

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

In the matter of an application for revision under and in terms of Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CPA 160/2022

Thushara Sanjeewa Witharana,
Mayor,
Kurunegala Municipal Council,
Kurunegala.

Petitioner

High Court of Kurunegala Case No:
HCW/17/2022

Vs.

1. Admiral of the Fleet Wasantha Karannagoda,
Governor-North Western Province,
Governor's Office,
"Maligawa",
Kurunegala.
2. Kamal Amarasinghe,
Governor Secretary,
Governor's Office,
"Maligawa",
Kurunegala.
3. P. B. M. Sirisena,
Chief Secretary- North Western Province,
Provincial Council Office Complex,
Kurunegala.
4. K. M. H. S. K. Jayalath,
Commissioner of Local Government- North Western Province,
Department of Local Government- North Western Province,
Provincial Council Office Complex,
Kurunegala.

5. Ekanayake Weerakoon Mudiyanseelage
Lalith Ekanayake,
Retired Judicial Officer,
Inquiring Officer,
Provincial Council Office Complex,
Kurunegala.

And
Kappetiyyawa Walauwa,
Ulapane.

6. Municipal Council,
Kurunegala.

7. M. A. B. C. Aloka Bandara,
Municipal Commissioner,
Kurunegala Municipal Council,
Kurunegala.

Respondents

AND NOW

Thushara Sanjeewa Witharana,
Mayor,
Kurunegala Municipal Council,
Kurunegala.

Petitioner-Petitioner

Vs.

1. Admiral of the Fleet Wasantha
Karannagoda,
Governor-North Western Province,
Governor's Office,
"Maligawa",
Kurunegala.

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Kurunegala.
 7. M. A. B. C. Aloka Bandara,
Municipal Commissioner,
Kurunegala Municipal Council,
Kurunegala.

Respondent-Respondents

Before: Prasantha De Silva, J.
K.K.A.V. Swarnadhipathi, J.

Counsel: Faizer Musthapa PC with Shahida Barrie and Pulasthi
Rupasinghe for the Petitioner.
ASG Milinda Goonathilake with SSC Nayani Kasthurirathne and
SC Rajika Aluwihare for the 1st-4th Respondents.
W.H.D.N. Chathurangika for the 6th and 7th Respondents.

Application supported on: 15.12.2022

Written Submissions 02.01.2023 by the Petitioner.
tendered on: 05.01.2023 by the 1st 2nd 3rd and 4th Respondents.

Decided on: 10.01.2023

Prasantha De Silva, J.

Order

The Petitioner-Petitioner is the Mayor of the Kurunegala Municipal Council and the 1st Respondent-Respondent is the Governor of the North Western Province. 2nd, 3rd and 4th Respondent-Respondents are Governor's Secretary, Chief Secretary North Western Province and Commissioner of Local Government respectively and 6th Respondent-Respondent is the Municipal Council of Kurunegala and the 7th Respondent-Respondent is the Municipal Commissioner of Kurunegala.

It appears that the Petitioner-Petitioner [hereinafter sometimes referred to as the Petitioner] had instituted writ application bearing No. HCW 17/2022 in the High Court of Kurunegala against the 1st-4th Respondent-Respondents [hereinafter sometimes referred to as the 1st, 2nd, 3rd and 4th Respondents] seeking a writ of Certiorari quashing the gazette notification bearing No. 2305/12 dated 22.11.2009 marked as P4.

According to the said gazette notification, Governor of the North Western Province had appointed the 5th Respondent-Respondent [hereinafter referred to as the 5th Respondent] to inquire and report within a period of three months from the date of this notification, whether the Mayor of Kurunegala Municipal Council has committed any offences referred to in Section 277 (1) of the amended Municipal Council Ordinance (Chapter 252) and the 5th Respondent had given the authority to a commission appointed under the Commission of Inquiry Act in relation to the inquiry.

Further, the Petitioner had sought a writ of Prohibition preventing the 5th Respondent from commencing and/or continuing with any inquiry against the Petitioner in terms of gazette marked as P4.

The Petitioner sought to challenge the said gazette notification bearing No. 2305/12 dated 09.11.2022 [P4] on the basis that it has been promulgated by the 1st Respondent, the Governor of the North Western Province arbitrarily and illegally, ultra vires the

provisions of the Municipal Council Ordinance (as amended) and that the decisions contained therein are tainted with malice.

It is seen that the Petitioner's said application was taken up before the learned High Court Judge of Kurunegala for support and having heard the submissions made on behalf of the Petitioner as well as the 1st-4th Respondents and the 6th Respondent-Municipal Council of Kurunegala and the 7th Respondent-Municipal Commissioner of Municipal Council of Kurunegala, the learned High Court Judge of Kurunegala had refused the Petitioner's application for notice and interim relief and had dismissed the said application of the Petitioner on 29.11.2022.

Being aggrieved by the said Order marked as [A4], the Petitioner invoked the revisionary jurisdiction of this Court seeking to revise, set aside or vacate the said Order dated 29.11.2022 by the learned High Court Judge of Kurunegala in writ application bearing No. HCW 17/2022 and the reliefs sought therein.

The learned President's Counsel made submissions in support of the application and sought an interim order, suspending the operation of the gazette notification marked P4 until the final determination of this application and also prayed for an interim order preventing the 5th Respondent from commencing and/or continuing with any inquiry against the Petitioner and also submitting any report and/or recommendation to the 1st Respondent in respect of the inquiry initiated by the gazette notification marked P4.

Furthermore, an interim order was sought until the final determination of this application, preventing the 1st Respondent from acting in terms of Section 277 (1) of the Municipal Council Ordinance based on any report and/or findings made by the 5th Respondent.

On behalf of the 1st-4th Respondents, Additional Solicitor General made submissions in the opposition. Thereafter, the Court reserved its Order in respect of granting interim orders prayed in terms of prayers (e), (f), (g), (h) and (i) of the Petition.

The main contention of the Petitioner is that the gazette notification [P4] is *ultra vires*, null and void and *ex facie* illegal. In view of the North Western Provincial Council Statute No. 01 of 1990, the said gazette notification is void and of no force or avail in law within the North Western Province in as much the provisions of the Municipal Council Ordinance referred to therein cannot be invoked by those bound and governed by the aforementioned statute. Thus, P4 had not been promulgated in terms of the North Western Provincial Council Statute No. 01 of 1990.

It was submitted on behalf of the Petitioner that consequent to instituting the High Court proceedings, the Petitioner became aware that the North Western Provincial Council has enacted the North Western Provincial Statute No. 1 of 1990 which is cited as “වයඹ පළාත් සභාවේ 1990 අංක 1 දරණ වයඹ පළාතේ පළාත් පාලන ආයතන (පරිපාලන අධිකෂණය කිරීමේ බලතල) පිළිබඳ ප්‍රඥප්තිය” which is marked as X with the Petition.

Therefore, it was the contention of the Petitioner that by virtue of the said statute being enacted and assented by the Governor of the North Western Province, the provisions of the Municipal Councils Ordinance referred to in the said Gazette notification marked “P4” are rendered inapplicable within the North Western Province.

It was further submitted by the Petitioner that since the impugned Gazette notification marked “P4” has been promulgated with reference to the Municipal Councils Ordinance and not with reference to the said statute. Thus, the said Gazette notification is void *ab initio* and has no force or avail in law.

Moreover, it was submitted that,

- a. A Provincial Council is entitled to make Statutes in respect of subjects and functions set out in the Provincial Council List of the Ninth Schedule to the Constitution in terms of Article 154G (1) of the Constitution of the Republic.
- b. Once such Statute comes into force, the provisions of existing Law would remain inoperative within the said Province.

- c. Where such Statute has an inconsistency with an existing law, then the said Statute in its long title has to specify that the said Statute is inconsistent with a particular existing law.

In this regard, Petitioner has drawn the attention of Court to the decision of the Supreme Court in the case of *In Re Local Authorities Housing Statute No. 2 of 1995 of the Provincial Council, North Central Province [1997] 3 SLR 344*. The gravamen of the said case was whether a Provincial Statute that had provisions inconsistent with the provisions of an existing law should in its long title state that it was inconsistent with the said law. The Supreme Court held that Statute should have been described in its long title “as being inconsistent with that law” as required by Article 154G (8).

On this premise, it was argued on behalf of the Petitioner that in view of the said decision of the Supreme Court, it is evident that where a provision of a Provincial Statute is inconsistent with an existing Law, it should specify such inconsistency in its long title. Hence, it is axiomatic that where there is no inconsistency there is no necessity to specify so in the Statute’s long title. Thus, the aforementioned Statute is valid and operative within the Province.

As such, it was submitted on behalf of the Petitioner that where a validly incorporated Statute is operative within the Province, it is the said Statute that has to be invoked by the Provincial actors. Thus, the Provincial Minister would be required to act in terms of the Statute that is promulgated for the province. As the Governor in this instance is exercising the powers of the Provincial Minister, under the Provincial Councils (Consequential Provisions) Act No. 12 of 1989, the Governor cannot act outside the scope of powers of the Provincial Minister.

Accordingly, the relevant Provincial Minister could only have acted under the said Statute, and therefore, the invocation of the Municipal Council’s Ordinance by the Governor is bad in law and void *ab initio*.

As such, the position taken by the Petitioner was that in view of the North Western Provincial Council Statute No. 1 of 1990, the said Gazette notification is void and of no force or avail in law within the North Western Province, in as much the provisions

of the Municipal Council Ordinance referred to therein cannot be invoked, by those bound and governed by the aforementioned Statute.

Hence the Petitioner contended that the North Western Provincial Council Statute No. 1 of 1990 overrides the provisions of the Municipal Council's Ordinance and that the promulgation of any Gazette could only be done in terms of the North Western Provincial Council Statute No. 1 of 1990.

In this respect, it was submitted on behalf of the 1st - 4th Respondents that it is trite law that a Provincial Council Statute would override dealing with a matter in the Provincial Council List (including the Municipal Councils' Ordinance) only to the extent that there is any inconsistency between the two. It is noteworthy that this position is premised on Article 154G of the Constitution.

Article 154G (1) enables every Provincial Council to promulgate provincial Statute and provides as follows;

“Every Provincial Council may, subject to the provisions of the Constitution, make statutes applicable to the Province for which it is established, with respect to any matter set out in List I of the Ninth Schedule (hereinafter referred to as “the Provincial Council List”).”

Court draws the attention to Article 154G (8) of the Constitution;

“Where there is a law with respect to any matter on the Provincial Council List in force on the date on which this Chapter comes into force and a Provincial Council established for a Province subsequently makes a statute on the same matter and which is described in its long title as being inconsistent with that law, then, the provisions of the law shall, with effect from the date on which that statute receives assent and so long only as that statute is in force, remain suspended and be inoperative within that Province.”

In terms of Article 154G (8), a Provincial Council Statute would override any law in respect of any matter in the Provincial Council list only where;

- i. There is a law in respect of any matter on the Provincial Council List in force, and,
- ii. The Provincial Council subsequently makes a statute on the same matter which is in turn described in the long title as being inconsistent with the aforesaid law in force.

Hence, for any Provincial Council Statute to override any law in respect of a matter on the Provincial Council List, the statute must expressly refer to the inconsistency in its long title.

On this premise, it is observable that the long title of the North Western Provincial Council Statute No. 1 of 1990 does not describe the statute as being inconsistent with the Municipal Council's Ordinance.

Therefore, it was submitted on behalf of the 1st - 4th Respondents that the constitutional pre-requisite provided in Article 154G (8) for the North Western Provincial Council Statute No. 1 of 1990 to override the provisions of the Municipal Council's Ordinance is not fulfilled.

It was further submitted that the North Western Provincial Council Statute No. 1 of 1990 does not in any way override and/or negate the provisions of the Municipal Council's Ordinance.

It is relevant to note that for the law to "remain suspended and be inoperative" within the province, the competing Statute of the Provincial Council must describe in its long title that the said statute is inconsistent with the law.

It is not the function of this Court to compare the statute and the law for the purpose of ascertaining whether there is any inconsistency between the statute and the law.

Under Article 154G (8), what is required for the law to be inoperative in a Province is the existence of a description of inconsistency between the Statute and the law.

It clearly manifests from the long title of the Statute [වයඹ පළාත් සභාවේ 1990 අංක 01 දරණ වයඹ පළාතේ පළාත් පාලන ආයතන (පරිපාලනය අධීක්ෂණය කිරීමේ බලය) පිළිබඳ ප්‍රඥප්තිය] that it does not refer to any inconsistency with the law.

Eg- Municipal Council's Ordinance.

In contradistinction, a similar Statute enacted by the Western Provincial Council [බස්නාහිර පළාත් සභාවේ 1991 අංක 04 දරණ පළාත් පාලන ආයතන වල (පරිපාලනය අධීක්ෂණය කිරීමේ බලය) පිළිබඳ ප්‍රඥප්තිය] includes such description to the effect that the Statute is inconsistent with the law.

