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

In the matter of application for Revision under the Article 138 and 154 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the provisions in Chapter XXIX of the Code of Criminal Procedure Act and Section 9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

Court of Appeal No:

CA/MCR/0005/2022

OIC – Police Station,

Raddolugama.

COMPLAINANT

Magistrate's Court Negombo

Case No: M/49423

Dinayadura Gayani Kokila Silva,

No. 1/B/52/R,

National Housing Complex,

Raddolugama.

AGGRIEVED PARTY

Vs.

Thommage Sanjeewa Darshana Fernando,

No. P/26,

Polgalawatta,

Kimbulapitiya.

RESPONDENT

AND NOW BETWEEN

Thommage Sanjeewa Darshana Fernando,

No. P/26,

Polgalawatta,

Kimbulapitiya.

RESPONDENT-PETITIONER

Vs.

1. OIC – Police Station,

Raddolugama.

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENTS

Dinayadura Gayani Kokila Silva,

No. 1/B/52/R,

National Housing Complex,

Raddolugama.

AGGRIEVED PARTY-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Kamal Perera for the Petitioner

: I.M.M.Fahim, S.C. for the 1st and 2nd Complainant-Respondents

: A.D.H.Gunawardena with Shanaka Warnakulasooriya for the Aggrieved Party-Respondent

Argued on : 17-11-2023

Decided on : 22-03-2024

Sampath B. Abayakoon, J.

This is an application by the respondent-petitioner (hereinafter referred to as the petitioner) invoking the revisionary jurisdiction granted to this Court in terms of Article 138 of The Constitution.

Although the petitioner has stated in the heading of his petition that, he is making this application in terms of Article 154 of the Constitution read with the Provisions of Chapter XXIX of the Code of Criminal Procedure Act and Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, I find that the petitioner has mentioned these provisions either purposely or

misdirected as to the relevant law. Article 154 of The Constitution has several sub-articles, which does not refer to any power of the Court of Appeal in exercising its jurisdiction. The only sub-article, which refers to the judiciary is the Article 154P, where the High Court of the relevant province has been conferred with the power to exercise appellate, revisionary, and limited writ jurisdiction under certain limited circumstances in relation to judgments and orders pronounced by the Magistrate's Court and the Primary Courts within its jurisdiction.

The only Article that refers to the Court of Appeal is Article 154P (6) which reads as follows:

> **(6) Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgement or sentence of any Court, in the exercise of its jurisdiction under paragraph (3) (b) or (3) (c) or (4) may appeal therefrom to the Court Appeal in accordance with Article 138.**

The above sub-article has no relevance to the application before this Court, as this is not an appeal, but an application seeking the discretionary remedy of revision from this Court.

Chapter XXIX of the Code of Criminal Procedure Act is a Chapter where certain procedural aspects of hearing and determining of an application in revision has been stipulated.

The mentioned Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 refers to an appeal to the Supreme Court from the High Court in certain cases, which has nothing to do with the application before this Court.

In accordance with the 13th Amendment to the Constitution, the High Court of the Provinces was established in terms of Article 154P of The Constitution. After its establishment, the appellate and revisionary jurisdiction in respect of the convictions, sentences and orders by Magistrate's Courts or Primary Courts

within the province, stands exclusively within the powers of the relevant Provincial High Court.

The relevant Article 154P (3) (b) reads as follows,

> **(b) Notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrate's Court and Primary Courts within the province.**

This Article clearly shows that the intention of the legislature had been to grant revisionary and appellate powers to the relevant Provincial High Court as mentioned in the Article.

It is my considered view that in view of the provisions of Article 154P of the Constitution, Article 138 of the Constitution should be read and understood subject to Article 154P (3) (b), where it states that notwithstanding anything in Article 138, the provision of Article 154P shall become operative.

The petitioner has come before this Court seeking to challenge the orders pronounced by the learned Additional Magistrate of Negombo on 25-04-2022 and 29-04-2022, in the Magistrate's Court of Negombo Case Number M/49423.

The said orders have been pronounced by the learned Magistrate in terms of Section 4 and 5 of the Prevention of Domestic Violence Act No. 34 of 2005 (hereinafter referred to as the Act), which are orders against the petitioner.

These orders are essentially temporary orders until the relevant Court considers the application and decides whether to grant protection orders as stipulated in the said Act.

Section 17 of the Act has provided for the right of appeal for a person who is dissatisfied with an order made by the Magistrate under Section 6 or 7, which are the sections under which a protection order can be granted.

In terms of the said section, an appeal can be preferred to the High Court established under Article 154P of the Constitution, challenging the order.

Since it is clear that the relevant Act had not provided for an appeal to be preferred against an interim order as in this case, if dissatisfied of an interim order, the constitutionally guaranteed remedy available to the petitioner, is to file an application seeking to invoke the revisionary jurisdiction of the relevant Provincial High Court in terms of Article 154P of the Constitution.

I am of the view that the petitioner has circumvented the Constitutionally guaranteed remedy available to him by using the powers vested in the Court of Appeal in terms of Article 138 of The Constitution and the provisions of Section 12 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 on the basis that the Court of Appeal still can entertain a direct application in revision, challenging a decision of a Magistrate's Court.

I find that this is not in line with the intention of the legislature and the spirit of the Constitution. I view this as a practice that should not be encouraged under any circumstances. However, since this Court has previously decided to entertain this application and issue notice of it to the mentioned respondent, it was decided by this Court to consider the application on its merit.

The only basis upon which the petitioner can succeed in this application is by establishing that he has exceptional circumstances, which require the intervention of this Court, by invoking the extraordinary discretionary remedy of revision of this Court.

It was held in the case of **Hotel Galaxy (Pvt) Ltd. Vs. Mercantile Hotels Management Ltd. (1987) 1 SLR 05** that;

> *"It is settled law that the exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention."*

In the case of **Wijesinghe Vs. Thamaratnam, (Srikantha Law Reports Vol-IV page 47)** it was held that;

> *"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of the Court."*

In the case of **Vanik Incorporation Ltd. Vs. Jayasekare (1997) 2 SLR 365** it was held thus;

> *"Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."*

In his petition before this Court, under Paragraph 16, the petitioner has mentioned several grounds, which he has termed as exceptional grounds available to him. Therefore, it is my view that the petitioner needs to establish that the mentioned exceptional circumstances exist for him to succeed in this application.

The petitioner is seeking to revise or set aside interim protection orders made by the learned Additional Magistrate of Negombo on 25-04-2022 and 29-04-2022.

On 25-04-2022, the learned Additional Magistrate of Negombo has heard the application made under the provision of the Act. After hearing evidence of the aggrieved party and other witnesses, the learned Magistrate has pronounced the said interim protection order. Thereafter, the said interim order had been served on the petitioner. It needs to be noted that when this matter was taken up for hearing, the petitioner has also been present with legal representation and he has been allowed to cross-examine the witnesses.

When this matter was mentioned again on 29-04-2022, the learned Magistrate has extended the interim protection order for 14 days and the matter has been fixed on further inquiry on 20-05-2022.

Although the petitioner has come before this Court challenging the above two orders, the petitioner has failed to enlighten this Court as to the present status of this application, and whether a protection order was issued against him.

Once an interim protection order is issued, any respondent against whom the interim order is issued can appear before the Court and show cause as to why a protection order should not be issued against him.

When it comes to the facts relating to this case, since the petitioner has had legal representation even at the stage of issuing of an interim protection order, there is no material before this Court to assume that the petitioner was not afforded an opportunity to show cause. There is no material before this Court as to what was the final result of this application or whether it is still pending before the Court.

It is clear from the material placed before the Court that there had been a previous application as well between the parties, where a protection order has been issued. Since it has been issued for a specific period, the present action has been instituted by the police on the basis that the aggrieved party still needs protection under the provisions of the Act.

Although the learned Counsel for the petitioner argued that the police took steps to initiate proceedings in the Magistrate's Court without even recording a statement from the petitioner, and there was no evidence before the Court to issue an interim protection order, I find no basis for such a contention. I am of the view that the intention of the legislature by enacting this law has been to prevent domestic violence. The provisions of the Act are clear that a Magistrate can act, depending on the relevant facts and the circumstances in order to prevent domestic violence.

The Act has clearly stipulated the procedure that has to be followed in issuing interim orders in that regard. I am of the view that, having considered the nature of the issue, recording a statement from the petitioner who was the respondent named in the action before the Magistrate's Court was not a must.

Besides that, this is an order, not made *ex parte* but after an *inter parte* inquiry. The petitioner has been allowed to cross-examine the witnesses. It is clear from the interim protection order that the learned Magistrate has considered all the relevant facts and the circumstances, and also has considered the evidence placed before the Court in issuing the interim protection order.

As the Act itself has provided a solution for the petitioner to show cause before the Court if he was dissatisfied with the interim protection order, he has no bar to go before the same Court and establish his case rather than seeking to challenge the interim protection order, which is a temporary order.

If the petitioner is dissatisfied with any final protection order pronounced by the learned Magistrate, he has the right to appeal against such an order in terms of Section 17 of the Act to the relevant Provincial High Court.

For the reasons considered as above, I find no basis to conclude that the petitioner has any exceptional circumstances to seek the discretionary remedy of revision from this Court. Accordingly, the revision application is dismissed.

The Registrar of the Court is directed to communicate this judgement to the relevant Magistrate's Court of Negombo for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal