

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

In the matter of an Application for Revision under and in terms of Article 138 of the Constitution read With the Provisions of the High Court of the Province (special Provisions) Act No. 19 of 1990 as amended.

**CA PHC APN. 61/2016  
HC (Kandy) Revision App.  
No. HC/RA/26/2016  
M.C. Kandy Case No: 85252016**

01. Paraketawella Diddenigoda  
Gedara Niranjan  
Padmakumara,  
No: 258/B/1, Paraketawella,  
Pilimathalawa.
02. Wattegedera Asanka Pradeep  
Bandara Gunaratne,  
No: 20/20/A, Dodamwala,  
Ihala Pilimathalawa.
03. Kiriwawle Pallewela Gedara  
Pushpashantha Jayarate,  
No: 273/A, Paraketawella,  
Pilimathalawa.
04. Madadeniye Gedara  
Wimalawathie,  
No: 258/B, Paraketawella,  
Pilimathalawa.

05. Hangadigedera Wimalawathie,  
No: 275, Paraketawella,  
Pilimathalawa.

06. Officer-in-Charge,  
Police Station,  
Kadugannawa.

**Complainants**

**-Vs-**

01. Jaltotage Don Keerthi  
Wickramaratne,  
Managing Director,  
Bluebay Mineral International  
(Pvt) Limited,  
No: 263, Paraketawella,  
Pilimathalawa.

02. Naotunna Rajaguru  
Bamunuge Dileepa Anuradha  
Edirisinghe,  
Bluebay Mineral International  
(Pvt) Limited,  
No: 263, Paraketawella,  
Pilimathalawa.

**Respondents**

***AND BETWEEN***

01. Jaltotage Don Keerthi  
Wickramaratne,  
Managing Director,  
Bluebay Mineral International  
(Pvt) Limited,  
No: 263, Paraketawella,  
Pilimathalawa.

02.Naotunna Rajaguru  
Bamunuge Dileepa Anuradha  
Edirisinghe,  
Bluebay Mineral International  
(Pvt) Limited,  
No: 263, Paraketawella,  
Pilimathalawa.

**Respondents – Petitioners**

**-Vs-**

01.Paraketawella Diddenigoda  
Gedara Niranjan  
Padmakumara,  
No: 258/B/1, Paraketawella,  
Pilimathalawa.

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Bandara Gunaratne,  
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No: 258/B, Paraketawella,  
Pilimathalawa.

05.Hangadigedera Wimalawathie,  
No: 275, Paraketawella,  
Pilimathalawa.

**Original Complainant – Respondents**

06. Officer-in-Charge,  
Police Station,  
Kadugannawa.

**Complainant – Respondent**

07. Honourable Attorney General,  
Attorney General's  
Department,  
Colombo 12.

**Added Respondent**

***AND NOW BETWEEN***

01. Jaltotage Don Keerthi  
Wickramaratne,  
Managing Director,  
Bluebay Mineral International  
(Pvt) Limited,  
No: 263, Paraketawella,  
Pilimathalawa.

02. Naotunna Rajaguru  
Bamunuge Dileepa Anuradha  
Edirisinghe,  
Bluebay Mineral International  
(Pvt) Limited,  
No: 263, Paraketawella,  
Pilimathalawa.

**Respondents – Petitioners –  
Petitioners**

***-Vs-***

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Gedara Niranjan  
Padmakumara,  
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Wimalawathie,  
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Pilimathalawa.

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No: 275, Paraketawella,  
Pilimathalawa.

**Original – Complainant –  
Respondents – Respondents**

06. Officer-in-Charge,  
Police Station,  
Kadugannawa.

**Complainant – Respondent –  
Respondent**

07. Honourable Attorney General,  
Attorney General's

Department,  
Colombo 12.

**Added Respondent –**  
**Respondent**

**Before : P.R. Walgama, J**  
**: L.T.B. Dehideniya, J**

**Council : Nalin Ladduwahetty, PC with Shatha**  
**Jayawardena for the Respondent – Petitioner –**  
**Petitioner.**

**Argued on : 09.06.2016**

**Decided on : 15.09.2016**

CASE –NO- CA-PHC-(APN)- 61/ 2016- ORDER- 15.09.2016

**P.R. WALGAMA J,**

The Officer in Charge of Kadugannawa Police instituted action in the Magistrate Court of Kandy on a complaint received from the public of a nuisance caused to them by the operation of the factory of manufacturing quartz grits.

The said application was filed in terms of Section 98 (b) of the Criminal Procedure Code No 15 of 1979. Further a complaint was also made regarding the validity of the permit to carry on the business. It is alleged by the complainant that the Respondent

company is carrying on this business without a valid permit for the year 2016.

Pursuant to the said application by the Police the Learned Magistrate issued summons to the Respondents. It is seen from the record that after receiving summons the 2<sup>nd</sup> Respondent made his appearance in court and after recording evidence from the complainants the Learned Magistrate made order on 14.03.2016, staying the operation of the alleged factory. But nevertheless by order dated 18.03.2016 the court allowed the Respondents to remove the bags containing the said grits.

Being aggrieved by the said order the Respondent-Petitioners moved the High Court in Revision to have the said order set aside. The Respondent-Petitioners in their petition to the Provincial High Court has basically reiterated the facts stated above and had specifically averred that the Respondent Company had applied for the permit to the Environment Protection Bureau, and it is in the process of issuing the same.

It is contended by the Petitioners that the Learned Magistrate made the said impugned order on the basis that the Petitioners were carrying on the business without a valid permit. Further it is alleged that the Learned Magistrate has made an order to close down the factory, without making a conditional order.

The Petitioners had assailed the said order of the Learned Magistrate for the reasons stated below;

- a. That the Magistrate is not empowered to inquire in to the fact, whether the Company has a valid permit or not, in making an order under Section 98(b) of the Criminal Procedure Code No. 15 of 1979.
- b. That the said order is contrary to Section 98 of the Criminal Procedure Code,
- c. That in terms of Section 98 of the Criminal Procedure Code the Magistrate is empowered only to make a conditional order , and therefore to make an order to close down the factory at the very first instant is contrary to the law and obnoxious to the above section.

The Learned High Court Judge by his order dated 28.04.2016 has refused the application to stay the order of the Learned Magistrate, without stating any reason for making such order.

Being dissatisfied with the said impugned order the Respondent- Petitioners, came by way of Revision to have the said orders of the Learned High Court Judge and the Learned Magistrate vacated.

The said order of the Learned Magistrate is basically impugned on the ground that it is not a conditional order as contemplated in the Section 98 (1) of the Criminal Procedure Code. Further it seen from the said



order that no time limit has been fixed for the said order.

Therefore it is contended by the Petitioners that said order is a violation of the above section and should be set aside forthwith.

The Counsel for the Petitioners in submitting the written submissions to court has adverted to the above section which gives the Magistrate only to make a conditional order for a limited period. But in the instant matter the Learned Magistrate by his order had made a permanent order for a closure of the factory and there by had violated the Section 98(1)(b) of the Criminal Procedure Code.

It is asserted by the Counsel for the Petitioners that the Learned Magistrate is not empowered to make any order regarding the possession of a valid permit, under Section 98 (1)(b) of the Criminal Procedure Code. But should inquire in to the public nuisance complained by the complainants.

Therefore the core issue for the Magistrate to consider was whether the business that was carrying on by the Respondent- Petitioners is injurious to the health or physical comfort of the community.

It is contended by the Counsel for the Complainant- Respondent that the Learned Magistrate in making the said order had also taken in to account the evidence

adduced by the complainants and made the order and had given the opportunity for the Respondent-Petitioners to make any application for any variation of the stay order issued by the Learned Magistrate. It is seen from the case record that on the day the said impugned order was made the 2<sup>nd</sup> Respondent-Petitioner was present in court and was represented by a counsel but had never challenged the position of the complainants. Besides the only application the Petitioners had made was only for an order for the removal of the grits.

Therefore it is abundantly clear that Learned Magistrate has afforded an opportunity for the Respondents to make an application for variation of the said order.

In determining the matter in issue this Court will take cognisance and recognise the case cited by both parties.

SINGALANKA STANDARD CHEMICALS LTD .VS.  
THALANGAMA APPUHAMILAGE SIRISENA OAND OTHERS  
C.A. Appeal 85/1998, has observed thus;

“ under the provisions of the Code of Criminal Procedure the Magistrate is entitled to take prompt action and issue a conditional order prohibiting any act of nuisance instantaneously and thereafter investigate in to the complaint and if is found that the Respondent is entitled to cause so much pollution

as authorised by the licence issued by the Central Environmental Authority that the order could be vacated,

On an examination of Section 23(h) to 23(w) of the National Environment Act, one cannot find such an effective or speedy remedy provided for, by section 98 of the Criminal Procedure Code; on the contrary one could see only technicalities, obstacles and delay in preventing an act of nuisance where as section 98 of the Criminal Procedure Code provides a swift and efficacious remedy;

If a person who has been issued with a licence is charged in the Magistrate Court for an act of public nuisance the jurisdiction of the Magistrate is not ousted to try the offender. Such licence cannot and should not be considered as prima facie evidence of the fact that the person holding the licence has been authorised to do which if not for the licence he would be precluded from doing. The purpose of issuing licence under the Environment Act is to balance environment concerns with development needs. Sustainable development is an attempt to reconcile two contradictory human rights namely, the right to development and the right to environment conservation.”

In the said backdrop it is abundantly clear that the Learned Magistrate still could make an order under Section 98 of the Criminal Procedure Code, even the

petitioner holds a valid permit, if the act complained of is a public nuisance in terms of section 98 of the Criminal Procedure Code.

Hence the present situation generates whether the order of the Learned Magistrate made under section 98 is erroneous.

This court is persuaded to up hold the order of the Learned Magistrate and order of the Learned High Court Judge as the said orders are unattended in error.

Thus the Respondent- Petitioners application in revision is dismiss subject to a costs of Rs. 10,000/ .

Accordingly we dismissed the application.

*P. R. Walzame*

**JUDGE OF THE COURT OF APPEAL**

L.T.B. Dehideniya, J

I agree.

*L.T.B. Dehideniya*

**JUDGE OF THE COURT OF APPEAL**