

THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 2 SRI L.R. - PART 9**

**PAGES 225 - 252**

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**PUBLISHED BY THE MINISTRY OF JUSTICE**

**Printed at M. D. Gunasena & Company Printers (Private) Ltd.**

**Price: Rs. 25.00**

**D I G E S T**

**Page**

**CONSTITUTION ARTICLE 138, 154 –** 13th Amendment – Article 154P (4)(b) 231

– Provincial Council list – Arrears of rent - No payment – Quit notice

by Assistant Commissioner of Agrarian Services (Provincial) – Setting

aside same by Commissioner General of Agrarian Services – Writ of

Certiorari in the High Court – Does the High Court have jurisdiction? –

Intention of the 13th amendment.

**Wijesuriya vs. Wanigasinghe and others**

**CRIMINAL PROCEDURE CODE –** Section 176, 177, Section 178 [1], 178 [2] 242

– Penal Code Section 296, Section 315, Section 358 – Charged for

murder – Convicted under Section 315 and Section 358 – Applicability

of Section 178 [1] [2] of the Criminal Procedure Code – Minor offence of

the main offence? Does Revision lie?

**Seeralathevan vs. Attorney General**

**WRIT OF CERTIORARI –** Placement in a segment of a Technical grade – 225

Unreasonable, arbitrary – Legitimate expectation? – Locus standi –

Central Principles of Administrative Law – Ultra Vires – Could a writ of

certiorari be issued as a matter of course? – Wage Policy.

**Edirisooriya and others vs. National Salaries and Cadre**

**Commission and others**

**(**Continued from Part 8)

**WRIT OF CERTIORARI –** Pilgrimages Ordinance – Section 2 – Minister 247

defining area as “Camp Area” – No inquiry held? – Gazetted – Title to

the property disputed? – Disputed facts cannot be decided in a writ

Court – Necessary parties?

**Wijenayake and others vs. Minister of Public Administration**

*Edirisooriya and others vs. National Salaries and Cadre Commission and others*

CA *(Sathya Hettige PC. J (P/CA))* 225

the appropriate categorization is MT – 2-2006 (MA technical

Segment 2) as per the document marked P 8 A. It was

submitted by the petitioners that Management Assistant

Technical Segment 2 falls within the salary category of

MT-2-2006. It was strenuously contended by the learned

President’s Counsel that technical/professional training

experience was a requirement as per the scheme of recruit-

ment which the petitioners possessed.

The petitioners in this application are seeking among

other reliefs, to quash the decision of the respondents as

contained in P 13 to place the petitioners in category

MT-1-2006 as per circular 6 of 2006 (P8) on the basis that

the decision contained in P 13 is wrongful, arbitrary, un-

reasonable and in violation of legitimate expectation of the

petitioners.

In paragraph 19 of the petition it is specifcally stated

that “. . . ***the placement of the petitioners in MT-2-2006***

***as aforesaid is wrongful”***

The petitioners also seek a Writ of Mandamus to place

the petitioners in category MT-2-2006 as a consequential

relief and to place them in MN 3 of 2006. It was contended

by the learned President’s Counsel for the petitioner that the

petitioners had a legitimate expectation to be placed in the

salary scale of MN 3 – 2006 A.

The respondents, objecting to the petitioners’ application

for relief submitted that the petitioners’ placement in category

MT-1-2006 was consequent to an introduction of the Public

Administration Circular 6/2006 (P8) which was brought after

the Budget Proposal of 2006 in order to restructure and or to

regroup all posts in the public service. State Counsel further

226 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

drew the attention of court to the section 2 of the Circular

(P8).

Section 2 of the Public Administration Circular 6/2006

reads as follows.

***“in order to implement the new salary structure all***

***posts/services in the public service should be re-catego-***

***rized/regrouped by each Ministry and Departments based***

***on the defnitions given in Annexure 11 and in terms of***

***Annexure 111 – index to salary conversions. . .”***

The learned State Counsel submitted that when catego-

rizing the petitioners in MT-1-2006 the respondents consid-

ered the duties of the petitioners, the scheme of recruitment

of the petitioners and all other matters (criteria) stated in

Annexure 11 of the Circular marked P8 in respect of re

categorization.

It was strongly denied by the respondents that the

petitioners were placed in an wrongful and incorrect

category.

It was brought to the court’s attention by the respon-

dents that section 22 of the Circular No. 6/2006 states that

the National Salaries Cadres Commission is the permanent

body and will continue to review the implementation of the

Circular and will provide any further assistance required by

the government Institutions in the form of clarifcations and

further instructions. As such it is the National Salaries and

Cadre Commission which is the body empowered to clarify any

confusion that may arise when implementing the circular.

It appears that the matters that are canvassed and

reviewed in this application are policy decisions of the

Government. It was submitted by the learned State Counsel,

*Edirisooriya and others vs. National Salaries and Cadre Commission and others*

CA *(Sathya Hettige PC. J (P/CA))* 227

that the PA Circular 6/2006 was introduced consequent

to a Budget Proposal in 2006 and therefore the policy

decisions of the Government regarding the salary structure of

the public servants should not be subject to judicial review.

