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

In the matter of a revision application under Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka and provisions under the High Court of Provinces Act No 19 of 1990.

Officer-in-Charge, Police Station, Gandara

Complainant

Vs.

Court of Appeal Application
No: **CA/PHC/APN/89/20**

High Court of Matara
No: **153/2020/Revision**

Magistrate's Court of Matara
No: **93649**

Nandani Sellahewage of Madamewatte, Kiralawella, Devinuwara.

1st Party

1. A. A. Nadeeka Priyadarshani of Madamewatte, Kiralawella, Devinuwara.
2. Tikira Hennadige Geethani and
3. Jayaweera Patabendige Supun Geeth both of PaluHummanawatte, Kiralawella, Devinuwara.
4. Tikira Hennadige Tharushi Jaya of Madamewatte, Kiralawella, Devinuwara.

2nd Party

Vs.

Nandani Sellahewage of Madamewatte,
Kiralawella, Devinuwara.

1st Party-Petitioner

Vs.

1. Officer-in-Charge, Police Station,
   Gandara.

Complainant- 1st Respondent

2. Hon. Attorney General,
   The Attorney General's Department
   Colombo 12

2nd Respondent

3. A. A. Nadeeka Priyadarshani of
   Madamewatte, Kiralawella, Devinuwara.
4. Tikira Hennadige Geethani and
5. Jayaweera Patabendige Supun Geeth
   both of PaluHummanawatte,
   Kiralawella, Devinuwara.
6. Tikira Hennadige Tharushi Jaya of
   Madamewatte, Kiralawella,
   Devinuwara.

2nd Party- 3rd to 6th Respondents

And now

Nandani Sellahewage of Madamewatte,
Kiralawella, Devinuwara.

1st Party-Petitioner-Petitioner

Vs.

1. Officer-in-Charge, Police Station,
   Gandara.

Complainant-1st Respondent- 1st Respondent

2. Hon. Attorney General,
   The Attorney General's Department
   Colombo 12

2nd Respondent-2nd Respondent

3. A. A. Nadeeka Priyadarshani of
   Madamewatte, Kiralawella, Devinuwara.
4. Tikira Hennadige Geethani and
5. Jayaweera Patabendige Supun Geeth
   both of PaluHummanawatte,
   Kiralawella, Devinuwara.
6. Tikira Hennadige Tharushi Jaya of
   Madamewatte, Kiralawella,
   Devinuwara.

2nd Party-3rd to 6th Respondents-3rd to 6th Respondents

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Dr. Sunil Abeyratne with Mihiri Kudakolowa for the Petitioner

Mayushi P. Punchibandara with Tharanath Palliyaguruge for 3rd – 6th Respondents.

Decided on : 01.08.2022

Iddawala – J

This is a revision application filed on 31.07.2020 against a judgment of the Provincial High Court of Matara dated 12.06.2020, which refused to revise an order of the Magistrate Court of Matara dated 20.12.2019. This instant application was supported on 21.09.2020, and notices were issued to the respondents. On 26.11.2021, the State Counsel informed Court that no relief had been sought from the Attorney General and requested the Attorney General be discharged. Thereafter, notices were issued to the remaining respondents, after which time was granted to file objections. When the matter came up to be mentioned on 20.07.2022, the counsel appearing on behalf of 3rd to 6th respondents submitted that she had no intention of filing objections and that she concedes to the prayer of the petitioner to set aside both the Magistrate Court order dated 20.12.2019 and the High Court order dated 12.06.2020. As the Court of Appeal cannot deliver a judgment to set aside an order by mere consent, the judgment was reserved.

The facts of the case are as follows. On 20.03.2018, the officer in charge, police station Gandara (*hereinafter the 1st respondent*), filed a report before the Magistrate Court, Matara under Section 81 of the Code of Criminal Procedure Act, No. 15 of 1979 (*hereinafter the CPC*). The report detailed a land dispute between the petitioner and the 3rd to 6th respondents. The report further informed the Magistrate that despite a warning by the 1st respondent and a reference to the Mediation Board, parties have continued the dispute as of habit causing a breach in peace as per Section 81 of the CPC. Hence, the 1st respondent moved to issue an order against the petitioner and 3rd – 6th respondents to show cause as to why they should not be bonded over per Section 81 of the CPC. The show cause inquiry commenced, and the petitioner tendered written reasons on 29.10.2019. As the 3rd – 6th respondent failed to show cause, the Magistrate entered the said respondents into a bond of Rs. 1 million for an indefinite period by order dated 26.11.2019.

On 20.12.2019, the Magistrate ordered the petitioner to enter into a bond of Rs. 1 million for an indefinite period of time citing that the petitioner failed to show

cause as to why such a bond should not be issued against her, thereby invoking the Magistrate's powers under Section 81 of the CPC. Aggrieved by the Magistrate's order dated 20.12.2022, the petitioner filed a revision application to the High Court on 08.06.2020. On 12.06.2020, the High Court dismissed the application of the petitioner *in limine*. Such dismissal was solely based on the determination that the petitioner is guilty of laches.

Hence, it is incumbent upon this Court to examine whether there exists any illegality or irregularity in the Magistrate Court order dated 20.12.2019 and whether the learned High Court judge has erred in law by dismissing the petitioner's revision application on a technical ground. Prior to an examination of the outlined issues, this Court will set out the law pertaining to Section 81 of the CPC:

> *" Whenever a Magistrate receives information that any person is likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace within the local limits of the jurisdiction of the court of such Magistrate, or that there is within such limits a person who is likely to commit a breach of the peace or do any wrongful act as aforesaid in any place beyond such limits the Magistrate may in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for* ***such period not exceeding two years as*** *the court thinks fit to fix".* (Emphasis added)

The Section provide for the taking of security from certain classes of people to keep the peace. This is a form of prevention and not punishment. Upon receiving information, if the Magistrate is satisfied that the facts stated are well founded, and that it is necessary or desirable to call upon the party complained against to keep the peace he must first call upon such party to show cause why such an order should not be made.

A plain reading of Section 81 of the CPC clearly establishes the legislative intention of limiting the period for which an accused is bonded over to keep the peace: "**a period not exceeding two years**". Therefore, in framing Section 81, the legislature requires the presiding judge to delineate a specific period when ordering the execution of a bond. Under Ordinance No 15 of 1898, the maximum period under which a person could be bonded was 6 months (*See* Police Officer V. Dineshamy 21 NLR 127; Velaiden V. Zoysa Et Al. 14 NLR 140; Weerasinghre V. Peter 39 NLR 426).

However, in the instant case the order made by the Magistrate under Section 81 of the CPC does not specify a time period. Thus, the Magistrate order dated 20.12.2019 carries a fatal illegality as it is in direct contravention of Section 81 of the CPC. The same illegality has been averred by the petitioner in the revision application filed to the High Court. Yet, the learned High Court judge has completely disregarded this fatality and has dismissed the petitioner's application solely on the ground of laches. i.e., the delay of 5 ½ months.

While unexplained, inordinate delay may be significant in deciding whether the revisionary jurisdiction of the Court ought to be invoked or not, the purported delay must not be viewed in isolation. Such a construction is in line with the wide discretion vested under the revisionary jurisdiction, which allows rectification *ex mero motu*. The fact of the instant case is such that the impugned order of the Magistrate carries a fatal illegality vis-à-vis its disregard of the maximum period under which an accused can be bonded over under Section 81 of the CPC. As opined by Sansoni CJ, the object of the power of revision is the due administration of justice (Mariam Beebee v Seyed Mohamed 68 NLR 38). Due administration of justice warrants the compliance of the law as enacted by the legislature, a point which the Magistrate has failed in the instant case. The fact of the instant case aptly echoes the following dicta quoted from Somawathie v Madawala and others (1983) 2 SLR 15 at 30 and 31: "*The court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred . . . Indeed, the facts of this case cry aloud for the intervention of this court to prevent what otherwise would be a miscarriage of justice."*

Furthermore, it is pertinent to comment on the sum of the bond imposed by the Magistrate. While Section 81 of the CPC does not indicate the manner of calculation, Section 87 may be of some guidance, as both Sections are under Chapter IV Prevention of Offences B – Security for keeping the peace in other cases and security for good behaviour. Section 87 provides that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive. Hence it is clear that a Magistrate having been satisfied of breach of peace under Section 81 ought to set an amount which is not fanciful or arbitrary with due regard to the facts and circumstances of the case and the party concerned. The provisions of Chapter IV of the CPC should not be used with the object of imprisoning a person who has made himself obnoxious to others, he should be given a chance of obtaining his freedom by tendering security. A point to be considered when setting the bond amount would be the party's status in life, and the sum demanded should never be such as to absolutely preclude him from being able to furnish the necessary security.

A bond of Rs 1 million, no doubt in such circumstances is an exorbitant amount. The facts of the case involve a personal dispute between two parties over a land. Though the Magistrate has discretion in deciding the quantum of the bond as he thinks fit, as examined above, he should act judiciously. Such quantum must be considered in light of the offence/ act committed and should not be imposed just for the sake of being imposed. The effect of the impinged Magistrate order would result in absurdity where any claim that the petitioner had breached peace within the indefinite period of time would result in the petitioner being liable under a Rs 1 million bond. Any default on the part of the petitioner would result in a fine, which, if defaulted, would result in imprisonment.

At this juncture, it is pertinent to refer to the order delivered by the Magistrate against the 3rd – 6th respondents as well. The said order dated 26.11.2019 carries the same fatal errors as the impugned order dated 20.12.2019 i.e., failure to define the bond period, the quantum of the bond being exorbitant. Article 138 which sets out the revisionary jurisdiction of this Court empowers the Court to correct all errors in fact or in law. As per Section 365 of the CPC the Court of Appeal is vested with the power to take congnisance of and exercise the

revisionary jurisdiction against any case record of the proceedings of which has been called for by itself or which otherwise comes to its knowledge. As provided by the Article 145 of the Constitution the Court of Appeal may, *ex mero motu* or on any application made, call for, inspect and examine any record of any Court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require. Hence, it is incumbent upon this Court to use its revisionary powers against the order of the Magistrate Court dated 26.11.2019 despite it not being referred to in the prayer of the instant application.

Hence, it is the considered view of this Court that the Magistrate Court order dated 26.11.2019 has erred in law by failing to comply with Section 81 of the CPC. In light of such a fatal illegality, it is the view of this Court that the High Court order dated 12.06.2020 erred by dismissing the revision application of the petitioner *in limine*. Hence, both orders are hereby set aside. This Court further sets aside the order of the Magistrate dated 26.11.2019.

Application allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL