

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

1. Nimal Samarasinghe
 2. Edirippulige Rosalin Fernando
- Both of Sayakkaramulla, Dunagaha.

1st Respondents – Petitioners -

Appellants

1. T. Repiyal Fernando
2. Anada Jayantha
3. T Jagathsiri Salinda
4. J.S. Piyadasa
5. Samarasuriyage Piyasin

All of Sayakkaramulla, Dunagaha.

Added Respondent – Petitioners -

Appellants

Vs.

1. Tanippulige Pathmaseeli
117, Negombo Road,
Marandagahamula
2. Thennakonlage Sunil Rathnayake,
157, Sayakkaramulla, Dunagaha.

2nd Respondents - Respondents -

Respondents

Officer in Charge

M.O. Branch, Police station, Divulapitiya.

Informant – Respondent - Respondent

Court of Appeal case No.

CA (PHC) 34/2006

High Court of Negombo case No.

364/ 2005

Magistrate Court of Minuvangoda

case No. 55490

Before : P.R.Wlgama J.

: L.T.B. Dehideniya J.

Counsel : Appellants absent and unrepresented

Sandamal Rajapakse with R. Serasinghe for the 2nd Respondents
– Respondents - Respondents

Argued on : 15.03.2016

Decided on : 21.06.2016

L.T.B. Dehideniya J.

This is an appeal from the order of the Learned High Court Judge of Negombo. The Informant Respondent – Respondent, the O.I.C. of the M.O. Branch of the Police Station Divulaapitya filed information in the Magistrate Court of Minuwangoda under section 66 of the Primary Court Procedure Act on a land dispute threatening breach of the peace on a complaint made by the 1st Respondents Petitioners Appellants (hereinafter called and referred to as the Appellants) to the police stating that the 2nd Respondents – Respondents – Respondents (hereinafter called and referred to as the Respondents) have erected a fence and dug up a pit to construct a gate post obstructing their right of way. The learned Magistrate, after taking necessary steps under part VII of the Act, determined that the Respondents are entitled to erect the fence and to dig up the pit to construct the gate post. Being dissatisfied by the said order, the Appellants moved in revision to the High Court of Negombo. The learned High Court Judge dismissed the application. This appeal is from the said order.

The Learned High Court Judge dismissed the revision application basically on the absences of exceptional circumstances and the non disclosure

of material facts. The Learned High Court Judge held that unless there are exceptional circumstances, the revisionary jurisdiction of the High Court cannot be exercised.

This case instituted under the Part VII of the Primary Court Procedure Act. It is a temporary remedy of dispute settlement through a Court of law to prevent the occurrence of the breach of the peace. Section 74 of the Act provides that the determination of the Primary Court is in operation till the matter is finally settled by a competent civil court. Further the Legislature intended to bring about finality to the special procedure provided in the Primary Court Procedure Act for dispute settlement by withdrawing the right of appeal expressly. The section 74 of the Act reads thus;

74. (1) An order under this Part shall not affect or prejudice any right or interest in any land or part of a land which any person may be able to establish in a civil suit; and it shall be the duty of a Judge of a Primary Court who commences to hold an inquiry under this Part to explain the effect of these sections to the persons concerned in the dispute.

(2) An appeal shall not lie against any determination or order under this Part.

Under this circumstance, if the Court allows exercising the revisionary jurisdiction on the non availability of an appeal alone in a case instituted under Part VII of the Primary Court Procedure Act, it will become doing something indirectly which cannot be done directly. It is not the scheme of the Part VII of the Primary Court Procedure Act or the intention of the Legislature. Edussuriya J. (P/CA) (as he was then) in the case of Letchumi v. Perera and another [2000] 3 Sri L R 151, referring to the judgment in CA application No. 141/90(1), observed that "*Justice Senanayake in the course of his judgment commenting on the language used under Section 329 stated, "in my view this*

Section gives an alternative remedy to an aggrieved party in such a situation. It is the duty of the Court to carry out effectually the object of the statute. It must be so construed as to defeat all attempts to do so or avoid doing in a direct or circuitous manner that which has been prohibited or enjoined (Maxwell Interpretation of Statutes) 12th Edition Page 137."

On the other hand, the law has provided that a determination of the Primary Court under this part is not a bar for a civil action. The alternative remedy of instituting action in a competent civil court is available for the aggrieved party. Under these circumstances, unless exceptional circumstances pleaded and established, revisionary jurisdiction of the High Court cannot be invoked.

It has been held in several authorities that if an alternative remedy is available, exceptional circumstances must be established to invoke the revisionary jurisdiction.

Attorney General V. Podisingho 51 NLR 385

Held, that the powers of revision of the Supreme Court are wide enough to embrace a case where an appeal lay but was not taken. In such a case, however, an application in revision should not be entertained save in exceptional circumstances, such as,

- (a) where there has been a miscarriage of justice,*
- (b) where a strong case for the interference of the Supreme Court has been made out by the petitioner, or*
- (c) where the applicant was unaware of the order made by the Court of trial.*

Rustom V. Hapangama & Co. [1978-79-80] 1 Sri L R 352

The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available, only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise its powers in revision

Bank of Ceylon V Kaleel and others [2004] 1 Sri L R 284

(1) The court will not interfere by way of revision when the law has given the plaintiff-petitioner an alternative remedy (s. 754(2)) and when the plaintiff has not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction.

Per Wimalachandra, J.

"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary per-son would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."

In the case before us, the Petitioners have not pleaded any exceptional circumstance other than the so called errors committed by the learned Magistrate. They are arguable points. They do not constitute a manifest error in the determination. The learned Magistrate has considered the facts and the law relating to the case and came to the finding. Therefore, the mistakes or the errors said to have been committed by the Learned Magistrate do not require the intervention of the appellate court by way of revision.

The Petitioners have already utilized the alternative way of seeking relief by filing an action in the District Court of Negombo. They have not

disclosed that fact to the Court. In a revision application *uberrima fide* of the applicant is a pre condition. In the case of Navaratnasingham v. Arumugam and another [1980] 2 Sri L R 1 it has been held that “*where a petitioner invokes the jurisdiction of the Appellate Court by way of revision as in the present case, the Court expects and insists on uberrima fides and where the petitioner's affidavits contradict the record of the trial judge the Court would be very slow to permit this.*”

The Petitioners tendered a document marked as X with the petition and relied on it. The Petitioners cannot tender new documents with the revision application in support of their claim because the learned Magistrate did not have the privilege of looking at it.

The Learned High Court Judge correctly dismissed the revision application. I see no reason to interfere with the order of the Learned High Court Judge.

For the reasons stated above, I dismiss the appeal subject to costs fixed at Rs. 10,000/-.

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal