

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

In the matter of an Application for
Revision made under Article 138 and
154P (3) (b) of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

C.A. Revision Application No.

CA (PHC) APN 45/2017

H.C. Colombo Case No: **22/2015**

M.C. Colombo Case No: **12908/2012**

Director General,
Commission to Investigate Allegations
of Bribery and Corruption
No.36, Malalasekere Road, Colombo 07.

Complainant

Vs.

1. Hethumuni Titus Mendis
Jayawardena
No. 04/B/3/5, Housing Scheme
Mattegoda.
2. Gamage Mudiyanse Udittha
Wimalnatha Doloswala,
No. 230/6, High Level Road
Galawilawatta, Homagama.

Accused

AND BETWEEN

Hethumuni Titus Mendis
Jayawardena
No. 04/B/3/5, Housing Scheme
Mattegoda.

1st Accused-Petitioner

Vs.

Director General,
Commission to Investigate Allegations
of Bribery and Corruption
No.36, Malalasekere Road, Colombo 07.

Complainant- 1st Respondent

Gamage Mudiyanseelage Uditha
Wimalnatha Doloswala,
No. 230/6, High Level Road
Galawilawatta, Homagama

2nd Accused Respondent

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

3rd Respondent

AND NOW BETWEEN

Hethumuni Titus Mendis Jayawardena
No. 04/B/3/5, Housing Scheme
Mattegoda.

1st Accused-Petitioner-Petitioner

Vs.

Director General,
Commission to Investigate Allegations
of Bribery and Corruption
No.36, Malalasekere Road, Colombo 07.

Complainant- 1st Respondent-Respondent

Gamage Mudiyanse Udittha
Wimalnatha Doloswala,
No. 230/6, High Level Road
Galawilawatta, Homagama

2nd Accused - Respondent - Respondent

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

3rd Respondent - Respondent

AND NOW

In the matter of an Application for re-
listing of Application bearing No. CA
(PHC) APN 45/2017.

Hethumuni Titus Mendis Jayawardena
No. 04/B/3/5, Housing Scheme
Mattegoda.

1st Accused-Petitioner-Petitioner- Petitioner

Vs.

Director General,
Commission to Investigate Allegations
of Bribery and Corruption
No.36, Malalasekere Road, Colombo 07.

Complainant- 1st Respondent-Respondent- Respondent

Gamage Mudiyanse Udittha
Wimalnatha Doloswala,
No. 230/6, High Level Road
Galawilawatta, Homagama

2nd Accused - Respondent – Respondent- Respondent

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

3rd Respondent – Respondent- Respondent

BEFORE	:	Hon. K. K. Wickremasinghe, J. Hon. Devika Abeyratne, J.
COUNSEL	:	Thusith Mudalige, DSG for Hon. Attorney General. Thusani Machado, AAL for the Petitioner.
ARGUED ON	:	21 st September 2020
DECIDED ON	:	16 th October 2020

ORDER

K.K.WICKREMASINGHE, J.

The 1st Accused - Petitioner- Petitioner (hereinafter referred to as the Petitioner) has filed this revision application in this court seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of the Western Province bearing case number HCRA 22/2015 dated 31.01.2017. The instant order is concerned with, whether the Petitioner is entitled to relist the revision application which was previously dismissed by the bench on 01/06/2018.

FACTS OF THE CASE

The facts of the instant case is briefly summarized as follows before examining whether the Petitioner is entitled to relist the Revision Application. The Petitioner is a former Secretary to the Minister of Petroleum Industries. During his term of service, a stock of “Octane 92” Petroleum had been imported by the Ceylon Petroleum Corporation from a Dubai based Company. Consequently, when the said stock of “Octane 92” had been distributed among the agents, few consumers who had purchased the said fuel had complained that their vehicles had come across problems associated with the engine. In virtue of the investigations carried out, proceedings were instituted in the Magistrate’s Court of Colombo bearing number 12908/2012 and Petitioner together with the 2nd Accused - Respondent – Respondent was charged for committing the offence under Section 70 of the Bribery Act.

At the stage of the trial in the Magistrate’s Court of Colombo, a preliminary objection as to the maintainability of the application was raised for the reason that was not in compliance with the mandatory requirements stipulated under Section 78 of the Bribery Act. It was overruled by the order dated 26/09/2014. The subsequent revision application filed in the High Court of Colombo in light of the said order of the Learned Magistrate bearing the number HCRA 22/15 was dismissed on 5/02/2015 by the Learned High Court Judge.

Being aggrieved by the said order of the Learned High Court Judge, the Petitioner filed this Revision Application in this Court on 24/03/2017. Having filed the said Revision application, the Learned President’s Counsel for the Petitioner made an application to move out the matter from the list on 28/03/2017.

I wish to reproduce the relevant journal entry dated 28/03/2017 as follows;

"Counsel for the Petitioner moves this matter be submits stand out of the today's list."

Further, the Registrar of the Court of Appeal had entered the following journal entry on 24/05/2018 which I wish to reproduce as follows;

"Petitioner has not been taken steps to list this case from 28/03/2017.

Since it appears that the parties are not interested in prosecuting this application any further this case is listed for 1/6/2018/ for an order of the Court in terms of rule 3(14) of the Court of Appeal (Appellate Procedure) Rules 1990."

Subsequently, on 01/06/2018 the bench consisted of Honorable Justice P. Padman Surasena and Honorable Justice Arjuna Obeysekere dismissed the said Revision Application stating that parties are absent and unrepresented. The subsequent analysis is to see whether the Petitioner is entitled to relist the application.

LEGAL ANALYSIS

The following grounds were derived as the grounds of contention via the Petition for relisting and by the submissions made by the Learned Counsel for the Petitioner before this Court.

- 1. The Registrar of the Court of Appeal has not taken any step whatsoever to send out a notice to the Petitioner.**
- 2. The order made by the Court on 01/06/2018 was not based on rule 3(14) of the Court of Appeal (Appellate Procedure) Rules 1990.**
- 3. The delay caused by the Petitioner is excused in the eyes of Law.**
- 4. The Petitioner should be given with the right of being heard in light of the principles of natural justice**

Each ground shall be analyzed separately.

- I. The principal rule that the Registrar of the Court of Appeal has acted is rule 3(14) of the Court of Appeal (Appellate Procedure) Rules 1990 which explicitly mentioned in the Journal entry dated 24/05/2018. I would like to cite Rule 3(14) of the Court of Appeal (Appellate Procedure) Rules 1990.

“Where the parties fail to comply with the requirements set out in the proceeding rules, the registrar shall without any delay, list such application for an Order of the Court”.

The Counsel for the Petitioner contended that the Registrar of the Court of Appeal has not taken any step whatsoever to send out notices either to the Petitioner or to his registered Attorney – at – Law on record or to the Honorable Attorney General and for that reason the Petitioner was denied the opportunity of being present and represented.

It is my view that according to the above rule, the Court of Appeal is not bound to send notices to the parties and the Registrar of the Court of Appeal has acted very correctly and in compliance of the rules listed the case for an order. The Petitioner has not taken any step to list the application from 28th March 2017 to 24th May 2018. For further analysis, I would like to cite Rule 13 (b) of Supreme Court (Court of Appeal-Appellate Procedure Copies of Records) Rules 1978. The rule reads as follows.

“Where the appellant fails to pay the fees due under these rules, the Court of Appeal may direct the appellant to comply with such directions as the court may think fit to give, and may reject such appeal if the appellant fails to comply with such directions.”

According to the above rule, the Court of Appeal has the power to send notices to the appellant which is distinct to the instant revision case. Moreover as per Rule 3(13) of the Court of Appeal (Appellate Procedure) Rules 1990, it is the duty of the Petitioner to take steps as may be necessary to ensure the prompt service of notice and to prosecute his application with due diligence. Accordingly, I agree with the submissions made by the state that, there is no duty cast upon the Court to notice the parties in a revision Application unlike in an application for appeal where they have failed to appear. The instant application is a revision application and not an appeal. It is the duty of the Petitioner to get it listed if proceeding with the case. Therefore, the Registrar is not bound to send notices to the parties once the case was taken out from the list. Considering all the aforementioned matters, I reject the above 1st contention advanced by Learned President’s Counsel for the Petitioner.

When perusing the docket it’s apparent that the Petitioner has filed a Special Leave to Appeal in the Supreme Court on 14th March 2020 which is before 28th March 2017. Therefore it is apparent that the Petitioner chosen to cease the proceedings of the instant application.

However when the Judgement of the case no; SC Writ 1/2011 was delivered by the Supreme Court, the Petitioner seems to be reinstating upon the instant revision application yet again but never mentioned that the petitioner was awaiting for the judgment. In my opinion if such deviation from the process is allowed there can be an inevitable flood gate created.

At this stage, my attention is drawn to the duty cast upon the Court and duty of the Judge to conclude cases without any delay. This view is supported by the judgment of Justice A.R.B. Amarasinge in the case of ***Jinadasa Vs Sam Silva [1994] 2SLR 232***. This is an appeal from an order of the Court of Appeal re- listing a petition which was dismissed, when the petition was not supported on the date appointed for hearing. Supreme Court affirmed the decision of the Court of Appeal that dismissed the application. However at page 233 of the Judgment His Lordship explained the duty upon a judge and held thus:

“A judge must ensure a prompt disposition of cases, emphasizing that dates given by the court, including dates set out in lists published by a court's registry, for hearing or other purposes, must be regarded by the parties and their counsel as definite court appointments. No postponements must be granted, or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot be otherwise provided for.”

- II. The Second contention advanced by the Learned Counsel for the Petitioner is that the order made by the Court on 01/06/2018 was not based on rule 3(14) of the Court of Appeal (Appellate Procedure) Rules 1990 hence the Lordships have not cited rule 3(14) when dismissing the application. The stance of the Learned Counsel for the Petitioner was that if the Honorable Judges have acted upon rule 3(14) they should have cited it and dismissed the application. It is observed by this Court that the order dated 01/06/2018 by Honorable Justice P. Padman Surasena and Honorable Justice Arjuna Obeysekere is a bench order made in pursuance to the listing made by the Registrar of the Court of Appeal under Rule 3(14). Therefore I find that there is no necessity to cite the relevant provisions in such instance since the journal entry was made in order to get a ruling under Rule 3(14) by the bench.

III. The third contention made by the Learned Counsel for the Petitioner is that the delay caused by the Petitioner is excused in the eyes of Law. The Learned Counsel for the Petitioner submitted two cases in support of their contention.

a. *Biso Menike vs. Cyril de Alwis* [1982] 1 Sri LR 368

b. *Liyanage vs. Karunaratne* [1983] 2 Sri LR 144

The traditional approach of the Court is that delay by itself is fatal to the application. However, courts generally do not apply the principle of laches mechanically, but take in to account the facts and the circumstances of the case. There is no criteria to determine what constitutes delay. Whether there has been an undue delay and whether the explanation offered by the petitioner sufficiently excuses the delay is to be decided by the Court.

In *Biso Menike v Cyril de Alwis (Supra)*, Sharvananda J. Held that the delay caused by the Petitioner unsuccessfully making representation to a committee of inquiry appointed by the Minister to look into injustices caused to the parties by the past operation of the Ceiling Housing Property Law, No. 01 of 1973, under S. 17A (1) under which Law the Commissioner of National Housing had the power, with the approval of the Minister, to divest himself of the ownership of houses vested in him under the law, was justified. The same Also, in *Liyanage vs. Karunaratne (Supra)*, the same situation is depicted. As observed in the instant case, the Petitioner in the present application occupies delay prior to filing of the application. Therefore the above cases have no bearing for the instant application.

IV. The fourth contention made by the Learned Counsel for the Petitioner is that the Petitioner should be given with the right of being heard in light of the principles of natural justice. The Learned Counsel for the Petitioner submitted two cases in support of their contention.

a. *The Ceylon Ceramics Corporation Vs. Premadasa* [1984] 2 Sri LR 250

b. *Albert vs. Veeriahpillai* (1981) 1 S.L.R 110

In the case of *The Ceylon Ceramics Corporation Vs. Premadasa (Supra)*, there was a fault of the Registry and thereafter it was rectified by the bench. The facts of the instant case is totally different to the above where in the instant revision application the Learned President's Counsel made the application to be stand out of the list. Thereafter since then the Counsel

was not proceeding for more than 1 year and later the application for relisting is made after more than 1 and ½ years of the dismissal. If the petitioner was willing to proceed he would have reserved his rights and inform the Court to wait for the Judgement of the pending case. In **Albert vs. Veeriahpillai (Supra)**, the Court of Appeal had granted leave under Article 128(1) of the Constitution as there was a substantive question of law involved. Further, the applicant had no notice of the hearing. In the instant case the case was taken out from the list and thereafter did not proceed for more than 1 and ½ years after the dismissal. Therefore, the above cases have no bearing for the instant application in light of natural justice.

Nevertheless, the fact that the present application contains unusual circumstances cannot be overlooked. I observe that in the instant case the Learned President's Counsel has made an application to move out the matter from the list on 28/03/2017 but he has neither reserved any right to relist the instant application nor any other mentioning date is given. After more than one year of showing no interest to prosecute I observe that the parties have failed to follow steps in due diligence which is of utmost important in litigation. To succeed in a relisting application, Petitioner must establish sufficient reasons for his failure to appear. I find the Petitioner in the instant case have failed to convince this court as to sufficient and adequate reasons to allow relisting.

This view is supported by the judicial decision in **Jinadasa Vs Sam Silva (supra)** wherein at page 234 His Lordship Justice A.R.B. Amarasinghe held as follows.

"Where a party has established that he had acted bona fide and done his best, but was prevented by some emergency, which could not have been anticipated or avoided with reasonable diligence from being present at the hearing, his absence may be excused and the matter restored. The Court cannot prevent miscarriages of justice except within the framework of the law: it cannot order the reinstatement of an application it had dismissed, unless sufficient cause for absence is alleged and established. It cannot order reinstatement on compassionate grounds. Inasmuch as it is a serious thing to deny a party his right of hearing, a court may, in evaluating the established facts, be more inclined to generosity rather than being severe, rigorous and unsparing."

In the above premise the order of allowing the relisting application was set aside by the Supreme Court.

Considering all the aforementioned reasons, relisting of the application is not allowed.
Revision application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Devika Abeyratne, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. *The Ceylon Ceramics Corporation Vs. Premadasa* [1 9 8 4] 2 Sri LR 250
2. *Albert vs. Veeriahpillai* (1981) 1 S.L.R 110
3. *Biso Menike vs. Cyril de Alwis* [1982] 1 Sri LR 368
4. *Liyanage vs. Karunaratne* [1983] 2 Sri LR 144
5. *Jinadasa Vs Sam Silva* [1994] 2SLR 232.