It was argued that prior to the recommendation being

made by the National Salaries and Cadre Commission the

petitioners were paid at a different salary scale due to a

misinterpretation of the Circular No 6/2006. However, sub-

sequent to the recommendation being made the steps were

taken to rectify the error.

The petitioners are challenging the decision (P13) on the

basis that the decision to place the petitioners is wrongful

and unlawful.

The question before this court is to determine whether

the petitioners have placed before this court suffcient

material to establish that the respondents have acted unlaw-

fully exceeding the powers.

It is to be noted that the respondents position is that

the petitioners are public servants and they are bound by

the Circulars issued by the Public Administration Ministry

from time to time according to the letters of appointment. The

petitioners were re-categorized and regrouped in Category

MT-1-2006 as per their educational qualifcations, duties,

scheme of recruitment and having taken in to account the

period of vocational training.

In order to invoke jurisdiction of this court to review the

decision contained in P13 the petitioners must establish that

the decision is illegal and *ultra vires* and not whether the

decision is right or wrong.

228 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

In the case of *Sudhakaran vs. Barathi and others*(1), it was

held that “While legitimate expectation gives an applicant

*locus standi* to ask for judicial review it differs from wrongful

or *ultra vires* action. It is wrongful or *ultra vires* action which

justifes the granting of judicial review and that too only if all

the circumstances point to an exercise of the Court’s discre-

tion that way”.

Therefore it should be noted that the petitioners in this

application will have to establish when seeking a writ of

mandamus that a decision in question is illegal. It was

submitted by the respondents that the placement of the

petitioners in the salary scale of MT-1-2006 was taken having

considered all the necessary material and facts and in terms

of the circular PA 6 of 2006 and the decision sought to be

quashed is well within the law.

On a careful perusal of P13 which is the impugned

document in this application has been addressed to the

principals of all Technical Colleges and if any relief granted to

the petitioners as sought in the petition that decision would

affect all other decisions in respect of the public offcers based

on P13 and the PA circular No. 6 of 2006. It appears from the

material placed before this court and the submissions of the

Learned Counsel that PA circular No. 6 of 2006 has been

issued based on the recommendations made by the Nation-

al Salaries and Cadre Commission. Even though the peti-

tioners have made all the members of the National Salaries

Cadre Commission respondents in this application no

relief has been sought from the National Salaries and Cadre

Commission or the petitioners are not challenging the rec-

ommendations of the National Salaries Cadre Commission.

*Edirisooriya and others vs. National Salaries and Cadre Commission and others*

CA *(Sathya Hettige PC. J (P/CA))* 229

**It should be noted that wage policy of the public offcers**

**can be decided by the Cabinet under the provisions of the**

**Constitution and the court cannot interfere with the pol-**

**icy decision in relation to restructure of salaries of pub-**

**lic offcers unless the petitioners can establish that the**

**policy decision is *ultra vires*.**

It can be seen that the National Salaries and Cadre

Commission has recommended to restructure and recatego-

rize and or to regroup the public offcer having considered all

the relevant facts and the policy decision of the government

and therefore I do not think that this court should inter-

fere with the recommendations of the National Salaries and

Cadre Commission or the decision taken in PA circular

No. 6 of 2006. This court is of the view that the petitioners

have failed to establish that the respondents have exceeded

their powers and have acted in violation of principles of

natural justice or the decision makers are guilty of errors

of law.

It was submitted by the learned State Counsel that the

implementation of PA circular 6 of 2006 will not amount to

a public duty capable of invoking a writ of mandamus. The

issuance of a writ of Mandamus is a discretionary power of

this court.

In *P.S. Bus Company v. Ceylon Transport Board*(2) the

court held that,

***“A prerogative Writ is not issued as a matter of***

***course and it is in the discretion of court to refuse to***

***grant it if the facts and circumstances are such as to***

***warrant a refusal”.***

230 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

Prof. Wade calls *ultra vires*

“The central principle of administrative law”, *ultra vires*

is a Latin phrase meaning simply” acting beyond one’s power

of authority “the general idea behind the term is that a

decision or action of a functionary is said to be *ultra vires*

when that functionary acts outside the ambit or scope of his

authority.

In the circumstances of this application the court is

of the view that the respondents have acted within the law

and therefore the reliefs sought by the petitioners cannot be

granted in favor of the petitioners.

Accordingly application of the petitioners is refused. No

costs.

**Goonaratne J.** – I agree.

*Application dismissed.*

*Wijesuriya vs. Wanigasinghe and others*

SC *(Ms. S. Tilakawardane, J.)* 231

**WIJESURIYA vS. WANIGASINGHE AND OTHERS**

SuPrEME COurT

SHIrANI TILAkAWArdANE J.

SOMAWANSA, J.

BALAPATABENdI, J.

SC 33/2007

SC SPL LA 41/07

CA PHC (APN) 206/03

HC HAMBANTOTA HCA 79/01

AGrArIAN SErvICES CASES 44/4615/98

dECEMBEr 11, 2007

***Constitution Article 138, 154 – 13th Amendment – Article 154P (4)(b)***

***– Provincial Council list – Arrears of rent - No payment – Quit no-***

***tice by Assistant Commissioner of Agrarian Services (Provincial) –***

***Setting aside same by Commissioner General of Agrarian Services***

***– Writ of Certiorari in the High Court – Does the High Court have***

***jurisdiction? – Intention of the 13th amendment.***

On a complaint lodged with the Assistant Commissioner of Agrarian

Services, Hambantota for failure to provide the due share of paddy to

the petitioner – it was held that, the tenant cultivator was in default,

and a quit notice was issued by the Assistant Commissioner. This was

set aside by the Commissioner General of Agrarian development which

order was reversed by the High Court. The respondent moved the Court

of Appeal in revision – and the Court of Appeal set aside the judgment

of the High Court on the ground that the High Court lacked jurisdiction

to review that Commissioner General’s order. On special leave being

granted,-

**Held:**

(1) Though devolution of power to the Provincial High Court was

meant to bring justice closer to those situated far from the High

Court, it was never meant to fundamentally alter the established

map of legal jurisdiction nor derogate powers of the Central

Government.

232 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

(2) It would be patently disingenuous to declare the position of the

Commissioner General of Agrarian development – a position (i)

created by the Legislative Act of Parliament (ii) that services as

the Head of the department under Article 55(3) (iii) controlled by

the Central Executive with respect to appointment and supervi-

sion and most importantly (iv) that wields power across the entire

island – as anything other than a position of the Central Execu-

tive.

(3) The 13th Amendment was intended to supplement and not to

replace established functioning of the legislature and judiciary.

Per Shirani Tilakawardane, J.

“If it were held that the High Court of Hambantota had sole

jurisdiction to pronounce upon the Commissioner General’s order

then it necessarily follows that an identical order on another

Province would rest solely under the purview of the Provincial

High Court and so on. Judicial disparity in such a scenario is

inevitable with the passage of time resulting in disparity rulings

upon otherwise identical orders – if the goal of the judicial system

is to provide justice, such judicial disparity cannot be permitted

and was clearly not the intention of the legislature. The Commis-

sioner General’s order though acting upon a matter occurring in a

Province is merely an excess of power in relation to such province,

such island wide powers are appropriately the domain of the juris-

diction of the appellate Courts with island wide jurisdiction.”

(4) The 13th amendment does not effect any change in the structure of

the Courts of the judicial power of the people. The Supreme Court

and the Court of Appeal continue to exercise unimpaired several

jurisdictions vested in them by the Constitution. There is only one

Supreme Court and only Court of Appeal for the whole island.

**appeal** from a judgment of the Court of Appeal.

**Cases referred to:-**

1. *Weragama vs. Eksath Lanka Wathu Kamkaru Samithiya and others*

– 1994 – 1 Sri Lr 293

2. *Madduma Banda vs. Asst. Commissioner of Agrarian Services 2003* –

2 Sri Lr 81

3. *In Re 13th amendment* – 1987 – 2 Sri Lr 313

*Wijesuriya vs. Wanigasinghe and others*

SC *(Shiranee Tilakawardane, J.)* 233

*Manohara de Silva PC* with *Priyangi de Alwis* and *G.W.C. Bandara*

*Thalagune* for appellant

*Saliya Peiris* for 1st respondent

*L.M.K. Arulanandan DSG* for 2nd and 3rd respondents

June 26th 2008

**SHiranee tilakawardane, J.**

The facts of this matter involve a paddy cultivation

dispute, whereby Complainant-Petitioner-respondent-Peti-

tioner (the owner of the land and hereinafter referred to as the

“Petitioner”) recorded a complaint with the Agrarian Services

Offce of Hambantota, alleging that Respondent-Respondent-

Petitioner-respondent (the tenant cultivator of the aforemen-

tioned land and hereinafter referred to as the “respondent”)

had failed to provide to the Petitioner, his due share of paddy

yield as per an agreement between the two. After inquiry, the

Assistant Commissioner of Agrarian Services of Hambantota

(hereinafter referred to as the “Assistant Commissioner”)

directed the respondent to provide 70 bushels of paddy

(hereinafter referred to as the “P3 Order”) as the defaulted

share to the Petitioner. respondent made available the

requisite bushels to Petitioner, however, despite several

notices via registered Post to Petitioner, the Assistant

Commissioner, and eventually to the Regional Offce of

Agrarian Services Centre of Weerawila, no action was taken

by the Petitioner to procure the bushels, or by the Assistant

Commissioner or Regional Offce to direct the Petitioner to

do the same. Nevertheless, the Assistant Commissioner sent

a quit notice dated 8th May 2000 to respondent (hereinafter

referred to as the “P12 Order”), informing him that (i) he had

failed to comply with the P3 Order, (ii) his tenancy of the land

234 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

was revoked, and that (iii) he had thirty (30) days to tender

possession of the land to the Petitioner.

Being aggrieved by the said decision of the Assistant

Commissioner, the respondent appealed on 12th May 2000

to the Commissioner General of Agrarian development

(hereinafter referred to as the “Commissioner General” or

3rd respondent”), who ordered that the P3 and P12 Orders

be set aside. despite the respondents compliance with a

subsequent directive by the Assistant Commissioner to

tender either 70 bushels or its monetary equivalent – respon-

dent, in fact, tendered the rs. 18,655 to the Petitioner – the

Petitioner fled an application bearing No. HCA 79/2001 to

the High Court of Hambantota seeking (i) a Writ of Certioran

to quash the decision of the Commissioner General and (ii)

a Writ of Mandamus to reinstate the P3 Order. Both were

granted by the High Court.

Being aggrieved by the said decision of the High Court,

the respondent submitted an application of revision before

the Court of Appeal bearing No. CA (PHC) APN No. 206/2003

in terms of the Article 138 of the Constitution, seeking inter

alia to revise and/or set aside the said judgment of the High

Court on the grounds that the High Court lacked jurisdiction

to review the Commissioner General’s order. By a Judgment

dated 12th January 2007, the Court of Appeal held that the

High Court, in fact, lacked jurisdiction.

Being aggrieved by the said order of the Court of Appeal,

Petitioner sought, and we granted, special leave to appeal

to this Court with respect to the following questions of law

stated in paragraph 7 of the Petitioner’s 21st February 2007

petition:

*Wijesuriya vs. Wanigasinghe and others*

SC *(Shiranee Tilakawardane, J.)* 235

1. did the Court of Appeal err in law in holding that the

Commissioner General of Agrarian development is not a

person exercising any powers within the province?

2. did the Honorable Judge of the Court of Appeal err in

law in arriving at the above conclusion in as much as

Article 154P(4)(b) confers jurisdiction on the Provin-

cial High Courts to issue writs of certiorari, prohibition,

mandamus etc. against any person exercising, within the

Province, any power under any law?

3. did the Honorable Judge of the Court of Appeal fail to

appreciate that there is no requirement in Article

154(P)(4)(b) that the person exercising powers should be

resident and/or stationed within the Province, what is

required is for a person to exercise powers within the

province?

Questions of jurisdiction often invoke statutory interpre-

tation. However, this case is unique in that the questions of

law we have to review, have been chosen not because of their

cryptic and ambiguous language as is often the case with

legislation that prompts legal dispute, but because they

warrant and, in fact, afford a simple answer. As this Court

noted in *Weragama v. Eksath Lanka Wathu Kamkaru*

*Samithiya and Others*(1). The meaning of Article 154(P)(4) is

perfectly clear, and there is no ambiguity, absurdity, or

injustice justifying the modifcation of the language.

The operative provision of Law relevant to this determi-

nation is Article 154 of the Constitution, as provided by the

Constitution’s 13th Amendment. Article 154(P)(b) reads in

relevant part:

236 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

*154(P)(4)(b) Every Such High Court shall have jurisdiction*

*to issue, according to law –*

*(a) …*

*(b) orders in the nature of writs of certiorari, prohibition,*

*procedendo, mandamus and quo warranto against*

*any person exercising, within the Province, any power*

*under –*

*(i) any law; or*

*(ii) any statutes made by the Provincial Council estab-*

*lished for that Province.*

*In respect of any matter set out in the Provincial Council*

*List.*

By this amendment the Constitution is charged with

conferring signifcant jurisdiction to the Provincial High

Courts, and represents a legislative effort to (i) recognize

the inherent beneft of resolving matters of local nature by

the local wisdom best able to pronounce upon them, and (ii)

remove the geographic penalty upon those who suffer injustice

far away from the higher Colombo Courts, as was the in-

tention refected in the Bill when it was submitted to

Parliament. Such power was not given without limit, however,

with the legislature carefully circumscribing the scope of

jurisdiction conferred upon the Provincial High Courts. The

means by which this circumscription is effected is through a

delineation upon both judicial and geographical topogra-

phies, as the statute clearly devolves jurisdiction to the

Provincial High Courts over issuances of Writs in respect of (i)

only those matters enumerated in the Provincial Council List

(List 1) contained in the Ninth Schedule to the Thirteenth

*Wijesuriya vs. Wanigasinghe and others*

SC *(Shiranee Tilakawardane, J.)* 237

Amendment to the Constitution, and (ii) only against a

person exercising power pursuant to any law or provincial

specifc statutes *within* the Province.

Of the items enumerated in the Provincial Council List,

two are of relevance in this determination. Item Nine (9) of the

Provincial Council List involves matters pertaining to Agricul-

ture and Agrarian Services and item Eighteen (18) contains

matters pertaining to Land to the extent set out in Appendix II

They read as follows:

***9. Agriculture and Agrarian Services –***

*9.1 Agriculture, including agricultural extension, promotion*

*and education for provincial purposes and agricultural*

*services (other than in inter-provincial irrigation and*

*land settlement schemes. State land and plantation*

*agriculture);*

*9.2 Rehabilitation and maintenance of minor irrigation*

*works;*

*9.3 Agricultural research, save and except institutions*

*designated as national agricultural research institu-*

*tions.*

***18. Land –*** *Land, that is to say, rights in or over land, land*

*tenure transfer and alienation of land, land use, land*

*settlement and land improvement, to the extent set out in*

*Appendix II.*

On its fact, item 18 seems to devolve jurisdiction to the

Provincial High Courts over matters relating to the owner-

ship, improvement, use and other rights pertaining to land,

while Item 9 has been drafted to afford the Provincial High

238 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

Courts broad jurisdiction over agricultural issues. However,

given the incomplete nature of the enumeration of matters

on List I – in a few instances, they refer to a subject or

function, with no elaboration of any kind, and in other situa-

tions, terse descriptions accompany such headings – we are

of the opinion that it is not possible to determine whether a

matter is a List I subject merely by looking to the headings

upon this list. This Court, however, has had an opportunity

to analyze and pronounce upon the Provincial Council List

items of relevance to us in the instant case. In *Madduma*

*Banda vs. Assistant Commissioner of Agrarian Services*(2), this

Court noted that:

*“The word ‘agrarian” in section 9 of the Provincial Council*

*List relates to landed property and such property could no*

*doubt attract paddy lands and tenant cultivation of such*

*land and the impugned order would be covered by the said*

*section 9 in the Provincial Council List.”*

Such a determination makes sense, given the purpose

of the 13th Amendment to give a right to an aggrieved party

to have recourse to the local Provincial High Court instead

of having to seek relief from the Court of Appeal in Colombo.

It is this legislative intent that serves as the primary contention

of the Learned Counsel for the Petitioner in his efforts

to have the High Court’s dismissal of the Commissioner

General’s order. Legislative intent is indeed a compelling

factor to be considered in the determination of statutory

application, and, ironically, legislative intent leads us to

conclude that the facts of the instant case fail to satisfy the

second jurisdiction requirement of Article 154(P)(4) (b), namely

the “within” requirement.

*Wijesuriya vs. Wanigasinghe and others*

SC *(Shiranee Tilakawardane, J.)* 239

Though the devolution of power to the Provincial High

Court was meant to bring justice closer to those situated far

from the high Colombo Courts, it was never meant to funda-

mentally alter the established map of legal jurisdiction nor

derogate powers of the central government executive. In fact,

In *Re 13th Amendment*(3) 328 it has been stated that

*“. . . the provisions of the bill ensure that devolution does*

*not damage the basic unity of Sri Lanka. The scale and*

*character of the devolved responsibilities will enable*

*the people of the several provinces to participate in the*

*national life and government. The general effect of the new*

*arrangement will be to place under provincial democratic*

*supervision a wide range of services run in the respec-*

*tive provinces for the said provinces, without affecting the*

*sovereign powers of parliament and the Central Execu-*

*tive.”*

While “within” may give rise to multiple interpretations,

the only reasonable interpretation in light of the legislative

history and purpose of Article 154(P) (4) (b) and indeed the

13th Amendment as a whole, is that it refers to that qualitative

nature and scope of the power at issue, and not necessarily

the geographic location of the person who exercised it; in

other words, the question that this “within” requirement leads

us to determine is Whether the power at issue is one that is

local or “provincial” in nature, or one exercised from, or as

part of, a centrally acting authority or position? And the only

logical, reasonable and conclusive determination is that it is

exercised from a centrally acting authority or position. In fact,

it would be patently disingenuous to declare the position of

Commissioner General of Agrarian development – a position (i)

created by a legislative act of Parliament. (ii) that serves as

240 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

the Head of a department under Article 55(3) of the Con-

stitution as amended (iii) controlled by the Central Execu-

tive, with respect to appointment and supervision and most

importantly, (iv) that wields power across the entire island –

as anything other than a position of the Central Executive.

Such a determination is the only one that accords with

the pith and substance of the 13th Amendment. The 13th

Amendment was intended to supplement and not to replace

established functioning of the legislature and judiciary. In *Re*

*13th Amendment(supra)* unequivocally and expressly articu-

lated the preservation of then-existing **judicial uniformity:**

*“The [13th Amendment does] not effect any change in the*

*structure of the Courts of the judicial power of the People.*

*The Supreme Court and the Court of Appeal continue to*

*exercise unimpaired the several jurisdictions vested in*

*them by the Constitution. There is only one Supreme Court*

*and only Court of Appeal for the whole Island. Unlike in*

*a Federal State,”* and furthermore, *“the 13th Amendment*

*Bill defnes those areas of activity where decisions affect*

*primarily persons living in the province. It does not devolve*

*powers over activities which affect people elsewhere or*

*the well-being of Sri Lanka generally. The powers that are*

*conferred on the Provincial Councils are not at the expense*

*of the benefts which fow from* ***political and economic***

***uniformity of Sri Lanka.****”*

Given this overarching directive of judicial uniformity,

this desire on the part of the drafters to protect the effcacy

of established jurisdiction is quintessentially a pivotal re-

quirement of the intention of Parliament. If, in terms of the

arguments presented, it were to be held that the High Court

*Wijesuriya vs. Wanigasinghe and others*

SC *(Shirani Tilakawardane, J.)* 241

of Hambantota had sole jurisdiction to pronounce upon the

Commissioner General’s order, then it necessarily follows

that an identical order in another Province would rest solely

under the purview of that Province’s High Court, and so on.

Judicial disparity in such a scenario is inevitable with the

passage of time, resulting in disparate rulings upon otherwise

identical orders. If the goal of the judicial system is to provide

justice, such judicial disparity cannot be permitted and was

clearly not the intention of the legislature. The Commissioner

General’s Order though acting upon a matter occurring

in a Province (as it must, since all matters arise in *some*

Province or another), is merely an exercise of Power in

relation to such Province Such “island–wide” powers are

appropriately the domain of the jurisdiction of the Appellant

Courts with “island-wide” jurisdiction.

