

KEANGNAM ENTERPRISES LTD.

v.

ABEYSINGHE AND OTHERS

COURT OF APPEAL.

ANANDA GRERO, J.

C.A. NO. 259/92.

M.C. KURUNEGALA NO. 55907/91.

JULY 13, 1992.

*National Environmental Act, No. 47 of 1980 as amended by the National Environmental [Amendment] Act, No. 56 of 1988 ss. 23A, 23B and 29 - Environmental Protection Licence - Code of Criminal Procedure Act, No. 15 of 1979, ss. 98(1) and 104(1) - Jurisdiction of Magistrate - Rule 46 of the Supreme Court Rules.*

The Petitioner-Company had established a metal quarry, a metal crusher and a premix plant at a site taken on lease for developing and rehabilitating the Ambepussa - Dambulla - Anuradhapura road. The Informant-Respondents complained of a public nuisance created by the Petitioner-Company. The Magistrate granted an injunction restraining the operation of the quarry under

section 104(1) of the Code and also entered a conditional order under section 98(1) of the Code for the removal of the public nuisance caused by the quarry.

**Held:**

The Magistrate had jurisdiction to make the orders complained of under Chapter IX of the Code of Criminal Procedure Act, No. 15 of 1979 because at the time the quarrying was commenced and the matter was heard the Petitioner-Company had not obtained an Environmental Protection Licence from the Central Environmental Authority as required by section 23A of the National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988. The Pradeshiya Sabhas permission to have and maintain a metal quarry and a metal crusher is not enough.

By the time the application for revision was taken up the Petitioner-Company had obtained the requisite licence but this will not legalise the earlier illegality of quarrying without the licence.

If the Petitioner-Company had the Environmental Protection Licence at the time when the Informant-Respondents complained to the Magistrates' Court, then the Magistrate would have had no jurisdiction to entertain and determine the application (section 29 of the National Environmental Act.). As the Petitioner-Company has the licence now it can make the appropriate application to the Magistrate.

Under Rule 46 of the Supreme Court Rules only material documents need be filed along with an application for revision.

**Case referred to:**

1. *Kiriwantha and Another v. Navaratne and Another* S.C. Application No. 628/88.

**APPLICATION** for revision of the order of the Magistrate of Kurunegala.

*H. L. de Silva P.C. with D. S. Wijesinghe P.C. and Anil Silva* for Petitioner-Company.

*Lalanath de Silva with Preethi Raj Perera* for informant-respondents.

*S. J. Jayanaga with Rohana Jayasekera* for 9-12 aggrieved-party-respondents.

*Cur. adv. vult.*

August 26, 1992.

**ANANDA GRERO, J.**

This is an application for revision made by the Respondent – Petitioner to this court seeking the following reliefs:–

- (i) To set aside the orders made by the learned Magistrate of Kurunegala dated 18.12.91 and 26.3.92.
- (ii) To dismiss the application of the Informant-Petitioners.
- (iii) To stay the operation of the *ex parte* injunction dated 18.12.91 and the inquiry fixed for 30.4.92 pending the hearing and determination of this application.

When this matter came up for the first time before this Court on 2.4.92, the petitioner reserved his right to pursue the interim relief he sought in paragraph (d) of the prayer (i.e. to stay the operation of the *ex parte* injunction dated 18.12.91, and the inquiry fixed for 30.4.92 till the determination of this application) to the petition on a future date. On that day, this Court issued notices on the Informant-Respondents.

On 22.4.92, when this matter came up before this Court, on an application made by the Counsel for the petitioner, an order was made, directing the Magistrate of Kurunegala not to hold the inquiry fixed for 30.4.92, until the final determination of this application. But up to date, no order has been made to stay the operation of the *ex parte* injunction issued by the Magistrate of Kurunegala dated 18.12.91.

The respondent-petitioner (also referred to as Petitioner-Company) had established a metal quarry, a metal crusher, and a premix plant, at a site taken on lease by the Petitioner-Company in July 1991. Thereafter, the Petitioner-Company states that after obtaining the requisite permits and/or licences from the various statutory authorities it commenced blasting operations on 1.9.91, and had employed about 850 employees and the metal obtained from the said quarry was used for the purpose of developing and rehabilitating the Ambepussa-Dambulla-Anuradhapura road.

The Informant-Respondents on 18.12.91, filed papers in the Magistrate's Court of Kurunegala complaining of a public nuisance created by the Respondent-Petitioner, by the operation of the said quarry, and sought reliefs under Sections 98(1) and 104(1) of the Code of Criminal Procedure Act No. 15 of 1979. The learned Magistrate having heard the Counsel for the Informant-Respondents,

and after considering the affidavits and the petition filed by them, and also after examining the documents filed along with the petition, granted an injunction restraining the operation of the quarry (under Section 104(1) of the Code) and also entered a conditional order (under Section 98(1) of the Code) for the removal of a public nuisance caused by the said quarry.

Thereafter, on 31.12.91 the Administration Manager of the Respondent-Company filed his objections which is marked and produced as P8, and for the reasons contained therein, stated that the Magistrate had no jurisdiction to make any order under Chapter IX of the Code of Criminal Procedure Act No.15 of 1979, and that the application made to the Magistrate's Court was misconceived.

On 16.1.92, when the conditional order made under Section 98(1) and the injunction issued under Section 104(1) of the Code of Criminal Procedure Act were served on the Petitioner-Company, it filed its objections on 17.1.92 which is marked and produced as P10, and for the averments stated therein took up the position that Magistrate had no jurisdiction to make any order under Chapter IX of the Code, and that he should not consider the application of the Informant-Respondents.

The Road Development Authority at a later stage sought to intervene as a party, and its intervention was allowed by the learned Magistrate, and the said Authority was made an added Respondent-Respondent to the case before the Magistrate. Further at a later stage four workmen under the Petitioner-Company, sought the permission of the learned Magistrate to intervene, and he by his order dated 6.3.92, allowed their application, and they were added as 9th, 10th, 11th and 12th, Aggrieved-Party-Respondents to the case before him.

Thereafter, on 14.2.92, submissions were made on behalf of the Petitioner-Company regarding the question of jurisdiction of the Magistrate's Court to make orders under Chapter IX of the Code of Criminal Procedure Act. The Added-Respondent-Respondent and the Aggrieved-Party-Respondents too agreed with the submissions made by the Counsel for the Petitioner-Company, that the Magistrate's Court had no jurisdiction to inquire into the application of the Informant-Respondents.

It appears from the submissions made before the learned Magistrate by the learned Counsel for the Petitioner-Company, that he had relied upon the provisions of the National Environmental Act, No. 47 of 1980 as amended by Act, No. 56 of 1988. According to him, the provisions of the said Act had taken away or ousted the ordinary jurisdiction of the Magistrate under Chapter IX of the Code of Criminal Procedure Act and with regard to any environmental damage caused, then the remedy available for the Informant-Respondents is to resort to the remedies provided by the said Act, and not to resort to the provisions of Chapter IX of the Code. It appears that the attention of the learned Magistrate had been drawn to Section 29 of the said National Environmental Act by the learned Counsel for the Petitioner-Company when he made his submissions. The said section reads as follows:—

"The provisions of the Act shall have effect notwithstanding anything to the contrary in the provisions of any other written law, and accordingly in the event of any conflict or inconsistency between the provisions of this Act and the provisions of such other written law, the provisions of this Act shall prevail over the provisions of such other written law."

There had been some other submissions made by the learned Counsel for the Petitioner-Company before the learned Magistrate as averred in its Petition; but the contention or the main submission was that the learned Magistrate had no jurisdiction to make orders under Chapter IX of the Code of Criminal Procedure Act, in view of the provisions of the National Environmental Act.

The Informant-Respondents in reply to the submissions made on behalf of the Petitioner-Company, submitted to Court written submissions (marked P11) and had taken up the position that the Magistrate's Court has jurisdiction to hear, determine, and to make orders, under Chapter IX of the Code of Criminal Procedure Act and its jurisdiction has not been ousted by the National Environmental Act.

It must be noted that the aforesaid submissions were made by the respective parties, not before the Magistrate who made the orders under Section 98(1) and Section 104(1) of the Code dated 18.12.91, but before his successor in office. The said Magistrate by his order

dated 19.3.92 had rejected the objection raised by the Petitioner-Company and the other parties that the Magistrate's Court has no jurisdiction to make orders regarding the application of the Informant-Respondents, and fixed the matter for inquiry under Section 101(1) of the Code of Criminal Procedure Act.

Thereafter the Respondent-Petitioner made an application for Revision to this Court and sought the reliefs mentioned earlier in this order. The Informant-Respondents filed their objections and for the averments contained therein prayed that the application of the Respondent-Petitioner be dismissed with costs. The Aggrieved-Party-Respondents too filed an affidavit and sought the assistance of this Court to have the matter resolved very early so as to enable them to continue in their employment.

At the inquiry before this Court, the primary issue that arose for determination was, whether the Magistrate's jurisdiction to entertain the information of the Informant-Respondents and to make orders under Chapter IX of the Code of Criminal Procedure Act had been ousted by the provisions of the National Environmental Act?

In regard to the said issue, the parties concerned made their submissions both oral and written through their attorneys-at-law.

In the Statement of objections filed by the Informant-Respondents they have taken up the position that contrary to the instructions issued by the Central Environmental Authority as indicated in P5, **the Petitioner-Company had commenced quarrying without an Environmental Protection Licence as required by law.** That no Environmental Protection Licence has been issued by the Central Environmental Authority even at the date of filing their objections and in proof of that fact they had tendered to this Court a letter dated 6.5.92 from the said Authority marked 1R1. They further stated in their statement of objections, that in paragraph 10 of the complaint made to the Magistrate's Court dated 18.12.91, they had clearly stated that though the Authority had only granted a site clearance for the project, it had not issued an Environmental Protection Licence to the Petitioner-Company. (Vide paragraph 7(c), (d) and (e) of the Statement of Objections).

When this matter came up for inquiry on 22.6.92 before this Court, the learned Counsel for the Petitioner-Company submitted a letter from the Central Environmental Authority marked X, dated 19.6.92, and the Environmental Protection Licence issued by the Director-General, Central Environmental Authority dated 19.6.92, marked X(1). The learned Counsel for the Informant-Respondents objected to the said licence being produced at that stage; but this Court accepted the same subject to his objections.

The said licence had been issued to the Petitioner-Company by the aforesaid Authority to be in force from 19th June 1992 to 18th June 1993.

The learned Counsel for the Informant-Respondents submitted to this Court that at the time the learned Magistrate made his conditional order with regard to the removal of nuisance under Section 98(1) of the Code, and granted an injunction under Section 104(1) of the Code restraining the operation of the quarry in question, there was no licence granted by the Central Environmental Authority to the Petitioner-Company.

He also drew the attention of this Court to P5, a letter that has been sent to the Special Commissioner, Kurunegala Pradeshiya Sabha, by the Director, Central Environmental Authority dated 10.7.91 and said that the Petitioner-Company had violated or acted contrary to condition 14 of the said letter. The said condition 14 says:-

**“In accordance with the section 23(A) of the National Environmental Amendment Act No. 56 of 1988, an Environmental Protection Licence shall be obtained by the developer to carry out operations. The developer shall submit an application for the said licence to the Central Environmental Authority one month prior to the commencement of manufacturing operations”.**

He further contended that the Petitioner-Company had acted contrary to Section 23(A) of the National Environmental Act. The said Section reads as follows:-

**“With effect from such date as may be appointed by the Minister by order published in the Gazette, (hereinafter referred to as the**

"relevant date"), **no person shall discharge, deposit, or emit waste into the environment which will cause pollution except –**

- (a) under the authority of a licence issued by the Authority and**
- (b) in accordance with such standards and other criteria as may be prescribed under this Act".**

He therefore contended that the commencement of metal manufacturing operations by the Petitioner-Company without obtaining the most requisite licence from the Authority was an act contrary to the aforesaid provisions of Section 23(A) of the Act, and Condition 14 of P5, and such operations are illegal.

The learned counsel for the Petitioner-Company, when he made his oral submissions admitted, that there is a breach of condition 14 of P5, but contended, that it is not a thing that the Informant-Respondent could complain of a nuisance, as they have done in this case.

It is crystal clear, that at the time the Informant-Respondent complained of a public nuisance to the learned Magistrate under Chapter IX of the Code of Criminal Procedure Act, there was no Environmental Protection Licence issued to the Petitioner-Company by the Central Environmental Authority. Even at the time the learned Magistrate considered the application of the Informant-Respondents, and made orders under Section 98(1) and 104(1) of the Code of Criminal Procedure Act, the Petitioner-Company was without a licence granted by the Authority. Even when the learned Magistrate made his subsequent order dated 19.3.92 (which was delivered on 26.3.92), the Petitioner-Company was still without a licence issued by the Authority. It is only after the application for Revision was filed before this Court, the Petitioner-Company was able to get a licence from the Authority. No doubt the Petitioner-Company had made an application for such a licence on 3.7.91. But making an application does not mean that there was sufficient compliance with Section 32(A) of the Act. The licence issued by the Authority (X(1)) is in force from 19.6.92 to 18.6.93, and it does not relate back to the date of application, i.e. 3.7.91. Therefore, it could be seen that when the Petitioner-Company commenced metal manufacturing operations it was without a licence granted by the Authority in terms of Section 23(A) of the Act.



The necessity to have a licence from the Authority to carry out operations is further established, when this Court considers condition 14 of P5. The said P5 is a letter sent by the Director, Central Environmental Authority, to the Special Commissioner, Kurunegala Pradeshiya Sabha, informing him that the Authority has no objection for the establishment of a project (i.e. a metal quarry, metal crusher and a premix plant) at the proposed site subject to 14 conditions stated therein. One of such conditions is that in accordance with sec. 23(A) of the National Environmental Amendment Act, No. 56 of 1988, the Environmental Protection Licence **shall be obtained by the developer to carry out operations.**

To obtain a licence from the Authority is mandatory both under the provisions of Section 23(A) of the Act, and condition 14 of P5, in order to carry out operations of the quarry in question. But no licence has been obtained by the Petitioner-Company from the Authority as aforesaid, when it commenced the operations of the metal quarry.

The Petitioner-Company relies more particularly on P5, and P6 in order to show that it commenced operations with the leave and licence of various authorities. P3 is a permit granted by the Government Agent Kurunegala under the Explosives Act No. 21 of 1956 to the Petitioner-Company to possess and use the quantity of explosives stated in the said permit. P6, is a letter issued by the Chairman of Kurunegala Pradeshiya Sabha, dated 10.7.91, whereby he had given permission to the Petitioner-Company to have and maintain a metal quarry, and a metal crusher at the proposed site for the year 1991 subject to 16 conditions stated therein. P6 reveals that it had been issued by the Chairman of the Pradeshiya Sabha, in a sequel to the application made by the Petitioner-Company for a permit to have a quarry and a metal crusher for the year 1991. Nowhere in P6, is it stated that permission is given to the Petitioner-Company to have and maintain a metal quarry, and a metal crusher, by virtue of the power delegated to the Pradeshiya Sabha by the Authority. Pure and simple, P6 grants to the Petitioner-Company, the Pradeshiya Sabha's permission, to have and maintain a metal quarry and a metal crusher, at the proposed site as the sabha had been satisfied with the application of the Petitioner-Company. The said documents (P3, P5, P6) and other documents like P7A, P7B and P73 cannot be equated to the licence granted by the Authority as contemplated in Section 23(A) and 23(B) of the Act.

The commencement of operations of the quarry and the metal crusher on the strength of P6 cannot be equated to such commencement of operations after the receipt of a licence granted by the Authority under the provisions of Section 23(A) and 23(B) of the Act. The most fundamental requirement is to get a licence from the Authority, because according to the provisions of the Act to have such a licence is mandatory. This Court is of the view that in order to invoke the provisions of the Act, the Petitioner-Company should possess a licence granted by the Authority. It is only the licence granted by the Authority in terms of the Act which paves the way to the Petitioner-Company to rely upon the provisions of the Act, when it appeared before the learned Magistrate, through its Administration Manager in connection with the application made by the Informant-Respondent, and made its submissions (before the Magistrate) that the learned Magistrate had no jurisdiction to act under Chapter IX of the Code, and make the orders under Sections 98(1) and 104(1) of the Code.

As stated earlier the Petitioner-Company was not possessed of a licence granted by the Authority at the time the learned Magistrate made his orders under Chapter IX of the Code. It did not possess such a licence granted by the Authority when submissions were made on its behalf before the learned Magistrate that his ordinary jurisdiction under Chapter IX of the Code had been ousted by virtue of Section 29 of the Act. Even at the time the learned Magistrate made order rejecting the objection raised by the Petitioner-Company it did not have a licence granted by the Authority. No doubt P6 was in force at that time; but based on that the Petitioner-Company cannot invoke the provisions of the Act. If the Petitioner-Company had the licence granted by the Authority at the time the Informant-Respondents made their application to the Magistrate's Court, and at the time the learned Magistrate made his orders, and when submissions were made on behalf of the Petitioner-Company that the learned Magistrate had no jurisdiction to entertain and make a determination on such application, then it could be held that the Petitioner-Company was entitled to invoke or rely upon the provisions of the Act; but not otherwise. In the circumstances, it could not be held that the learned Magistrate had no jurisdiction to entertain and make orders under Chapter IX of the Code in view of the provisions of the Act; and more particularly in view of Section 29 of the Act.

Even under P6, the Petitioner-Company had been allowed to have and maintain a quarry and a metal crusher and to carry out operations, strictly according to the conditions stated therein. If a condition is violated or conditions are violated and such violation becomes a nuisance to the people living in the neighbourhood, would it then not be possible for such people to make an application under the provisions of Chapter IX of the Code to abate such nuisance? This Court is of the view that they can.

According to 1R16, an Informant-respondent (1st Informant-respondent) had written to the Director of Central Environmental Authority complaining that the metal crusher operates till 10 p.m., and as a result it has become a nuisance to the people living in that area. The same Informant-respondent had written a letter (1R17) to the Chairman, Pradeshiya Sabha complaining that the metal crusher operates till late at night. In fact according to condition 2 of P6, the operations could only be carried out between 6 a.m. and 6 p.m., and this requirement has to be compulsorily adhered to. The aforesaid 1R16 and 1R17 reveal that the said condition had been violated. An examination of the affidavits submitted to the Magistrate's Court (marked and produced 1R3 to 1R8) by the Informant-respondent reveal that they were complaining of a nuisance that arose as a result of: an environmental pollution created due to the commencement of operations by the Petitioner-Company. This environmental pollution had taken place at a time when the petitioner-Company had not obtained an Environmental Protection Licence from the relevant Authority under the provisions of the Act. In other words when it had acted contrary to condition 14 of P5. 1R16 reveals that on behalf of the affected parties (people who suffered due to the environmental pollution) the 1st named Informant-respondent had complained about this environmental pollution to the Director-General of the Central Environmental Authority to take necessary action. At last the Informant-respondents had gone before the Magistrate's Court of Kurunegala and sought relief under Chapter IX of the Code. This in short is the history of this case.

All the aforesaid steps have been taken at a time when the Petitioner-Company did not possess a licence issued by the Authority under the provisions of the Act. Under such circumstances, the learned Magistrate is not prevented from making orders under

Chapter IX of the Code if he is satisfied with the information furnished by the Informant Respondents regarding the nuisance which they complained of. **The learned Magistrate had acted under the provisions of Chapter IX of the Code, at a time when the Petitioner-Company could not invoke or rely upon the provisions of the Act as it had not got the required licence from the Central Environmental Authority.** In the circumstances, it cannot be held that the learned Magistrate had made the orders in question without jurisdiction to do so. Also for the reasons stated above, this Court cannot agree with the contention of the learned Counsel for the Petitioner-Company, that although there was a breach of condition 14 of P5, yet it is not a ground for the Informant-Respondents to have complained of a nuisance as done by them in this case.

The Petitioner-Company is now in possession of the licence granted by the Authority as contemplated in Section 23(A) and 23(B) of the Act. It could now go before the learned Magistrate and place it before him, and make submissions based on the provisions of the Act, and would be able to ask him to annul the orders, made by him. For that, the opportunity is already afforded by the learned Magistrate by fixing the matter for inquiry under Section 101 of the Code of Criminal Procedure Act.

In the aforesaid circumstances, I do not think that this Court should exercise its revisionary powers to revise the orders made by the learned Magistrate, and therefore the application of the Petitioner-Company for revision is hereby dismissed with costs.

In view of the aforesaid decision arrived at by this Court on the basis of the reasons stated earlier in this order, this Court is of the view that the necessity does not arise at this stage to consider other matters raised at this inquiry by the respective parties (including the Added-Party Respondents) to this application except one matter raised by the Informant-respondents.

The learned Counsel for the Informant-respondents submitted to this Court that the petitioner-Company has failed and neglected to file 17 documents marked along with its revision application. He says that these documents marked P1 to P17 by the Informant-Respondents in the Magistrate's Court of Kurunegala, have been

suppressed by the Petitioner-Company in violation of Rule 46 of the then Rules of the Supreme Court and the current Rule 3 of the Court of Appeal. He cited a few decisions of the Supreme Court and the Court of Appeal to show that this Court has the power to dismiss the revision application of the Petitioner-Company *in limine* for non-compliance of the said Rule. Rule 46 of the Supreme Court requires that an application for Revision should be made by way of petition and affidavit accompanied by originals of documents **material to the case** or duly certified copies thereof in the form of exhibits.

In a more recent case namely *Kiriwanthe and Another v. Navaratne and Another* (S.C. Application No. 628/88) the Supreme Court held that all these rules must be complied with, and the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance is a matter falling within the discretion of the Court to be exercised after considering the nature of the default, as well as the excuse or explanation thereof, in the context of the object of the particular Rule.

The learned counsel for the Petitioner-Company submitted to this Court that the issue before this Court is, to find out whether the Magistrate had no jurisdiction to entertain the information of the Informant-respondents, having regard to the provisions of the National Environmental Act. To decide that issue, he contended, that the documents referred to by the learned counsel for the Informant-respondents are not material, and are unnecessary. Therefore, he said that those documents were not filed along with the application for revision. This Court agrees with the said contention of the learned Counsel for the Petitioner-Company and considering the purpose of the said Rule 46 and the decision of *Kiriwanthe's* case. I am of the view that there is a substantial compliance of this rule by the petitioner Company when it filed its application before this Court. In the circumstances, the application for revision should not be dismissed *in limine*. But for the reasons stated earlier, the application for revision is hereby dismissed with costs.

*Application dismissed.*