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

CA(PHC) 132/2012

HC Avissawella RE 31/2011

1. Nalin Nagahawatta,
2. Susantha Nagahawatta

Nagahawatta Exporters and Importers,

693/3, Kulasevana Road, Kottawa, Pannipitiya

RESPONDENTS PETITIONERS

PETITIONERS

Vs

Officer in Charge Police Station, Kottawa.

COMPLAINANT-RESPONDENT-RESPONDENT

Dammika Manel,

693/2, Kulasevana Road, Kottawa, Pannipitiya

And 9 others

AGGRIVED PARTY-

RESPONDENT-RESPONDENTS
Hon Attorney General,
Colombo 12
RESPONDENT-RESPONDENT

BEFORE : A.W.A Salam, J (P/CA) & Sunil Rajapaksha, J
COUNSEL : Kushan de Alwis P.C with Harindra Rajapaksha for the 1st and 2nd respondent-petitioner-petitionrs, M/S I L Rajapaksha for the aggrieved party-respondent-respondent and Anoopa de Silve SSC for the Complainant-respondent.
ARGUED ON: 04.12.2013
WRITTEN SUBMISSIONS TENDERED ON: 27.01.2014
DECIDED ON: 10.07.2014

A.W.A Salam, J (P/CA

This is a revision application filed by the respondent-petitioner-petitioner (hereinafter referred to as the "petitioner") challenging the propriety of the order made by the Magistrate, which was later affirmed by the High Court in the exercise of its revisionary powers. By the said order made by the learned Magistrate, a conditional order was made restraining the operations of the factory belonging to the petitioner until the final determination of the application

petitioner until the final determination of the application made to the Magistrate's Court. The said order made by the learned Magistrate was to command the petitioners to close up their factory on the basis that it is a public nuisance. Admittedly the petitioner runs the factory to manufacture charcoal briquettes using charcoal powder under the name "Nagahawatta exports and importers. The allegation made against the petitioner in the Magistrate Court was that charcoal dust, particulate matter and the smoke that emanates from the factory was injurious to the health and the comfort of the community whose members complained of respiratory problems and disturbance of noise and dust emanating from the factory.

Being aggrieved by the order of the learned Magistrate which is termed as a "conditional order and injunction", the revisionary jurisdiction of the Provincial High Court was invoked to have the order made by the Magistrate suspended or recalled. However, the learned High Court Judge having gone into the matter refused the application to revise the order of the learned Magistrate on the basis that the operations at the factory of the petitioner according to the evidence led constitutes a public nuisance. The learned President's Counsel who appeared for the petitioner has submitted that no conditions had been imposed by the learned Magistrate in

making the order marked as X5 and the said order is in fact not a conditional order, even though it is termed that way. The learned Counsel for the respondents submitted that the word "conditional" does not mean that conditions are attached to the said order, but it denotes that such an order can be modified or rescinded during the course of the case by the same Magistrate, who made the order or by any other Magistrate. To buttress her argument, she cited section 92(2) of the Code of Criminal Procedure. Having examined the relevant Section, I am of the opinion that the word "conditional" as used in Section 98 denotes that an order made under that section can be modified or rescinded as submitted by the learned Counsel for the aggrieved party respondent-respondents-respondents (hereinafter referred to as the "respondents").

The next question that has to be addressed is whether the complainant-respondent-respondent was able to satisfy the Magistrate before the issuance of the conditional order or after the respondent made an application to have the same varied that there was sufficient evidence to satisfy Court that there was in fact a nuisance created by the petitioners in running the factory in question. At the inquiry held by the Magistrate into the application to have the order made against the petitioners' set aside and/or modified two officers from the

central environmental authority gave evidence and also produced 3 documents relating to the field the investigation carried out with regard to the presence of a public nuisance. The 3 reports deal with the noise level, suspended particulate matter and organic vapour concentration relevant to the issue. The 1st witness who gave evidence is the Senior Environmental Officer of the Central Environmental Authority who has prepared the field investigation report of the factory premises in question. The second witness who testified is the Senior Environmental Officer of the Central Environmental Authority who has also carried out certain other investigation with regard to the factory. It is to be observed that the order against the petitioners' was issued to put an end to the alleged public nuisance on the basis that the charcoal dust and smoke said to be emitting from the factory had created a nuisance to the public in the area. It is to ascertain the truth of this allegation the investigation had been carried out by the officers attached to the Central Environmental Authority. It is significant to note that the report produced in this regard, namely the field investigation report reveals that the tests carried out using standard methods, show that the petitioners have not exceeded the emission levels prescribed by law. The learned Magistrate and the learned High Court Judge have failed to give sufficient weightage to the evidence of the two senior officers testified before him prior to his refusing the

application of the petitioners to set aside the order or vary the same. The two officers have particularly testified to the fact that no harmful chemicals or vaporizing substances are used in the production process of the petitioners and their tests had revealed that the noise levels and the organic vaporable substance levels are within the safety limits prescribed by law. In the circumstances, it would be seen that the petitioners have adduced proof in support of their position that there was no danger of a public nuisance created in the area and therefore the learned Magistrate should have either set aside or modified the order to suit the evidence adduced.

Another important question referred to in this judgment is the failure of the learned Magistrate to limit his injunction for a period of one month, as was sought by the complainant-respondent-respondent. As a matter of fact, the complainant-respondent-respondent had sought the restraining order to stop the public nuisance only for one month, so as to enable the petitioners to obtain the sanction of the Environmental Authority to run the factory in question. Although the prayer of the complainant-respondent-respondent to have an order issued against the petitioner only for one month, by issuing the order without restricting it to the said period the learned Magistrate has erred in not taking into consideration the

temporary nature of the relief sought by the complainant respondent-respondent.

Had the learned Magistrate issued the restraining order only for a limited period, the petitioner could have made an attempt to obtain the environmental sanction of the central environmental authority.

In any event it has to be noted that not having a licence from the environmental authority is no ground by itself to issue an order for the closure of the factory of the petitioner. Taking into consideration the reports filed by the environmental authority and the evidence given by the two senior officers, I am of the opinion that both the learned Magistrate and High Court Judge should have taken into consideration the harmless nature of the business operation of the petitioners and ought to have dissolved the order relating to public nuisance. In the circumstances, I am of the opinion that the learned Magistrate should have granted relief to the petitioners by suspending the operation of the orders dated 15 September 2011 and 24 October 2011. For reasons stated above it is also my opinion that the learned High Court Judge too should have not made his order dated for July 2012. In the circumstances, the order of the learned High Court Judge dated 4 July 2012 set aside and the order made by the learned

operations at the factory. Accordingly, the petitioner is granted relief as per prayers (b), and (C). There shall be no costs.

President of the Court of Appeal.

Sunil Rajapakha, J.

I agree.

Judge of the Court of Appeal.