Accordingly, for the reasons above we affrm the judg-

ment of the Court of Appeal dated 12th January 2007, and

dismiss this Appeal. No Costs.

**SomawanSa, J.** – I agree.

**BalapataBendi, J.** – I agree.

*Appeal dismissed.*

242 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

**SEERALATHEvAN vS. ATTORNEY GENERAL**

COurT OF APPEAL

SISIrA dE ABrEW, J

ABEyArATNE, J.

CA [PHC] APN 111/2009

HC BATTICALOA NO. HCEP 2399/06

***Criminal Procedure Code – Section 176, 177, Section 178 [1], 178 [2]***

***– Penal Code Section 296, Section 315, Section 358 – Charged for***

***murder – Convicted under Section 315 and Section 358 – Applica-***

***bility of Section 178 [1] [2] of the Criminal Procedure Code – Minor***

***offence of the main offence? Does Revision lie?***

The accused was charged under Section 296 of the Penal Code, but

convicted under Section 315 and Section 358 of the Penal Code. It was

contended that when an accused is charged with the offence of murder,

offence under Section 358 cannot be considered as a minor offence

under Section 178 [2] Criminal Procedure Code.

**Held:**

(1) The minor offence envisaged in Section 178 [2] should be inter-

preted to say that it is a minor offence of the main offence with

which the accused is charged.

(2) When the accused is charged under Section 296 – murder, offence

under Section 358 cannot be considered as a minor offence of the

offence of murder.

Per Sisira de Abrew, J.

“I have earlier held that the High Court Judge has committed a

mistake in convicting the accused who was charged for the offence

of murder, for the offence under Section 358, therefore I hold that

this mistake committed by the High Court Judge can be consid-

ered as an exceptional ground to invoke the revisionary jurisdic-

tion – Court cannot turn a blind eye when an illegal order has been

made by a trial Court.”

*Seeralathevan vs. Attorney General*

CA *(Sisira de Abrew, J.)* 243

**an application** in revision from an order of the High Court of

Batticaloa.

**Cases referred to:**

1. *Queen v. Wellasamy* 63 NLr 265

2. *Rashed Ali vs. Mohamed Ali* 1981 1 Sri Lr 262

3. *Hotel Galaxy Ltd vs. Mercantile Hotel Management* 1987 1 Sri Lr 156

4. *Attorney General vs. Gunawardene* 1996 2 Sri Lr 149

*Yoosuf Nasar* with *Manjula Egodawattage* for Petitioner.

*Ms. Haripriya Jayasundara S.S.C.* for respondent.

June 15st 2011

**SiSira de aBrew, J.**

This is a revision application to set aside a part of the judg-

ment of the learned High Court Judge dated 27.09.2007.

The accused in this case was charged with the murder

of a man named Arockiyam rooparaj. After trial the learned

High Court Judge discharged the accused of the charge of

murder, but convicted him for the offences under Section 315

and 358 of the Penal Code. Learned Counsel for the petitioner

submits that conviction of the offence under Section 358 of

the Penal Code is illegal since there was no charge under

Section 358 of the Penal Code. He does not complain in

respect of the conviction of the offence under Section 315 of

the Penal Code. Learned High Court Judge in convicting the

accused for the offence under Section 358 of the Penal Code,

acted under Section 178 of the Criminal Procedure Code.

Section 178(1) of the Criminal Procedure Code does not apply

to the facts of this case. Section 178(2) deals with a situation

where the Court can convict an accused person for a minor

offence. The minor offence envisaged in Section 178(2) of the

Criminal Procedure Code should be interpreted to say that it

244 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

is a minor offence of the main offence with which the accused

is charged. For instance accused person who was charged

with the offence of murder can be convicted of the offence of

culpable homicide not amounting to murder, grievous hurt or

causing simple hurt. But the said Section does not empower

Court to convict a person of a different offence. Thus, when

the accused is charged with the offence of murder, offence

under Section 358 cannot be considered as a minor offence

of the offence of murder. Learned High Court Judge could not

have acted even under Section 176 and 177 of the Criminal

Procedure Code to convict the accused for the offence under

Section 358 of the Penal Code since it is a completely differ-

ent offence of the offence of murder. This view is supported by

the judicial decision in *Queen vs. Wellasamy* (1). His Lordship

Basnayake CJ. At page 271 dealing with Section 181 and

182 of the Old Criminal Procedure Code which are in terms

identical with Section 176 and 177 of the present Criminal

Procedure Code stated thus:

“These two Sections cannot properly be applied to a case

in which one offence alone is indicated by the facts and

in the course of the trial the evidence falls short of that

necessary to establish that offence, but discloses another

offence”

For these reasons we hold that the learned High Court

has committed a mistake in convicting the accused for the

offence under Section 358 of the Penal Code, when he was

charged under Section 296 of the Penal Code. Learned Senior

State Counsel whilst conceding that the conviction of the

offence under Section 358 of the Penal Code is wrong, however,

contended that the petitioner cannot invoke the revisionary

jurisdiction of this Court since the petitioner has a right of

*Seeralathevan vs. Attorney General*

CA *(Sisira de Abrew, J.)* 245

appeal against the judgment of the learned High Court

Judge. It is settled law that a party aggrieved of a judgment

of a lower Court cannot invoke the revisionary jurisdiction of

the Superior Court when he has a right of appeal. However,

such a party can invoke the revisionary jurisdiction of the

Superior Court if there are exceptional circumstances.

This view is supported in *Rashid Ali vs. Mohamed Ali*(2) by

Wanasundera, J. and *Hotel Galaxy Limited vs. Mercantile*

*Hotel Management*(3) by Sharvananda C.J. I have earlier held

that the learned High Court Judge has committed a mistake

in convicting the accused who was charged for the offence

of murder, for the offence under Section 358 of the Penal

Code. Therefore, I hold that this mistake committed by the

learned High Court Judge can be considered as an exceptional

ground to invoke the revisionary jurisdiction of this Court.

Court cannot turn a blind eye when an illegal order has been

made by a trial Court. In *Attorney General vs. Gunawardane*(3)

a Bench of fve judges of the Supreme Court held thus:

“revision like an appeal is directed towards the correction

of errors but it is supervisory in nature and its object

is the due administration of justice and not primarily or

solely the relieving of grievances of a party”.

Applying the principles laid down in the above judicial

decision I hold that this Court has power to correct errors

made by a lower Court in the exercise of its revisionary

jurisdiction. For these reasons I reject the objection raised

by the learned Senior State Counsel. As I pointed out ear-

lier the conviction of the offence under Section 358 of the

Penal Code is wrong. The accused has been sentenced to a

term of 7 years rigorous imprisonment and to pay a fne of

246 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

rs. 10,000/- in respect of the conviction under Section 358

of the Penal Code. For the above reasons I set aside the

conviction and the sentence of the accused-appellant in

respect of the offence under Section 358 of the Penal Code.

I refuse to intervene with the conviction and the sentence of

the accused-appellant in respect of the offence under Section

315 of the Penal Code as there is no illegality.

Conviction and the sentence altered.

**Upaly aBeyratHne, J.** – I agree.

*Conviction/sentence in respect of offence under Section 358*

*[only] set aside.*

*Application partly allowed.*

*Wijenayake and others vs. Minister of Public Administration*

CA 247

**WIJENAYAkE AND OTHERS vS.**

**MINISTER OF PUBLIC ADMINISTRATION**

COurT OF APPEAL

SATHyA HETTIGE, PC.J [P/CA]

ANIL GOONErATNE, J.

CA 255/2008

NOvEMBEr 20, 2008

MArCH 17, 2008

***Writ of Certiorari – Pilgrimages Ordinance – Section 2 – Minister***

***defning area as “Camp Area” – No inquiry held? – Gazetted – Title***

***to the property disputed? – Disputed facts cannot be decided in a***

***writ Court – Necessary parties?***

Petitioners complain that their properties are included in the “Camp

area” in the gazette published in terms of the provisions of the Pilgrims

Ordinance by the Minister.

The respondent contended that the title to the property of the petitioner

is disputed and a prerogative writ does not lie.

**Held**

(1) Finality of title and boundary of the land in dispute lies in a civil

Court. These are all disputed facts which cannot be decided in a

writ Court.

Per Anil Gooneratne, J.

“In the event the petitioners succeed in the original Court, I see no

reason to prevent the petitioners to move the Court of Appeal to

get the relevant gazette quashed”.

**application** for a Writ of Certiorari.

**Cases referred to:-**

(1) *Gregory Fernando and others vs.Stanley Perera* – *Acting Principal*

*Christ King National School and others* 2004 1 SLr

248 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

(2) *Farook vs. Siriwardena – Education offcer* – 1997 1 Sri Lr 145 at

148

(3) *Abayadeera and 162 others vs. Don Stanley Wijesundara* - *V. C.*

*University of Colombo and others* - 1983 2 Sri Lr 267

(4) *Mutusamy Gnanasambanthan vs. Chairman PEIA and others* –

1998-3 Sri Lr 169

(5) *Dr. K. Puvanedram and another vs. T.M. Premasiri and two others*

-2009-BLr 65

*Chula Bandara* with *D. K. Dhanapala* for petitioner

*L.M.K. Atulananda ASG* with *N. Peiris* SC for respondent

July 28st 2010

**anil Gooneratne J.**

The three Petitioners in this application have sought

a Writ of Certiorari to quash the defnition of “camp area”

in gazette marked P11. Sub paragraph (ii) of the prayer to

the Petitioners reads thus “issue a mandate in the nature of

a Writ of Certiorari, to quash the defnition of “camp area”

contained in paragraph 2 and the Schedule to the regula-

tions marked P11. In the Petition it is pleaded that the 1st

Petitioner is the owner of the property which is the subject

matter of this action. 2nd and 3rd Petitioners being the parents

of the 1st Petitioner have life interest on the property in

dispute.

The property in question is described more particularly

in the schedule of document P11 which is marked as ‘P11A’.

the 'schedule’ gives the following description.

The premises where kirindigalla Sri vishnu devalaya is

situated in the village of kirindigalla of Grama Niladhari’s

*Wijenayake and others vs. Minister of Public Administration*

CA *(Anil Gooneratne J.)* 249

division of No. 512 kirindigalla in the divisional Secretary’s

division of the Ibbagamuwa in the kurunegala district.

Boundaries are as follows:

North: dewalalanda Waththa belonging to dewalaya:

East: Deiyandalupotha paddy felds;.

South: Mathale, Thalgodapitiya main road;

West: kirindigalla, Ganemulla, Gamsabha road.

These Petitioners have given details of devolution of title

and the several deeds and plans relied by them in paragraphs

3 to 11 of the Petition. It is pleaded that a dispute arose

between the Petitioners and the Basnayake Nilame

kirindigalle devalaya regarding boundaries of the property

in dispute. Further it is pleaded that the above-mentioned

Basnayake Nilame fled action in District Court, Kurunegala

seeking a declaration that the property claimed by the 1st

Petitioner belongs to the above named devalaya.

In the Petition it is pleaded that the 1st respondent

Minister has acted in excess of authority or without authority

by defning a “camp area” since

(a) the 1st respondent does not have authority in terms of

the provisions of Section 2 of the Pilgrimages Ordinance

to defne a camp area relating to a Devale.

(b) in any event the 1st respondent has no authority to

defne any such camp area to include the private property

belonging to the Petitioners

(c) the 1st respondent has failed to conduct any inquiry into

the matter prior to making the said regulations (P11).

250 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

The 1st respondent was under a duty to do so when 3rd

parties are allowed to encroach upon the land belonging

to the petitioners.

(d) the 1st respondent has failed and neglected to consult

the divisional Secretary Ibbagamuwa prior to making

regulations (P11).

(e) the 1st respondent has acted contrary to the rules of

natural justice by failing to consult the divisional

Secretary Ibbagamuwa or the Petitioners who are claim-

ing ownership to the land and who are also aggrieved by

the publication of these regulations (P11).

The Respondent very briefy take up the following

positions:

(a) documents referred to in paragraphs 11/12 of the

Petition does not establish that the property is State

property. P9 state that title cannot be established or it is

no item of evidence as regards title of petitioner.

(b) The Minister is empowered to frame regulations in rela-

tion to a place of worship, and it need not necessarily be a

public place.

(c) The document marked r2 which is the gazette dated

1948 April 30 bearing No. 9859 under the title for regu-

lation for pilgrimages to kataragama referred to in sub-

paragraph (iii) of the paragraph 9 of the statement of

objections defnes camp area as the area within a

radius of a mile from the ford in the Menik Ganga at

kataragama, the area within a radius of a quarter mile

of the Pillayar kovil at Sella kataragama. It is, therefore,

clear as far back as 1948 camp area has been defned to

include land which need not necessarily be public land.

*Wijenayake and others vs. Minister of Public Administration*

CA *(Anil Gooneratne J.)* 251

(d) A perusal of the averments in paragraphs 13 and 15

of the petition refects the fact that there is a dispute

between the petitioner and the Basnayake Nilame of the

kirindigala devalaya with regard to the boundaries of

the land described in the said schedule contained in the

Gazette P11. It should be noted that in paragraph 16 of

the Petition, it is revealed that a case has been instituted

in the district Court of kurunegala by the Basnayake

Nilame of the kirindigala devalaya to establish title of the

devalaya to the land in question.

(e) district Court of kurunegala would decide accuracy of

title and boundaries.

(f) As a further matter of law respondent state that

Basnayake Nilame of the devalaya in question is a neces-

sary party and refer to the following case law.

(1) *Gregory Fernando and others v. Stanley Perera., Acting*

*Principle, Christ the King National School and others*(1)

(2) *Farook v. Siriwardena, Education Offcer*(2)

(3) *Abayadeera and 162 others v. Don Stantley Wijesurndera,*

*Vice Chancellor, University of Colombo and another*(3)

(4) *Mutusamy Gnanasambanthan v. Chairman, PEIA and*

*others*(4)

The Petitioners’ complaint very briefy is that the prop-

erty belonging to the Petitioners are included in the camp

area in the Gazette produced in this application and such

publication is *ultra vires* the powers of the Minister in terms

of the Pilgrims Ordinance. Such a publication however

would not affect the rights of the Petitioners as far as title of

the property. If in fact private property belonging to the

252 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

Petitioners are included in the camp area. I see that there is

merit in that submission of the Petitioners and the Gazette is

liable to be quashed. However the material furnished suggest

that a title/boundary dispute is agitated before the kurune-

gala District Court. As such fnality (subject to appeal) of title

and boundary of the land in dispute lies in the action fled

in the district Court of kurunegala. These are all disputed

fact which cannot be decided in a Writ Court, of the Court of

Appeal. *Vide Dr. K. Puvanendram & Another vs. T.M,*

*Premasiri & 2 others*(5)

In the event the Petitioners succeed in the original court,

I see no reason to prevent the Petitioners to move the Court

of Appeal to get the relevant gazette quashed. However in the

application before us Petitioners do not give a clear indication

regarding title to the property in dispute. If the title to the

property in dispute and the boundaries are correctly defned

Petitioners would be in a better position. In the absence of

material in this regard I am reluctantly compelled to refuse

this application.

Application dismissed without costs.

**HettiGe pc J. (p/ca) –** I agree.

*Application dismissed.*