

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

C A (PHC) APN 108/2013
HC Kalutara Case No. HCRA 25/2013
MC Kalutara Case No.22148

Kirana Gamage Sudara Nicholas
Kariyawasam,
Princes Grace Orphanage,
Kalamulla, Kalutara.

5th Accused-Petitioner-Petitioner

- Vs -

The Officer-in Charge,
Police Station,
Payagala.

**Complainant-Respondent-
Respondent**

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

Respondent-Respondent

Mohomed Mohideen Janith Paul
and 08 others, all of of them are at
Princes Grace Orphanage,
Kalamulla, Kalutara.

**Accused-Respondent-
Respondents**

BEFORE : A W A Salam, J (P/CA) & Malinie Gunaratne, J.

COUNSEL : Janaka Amerasinghe for the 5th Accused-Petitioner-
Petitioner.
Amila Palliyage for the 1st, 4th, 6th - 10th Accused-

Respondent - Respondents.
Anoopa De Silva SSC sor the Hon. Attorney - General.

ARGUED ON : 24.03.2014

DECIDED ON : 29.08.2014

A W A Salam, J(P/CA)

This is a revision application. The 5th accused-petitioner-petitioner (hereinafter referred to as the "petitioner") has invoked the present revision application to challenge the propriety of the order made by the learned Magistrate of Kalutara dated 28 August 2013 evicting the petitioner and to set aside the order of the learned High Court Judge dated 3 September 2013.

The facts briefly are as follows; the petitioner is an orphan and has been given shelter in the Prince's Grace Orphanage (hereinafter sometimes referred to as the "orphanage") from his birth or from the time he could remember. The petitioner claims that he was baptized by those who were in charge of the said orphanage and therefore considered to be a catholic. As the petitioner is an orphan from birth and given shelter in the orphanage, he continued to stay there until the day of incident.

On 28 August 2013, the OIC of the relevant police station filed a B report in the Magistrate's Court of Kalutara alleging the commission of certain offences by the petitioner along with certain others and the learned Magistrate in the same proceedings made order to have the petitioner evicted form orphanage in questions. The order made by the learned Magistrate evicting the children who have attained the age of majority, including the petitioner from the orphanage includes a condition that those who are not willing to vacate the premises are obliged to show cause.

The order of the learned High Court Judge running into 18 pages considers the questions whether the petitioner has made out a case disclosing exceptional circumstances to warrant the invocation of the discretionary remedy of revision. Quite unfortunately, the learned High Court Judge has not considered the question whether the learned Magistrate in the exercise of his criminal jurisdiction can direct the eviction of the accused before he decided whether the suspects are guilty of the charges leveled against them. One of the main questions that arises for consideration in this application is whether the petitioner has an alternative remedy. Undoubtedly if he has one such remedy he cannot invoke the revisionary jurisdiction unless he satisfies certain prerequisites. The learned Senior State Counsel has submitted that the revisionary powers of the High Court cannot be invoked inasmuch as petitioner has an alternative remedy.

As has been suggested by the learned Counsel for the petitioner, it is trite law that the revisionary powers of Court will not be exercised if there be an alternative remedy, unless exceptional grounds are shown to exist. The alternative remedy as being shown to be available to the petitioner is to show cause against the order made by the learned Magistrate to evict the petitioner from the premises in question. The learned Counsel for the petitioner has contended that the remedy shown to be available to the petitioner is no remedy in law and therefore the Court is not bound to consider the same as an alternative remedy. I am in agreement with the submissions of the learned Counsel for the petitioner because the learned Magistrate has no power to order the eviction of the accused even before he had commenced the hearing into the charges.

The learned Counsel for the petitioner has also submitted that his client is not bound to answer or show cause against any illegal order and that he has every right to challenge the order by way of revision, due to the fact that the impugned order in question is tainted with so much of illegalities. An order which is illegal can always be questioned before a higher forum having the jurisdiction to revise such an order.

In the case of R C Fernando Vs. Wijesekara SC 524/63- application for revision in MC Colombo 29426 and 33359, it was held that the Magistrate is not entitled to convert his criminal jurisdiction into one of civil jurisdiction. It was further emphasized in that case that the criminal jurisdiction of the Magistrate cannot be so converted into a civil jurisdiction even by agreement of the parties. In the case of Perera versus Mendis (1948) 49 New Law Report 240, it was held that in a criminal case a Magistrate is not entitled to turn the nature of the proceedings into a civil proceeding by issuing commissions to surveyors and entering agreements on the record. When a case is compounded and the accused is then set free. That is all the Magistrate has to do.

In the case of Thegis Vs Agonis 22 New Law Report 376 the accused was charged with criminal trespass. The Magistrate thought that the case involved a civil dispute and discharged the accused, but ordered that he should bring a civil action. Commenting on the impropriety of the order made by the learned Magistrate, it was pointed out that the learned Magistrate had no authority or any right whatsoever to make the order relating to possession and directing the accused to bring a civil action.

In C.A. (P.H.C) APN 28/2014 - H.C. Colombo HCR 17/2014 - MC Kaduwela B 55620/55056 W.H. Thulyananda Senanda, vs. OIC, Special Crimes Investigation Bureau, Police Station Mirihana, this Court acted on its own when the learned Magistrate had purportedly acted in a manner contrary to all the norms known to the law, converting a criminal proceeding into proceedings of debt collection. Taking into consideration, all these matters I am of the view that the petitioner has unfolded a strong case with full of

exceptional circumstances pointing to the illegality of the order made by the learned Magistrate.

It is settled law that the power of revision vested in this Court and the Provincial High Court can be exercised and in certain circumstances ought to be exercised when the impugned order is tainted with illegalities or entered without jurisdiction or in excess of jurisdiction. The revisionary jurisdiction thus vested is not fettered even if a person aggrieved by an order may not have availed of the right of appeal within the specified period of time.

As has been reiterated in several Judgments of the apex Court where a strong case for the interference of this Court is made out or a miscarriage of justice had occurred, this Court is obliged to revise such an order.

In the circumstances, I am of the opinion that is a fit case to exercise the revisionary jurisdiction of this Court to remedy the situation. Hence, the order dated 28 August 2013 made by the learned Magistrate directing the eviction of the petitioner and the other orphans from the orphanage in question is revised and set aside. Further, the order of the learned High Court Judge dated 3 September 2013 in application bearing No HC RA 25/2013 is also set aside.

The learned Magistrate is at liberty to proceed with the criminal prosecution initiated against the petitioner and others.

There shall be no costs.

Sgd. /-

PRESIDENT/COURT OF APPEAL

Malinie Gunaratne, J.

I agree.

Sgd. /-

JUDGE OF THE COURT OF APPEAL

