

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

Nandani Pushpa Siriwardane
Samurdhi Mawatha
Polegoda, Mahagama

Petitioner

Vs.

C.A. PHC [APN] REVISION
NO.36/2011
H.C.KALUTARA HABEAS
CORPUS CASE NO.01/09

1. Officer-In-Charge
Police Station
Bulathsinhala
2. Officer-In-Charge
Police Station
Matugama
3. Senior Superintendent of Police
Office of the Superintendent of Police
Kalutara
4. The Inspector General of Police
Police Headquarters
Colombo 01
5. Hon.Attorney General
Attorney General's Deptment
Colombo 12
6. Wijayalathpedige Piyasiri Sisira Kumara
Samurdhi Mawatha
Polegoda, Mahagama.

Respondents

AND NOW BETWEEN

1. Officer-In-Charge
Police Station
Bulathsinhala

1st Respondent-Petitioner

2. Officer-In-Charge
Police Station
Matugama

2nd Respondent-Petitioner

Vs.

1. Suduhewage Shyama Sunilani
Polegoda, Mahagama
2. Nandani Puspa Siriwardena
Samurdhi Mawatha
Polegoda, Mahagama

Petitioner-Respondents

1. T. H. Neil Thushara Jayalath
Polegoda, Mahagama
2. Wijayalathpedige Piyasiri Sisira Kumara
Samurdhi Mawatha
Polegoda, Mahagama. **[Corpus]**

Respondent-Respondents

BEFORE : **K.T.CHITRASIRI, J.**
P.R.WALGAMA, J.

COUNSEL : Anoop de Silva S.S.C.for the 1st and 2nd Respondent-Petitioners
K.V.Sirisena with S.Kulasuriya for the Petitioner-Respondents

ARGUED ON : 23.01.2015

WRITTEN SUBMISSIONS : 09.02.2015 by the 1st and 2nd Respondent-Petitioners
23.03.2015 by the Respondent-Respondents

DECIDED ON : 06. 05. 2015

CHITRASIRI, J.

This is an application filed invoking the revisionary jurisdiction of this Court seeking to set aside the judgment dated 11.01.2011 of the Learned High Court Judge of Kalutara. By that judgment learned High Court Judge made order, making the 1st and the 2nd respondents namely, O.I.C.Bulathsinhala and O.I.C.Matugama, personally liable, to pay Rupees One Hundred Thousand (Rs.100,000/-) as exemplary costs to the 6th respondent (corpus) in respect of whom this habeas corpus application was filed. He has also made order directing the Registrar of the High Court of Kalutara, to send the impugned judgment to the Attorney General and to the Inspector General of Police, for them to take appropriate legal action.

Being aggrieved by the aforesaid decision of the learned High Court Judge, the two respondent-petitioners who were the 1st and the 2nd respondents in the

application filed in the High Court, have filed this revision application in this Court. They are the O.I.C. Police Station Bulathsinhala and O.I.C. Police station Matugama.

Petitioner-respondent, by the petition dated 26.10.2009, filed action in the High Court in terms of Article 141 of the Constitution in order to have a Writ of Habeas Corpus issued on the petitioners directing them to produce to Court the 6th respondent namely Wijayalathpedige Piyasiri Sisira Kumara. When the matter was taken up in the High Court on 02.06.2010, learned State Counsel has informed Court that the corpus Wijayalathpedige Piyasiri Sisira Kumara was arrested on 16.10.2009 and thereafter he was detained under the Emergency Regulations having obtained an order for detention which bears the reference ර.අම/අංක ඩී.එම්/ඊ.ආර්/2009/3125. Thereafter, the detention order had been extended regularly by the authorities concerned. Subsequently, the corpus had been produced before the Magistrate on 17.11.2009. Accordingly, the corpus was kept under judicial custody since then.

Indeed, these matters have been considered and accepted by the learned High Court Judge as well. Those have been referred to in his judgment in the following manner.

*“Third Respondent in his objections states that as the corpus was produced before the Magistrate’s Court Matugama on 17.11.2009 in case No.BR.545/08 and remanded by the learned Magistrate, **the petitioners’ application has no legal effect to grant a writ of Habeas Corpus.** Since the corpus in the above said both applications are now in the judicial custody, this Court has to ascertain whether the*

Petitioners are entitled to any other relief as the petitioners' prayed for."
(emphasis added)

The decision referred to above of the learned High Court Judge, show that he was very well aware of the fact that the Court had no power to issue a writ of habeas corpus in this instance since the corpus was in the judicial custody by the time the action was filed. Under those circumstances, the learned High Court Judge should have terminated the proceedings at that point of time having refused the application of the petitioner-respondent. However, the learned judge without doing so has proceeded to make an order directing the two petitioners to pay exemplary costs and to send the proceedings to the A.G. and to the I.G.P for necessary action. It was the reason for the petitioners to come before this Court seeking to have the said orders namely payment of the exemplary costs and the direction to have the proceedings sent to Hon. Attorney General and to the Inspector General of Police, set aside.

Article 141 of the Constitution empowers the Court to grant and issue orders in the nature of Writ of Habeas Corpus to bring up before such Court;

- a) the body of any person to be dealt with according to law; or
- b) the body of any person, illegally or improperly detained in public or private custody.

In the event an order is made under item (a) or item (b) above, then the Judge is required to make an order discharging or remanding any person brought up before Court or he may otherwise deal with such person according to law.

In this instance such a cause of action did not become necessary since the learned High Court Judge himself has decided that the petitioner's application had no legal effect to grant a writ of habeas corpus. At this stage, it is important to note that the petitioner had not sought any other relief than to grant a writ of habeas corpus in order to bring up the corpus before Court. Under these circumstances, learned High Court Judge should not have proceeded to consider granting any other relief when he was informed that the corpus was under judicial custody by then.

The writ of habeas corpus is available where any person is illegally detained in public or private custody. Such a detention must be illegal or improper at the time the writ is to be issued by the court. Moreover, writ will not be issued in the event the detention was subsequently became legalized pending the application. **[Senthilnayagam V. Seneviratne 1981 (2) S L R 187]** In this instance, the corpus had been under judicial custody by the time the application was filed. In the circumstances, no further orders could have been made by the learned High Court Judge than refusing the application. Therefore, it is my opinion that the learned High Court Judge misdirected himself when he made order to pay exemplary costs and directed the Registrar to send the proceedings to A.G. and to I.G.P.

At this stage, it is pertinent to refer to the decision in **Leeda Violet and others V. Vidanapathirana O.I.C. Police Station Dickwella and others [1994 (3) S L R 377]** as well since this Court had considered the issue of ordering exemplary costs in an application for a writ of habeas corpus. In that decision

S.N.Silva J (as he then was) recognized paying exemplary costs in respect of each of the disappeared corpus. However, that decision was made only after it was found that the respondents in that case were answerable to the corpses that were missing. That was the reason for the making an order to pay exemplary costs. In this instance, it was brought to the notice of Court that the corpus was under judicial custody. Hence, it is clear that the decision in **Leeda Violet and others V. Vidanapathirana O.I.C. Police Station Dickwella and others (supra)** had been made on a quite a different footing and therefore it has no application to the case at hand.

In the submissions filed by the learned Counsel for the respondent-respondents, he has referred to the **Bracegirdle case [3 N.L.R 196]** in support of his argument. The ratio in that decision was that the corpus should be released if he was detained illegally. In this instance, no such illegal detention had been found. Admittedly, the corpus was under the judicial custody by the time the application was filed in the High Court. However, it is significant to note that even the learned Counsel for the respondent-respondents have not supported the payment of exemplary costs that was ordered by the learned High Court Judge.

In the circumstances, it is my view that the learned High Court Judge was in error when he made order to pay exemplary costs and also to send the proceedings to the A.G. and to the I.G.P.

For the aforesaid reasons, I set aside the orders dated 11.01.2011 of the learned High Court Judge of Kalutara by which he made order to pay exemplary costs having directed the Registrar of the High Court, Kalutara to send the

proceedings to the Attorney General and to the I.G.P. Accordingly, this application is allowed. No costs.

In paragraph 6 of this petition that was filed on 11.03.2011, the petitioners have stated that they have filed an appeal as well, in order to have the impugned orders vacated. Hence, the Registrar is directed to file a copy of this judgment into the docket in that appeal and to bring it to the notice of the judges who are to attend to the said appeal.

Application allowed.

JUDGE OF THE COURT OF APPEAL

P.R. WALGAMA, J.

I agree

JUDGE OF THE COURT OF APPEAL