

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA.**

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

Officer in Charge

Divisional Crime Investigation Unit

Badulla.

**Complainant**

Vs.

Dissanayake Mudiyansele Manjula  
Dissanayake,

No.21 Welgama,

Uwatenna, Haldummulla.

**Suspect**

**AND**

Dissanayake Mudiyansele Indika  
Sanjeevani,

No.21 Welgama,

Uwatenna, Haldummulla.

**Petitioner**

Vs.

Court of Appeal Case No:  
**CA / 108 / 21**

High Court of Badulla Case No:  
**HC BAIL 5 / 2021**

Magistrate's Court of Badulla Case  
No: **37811**

1. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

2. Officer in Charge  
Divisional Crime Investigation Unit,  
Badulla.

**Respondents**

Dissanayake Mudiyansele Manjula  
Dissanayake.

**Suspect**

**AND NOW**

Dissanayake Mudiyansele Indika  
Sanjeevani,

No.21 Welgama,

Uwatenna, Haldummulla.

**Petitioner – Petitioner**

Dissanayake Mudiyansele Manjula  
Dissanayake,

(Currently in Remand Custody)

**Suspect on behalf of whom the  
instant application is made.**

Vs.

1. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

2. Officer in Charge

Divisional Crime Investigation Unit,

Badulla.

**Respondents - Respondents**

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Sahan Kulatunga for the Petitioner.

Erandi Dassanayake for the State.

Argued on: 05.04.2022

Decided on: 01.06.2022

**MENAKA WIJESUNDERA J.**

The instant application has been filed to set aside the order of the High Court of Badulla dated 14/07/2021.

The suspect in this matter had been arrested on 09/10/2020 for an offence of theft of an automatic weapon from the production room of the Magistrate's Court of Badulla while being an employee of the same. The charges have been filed under the offences against Public Property Act No.12 of 1982 under which, according to Section 8(1) of the said Act "Any person charged under this Act **shall** not be released on bail until the trial has concluded but the Magistrate has to

grant bail to a suspect on exceptional circumstances....In that event, a Police Officer not below the rank of a Superintendent of Police has to file a certificate stating that the value of the property of which the offence has been committed is more than Rs.25, 000.

In the case of ***Mohamed Ali Sameed Smail v Attorney General Case No. CA /160/2015***, S. Thuraija PCJ has held that “if in law the word **shall** is used it means that it must be complied with and there is **no discretion** available to the person who is complying with the said law”.

As per ***T.M. Prakash v The District Collector W.P. No. 17608 of 2013, M.P. No. 1 of 2013 on 27 September 2013***, the Hon'ble Judge S. Manikumar has held that when a statute uses the word '**shall**', **prima facie it is mandatory**, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute.

Moreover, in the case of ***M/s. Sainik Motors v State of Rajasthan AIR 1961 SC 1480***, Hon'ble Mr. Justice Hidayatullah observed that ordinarily though the word **shall is mandatory**, it can be interpreted as directory if the context and intention otherwise demands.

In the case of ***Lakshmanasami Gounder v C.I.T. Selvamani and others (1992) 1 SCC 91***, K Ramasamy J laid down the following statement with regards to the mandatory nature of word “shall” in paragraph 5 as; “.....It is settled law that the word '**shall**' be construed in the light of the purpose the Act or Rule that seeks to serve. It is not an invariable rule that even though the word '**shall**' **be ordinarily mandatory** but in the context or if the intention is, otherwise, it may be construed to be directory. The construction ultimately depends upon the provisions itself, keeping in view the intendment of the enactment or of the

context in which the word '**shall**' has been used and the mischief it seeks to avoid. Where the consequence of failure to comply with any requirement of a provision is provided by the statute itself, the consequence has to be determined with reference to the nature of the provision, the purpose of enactment and the effect of non-compliance thereof. In its absence the consequence has to be determined with reference to the effect of the non-compliance of the provision of the legislature. Mere use of the word '**shall**' need not be given that connotation in each and every case that the provision would be invariably interpreted to be **mandatory** or directory."

In the case of *M.N. Gopalakrishna Panicker v State of Kerala* (1991] 1 KLJ 75; [1990] 2 KLT 495, the Counsel, on behalf of the petitioner, referred to a decision to show that the **word "shall" in the rule should be interpreted as mandatory.**

Furthermore, in *Lexecon, Inc. v Milberg Weiss Bershad Hynes and Lerach*, 523 U.S. 26, 35 (1998) the Court was of the view that, **"The mandatory 'shall' ... normally creates an obligation impervious to judicial discretion."**

According to **Black's Law Dictionary 8th Edition at page 1407** the word **shall** is defined as: being **"Has a duty to; more broadly is required to"** and in **Merriam-Webster Dictionary**, the term **shall** is defined as a term **"Used in laws, regulations, or directives to express what is mandatory."**

**Therefore, the certification by a Gazetted Officer as with regard to the value of the property is mandatory for the purpose of identification of a public property. Therefore, it is the opinion of this Court that one has to adopt the Literal Rule in interpreting the term shall under Section 8(1) of the Act.**

In the instant matter the Counsel for the suspect submitted that, the Police have not filed a certificate as per Section 8(1) of the relevant Act, if that is so the instant matter has to be considered under the provisions of the Bail Act.

The State Counsel appearing on behalf of the Attorney General further drew the attention of this Court to the B report which is marked as P6 which reveals the fact that the Police had not been able to ascertain the value of the production which is supposed to be lost. The subsequent B reports filed also do not reveal a Gazetted Officer certifying the value of the property involved.

Therefore, this Court cannot conclude that the instant matter falls within the provisions of the Offences against Public Property Act No.12 of 1982. As such, exceptional circumstances are not needed to consider bail but as this is a revision application which has been filed to set aside the Order of the High Court, it is well established law that a person filling a revision application must plead exceptional circumstances which shocks the conscious of Court in the impugned order, in a revision application.

In the instant matter, the learned High Court Judge had concluded in the order that there is no certification as to the value of the property involved by a Gazetted Officer. But he has proceeded to conclude that it is a public property which in the opinion of this Court is a clear violation of Section 8(1) of the said Act. Therefore, we see a circumstance which shocks the conscious of this Court in the impugned order of the High Court Judge.

As such the instant application for revision application is allowed and the suspect namely Dissanayake Mudiyansele Manjula Dissanayake is hereby enlarged on bail on the following conditions,

1) A cash bail of RS.100, 000/=

2) Two sureties to the value of Rs.200, 000/= each

3) The suspect is to report to the relevant Police Station on every last Sunday of the month

4) The suspect to hand over his passport if any to the registrar of the relevant High Court

The registrar of this Court is directed to convey the instant order to the relevant High Court.

**Judge of the Court of Appeal.**

**I agree.**

**Neil Iddawala J.**

**Judge of the Court of Appeal.**