

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

CA PHC APN 132/2012

MC Homagama Case No - 15823/Sec: 98

HCRA Avissawella Case No - RE 31/2011

Officer in Charge
Police Station
Kottawa.

Complainant

Vs.

01. Nalin Nagahawatta
02. Susantha Nagahawatta

Both of,

Nagahawatta Exporters and Importers,
No. 693/3,
Kulasevana Road,
Kottawa,
Pannipitiya.

Respondents

01. Dhammika Manel,
693/2, Kulasevana Road,
Kottawa, Pannipitiya.

And 09 others

Aggrieved Party Respondent

AND BETWEEN

01. Nalin Nagahawatta
02. Susantha Nagahawatta

Both of,

Nagahawatta Exporters and Importers,
No. 693/3,
Kulasevana Road,
Kottawa,
Pannipitiya.

Respondent- Petitioners

Vs.

Officer in Charge
Police Station,
Kottawa.

Complainant- Respondent

1. Dhammika Manel,
693/2,
Kulasevana Road,
Kottawa,
Pannipitiya.

And 09 others

**Aggrieved Party Respondent
Respondents**

Hon. Attorney General
Attorney Generals Department
Colombo 12.

NOW BETWEEN

01. Nalin Nagahawatta
02. Susantha Nagahawatta

Both of,

Respondent

Nagahawatta Exporters and Importers
No. 693/3,
Kulasevana Road,
Kottawa,
Pannipitiya.

Vs.

Respondent- Petitioners Petitioner

Officer in Charge
Police Station,
Kottawa.

Complainant- Respondent-Respondent

1. Dhammika Manel,
693/2,
Kulasevana Road,
Kottawa,
Pannipitiya.

And 09 others

Aggrieved Party Respondent

Respondent-Respondents

Hon. Attorney General
Attorney Generals Department,
Colombo 12.

Respondent-Respondent

**In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka**

**CA PHC APN 132/2012
HC Avissawella RE 31/2011
MC Homagama 15823**

Before : A. W. A. Salam J & Deepali Wijesundera, J
Counsel : Mohan Peiris P.C. for the Petitioner.
R. Rajapakse with W. Karunaratne for the Respondent.
Argued On : 15.10.2012 & 25.10.2012
Decided On : 30.11.2012

Order

The respondent – petitioner – petitioners (“petitioners”) have invoked the revisionary jurisdiction of this court to challenge the legality of the order made by the learned Magistrate on 15th September 2011 and 24th October 2011 in case No 15823/ MC Homagama and to revise and set aside the order of the learned High Court judge of Avissawella dated 4th July 2012 in application bearing No 31/2011/Revision.

The facts relevant to the revision application are that the petitioners filed information in the relevant Magistrate’s Court in terms of Section 98(1) of the Code of Criminal Procedure Act No 15 of 1979. In the said information the complainant

respondent – respondent informed Court that the petitioner was carrying on a business enterprise against which 10 people had made complaints that the smoke emanates from the business operation of the petitioners created a nuisance to the neighbourhood. By reason of the alleged nuisance the complainant-respondent-respondent sought an order in terms of Section 98(1)(b) of the Code of Criminal Procedure Act. After evidence had been led exparte of two witnesses the learned Magistrate issued an order citing Section 98(1)(b) without stipulating any conditions and an injunction in terms of Section 104 of the Criminal Procedure Code. Before the order made by the learned Magistrate was served on the petitioners, they filed a motion within a period of one week seeking to set aside or modify the said order made by the learned Magistrates under Section 98(1)(b) and 104 of the Criminal Procedure Code. The Learned Magistrate thereafter fixed the matter for inquiry. At the inquiry on behalf of the petitioners two officers from the Central Environmental Authority testified and produced reports which categorically stated that the function of the business enterprise of the petitioners is well within the parameters prescribed by law.

The operative parts of Section 98 as far as it relates to the present application reads thus.....

“ Whenever a Magistrate considers on the receiving a report or other information and on taking such evidence (if and as he thinks fit) that any trade or occupation or the keeping of any goods merchandise should by reason of its being injurious to the physical comfort of the community be suppressed or removed or prohibited such

Magistrate may make a conditional order requiring that the person causing such obstruction or nuisance or carrying on such trade or occupation or keeping any such goods or merchandise or owning possessing or controlling such building Shall be within the time to be fixed by such order remove such obstruction or nuisance, suppress or remove such trade or occupation; remove such goods or merchandise, as the case may be.

Any person against whom a conditional order has been made under subsection (1) may appear before the Magistrate before the expiration of the time fixed by that order and move to have the order set aside or modified in the manner hereinafter provided”.

The principal complaint of the petitioners in this revision application is that both the learned Magistrate and the learned High Court judge have not considered the legal question raised by them with regard to the failure of the learned Magistrate to make a conditional order as contemplated in Section 98(b)(1) of the Code of Criminal Procedure. Further the petitioners have urged that the order issued by the learned Magistrate in any event should have been modified or set aside upon the petitioners having led the evidence of two officers from the Environmental Authority pointing to the position that the business operations of the petitioners manufacturing briquettes was within the parameters prescribed by law and therefore does not constitute a public nuisance. The petitioners further urge that in any event the learned High Court judge has failed to consider the

parameters of Section 104 of the Code of Criminal Procedure and its implications by mechanically confirming the finding of the learned Magistrate.

It is also alleged by the petitioners that the learned High Court judge also has failed to appreciate that the absence of an environmental protection licence should not have a bearing on the question of deciding whether the activity in question was a nuisance in terms of Section 98 of the Code of Criminal Procedure. Taking into consideration the matters urged by the petitioners I am of the opinion that on the question as to whether an order made without stipulating the condition under Section 98(1)(b) would constitute a legal order is a question of law that has to be addressed at the appropriate stage. An order made under this Section being generally made after *ex parte* evidence or matters having been initially established without the participation of the party against whom an order is made, it can be argued that the provision of law enabling the Magistrate to issue conditional order under Section 98 requires to be construed as being strictly complied with. Had an interim order been made stipulating the condition under Section 98 probably the petitioners would have had the opportunity of making an application to set aside, rescind or modify the interim order before they had to stop the business operations. Taking into consideration all these matters I issue an interim order staying operation of the order dated 15th September 2001 and 24th October 2011 of the learned Magistrate in case No.15823 MC Homagama in terms of paragraph (e) to the prayer to the petition.

Although the respondents to the revision application participated in the proceedings when application was initially supported, I make order that notice of this application be issued on the respondents.

A.W.A. Salam, J

Judge of the Court of Appeal

I agree,

Deepali Wijesundera, J

Judge of the Court of Appeal

Na/-