

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

In the matter of an Appeal in terms of
Section 154P(6) of the Constitution
for read together with High Courts of
the Provinces (special provisions) Act
No. 19 of 1990.

Case No:CA PHC 235/2004

D.R.Jayasundara,
Sakarawatta,
Kapuhempala.

Petitioner - Appellant

-Vs-

01. Assistant Commissioner of Galle.

02. Attorney General,
Attorney General's Department.

RESPONDENT - RESPONDENT

Before : W.M.M.Malanie Gunarathne, J
: P.R.Walgama, J

Counsel :Appellant was absent and unrepresented,
Nayomi Kahawita, SC for the Respondent.

Argued on : 31.03.2015

Decided on: 23.06.2015

P.R.Walgama, J

The Defendant-Petitioner- Appellant (herein after sometimes called and referred to as the Appellant) has lodged the instant appeal and invited this Court, inter alia; for the vacation of the order of the Learned Magistrate dated 25.09.2003, and the order of the Learned High Court Judge, dated 20.05.2004.

When this case was taken up for argument the Appellant was absent and unrepresented, hence the Court heard only the argument of the Counsel for the Respondent. Thereafter the Court granted a date for the Respondent to file written submissions on 15.06.2015, and on the said date it was informed by the Counsel for the Respondent that the appeal is not being challenge, as the Learned Magistrate has failed to follow the proper procedure laid down in Section 33 of the Agrarian Development Act No.46 of 2000.

As per document marked P2 the Assistant Commissioner of Agrarian Development Department filed an affidavit in terms of Section 33(4) for a restraining order against the Appellant who has contravened the section 33(1) Agrarian Development Act No. 46 of 2000.

Section 33(1)

“No person shall fill any extent of paddy land or remove any soil from any extent of paddy land or erect any structure on any extent of paddy land except with the written permission of the Commissioner- General.”

Section- 33(2)

"Any person who contravenes the provisions of Subsection (1) shall be guilty of an offence under this Act."

"Pursuant to the application made under Section 33(3), the Magistrate acting in terms of Section 33(5) shall determine whether an act has been committed in contravention of this Section and upon arriving at such determination the Magistrate shall make an interim order restraining the person named in the application and his servants or agents from acting in contravention of subsection (1) and shall forthwith issue summons on the person or persons named in the application to appear and show cause on the date specified in such summons, as to why such person/persons should not be restrained, as prayed for in the application."

33 (6)(a) if on the date specified in the summons the person to whom such summons has been issued fails to appear or informs the Court that he has no cause to show against the issuing of such order the Court shall confirm the interim order.

Therefore it is abundantly clear as the Claimant- Respondent filed the affidavit in terms of Section 33(4) the Magistrate's powers are limited only to an issuance of a restraining order, if the defendant fails to show cause, why a restraining order should not be issued against him.

In the instant matter although the claimant has filed the application seeking a restraining order to restrain the defendant and his servant from filling the paddy field, the Learned Magistrate has acted in terms of Section 32 (8) and has convicted the

Defendant Appellant without a summery trial, on the basis that the, Defendant -Appellant has failed to show cause. Pursuant to the afore said the Learned Magistrate moved to convict the Appellant and imposed a fine of Rs. 2000/ and further made order that the soil to be removed within three months from the date thereof.

Hence it is crystal clear that the Learned Magistrate has followed the improper procedure which calls for a annulment of the said order. Being aggrieved by the said impugned order the Petitioner-Appellant made an application by invoking the revisionary jurisdiction of the Provincial High Court of Galle to have the said order set aside or vacated.

The Learned High Court Judge by her order dated 20.05.2004 dismissed the Petitioner-Appellant's application on the basis that no exceptional circumstances are averred by the Petitioner, to warrant the exercise the extraordinary jurisdiction to revise the said impugned order. Further more it is stated that the Petitioner-Appellant could resolve the main matter in the Appeal. In the above setting the Learned High Court Judge has dismissed the Revision application accordingly.

The Petitioner-Appellant lodged the instant appeal to have the said order set aside or be vacated, on the following grounds.

That the above dated order of the Learned High Court Judge is illegal,

That the Learned High Court Judge has made the said impugned order on the basis that the facts stated by the Appellant could be

resolved in the Appeal and in addition the Petitioner - Appellant has not revealed any exceptional circumstances for the High Court Judge to exercise the revisionary jurisdiction, in this matter.

Against the said order the Appellant lodged the instant appeal to this Court, inter alia for the following reliefs;

To vacate the order of the Learned High Court Judge dated 20-05-2004,

To vacate the order of the Learned Magistrate dated 25.09.2003.

As it was mentioned at the very outset the procedure which was adopted by the Learned Magistrate was blatantly erroneous and as such the said order is set aside accordingly.

The Learned High Court Judge by her order dated 20.05.2015, has rejected the Petitioner- Appellant's application in revision on the basis that the Petitioner has not averred any exceptional circumstances that warrants the High Court to exercise the revisionary jurisdiction, and further had held that the matters that were to be resolved in the revision application could be gone in to in the appeal. But it is pertinent to note that in terms of Section 33(9)(a)(1) an appeal will lie only against an order of forfeiture, after a conviction for an offence committed under subsection 2 of Section 33 of the said Act. Hence it is salient to note that the Applicant instituted action against the Defendant by filing an affidavit in terms of Section 33(4) of the said Act and moved only for a restraining order against the Defendant-Appellant. The Learned Magistrate has resorted to the procedure laid down in Section 32 of the said Act and had convicted the Appellant and had imposed a fine. As per above act there is no

right of Appeal available to the Appellant and it is apparent that the Appellant had a right to come by way of an application in revision, to the Provincial High Court.

As it was mentioned before the Learned Magistrate's order is ab initio void, which has created a special circumstance to come by way of revision to the High Court to have the impugned order of the learned Magistrate set aside.

In Considering the above facts in its totality, and conceded by the counsel for the Respondent, the Appeal is allowed, and the impugned orders of the Learned Magistrate and the High Court Judge is vacated here by.

Appeal is allowed accordingly.

JUDGE OF THE COURT OF APPEAL

W.M.M.Malanie Gunarathne, J

I agree,

JUDGE OF THE COURT OF APPEAL