IN THE COURT OF 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.

Nimalawathie Wanigasinghe,

Uduwila, Tissamaharama

**Respondent-Respondent-Petitioner-Respondent-Petitioner**

C.A.(PHC)APN No. 28/2010

H.C. (Civil) Matara No. SP/HCCA/MAT/WRIT/08/2008

**Vs.**

1. Maithrilee Padmanjalee Wijesuriya,

   "Santhapaya", Walasmulla Road,

   Beliatta.

   **Complainant-Petitioner—Respondent-Petitioner-Respondent (1st Respondent)**

2. D.L.K. Priyawansa, Assistant Commissioner of Agrarian Development,
   Hambantota.

   **Respondent-Respondent-Respondent(2nd Respondent)**

BEFORE : **JANAK DE SILVA, J. &**
**ACHALA WENGAPPULI, J.**

COUNSEL : Saliya Peiris P.C. with Thanuka Nandasiri and Susil Wanigapura for the Respondent-Respondent-Petitioner-Respondent-Petitioner.
Manohara de Silva P.C. with Boopathi Kahathuduwa for the Complainant-Petitioner-Respondent- Petitioner -Respondent (1st Respondent).
Chaya Sri Nammuni S.C. for the Respondent-Repondent-Respondent(2nd Respondent).

WRITTEN SUBMISSIONS
TENDERED ON : 28-08-2018( by the Complainant- Respondent)
06-09-2018( by the Petitioner)

DECICED ON : 14th September, 2018

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**ACHALA WENGAPPULI, J.**

This is an application preferred by the Respondent-Respondent-Petitioner-Respondent-Respondent- Petitioner (hereinafter referred to as the "Petitioner") challenging an order of the Provincial High Court holden in Matara, delivered on 29.09.2009 in Case No. SP/ HCCA/ MAT/ WRIT/08/2008 as well as in the connected Appeal bearing case No. CA (PHC) No.193/2009 , seeking the said identical relief.

In seeking a prerogative Writ of *Certiorari* from the Provincial High Court, the Complainant-Petitioner-Respondent-Petitioner-Petitioner-

Respondent (hereinafter referred to as the "1st Respondent") moved Court to quash an order under Section 7(7)(b)(ii) of the Agrarian Development Act No. 46 of 2000 made by the 2nd Respondent-Respondent-Respondent (hereinafter referred to as the "2nd Respondent"), an Assistant Commissioner of Agrarian Development at Hambantota.

Since the Petitioner had sought similar relief under two different jurisdictions of this Court, it is appropriate for this Court to deal with the appeal and to make its determination covering both these cases.

It is helpful at the very outset to refer to the long history of litigation between the two contesting parties namely, the Petitioner and the 1st Respondent to consider the submissions in the correct perspective.

The 1st Respondent is the landlord of a paddy land known as *Welikumbura*, situated at *Udawila* in *Weerawila*, an area coming under the purview of the 2nd Respondent. Upon a complaint by the 1st Respondent that the Appellant is in arrears of rent, the office of the 2nd Respondent initiated an inquiry and determined that the Petitioner is in fact in arrears of rent. This determination was conveyed to the Petitioner with the direction that if she fails to pay the arrears within the given period, her tenancy would be terminated. Upon the Petitioner's failure to pay arrears of rent her tenancy was terminated. Thereafter, Commissioner General of

Agrarian Development has rescinded the said termination of tenancy and the Petitioner was granted further time to pay her arrears.

In view of this determination by the Commissioner General of Agrarian Development, the 1st Respondent successfully sought judicial review by seeking Writ of Certiorari and Mandamus against him and the 2nd Respondent in the Provincial High Court holden in Hambantota in case No. HCA 79/2001. The Petitioner had the said order set aside by this Court in CA (PHC) 206/2003 on the basis that the Provincial High Court had no Writ jurisdiction over the Commissioner General. Then the 1st Respondent moved Supreme Court and in S.C. Appeal No. 33 /2007 (reported as ***Wijesuriya v Wanigasinghe and Others*** (2011) 2 Sri L.R. 231), the Apex Court has accepted the determination by this Court that a Provincial High Court lacked jurisdiction to issue a Writ of Mandamus against the Commissioner General of Agrarian Development.

Thereafter, the 2nd Respondent, by his letter dated 20.08.2008 (marked as P1 in the application before the Provincial High Court), directed the 1st Respondent to vacate the disputed paddy land within 14 days. The 1st Respondent sought to quash the said order in the Provincial High Court holden in Matara by seeking a Writ of *Certiorari* in Case No. SP/HCCA/MAT/WRIT/08/2008. The Petitioner objected to the application placing reliance of preliminary objections.

The Provincial High Court, in delivering its order on 29.09.2009, issued Writ of *Certiorari* and quashed P1, having held that it had

jurisdiction over the determination of the 2nd Respondent, in issuing P1 to the 1st Respondent. The Provincial High Court held in favour of the 1st Respondent.

In challenging the validity of the said order of the Provincial High Court before this Court, the Petitioner contended that the Provincial High Court erred in its failure to state the reasons upon which it issued Writ of *Certiorari* in quashing P1. She further submitted that the Provincial High Court had erred in overruling the preliminary objections raised by her as to the maintainability of the application for Writ.

The impugned order of the Provincial High Court, states that *"at the hearing of the application the President Counsel appearing for the 2nd Respondent as well as the State Counsel for the 1st Respondent took up certain objection as preliminary nature ...."*and proceeded to consider them.

The Petitioner's written submissions tendered to Provincial High Court confines only to the said preliminary objections taken up at the hearing of the application. The Petitioner in her written submissions took up a preliminary objection as to the jurisdiction of the Provincial High Court on the basis that it has no jurisdiction over the 2nd Respondent who issued P1. In addition, the Petitioner also claimed that the affidavit of the 1st Respondent, annexed to her Petition seeking issuance of a prerogative Writ, is defective owing to violation of the provisions of Oaths and Affirmations Ordinance and that she failed to include a necessary party to

the application, namely, the Commissioner General of Agrarian Development.

In her written submissions, as the Petitioner before the Provincial High Court, the 1st Respondent too had confined herself to address only the preliminary objections raised by the Petitioner and the 2nd Respondent.

The Provincial High Court, in its impugned order rejects the preliminary objection on jurisdiction as well as the objection on the validity of the affidavit. In addition, it dealt with the issue of "undue delay" apparently raised by the Petitioner. However, having overruled the three preliminary objections, it should have afforded an opportunity for the contesting parties to make their submissions on the merits to assist Court to determine the issue whether the 1st Respondent is entitled to the relief she prayed for, by applying the relevant principles of judicial review on administrative actions. Instead, the Provincial High Court had issued Writ of Certiorari without any assistance by the parties or considering the merits or demerits of the application of the 1st Respondent.

Relevant part of the impugned order is reproduced below;

> "In the circumstances, I am of the view that the 1st and 2nd respondents have failed to establish their preliminary objections raised with regard to the maintainability of this application for the reasons stated above. Hence, the order dated 20.08.2008, marked as P1 is hereby quashed, as no failure of justice should occasion to the petitioner due to the erroneous order."

Unfortunately, it is not possible to ascertain the basis on which the Provincial High Court thought that the P1 should be quashed as the order contains no reasons which could be attributable to justify arriving at such a finding as evident from the part reproduced above. Therefore, the Petitioner's contention is that the Provincial High Court has failed to consider the application of the 1st Respondent on its merits to satisfy itself whether her entitlement of judicial review on administrative action and intervention of the Court by issuance of a Writ is a valid complaint.

In the circumstances, the Petitioner is entitled to relief she prayed for in her application that the order dated 29.09.2009 issued by the Provincial High Court in case No. SP/HCCA/MAT/WRIT/08/2008 be set aside by allowing her appeal. In addition to these reliefs, the Petitioner further seeks to dismiss the Writ application of the 1st Respondent ( Case No. SP/HCCA/MAT/WRIT/08/2008).

In her petition, the Petitioner sought relief from this Court pleading its appellate jurisdiction against the order of the Provincial High Court. The written submissions of the Petitioner are confined to the following issues;

i. Whether the Provincial High Court erred in law by failing to give reasons to quash the impugned decision contained in P1 ?

ii. Whether the Provincial High Court failed to consider properly that the 1st Respondent was guilty of lashes ?

In the written submissions of the 1st Respondent filed in this Court, she did not address the issue of the merits of her application for a prerogative Writ but only the issue of jurisdiction.

Thus, it is seen that neither the Petitioner nor the 1st Respondent did address the issue of the merits of the application of the 1st Respondent before the Provincial High Court seeking a prerogative Writ before this Court in the instant application.

It is therefore noted that in the instant Application and her connected Appeal the Petitioner only invoked appellate and revisionary jurisdiction of this Court. If this Court were to determine the application of the Writ on its merits, then it would be exercising original jurisdiction over the parties instead of its appellate or supervisory jurisdiction that had been invoked by the Petitioner. There is no such invitation made to this Court by the parties in their written submissions either.

A similar situation arose for determination of this Court in CA (PHC) 63/2012 - C.A.M. of 13.07.2018, where De Silva J held the view that;

> *"The learned Counsel for the Appellant submitted that this Court is entitled to go into the merits of the revision application filed before the High Court of Panadura and make order thereon. Having given my anxious consideration to this submission I am of the view that legally it is not permissible to do so. The learned High Court Judge has not considered the merits of the revision application made by the Appellant. In these circumstances, this Court will be usurping the revisionary jurisdiction of the High Court by examining the merits of the application when the High Court has not done so. Such a course of action on the part of this*

*Court will also deprive a party the right of appeal it has against the order of the High Court on the merits of the application."*

In the circumstances, this Court sets aside the order of the Provincial High Court delivered on 29. 09. 2009 in Case No. SP/HCCA/ MAT/ WRIT/08/2008 by allowing the appeal of the Appellant and also by granting relief as prayed for in the paragraph "B" of the prayer to the petition in her revision application No. CA (PHC) APN 28/2010.

The matter is accordingly remitted back to the relevant Provincial High Court directing it to make an appropriate determination on the issuance of a prerogative Writ upon the merits with a further direction by this Court for its expeditious disposal.

**JUDGE OF THE COURT OF APPEAL**

**JANAK DE SILVA, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**