

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

*In the matter of an application for  
Revision in terms of Article 138 of The  
Constitution of the Democratic  
Socialist Republic of Sri Lanka.*

**Court of Appeal Case No:**

CA/CPA/123/2023

Officer-in-Charge,

Police Station,

Maharagama.

**High Court of Colombo**

Case No: HC/RA/113/2023

**COMPLAINANT**

**Vs.**

**Magistrate's Court of Nugegoda**

Case No: 11296/2022

1. Dhammika Karannagoda,

No. 14/11/B,

Pannipitiya Cross Lane,

Pannipitiya (East).

2. H.N.P. Kumara,

No. 14/10,

Pannipitiya Cross Lane,

Pannipitiya (East).

3. P.R.C. Silva,  
No. 9/14/A,  
Pannipitiya Cross Lane,  
Pannipitiya (East).

4. Ruchira De Silva,  
No. 14/9,  
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Pannipitiya (East).

5. A.A.A.S.L. Kumari,  
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No. 14/19/1/1,  
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No. 14/10/G/1/1,  
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28. S.A. Dahanayake,  
No. 14/10/F,  
Pannipitiya Cross Lane,  
Pannipitiya (East).

**1<sup>ST</sup> PARTY**

**Vs.**

1. D.L.H. Samaranayake  
No. 145,  
High Level Road,  
Maharagama.

2. Secretary,  
Municipal Council,  
Maharagama.

3. Chief Engineer,  
Western Provincial Road  
Development Authority,  
Moratuwa.

**2<sup>ND</sup> PARTY**

1. A.K.P. Dayan Heminda,  
No. 20,  
Old Road,  
Pannipitiya.

2. P.D.C. Rajapaksha,  
No. 14/8,  
Railway Cross Lane,  
Pannipitiya.

3. H.T. Dilum Ariyarathna,  
No. 27,  
Old Road,  
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4. K.W. Rathnasekara,  
No. 14/1,  
Railway Cross Lane,  
Pannipitiya.

5. S.M. Nihalsinghe,  
No. 221/B,  
Old Road,  
Pannipitiya.

6. K.K.A. Irangani Kumarasinghe,  
No. 8/1,  
Old Road,  
Pannipitiya.

7. R.A.D.J.D. Irangani,  
No. 8/1/1,  
Old Road,  
Pannipitiya.

**1<sup>ST</sup> TO 7<sup>TH</sup> INTERVENIENT**

**PETITIONERS**

8. Provincial Road Development  
Authority of the Western Province,  
No. 59,  
St. Sebastian Hill,  
Colombo 12.

**8<sup>TH</sup> INTERVENIENT**

**PETITIONER**

**AND BETWEEN**

1. Dhammika Karannagoda,  
No. 14/11/B,  
Pannipitiya Cross Lane,  
Pannipitiya (East).

2. H.N.P. Kumara,  
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**1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup>, 5<sup>TH</sup>, 6<sup>TH</sup>, 7<sup>TH</sup>, 8<sup>TH</sup>,  
AND 11<sup>TH</sup> 1<sup>ST</sup> PARTY-  
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**Vs.**

Officer-in-Charge,  
Police Station,  
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**COMPLAINANT-RESPONDENT**

1. D.L.H. Samaranayake  
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**4<sup>TH</sup>, 9<sup>TH</sup>, 10<sup>TH</sup>, AND 12<sup>TH</sup> TO 28<sup>TH</sup>**

**1<sup>ST</sup> PARTY-RESPONDENTS**

**AND NOW BETWEEN**

Provincial Road Development  
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**8<sup>TH</sup> INTERVENIENT**  
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**PETITIONER**

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**1<sup>ST</sup> TO 7<sup>TH</sup> INTERVENIENT**  
**PETITIONERS-RESPONDENTS-**  
**RESPONDENTS**

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Chamara Nanayakkarawasam with Chamodi  
Rajaneththi and Dinesh de Silva for the 8<sup>th</sup>  
Intervenient Petitioner-Respondent-Petitioner.

: Asela Serasinghe with Poorna De Silva for the  
1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> & 11<sup>th</sup> 1<sup>st</sup> Party-Petitioner-  
Respondents and 4<sup>th</sup> Party-Respondent-Respondent.

: R.A.P. Ranawaka with P.S.W. Dissanayaka for the 2<sup>nd</sup>  
Party-2<sup>nd</sup> Respondent-Respondent.

Argued on : 10-06-2024

Decided on : 28-08-2024

**Sampath B. Abayakoon, J.**

This is an application by the 8<sup>th</sup> intervenient petitioner-respondent-petitioner (hereinafter referred to as the petitioner) seeking to invoke the revisionary jurisdiction of this Court granted to this Court in terms of Article 138 of The Constitution.

When this matter was supported for notice and for an interim order, this Court, having heard the parties, issued notice to the respondents mentioned, and also issued a stay order suspending the order made by the learned Provincial High Court Judge of the Western holden in Colombo on 25-09-2023 in High Court Case No. HC/RA/113/2023.

At the hearing of this application, this Court heard the submissions of the learned Counsel for the petitioner, as well as the submissions of the learned Counsel for the 1<sup>st</sup> party respondent-respondents.

The petitioner who is the Provincial Road Development Authority of the Western Province is seeking to revise and set aside the order dated 25-09-2023 made by the learned High Court Judge of the Provincial High Court of the Western Province Holden in the earlier mentioned application.

The impugned order has been pronounced as a sequel to an order made by the learned High Court Judge on 21-09-2023.

The learned High Court Judge, after having considered the revision application filed by petitioners in the above-mentioned case, which has been filed in terms of Article 154P of The Constitution, has decided to issue notices to the respondents mentioned in the application before the High Court.



In the same order, having considered an application for an interim order, the learned High Court Judge has ordered that the order dated 16-12-2022 should be made effective as it is. However, it was also ordered that this interim order shall not stand as a bar to the Magistrate's Court to proceed with the inquiry, and come to a final conclusion or for the parties to come to a settlement.

Although the order itself does not give any indication as to what was meant by the order dated 16-12-2022, it is clear from the documents filed before this Court that it was an order made by the learned Additional Magistrate of Nugegoda in Magistrate's Court on Nugegoda Case No. 11296/22, which was an order relating to an application filed before the Court in terms of section 98(1) of the Code of Criminal Procedure Act, for removal of a nuisance.

The Officer-in-Charge of Maharagama police station has filed the above-mentioned application naming 28 persons as the 1<sup>st</sup> party and 3 parties as the 2<sup>nd</sup> party.

The 1<sup>st</sup> person mentioned as the 2<sup>nd</sup> party is an individual named Samaranayake, while the 2<sup>nd</sup> and 3<sup>rd</sup> persons mentioned had been the Secretary of the Maharagama Urban Council and the Engineer of the Western Provincial Road Development Authority Moratuwa. It needs to be noted that both the latter mentioned parties are not legal personalities, but are officials of the relevant institutions.

The public nuisance referred to by the police had been in relation to allowing rainwater to be released into a roadway used by the 1<sup>st</sup> party, and thereby causing a public nuisance.

The learned Additional Magistrate of Nugegoda having heard evidence from the 1<sup>st</sup> party in that regard, has made the following order on 16-12-2022, which was the order the learned High Court Judge has directed that should be carried out.

"මේ අවස්ථාවේදී ඉදිරිපත් කරන ලද කරුණු වලට අනුව සහ ඡායාරූප අනුව මෙම ප්‍රදේශයේ ජීවත් වන පුද්ගලයන්ට මහජන පීඩාවක් ඇති බව අධිකරණයට පෙනී යයි. ඒ අනුව මෙම

අවස්ථාවේදී එම ක්‍රියාවන් වැලැක්වීමේ හැකියාව තිබියදී එලෙස කටයුතු කරන මෙම නඩුවේ වගදන්තරකරුවන් අදාළ සියලු ක්‍රියාවන් වලින් වැලැක්වෙමින් මින් ඉදිරියට පෙත්සම්කරුවන්ට අදාළ පීඩා සිදු නොවන ආකාරයෙන් කටයුතු කිරීමට දන්වමින් කොන්දේසි සහගත ආඥාවක් නිකුත් කරයි.”

It appears that the learned Additional Magistrate has made the above order in terms of section 98(1)(a) of the Code of Criminal Procedure Act which reads as follows.

**98. (1) Whenever a magistrate considers on receiving 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) ...**
- (c) ...**
- (d) ...**
- (e) ...**

**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 may be.**

The provisions of section 98 are clear that, whatever the conditional order a Magistrate decides to make should be definitive and should be a one one that could be carried out, and there should be a time limit to carry out the order as well. I am unable to find any of the above in the said order.

After the order was served on the mentioned 2<sup>nd</sup> party named before the Magistrate's Court, the Chief Engineer of the Provincial Road Development Authority has appeared before the Court, and a clarification has been sought as to the conditional order.

It appears that, submissions have been made before the learned Additional Magistrate to the effect that as a solution to flooding which occurs in Borella to Kottawa road situated adjacent to the land belonging to the 1<sup>st</sup> respondent of the 2<sup>nd</sup> party, the said respondent has given a part of the land belonging to her to the Provincial Road Development Authority for the authority to construct a drainage system to bring down the water from the said road up to the railway culvert situated towards the Northern boundary of her land, and accordingly, the Provincial Road Development Authority of the Western Province has constructed a drainage system far back as the year 2004. This is the drainage system the 1<sup>st</sup> party respondents named in the Magistrate's Court case had wanted the learned Additional Magistrate to close down.

The Provincial Road Development Authority has also submitted a proposal where it has been indicated to the Court that if an underground drainage system can be built along the road used by the 1<sup>st</sup> party, the issue of rainwater running through the roadway could be resolved.

However, it appears that the learned Additional Magistrate has made another order on 15-02-2023 on the basis that she is clarifying the order made on 16-12-2022, which reads as follows.

“ඒ අනුව වගන්තරකරුවන් කියා සිටින්නේ අදාළ ආඥාව අපැහැදිලි බවයි. කෙසේවුවත් ඒ අනුව අද දින මා විසින් ලබා දෙන ලද ආඥාව පැහැදිලිව පහත ආකාරයෙන් සඳහන් කරමි.

මෙහි යම් කාන්තා පද්ධතියක් අලුතින් ඉදිකිරීම තුලින් පෙත්සම්කරුවන්ට යම් හානියක් මහජන පීඩාවක් සිදු වන බව කියා සිටී. ඒ අනුව තාවකාලිකව එම කාන්තා පද්ධතිය වැසීමට මා විසින් කොන්දේසි සහිත ආඥාවක් නිකුත් කරමි.”

I am of the view that none of the conditional orders made by the learned Additional Magistrate are orders made with clarity which can be implemented. It is imperative on a Magistrate when making conditional orders to identify the place or the structure or the issue where the nuisance should be prevented. When making such an order, a Magistrate needs to consider all the relevant factors and consider where the balance of convenience lie. There should be a time limit fixed by such an order as well.

I am unable to find any of the basic matters that should be stated in an order of this nature has been mentioned by the learned Additional Magistrate, so that the conditional order can be carried out.

After making the above two orders, it appears that the learned Additional Magistrate has carried out an inspection of the place where the alleged nuisance is taking place. There had been a public disturbance at the inspection as several persons have come forward claiming that if the drainage system is closed, they will be affected as a result.

Several other parties have intervened to the case after the inspection. The petitioner has also intervened in the matter as the party responsible for the construction of the drainage system and maintenance of the roads within the Western Provincial Council area.

After having considered the submissions made by the intervening parties, the learned Additional Magistrate, on 02-08-2023, has made the following order.

#### නියෝගය

“ඉදිරිපත් කරන ලද කරුණු සලකා බලමි. ඒ අනුව මෙම ස්ථානය මා විසින් පුද්ගලිකව ගොස් පරීක්ෂා කරන ලදී. ඒ අවස්ථාවේදී මෙම නඩුවේ මාර්ග සංවර්ධන අධිකාරියේ ප්‍රධාන ඉංජිනේරුවරයා එම ස්ථානයේ පෙනී සිටින ලද අතර ඔවුන් විසින් මෙම නඩුවේ පෙත්සම්කරුවන්

සමග මා හට අදාළ ස්ථාන පෙන්වා දෙන ලදී. එසේම එම ස්ථාන පරීක්ෂාකර බැලීමේදී මෙම කොන්දේසි සහිත ආඥාව ක්‍රියාත්මක කළහොත් තවත් පාර්ශවයකට අගතියක් සිදු වන බව ඉතාම පැහැදිලිව පෙනී යන ලදී. එසේම, අපරාධ නඩු විධාන සංග්‍රහ පනතේ 100(2) වගන්තිය සලකා බැලීමේදී එහි දක්වා ඇත්තේ, "ඒ තැනැත්තා විසින් ඒ ක්‍රියාව කරනු නොලැබුවහොත් හෝ ඒ තැනැත්තා පෙනී නොසිට ආඥාව අවලංගුකරවා ගැනීම හෝ සුළු වශයෙන් වෙනස් කරවා ගැනීමට ඔහුට නොහැකි වුවහොත් දණ්ඩනීති සංග්‍රහයේ 185 වගන්තියේ ඒ වෙනුවෙන් නියම කර ඇති දණ්ඩනයට ඔහු යටත් විය යුතු අතර ආඥාව නියත බවට පත් කරනු ලැබිය යුතුය" යනුවෙනි. මෙහිදී කිසිම අවස්ථාවක මෙම පුද්ගලයන් අධිකරණයේ පෙනී නොසිටීමක් කර නොමැති අතර ඔවුන් සෑම අවස්ථාවකදීම අධිකරණයේ පෙනී සිට කරුණු දැක්වීමක් කර තිබේ. එසේම මේ සම්බන්ධයෙන් ප්‍රතිශෝදන ඉල්ලුම්පත්‍රයක්ද ගොනු කර තිබේ. එසේම සියලු පාර්ශවයන්ගේ එකඟත්වය මත මා ස්ථාන පරීක්ෂණයට රැගෙන යන ලද්දේ ද එම කරුණ නිසා බව මා විසින් තීරණය කරමි. ඒ අනුව ඒ අවස්ථාවේදී මා විසින් ලබා දෙන ලද කොන්දේසි සහිත ආඥාව මා විසින් ක්‍රියාත්මක කළහොත් එය තවත් පාර්ශවයකට අගතියක් වන හෙයින් මේ අවස්ථාවේදී අපරාධ නඩු විධාන සංග්‍රහ පනතේ මා වෙත පැවරී ඇති බලතල ප්‍රකාරව සහ මාගේ අභිමතය ප්‍රකාරව අපරාධ නඩු විධාන සංග්‍රහ පනතේ 101 වගන්තිය යටතේ ක්‍රියා කරමින් මෙම නඩුව විමසීමට තබමි."

Although the learned Additional Magistrate has not specifically stated so, it is clear that the learned Additional Magistrate has decided that if the earlier conditional order made was to be carried out, it will cause more prejudice to some other parties. In all practical terms, the effect of the above order had been the suspension of the earlier mentioned conditional order and to hold an inquiry in terms of section 101 of the Code of Criminal Procedure Act.

It is against the said order made on 02-08-2023, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> parties of the 1<sup>st</sup> party respondents (hereinafter referred to as the respondents) named in the Magistrate's Court action have filed the revision application number HC/RA/113/23 before the Provincial High Court of the Western Province Holden in Colombo.

