

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

In the matter of an application made  
under and in terms of Article 138 of  
the Constitution of the Democratic  
Socialist Republic of Sri Lanka.

Officer-in-Charge

Minor Offences Branch,

Police Station,

Kalutara South.

C.A. Revision Application No:  
**CA (PHC) APN 171/2013**

**Complainant**

H.C. Kalutara Case No:  
**HCRA 23/2011**

**Vs.**

M.C. Kalutara Case No: **66906**

01. Pandithage Senarath  
Wijemanna (should be  
corrected as **Pandithage  
Senarath Wijesoma  
Kiththangoda**),

02. Pathirana Don Wimaladasa,

03. Pandithage Thilini  
Hettiarachchi,

04. Padmakumara Herath,  
**Party of the 01<sup>st</sup> Part**

01. Ranapurahewa Aruna Sampath  
Piyarathna,

02. Ranapurahewa Iresha Dulmini  
Piyarathna,

03. Ranapurahewa Deepa Nilmini  
Piyarathna,

**Party of the 02<sup>nd</sup> Part**

**AND BETWEEN**

01. Pandithage Senarath Wijesoma  
Kiththangoda,

02. Pathirana Don Wimaladasa

03. Pandithage Thilini  
Hettiarachchi,

(Appearing by Power of  
Attorney holder)

**Party of the 01<sup>st</sup> Part-  
Petitioners**

**Vs.**

Officer-in-Charge,  
Minor Offences Branch,  
Police Station,  
Kalutara South.

**Complainant- 01<sup>st</sup> Respondent**

01. Ranapurahewa Aruna Sampath  
Piyarathna,

02. Ranapurahewa Iresha Dulmini  
Piyarathna,

03. Ranapurahewa Deepa Nilmini  
Piyarathna,

**Party of the 02<sup>nd</sup> Part-  
Respondents**

The Attorney-General,  
Attorney-General's Department,  
Colombo 12

**03<sup>rd</sup> Respondent**

The Chairman,  
Kalutara Pradeshiya Sabhawa,  
Waskaduwa,  
Kalutara.

**04<sup>th</sup> Respondent**

**AND NOW BETWEEN**

01. Pandithage Senarath Wijesoma  
Kiththangoda,  
No. 371, Kurunduwaththa  
Meda Para,  
Nagoda,  
Kalutara South.

02. Pathirana Don Wimaladasa,

No. 37/A, Kurunduwaththa  
Meda Para,  
Nagoda,  
Kalutara South.

03. Pandithage Thilini  
Hettiarachchi,  
No. 371/A, Kurunduwaththa  
Meda Para,  
Nagoda,  
Kalutara South.

(Appearing by Power of  
Attorney holder)

**Party of the 01<sup>st</sup> part-  
Petitioners-Petitioners**

**Vs.**

Officer-in-Charge,  
Minor Offences Branch,  
Police Station,  
Kalutara South.

**Complainant- 01<sup>st</sup> Respondent-  
Respondent**

01. Ranapurahewa Aruna Sampath  
Piyarathna,  
No. 332A, Kurunduwaththa  
Meda Para,  
Nagoda,  
Kalutara South.
04. Ranapurahewa Iresha Dulmini  
Piyarathna,  
No. 332A, Kurunduwaththa  
Meda Para,  
Nagoda,  
Kalutara South.
05. Ranapurahewa Deepa Nilmini  
Piyarathna,  
No.67/2, Pubudu,  
Bataganwila,  
Galle.

**Party of the 02<sup>nd</sup> part-**  
**Respondents-Respondents**

The Attorney-General,  
Attorney-General's Department,  
Colombo 12

**03<sup>rd</sup> Respondent-Respondent**

The Chairman,  
Kalutara Pradeshiya Sabhawa,  
Waskaduwa,  
Kalutara.

**04<sup>th</sup> Respondent- Respondent**

BEFORE : K. K. Wickremasinghe, J.  
Janak De Silva, J.

COUNSEL : AAL Ranil Samarasuriya with AAL  
Pavithra Bolapage for the 1<sup>st</sup> part  
Petitioners-Petitioners  
AAL Prinath Fernando for the 2<sup>nd</sup> part  
Respondents-Respondents  
Nayomi Wickramasekara, SSC for the 3<sup>rd</sup>  
Respondent-Respondent  
AAL Tenny Fernando for the 4<sup>th</sup>  
Respondent- Respondent

ARGUED ON : 08.02.2018

WRITTEN SUBMISSIONS : The 3<sup>rd</sup> Respondent-Respondent – on  
12.04.2018

DECIDED ON : 18.07.2018

**K.K. WICKREMASINGHE, J.**

This Revision application is filed by the 1<sup>st</sup> part Petitioners-Petitioners seeking to set aside the order of the Learned High Court Judge of Kalutara in Case No. 23/2011 dated 08.10.2013 and seeking to set aside the order of the Learned Magistrate of Kalutara in MC Case No. 66906.

**Facts of the case:**

The 1<sup>st</sup> part Petitioners-Petitioners (hereinafter referred to as the Petitioners) had made a complaint to the Police Station, Kalutara South in December 2009 stating that,

- a) The road that leads to the residence of the Petitioners was a 12 feet wide road, namely Kuruduwatta Meda Para,
- b) House of the 2<sup>nd</sup> Part Respondents-Respondents (hereinafter referred to as the 2<sup>nd</sup> Respondent) was situated at the end of the said road and the owner of the land, namely Aruna Piyaratne (2<sup>nd</sup> Respondent) had filled his land with soil that had been transported on several occasions in heavy vehicles,
- c) In the said process, the 2<sup>nd</sup> Respondent had covered the drain that was in his land and thereby obstructed the flow of water into the drain.
- d) As a result of aforesaid conduct, the houses of the Petitioners go under water and the use of heavy vehicles had caused serious damages to the said road.
- e) This was brought to the notice of the 2<sup>nd</sup> Respondent, but he had failed to take any action to prevent such damages being caused to the road and to prevent the nuisance caused to the Petitioners.

Consequent to the said complaints, a police officer had inspected the said road in issue on 28.12.2009 and had recorded the observations. According to the said observations,

- 1) The lands were situated approximately half a feet lower elevation from the said road,
- 2) The houses on the said road go under water even after a slight rain,
- 3) The land of the 2<sup>nd</sup> Respondent had been filled with soil,
- 4) The said road had been damaged due to the transportation of construction materials in heavy vehicles to the land of 2<sup>nd</sup> Respondent,
- 5) Although the Petitioners had stated that there was a drain in the land of the 2<sup>nd</sup> Respondent for the rain water to recede, there was no sign of such a drain,
- 6) The level of the land of 2<sup>nd</sup> Respondent had been raised and therefore no water stagnation in the said land.

Thereafter Party of the 2<sup>nd</sup> part-Respondents had made their statements to the Police Station, Kalutara South in response to the complaints made by the Petitioners. Accordingly the Complainant-1<sup>st</sup> Respondent-Respondent (hereinafter referred to as the 1<sup>st</sup> Respondent) had instituted action in the Magistrate's Court of Kalutara under case No. 66906 in terms of section 98 of the Criminal Procedure Code Act No.15 of 1979. On 22.02.2010, the Learned Magistrate of Kalutara had issued a Conditional order which included three conditions and subsequently the 2<sup>nd</sup> Respondent had filed objections in respect of the said Conditional order. On 03.06.2010, the Learned Magistrate had gone on a scene inspection with the Public Health Inspector, Nagoda and had recorded his observations. The Learned Magistrate had ordered the Public Health Inspector to tender a report with regard to this issue and the PHI had tendered the same on 07.06.2010.



The Learned Magistrate of Kalutara had delivered the order of the case No. 66906 on 04.11.2010, in which the Learned Magistrate had made the 1<sup>st</sup> and 2<sup>nd</sup> conditions of the Conditional Order absolute and vacated the 3<sup>rd</sup> condition without making the said condition absolute.

Thereafter on or around 01.01.2011, the 2<sup>nd</sup> Respondent had obstructed the water flow within Lot No.01 using a dozer and therefore the Petitioners had made a complaint to the Police Station, Kalutara. Accordingly the 2<sup>nd</sup> Respondent was charged in the Magistrate Court of Kalutara under Case No. 81443 for violation of Court Order issued in MC Case No. 66906 dated 04.11.2010.

The Counsel for the Petitioners submitted that there had been an error with regard to the condition No. 01 of the Conditional Order made by the Learned Magistrate on 22.02.2010 and the same condition reproduced in the Order dated 04.11.2010, and the said error had made the entire order made on 04.11.2010 of no force or value. Therefore the Petitioners had made an application to the Learned Magistrate of Kalutara seeking to correct the said error, to which the 2<sup>nd</sup> Respondent had objected. The Learned Magistrate had delivered the order in respect of said application on 24.03.2011, rejecting to rectify the said error since there was no direct provision to rectify such errors in an event of both parties did not agree to do so.

Being aggrieved by the Orders of the Learned Magistrate dated 04.11.2010 and 24.03.2011, the Petitioners had filed a revision application in the High Court of Kalutara under Case No.HCRA 23/2011 seeking to revise and set aside the aforesaid orders. The Learned High Court Judge of Kalutara had pronounced the Judgment of the said case on 08.10.2013 stating that,

- i. This matter was a civil dispute between parties,

- ii. The Learned Magistrate had failed to correctly ascertain whether the alleged nuisance was a public or a private one,
- iii. The Magistrate had no power to interfere with a private nuisance.

Accordingly the Learned High Court Judge of Kalutara had set aside all the orders made by the Learned Magistrate of Kalutara in the aforesaid case.

Being aggrieved by the said order, the Petitioners have preferred a revision application in this court seeking to set aside the said Order of the Learned High Court Judge of Kalutara. Further they seek to rectify the error in 1<sup>st</sup> condition of the Order made on 04.11.2010 by the Learned Magistrate of Kalutara.

The Learned Counsel for the petitioners submitted that the said order of the Learned High Court Judge dated 08.10.2013 was contrary to law and to the judicial precedence in matters related to public nuisance and therefore has amounted to constitute exceptional circumstances to invoke the revisionary jurisdiction of this court.

In the case of **Saram v. Seneviratna (1918) 21 NLR 190**, it was held that,

*“Here, again, it is noticeable that the act may be a “public nuisance,” though it only affects people dwelling in the vicinity. All that is essential is that the injury, danger, or annoyance should be common”, and not special to a few individuals. In an Indian case referred to in Ratanlal's Law of Crimes 487, it was held that the expression “people in general” in the corresponding section of the Indian Penal Code meant a body or considerable number of persons, and, as the learned authors put it at page 486, it is in the quantum of annoyance that public nuisance differs from private...”*

In the case of **Sinna Gura v. IP of Police, Karawanella (1957) 61 NLR 186**, it was held that,

*“The evidence in this case shows that the damage which was likely to be caused by the jack tree in question would be confined to the complainant and the members of his family...the Learned Magistrate has not appreciated the fact that Cap.9 relates only to public nuisances...”*

In the above mentioned case of **Sinna Gura**, Justice Sinnetamby had referred to the Judgment of **K.S.P. Fernando v. C.D. Fernando and another (1936) 1 CLJ 29**.

In the said Judgment of **Fernando v. Fernando**, Soertsz,J had held that,

*“But, as pointed out by De Sampayo J, in De Silva v. De Silva 1 C.W.R. 98, those provisions are aimed against public nuisance...DE SAMPAYO, J, continues as follows- “Counsel for the complainant, however, emphasized the words ‘injury to persons living in the neighbourhood’ and argued that as the complainant and his family are persons living in the neighbourhood of the land on which the offending tree stands, the requirements of the section were satisfied. But the word ‘neighbourhood’ in the context does not imply ‘nearness’ but locality and it seems to me that the section provides for a case in which the part of the public living in the place where the nuisance exists are generally affected, and that a single man and his family who complain against the next door neighbour are not within the contemplation of the section.” I would respectfully follow that ruling and say that the Petitioner cannot claim relief under this chapter...”*

In the case of **Somapala Fernando v. S.C. Fernando (2002) 3 Sri.LR 388**, it was stated that,

*“The above items of evidence may have been useful if there was initially evidence to show that the smoke emitted or likely to be emitted was causing a nuisance to the residents in the vicinity. The evidence led at the Magistrate’s Court at best goes to prove a private nuisance as opposed to a public nuisance the only witnesses being the husband and wife...”*

The Learned High Court Judge of Kalutara had referred to the following Judgments in the order dated 08.10.2013;

- 1) **Fernando v. Fernando (1936) 01 CLJ 29**
- 2) **Don Andris v. Manuel (1909)-2 Leader LR 143**
- 3) **Sinna Gura v. IP of Police, Karawanella (1957) 61 NLR 186**
- 4) **Ratwatte v. Owen (1892) 01 S.C.R. 172**
- 5) **Saram v. Seneviratna (1918) 21 NLR 190**
- 6) **Sandrasedra v. Sinnatamby (1923) 25 NLR 139**
- 7) **Hendricks Mendis v. Chandrasekera Mudaliyar (1908) 12 NLR 33**

Upon examination of the sketch of road in issue (Page 107 of the brief) and the evidence produced, we find that the said road too does not seem to be a public road but rather a private right of way for the owners of certain lands and houses. Further we find that this issue does not fall within the ambit of public nuisance.

In light of above Judgments and the facts of the instant case we are of the view that the Petitioners should resort to a civil action which provides an appropriate remedy.

In the case of **Rustom v. Hapangama (1978-79) 2 Sri. LR 225**, it was held,

*“The powers by way of revision conferred on the Appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original Court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are, is dependent on the facts of each case...”*

*Considering the facts and circumstances of the present case there were no such exceptional circumstances disclosed as would cause the Appellate Court to exercise its discretion and grant relief by way of revision...”*

Accordingly we are of the view that the order of the Learned High Court Judge of Kalutara in the Case No. HCRA 23/2011 is correct in law and we see no reason to interfere with the findings of the Learned High Court Judge. Therefore we affirm the order dated 08.10.2013.

Revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

**Janak De Silva, J**

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

- 1) Saram v. Seneviratna (1918) 21 NLR 190
- 2) Sinna Gura v. IP of Police, Karawanella (1957) 61 NLR 186
- 3) K.S.P. Fernando v. C.D. Fernando and another (1936) 1 CLJ 29
- 4) Somapala Fernando v. S.C. Fernando (2002) 3 Sri.LR 388
- 5) Rustom v. Hapangama (1978-79) 2 Sri. LR 225