

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

In the matter of an appeal in terms of the Article 154 (P) 3 (B) of the Constitution of the Democratic Socialist Republic of Sri Lanka, against the order of the Provincial High Court of Matara, dismissing the revision application against the order of the Magistrate Court of Matara under section 98 of the Criminal Procedure Code.

Officer-in-Charge,
Police Station,
Weligama

Complainant

Vs.

Court of Appeal Application
No: **CA (PHC) 73/2015**

Provincial High Court of
Matara ApplicationNo:
80/2015 RA

Magistrate Court of Matara
Case No. **24870**

1. Ahangama Vithanage Chaminda
Chathuranga,
Aluhgedarawatta,
Kongashena, Kalapuwa,
Ahangama.
2. AhangamaWithanage Chandrasiri,
Rohitha Mawatha,
Kalapuwa,
Ahangama.
3. MahagedaraWithanage Sirisena,
EllketiyaWatta,
Rohitha Mawatha,
Kalapuwa,
Ahangama.

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4. HabaraduwaPathiranageSarath,
Godaihalawatta, Kalapuwa,
Ahangama.
5. Hewa Palande Withanage Premadasa,
Induranhena,
Midigama, Ahangama.
6. Basnayake Mudiyanselege Geetha
Basnayake,
Anagiyawatta, Midigama,
Ahangama.
7. HewawasamEderageDayarathna,
Rohitha Mawatha, Kalapuwa,
Ahangama.

1st Party

Kim John Kooling,
Animal S.O.S. Lanka (Private) Limited,
Puwakwatta, Kongashena,
Midigama, Ahangama.

2nd Party

AND

Kim John Kooling,
Animal S.O.S. Lanka (Private) Limited,
Puwakwatta, Kongashena,
Midigama, Ahangama.

2nd Party- Petitioner

Vs

Officer-in-Charge,
Police Station,
Weligama

Complainant-Respondent

1. Ahangama Vithanage Chaminda
Chathuranga,
Aluhgedarawatta,
Kongashena, Kalapuwa,
Ahangama.
2. Ahangama Withanage Chandrasiri,
Rohitha Mawatha,
Kalapuwa,
Ahangama.
3. Mahagedara Withanage Sirisena,
Ellketiya Watta,
Rohitha Mawatha,
Kalapuwa,
Ahangama.
4. Habaraduwa Pathiranage Sarath,
Godaihalawatta, Kalapuwa,
Ahangama.
5. Hewa Palande Withanage
Premadasa,
Induranhena,
Midigama, Ahangama.
6. Basnayake Mudiyanse Lage Geetha
Basnayake,
Anagiyawatta, Midigama,
Ahangama.

7. HewawasamEderageDayarathna,
Rohitha Mawatha, Kalapuwa,
Ahangama.

1st Party-Respondents

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

Respondent

AND NOW BETWEEN

Kim John Kooling,
Animal S.O.S. Lanka (Private) Limited,
Puwakwatta, Kongashena,
Midigama, Ahangama.

2nd Party- Petitioner- Appellant

Vs

Officer-in-Charge,
Police Station,
Weligama

Complainant-Respondent-Respondent

1. Ahangama Vithanage Chaminda
Chathuranga,
Aluhgedarawatta,
Kongashena, Kalapuwa,
Ahangama.

2. Ahangama Withanage Chandrasiri,
Rohitha Mawatha,
Kalapuwa,
Ahangama.
3. Mahagedara Withanage Sirisena,
Ellketiya Watta,
Rohitha Mawatha,
Kalapuwa,
Ahangama.
4. Habaraduwa Pathiranage Sarath,
Godaihalawatta, Kalapuwa,
Ahangama.
5. Hewa Palande Withanage
Premadasa,
Induranhena,
Midigama, Ahangama.
6. Basnayake Mudiyanseelage Geetha
Basnayake,
Anagiyawatta, Midigama,
Ahangama.
7. Hewawasam Ederage Dayarathna,
Rohitha Mawatha, Kalapuwa,
Ahangama.

1st Party-Respondents- Respondents

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

Respondent-Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Ranil Samarasooriya with Shashiranga
Sooriyapatabandi and Madhava De Alwis
for the 2nd Party Petitioner

Hafeel Farisz with Nishika Fonseka and
Himantha Wickremaratne for the 1st
Party-Respondent-Respondent

Yohan Abeywickrama DSG for the State

Argued on : 23.11.2022

Decided on : 24.01.2023

Iddawala – J

This is an appeal filed on 13.07.2015 against an order of the learned High Court Judge of the Southern Provincial High Court holden in Matara dated 30.06.2015. The 2nd party- petitioner- appellant (*hereinafter referred to as the appellant*) being aggrieved by the said order has preferred this instant appeal to this Court to set aside the said order.

The facts of the case are as follows. The appellant who is a British national is the director of Animal S.O.S. (Pvt) Ltd (hereinafter referred to as the Company) which is a branch of a company registered in the United Kingdom as a charity organization and incorporated in Sri Lanka under the Companies Act No. 7 of 2007. The company acts as a rescue center for stray dogs and cats, where medical treatments and sterilization are conducted for such abandoned animals. The

complainant-respondent filed action No. 24870 under section 98 (1) of the Code of Criminal Procedure Act (hereinafter referred to as CCPA) in the Magistrate's Court of Matara in terms of purported complaints by 1-7 1st party-respondents-respondents (*hereinafter referred to as respondents*). The complaints were made on the basis that the activities of the company were injurious to the health of the community and that the company has not obtained required approvals from authorities. Upon considering the inspections and submission the learned Magistrate of Matara ordered on 11.12.2014 to implement certain practical recommendations by the Central Environmental Authority for the company premises within a time period of two months.

The MC has ordered the appellant to submit a report on 2.4.2015 to assess the compliance to court ordered recommendations. The case has been fixed for 7.5.2015, but the learned Magistrate did not make an order but entered a journal entry that *inter alia* 'the case will be taken up for inquiry under section 101 of the CCPA'. A revisionary application was filed in the Matara HC on the basis that the learned Magistrate has erred in law by fixing the case for taking evidence under section 101 of the CCPA in the absence of any conditional order under section 98 (1) of the CCPA which is a precondition in a matter of removal of nuisance. On 30.06.2015 the application of the appellant was dismissed by the learned High Court Judge on the basis that the Magistrate had in fact made a conditional order on 11.12.2014 and the High Court further set aside the 7.5.2015 order of the learned Magistrate using its revisionary jurisdiction. High Court further ordered to consider the appellant to have violated a conditional order under the CCPA as all the recommendations had not been implemented by the appellant by that time as mentioned in 11.12.2014 order.

The only contention that has arrived upon this Court is to assess the validity of the order of the HC dated 30.06.2015. At the inquiry the counsel appearing for the appellant submitted that the learned High Court Judge has not correctly applied law, thereby the order is bad. The Deputy Solicitor General appearing for the State was in the view that 11.12.2014 order by the MC is duly made following the correct procedure. The DSG conceded that the matter is still at the section

98 (2) stage. However, no firm submissions were made regarding the validity of the HC order. The counsel for other respondents reiterated that MC and HC orders are in order, and several other submissions were made which were not relevant to the instant application but to the inquiry at MC.

In analysing the applicable provisions, **Section 98** of CCPA states;

Conditional order for removal of nuisance.

(1) Whenever a Magistrate considers on receiving a report or other information and on taking such evidence (if any) as he thinks fit –

(a) that any unlawful obstruction or nuisance should be removed from any way, harbour, lake, river, or channel which is or may be lawfully used by the public or from any public place; or

(b) that any trade or occupation or the keeping of any goods or merchandise should by reason of its being injurious to the health or physical comfort of the community be suppressed or removed or prohibited; or

(c) that the construction of any building or the disposal of any substance should as being likely to occasion conflagration or explosion be prevented or stopped; or

(d) that any building or tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighborhood or passing by and that in consequence its removal, repair, or support is necessary; or

(e) that any tank, well, or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public,

such Magistrate may make a conditional order requiring that the person causing such obstruction or nuisance or carrying on such trade or occupation or keeping any such goods or merchandise or owning, possessing, or controlling such building, substance, tree, tank, well or excavation shall within a time to be fixed by such order –

(i) remove such obstruction or nuisance; or

(ii) suppress or remove such trade or occupation; or

(iii) remove such goods or merchandise; or

(iv) prevent or stop the construction of such building; or

(v) remove, repair, or support it; or

(vi) alter the disposal of such substance; or

(vii) remove such tree; or

(viii) fence such tank, well, Or excavation as the case maybe.

(2) Any person against whom a conditional order has been made under subsection (1) may appear before the Magistrate making that order or any other Magistrate of that court before the expiration of the time fixed by that order and move to have the order set aside or modified in manner hereinafter provided.

(3) Any order duly made under this section shall not be called in question in any civil court.

(4) For the purpose of this section a “public place” includes also property belonging to the State or a corporation or vested in any public officer or department of State for public purposes and ground left unoccupied for- sanitary or recreative purposes.

The plain legal provision indicates that even to entertain an application for a conditional order the Magistrate has to rely on a report or some form of information and the order is made as he/she thinks fit. Under section 98 (2) when a conditional order is issued, the notices will be served to the relevant parties to appear before the Court and such parties can act to set aside or modify the order. Thus, for an example if more time was required to implement recommendations an application could be made under 98 (2) for an extension of time.

Thereafter section 99 states that any order or notice given under this Chapter shall if practicable be served on the person against whom it is made in manner herein provided for service of a summons.

Section 100 states that;

Person to whom order is addressed to obey or show cause.

(1) The person against whom such order is made shall within the time specified therein –

(a) perform the act directed thereby; or

(b) act under subsection (2) of section 98.

Consequence of failing to do order

(2) If such person does not perform such act or appear and move to have the set aside or modified as required by subsection (1) he shall be liable to the penalty

prescribed in that behalf in section 185 of the Penal Code and the order shall be made absolute;

Provided that if such person be a corporate body every director thereof shall be liable to the penalty hereinbefore prescribed unless such director proves that such default was not occasioned by any act of his or by any omission on his part.

Section 101 states that;

Procedure in case of appearance

(1) If such person appears and moves to have the order set aside or modified the Magistrate shall take evidence in the matter.

(2) If the Magistrate is satisfied that the order is not reasonable and proper it shall either rescind the same or modify it in accordance with the requirements of the case, and in the latter case the order as modified shall be made absolute.

(3) If the Magistrate is not so satisfied the order shall be made absolute.

As indicated in section 100 if a party against whom a conditional order is made, obeys the order, the matter ends there. Therefore, in a matter of nuisance, a party can either obey the conditional order or make an application under section 98 (2) and appear under section 101 if they disagree with such order. Under section 100 (2) if the party does not appear upon serving notice on the conditional order, the order shall be made absolute from that point onwards. Therefore, the conditional order can be made *ex-parte* based on reports/verbal evidence or such other evidence. If it is unreasonable to the party, the process under section 98 (2) and 101 has to be followed. Thus, if the Court is making a conditional order absolute when such application is made to set it aside or modify, it is always done upon inquiry.

Now the attention should be diverted to **Section 102** in analysing the process that follows once a conditional order is made absolute.

Procedure on order being made absolute.

“When an order has been made absolute under section 100 or section 101 the Magistrate shall give notice of the same to the person against whom the order was made and shall further require him to perform the act directed by the order within a time specified in the notice and inform him that in case of disobedience, he will be liable to the penalties provided by subsection (2) of section 100”.

It is evident that the Court can only make a conditional order absolute *ex-parte* under section 100 (2) when the party, notice being served, does not appear or if a party against whom a conditional order is made, obeys the order without any condition. In any other time, an inquiry must be held when making the conditional order absolute. Furthermore, under section 102 when an absolute order is made such notice has to be also served to the relevant parties.

In the instant matter the Court would like to first divert its attention to the Magistrate Court proceedings of 04.12.2014 to determine whether it fits the criteria of a conditional order. All the parties were present on this day and the complainant-respondent (OIC Weligama Police) submitted a report to the Magistrate’s court under section 98 (1). Along with it a field report was filed by Samantha Pathirana, Deputy Director of Southern Provincial Central Environmental Authority which included practical recommendations. The appellant has agreed to implement the recommendations however has informed about time constraints on this day and has sought an extension. By the 11.12.2014 order the learned Magistrate has ordered to implement the CEA recommendations within 2 months. Therefore, this Court identifies the order made on 11.12.2014 as the conditional order under section 98 of CCPA.

Furthermore, a key contention of the proceedings at the HC stage has been whether the appellant has completed all the conditions ordered by the MC. While the appellant claims it was only 3 conditions which were to repair the parapet wall, repair the drainage system and build a waste incineration machine, that were imposed by the MC and they were duly completed by the appellant within 2 months, the learned High Court Judge upon perusing the MC order has determined it is not limited to those 3 conditions and the appellant is bound to implement all the recommendations by the CEA. While this Court identifies the

Magistrate Court order made on 11.12.2014 to be ambiguous due to technical faults, from its outset the learned Magistrate has not limited the order to those 3 conditions and clearly mentions implementing CEA recommendations, further mentioning avoiding waste disposal to outside environment and waterways and obtaining necessary approvals.

After the order was made on 11.12.2014 a new Magistrate was appointed to Matara Magistrate Court and she held an inquiry on 07.05.2015 on the matter. An order has not been issued upon such inquiry, yet a journal entry has been made stating the need to have the inquiry under section 101. It is conceded by this Court that 2 months might not have been an adequate time period to implement all the recommendations including obtaining government approvals. However, it is unclear to this Court why the appellant filed a revisionary application against the 07.05.2015 decision of the Magistrate Court, as what the appellant should have ideally done is to follow the procedure under sections 98(2) and 101 filing for modifications to the conditional order thereafter allowing the Magistrate to enter into an absolute order. In cases such as **Neil Fernando vs Ranjith Cooray and Others [1991] 1 SLLR 281** and **Greena Fernando vs TecklaSaparamadu [1990] 1 SLR 270** the Court has ensured the right to appeal to High Court against an absolute order made under section 101. Right to appeal against the conditional order is not provided for by the CCPA. The appellant has not followed the correct procedure in law, which has resulted in unnecessary delays and complications.

In the matter at hand, it is evident to this Court that the order has not moved from the conditional stage to the absolute stage yet. The learned Deputy Solicitor General correctly pointed out this position in his oral submission. The learned Magistrate has not been able to hold an inquiry to convert the conditional order into absolute. Further, when the order is made absolute under section 101 the learned Magistrate is ought to follow the procedure as per section 102. The learned High Court Judge has erred in setting aside the Magistrate Court order dated 07.05.2015, where the Magistrate called for an inquiry on the matter which is rightfully within her purview. To streamline the judicial process of the instant

case, this Court sets aside the order 80/2015 RA by the learned High Court Judge of Matara dated 30.06.2015 and direct the learned Magistrate of Matara to conduct an inquiry under section 101 of the CCPA expeditiously according to law.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL