

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

CA (PHC) APN 38/2012

HC Ratnapura RA 11/2010

MC Ratnapura 21487

D S Jayawardena,
271, Makumbura,
Pannipitiya

K K Nishantha,
Umangedara,
Ellagawa
Respondent-Petitioner-
Petitioners.

Vs.

L Karunaratna,
Kuttikanda,
Dumbara,
Manana

Petitioner-Respondent-
Respondent

G A Gunawardena,
5th Mile Post,
North Karandana,
Karandana

Intervenient-Respondent-
Respondent
Respondents.

Before : A.W.A. Salam, J.
Sunil Rajapaksha, J.

Counsel : Kumar Dunusingha for the Respondent-Petitioner-Petitioners and I M Wijebandara for the Petitioner-Respondent-Respondent.

Argued on : 21.10.2013

Decided on : 07.03.2014

A W A Salam, J

This is a revision application filed by the 1st and 2nd respondent-petitioner-petitioners (hereinafter referred to as the "petitioners") to revise and set aside the judgment of the learned High Court Judge dated 28 February 2012. The learned High Court Judge entered the said judgment, after the petitioners were heard in support of a revision application challenging the validity of an order made by the learned Magistrate exercising the jurisdiction as a Judge of the Primary Court under Section 69 of the Primary Court Procedure Act No 44/1979.

The background to the revision application is that the 1st respondent-respondent-respondent (hereinafter referred to as the "respondent") filed an application in the Magistrate's Court under part VII of the Primary Court Procedure Act, complaining of an obstruction of a roadway which he claimed as being entitled to use, by reason of his having previously enjoyed the right to use the same for nearly 50 years. He alleged that the roadway was obstructed by the petitioners denying him of the use of the said road. The learned Magistrate having inquired into the dispute held that the respondent and the intervenient-respondent-respondent are entitled to use the roadway which

had been obstructed by the petitioners by erecting a barbed wire fence. Against the order/determination of the learned Magistrate the petitioners invoked the revisionary jurisdiction of the Provincial High Court to challenge its validity. The learned High Court Judge by his judgment dated 28 February 2012 held *inter alia* that the revision application filed by the petitioners is not consistent with the rules 3 of the Supreme Court as the purported affidavit annexed to the petition to invoke the revisionary jurisdiction of that court was patently defective in that there was no proper *jurat*. The purported affidavit annexed to the petition had neither been affirmed nor has it been sworn to by the deponent. The learned High Court Judge in his judgment under consideration cautiously analysed the case laws relating to the defect in the affidavit and came to the conclusion that the said defect is incurable and therefore no purpose would be served by returning the affidavit for due compliance of the law. In the circumstances, he dismissed the revision application in the first instance. The respondent had submitted before the learned High Court Judge that the defect is curable and he ought to have returned the affidavit or called upon the respondents to regularise the affidavit by inserting the correct *jurat* according to law. I am not inclined to accept this position of the respondent as the dismissal of the revision application by the learned High Court Judge in the first instance due to the defect in the affidavit referred to above, was no obstacle in the way of the petitioners to have filed a subsequent revision application, if they were so interested, to challenge the impugned order/determination of the learned Magistrate. Therefore, even if the learned High Court Judge has not given an opportunity to the petitioners to cure the defect in

the affidavit, yet they were not prejudiced by the refusal to issue notice on the revision application as they could have very well filed a subsequent application.

In any event, the petitioners have failed to aver in the revision application filed in this Court, as to why they did not prefer an appeal against the judgment of the learned High Court Judge. Further, they have not pleaded any exceptional circumstances acceptable to this Court against the impugned judgment of the learned High Court Judge to invoke the extraordinary revisionary jurisdiction of this Court.

In the circumstances I see no reason to interfere with the judgment that is impugned in this application. Accordingly, the revision application filed by the petitioners is dismissed subject to costs.

Judge of the Court of Appeal.

Sunil Rajapakha, J

I agree

Judge of the Court of Appeal

NR/-