

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

In the matter of an Application for Special Leave to Appeal from the Judgement pronounced on 08.02.2018 by the High Court of the North Western Province Holden in Kurunegala in High Court Appeal No. 48/2012 in terms of Section 9 (a) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 read with Article 154P of the Constitution and the Supreme Court Rules 1990

SC. Appeal No.19/2021

SC/Spl./L.A Case No. 55/2018

HC Kurunegala Appeal No 48/2012

MC Mahawa Case No. 54127

1. M. Jagath Keerthi Bandara

Public Health Inspector/Authorized
Officer

Nanneriya

Complainant

Vs.

1. Nilanthi Distributors

Yapahuwa Junction

Mahawa

2. Coca-Cola Beverages Company

Tekkawatta

Biyagama

Accused

AND BETWEEN

Coca-Cola Beverages Sri Lanka Ltd
Tekkawatta
Biyagama

2nd Accused- Appellant

Vs.

1.M.Jagath Keerthi Bandara
Public Health Inspector/Authorized
Officer
Nanneriya

Plaintiff Respondent

Hon. Attorney General
Attorney General's Department
Colombo 12

Respondent

AND NOW BETWEEN

Coca – Cola Beverages Sri Lanka Ltd
Tekkawatta
Biyagama

2nd Accused-Appellant-Petitioner

Vs.

1.M. Jagath Keerthi Bandara
Public Health Inspector/Authorized
Officer
Nanneriya

Complainant-Respondent- Respondent

Hon. Attorney General
Attorney General's Department
Colombo 12

Respondent-Respondent

Nilanthi Distributors
Yapahuwa Junction
Mahawa

1st Accused-Respondent-Respondent

BEFORE: Buwaneka Aluwihare, PC., J
A.H.M.D Nawaz, J
Mahinda Samayawardhena, J

COUNSEL: Gamini Marapana, PC., with Navin Marapana, PC., Uchitha
Wickremasinghe and Thanuja Meegahawatta for the 2nd Accused
Appellant-Appellant

Ms. Induni Punchihewa, SSC for the Respondent

ARGUED ON: 08.07.2021

DECIDED ON: 13.09. 2023

Judgement

Aluwihare, PC.,J

- 1) The 2nd Accused -Appellant -Petitioner Appellant [hereinafter referred to as the 2nd Accused] was charged before the magistrate's court of Mahawa for having manufactured and distributed to the 1st Accused -Respondent-Respondent [herein after the 1st Accused] a bottle of 'Coca-Cola' containing impurities and/or foreign matter, in violation of Section 2(1)(b) read with Section 2(1)(a) of the Food Act No.26 of 1980 as amended, an offence punishable under Section 18(1)(a) read with Section 14(1)(a) of the said Act.
- 2) The 2nd accused was found guilty by the learned magistrate after trial and accordingly a fine of Rs.10,000/- was imposed with a default sentence of 6 months imprisonment.
- 3) Aggrieved by the conviction and the sentence, an appeal was lodged before the High Court and the learned High Court Judge delivered judgement affirming the conviction and the sentence and dismissed the appeal.
- 4) The 2nd Accused sought special leave to appeal from this court against the judgement of the High Court and special leave was granted on the following question of law;

“Has the learned High Court Judge erred in failing to consider that the Mahawa Magistrate's Court is not vested with the jurisdiction to hear and determine the case against the 2nd accused appellant-petitioner?”

Factual Background

- 5) On 01.03.2009, Public Health Inspector [of Nan-Neriya] detected a [sealed] bottle of Coca-Cola, a product of the 2nd Accused establishment, containing impurities and/or foreign matter. After attending to the preliminary investigations, the bottle of Coca -Cola was forwarded to the Government Analyst. The Analyst, upon analyzing the contents, had detected foreign matter, which has been referred to as ‘කලු පැහැති ලප සහිත සුදු පැහැති අවලම්බිත ආගන්තුක ද්‍රව්‍යය’ suspended impurities in the liquid and had expressed the opinion that the contents were not fit for human consumption. It should be noted that what led to the detection was the

information provided by a person in charge of running a canteen who had observed that the bottle, which had been supplied to her by the distributor of Coca-Cola in the area, had some foreign matter in it.

- 6) After the investigations, both the distributor of Coca-Cola [the 1st accused] and the producer [the 2nd Accused] were charged before the magistrate's court. The 1st accused pleaded guilty, whereas the 2nd accused contested the charge.
- 7) The only legal issue that came up for consideration before us was whether the Magistrate's Court of Mahawa had jurisdiction to hear and determine the charge against the 1st Accused.
- 8) The learned President's Counsel argued that the charge against the 2nd Accused was, for manufacturing a bottle of Coca-Cola that contained impurities. It was pointed out that the manufacturing of the bottle of Coca-Cola concerned, took place at Biyagama Thekkawatte, which is not within the local limits of the magistrate's Court of Mahawa. The State did not dispute this contention; thus, it was common ground that Biyagama, Thekkawatte, was not within the local limits of the Mahawa Magistrate's court.
- 9) It was the contention on behalf of the 2nd Accused that the evidence led at the trial had clearly established that the seal of bottle of Coca-Cola was intact and the evidence showed that it had not been opened. Thus, it was argued that no consequences of the offending act alleged, flowed to the local jurisdiction of the Mahawa Magistrate's Court. It was further contended by the learned President's Counsel that Section 129 of the Code of Criminal Procedure Act No. 15 of 1979 as amended [hereinafter the 'CPC'] would have applied if the bottle of Coca-Cola was opened and consumed, as one could argue that the consequences of the act of manufacturing had ensued or flowed to the 'act of consuming' thereby, by operation of law, jurisdiction to try the offence would have vested with both; the magistrate's court within the local limits of which the act of manufacturing took place and also with the magistrate's court within whose jurisdiction such consequence has ensued .

This can be easily gleaned from the illustration (a) to Section 129 of the CPC;

A is wounded within the local limits of the jurisdiction of the Magistrate's court of X and dies within those of the Magistrate's Court of Z; the offence of culpable Homicide of A may be inquired into by the Magistrate's Court of either X or Z. [emphasis added]

The contention of the learned President's Counsel, in my view, is correct and Section 128 of the CPC requires the offence to be inquired into and tried by the court within the local limits of whose jurisdiction it was committed. The learned State Counsel also did not dispute this position. The learned President's Counsel in his submission relied on Section 9(a) and Section 128(a) of the CPC and argued that a Magistrate's Court shall only try offences committed wholly or in part within its local limits.

- 10) The principal issue before this court, however, is whether the lack of jurisdiction on the Mahawa Magistrate's Court to try the offence, as argued by the learned President's Counsel, is 'patent' or 'latent'. In determining the issue, it would be necessary to consider the submission made by the learned President's Counsel regarding the territorial jurisdiction of a Magistrate's Court, in the backdrop of the applicable provisions of the CPC in conjunction with the jurisprudence.
- 11) The contention of the learned State Counsel was that, ordinarily the offence with which the 2nd accused was charged, is one that is triable by a magistrate and as such there was no lack of patent jurisdiction, and the *issue of latent jurisdiction* must be decided by the application of the legal principles and the relevant statutory provisions.
- 12) The contention of the learned President's Counsel, on the other hand, was that the Mahawa Magistrate's Court lacked patent jurisdiction. The learned President's Counsel also relied on an observation made by the Supreme Court in the case of **King vs. Perera** 19 N.L.R.310. The Court observed [at pg. 312]

“Another objection was taken to the ruling of the District Judge, namely, that the accused, having pleaded in the District Court, could not afterwards take objection to the jurisdiction in consequence of the provisions of section

73 of the Courts Ordinance. I think that this contention is not sound in the present case. The Criminal Procedure Code by section 12 provides that no District Court shall take cognizance of any offence, unless the accused person has been committed for trial by a Police Court duly empowered in that behalf, or unless the case has been transferred to it from some other Court for trial by order of the Supreme Court”.

(13) **King vs. Perera** [Supra] was a case where the District Court tried the accused on a committal by the Police Court, and the issue was if the committal was not made by a competent Police Court, whether the District Court could have assumed jurisdiction. In view of the specific wording in Section 12 of the then Criminal Procedure Code, the Supreme Court held that for the District Court to assume jurisdiction, the committal must be from a ‘Police Court duly empowered to commit’ an accused. I am of the view that the observation of their Lordships in the case of **Perera** [supra] has no application to the instant case for the reason that none of the provisions considered by the Supreme Court in that case would be applicable to the instant case before us, but statutory provisions altogether different to that of Section 12 of the earlier CPC, which provisions I have referred to later, in this judgement.

14) Quoting an observation made by his Lordship Justice Drieberg in **King vs. Ludowyke** 36 NLR 397 at p. 398, the learned President’s Counsel sought to establish that the learned Magistrate of Mahawa lacked the territorial jurisdiction to hear this case. An extract, however, of the quoted judgment at p. 398 must be highlighted.

“Every offence must ordinarily be tried by a Court within the local limits of whose jurisdiction it was committed... A departure from this rule should only be permitted in exceptional circumstances.”

Therefore, it necessarily must be understood from his Lordship Justice Drieberg’s observation that exception may be permitted, that he too, was

aware of the fact that even if the original court lacked territorial jurisdiction, such defect is not fatal in all instances.

The learned President's Counsel also referred to the observation made by Justice Middleton in the case of **Halliday v. Kandasamy** 14 N.L.R 493;

Per Middleton J.-“ This application of section 423 must by no means be considered to obviate the requirements of the law that criminal proceedings should be originally instituted in the Court having proper and competent local jurisdiction.”

- (15) In the case of **Halliday** [supra] the court, while affirming the conviction, held that the Police Court of Nuwara Eliya had no jurisdiction to try the case. The conviction was affirmed as the accused was not prejudiced in his defence.
- (16) In the case before us, neither party had disputed the fact that the Magistrate's court is vested with the jurisdiction to try the impugned offence, nor was the issue of jurisdiction raised in the course of the proceedings before the magistrate.
- (17) **Therefore, the question which warrants determination is: If an accused is tried for an offence before a forum which is vested with 'forum jurisdiction' to try such an offence but if such offence had taken place outside the local limits of that forum, would the judgement be a nullity?**
- (18) It is trite law that an objection to the jurisdiction of a court must be raised by a party at the earliest possible opportunity. It would be pertinent at this point to consider the applicable provisions of the law.
- (19) Section 39 of the Judicature Act states that; -

“Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court but such court shall be taken and held to have jurisdiction over such, proceeding or matter;

Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court having no jurisdiction intentionally

and with previous knowledge of the want of jurisdiction of such court, the judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void.”

(20) Section 39 of the Judicature Act must be examined in the light of patent and latent want of jurisdiction. In his monumental work, **The Law of Evidence, [Volume 1, 2nd Edition, 2012, Pages 131 & 132]** E.R.S.R. Coomaraswamy, relating to Section 39 of the Judicature Act states as follows;

“Can a party by admitting expressly or by implication the jurisdiction of a court confer Jurisdiction on the court where none exists? Spence Bower and Turner say that not even plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal, and the same results cannot be achieved by conduct or acquiescence by the parties. These cases are described as cases of a total or patent want of Jurisdiction.

On the other hand, where nothing more is involved than a mere irregularity of procedure or for example, non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that if one of the parties be allowed to waive the defect, or to be estopped by conduct from setting it up, no new Jurisdiction is thereby impliedly created and no existing jurisdiction extended beyond its existing boundaries, the estoppel will be maintained and the court will have jurisdiction. These are cases of partial or latent want of jurisdiction.... In Sri Lanka also, this distinction between a patent want of jurisdiction and a latent want of jurisdiction has been drawn.

.... It is submitted that the disability laid down by section 39 can only be availed of in case of partial or latent want of jurisdiction and not of a total or patent want of jurisdiction, though the section appears to be absolute in its terms.” [Emphasis added].

(21) It was held in the case of **Don Tilakaratne vs. Indra Priyadarshanie Mandawala** (2011) 2 SLR 260-

“...even on restrictive interpretation of section 39 of the Judicature Act, the petitioner is estopped in law from challenging the jurisdiction of the Magistrate Court as the petitioner has conceded the jurisdiction of the Court and his failure to object at the earliest possible opportunity implies a waiver of any objections to jurisdiction.”

- (22) These observations indicate that Section 39 of the Judicature Act refers only to instances where there is a latent want of jurisdiction, which can be cured by the waiver, acquiescence, or inaction of the parties.
- (23) A similar opinion was expressed in the case of **Navaratnasingham vs. Arumugam** (1980) 2 Sri. L.R.1- and the court observed; *“where a matter is within the plenary jurisdiction of the Court if no objection is taken, the court will then have jurisdiction to proceed on with the matter and make a valid order.”*
- (24) Our courts have drawn a distinction between patent want of jurisdiction and latent want of jurisdiction.
- (25) In **P. Beatrice Perera vs. The Commissioner of National Housing** 77 NLR 361 at page 366, the distinction between patent and latent want of jurisdiction was discussed as follows,

“... Lack of competency may arise in one of two ways. A court may lack jurisdiction over the cause or the matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the court. Both are jurisdictional defects; The first mentioned of these is commonly known in the law as ‘patent’ or ‘total’ want of jurisdiction or a defectus jurisdictionis and the second a ‘latent’ or ‘contingent’ want of jurisdiction or defectus triationis. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit the parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new

jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are non coram iudice and the want of jurisdiction is incurable. In other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction...”

- (26) This means that if a court labours under a patent want of jurisdiction, any objection to the assumption of such jurisdiction can be raised before a higher court (either in Appeal or Revision), even if the party raising that objection has failed to do so in the first instance. (**Kandy Omnibus Co Ltd vs. T.W. Roberts** (1954) 56 NLR 293)
- (27) However, “*Where a latent lack of jurisdiction exists, a party must raise these procedural defects at the earliest opportunity as acquiescence, waiver or inaction on the part of the party will estop that party from raising the objections in later proceedings.*” – **Koraburuwane Hetitiarachchige Siri Bandula vs Koraburuwane Hetitiarachchige Kithsiri Mahinatha and others.** CA (PHC) 152/2013 at page 7.
- 28) The territorial Jurisdiction of the Magistrate’s Court-is referred to in Section 128 of the Criminal Procedure Code, which stipulates;
- (1) *Every offence shall ordinarily be inquired into and **tried by a court within the local limits of whose jurisdiction it was committed.***
 - (2) *Any Magistrate’s Court within the local limits of the jurisdiction of which an accused may be or be found shall have jurisdiction respectively in all cases of offences otherwise within their respective jurisdictions which have been committed on the territorial waters of Sri Lanka.*
 - (3) *An offence committed on the territorial waters of Sri Lanka to which subsection (2) is not applicable or an offence committed on the high seas, or on board any ship or upon any aircraft may be tried or inquired into by the Magistrate’s Court of Colombo if it otherwise has jurisdiction or on indictment by High Court.*

29) It is settled law that the lack of territorial jurisdiction of a court is a latent lack of jurisdiction. In the case of **Colombo Apothecaries Ltd. and Others vs Commissioner of Labour** (1998) 3 SLR 320, it was held that “*The lack of territorial jurisdiction of court is a latent lack of jurisdiction curable by waiver or conduct of the party seeking to attack the order of court on lack of jurisdiction.*”

30) **Spencer Bower on the Law Relating to Estoppel by Representation** – 1966, 2nd Edition, page 308, states;

“So too when a party litigant, being in a position to object to that the matter in difference is outside the local, pecuniary or other limits of jurisdiction of the tribunal to which his adversary has resorted, deliberately elects to waive the objection, and to proceed to the end as if no such objection existed, in the expectation of obtaining a decision in his favour, he cannot be allowed, when this expectation is not realized, to set up that the tribunal had no jurisdiction over the cause or parties.”

31) On the other hand, for an accused to succeed in appeal, the illegality or the irregularity relied upon must be of a nature which meets the threshold laid down in the proviso to Article 138 (1) of the Constitution, which states; that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. In **Sunil Jayarathna vs. Attorney General** (2011) 2 Sri LR 91, the Supreme Court, in applying the proviso to Article 138 (1) of the Constitution observed that;

“Unless there is some grave miscarriage of justice it would not be appropriate to interfere with the judgment of the trial judge who enters judgment after careful consideration of the first-hand evidence put before her to which the Judges of the Appellate Court would not have the ability to witness.”

32) This principle, particularly in relation to territorial jurisdiction, is reflected in Section 434 of the Criminal Procedure Code which reads ;

“Any judgment of any criminal court shall not be set aside merely on the ground that the inquiry, trial, or other proceedings in the course of which it was passed took place in the wrong local area unless it appears that such error occasioned a failure of justice.”

- 33) If a Magistrate is empowered by law to try an offence but the Court lacks territorial jurisdiction to entertain the action, then it amounts to latent lack of jurisdiction as it is a procedural error. In such an instance it is then open for the accused to raise an objection at the earliest possible opportunity. If he fails to do so, the court will assume jurisdiction. The accused cannot succeed by raising an objection with respect to territorial jurisdiction on appeal, unless it is satisfied that the thresholds laid down either in Article 138 (1) proviso to the constitution [*prejudiced the substantial rights of the parties or occasioned a failure of justice*] or Section 434 of the CPC [*error occasioned a failure of justice*] are met.
- 34) It does not seem not possible to tie up the want of territorial jurisdiction with a court’s failure to administer justice. It is difficult to make a convincing argument that there has been a miscarriage of justice because the action was instituted in a Magistrate’s Court in the local limits of which the offence was NOT committed. As observed in **Sunil Jayarathna vs. Attorney General** [supra], a trial judge makes a decision after careful consideration of the first-hand evidence put before him. This is even more evident in the case of a Magistrate who plays an active role in a criminal trial to ascertain the truth.
- 35) Therefore, an argument brought up at a later stage of the action or even on appeal that a Magistrate’s Court did not have the territorial jurisdiction to entertain the action cannot lead to the setting aside of a judgment delivered after careful deliberation by a Magistrate empowered by law to try that particular offence. The failure to comply with procedural law and the institution of an action in a court empowered by law to adjudicate the issue although it does not have territorial jurisdiction to entertain it, amounts only to latent lack of jurisdiction. If no objection is raised, as in the case before us, at the earliest possible opportunity, then it is deemed to have been waived and the court will assume jurisdiction.

For the reasons set out above, I answer the question of law in the negative and accordingly the appeal is dismissed.

Appeal Dismissed

JUDGE OF THE SUPREME COURT

A.H.M.D NAWAZ J

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMMAYAWARDHENA J

I agree.

JUDGE OF THE SUPREME COURT