In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

C A (PHC) APN 117/2013

HC Galle HCRA 32/13

Ananda Sarath Paranagama

PARTY OF THE 2ND PART- PETITIONER-PETITIONER

vs.

Dhammadhinna Sarath Paranagama

And

Kamitha Aswin Paranagama

PARTIES OF THE 1ST PART-RESPONDENT RESPONDENT

OIC, Habaraduwa Police Station,

INFORMANT-RESPONDENT-RESPONDENT

Before: A.W.A.Salam, J (P/CA) and Sunil Rajapaksha, J

Counsel: Dr Sunil Cooray with R. M Perera for the 2nd party-petitioner-petitioner and Janaka Balasuriya for the parties of the 1st respondent-respondents.

Argument on: 10 February 2014
Decided on: 07 August 2014

A.W.A.SALAM, J (P/CA)

This application is aimed at revising an order of the Provincial High Court entered in the exercise of the revisionary jurisdiction vested in it under Article 154 P(3)(b) of the Constitution. A narrative description of the main events preceded the instant revision application, briefly are as follows; Proceedings began under Chapter VII of the Primary Court Procedure Act (hereinafter referred to as the "Act"), before the learned Magistrate (who is deemed to be a Judge of the Primary Court[1]) upon a dispute referred for adjudication under Section 66(1) (a) regarding the obstruction of a pathway. The parties to the dispute were three siblings. The learned Magistrate declared the parties of the 1st part-respondents-respondents (referred to in this judgment as the "respondents") as being entitled to use the pathway of 17 feet in width.

Based on this decision, the learned Magistrate directed the removal of the obstruction that was constructed across the pathway so as to facilitate the use of it.

Discontented with the determination, the party of the 2nd Part- Petitioner-Petitioner (referred to in the rest of this judgment as the "petitioner") sought to invoke the revisionary jurisdiction of the Provincial High Court. Upon hearing the parties as to the maintainability of the revision

[1] Vide Section 57 of the Judicature Act

application, the High Court refused to entertain the same, on the ground that the petitioner has failed to adduce exceptional/special grounds. The instant revision application has been filed thereafter, with a view to have the impugned order refusing to entertain the revision application set aside and revised *inter alia* on the following grounds.

1. The impugned refusal to entertain the revision application is contrary to law and the facts of the case.
2. The learned High Court Judge has failed to consider, evaluate, and give reasons for not considering or accepting as exceptional circumstances, the several matters set out in paragraphs 10 and 11 of the said petition.
3. No other remedies are available to the petitioner to prevent the wall being demolished although the High Court had set out as the second ground that there are other remedies available;
4. No reasons whatsoever are given in the said judgment for dismissing the revision application on the two grounds stated therein.

When an alternative remedy is available the type of restrain imposed on the exercise of the revisionary powers, had been discussed in several cases both in our Courts and other jurisdictions. Suffice it to discuss the principle embodied in the judgment of the well-known case of Rustom Vs Hapangama [1978-79-80 SLR Volume 1V Page 352] where it is laid down that the revisionary powers of a Court will not be invoked, if an alternative remedy is available, unless the existence of special circumstances are

urged and established necessitating the indulgence of Court to exercise its powers in revision.

The term 'revision' means the examination of a decision with a view to correction. The material points that may arise for consideration in a revision application *inter alia* are whether a subordinate Court has exercised jurisdiction which is not vested in it in law or whether it has failed to exercise such jurisdiction which is so vested or has acted in the exercise of the jurisdiction illegally or in excess of jurisdiction or with material irregularity. In other words, strictly speaking a revision application calls for the correction of errors concerning illegalities and patent irregularities which are of such magnitude that call for the discretionary powers of Court to correct them.

Hence, it is the duty of a High Court and the Court of Appeal vested with the revisionary jurisdiction under the Constitution, to ensure that the revisionary powers of such Courts are not invoked as a matter of course, at the expense of a successful party in the original Court having to needlessly wait for the fruits of his victory to be reaped.

Inasmuch as the facts of this case are concerned, the trend of authority not being in favour of the exercise of the discretionary remedy unless upon the applicant showing the existence of special circumstances warranting the clemency of Court to exercise the revisionary jurisdiction, the petitioner was obliged to adduce special or exceptional

circumstances. This is a condition precedent to entertain the revision application by the High Court.

Similarly, as there is a right of appeal to this Court against the refusal of the learned High Court Judge to entertain the revision application, the petitioner has to establish exceptional circumstances to have the impugned order revised by this Court as well.

It was contended on behalf of the petitioner that the High Court Judge without giving any reasons by a judgment of two lines refused to issue notices and dismissed the application stating that there were no exceptional circumstances on which its revisionary jurisdiction could be exercised. He complains that this has culminated in a miscarriage of justice.

On a consideration of the practice ordinarily adopted by Courts in disposing revision applications at the threshold stage, it is manifest that the contention raised by learned Counsel is wholly untenable and devoid of merits. In other words, in an order refusing to entertain an application, the High Court Judge can most of the time able to state that there are no exceptional circumstances that warrant the entertainment of the application and no more. He is not obliged to give details regarding the existence or nonexistence of special or exceptional circumstances. In passing it might be of some relevance to mention that this is the procedure adopted even in the Supreme Court when application for special leave is refused.

The main ground alleged in the revision application made to the High Court was that the learned Magistrate had not given his mind as to the proof required of the right in question in a Section 66 matter, as the action is commonly known. It was submitted on behalf of the petitioner that the respondents were obliged to establish in the Magistrate's Court the entitlement to use the pathway by proof of user for an uninterrupted period of 10 years adverse to the petitioner's rights. This ground alleged as a special circumstance warranting the intervention of the High Court by way of its revisionary powers should fail *inlimine* as there is no requirement under Chapter VII – Section 69 to establish the entitlement in the same manner as is usually proved in a civil case.

The ingredients necessary to be proved to obtain a declaration of 'entitlement' as contemplated in Section 69 of the Act will be discussed at a different stage.

On a consideration of the material available, it appears to me that the petitioner has failed to impress upon this Court that there are exceptional circumstances to warrant the intervention of this Court by way of revision. Therefore, the endeavour made by the petitioner to involve this Court in the correction of the purported error committed by the High Court should fail.

The learned Counsel for the petitioner has submitted that a glaring error of law has been committed by the learned Magistrate when failing to address his mind as to whether

one brother has used the right of way over the other brother's land adversely to the latter, and for a period of not less than 10 years. The glaring error said to have been committed in coming to the conclusion as to the existence of the pathway followed by the order of demolition to remove the impediment, according to the petitioner, has ended up in serious miscarriage of justice.

It is elementary principle of law that under Chapter VII of the Act, when the dispute relates to the possession of an immovable property, the Judge of the Primary Court is duty-bound under Section 68 to restrict to the issue of actual possession as at the date of filing the information, except where a person who was in possession of the subject matter is dispossessed within a period of two months immediately preceding the date on which information under Section 66 was filed.

Unlike in the case of a dispute relating to possession of immovable property, no timeframe has been laid down as to the length of time during which the right should have been enjoyed in relation to the purported entitlement. In resolving such a dispute the Judge of the Primary Court is expected to determine as to who is entitled to the right which is the subject of the dispute and make an order under Section 69(2).

The marginal note to Section 69 of the Act reads as "Determination and order of Judge of the Primary Court when dispute is in regard to any other right". For purpose

of ready reference, Section 69 of the Act is reproduced below...

> (1) Where the dispute relates to any right to any land or any part of a land, other than the right to possession of such land or part thereof, the Judge of the Primary Court shall determine as to who is entitled to the right which is the subject of the dispute and make an order under Sub-Section (2).
>
> (2) An order under this Sub-Section may declare that any person specified therein shall be entitled to any such right in or respecting the land or in any part of the land as may be specified in the order until such person is deprived of such right by virtue of an order or decree of a competent Court, and prohibit all disturbance or interference with the exercise of such right by such party other than under the authority of an order or decree as aforesaid.

The question that arises for determination at this stage is whether a party claiming a right to any land other than the right to possession should establish his right precisely as he is expected to do in a civil case or whether he could succeed in obtaining the declaration as contemplated in Section 69, merely by proving that he enjoyed the right as at the time when the dispute arose. It is to be understood that the proof of the acquisition of the right is totally different from proving the enjoyment/existence of the right at the time the dispute arose.

In dealing with the nature of the right, a Judge of the Primary Court is expected to adjudicate under Section 69

of the Act, Sharvananda, J (later Chief Justice) in the case of Ramalingam Vs Thangarajaha 1982 Sri Lanka Law Reports - Volume 2 , Page – 693 stated that in a dispute in regard to any right to any land other than right of possession of such land, the question for decision, according to Section 69(1), is who is entitled to the right which is subject of dispute. The word "entitle" here connotes the ownership of the right. The Court has to determine which of the parties has acquired that right or IS ENTITLED FOR THE TIME BEING TO EXERCISE THAT RIGHT. In contradistinction to Section 68 of the Act, Section 69 requires the Court to determine the question as to which party is entitled to the disputed right preliminary to the making of an order under Section 69(2). (Capitalization is mine)

According to the decision in Ramalingam (supra) the Judge of the Primary Court has two options, in deciding as to which of the parties should be declared entitled to the right. Since the word "entitle" as used in Section 69 implies ownership of the right, the Judge of the Primary Court could determine as to who in fact has acquired the disputed right. In the larger sense it means any kind of proof of the acquisition of the disputed right as envisaged by any law dealing with the ingredients to be proved. For instance, if the disputed right is the existence of a right of way, the party who desires the Court to pronounce his entitlement may establish the uninterrupted and undisturbed use of the pathway, by a title adverse to or

independent of the owner that is to say, a use of the pathway unaccompanied by any payment from which an acknowledgment of a right existing in another person would fairly and naturally be inferred for ten years previous to the filing of the information under Section 66 of the Act.

This may not be possible in every case relating to a dispute over a right concerning an immovable property, as the proceedings under Chapter VII of the Act is required to be held in a summary manner, concluded within three months of the commencement of the inquiry and the order under Section 68 or 69 as the case may be, having to be delivered within one week of the conclusion of the inquiry. Further, under Section 72 of the Act before the pronouncement of the order, the material on which the Judge of the Primary Court may act are limited to certain types of material unlike in a civil case where parties have the option to lead evidence of any volume as long as it is admissible and relevant to the facts in issue and facts relevant to the facts in issue.

It is now trite law that in an inquiry under Chapter VII of the Act, adducing evidence by way of affidavits and documents is the rule and oral testimony is an exception to be permitted only at the discretion of the Judge. The discretion is hardly exercised to permit oral testimony and generally not granted as a matter of course. In such an instance it is not only impracticable but beyond the ability

of a party to establish a right as is usually accomplished in a civil Court under the regular procedure.

Although in certain limited number of disputes, a party may be able to establish the right he claims strictly in accordance with the substantial law, in a large number of cases they may not be able to do so, by reason of the limited time frame within which the inquiry has to be concluded, the restricted mode of proof and the sui generis nature of the procedure.

There are two ways in which an entitlement can be proved in the Primary Court. They are ...

1. By adducing proof of the entitlement as is done in a civil Court.

2. By offering proof that he is entitled to the right FOR THE TIME BEING.

The phrase "for the time being" as used in the decision in Ramalingam's case connotes the exercise of right by one party, temporarily or for the moment until such time such person is deprived of his right by virtue of a judgment of a Court of competent jurisdiction. If you describe a party as being entitled to enjoy a right but for the time being, it means that it will be like that for a period of time, but may change in the future. This is exactly in keeping with legislative wisdom embodied under part VII of the Act.

The rationale behind this principle is that the conferment of the special jurisdiction on a Judge of the Primary Court

under Chapter VII of the Act is quasi-criminal in nature and is intended to facilitate the temporary settlement of the dispute between the parties so as to maintain the status quo until the rights of the parties are decided by a competent civil Court. Subject to this, every other concerns however much prominent they may appear to be, will have to be placed next to the imperative necessity of preserving the peace.

As has been emphasised in the case of Ramalingam (supra) at an inquiry under Chapter VII, the action taken by the Judge of the Primary Court is of a purely preventive and provisional nature, pending the final adjudication of the rights of the parties in a civil Court and the proceedings under this Section are of a summary nature. Moreover, it is essential that they should be disposed of as expeditiously as possible. In the circumstances, although it is open to a party to prove the right he claims to be entitled to as is required under the substantial law dealing with a particular right, it is not impossible for him to be content with adducing proof to the effect that he has the right to enjoy the entitlement in dispute **for the time being.**

Even in a civil action when the plaintiff had failed to prove a clear case of servitude there had been instances where the Courts have issued restraining orders against the right of way being obstructed. One such case is Perera Vs. Gunatilleke where Bonsor C. J, observed as follows:

"It seems to me that, where a person establishes that he has used a way as of right openly and continuously for a long period and is forcibly prevented from using it, he is entitled to an injunction to restore him to the quasi possession of the way, irrespective of whether he can establish the existence of a servitude. We will treat this action as a possessory action and grant an injunction which will restore the status quo ante" [4 NLR 181]

Historically, unlike in India which introduced laws to combat the breach of the peace arising from disputes relating to immovable properties very early, the Magistrates here did not have the jurisdiction to adjudicate over such disputes until recently. As it was unaffordable to permit violence in the name of civil disputes which generally culminates in the devastation of the progress of a nation, the bench and the bar had continued to clamour for Laws to be introduced to meet the challenges.

In 1953 the Criminal Courts Commission headed by E F N Gratian (Chairman) and M S F Pulle (Commissioner) accompanied by its Secretary M C Sansony [2] forwarded its report to His Excellency the Governor suggesting that changes be brought into the law to put an end to this menace.

[2] All of them adorned the Supreme Court

The suggestions made by the commission with regard to disputes affecting lands, resulting in the breach of the peace are found at page 8 and 9 of the report. The suggestion made by the Criminal Courts Commission was to strengthen the hands of the Magistrates to adjudicate summarily on disputes affecting land where the breach of the peace is threatened or likely and to permit the enjoyment of the rights relating to lands to those who are entitled to enjoy them FOR THE TIME BEING.

It took almost two decades to pass Laws in terms of the suggestion made by the Criminal Courts Commission, when the National State Assembly in 1973 made Provisions by enacting law No 44 of 1973 with the inclusion of Section 62 which was later replaced by Act No 44 of 1979 (Vide Chapter VII).

As the original Provision of Section 62 in the Administration of Justice Law was based on the report of the Criminal Courts Commission, it is pertinent at this stage to reproduce the relevant passages from the said report concerning the suggestions made with regard to disputes affecting immovable properties. For purpose of ready reference the suggestions made by the commission are reproduced below...

"Dispute as to immovable property

10. Many disputes and resulting offences spring from rival claims to land. There is at present no method by which a Magistrate can deal speedily and summarily such disputes. It is essential that the Magistrate should be vested with statutory powers to make orders with regard to the possession of lands where disputes affecting such lands may result in a breach of the peace. The procedure suggested by us in Section 98 A is based in part on the provisions of Section 145 of the Indian Code of Criminal Procedure. As far as possible, notice will be given to the parties alleged to be concerned in the dispute, but whether such notice reaches the parties or not the Magistrate will hold summary inquiry and may, even before the inquiry is concluded, make an interim order on the question of possession in order to maintain the peace. The purpose of the inquiry is to enable the Magistrate to determine in a summary manner who should **FOR THE TIME BEING** permitted to enjoy the right in dispute, but he will make an order which may not be founded strictly on the legal merits of the claim of the rival parties but rather with the view to the necessities of the immediate emergency. It will be directed rather to resorting to the status quo and to ensure that interference, except by due process of law, which possession does not give rise to a breach of the peace. The ultimate decision as to the legal right of the parties will necessarily have to be made, in subsequent proceedings, by a competent civil Court. No

particular procedure has been prescribed in regard to the manner of holding the inquiry, for that would only have introduced technicalities. The order eventually made by the Magistrate will be purely a temporary one and a refusal to comply with it in breach of it is made punishable. [Capitalisation added]

11. We have sought to give effect to the principle that parties should not take the law into their own hands. Therefore, any party who dispossesses another forcibly should not gain any advantage thereby, when the Magistrate makes his final order. The scope of the Section has been deliberately made as wide as possible in order to embrace all possible disputes concerning any rights affecting land, and the intention is that in making an equitable interim order, a Magistrate is empowered to order a party placed in possession **FOR THE TIME BEING** to furnish security for the purpose of complying with the final decision of the dispute". [Capitalisation added]

From the above report, it would be seen that the commission has given the highest priority to orders being made FOR THE TIME BEING, permitting those who enjoy the rights to continue with it, until such time the Court of competent jurisdiction resolves the dispute on a permanent basis.

Insistence on the proof of a right as in the case of a civil dispute, in this type of proceedings, would lead to two original Courts having to resolve the identical dispute on the same evidence, identical standard of proof and quantum of proof twice over. This would indeed an unnecessary duplicity and is not the scheme suggested by the Criminal Courts Commission and could neither be the intention of the Legislature.

One has to be mindful of the fact that there are still judicial officers in this country who function simultaneously as Judges of the Primary Court, Magistrates, and Judges of the Juvenile Court, Judges of the family Court and District Judges. If disputes affecting lands under the Primary Court Procedure Act are to be heard by the Primary Court Judges and later the civil case as District Judges on the same evidence, same standard of proof and identical quantum of proof, it would not only result in the utter wastage of the precious time of the suitors and the Courts but will be a meaningless exercise as well.

Turning to the determination, the learned Magistrate has addressed his mind to the averments in the affidavits of both parties and considered the documents annexed and given cogent reasons for his findings. In short, the findings of the learned Magistrate are quite logical, stand to reasons and consistent with the material available. He has referred to the petitioner as having stated at the inspection that the respondents used the pathway in question as permissive

users. As a result, the parties in the Magistrate's Court were at variance only as to the nature of the pathway and not whether the respondents used the pathway. There is thus an implied admission of the road having been used by the respondents. Therefore the issue is whether the pathway used by the respondents is a right of servitude or a merely permissive user in nature. The wall has been put up overnight to obstruct the pathway.

In the Primary Court Procedure Act under Section 75 a dispute is defined as follows...

> " dispute affecting land includes any dispute as to the right to the possession of any land or part of a land and the buildings thereon or the boundaries thereof or as to the right to cultivate any land or part of a land, or as to the right to the crops or produce of any land, or part of a land, or **as to any right in the nature of a servitude affecting the land** and any reference to " land" in this Part includes a reference to any building standing thereon. (Emphasis added)

In the case of Kandiah Sellappah Vs Sinnakkuddy Masilamany (CA application 425/80- C A. minute dated 18 March 1981, Abdul Cader, J with the concurrence of Victor Perera, J held inter alia that the claimant of a footpath who started using it in 1966 August and was obstructed a few months before the prescriptive period of 10 years, in June 1976 was not entitled to a declaration under section 69.

Having analysed the evidence led in the lower court his Lordship formed the opinion that there had been no satisfactory evidence on which it can be held that the claimant exercised a right which has been in continuous existence for a period of time prior to his use.

I am of the view that the decision in Kandiah Sellappah's case has been entered per incuriam without properly defining or appreciating that all what section 76 mandates is "a dispute in the nature of a servitude" and not a dispute touching upon a servitude per se. Therefore, when the right concerned is in the nature of a servitude relating to a right of a pathway, the period of 10 years plays no important role.

Further, the answer to this issue is found in the Judicature Act No 2 of 1978 by which the primary court had been created. In terms of section 32 (2) of the Judicature Act the primary court shall have no jurisdiction in respect of the disputes referred to in the 4th schedule, irrespective of the value thereof. According to the 4th schedule the actions excluded from the jurisdiction of the primary court inter alia are as follows..

> 12. Any action for a declaratory decree including a decree for the declaration of title to a land.
>
> 24 (i) for obstruction to or interference with the enjoyment of any servitude or the exercise of any right over property.

The two exclusions referred to above provide clear authority for the proposition that the right intended to be declared under section 69 is definitely not with the regard to servitude per se but a right in the nature of a servitude.

Since the dispute in this case therefore is a right connected with land in the nature of servitude there is no doubt that the learned Magistrate had jurisdiction to adjudicate on the issue in terms of the Act.

He also had jurisdiction to order the demolition of the construction that obstructed the pathway. In Tudor Vs. Anulawathie and Others - 1999 - Sri Lanka Law Reports Volume 3, Page No - 235 it was decided that although there is no specific Provision in the Primary Courts' Procedure Act, expressly enabling the Court to order removal of obstructions in the way of restoration of the right to the person entitled thereto in terms of the determination made by the Court, there is no such prohibition, against the Court exercising such a power or making such an order.

As was held in Narasingh v. Mangal Dubey - (1883) 5 Allahabad 163, the Courts are not to act on the principle that every procedure is to be taken as prohibited unless it is expressly provided for by law. What in fact matters here is the converse that every procedure is to be understood as permissible till it is shown to be prohibited. As such, I can see no reason as to how the order of demolition made by the learned magistrate can be faulted as being illegal. It

axiomatic wisdom that prohibitions are generally not presumed and therefore a court cannot be faulted for acting on the converse.

The photograph produced marked as 2D9b, by the petitioner has been observed by the Magistrate as an attempt to mislead Court with regard to certain important features of the subject matter.

According to the affidavit of the Postmaster of the relevant area, following the construction of the wall, postal authorities had experienced difficulties in delivering the mails, addressed to the respondents.

Further, the affidavit of the sister of both parties bears testimony that the pathway had existed over a period of 40 years serving as access road to buildings bearing assessment No's 195/1 and 195/2.

According to the affidavit of the Grama Niladhari the pathway in question had been used for a period of 50 years as access to the aforesaid buildings.

In addition, a lawyer practising in Galle and a science teacher had affirmed severally that the right of way had been used over a period of time.

The employees of the respondents also have affirmed to the existence of the road in question. Further, certain others who had used the pathway also had given affidavits.

Upon a consideration of the material referred to in Section 72 of the Act, the learned Magistrate has formed the

opinion that the respondents are entitled to use the said pathway. This being a finding based on the credibility of the witnesses and parties, I do not think the High Court Judge or this Court should interfere with it, as the law permits the reversal of such a strong finding only if it had ended up in a miscarriage or travesty of justice. No such eventualities appear to have taken place by reason of the magisterial determination.

By placing a permanent obstruction in a haste, with no justification or explanation warranting such a quick action, carried into effect over a weekend, the petitioners appear to have aimed at making the respondents unable to turn to Court for redress, a compelling reason that had influenced the Magistrate to look for a draconic measure to undo the damage.

I feel obliged here to reiterate the concern of Bonser CJ penned over a century and a decade ago (4 NLR 181) which needs to re-echo in the minds of every officer exercising judicial, quasi-judicial and administrative powers in resolving or investigating into a complaint touching upon the breach or apprehension of a breach of the peace emanating from a dispute affecting land. It reads as follows...

> **"In a Country like this, any attempt of parties to use force in the maintenance of their rights should be promptly discouraged. Slight brawls readily blossom into riots with grievous hurt and murder as the fruits. It is, therefore, all the more necessary that Courts**

should strict in discountenancing all attempts to use force in the assertion of such civil rights".

BONSER CJ- Perera Vs. Gunathilake (1900 - 4 N.L.R 181 at 183)

In conclusion, I wish to place it on record that land disputes can cause social disruption and sometimes loss of life. They can have a negative impact on the development of lands and eventually on the economy of the Country. An efficient and effective system for settling land disputes is essential in any Country although the resolution of land disputes may appear to be complex. However trivial the dispute may be, it is the duty of the law enforcing authorities to pay serious attention to the issue, particularly with a view to take a preventive measure against possible violence. The determination of the learned Magistrate points to a right decision taken at the right time in the best interest of the parties, in consistent with the Law and the Legislative aim. Any decision to overturn such a decision by the High Court would have ended up in a miscarriage of justice.

Hence, it would be seen that the petitioner has failed to adduce exceptional circumstances or made out a case deserving the exercise of the revisionary powers of this Court under Article 138 of the Constitution.

He has neither unfolded a case deserving the intervention of the Provincial High Court by way of revision under Article 154 (3) (b) of the Constitution. In the circumstances,

the fate of the petition could not have been different from how it culminated in the High Court.

Hence, the Magistrate and the Learned High Court Judge are amply justified in their respective conclusions which effectively had prevented the petitioner from taking the law into his own hands. The decision allowing the respondents to continue to enjoy the disputed right in the nature of a servitude for the time being, is the only order that could have been lawfully made by the Magistrate.

Revision application is therefore dismissed subject to costs fixed at Rs 1,03,000/-.

President/Court of Appeal

Sunil Rajapaksha, J
I agree

Judge of the Court Of Appeal

TW/-