

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

In the matter of an appeal under the provisions of Article 154 P(6) of the Thirteenth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka and of the Rules made by the Supreme Court.

**CA (PHC)122/2002**  
**HC Awissawella Case No- 54/2001**

Officer-In-Charge  
Police Station,  
Kosgama.

**Complainant**

Vs.

1. Wijesingha Mudalige Gunarathna  
of Alubodala,  
Ihala Kosgama.
2. Nisella Devage Niporis Fernando  
of Ihala Kosgama.
3. Ratmalgodage Karaline Nona,  
443/ A, Ihala Kosgama,  
Kosgama.
4. Karavitige Hemapala Priyaratna,  
441/ A, Ihala Kosgama,  
Kosgama.
5. Ratmalgodage Somawathie,  
444/ A, Ihala Kosgama.
6. Talduwa Lekam Ralalage Wimala  
Atapattu,  
Welegedara, Ihala Kosgama.

**First Party Respondents**

Nawagamuwage Hemalatha Piyaseli  
Perera Jayawardana,  
of Gamapathy Villa, Ihala Kosgama.

**Second Party Respondent**

Again

Nawagamuwage Hemalatha Piyaseli  
Perera Jayawardana,  
of Gamapathy Villa, Ihala Kosgama.

**Second Party Respondent-Petitioner**

Vs.

Officer-In-Charge,  
Police Station,  
Kosgama.

**Complainant-Respondent**

1. Wijesingha Mudalige Gunarathna  
of Alubodala,  
Ihala Kosgama.
2. Nisella Devage Niporis Fernando  
of Ihala Kosgama.
3. Ratmalgodage Karaline Nona,  
443/ A, Ihala Kosgama,  
Kosgama.
4. Karavitage Hemapala Priyaratna,  
441/ A, Ihala Kosgama,  
Kosgama.

5. Ratmalgodage Somawathie,  
444/ A, Ihala Kosgama.
6. Talduwa Lekam Ralalage Wimala  
Atapattu,  
Welegedara, Ihala Kosgama.

**First Party Respondents-Respondents**

And Now

Nawagamuwage Hemalatha Piyaseli  
Perera Jayawardana,  
of Gamapathy Villa, Ihala Kosgama.

**Second Party Respondent-Petitioner-  
Appellant**

Vs.

Officer-In-Charge,  
Police Station,  
Kosgama.

1. Wijesingha Mudalige Gunarathna  
of Alubodala,  
Ihala Kosgama.
2. Nisella Devage Niporis Fernando  
of Ihala Kosgama.
3. Ratmalgodage Karaline Nona,  
443/ A, Ihala Kosgama,  
Kosgama.
4. Karavitage Hemapala Priyaratna,  
441/ A, Ihala Kosgama,  
Kosgama.

5. Ratmalgodage Somawathie,  
444 /A, Ihala Kosgama.

6. Talduwa Lekam Ralalage Wimala  
Atapattu,  
Welegedara, Ihala Kosgama.

**First Party Respondents-Respondents**

And Now Between

1. Nawagamuwage Hemalatha Piyaseli  
Perera Jayawardana,  
Of Gamapathy Villa, Ihala Kosgama.

**Second Party Respondent-Petitioner-  
Appellant (Deceased)**

1. (a) Ruwan Wasantha Jayawardana,  
No. 15, Vidyala Mawatha,  
Colombo 08.

**Substituted Second Party  
Respondent-Petitioner-Appellant**

Vs.

Officer-In-Charge,  
Police Station,  
Kosgama.

**Complainant-Respondent-  
Respondent**

1. Wijesingha Mudalige Gunarathna  
Of Alubodala,  
Ihala Kosgama.

2. Nisella Devage Niporis Fernando  
Of Ihala Kosgama.
3. Ratmalgodage Karaline Nona,  
443 A, Ihala Kosgama,  
Kosgama.
4. Karavitage Hemapala Priyaratna,  
441 A, Ihala Kosgama,  
Kosgama.
5. Ratmalgodage Somawathie,  
444 A, Ihala Kosgama.
6. Talduwa Lekam Ralalage Wimala  
Atapattu,  
Welegedara, Ihala Kosgama.

**First Party Respondents-Respondents-  
Respondents**

**Before : H.C.J. Madawala , J  
&  
L.T.B. Dehideniya, J**

**Counsel : Harindra Rajapaksha for substituted 2<sup>nd</sup> party Respondent-Petitioner  
Appellant  
E. Silva for the Respondents**

**Argued On : 13 /09 /2016**

**Written Submissions On : 01 /12 /2016**

**Decided on : 16 / 02 /2017**

## **H. C. J. Madawala , J**

When this matter came up for argument on 13/09/2016 the counsel for the 1<sup>st</sup> to 6<sup>th</sup> Respondents raised a preliminary objections to the effect that the Revision Application No. CA(PHC) Rev. Appl. No. 63/2002 pertaining to the instant dispute between the parties has already been decided by this court by judgment dated 07/06/2004 and therefore the current appeal cannot be maintained. Both parties tendered their written submissions respectively on the preliminary objections. The counsel for the substituted Second party Respondent-Petitioner-Appellant submitted that the Kosgama Police on behalf of the First Party Respondent-Respondent filed a 66 application under the Primary Court Procedure Act No. 44 of 1979, before the Hon. Magistrate Awissawella, in case No. 29808.

In this case Police stated that the T.L. Wimala Athapattu made a complaint on or about 29/5/2001, against the deceased Second Party Respondent with regard to a dispute about a road way. After the parties tendered their pleadings, the Hon. Magistrate disregarding the objections raised by the Substituted Second Party Respondent-Petitioner-Appellant for a scene visit, visited the corpus and made an order dated 29/10/2001, based on the said scene visit, in favor of the First Party Respondent-Respondent-Respondents.

Being aggrieved by the said order, deceased Second Party Respondent-Petitioner-Appellant preferred an application for Revision to the Provincial High Court in Awissawella, in case No. 54/2001.

The Learned High Court Judge dismissed the said application. Being aggrieved with the said judgment, deceased Second Party Respondent-Petitioner-Appellant made an application by way of Revision, in case No. 63/2002, and also preferred an appeal bearing No. CA(PHC) 122/2002. The said Revision Application was decided by this court on the urged grounds on 07/06/2004.

Attention of this court was drawn to the following journal entries contained in the Appeal Brief. The journal entry dated 12/07/2001, when the scene visit was requested for the 1<sup>st</sup> time, the Second Party Respondent-Petitioner-Appellant objected and the objection was recorded. On 13/08/2001 despite the objection raised by the Second Party Respondent-Petitioner-Appellant for a scene visit, the Learned Magistrate decided to go ahead with the scene visit. On 17/09/2001 at the time of the scene visit, the Second Party Respondent-Petitioner-Appellant objected for the 3<sup>rd</sup> time, but the Learned Magistrate proceeded with the scene visit. It was contended that it is quite evident, that the said scene visit was

carried out disregarding the objections and without having the consent of all parties.

Attention of court was drawn to the order of the Learned Magistrate dated 29/10/2001 the said order at page 5, disregarding the previous judgment given by the competent court in 18785/L, the Learned Magistrate granted a roadway based on the observations made by him, at the scene visit, which was duly objected.

The Learned Magistrate came to a conclusion based on the said scene visit again at page 8 and at page 9 of the said order, on two occasions the Learned Magistrate came to conclusion solely based on the said scene visit. Therefore it was contended that the Learned Magistrate more or less completely based his order, on the said scene visit. It was submitted on the perusal of the High Court Judgment dated 23/05/2002 it reveals that the High Court too failed to consider the legality of an order based on observations made at a scene visit though the scene visit was done ex-parte and disregarding the objections for it.

It was submitted that the Court of Appeal too in CA(PHC) Revision Application No. 63/2002 did not consider the above aspect at all. Therefore it cannot be contended that the CA(PHC) Revision Application No 63/2002 has



been decided on all the merits. It was submitted that in a 66 application can the Primary Court Judge carry out an inspection disregarding the objections and without having the consent of all parties, has not been decided in the aforesaid Revision Application and it is yet to be decided by this Court.

It was submitted that the non-consideration of the legality of the Learned Magistrate's order, in the given circumstances as explained earlier caused an irreparable and /or patent injustice to the Second Party Respondent-Petitioner-Appellant. Hence it was urged that the said Preliminary objection be rejected and the matter be fixed for argument.

The counsel for the Respondents submitted that the Revision Application preferred before this court, which had the effect of dismissing the said action filed by the Appellants of the present case, was a judgment having considered the merits of the case there by an order that considered the merits of the present case and resulted in a dismissal, therefore the present appeal should also stand dismissed following the determination as judicially decreed in the case of Robert Silva Vs. Goonawardena and another 1991 (2) SLR 53.

The High Court made order against the revision application preferred subsequently to the order of the Learned Magistrate by affirming the order of

the Learned Magistrate. It was submitted that this having addressed the issue in relation to *Res Judicata* further proceeded to address their minds to the main matter in issue being the findings of the Learned Magistrate and whether or not their Lordships ought to interfere with the same, which exactly the same question before where the Lordships court in the present appeal. Having analyzed the same their Lordships in the said revisions application decreed in the following manner:

*“beside, this is a matter where the Learned Primary Court Judge on the Police information filed in his court after inquiry had visited the site for inspection and the original order which subject to revision has been made consequent to such inspection by the Learned Primary Court Judge. On inspection the Learned Primary Court Judge would have observed the ground situation existing at the site. There is undisputedly greater possibility for ascertainment of realities by such inspection and where the Learned Primary Court Judge makes a determination in such a situation this court is slow to reverse that decision unless patent injustice had been caused to a party.”*

They also addressed their minds to the question whether, their Lordships had to interfere with the findings of the Learned Magistrate which is in fact of meritorious value. It was also decided in **Robert Silva Vs. Goonewardena and Another 1991 (2) SLR 53** which decrees thus:

*“Where an Appellant had made an application for Revision in respect of the same order he has appealed from and the Revision Application had been considered on its merits, and dismissed, the appeal cannot be maintained.”*

Accordingly it was submitted that the Appellants of the present appeal would be estopped from maintaining the same on the basis that, the revision application preferred to this court pending the present appeal was dismissed having resorted to the merits of the present case.

We have considered the submissions of both parties. The Revision Application No CA(PHC) Rev. Appl. No 63/2002 pertaining to the instant dispute between the parties has already been decided by this court on 07/06/2004 having resorted to the merits in the present case. However it was the contention of the counsel for the 1 to 6<sup>th</sup> Respondents that the present appeal cannot be maintained although in the said Revision application the Hon. High Court Judge has not considered that the Magistrate has disregarded the objections raised by the substituted Second Party Respondent-Petitioner-Appellant for a scene visit and has visited the corpus and made an order dated 29/10/2001, based on the said scene visit, in favor of the First Party Respondent-Respondent-Respondents.

On a perusal of the revision application No. CA(PHC) Rev. Appl. No. 63/2002 that the Learned High Court Judge has decided the case on the merits on the instant appeal. We are of the view that the Appellant cannot now in his appeal that is preferred to this court be able to consider the merits and decide on the facts whether the Primary Court Judge who carry out the inspection disregarding the objections and without having the consent of all parties can be decided in this appeal. This facts should have been decided in the revision application and cannot be tried on a piecemeal basis in the appeal that has been preferred to this court.

The fact that the Learned Magistrate and the Learned High Court Judge has not considered the legality of the Magistrate's order. The Second Party Respondent-Petitioner-Appellant had the opportunity to make his objections in the revision application. The Learned Court of Appeal Judges has not considered same cannot be accepted as the Appellant is raising a new objection which he has not raised in the revision application. The Appellants cannot now by way of appeal consider those facts, once again in the present appeal preferred to this court.

The Appellants in the present appeal is estopped as in the revision application the merits of this case has already been considered. The order of the revision application is final and conclusive of all facts in this case.

Accordingly we uphold the preliminary objection and hold that the present appeal cannot be maintained as the revision application had been decided on the merits of this case.

Accordingly we dismiss this appeal with cost of Rs.10,000/-.

Judge of the Court of Appeal

L.T.B.Dehipeniya, J

I agree.

Judge of the Court of Appeal