The long title of the said Western Provincial Council Statute "Delegation of supervising authority of Local Authorities Statute No.4 of 1991" [1991 අංක 4 දරණ පළාත් පාලන ආයතන වල (පරිපාලන අධීක්ෂණය කිරීමේ බලය පිළිබඳ ප්‍රඥප්තිය] stipulates;

"බස්නාහිර පළාත තුළ පිහිටුවා ඇති පළාත් පාලන ආයතන වල පරිපාලනය අධීක්ෂණය කිරීම සඳහා වූ බලතල ක්‍රියාත්මක කිරීම සම්බන්ධයෙන් සහ ඊට අදාළ හෝ අනුශාංගික කරුණු සම්බන්ධයෙන් විධිවිධාන සැලැස්වීම පිණිස වූ ප්‍රඥප්තියකි. මෙම ප්‍රඥප්තිය, මහ නගර සභා ආඥා පනතේ (252 වන අධිකාරිය වූ) XIV වන කොටසේ 277 වගන්තියට, නගර සභා ආඥා පනතේ (255 වන අධිකාරිය වූ) 08 වන කොටසේ 184 වන වගන්තියට සහ 1987 අංක 15 දරණ ප්‍රාදේශීය සභා පනතේ 185 වගන්තියට අනනුකූල (inconsistent) වූවකි."

It is to be observed that the long title of the North Western Province Statute "Delegation of Supervising Authority of Local Authorities Statute No. 04 of 1991, does not indicate the word "අනනුකූල" (inconsistent).

The long title of the said Statute states that;

"වයඹ පළාත තුළ ස්ථාපිත පළාත් පාලන ආයතන වල පරිපාලනය අධීක්ෂණය කිරීමට අදාළව වයඹ පළාතේ ආණ්ඩුකාරවරයා වෙත ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ ආණ්ඩුක්‍රම ව්‍යවස්ථාවෙන් පැවරී ඇති බලතල ක්‍රියාත්මක කිරීමට විධිවිධාන සැලැස්වීම සඳහා සහ ඊට අදාළ වූ හෝ අනුශාංගික වූ හෝ කරුණු පිළිබඳව විධිවිධාන සැලැස්වීම පිණිස වූ ප්‍රඥප්තියකි."

In this circumstance, it is apparent that the 1st Respondent is fully empowered by law to issue the Gazette marked P4 under and in terms of Section 277(1A) of the Municipal Council's Ordinance.

The Petitioner contended that the use of the word "offences" in the Gazette marked P4 somehow deprives the said Gazette of any legal validity. However, the Petitioner has failed to provide any legally valid rationale to substantiate the same.

The said Gazette P4 does not merely refer to "offences" but refers to the offences in Section 277(1) of the amended Municipal Council's Ordinance.

It was submitted by the Respondent that since the wording used clearly refers to Section 277(1) of the Municipal Council's Ordinance, there is no ambiguity or uncertainty in the scope of the inquiry to be conducted by the retired judicial officer who was appointed by the said Gazette. It is expressly limited to the provisions of Section 277(1) of the Municipal Council's Ordinance.

Irrespective of the terminology used, it is obvious that the retired Judicial Officer (the 5th Respondent) is to carry out an inquiry pertaining to the item listed in Section 277 (1) of the Municipal Council's Ordinance.

In other words, in terms of the Gazette, the retired judicial officer will carry out an inquiry to ascertain whether there was;

- a) Incompetence; or
- b) Persistent default in the performance of the duties imposed by this Ordinance or any other written law; or
- c) Persistent refusal or neglect to comply with any provisions of law; or
- d) Abuse of the powers conferred by this Ordinance or any other Written law; or
- e) Persistent refusal to hold or attend any meetings or to vote or to transact business at any meeting to be held, on the part of the Petitioner.

Moreover, the learned High Court Judge has considered the Sinhala version of the Gazette and correctly identified that the Sinhala version provides as follows;

“277(1) වගන්තියේ සඳහන් වැරදි කිසිවක් සිදුකර ඇත්තේද යන්න පිළිබඳ මෙම දැන්වීමේ දින සිට මාස තුනක කාල සීමාව ඇතුළත පරීක්ෂා කොට මා වෙත වාර්තා කිරීම සඳහා විශ්‍රාමලත් අධිකරණ නිලධාරී ඒකනායක වීරකෝන් මුදියන්සේලාගෙ ලිපිත් ඒකනායක යන මහතා මෙයින් පත් කරමි.”

The use of the term "වැරදි" is not in any way inconsistent with the wording of Section 277(1) of the Municipal Council's Ordinance.

Therefore, it is apparent that the Petitioner's position is misconceived, that the wording used in the Gazette marked P4 does not in any way deprive the same of legal validity and that the said gazette is not vague. Thus, the said Gazette notification marked P4 is not ultra vires, illegal or bad in law and has not been issued in contravention of the due process and principles of natural justice.

Taking into consideration all the facts and law placed before Court on behalf of the Petitioner and the 1st - 4th Respondents, I see no reason to interfere with the Order of the learned High Court Judge of Kurunegala dated 29.11.2022. Thus, I hold that there is no legal basis to issue formal notice of this application on the Respondent-Respondents.

Hence, this application is dismissed with cost.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL