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

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

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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 recruitment 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, unreasonable and in violation of legitimate expectation of the petitioners.

In paragraph 19 of the petition it is specifically 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

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-categorized/regrouped by each Ministry and Departments based on the definitions given in Annexure 11 and in terms of Annexure 111 – index to salary conversions. . ."

The learned State Counsel submitted that when categorizing the petitioners in MT-1-2006 the respondents considered 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 respondents 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 clarifications 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,

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, subsequent 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 sufficient material to establish that the respondents have acted unlawfully 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 qualifications, 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.

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 justifies the granting of judicial review and that too only if all the circumstances point to an exercise of the Court's discretion 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 officers 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 National Salaries and Cadre Commission. Even though the petitioners 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 recommendations of the National Salaries Cadre Commission.

It should be noted that wage policy of the public officers can be decided by the Cabinet under the provisions of the Constitution and the court cannot interfere with the policy decision in relation to restructure of salaries of public officers 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 recategorize and or to regroup the public officer having considered all the relevant facts and the policy decision of the government and therefore I do not think that this court should interfere 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".

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

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 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.

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.

(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 supervision and most importantly (iv) that wields power across the entire island – as anything other than a position of the Central Executive.

(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 Commissioner 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 jurisdiction 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

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-Petitioner (the owner of the land and hereinafter referred to as the "Petitioner") recorded a complaint with the Agrarian Services Office of Hambantota, alleging that Respondent-Respondent-Petitioner-Respondent (the tenant cultivator of the aforementioned 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 Office of Agrarian Services Centre of Weerawila, no action was taken by the Petitioner to procure the bushels, or by the Assistant Commissioner or Regional Office 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

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 – Respondent, in fact, tendered the Rs. 18,655 to the Petitioner – the Petitioner filed 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:

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 Provincial 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 interpretation. 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 modification of the language.

The operative provision of Law relevant to this determination is Article 154 of the Constitution, as provided by the Constitution's 13th Amendment. Article 154(P)(b) reads in relevant part:

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 established for that Province.

In respect of any matter set out in the Provincial Council List.

By this amendment the Constitution is charged with conferring significant jurisdiction to the Provincial High Courts, and represents a legislative effort to (i) recognize the inherent benefit 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 intention reflected 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 topographies, 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

Amendment to the Constitution, and (ii) only against a person exercising power pursuant to any law or provincial specific 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 Agriculture 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 institutions.

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 ownership, improvement, use and other rights pertaining to land, while Item 9 has been drafted to afford the Provincial High

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 situations, 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.

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 fundamentally 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 respective provinces for the said provinces, without affecting the sovereign powers of parliament and the Central Executive."*

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

the Head of a department under Article 55(3) of the Constitution as amended (iii) controlled by the Central Executive, 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 articulated 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 defines 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 benefits which flow 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 efficacy of established jurisdiction is quintessentially a pivotal requirement of the intention of Parliament. If, in terms of the arguments presented, it were to be 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 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 affirm the judgment 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.

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 – Applicability 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 interpreted 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 considered as an exceptional ground to invoke the revisionary jurisdiction – Court cannot turn a blind eye when an illegal order has been made by a trial Court."

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 judgment 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

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 different 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

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 five 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 earlier 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 fine of

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

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 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?

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

(2) *Farook vs. Siriwardena – Education officer* – 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 definition 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 definition of "camp area" contained in paragraph 2 and the Schedule to the Regulations 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

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 fields;.

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 filed 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 defining 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 define a camp area relating to a Devale.

(b) in any event the 1st Respondent has no authority to define 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).

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 claiming ownership to the land and who are also aggrieved by the publication of these Regulations (P11).

The Respondent very briefly 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 relation 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 Regulation for pilgrimages to Kataragama referred to in subparagraph (iii) of the paragraph 9 of the statement of objections defines 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 defined to include land which need not necessarily be public land.

(d) A perusal of the averments in paragraphs 13 and 15 of the petition reflects 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 necessary 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 Officer*[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 briefly is that the property 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

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 Kurunegala District Court. As such finality (subject to appeal) of title and boundary of the land in dispute lies in the action filed 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 defined 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.