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 of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.
Complainant

C.A.(PHC)APN No. 25/2019
H.C. Colombo No. HC/PTB/02/2018

Vs.

01. Nandasena Gotabhaya Rajapakse
02. Liyanaarachchige Prasad Harshan De Silva
03. Gamaathi Arachchilage Badra Udulawathi Kamaladasa
04. Sudhammika Keminda Atigala
05. Saman Kumara Abraham Galapaththi
06. Maarukku Dewage Mahinda Saliya
07. Madamperuma Arachchilage Shrimathi Mallika Kumari Senadheera

Accused

And now Between

01. Nandasena Gotabhaya Rajapakse

1st Accused-Petitioner

Vs.

Hon Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent

02 Liyanaarachchige Prasad Harshan De Silva
03 Gamaathi Arachchilage Badra Udulawathi Kamaladasa
04 Sudhammika Keminda Atigala
05 Saman Kumara Abraham Galapaththi
06 Maarukku Dewage Mahinda Saliya
07 Madamperuma Arachchilage Shrimathi Mallika Kumari Senadheera

2nd, 3rd, 4th, 5th , 6th and 7th Accused-Respondents

BEFORE : **ACHALA WENGAPPULI, J. &**

ARJUNA OBEYESEKERE, J.

COUNSEL : Romesh de Silva P.C. with Ali Sabry P.C. , Sugath Caldera and Ruwantha Cooray for the Accused -Petitioner.
Priyantha Nawana A.S.G.(P.C.) with, Dileepa Peeris D.S.G., Wasantha Perera S.S.C. and Udara Karunathilake S.C. for the Complainant-Respondent.

SUPPORTED ON : 28th March 2019, 06th May 2019. 21st May 2019, 30th May 2019, 06th June 2019, 07th June 2019 and 14th June, 2019

WRITTEN SUBMISSIONS
TENDERED ON : 30th April 2019 (by the Complainant-Respondent)
16th May,2019 (by the 1st Accused-Petitioner)

DECICED ON : 18th June 2019

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ACHALA WENGAPPULI, J.

The 1st Accused-Petitioner (hereinafter referred to as the "Petitioner") with his petition addressed to this Court, has invoked the revisionary jurisdiction of this Court under Article 138 of the Constitution seeking its intervention to "set aside or vary" an order made by the Permanent High Court at Bar in case No. HC/PTB/1/02/2018 on 11.02.2019, marked as P2. He also sought notice on the Respondents and interim relief by way of an order of this Court staying further proceedings of the said case.

It is stated by the Petitioner that he was indicted by the Complainant-Respondent (hereinafter referred as the "Respondent") in the said Permanent High Court at Bar along with several other Accused-Respondents. He was served with an indictment by the said Court on 10.09.2018. On that day itself, the Petitioner took up an objection before the Permanent High Court at Bar that it had no jurisdiction to hear and determine the matter and reserved his right to make detailed submissions in support of his objection.

On 22.01.2019, learned President's Counsel who represented the Petitioner at the Permanent High Court at Bar made oral submissions in support of his objection to jurisdiction on the following grounds;

a. the Court's jurisdiction is limited to hearing, trying and determining prosecutions on indictments against persons in

respect of Financial and Economic Offences specified in the 6th Schedule to the Act No. 9 of 2018,

b. the indictment is not in respect of Financial and Economic Offences specified in the 6th Schedule to the said Act.

Learned President's Counsel took up another preliminary objection as to the validity of the indictment on the basis that the Petitioner is only indicted for conspiracy, and/or abetment of certain purported offences and that abetment and conspiracy as set out in the said indictment is not covered by the 6th Schedule.

The Permanent High Court at Bar pronounced its order on both these preliminary objections that are raised by the Petitioner on 11.02.2019 by which the Court had overruled the said objections.

It is stated by the Petitioner that due to the grounds specified in paragraph 11 of his Petition, addressed to this Court, which he claims constitutes exceptional circumstances warranting this Court's intervention to exercise its extraordinary power of revision, he is entitled to the reliefs sought in the prayer.

When this matter was mentioned for support before us on 12.03.2019, Learned President's Counsel undertook to serve notice on the Respondents as required by Rule 2(1) of the Court of Appeal (Appellate Procedure) Rules 1990 since the Petitioner had prayed for interim relief.

On 28.03.2019, the Respondent was represented by the learned Additional Solicitor General who raised an objection to the jurisdiction of this Court to entertain the Petitioner's application for revision.

Parties have made oral submissions in support of their respective positions and were afforded an opportunity to tender written submissions along with the authorities that they rely on, in support of their respective contentions that had been advanced before this Court during their oral submissions.

Learned President's Counsel urged that he be heard in support of his prayer for issuance of notice formally as well as for interim relief in spite of the objection to the jurisdiction of the Respondent. This was allowed and he made submissions in support of his application on 14.06.2019.

Learned President's Counsel, in support of his position that the petition of the Petitioner discloses a prima facie case/ serious matter to be considered by this Court, submitted that;

a. the impugned order of the Permanent High Court at Bar is palpably wrong as it erroneously decided that the issue whether the allegation of the prosecution that the Petitioner committed "financial and economic" offences, had already been decided by the Chief Justice in nominating the three Judges of the High Court of the Republic to the said Permanent High Court at Bar, when in fact Section 12A(4)(a) of the Judicature (Amendment) Act No 9 of 2018, had specified the applicable considerations in

making such nominations with no reference made in the said Section to "financial and economic" offences,

b. the Permanent High Court at Bar had erroneously rejected the Petitioner's contention that the only count against him in the indictment is an allegation of abetment of an offence under the Public Property Act No. 12 of 1982, and the 6th Schedule of the Judicature (Amendment) Act No 9 of 2018 limits the scope of the jurisdiction of a Permanent High Court at Bar to the offence of abetment under the Penal Code in the offences that are specified in the said schedule without making any reference to Section 102 of the Penal Code to the Offences Against Public Property Act No. 12 of 1982, in the said schedule. However, the Permanent High Court at Bar had accepted the validity of the same objection in case No. HC/PTB/1/03/2018 on 07.03.2019 and therefore when it rejected the Petitioner's objection it was "legally biased".

The objection to the jurisdiction of this Court in entertaining the Petitioner's revision application by the Respondent was based on the following grounds;

a. that the appellate jurisdiction over the Permanent High Court at Bar "has been constitutionally taken away and given to the Supreme Court with the enactment of special provisions to hear and determine such appeals by the Supreme Court under the Judicature Amendment Act",

b. "... any order made within jurisdiction by a court could be challenged by way of an appeal by the designated appellate tribunal and not otherwise. The extraordinary remedy of revision cannot be used to challenge a decision when such challenge is permitted by way of an appeal as explicitly provided by the statute before the designated appellate forum, which, in this instance, is the Supreme Court".

The Petitioner sought to counter this objection on the basis that Article 138 vests this Court with powers of revision and since the "High Court [also a Court of First Instance] has taken cognizance of this matter" and therefore "... the Court of Appeal has power in revision to take cognizance of this matter and to deal with it". It is also stressed by the Petitioner that " the powers of revision have never been transferred to the Supreme Court". Therefore, the Petitioner contends that this Court has jurisdiction to entertain his application for revision. He relied on the judgments of ***Sirimavo Bandaranaike v Times of Ceylon*** (1995) 1 Sri L.R. 22, ***Rasheed Ali v Mohamed Ali and Others*** (1981) 1 Sri L.R. 262 to impress upon this Court the extent to which the revisionary powers of the Court of Appeal extends to.

With the submissions made by the parties in mind, this Court would now proceed to consider them in the light of the applicable legal provisions .

The caption of the petition of the Petitioner in the instant application reads as follows;

" In the matter of an application for Revision under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka".

It is clear from the said citation that the Petitioner invokes the revisionary jurisdiction that had been conferred upon this Court by virtue of Article 138 of the Constitution, in seeking to have an order made by the Permanent High Court at Bar in case No. HC/PTB/1/02/2018, in which the Petitioner is named as the 1st Accused set aside. The impugned order was pronounced by the said Permanent High Court at Bar in relation to a preliminary objection to its jurisdiction to try the Petitioner upon the indictment it had taken cognizance of. The Permanent High Court at Bar, by the said order marked P2, had overruled the objection to its jurisdiction by the Petitioner and thereafter proceeded to fix the matter for trial.

The objection to the jurisdiction raised by the learned Additional Solicitor General against entertaining the Petitioner's application is founded on the argument that the right of appeal conferred upon an Accused against any Judgment, sentence or order made by a Permanent High Court at Bar requires that such an appeal must be made to the Supreme Court as per the statutory provisions contained in Section 12B (1) of the Judicature (Amendment) Act No. 9 of 2018. Learned Additional Solicitor General further argued that this Court therefore has no appellate jurisdiction over any Judgment, sentence and order made by a Permanent High Court at Bar that had been established under Section 12A (1)(a) of the said amendment and this position applies to the power of revision of the Court of Appeal, as well.

In view of the nature of the objection raised by the learned Additional Solicitor General, this Court must therefore decide at the outset whether it has been invested with appellate jurisdiction over the Permanent High Court at Bar under Article 138 and whether it could entertain an application for revision against an order of the said Court.

Article 138, in its original form in the 1978 Constitution, defined the nature of the jurisdiction it had conferred upon the Court of Appeal as *"an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution"*. The said Article also stated that the Court of Appeal had the power of *"sole and exclusive cognizance, by way of appeal, revision ... of all prosecutions"*.

A Plain reading of the said Article indicates that the appellate jurisdiction of this Court which could only be exercised over all errors in fact or in law, in respect of "any Court of First Instance, tribunal or other institution". But the Constitution did not specify what those Courts of First Instance, tribunal or other institutions are. This is significant in view of Article 105 where the Constitution identified the institutions for the administration of justice which protect, vindicate and enforce the right of the People as ;

(a) the Supreme Court of the Republic of Sri Lanka
(b) the Court of Appeal of the Republic of Sri Lanka
(c) the High Court of the Republic of Sri Lanka and such other Courts of First Instance, Tribunals or such institutions as Parliament may from time to time ordain and establish.

It is noted that the words "High Court of the Republic of Sri Lanka" is not included in Article 138. However, Section 2 of the Judicature Act No. 2 of 1978 used the identical phrase as it reads thus;

> "The Courts of First Instance for the administration of justice in the Republic of Sri Lanka shall be –
>
> (a) the High Courts of the Republic of Sri Lanka;
> (b) the District Courts;
> (c) the small claims Courts;
> (d) the Magistrate's Courts;
> (e) the Primary Courts."

Section 14 of the Judicature Act conferred a right to appeal upon any person "who stands convicted of any offence by the High Court" to the Court of Appeal. Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 provided the manner in which such right to appeal could be exercised.

The Court of Appeal was mandated to exercise the appellate jurisdiction which Article 138 had conferred on it *"subject to the provisions of the Constitution or of any other law"*. In ***Martin v Wijewardena*** (1989) 2 Sri L.R. 409, the Supreme Court demarcated the scope of Article 138 on following terms;

> *"... it is not possible to accept the contention that there is implied in Article 138 an unfettered "RIGHT OF APPEAL" to the Court of Appeal. Nor, is it possible to*

accept the contention that this alleged "RIGHT OF APPEAL" under this Article 138 is only fettered to the extent provided for in the Constitution or other Law. An Appeal is a Statutory Right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments. That is to say, for appeals from the regular courts, in the Judicature Act, and the Procedural Laws pertaining to those courts"

Thus the Legislature by enacting these specific statutory provisions that are contained in Sections 2 and 14 of the Judicature Act and Section 331 of the Code of Criminal Procedure Act, had enabled the Court of Appeal to exercise its appellate jurisdiction over any Judgment, sentence and order of the High Court of the Republic.

The order against which the Petitioner had invoked revisionary powers of this Court is not an order made by the High Court of the Republic, but by the Permanent High Court at Bar, established under Section 4A of the Judicature (Amendment) Act No. 9 of 2018. The Petitioner's position is that the Permanent High Court at Bar is created from the High Court of the Provinces that is established under Article 154P under the Thirteenth Amendment to the Constitution.

In this context, it is helpful, if we devote some space in this judgment to trace the transformation of the character of the High Court of the Republic, after its creation by Article 105 and Section 2 of the Judicature Act, with added Courts and expanded jurisdictions to it due to several Constitutional and statutory provisions which were subsequently enacted by the Parliament.

The Thirteenth Amendment to the Constitution created the High Court of the Province under Article 154P(1). The High Court of the Province is clearly a Court which was also conferred with original criminal jurisdiction and was empowered to exercise the said jurisdiction concurrent to the original island-wide criminal jurisdiction of the High Court of the Republic. A significant difference between the two Courts is that the High Court of the Province was conferred with original criminal jurisdiction in relation to the offences that are committed within that particular province within which the High Court of the Province was established as per Article 154P(3)(a). There is no such geographical limitation that was imposed on the High Court of the Republic.

The High Court of the Province was also invested with appellate and revisionary jurisdiction over convictions, sentences and orders of the Magistrate's and Primary Courts which are situated within the Province, by Article 154P(3)(b).

Article 154P(6) enabled a party to lodge an appeal to the Court of Appeal against *"a final order, judgment or sentence"* of a High Court of the

Province. The High Court of the Provinces (Special Provisions) Act No. 19 of 1990 laid down the applicable appellate procedure. However, any judgment, sentence or order made by the High Court of the Province, in exercising its original criminal jurisdiction under Article 154P(3)(a), is left out from the Article 154P(6) which enabled an aggrieved party to lodge an appeal to the Court of Appeal.

With the introduction of the High Court of the Provinces into the judicial hierarchy by the Thirteenth Amendment to the Constitution, the Legislature had simultaneously made amendments to Article 138, which laid down the jurisdiction of this Court, to include the newly established High Court of the Province under its appellate jurisdiction by insertion of the words "High Court, in the exercise of its appellate or original jurisdiction". The Supreme Court considered this question in its judgment of ***Wickramasekera v Officer-in-Charge, Police Station, Ampara*** (2004) 1 Sri L.R. 257, and reiterated the position that Article 138 is *"not an entrenched jurisdiction"* and the statutory provisions contained therein are only *"enabling provisions"* which had the character of permitting the omitted details of importance to be carried out by means of subsequent provisions provided for that purpose included High Court of the Province under the appellate jurisdiction of this Court as it was observed by their Lordships in the said judgment that;

> *"Article 138 of the Constitution was amended by the Thirteenth Amendment to the Constitution by the substitution of the words "committed by any Court of First Instance" of the words "committed by the High Court, in the exercise of its appellate or original*

jurisdiction or by any Court of First Instance," thus incorporating the decisions of the High Court in the exercise of its appellate or original jurisdiction, being amenable to the appellate jurisdiction of the Court of Appeal. "

The additional provisions, which were necessary for the effective functioning of the newly conferred appellate jurisdiction of the High Court of the Province were brought in by way of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Prior to the Thirteenth Amendment, only the Courts of First Instance, tribunals and other institutions were subject to the appellate jurisdiction of the Court of Appeal. There was no dispute that the Court of Appeal was empowered to exercise its jurisdiction "by way of appeal, revision and *restitutio in integrum*" over such entities. Under the Thirteenth Amendment, the High Court of a Province is vested with powers of appeal as well as revision, a jurisdiction that it exercised concurrent to the jurisdiction of the Court of Appeal, and therefore the High Court of the Provinces is not only a Court exercising original jurisdiction but also a Court with appellate powers. Hence, by a consequential amendment to Article 138(1), that Court also has been made subject to the appellate jurisdiction of the Court of Appeal. The amendment provides *inter alia* that "the Court of Appeal shall have and exercise ... an appellate jurisdiction for the correction of all errors ... which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction".

Learned Additional Solicitor General's contention is that Article 138 made no specific reference to the Permanent High Court at Bar at all and therefore, this Court clearly has no jurisdiction over it either by way of an appeal addressed to it or by way of revision.

Learned President's Counsel sought to counter this position by making reference to Section 12A(1)(a) of the Judicature (Amendment) Act No. 9 of 2018, in support of his position that the Permanent High Court at Bar is only another division of the High Court of the Province, established under Article 154P, and it had already been placed under appellate jurisdiction of this Court by the judicial precedents of the Supreme Court. He submitted that the Permanent High Court at Bar therefore is amenable to the appellate jurisdiction of this Court.

In view of these submissions, the fundamental issue before this Court is whether the reference to the "... High Court, ..."as found in Article 138, is meant to include the Permanent High Court at Bar as well among the already recognised group of inferior Courts which are subject to the appellate jurisdiction of the Court of Appeal.

This Court has no power to provide an interpretation to the said reference to "High Court" as found in Article 138, in view of the "sole and exclusive jurisdiction" conferred upon the Supreme Court by Article 125, by which only the apex Court could hear and determine any question related to the interpretation of the Constitution. Whether the said reference includes the High Court of the Republic, the High Court of the Province established under Article 154P, the High Court exercising jurisdiction under Special Provisions Act Nos. 10 of 1996 and 54 of 2006 or the

Permanent High Court at Bar as the Petitioner contends, therefore lies beyond the jurisdiction of this Court. Instead, it could only seek guidance from the Superior Court in the form of its judicial pronouncements and thereby venture to consider the question in the light of the general statutory scheme.

The only statutory clue on this issue would be that the appeals against the determinations of the Trial at Bar, the High Courts that exercise jurisdiction under Act Nos. 10 of 1996 and 54 of 2006, should be made to the Supreme Court. The appeals from the Permanent High Court at Bar also should be made to the Supreme Court. Appeals from the High Court of the Republic are made to the Court of Appeal through Section 14 of the Judicature Act and Section 331 of the Code of Criminal Procedure Act and apparently not under Article 138.

When viewed in this perspective, it would appear that the term "High Court" in Article 138, appears to be in relation to the High Court of the Province established under Article 154P(1) when it exercises its appellate jurisdiction.

Reverting to the primary issue before this Court whether the reference to the "... High Court, ..." found in Article 138, is meant to include the Permanent High Court at Bar into the scope of the appellate jurisdiction of the Court of Appeal it is noted that the Permanent High Court at Bar is invested only with original jurisdiction. The High Court of the Province had its original criminal jurisdiction restricted to the Province in respect of which it had been set up as per Article 154P(3)(a). In contrast, the Permanent High Court at Bar exercises not only island-wide original

criminal jurisdiction but also it could exercise jurisdiction in respect of offences that were committed "outside the territory of Sri Lanka" as Section 12A(2)(a) of the Judicature (Amendment) Act No. 9 of 2018 has specifically provided for.

The indictment on which the Petitioner is named as the 1st Accused by the Hon. Attorney General, was presented to "බස්නාහිර පළාත්බද ස්ථිර ත්‍රිපුද්ගල මහාධිකරණය" or the Permanent High Court at Bar of the Western Province. There is no dispute that the said Court, by taking cognizance of the indictment so presented, is exercising original jurisdiction when it proceeds to try the Petitioner and other Accused-Respondents.

The Supreme Court, in its determination of the Bill on the Judicature (Amendment), (reported in Decisions of the Supreme Court on Parliamentary Bills, Volume XIV at p.26) having identified an inconsistency with the provisions in the Constitution, in the proposed wording in Section 12A, had recommended that;

> *" ... if a jurisdiction is conferred on the High Court of Provinces under Article 154P(3)(c) like in Act No. 10 of 1996 and Act No. 54 of 2006 this inconsistency could be removed."*

Section 12A of the Judicature (Amendment) Act had incorporated these recommendations. It could well be that the Supreme Court had considered the Permanent High Court at Bar as another division of the High Court of the Province established under Article 154P and therefore the said Court could not be considered as a new Court and is merely conferred with additional jurisdiction as the situations that are

contemplated in the Act Nos. 16 of 1996 and 54 of 2006. The Supreme Court, in determining the Constitutionality of the Judicature (Amendment) Bill was of the view (at p.24) that "Act No. 10 of 1996 and Act No. 54 of 2006 conferred additional jurisdiction on the High Court of the Province under Article 154P(3)(c) but did not create or establish new Courts."

In these circumstances, even if the contention of the learned President's Counsel that the said Permanent High Court at Bar is another division of the High Court of the Province and not a distinct Court, is found to be legally correct, then the provisions contained in Article 154P indicates a contrary position. As already noted Article 154P(3)(a) confers original criminal jurisdiction to a High Court established under Article 154P. However, Article 154P(6) left out mentioning subsection (3)(a) when it made provisions to the effect that "... any person aggrieved by a final order, judgment or sentence of any such Court, in the exercise of its jurisdiction under paragraphs (3)(b) or (3)(c) or (4) may appeal therefrom to the Court of Appeal". This legislative gap is filled by the provisions of Section 12B of the Judicature (Amendment) Act No. 9 of 2018, with the conferment of a right to appeal to the Supreme Court.

In view of this clear statutory limitation, no appeal lies to the Court of Appeal, when a High Court of the Provinces, established under Article 154P, exercises its original criminal jurisdiction.

Learned Additional Solicitor General also submitted that the Petitioner should have addressed his grievance, to the Supreme Court since Section 12B of the Judicature (Amendment) Act No. 9 of 2018 states that any appeal from any Judgment, sentence or order by the Permanent

High Court at Bar "... shall be made within twenty-eight days from the pronouncement of such Judgment, sentence or order to the Supreme Court ...".

Not only in the said Judicature (Amendment) Act No. 9 of 2018, does one find similar statutory provisions which mandates that such right of appeal should be exercised by the Supreme Court. In respect of any Judgment, sentence or order of the High Court at Bar, the right to appeal is conferred upon the Supreme Court by virtue of Section 451(3) of the Code of Criminal Procedure Act No 15 of 1979 as amended. Similar provisions are found in Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 and Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 as well.

Learned President's Counsel in answer to this submission contended that the power of revision conferred upon the Court of Appeal by Article 138 remain unaltered and it is that power he relies on in seeking relief.

In view of this submission, we must consider the argument of the learned President's Counsel that the powers of revision of the Court of Appeal have never been transferred to the Supreme Court. He relied on the judgments of ***Sirimavo Bandaranaike v Times of Ceylon*** (supra) and ***Rasheed Ali v Mohamed Ali and Others*** (supra).

Both these judgments are indeed pronouncements on the revisionary jurisdiction of this Court. However, they could be distinguished from the instant matter on a fundamental point. In this matter the Petitioner seeks to invoke the revisionary jurisdiction of this

Court in order to challenge an order of the Permanent High Court at Bar, having already sought intervention of the Supreme Court in respect of the same impugned order by lodging a petition of appeal in the Permanent High Court and also by lodging another petition of appeal directly to the Supreme Court under SC Misc No. 04/2019.

The two judgments relied on by the Petitioner refer to situations where the revisionary jurisdiction of the Court of Appeal was invoked against determinations made by District Courts. The Appellants anyway had to come before the Court of Appeal as they had no right of appeal directly to the Supreme Court in these circumstances.

The reason for seeking relief by way of revision in ***Sirimavo Bandaranaike v Times of Ceylon*** was identified by Fernando J as follows;

> *"Insofar as a remedy in the District Court is concerned, the general rule would apply that the judge is functus officio and cannot review its own judgment. However, Section 86 makes an exception, by conferring jurisdiction on the District Court to set aside a default judgment if it was flawed in procedural aspects – but not on the merits. The necessary implication of the grant of that jurisdiction is that the District Court is not competent to review a default judgment on the merits."*

There was no right of appeal in relation to the matter before the Supreme Court in ***Sirimavo Bandaranaike v Times of Ceylon*** (supra) and the only remedy was revision to the Court of Appeal. But in this instance,

the Petitioner was mandated to lodge an appeal to the Supreme Court which he did. However, he seeks to invoke the revisionary jurisdiction of the Court of Appeal when he had already addressed a petition of appeal to the Supreme Court in compliance with Section 12B(1) of the Judicature (Amendment) Act No. 9 of 2018. The situation before this Court is totally different to the situation that arose for determination in ***Sirimavo Bandaranaike v Times of Ceylon***.

The judgment of ***Rasheed Ali v Mohamed Ali and Others*** is also clearly distinguishable as the matter before the Supreme Court was decided on the basis that in that particular instance the law does not give a right of appeal but makes the order of the lower Court final, then the Court of Appeal may nevertheless exercise its powers of revision.

Here, in this situation, the Petitioner had exercised his right of appeal to the Supreme Court by lodging two appeals and in addition, seeks to invoke the revisionary jurisdiction of this Court as well.

The Petitioner's contention that in spite of the right of appeal to the Supreme Court "the powers of revision [of the Court of Appeal] have never been transferred to the Supreme Court" must be considered next.

In ***Abeygunasekera v Setunga and Others*** (1997) 1 Sri L.R. 62, the Supreme Court recognised that *"conceptually, the expression "appellate jurisdiction" includes powers in appeal and revision"*.

It is not legally possible to create an artificial division of the appellate powers of appeal and revision over any Judgment, sentence or order made by the Permanent High Court at Bar by splitting them among the Supreme Court and Court of Appeal. When Section 12B of the

Judicature (Amendment) Act No. 9 of 2018 specifically made provisions that an appeal against any Judgment, sentence or order of the Permanent High Court at Bar, should be made within the stipulated time frame to the Supreme Court, it is not possible even to consider the position that the Legislature had limited the apex Court's appellate jurisdiction only to entertain an appeal against such Judgment, sentence or order and thereby leaving the power of revision with the Court of Appeal under Article 138 as a residual jurisdiction.

Such an approach to the provisions of Section 12B, as proposed by the Petitioner, would create a situation where the Court of Appeal, an inferior Court to the Supreme Court, is conferred with power of revision over conviction, sentence, or orders by the Permanent High Court at Bar, whilst the apex Court could only hear appeals from such High Court.

Irrespective of the remedy through which a party seeks relief from this Court, Article 138 specifies its core jurisdiction as "... an appellate jurisdiction for the correction of all errors in fact or law...". Article 127(1), in specifying the appellate jurisdiction of the Supreme Court, states that it is "... for the correction of all errors in fact or law ...". One finds identical wording has been used by the Parliament in describing the jurisdiction of both Courts.

In the judgment of ***Albert v Veeriahpillai*** (1981) 1 Sri L.R. 110, the Supreme Court expressed its determination on appellate jurisdiction of that Court in the fo*llowing terms;*

> *"Article 118 of the Constitution provides that 'the Supreme Court shall be the highest and final Court*

of record in the Republic and shall, subject to the provisions of the Constitution, exercise, inter alia final appellate jurisdiction. "Appellate jurisdiction may be exercised by way of appeal or revision. Article 128 of the Constitution prescribes how the appellate jurisdiction of this Court is invoked by way of appeal. The leave of this Court or of the Court of Appeal is a sine qua non for a party to come to this Court by way of appeal. But once leave is granted, on whatever ground it be, the appeal is before this Court and this Court is seized of the appeal. Its appellate jurisdiction extends to the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance (vide Art. 127 of the Constitution). Therefore, it is competent for this Court to permit parties to bring to its notice errors of law or of fact and raise new contentions or new points of law, or sue motu to raise them if there is proper foundation for them in the record. Thus, this Court will allow an appellant to urge before it grounds of appeal not set out in the application for leave if the material on record warrants the determination of same. This Court is not hamstrung by the fact that the Court of Appeal had not granted leave to appeal on the ground urged before the Supreme Court. This Court however,

doing justice between the parties, may not permit a party to raise a new point if the other party has had no proper notice of the new ground, or would suffer grave prejudice by the belated stage at which it is raised. The appellate jurisdiction of this Court is very wide in its amplitude, as it should be, it being the final Court of Appeal. The narrow construction contended for by Counsel erodes its width and usefulness" (emphasis added)

The judgment of ***Wadigamangawa and Others v Wimalasuriya*** (1981) 1 Sri L.R. 287 is a judgment where seven Justices of the Supreme Court defined the appellate jurisdiction of the apex Court as follows;

" The Constitution has made the Supreme Court the final Appellate Court (Article 118(c)) and it is the final Court of Civil and Criminal appellate jurisdiction in the Republic (Article 127 (1)). It has sole and exclusive cognizance by way of appeal "from any order judgment, decree or sentence made by the Court of Appeal" (Article 127(2))."

It was also held that:

"Article 127(2) grants a right of appeal, inter alia, from any order. Interlocutory orders are therefore appealable in terms of Article 127(2): There is

another fundamental and vital difference. Section 82A of the Order in Council grants a right of appeal direct to the Supreme Court. The Constitution has prescribed the converse – it is indirect. An appeal lies from a final order, judgment, decree or sentence of the Court of Appeal only if that Court grants leave to appeal to the Supreme Court (Article 128(1)), or else, where the Court of Appeal has refused to grant such leave the Supreme Court may grant special leave to appeal (Article 128(2). Article 128(2) refers expressly to an interlocutory order as well, a type of order not referred to in Article 128(1)."

There are other reasons to hold that the Petitioner's contention is not legally correct, in addition to the jurisdictional aspect of the Supreme Court. One such reason is evident from the relevant provisions of Section 12B(1) of the Judicature (Amendment) Act No. 9 of 2018. This section, whilst investing a right of appeal on the Petitioner to the Supreme Court from any Judgment, Sentence and Order, it also specifies that such an appeal "... shall be heard by a Bench of not less than five Judges of the said Court, which was nominated by the Chief Justice."

The important feature to be noted in this Section is that there is no right of appeal to the Court of Appeal. In effect, an accused who had been tried by a Permanent High Court at Bar has only one right of appeal whereas an accused who had been tried by the High Court of the Republic

has two, firstly to the Court of Appeal and therefrom to the Supreme Court.

These legislative provisions make it clear that the Legislature had consciously limited the right of appeal from a Permanent High Court at Bar to only one instance. The divisional bench of the Supreme Court nominated by the Chief Justice is placed under a duty in respect of such an appeal as it "... shall be heard and disposed of, expeditiously."

If the Petitioner's contention is accepted, then, this Court in exercising its revisionary powers under Article 138 could consider the validity of a Judgment, Sentence and Order of a Permanent High Court and make its own determination on it. Then, the Petitioner could appeal against that determination of this Court to the Supreme Court. Thus, conceding to the application of the Petitioner by which he invokes the revisionary jurisdiction of this Court under Article 138, this Court, in effect, creates another opportunity for him to have such a Judgment, sentence or order of the Permanent High Court at Bar reviewed by an appellate Court, circumventing the clear Legislative intent of restricting the Petitioner's right of appeal only to the Supreme Court. When there is clear and unambiguous expression of legislative intent in restricting the right of appeal only to the Supreme Court, and thereby limiting the right of appeal only to a single instance, this Court cannot and should not recognise such an attempt for an indirect review by this Court without clear statutory provisions indicating such a shift in the Legislative intent. In the absence of any statutory provisions to that effect, recognizance of such an indirect review would certainly undermine the clear and unambiguous intention of the Parliament.

In addition, the Petitioner's contention is essentially flawed when viewed from the perspective of administration of Justice in its hierarchical setting. If the Petitioner's contention is legally correct then he is entitled to a right of appeal to the Supreme Court and also to invoke revisionary powers of this Court under Article 138. The Petitioner has already invoked appellate jurisdiction of the Supreme Court. If this Court too entertains his revision application and decides to interfere with the impugned order, while the apex Court sees no merit in his appeal, then there exists two conflicting pronouncements on the same judgment, sentence or order of the Permanent High Court at Bar. It is obvious, by virtue of the superiority of the Supreme Court divisional bench, its judgments prevails over, and the determination by this Court is then left in a suspended state, having no prospect of its enforcement until and unless it is set aside by the superior Court. Even if an aggrieved party were to appeal against such determination made by this Court to the Supreme Court, it had already made a determination on the same matter when the Petitioner has exercised his right to appeal under Section 12B(1) of the said Act.

Therefore, the contention of the Petitioner is clearly not legally tenable, in view of the well defined appellate jurisdiction of the Supreme Court.

Thus, it is clear that when the right of appeal is conferred on the Supreme Court, the powers of revision could not be vested within an inferior Court.

The Supreme Court in ***Martin v Wijewardena*** (supra) observed that

"The words 'Subject to the provisions of the Constitution or of any Law' are a limitation on the powers of the Court of Appeal. They do not constitute a limitation on the Rights of an Appellant."

Hence, it is our considered view that Section 12B imposes a limitation on the appellate jurisdiction of this Court, when the legislature in its wisdom conferred such powers on the apex Court, limiting the Petitioner's right of appeal only to that Court.

Somewhat a similar situation to the instant application of the Petitioner arose for consideration before this Court in ***Senanayake and Others v Kohen and Others*** (2002) 3 Sri L.R. 381.

In this situation, the Petitioner invoked the revisionary jurisdiction of this Court against an order made by the "Commercial High Court". In the said case the Petitioner had already filed an appeal addressed to the Supreme Court under Section 5 of Act No. 10 of 1996 as the Petitioner did in the matter before us. The reason the said Petitioner invoked revisionary powers of this Court was "... that there is no provision to obtain a stay order from the Supreme Court in a situation where an appeal is made to the Supreme Court from a judgment of the Commercial High Court and therefore this Court should stay the operation of the judgment until the Supreme Court decides the appeal."

Having raised the question "Whether this Court has revisionary jurisdiction in respect of orders and judgments of the Commercial High Court ?", their Lordships, however, decided the application before them on the basis that since the Petitioner did not invite the Court of Appeal to

examine the validity of the order that had been challenged before the Supreme Court, the Court of Appeal could not consider the question of the validity of the impugned judgment.

In this situation *Amaratunga* J posed another question " ...is it the function of this Court to examine the legality of the judgment of the Commercial High Court to satisfy itself that the petitioner is entitled to the relief prayed for ?", and thereafter proceeded to provide an answer as follows;

> *"If this Court ventures into such an exercise it is an indirect usurpation of the exclusive jurisdiction conferred on the Supreme Court by the Legislature. It is therefore, my considered view that it is not proper for this Court to examine the legality of the judgment of the Commercial High Court even for the limited purpose of satisfying itself that the petitioner is entitled to the relief prayed for."*

In relation to the instant application by the Petitioner, it is our considered view that this Court was not conferred with appellate jurisdiction over the Permanent High Court at Bar that had been established under Section 12A(1)(a) of the Judicature (Amendment) Act No. 9 of 2018.

The Supreme Court in ***Martin Vs. Wijewardena*** (supra) stated that ;

> *" Article 138 is an enabling provision which creates and grants jurisdiction to the Court of Appeal to hear appeals from Courts of First Instance, Tribunals and*

Other Institutions. It defines and delineates the jurisdiction of the Court of Appeal. It does not, nor indeed does it seek to, create or grant rights to individuals viz-a-viz appeals. It only deals with the jurisdiction of the Court of Appeal and its limits and its imitations and nothing more. It does not expressly nor by implication create or grant any rights in respect of individuals."

Therefore, the preliminary objection raised on behalf of the Respondent by the learned Additional Solicitor General is entitled to succeed. The petition of the Petitioner is hereby dismissed for want of jurisdiction.

In view of this determination the issuance of formal notice on the Respondent and the Petitioner's entitlement for interim relief does not arise for consideration.

Considering the nature of the questions of law that were decided in this application, we order no costs.

JUDGE OF THE COURT OF APPEAL

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE COURT OF APPEAL