition filed by the petitioners in that case had no date, but only the month of June 2008 had been mentioned as the date of the petition.

Their lordships of the Supreme Court have considered the essential requirements of an affidavit and has found that the said affidavit was not in order. It has been determined that since the petitioner in that case has sought to challenge an order pronounced in June 2008, there cannot be any possibility for the facts contained in the petition to be in existence in June 2006, some two years before the order. Their lordships have further determined that the mentioned date in the affidavit cannot be attributed to a clerical error, and thereby affirmed the determination of the High Court of Civil Appeal and dismissed the appeal.

It is my considered view that there is nothing to conclude that this Supreme Court judgement expects an affidavit filed in support of the contents in a petition filed before the Court should be after the date of the petition. The Supreme Court has decided that matter based on the facts and circumstances unique to the matter argued before their lordships in agreeing with the decision of the High Court of Civil Appeal of the North Western Province Holden in Kurunegala, the facts of which has con relevance to the facts of the matter under consideration.

In the case of **Distilleries Company Ltd. Vs. Kariyawasam And Others (2001) 3 SLR 119**, it was held:

> In terms of section 757(1), the petition need not be precede in point of time to that of affidavits so as to enable a party to support the contents of the petition.

Per Nanayakkara, J.,

"The object of Civil Procedure Code is to prevent civil proceedings from being frustrated by any kind of technical irregularity of lapse which has not caused prejudice or harm to a party. A rigid adherence to technicalities should not prevent a Court from dispensing justice.

The Court should not approach the task of interpretation of a provision of law with excessive formalities and technicality. A provision of law has to be interpreted contextually giving consideration to the spirit of the law."

For the above-considered reasons, I find no basis in the preliminary objections taken up by the learned Counsel on behalf of the respondents.

I will now consider whether there is a basis to grant the relief sought by the petitioner as submitted by the learned Counsel for the petitioner, and whether it should be disallowed as opposed by the learned Counsel for the respondents.

This is a matter where the four accused-respondents stood indicted before the High Court of Colombo on 14 counts preferred against them by the Director General for the Prevention of Bribery or Corruption.

The counts include a charge of conspiracy in terms of section 113A of the Penal Code, aiding and abetting to commit conspiracy punishable in terms of the same section of the Penal Code read with section 25 (3) and 19C of the Bribery Act as amended, solicitation of a sum as a gratification and aiding and abetting for such a solicitation punishable in terms of section 19C of the Bribery Act, and accepting and aiding and abetting to accept a sum of Rs. 125 Million as a gratification.

At the trial, PW-01 who is the person from whom the solicitation was said to have been made and the person who has made the complaint to the Bribery Commission, has given evidence. During his evidence, he has stated, among other things, that he recorded the conversations that took place between him and the 1st and the 4th accused-respondents.

There had been several video recordings between the meetings of the accused-respondents and the PW-01 as well.

In leading evidence, the prosecution has marked the said video recordings, and when the trial was taken up for further evidence, it appears that the prosecution has moved to mark two recordings of the conversations alleged to have been made between the PW-01 and the accused-respondents.

When the prosecution moved to play the recordings of the production marked as P-25, which was a pen drive, and P-27, which was a CD recording, the learned Counsel who represented the accused-respondents, has raised an objection to playing the recordings and marking its transcripts in Court.

The said objection has been raised on the following basis.

1. The original mobile phone, which was said to have been used to record the conversations contained in P-25 and 27 has not been listed as a production.
2. The said mobile phone is not in working condition.
3. There was no scientific analysis of the contents of the recordings to establish the identity of the persons involved in the conversations.

It appears from the proceedings that the conversations allegedly contained in the productions marked P-25 and P-27 are conversations between the PW-01 and 1st and the 4th accused-respondents. PW-01 in his evidence has stated that he recorded these conversations using his mobile phone and the contention of the learned Counsel for the respondents had been that the mobile phone was not produced for inspection in terms of section 7 of the Evidence (Special Provisions) Act No. 14 of 1995.

The contention of the prosecution had been that although the mobile phone that has been used to record the conversations had not been listed as a production, it has been right throughout in the possession of its owner, the PW-01.

Accordingly, it has been in safe custody. The prosecution appears to have relied on the interpretation section of Evidence (Special Provisions) Act, namely section 12 to argue that the documents marked P-25 and P-27 falls within the interpretation of a contemporaneous recording in terms of section 4 of the Evidence (Special Provisions) Act, and therefore, the said recordings should be allowed to be produced as evidence.

For matters of clarity, I would now reproduce the final determinations of the learned High Court Judge in relation to the objections raised before the trial Court. At page 3 and 4 of the order dated 31-01-2023, the learned High Court Judge has stated;

> "Indiketiya Hewage Kusumadasa Mahanama and another Vs. Attorney General and another, නඩුවේ කරුණු පිලිබඳ ව අධිකරණයේ අවධානය යොමු කරන පැමිණිල්ලේ ස්ථාවරය වන්නේ, ජංගම දුරකතනයක් එහි හිමිකරු භාරයේ තිබීම යහපත් භාරයක තබා ගැනීමක් වන බව යි. නමුත්, මෙම නඩුව ට අදාල ජංගම දුරකතනය මෙම නඩුවේ නඩු භාණ්ඩයක් නොවේ.
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> නඩුවේ දී ඉදිරිපත් කල යුතු වන්නේ, හඬ පටවල මුල් පටිගත කල යන්ත්‍රය ද, එසේ නැතහොත් එයින් පිටපත් කරගන්නා ලද පැ.25 හෝ පැ.27 ද යන්න එක් ගැටලුව කි.
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> පැ.25 සහ පැ.27 පනතේ 12 වන වගන්තිය යටතේ, මුල් පිටපතක් ලෙස සලකන්නේ නම්, එහි නිරවද්‍යතාවය තවත් කරුණ කි.
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> යම් අයෙකුගේ හඬ හඳුනාගැනීම විද්‍යාත්මක ව සිදුකල යුත්ත කි. හුදෙක්, හඬක් ඇසූ පමණින් එය විද්‍යාත්මක විශ්ලේෂණයක ට නොගොස්, විශේෂඥ විශ්ලේෂණයක ට නොගොස් එවැනි මතයක් රහිත ව යම් හඬක් හෝ හඬ කුමන අයෙකුගේ ද යන්න තීරණය කිරීමට ට සාමාන්‍ය පුද්ගලයෙකු ට හෝ අධිකරණයක ට නොහැකි ය. ඒ සඳහා විශේෂඥ විද්‍යාත්මක සාක්ෂි තිබිය යුතු ය.
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> අද දින පැමිණිල්ල විසින් ඉදිරිපත් කිරීම ට උත්සාහ කරන හඬ පට එවැනි විශ්ලේෂණයක ට යටත් කල හඬ පට නොවේ.
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> ඒවා නිසි භාරයේ තිබී ඉදිරිපත් කල බව ට උපකල්පනය කල ද, ඒ සඳහා විද්‍යාත්මක විශ්ලේෂිත සාක්ෂියක් නැත.

ඒ අනුව පැ.25 සහ පැ.27 මුල් පිටපත් ලෙස හෝ අනු පිටපත් ලෙස සැලකුව ද, ඒවායේ හඬවල් කුමන පාර්ශවයකගේ ද යන්න විද්‍යාත්මක සාක්ෂි මෙහෙයවීම ට පැමිණිල්ල ට හැකියාවක් ද නැත. එබැවින්, හුදෙක් යම් දෙබස් පමණක් ප්‍රචාරණය කල පමණින් ඒවා ට චූදිතයන්ගේ ඇති සම්බන්ධතාවය විද්‍යානුකූල ව සනාථ කිරීමකින් තොර ව භාර ගැනීම සුදුසු නැත. එසේ ම, ඉන් ප්‍රතිඵලයක් ද නැත.

ඉහත කරුණු අනුව චූදිතයන්ගේ විරෝධතාවය මෙම අධිකරණය පිලිගනී. ඒ අනුව පැ.25 හෝ පැ.27 උපකරණයන්වල ඇති බව ට කියා සිටින රෙකෝඩන මෙම නඩුවේ සාක්ෂි වශයෙන් මෙහෙයවීම ට කරන ඉල්ලීම ප්‍රතික්ෂේප කර මි."

It appears that the learned High Court Judge has considered the English law principle of best evidence rule and the fact that there was no scientific analysis of the conversations alleged to have been recorded in agreeing with the objections raised on behalf of the accused-respondents.

It also appears that the fact that the mobile phone said to have been used in recording the conversations was not available as evidence and the fact that it has not been tendered for inspection as required in terms of the Evidence (Special Provisions) Act has been considered relevant by the learned High Court Judge in his determination.

As I have stated before, this determination relates to the English legal principle of best evidence rule.

E. R. S. R. Coomaraswamy in the book, **'*The Law of Evidence*' Volume 1 at page 42** considers the present applicability of this rule under the English law principles.

> *"But this principle, once considered so fundamental, is hardly more than a maxim. It is now not true, that the best evidence must, or even may, be given, though it is non-production may be a matter for comment or affect the weight of that which is produced. Thus, section 114f of the Evidence Ordinance provides that the Court may presume that evidence which could be, and is not, produced, would, if produced be unfavourable to the person who withholds it. The Court must however have regard to the extenuating*

circumstances. Section 114f is a reproduction of the best evidence rule which according to Taylor, 'does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any, which from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when better evidence is withheld, it is only fair to presume that the party has some sinister motive for not producing it, and that, if offered, his design would be frustrated.' "

At page 44, **Coomaraswamy** narrates the position in Sri Lanka in the following manner.

> The Supreme Court of Sri Lanka has recognized that the best evidence rule has been whittled down in the country of its birth and is no longer of general application. Thus, in the **King Vs. Peter Nonis (1947) 49 NLR 16 at 17 Windham, J.** said:
>
> *"In any case, what is the meaning of 'best evidence' in the English law sense? It certainly does not and never did mean that no other direct evidence of the fact in dispute could be tendered. Its meaning is rather that the best evidence must be given of which the nature of the case permits … The best evidence rule in England has been subjected to whittling down process for over a century and today it is not true that the best evidence must be given, though its non-production where available may be a matter for comment and may affect the weight to be attached to the evidence that is produced in its stead."*

In the case of **Vanderbona Vs. Perera (1985) 2 SLR 62 at 67**, the Supreme Court recognized the fact that the best evidence rule is now whittled down, and though the non-production of the best evidence may be a matter for comment or may affect the weight of the evidence that has been produced, it is not true that the best evidence must be given to prove a fact.

The recent English case of **Kajala Vs. Noble (1982) 75 Cr.A.R. 149, Cr.L.Rev. 433** was a case where very similar facts were considered and allowed to be admitted.

This was a case where the defendant was identified by a prosecution witness as one of the predominantly Asian youths involved in a serious disturbance in a public street and accompanied by throwing of missiles at police officers. The witness has recognized him on a B.B.C. news programme concerning the incident. As the B.B.C. based on their policy not to allow originals of their films to leave the premises, the prosecution has relied on a video cassette recording which the Court was satisfied as an authentic copy of the original, and the defendant was convicted based on the evidence.

In the appeal filed against the conviction, dismissing the appeal, it was held;

> *"That the older rule that a party must produce the best evidence that the nature of the case would allow no longer applied except where the original document was available in the party's hands. The Court was not confined to the best evidence but could admit all relevant evidence. The goodness or badness of it goes only to weight, but not to admissibility. The old rule was confined to written documents in the strict sense of the term and had no relevance to tapes or films. Accordingly, the prosecution was entitled to rely upon the copy, which copy the Justices were satisfied was an authentic copy of the original."*

In our law, further whittling down of this principle has been statutorily recognized by the Evidence (Special Provisions) Act No. 14 of 1995. Under the provisions relating to contemporaneous recordings under section 4, in any proceeding where direct oral evidence of a fact would be admissible, any contemporaneous recordings or reproductions thereof, tending to establish that fact, shall be admissible as evidence of that fact under certain conditions set out in the section itself.

Even the admissibility of a duplicate of such evidence also has been recognized in terms of section 4 (5) of the Act.

It is my considered view that if the prosecution has allowed access to the items of evidence intended to be marked as P-25 and 27 in terms of section 7 of the Evidence (Special Provisions) Act No. 14 of 1995, a trial Court has no basis to reject the leading of such evidence on the basis that the original instrument that recorded the conversations is not available, and that there is no scientific evidence to identify the voices contained therein.

I am of the view that those are matters of comment, and matters if relevant, that can be considered in determining the value of such evidence in the overall context of a case.

For the reasons as considered above, I am of the view that the learned High Court Judge was not correct when it was decided to refuse to allow P-25 and 27 to be led as evidence in the case.

Therefore, I set aside the order dated 31-01-2023 any other incidental orders by the learned High Court Judge of Colombo in that relation and direct that the learned High Court Judge shall allow leading evidence based on the productions intended to be marked as P-25 and P-27.

As it was informed to this Court that the leading of the prosecution evidence in this case has now come to a virtual end, it is up to the prosecution to decide whether they are going to recall PW-01 for that purpose or not. If the prosecution expresses their desire to recall the PW-01 for the above limited purpose of leading evidence in relation to P-25 and P-27, the learned High Court Judge is directed to facilitate that process and allow the learned Counsel for the accused-respondents to cross-examine the witness in relation to the above.

In such a scenario, the prosecution shall be entitled to call any other witnesses listed in the indictment to prove P-25 and P-27, which they may not have called due to the rejection by the Court to lead evidence in relation to P-25 and P-27.

The Registrar of the Court is directed to communicate this judgement to the High Court of Colombo for necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal