

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

*In the matter of an application for orders in the
nature of Writs of Certiorari, Mandamus and
Prohibition under Article 140 of the Constitution
of the Democratic Socialist Republic of Sri
Lanka.*

CA/WRIT/368/2021

Senaka Sebindra Lewis
Venus Mandiraya, Labuthota,
Welimada.

Petitioner

Vs.

1. D. G. Ajith Priyantha,
Provincial Assessor of Department of
Provincial Revenue, Uva Provincial
Council, Kings's Street, Badulla.
2. D. M. N. P. Dissanayake, Uva
Provincial Revenue Commissioner
(Acting), Uva Provincial Council,
King's Street, Badulla.
3. Secretary, Board of Review, Uva
Provincial Council, King's Street,
Badulla.
4. A. J. M. Musammil
Hon. Governor of Uva Province,
Governor's Office, King's Street,
Badulla.
5. Malani Mangalika Hettiarachchi, alias
Malani Mangalika Hettiarachchi
Lewis
Lewis Paper Hill, Karandagolla, Ella.

6. Hon. Magistrate
Magistrate's Court,
Badulla.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Kuvera de Zoysa, PC with Shantha Jayawardena and Thilini
Vidanagamage for the Petitioner.

Hashini Opatha, SC for the 1st, 2nd and 4th Respondents.

Supported on : 02.02.2022

Written Submissions: Petitioner - 15.07.2022

1st, 2nd and 4th Respondents- 24.08.2022

Decided on : 14.09.2022

Sobhitha Rajakaruna J.

The Petitioner has filed this application seeking, inter alia, for a mandate in the nature of a writ of Certiorari quashing the Certificate dated 19.08.2020, marked 'P30', filed by the 2nd Respondent in the Magistrate's Court of Badulla in case No.36410. The said impugned Certificate has been issued under Section 19 of the Finance Statute No. 8 of 1990 of the Uva Province. The 2nd Respondent by the said Certificate has informed the relevant Magistrate's Court that the Petitioner has defaulted a sum of Rs.7,917,000.00, the payment due to be recovered as stamp duty and fine, in view of the Deed of Transfer No. 308, marked 'P4'.

On the day the learned President's Counsel for the Petitioner supported this application for issuance of formal notice on the Respondents, two preliminary objections were raised by the learned State Counsel who appears for the 1st, 2nd and 4th Respondents. The objections are as follows;

- i. this Court has no jurisdiction to entertain the application of the Petitioner as the subject matter of this application is a devolved subject under the 13th Amendment to the Constitution and accordingly, the Petition should have been filled in the High Court of the Uva Province in terms of Article 154P(4)(b) of the Constitution.
- ii. the Petitioner is guilty of suppression and has not come to Court with clean hands.

Before I proceed to decide on the issuance of formal notice, by this Court on the Respondents, I must first dispose of the preliminary objection on jurisdiction raised by the learned State Counsel.

The 13th Amendment to the Constitution¹ came into effect in 1987 and the Provincial Council Act No. 42 of 1987 was enacted in order to establish Provincial Councils in the country. In terms of the Article 154P(1) there shall be a High Court for each Province with effect from the date on which the Chapter XVII A of the Constitution comes in to force and each such High Court shall be designated as the High Court of the relevant Province. (hereinafter referred to as the 'Provincial High Court'). The Provincial High Court has jurisdiction in terms of Article 154P(4)(b) of the Constitution to issue, according to law,

(b) order in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against any person exercising, within the Province, any power under -

- i. any law; or
- ii. any statutes made by the Provincial Council established for that Province,
in respect of any matter set out in the Provincial Council List.

S. N. Silva J. (as he then was) in Court of Appel Application No. 736/93, on 12.10.1993, held that;

“Agrarian service is a devolved subject, within the jurisdiction of the provincial High Court. In such circumstances, this court has consistently held that a petitioner should first invoke the jurisdiction of the Provincial High Court, unless there are exceptional circumstances that require the jurisdiction of this court to be invoked in the first instance.”

¹ 1978 (second Republican Constitution) Constitution of the Republic

‘The court, however, did not spell out what those exceptional circumstances are. Case law is replete with such instances.² A particular instance is non-accessibility to the local courts, either due to their non existence in the relevant locality or due to extreme inconvenience in gaining access to them. Such as when it is deemed to be physically unsafe to seek access.’ (Vide-‘*13th Amendment: Essays on Practice*’, Lakshman Marasinghe, Jayampathy Wickramaratne (eds.), Stamford Lake [2010] p. 20)

The learned State Counsel relies on the judgment of the Court of Appeal in *Adasuriya Mudiyanselage Rohana Bandara vs. The Governor, Wayamba Provincial Council, Kurunegala CA/Writ/762/08, decided on 19.05.2015* to emphasize the fact that the exclusive justification in respect of the subject matter of the instant application is vested in the Provincial High Court of Badulla.

However, the learned President’s Counsel for the Petitioner heavily relies on the judgement of the Supreme Court in *Weragama vs. Eksath Lanka Wathu Kamkaru Samithiya and others (1994) 1 Sri. L.R. 293*. In view of the precedent laid down in the said *Weragama* case, the learned President’s Counsel argues that the above *Adasuriya Mudiyanselage Rohana Bandara* case is per incuriam and not good authority.

It is important to note that in the said case of *Weragama vs. Eksath Lanka Wathu Kamkaru Samithiya and others*, Mark Fernando J. has held as follows;

“Apart from an error in punctuation (semicolon to be ignored or replaced by a comma) the meaning of Article 154P(4) is perfectly clear; and there is no ambiguity, absurdity or injustice justifying modification of language. (at p. 298)

“...None of the five judgements (in reference to the Determination³ of the Supreme Court regarding the 13th Amendment) support the Respondent’s contention that there was in the Thirteenth amendment an intention to devolve judicial power. There was nothing more than a re-arrangement of the jurisdictions of the judiciary.” (at p. 299)

“.....However, the jurisdiction of the Court of Appeal under Article 138 is not an entrenched jurisdiction, because Article 138 provides that it is subject to the provisions “of any

² Taczanowska vs. Taczanowski (1957) Probate 301 at page 306; Collette vs. Collette (1968) Probate 482 at page 487; Kuklyez vs. Kuklyez (1972) Victoria Reports 50; Preston vs. Preston (1963) Probate

³ In re the Thirteenth Amendment, (1987) 2 Sri LR 312

law"; hence it was always constitutionally permissible for that jurisdiction to be reduced or transferred by ordinary law (of course, to a body entitled to exercise judicial power). That is the reason why I held (in *Swastika Textile Industries Ltd. v. Dayaratne*, that section 3 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, conferred concurrent, appellate and revisionary jurisdiction on the High Courts in respect of Labour Tribunals, and that thereafter section 31D3 of the Industrial Disputes Act, as amended by Act No. 32 of 1990, made that jurisdiction exclusive, thereby taking away the jurisdiction of the Court of Appeal in that respect). And it was the absence of such a provision that made Parliament unable to reduce or affect the jurisdiction of the Court of Appeal under Article 140: because "its jurisdictions under Articles 140 and 141 are entrenched; but for the proviso inserted by the First Amendment, its jurisdiction under Article 140 cannot be transferred even to the Supreme Court" (Determination in re the Agrarian Services (Amendment)." (at p. 299,300) (Emphasis added)

K. C. Kamalabayson, PC, former Attorney General of Sri Lanka has expressed in an extended essay (Vide- ***The exercise of judicial power and the Provincial High Courts - Post 1994 experience*** in ***Devolution of Powers; The Sri Lankan Experience***, Uditha Egalahewa, Mahen Gopallawa (eds.), Kamalabayson Foundation, [2009], p. 108 at 113) as follows;

*"The Superior Courts of Sri Lanka have taken the view that the purpose of the establishment of the High Court of the Provinces by the Thirteenth Amendment has been to facilitate litigants to have their cases, in appeal, revision **or by way of writs**, heard in their respective Provinces instead of having to invoke the jurisdiction of the Superior Courts in Colombo. This has been a positive development as the establishment of this Court has been to decentralize the judicial administration in the country. **It was not the intention of the framers of the Thirteenth Amendment to the Constitution to devolve the judicial power of the People to the Provincial High Courts**, as the judicial officers in the Provinces continue to be answerable and accountable to the Judicial Service Commission and/or the National Legislature in the Centre."* (Emphasis added)

The conflict between powers given to the Court of Appeal in Article 138, 140 & 141 of the Constitution and powers given to the Provincial High Court under Articles 154P(3)(b) & 154P(4)(b) has been discussed extensively in the above ***Weragama*** case as well as in

several subsequent cases such as *Kamalawathie and others vs. The Provincial Public Service Commission, North-Western Province and others (2001) 1 Sri. L.R. 1*, *Ramalingam vs. Parameswary (2002) 2 Sri. L.R. 340⁴*, *Sunil Chandra Kumar vs. Veloo (2001) 3 Sri. L.R. 91⁵*, *Madduma Bandara vs. Assistant Commissioner of Agrarian Services and another (2003) 2 Sri. L.R 80*.

In the said *Madduma Bandara vs. Assistant Commissioner of Agrarian Services and another*, Shirani Bandaranayake J. (as she then was) observed as follows;

“Furthermore, in terms of Article 154(P) (4), High Courts of the Provinces shall have the jurisdiction to issue according to law orders in the nature of habeas corpus, in respect of persons illegally detained within the province; and orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto. The jurisdiction of the High Court of the Provinces, to issue such orders however is restricted as the Article specifies that this power could be used only against any person exercising within the Province any power under any law or any statute, made by the Provincial Council established for that Province in respect of any matter set out in the Provincial Council List. It is therefore abundantly clear that for the High Court to issue a writ quashing the order made by the 1st respondent, it is necessary that the subject matter should belong to one of the subjects listed out in the Provincial Council List.” (at p. 83)

“The word ‘agrarian’ relates to landed property and such property no doubt would attract paddy lands and tenant cultivators of such land.” (at p. 91)

“.....In the circumstances, it appears that the subject dealing with paddy lands falls within the ambit of the Provincial Council List and therefore the High Courts of the Provinces have the jurisdiction to issue orders in the nature of writs by virtue of the power given to them in terms of Article 154P of the Constitution.” (at p. 91)

Having considered the legal background relating to the relevant area of law, the arguments raised by the Respondents should be examined at this stage. The crux of the argument relied on by the 1st, 2nd & 4th Respondents is that this Court has no jurisdiction to hear and

⁴ Court of Appeal

⁵ Supreme Court

determine the instant application. The learned State Counsel refers to the following passage of the said **Weragama** case in order to substantiate the Respondent's argument.

“if a law or Statue is covered by a matter in the (exclusive) Provincial Council List, but not otherwise, the exercise of powers there under is subject to the Writ jurisdiction of the High Court”

In my view, as succinctly elaborated by Mark Fernando J. in the same **Weragama** case there is no ambiguity in the language in Article 154P(4) by which the Provincial High Court has been given the power to issue writs in respect of the matters set out in the Provincial Council List of the Ninth Schedule of the Constitution. However, what is pertinent to the instant application is whether the writ jurisdiction vested in the Court of Appeal under Article 140 and 141 of the Constitution has been taken away from the Court of Appeal in respect of matters set out in the said Provincial Council List. Mark Fernando J. in the above **Weragama** case, in reference to Article 154P(4), made it clear that it is nothing more than a re-arrangement of the jurisdictions of the judiciary and further that the jurisdiction of the Court of Appeal under Article 140 & 141 is entrenched.

In **Kalu Arachchige Allen Nona vs. Sunil Weerasinghe, Commissioner of Agrarian Development and others CA/Writ/23/2013 decided on 10.06.2016**, His Lordship Justice Vijith Malalgoda PC (P/CA) (as His Lordship then was) has followed the consistent principles in the above **Weragama** case (and also in **Nilwala Vidulibala Company (Pvt) Ltd vs. Kotapala Pradeshiya Sabha and others (2005) 1 Sri. L.R. 296** and has decided as follows;

“...Under these circumstances it is understood that with regard to the applications come within Article 154P(4) of the Constitution, Provincial High Courts are conferred with concurrent jurisdiction with the Court of Appeal.”

Therefore, in line with the precedent laid down by the aforesaid judgements, I take the view that it is settled law that the writ jurisdiction vested in Court of Appeal under Article 140 & 141 of the Constitution has not been partially taken away by the 13th Amendment to the Constitution in respect of the matters set out in the Provincial Council List of the Ninth Schedule of the Constitution. Moreover, the High Court of the Province has the concurrent writ jurisdiction in respect of the matters set out in the said Provincial Council

List. Hence, I reject the preliminary objection on the jurisdiction of this Court raised by the learned State Counsel and hold that this Court has jurisdiction to hear and determine the instant application.

Now I advert to examine whether the instant application should be heard and determined by this Court and also whether the other preliminary objection should be dealt with at this stage.

The defense taken up in 'P8' and 'P10' by the Petitioner against the impugned Certificate, marked 'P7', is that (a). he is not entitled to pay the amount mentioned in 'P7' as the subject property has been gifted to him by his mother (5th Respondent). (b). the assessment in respect of the subject land cannot be accepted. By Deed of Transfer No. 308 (marked 'P4') attested by Sanjeevani S. Dayananda, Notary Public on 15.09.2014, the subject land has been transferred to the Petitioner by the said 5th Respondent.

The Petitioner by way of the letter dated 16.07.2020, marked as 'G', annexed to 'P26' clearly gives the reasons as to why the mother of the Petitioner has transferred the subject property by way of a deed of transfer. The Petitioner's argument is that although the subject property has been transferred by way of Deed of Transfer No. 308, the said transfer should be considered as a gift for the purpose of calculating stamp duty.

It is observed, prima facie, that the said Deed No. 308 is nothing but an unconditional Deed of Transfer. The subject of stamp duties on transfer of properties has been listed in the said Provincial Council list.

The 2nd Respondent referring to Clause 48(2) of the Finance Statute of Uva Province No. 8 of 1990 has categorically informed the Petitioner that the stamp duty, in respect of a property that is being transferred subject to a consideration, should be calculated according to the land value of the property. Further, the 2nd Respondent as opposed to the contention of 'P10' has informed the Petitioner by letter, marked 'P11', that the Petitioner has failed to submit a proper appeal in terms of the provisions of the said Finance Statute.

The learned State Counsel draws the attention of Court to the documents marked 'P10', 'P13', 'P15' & 'P19' and asserts that the Petitioner has deliberately avoided a direct assertion as to whether the transfer of ownership of the subject land was by way of a gift

or a transfer. The contention of the learned State Counsel is that the Petitioner did not act with uberrima fides and has suppressed or misrepresented material facts.

At this stage, it is important to note that the Petitioner in his Petition has divulged about an action filed in the District Court of Bandarawela. The 5th Respondent, the mother of the Petitioner has instituted the said case bearing No. SPL/481 seeking for a declaration that the said Deed of Transfer No. 308, in fact, was intended to be a Deed of Gift. The Judgement of the said case was due to be delivered on 22.08.2021. The Petitioner has reserved his rights in the Petition to tender the pleadings and proceedings of the said case during the course of the proceedings of this application. I observe that the Petitioner has not tendered such documents or informed this Court of the final outcome of the said case up to date.

Similarly, the Petitioner states that he has forwarded an Appeal dated 04.08.2020 to the 3rd Respondent who is the Secretary to the Board of Review of the Uva Provincial Council in Badulla and such appeal has not been listed for hearing.

In my view the facts/outcome regarding the above case in the District Court of Bandarawela as well as the purported Appeal to the Board of Review in Badulla are pertinent to decide the preliminary issues of the instant application. All impugned decisions have been made by the Department of Provincial Revenue in Badulla. The Petitioner also resides in Welimada and the closest High Court to his residence is in Badulla.

At this stage, I draw my attention to the Section 12 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

Section 12 (a):

Where any appeal or application is filed in the Court of Appeal and an appeal or application in respect of the same matter has been filed in a High Court established by Article 154P of the Constitution invoking jurisdiction vested in that Court by paragraph (3) (b) or (4) of Article 154P of the Constitution, within the time allowed for the filing of such appeal or application, and the hearing of such appeal or application by such High Court has not commenced, the Court of Appeal may proceed to hear and determine such appeal or application or where it

considers it expedient to do so, direct such High Court to hear and determine such appeal or application:

Proviso to Section 12(a):

Provided, however, that where any appeal or application which is within the jurisdiction of a High Court established by Article 154P of the Constitution is filed in the Court of Appeal, the Court of Appeal may if it considers it expedient to do so, order that such appeal or application be transferred to such High Court and such High Court shall hear and determine such appeal or application.

Taking in to consideration the circumstances of the whole case and also the effect of the above provisions in Section 12 of the High Court of the Provinces (Special Provisions) Act, I hold that this is a fit case to be transferred to the High Court of the Uva Province, holden in Badulla. I have exercised my discretion to arrive at the said conclusion by reasons of the circumstances of this case and also due to the following reasons which are, in my opinion, favourable to the Petitioner as well as to the Respondents;

- i. it is expedient to hear and determine this case in the Provincial High Court in Badulla;
- ii. the convenience of the Petitioner and more fully the convenience of the officials who are operating from Badulla or suburbs should be taken in to consideration;
- iii. the District Court case in which a declaration has been sought to declare the said Deed of Transfer as a gift, is pending in the District Court of Bandarawela;
- iv. the main issue of levying stamp duty within the Province is exclusively governed under the Finance Statute of Uva Province No. 8 of 1990 and additionally under the Stamp Duty Act;
- v. primary intention of the 13th Amendment to the Constitution was to devolve powers to the Provinces and accordingly, the people who live within the respective provincial territorial limits should have the benefit of getting their grievances resolved speedily at a forum closer to their homes and eventually the public authorities in the Province also can assist Court effectively without much delay;
- vi. in an event that this Court decides to issue formal notice on the Respondents, this Court may sometimes not be able to conclude this matter expeditiously due to the heavy work load in writ applications in the Court of Appeal;

- vii. the resistance of the 1st, 2nd & 4th Respondents who are represented by the Attorney General for the maintainability of the instant application in this Court.
- viii. the necessity to ascertain effectively the material in relation to the purported Appeal to the Board of Review in Badulla.

In *Ramalingam vs. Parameswary (2002) 2 Sri. L.R. 340* (Court of Appeal), Wigneshwaran J. has observed as follows;

“....Therefore we are of opinion that even though the Thirteenth Amendment devolved judicial power earlier vested in the Court of Appeal to Provincial High Courts and proviso to Sec. 12(a) of Act No. 19 of 1990 empowered this Court to transfer certain types of cases to the appropriate High Court if considered expedient to do so, yet the use of discretion by this Court to transfer such cases must consider inter alia the convenience of parties. We are of opinion that when an order to transfer is made by this Court under the provisions of Act No. 19 of 1990 it must not be founded on the convenience of the of the Court of Appeal but on adequate grounds favourable to the litigants”

In the circumstances, the Application is transferred to the High Court of the Uva Province, holden in Badulla, enabling the Honorable High Court judge to examine the other preliminary objections raised by the learned State Counsel and also to decide on the issuance of notice and the interim relief as prayed for by the Petitioner. In light of the foregoing, the interim order issued by this Court on 26.08.2021 will not be further extended.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal