

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

In the matter of an application for revision in terms of Article 154P (6) of the Constitution of the Democratic socialist Republic of Sri Lanka read together with Article 138 of the Constitution.

CA PHC Appn No 245/05 REV
HC No 87/2005(Negambo)
MC No 56854/05/S (Negambo)

01. W M A De Silva,
No. 21/2, Yakkala Rd,
Gampaha
Chairman-Aryogya Western
Hospital Ltd.
02. Kumudini De Silva,
No. 21/2, Yakkala Rd,
Gampaha
Director-Aryogya Western
Hospital Ltd.
**Respondent-Petitioner-
Petitioners**

Vs

A M P Pathirage
Asst. Commissioner of
Agrarian Services and
Development,
Office of the Agrarian
Services and Development,
Sri Bodhi Road,
Gampaha
**Applicant-Respondent-
Respondent**

Before:

W L R Silva J &

A W A Salam J

COUNSEL:

**Upul Jayasuriya for Respondent-Petitioner-Petitioners
and M/s Yuresha de Silva, State Counsel for Applicant-Respondent-
Respondent.**

Argued on: 16.06.2009

Written Submissions filed on: 20.07.2009

Decided on: 26.10.2009

A.W.Abdus Salam,J.

This is an application for the revision of an order of the Learned High Court Judge, refusing to revise an order made by the Learned Magistrate who restrained the Respondent-Petitioner-Petitioners (W M A P de Silva and Mrs. Kumudini de Silva - hereinafter referred to as the petitioners) from acting in contravention of subsection (1) of section 33 of the Agrarian Development Act, No 46 of 2000.

According to the Petitioners the facts briefly are that they received summons dated 22nd July 2005 from the Magistrate's Court of Gampaha together with an attachment said to be an interim order even dated. In deference to court they immediately stopped the construction work as required by the interim order served on them and produced along with the application marked as P2 C and P2 D. They further maintain that no interim order has been in fact issued by the magistrate but one such order has been served on them, pursuant to an application made to the Magistrate's Court reporting an alleged violation of section 33 (1) of the Agrarian Development Act made by the informant-respondent (AMP Pathirage- Assistant Commissioner of Agrarian Services and Development). The petitioners complain that the application of the informant-respondent had come up ex-parte and the Magistrate's Court had only ordered summons to be issued on the petitioners unaccompanied by an interim order. The petitioners have quite emphatically stated in their petition that the learned additional Magistrate had

issued an order to issue summons on the petitioners returnable on 2 September 2005 and not made any interim orders. To substantiate this position the petitioners have produced the relevant journal entries marked as P1. In terms of the journal entry dated 2 July 2005, which presumably is the first journal entry in the case, it is quite clear that the learned additional Magistrate has neither considered the application for an interim order as contemplated under section 33 of the Agricultural Development Act No 46 of 2000 nor has she made order in the said journal entry to issue such interim order on the petitioners.

For purpose of convenience and ready reference journal entry in question is reproduced below in its original form

The learned State counsel who appeared for the informant-respondent has taken up a preliminary objection that the petitioners are not entitled to any relief from this court since they have not sought the vacation of the impugned order of High Court which apparently had exercised jurisdiction over the purported interim order. I have given my anxious consideration to this objection raised by the State. No doubt the petitioners have not specifically sought the vacation of the court order of the learned High Court judge in their prayer to the petition. However on a reading of the entire petition which is filed in terms of articles 154 P (6) read together with article 138 of the Constitution of the Democratic socialist Republic of Sri Lanka, it is quite evident that the

petitioners are seeking to challenge the order made by the learned High Court judge and therefore our jurisdiction to grant relief is unfettered, although the petitioners have not specifically sought such relief. It is trite law that the reversionary jurisdiction of this court to act in revision over the orders improperly made by a lower court is not in any way affected, if the order complained of could not have been in any event made according to law.

As far as the present application is concerned the learned additional Magistrate should have considered the application for the interim order and made a specific direction as to whether such interim order should be issued or not. It is more so when it comes to the implementation of draconian laws affecting the rights of people.

Section 33 (5) mandates that upon the receipt of an application by the magistrate under that section he shall determine whether an act has been committed in contravention of 33(1) and upon arriving at such determination, he shall make an interim order restraining the person named in the application from acting in contravention of that section and then forthwith issue summons on the person or persons named in the application to appear and show cause on the date specified in such summons, as to why such person should not be restrained from doing the acts complained of in the application.

As far as the purported order served on the petitioners is concerned, the learned additional Magistrate has failed to direct her mind judicially to the question whether there has been contravention of subsection 1 of section

33 of the Act, which warrants the issuance of an interim order. Upon a close perusal of the material available, it would be seen that the learned additional Magistrate has never considered that question. Further she has never made any determination as to whether the Petitioners had committed any acts, in contravention of section 33 (1).

In the circumstances, it is my considered view that the interim order served on the petitioners is of no force or avail in law since there is no judicial determination by the additional Magistrate as contemplated under section 33 (5). By reason of the neglect or failure on the part of the additional Magistrate to make a determination and then consider the question of the entitlement to obtain an interim order against the petitioners, has in actual fact caused serious prejudice to the Petitioners and the Informant-Respondent as well. As far as the petitioners are concerned they have been served with an interim order which has in fact never been entered. In so far as the Informant- Respondent is concerned, his application for interim order has not been considered at all.

As such, I consider the exercise of the reversionary powers of this court is most appropriate in the circumstances to set aside the order of the learned High Court judge and also to set side purported interim order signed by the additional Magistrate and served on the Petitioners.

As there has been no sufficient compliance of section 33 (5) of the relevant Act, the Magistrate's Court is now directed to consider the application for interim order in terms of the said section within a period of three weeks from the date of receipt of this order by the Magistrate.

Since the state of affairs dealt in this order has resulted by reason of the lapse on the part of the Court, based on the maxim that an act of court cannot prejudice a party (*actus curiae neminem gravabit*) and acting in the exercise the inherent powers of this Court clothed with the necessary revisionary jurisdiction, I direct both parties to maintain the status quo of the subject matter until the expiry of three weeks from the date of receipt of this order by the Magistrate's Court or until an order is made on the application for interim order whichever takes place first.

The Magistrate's Court of Gampaha is also directed to give priority to this matter and expeditiously dispose and conclude the case, as undue delay in disposing it could possibly result in the denial of justice to both sides.

Taking into consideration the peculiar circumstances of the case that led to the issuance of the interim order, I make no order as to costs.

Application for revision allowed.

A W A Salam. J

Judge of the Court of Appeal

W.L.R.Silva

I agree

Judge of the Court of Appeal