In their petition, they have sought a stay order against the earlier mentioned order of the Magistrate and for an order that the original conditional orders made on 16-12-2022 and 15-02-2023 be made effective.

After having considered the application filed before the Provincial High Court of the Western Province Holden in Colombo, the learned High Court Judge has pronounced the impugned order.

At the hearing of this application, the main contention of the learned Counsel who represented the respondents was on the premise that there was nothing wrong in the conditional order pronounced by the learned Additional Magistrate, and if the petitioner wanted to challenge the said order, the only way the petitioner could challenge would be under and in terms of section 98(2) of the Code of Criminal Procedure Act.

He was of the view that the petitioner has failed to do so, and has failed to abide by the conditional order causing great inconveniences to the respondents. Making extensive submissions as to the public nuisance caused by the alleged actions of the petitioner, the learned Counsel submitted that the revision application should be dismissed for want of merit.

He also submitted that the originally named 2<sup>nd</sup> party 3<sup>rd</sup> respondent before the Magistrate's Court, namely the Engineer of the Provincial Road Development Authority, has also filed an application in revision challenging the clarification made by the learned Additional Magistrate on 15-02-2023 in relation to the conditional order made by the learned Additional Magistrate on 16-12-2022, under Provincial High Court of the Western Province Holden in Colombo Case No. HC/RA/37/2023.

The said application has been dismissed by the order dated 22-03-2024 by the learned Provincial High Court Judge of the Western Province Holden in Colombo.

As I have stated before, it is clear from the material placed before this Court that the learned High Court Judge has decided to issue notice and hear the application filed in revision by the respondents. The learned High Court Judge, while giving a direction that the order dated 16-12-2022 should be given effect until the conclusion of the application before the High Court, has also given permission for the learned Additional Magistrate to hold the inquiry as decided

by her order dated 02-08-2023 and has also allowed the parties to pursue any possible settlements.

I am of the view that the part of the said order where the learned High Court Judge says that the conditional order dated 16-12-2022 should be given effect was an order made without having due consideration as to the fact whether it was an order that can be carried out.

As I have already stated, this was an order that cannot be carried out as it was not a clear order in that regard. The very reason why the learned Additional Magistrate decided not to implement the order and to hold an inquiry instead, shows that the original order was an order that cannot be implemented.

I am in no position to agree with the contention of the learned Counsel for the respondents that the petitioner has failed to come before the Magistrate's Court in terms of section 98(2) of the Code of Criminal Procedure Act and make an application in terms of the said section.

It is clear that the police have failed to name the correct party that should be brought before the Court, who should be actually held responsible for the construction of a drainage system which causes the alleged nuisance. The petitioner on its own motion has intervened into the matter and had even suggested the possible solution to the issue.

That means that in fact, the petitioner has come before the Magistrate's Court in terms of section 98(2) of the Code of Criminal Procedure Act and has made the relevant application in terms of the section, despite the fact there had been no time frame given in the conditional order.

I am of the view that the learned High Court Judge's interim order where it has been directed that the conditional order made by the learned Additional Magistrate should be given effect until the final conclusion of the revision application filed before the High Court cannot be justified for the reasons as considered above.

Therefore, allowing the revision application, I set aside the interim order pronounced by the learned High Court Judge on 25-09-2023 up to the extent of setting aside the order where it says that the order dated 16-12-2022 of the learned Additional Magistrate of Nugegoda should be carried out.

The remainder of the order, where it says that the Magistrate should proceed with the inquiry, and the parties are entitled to consider entering into a settlement shall remain intact.

Subject to the above variation to the order dated 21-09-2023 and 25-09-2023, the learned High Court Judge is directed to proceed with the revision application as already decided, and pronounce a judgment in that regard, expeditiously as possible.

The Registrar of the Court is directed to communicate this judgment to the Provincial High Court of the Western Province Holden in Colombo, and also to the Magistrate's Court of Nugegoda for necessary compliance.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal