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

In the matter of an appeal under Article 154(ශ) of the Constitution against an order made under the High Court of the Provinces (Special Provisions)Act No.19 of 1990.

C.A.(PHC) No. 109/2007
P.H.C. Panadura No. 33/2006 RV
M.C. Bandaragama No. 15777/06

Sangarange Lalith Perera
Lakshow Service Centre,
Panadura Road,
Bandaragama
Respondent-Petitioner-Appellant

Vs.

Kandasinghe Arachchige Kelum Lasantha Wijenayake,
Assistant Commissioner of Agrarian Development,
4th Floor,
The District Secretariat Office,
Kalutara.
Applicant-Respondent-Respondent

Hon. Attorney General
Attorney General's Department,
Colombo 12.
Respondent-Respondent

BEFORE	:	**JANAK DE SILVA, J. &** **ACHALA WENGAPPULI, J.**
COUNSEL	:	V. De Saram for the Respondent-Petitioner-Appellant Suranga Wimalasena S.S.C. for the Applicant-Respondent-Respondent and the Respondent-Respondent.
ARGUED ON	:	23rd March, 2018
DECICED ON	:	14th May, 2018

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ACHALA WENGAPPULI, J.

This is an appeal by the Respondent -Petitioner-Appellant (hereinafter referred to as the "Appellant") against the order of the Provincial High Court, holden at Panadura dated 27.08.2007, by which it dismissed his revision application *in limine*.

In his revision application before the Provincial High Court, the Appellant sought to challenge the legality of the proceedings instituted against him, under Section 33 of the Agrarian Development Act No. 46 of 2000 (hereinafter referred to as the "Act"), by the Applicant-Respondent-

Respondent (hereinafter referred to as the "Respondent") for allegedly filling a paddy land.

The Appellant, in his revision application filed before the Provincial High Court, claimed that he was only served with an interim order of 30.05.2006, by the Magistrate's Court of Bandaragama, restraining him from filling a paddy land and he was not served with summons as required by Section 33(5) of the said Act.

Learned High Court Judge, by her impugned order, has dismissed his revision application on the basis that his application is premature and that he should have first endeavoured to vacate the said interim order by making an application to the relevant Magistrate's Court.

At the hearing of this appeal, learned Counsel for the Appellant submitted that when the Respondent made his initial application, the Magistrate's Court should have dismissed it as the annexed affidavit is defective. He further contended that when such an application is made, the Magistrate's Court must first satisfy itself that the material disclosed revealed that there is a violation of the provisions contained in Section 33. It could only thereafter issue an interim order and, in addition, summons on the person against whom the application is made. In this particular instance, the Magistrate's Court has only issued interim order. No summons was issued on the Appellant and he was not notified of the next

date on which the case was to be called in open Court, and of his right to show cause.

According to the Appellant, in these circumstances, the procedure prescribed by the Act was erroneously not followed by the Magistrate's Court and as a result, he was denied an opportunity to place his case before the relevant Court for its consideration.

Learned Senior State Counsel who appeared for the Respondent, sought to counter the submissions of the Appellant by inviting attention of this Court to the fact that the Appellant was duly served with the interim order and with that he was well aware of the proceedings before the Magistrate's Court. The Appellant also knew of the next date on which the case was to be called as 13.06.2006 since he has obtained a certified copy of its proceedings on 09.06.2006. Learned Senior State Counsel further contended that the Appellant, having had the opportunity to move to vacate the interim order by placing his case before the Magistrate's Court, opted to go before the Provincial High Court instead, invoking its revisionary jurisdiction.

Therefore, the learned Counsel submitted that the conclusion reached by the Provincial High Court is correct as the application of the Appellant before it was premature and was made without resorting to a more effective remedy of placing his case before the very Court, which issued the interim order.

In view of the submissions made by the parties, it is necessary to refer to the sequence of events as revealed from the proceedings before the Magistrate's Court for proper determination of the instant appeal.

The Respondent initially filed an application under Section 33(3) of the said Act on 02.05.2006, supported by an affidavit. On the same day, the Court noted a defect in the affidavit and ordered the Respondent to make a proper application. On 30.05.2006, the Court issued an interim order restraining the Appellant from filling the land described in the corrected affidavit. In issuing the interim order, the Court ruled that it "appears" that the paddy land is being filled. The case was to be called on 13.06.2006.

It is evident from the proceedings before the Provincial High Court, that the Appellant has supported his revision application on 13.06.2006, the same day on which the Magistrate's Court was scheduled to call it and has obtained a stay order on the operation of the interim order already served on him.

The proceedings before the Magistrate's Court does not indicate that the Appellant was issued with "summons" along with the interim order as per Section 33(5) of the said Act. However, it is clear that he has had sufficient notice of the nature of proceedings before the Magistrate's Court and in fact has obtained a certified copy of its proceedings well before the

next calling date. The Appellant strongly claimed, in his petition addressed to the Provincial High Court, that the said procedural defect nullifies the proceedings before the Magistrate's Court in its entirety.

As already noted, the learned High Court Judge was not convinced with his submissions and decided to dismiss his application *in limine*. The basis on which his application for revision was dismissed, could be justified in view of the judgment of ***Siripala v Lanerolle and Another*** (2012) 1 Sri L.R. 105, where it was held by this Court, in exercising revisionary jurisdiction, following tests had to be applied;

> *"(a) the aggrieved party should have no other remedy,*
>
> *(b) if there was another remedy available to the aggrieved party, then revision would be available if special circumstances could be shown to warrant it,*
>
> *(c) the aggrieved party must come to Court with clean hands and should not have contributed to the current situation,*
>
> *(d) the aggrieved party should have complied with the law at that time,*
>
> *(e) the acts complained should have prejudiced his substantial rights,*
>
> *(f) the act or circumstances complained of should have occasioned a failure of justice."*

Although the Provincial High Court made no specific reference to the above judgment, it nonetheless has correctly applied the above reproduced tests in determining his application. The Appellant could have obtained relief easily from the Magistrate's Court as it is his position that the paddy

land claimed to be filled is not his. There is no reference to any special circumstances in his petition or submissions before the Provincial High Court. It is clearly alleged in paragraph 4 of his written submissions that he was denied an opportunity by the Magistrate's Court, to vacate the interim order issued against him. This is a factually incorrect assertion as observed by the Provincial High Court. The Provincial High Court considered this claim as an attempt to mislead it.

The order issued by the Magistrate's Court is only an interim one in nature and if the Appellant showed sufficient cause, the Court had the jurisdiction to vacate it. It is alleged by the Appellant in paragraph 10 of his petition to the Provincial High Court that, unless that Court interfered with the interim order of the Magistrate's Court, he runs the risk of being prosecuted and punished for a criminal act of another .However, at the stage on which he obtained interim relief from the Provincial High Court, there was no such realistic threat to prejudice his substantial rights. As correctly noted by the Provincial High Court, in this respect the Appellant's application was premature.

In view of the above reasoning, it is our considered view that the Provincial High Court has correctly determined the viability of the Appellant's revision application by applying the correct legal principles.

The complaint by the Appellant on the failure to issue summons as per Section 33(5) of the said Act had to be considered next.

There is no doubt that the section clearly provided for the issuance of summons forthwith, in addition to the interim order made on its recipient to show cause why he or his agents should not be restrained as per the application before it. The Magistrate's Court clearly failed to follow this important legislative provision, in exercising its jurisdiction conferred upon by it by the said Act.

What must be decided now is the effect of the failure to serve summons on the Appellant as per Section 33(5) of the said Act.

The proceedings before the Magistrate's Court is still at its initial stage. The Appellant could have, if he so wished, placed sufficient reasons before it, seeking vacation of the interim order made in his absence. There is no final determination made by the Magistrate's Court on the matter before it. It merely made a temporary restraining order to arrest a particular situation, which it considered as having existed at the time. The purpose of some of the provisions contained in the said Act, was intended to restrict certain activities on paddy lands, except for the purpose of its cultivation. Hence the provisions for the issuance of an interim order, was intended purely to prevent such activity as a temporary measure.

At this stage, there is no statutory requirement to determine the issuance of an interim order after hearing the offending party. It is only after the issuance of the interim order, the offending party could show cause. The original Court was to serve interim order on the offending party and it was also to issue summons on him. In fact, there is no wording used by the Legislature in the said section to denote that service of summons should be issued along with the service of interim order,

although such process is intended to run parallel with the service of interim order. This situation is clearly distinguishable from that of ***Ittepana v Hemawathie*** (1981) 1 Sri L.R. 466, where the apex Court held that;

> *"Failure to serve summons is a failure which goes to the root of the jurisdiction of Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity."* (emphasis added)

The strict applicability of this principle to the instant appeal could be restricted in relation to service of summons under Section 33(5) of the said Act for two reasons. Firstly, the Appellant was duly notified with the service of the interim order, issued *ex parte* upon the jurisdiction conferred upon the Magistrate's Court by Section 33(5) of the said Act, and thereby giving him adequate notice of the existence of the proceedings against him, unlike in the matter before the Supreme Court.

Secondly, the apex Court left room for a situation, as had arisen in the instant appeal, with its addition of the qualification that *"or is otherwise notified of the proceedings against him"*.

It is admitted that the Appellant has had sufficient notice as to the nature of the proceedings against him and the interim order made by the Magistrate's Court.

The proviso to Article 138(1) of the Constitution reads thus;

> *"Provided that no judgment, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."*

Therefore, we are unable to conclude that the failure of the Magistrate's Court, in issuing summons for the Appellant to show cause, has prejudiced his substantial rights or has occasioned a failure of justice; in view of the fact that he has had sufficient prior notice of the pending action.

The appeal of the Appellant is accordingly dismissed without cost.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL