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

An application for Revision in terms of Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka against the judgment/order dated 5th April 2022 of the Provincial High Court of Southern Province holden at Tangalle in case No. HC Revision 07/2022.

Officer-in-charge,
Police Station,
Middeniya.

Complainant

Vs.

Court of Appeal Application
No **CA/CPA/49/2022**

High Court of Tangalle
No: **RA/07/2022**

Magistrate's Court of
Walasmulla
No :**51714**

1. Binthennage Sanajaya Lakmal
Kospala Mandiya, Dawatayaya,
Udajulampitiya.

Accused

2. Mahanama Abeywickrama Arachchige,
Indika Pushpakumara,
"Kaviyasevana", Udajulampitiya,
Julampitiya.
(Registered Owner)

Defendant

AND IN BETWEEN

Mahanama Abeywickrama Arachchige,
Indika Pushpakumara,
"Kaviyasevana", Udajulampitiya,
Julampitiya.
(Registered Owner)

Defendant-Petitioner

Vs.

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

1st Complainant-Respondent

2. Officer – in- charge,
   Police Station,
   Middeniya

2nd Complainant-Respondent

3. Binthennege Sanjaya Lakmal,
   Kospela Mandiya, Dawatayaya,
   Udajulampitiya.

Accused-Respondent

AND NOW IN BETWEEN

Mahanama Abeywickrama Arachchige,
Indika Pushpakumara,
"Kaviyasevana", Udajulampitiya,
Julampitiya.
(Registered Owner)

Defendant Petitioner Petitioner

Vs.

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

1st Complainant Respondent Respondent

2. Officer – in –charge,
   Police Station,
   Middeniya.

2nd Complainant Respondent Respondent

3. Binthennege Sanjaya Lakmal,
   Kospela Mandiya, Dawatayaya,
   Udujulampitiya

Accused Respondent Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Razik Zarook, PC for the Petitioner.
		Ridma Kuruwita, SC for the Respondents.
Argued on	:	12.10.2022
Decided on	:	01.12.2022

Iddawala – J

This is a revision application against the order dated 05.04.2022, delivered by the Provincial High Court of the Southern Province holden in Tangalle which refused to act in revision and affirmed the vehicle confiscation order dated 01.02.2022, delivered by the Walasmulla Magistrate Court under the provisions of Forest Ordinance. The petitioner has invoked the revisionary jurisdiction of this Court in order to have both the orders set aside, and thereby disallow the confiscation of the vehicle bearing registration no. SP-LB 7260 (hereinafter the vehicle).

The following are the facts of the case. The accused was charged in the Magistrate Court of Walasmulla for the offence of transporting timber worth Rs. 38314.55 without a permit in the said vehicle, thereby contravening Sections 40, 40(a), and 40(b) read with Section 25(2) (a) of the Forest Ordinance as amended by laws, inter alia, Act no.65 of 2009 (hereinafter the Act). The accused pleaded guilty to the charge and the Magistrate convicted the accused on 04.09.2018, upon which the accused was imposed a fine of Rs. 20,000/- with a default imprisonment sentence. The conviction of the accused ensued the confiscation of the vehicle in relation to the offence which was released temporarily to its registered owner, the claimant- petitioner (hereinafter the petitioner), on the same day on a bond, and the learned Magistrate fixed the vehicle inquiry on 12.02.2019. After an inquiry into the matters of the petitioner's knowledge of the said diversion of the vehicle in relation to the case and whether the petitioner has taken sufficient precautionary measures to prevent such an offence, the Magistrate set out the order dated 01.02.2022 to confiscate the vehicle. Aggrieved by the said order, the petitioner filed for revision in

the High Court of Tangalle, and the revision application was rejected by the High Court *in limine*.

Hence, the petitioner has preferred the instant revision application to the Court of Appeal, seeking to set aside the impugned order dated 05.04.2022 of the High Court of Tangalle.

Primarily, it is pertinent to set out the pivotal issue before this Court which is the determination of whether the learned High Court Judge, having dismissed the application of the petitioner at the supporting stage, has erred in law, thereby sufficing to invoke the revisionary jurisdiction of this Court.

In this regard, the primary contention before this Court is to determine whether the impugned order has erred in concluding that the petitioner has failed to satisfy the court to the extent of issuing formal notice on the respondents. In other terms, it is incumbent upon this Court to examine whether the High Court has sufficiently assessed the establishment of a *prima facie* case (the legal threshold by which formal notice is issued on the respondents) before dismissing the petitioner's application *in limine*.

At page 6 of the impugned order, the learned High Court Judge makes the following pronouncement:

> "මෙම නඩුවේ වලස්මුල්ල උගත් මහේස්ත්‍රාත් තුමා විසින් ලබා දී ඇති නියෝගය සළකා බැලීමෙදී එය ප්‍රතිශෝධනය කිරීම සඳහා කිසිදු සුවිශේෂී කරුණක් පෙත්සම්කරු වෙනුවෙන් ඉදිරිපත් කොට නොමැත"

When examining the above, it is evident that the learned High Court judge is directly referring to the confiscation order of the Magistrate's Court of Walasmulla delivered on 01.02.2022 and deeming that no exceptionality is present in the same in favour of the petitioner. Nowhere in the impugned order has the learned High Court Judge referred to the exceptional

circumstances averred by the petitioner in his revisionary application RA/07/2022. In his petition the petitioner has averred, inter alia, the following as exceptional circumstances:

1. The learned Magistrate has failed to properly evaluate the adduced evidence and thus has erred in rejecting the petitioner's position that he has taken necessary precautions.
2. The learned Magistrate has not properly evaluated the contradictions in the evidence of the petitioner and the driver.
3. The learned Magistrate has not considered the vital elements of the applicable law and the decided case law, a court should take into consideration when confiscating the said vehicle.

(Vide Paragraph 7 of the petition marked as P4)

Yet, the impugned order does not refer to such averments or otherwise assess whether the same establishes a *prima* facie case of exceptionality that would warrant the issuance of formal notice on the respondents. It appears that the learned High Court judge has prematurely examined the impugned order and deemed it need not be interfered with. Even to that end, the learned High Court Judge has failed to give any reasons. At no point in the impugned order has the learned judge refer to the submissions of the petitioner, either written or oral, where the petitioner purports an exceptionality. Instead, the learned High Court Judge has directly proceeded to assess the impugned order. While the impugned order refers to the discretionary nature of a revisionary application, such discretion must be utilized, at least in the Support Stage of an application, to assess the threshold of a *prima facie* case. This is the standard used evinced by case law.

This Court in **Horathal Pedige Prishriya Ratna Vilochani v Hon. Attorney General** CA/PHC/90/18 CA Minute dated 25.07.2022, held that:

> *"At the support stage, the Court is required to make an assessment as to whether the resources of the Court ought to be exhausted by proceeding to the next stage by issuing notice to the respondents. That determination is at the discretion of the judge and is made by ascertaining whether the purported exceptional circumstances require further examination or not. If the Court determines that such an examination is not warranted, it can dismiss the application in limine, thus preserving the Court's resources for a more deserving application. This entire process is an act of judicial discretion, which falls in line with the revisionary jurisdiction of both the Court of Appeal and the Provincial High Courts as a petitioner cannot invoke the revisionary jurisdiction of the Court as of right. A blanket ban from even referring to the exceptional circumstances at the support stage, on the other hand, would amount to ousting the said discretion vested with the Court acting in revision. The Courts can refer to the exceptional circumstances averred during the support stages* ***to the extent of examining whether a prima facie case has been made out*** *in the application so as to warrant the issuance of notice on the respondents."*

In the same case, this Court analyzed the judgments in **Sarath Andarahennadi v Officer in Charge, Police Station Sigiriya** CA/PHC/APN/117/2017 CA Minute dated 27.03.2019 and **Ingiriya Multi-Purpose Co-operative Society Ltd v Kalubalage Dona Laitha Srimathi** CA/PHC/123/16 CA Minute dated 17.05.2022 to conclude that

"...In both instances, the Court of Appeal affirmed the thinking that if an application purports exceptional circumstances, despite them having the likelihood of failing to amount to an exceptionality in the eyes of the Court when merits are considered at a later stage, such likelihood alone will not make an application liable to be dismissed in limine." Speaking on the burden cast on an applicant at the support stage, His Lordship Justice Arjuna Obeysekara recently held the following in **P. M. Ranasinghe v Asselage Sujith Rupasinghe and Others** SC Appeal No. 59/2021 SC Minute dated 08.04.2022: *"In order to have notice issued on the Respondents, the burden cast on the Appellant was to establish a prima facie sustainable case and for the Court to be satisfied that there is a prima facie case to be looked into. In other words, the Court was only required to be satisfied that the application before it warrants a full investigation at a hearing with the participation of all parties".*

Hence, it is clear that the law on issuance of formal notice on the respondent during the support stage in revisionary application, places a burden on the petitioner to satisfy the court that there exists a *prima facie* case against the order being impugned. And as such, it is the duty of the presiding judge, to use his discretion judiciously to assess whether such a threshold has been met. Therefore, at the support stage, the presiding judge must assess averred the exceptionality within the test of *prima facie* case. And in doing so, such examination cannot be arbitrary for a judge must give reasons as to why he concluded the existence of a *prima facie* case or the lack thereof.

However, the impugned order of the present case reveals no such judicious assessment in testing whether the petitioner has dispensed his burden. In the instant case the petitioner has averred certain exceptional circumstances, yet that mere averment alone would not entitle the issuance of formal notice on a respondent. The order to issue formal notice

will require a judicious evaluation of the case presented during the support stage in terms of assessing whether it established a *prima facie* case. Such an assessment has not been carried out by the learned High Court judge. Hence it is the considered view of this Court that the impugned order has erroneously dismissed the application of the petitioner by failing to examine whether the purported exceptionalities establish a *prima facie* case.

Moreover, the above position of this court is further buttressed by Rule 3 (4) of the Court of Appeal (Appellate Procedure) Rules, 1990 where it is stipulated that where upon such application is being supported and court satisfied, the court shall order the issue of notice as long as the petitioner has, without fail tendered the necessary documents as required by the rules of the court.

Furthermore, the petitioner has sought a stay order until the final determination of the revision application, which the learned High Court Judge has rejected on the grounds that such a stay order can only be issued if and when notice has been served on the respondent. This is not the correct contention of law applicable in all such applications. The learned High Court judge has failed to take into consideration the proviso to Rule 2 (1) of the Court of Appeal (Appellate Procedure) Rules, where it is stipulated instances that a stay order can be granted even in the absence of a notice to the respondents. Therefore, the learned High Court Judge's failure to give due consideration to the proviso of Rule 2 (1) amounts to an erroneous application of the law. Hence, it is the observation of this Court that there exists an irregularity and an illegality of the order dated 05.04.2022 delivered by the High Court of Tangalle.

Therefore, in line with the above observations, it is considered the view of this Court that the impugned order has erred in failing to assess whether

a *prima* facie case has been established by the petitioner and in applying the law as stipulated in Rule 2(1) of the Court of Appeal (Appellate Procedure) Rules. Thus, this Court affirms that there exists an irregularity and an illegality in the impugned order. Hence, this Court sets aside the order dated 05.04.2022 and sends back the case to the High Court of Tangalle to hear and determine the revision application RA-07/2022.

Application allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL