IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

Court of Appeal No.
CA (Revision) APN 136/15

High Court of Kandy No.
Revision Application
No.121/13

Primary Court of Kandy No.
61013/13

Tharanga Dissanayake,
Dhrmashoka Mawatha,
Lewalla, Kandy.

Respondent-Petitioner-Petitioner

v.

Konara Mudiyanselage Nawarathne Bandara,
No.25/170, Darmashoka Mawatha,
Lewalla, Kandy.

Petitioner-Respondent-Respondent.

Before : Malinie Gunarathne J.
: L.T.B. Dehideniya J.

Counsel : Dr. Sunil Cooray with Amila Kiripitige for the Respondent-Petitioner-Petitioner

: Amali Amarathunga with Chandana Premathilaka for the Petitioner- Respondent-Respondent

Supported on : 04.12.2015
Written Submissions of the Petitioner filed on : 28.01.2016
Written Submission of the Respondent filled on : 05.02.2016

Decided on : 17.05.2016

L.T.B.Dehideniya J

This is a revision application against an order of the Learned High Court Judge of Kandy. The learned Counsel for the Respondent-Petitioner-Petitioner (hereinafter sometime called and referred to as the Petitioner) supported this application for notice and for an interim order restraining the learned Magistrate from executing the impugned order dated 01.10.2013. The learned Counsel for the Petitioner-Respondent-Respondent (hereinafter sometime called and referred to as the Respondent) objected to issuing notice as well as interim order. Both Counsels were heard and were directed to submit written submissions and was complied with. This order is in relation to the issue of notice and the interim order.

The facts of the case are briefly as follows. The Petitioner and the Respondent both are lessees of two blocks of the same land belongs to the Gangarama Raja Maha Viharaya temple. The two blocks of lands depicted in the plan No 478 A dated 23.09.2002 prepared by U. Wasala Licensed Surveyor. Lot 1 of the said plan was leased to the Petitioner by deed No. 3053 dated 12.03.2004 attested by Tikiri Banda Harindranath Dunuwila Notary Public and the lot 3 was leased to the Respondent by deed No. 3052 of the same date attested by the same Notary Public. The lot 2 of the said plan is depicted as roadway. The Respondent by his deed of lease No. 3052 acquired the right to use the lot 2 as an access road to lot 3 where the Petitioner was not granted any right to use the lot 2 by his deed No. 3053. These are admitted facts by the parties.

The dispute arose when the Petitioner commenced constructing a retaining wall obstructing lot 2. The Respondent says that the Petitioner

fixed an iron gate at the entrance of lot 2 prior to the construction of the wall, but there was no obstruction by the same. The Respondent's grievance is that the wall constructed by the Petitioner is obstructing the usage of the lot 2 as a roadway. The Petitioner's contention is that the lot 2 of the said plan was never used as a road and due to the soil erosion, it was not possible to use as a road. The Petitioner further avers that lot 3 is adjoining to the residential premises of the Respondent and he was entering to the lot 3 through his residential premises.

The learned Magistrate, after following all the steps under chapter vii of the Primary Court Procedure Act, held that the Respondent is entitle to use the lot 2 as a roadway and ordered to remove all obstructions done by the Petitioner. Being aggrieved by the order of the learned Magistrate, the Petitioner moved in revision in the High Court of Kandy. The Learned High Court Judge dismissed the revision application and affirmed the order of the Learned Magistrate. The Petitioner appealed against the order of the Learned High Court Judge to this Court which is numbered CA (PHC) 121/2015 and is pending before this Court. While the appeal is pending, the Petitioner presented this revision application. Among other reliefs, the Petitioner is seeking for an interim order to restrain the execution of the order of the Magistrate Court.

The Petitioner, as of a right, appealed against the order of the Learned High Court Judge. The instant application was filed while the appeal is pending. The revision, being a discretionary remedy, has to be exercised only in exceptional circumstances, when the right of appeal is available.

It has been held in Rasheed Ali V. Mohomad Ali [1981] 1 Sri L R 262 that the Court will not interfere by way of revision when the law has

given an aggrieved party an alternative remedy unless there are exceptional circumstances. It has been held that;

> *The Court of Appeal, after an examination of numerous authorities, has rightly taken the view that the powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. When, however, the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm.*

In the case of Vnik Incorporation Ltd. v. Jayasekara [1987] 2 Sri L R 365 considered several authorities and held that;

> *In Perera v. Muthalib (supra)Soertsz, J. set out that the revisionary powers of the Supreme Court are not limited to those cases in which no appeal lies or in which no appeal has been taken for some reason and that the Court would exercise revisionary powers where there has been a miscarriage of justice owing to the violation of a fundamental rule of procedure, but that this power would be exercised only when a strong case is made out amounting to a positive miscarriage of justice. In that case the bond of surety had been forfeited without an inquiry.*
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> *In the case of Attorney-General v. Podi Singho (supra) Dias, J. held that even though the revisionary powers should not be*

exercised in cases when there is an appeal and was not taken, the revisionary powers should be exercised only in exceptional circumstances such as (a) miscarriage of justice (b) where a strong case for interference by the Supreme Court is made out or (c) where the applicant was unaware of the order. Dias, J. also observed that the Supreme Court in exercising its powers of revision is not hampered by technical rules of pleading and procedure.

That was a case where a sentence below the minimum sentence prescribed by law had been imposed.

Although both those cases were decided long before the present Constitution was promulgated (incorporating Article 145) and the amendment to section 753 of the Civil Procedure Code in 1988, the Supreme Court expressed the view that its revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of judicial procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice.....

In the case of [1990] 1 Sri L R 262 Buddhadasa Kaluarachchi V. Nilamani Wijewickrama and Another several authorities were considered and held at page 269 that;

It was held in Atukorale v. Samyanathan (3): "The powers given to the Supreme Court by way of revision are wide enough to give it the right to revise any order made by an original court whether an appeal has been taken against it or not".

The trend of recent decisions is that the Court of Appeal has the power to act in revision even though the procedure by way of appeal is available in appropriate cases. In Rustom v. Hapangama & Co. (4) it was held that the powers by way of revision conferred on the appellate court are very wide and can be exercised whether an appeal has been taken against an order of the original court or not. However such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptionable circumstances are, is dependant on the facts of each case. Vythialingam, J. stated in Rustom v. Hapangama & Co. (supra) "where an order is palpably wrong and affects the rights of a party also, this court would exercise its powers of revision to set aside the wrong irrespective of whether an appeal was taken or was available."

In Sinnathangam v. Meeramohideen (5) T. S. Fernando, J. said "We do not entertain any doubt that this court possesses the power to set aside an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated. It only remains for us to examine whether there is a substantial question of law involved here and whether this is an appropriate case for us to exercise the powers of revision vested in this court".

In the present case the Petitioner has already exercised his legal right of appeal. While pending the appeal, this application was filed to obtain a stay order. The mere fact that the order of the Judge is incorrect is not a reason to exercise the revisionary jurisdiction. It has been held in the case of Rasheed Ali V. Mohomad Ali (supra) at page 266 that;

It would be sufficient in the present context also to state that the fact that a judge's order may be merely wrong should not be a sufficient ground for the exercise of the powers of revision in a case such as this and, as far as I could see, the appellant could not have placed his case any higher.

In the instant case, the Petitioner and the Respondent both are lessees under the same lessor. Their two blocks of lands are also depicted in the same plan as lot1 and 3. Lot 2 is depicted as a roadway. This was admitted by both parties.

The Respondent acquired the right of use of lot 2 as a roadway to access the lot 3 from the soil owner of the lot 2. It is not a servitude running over lot 1 which is in possession of the Petitioner as lessee. The Petitioner has not established that he has any right to the lot 2. Unless the Petitioner can establish prescriptive title to the lot 2, he has no right to obstruct the Respondent from using the roadway. It is doubtful whether the Petitioner can establish the prescriptive title to lot 2 because he has admitted the title of the lessor. In these circumstances, the Petitioner cannot say that the right of way acquired by the Respondent by a deed is abundant and lot 2 is amalgamated to lot 1 and formed one land. The Respondent's contention is that due to heavy soil erosion, lot 2 is physically not in the ground which means that lot 2 has amalgamated to lot 1 and formed one land.

The Petitioner submits that he obtained a development permit to construct this wall and produced the permit. Even though the permit says that the approved plan is attached to the permit, the approved plan was not produced for the reasons best known to him. If the approved plan was produced, Court would have looked in to the approved site plan of the

construction site and determined the exact point where it was approved to construct the wall. The Petitioner being the lessee of lot 1, there is no possibility to obtain a development permit to construct a retaining wall outside his land. As such, Court cannot rely on the development permit.

The Respondent has established that he has a legal right to use the access road through lot 2. Under section 69 of the Primary Court Procedure Act, if the dispute is on the issue of entitlement to a right to any land, the judge has to determine as to who is entitle that right. The section reads;

> *69. (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 subsection (2).*
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> *(2) An order under this subsection 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 learned Magistrate has correctly determined that the Respondent is entitle to the right of using lot 2 as a way of access to lot 3. The Petitioner has not made out a strong case to revise the order of the learned Magistrate.

Accordingly, I hold that the Petitioner has failed to establish exceptional circumstances. I refuse the application for an interim relief and refuse notice.

Application dismissed subject to costs fixed at Rs. 10,000/-

Judge of the Court of Appeal

Malinee Gunarathne J.

I agree.

Judge of the Court of Appeal