

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

In the matter of an Application for Revision or
Restitution in Integrum.

**C.A. (Revision) Case No.
1259/2006**

D.C. Colombo Case No.15270/L

Ranasinghe Arachchige Munidasa,
No.35/7, Seelarathana Lane,
Aramaya Road, Dematagoda,
Colombo 09.

PLAINTIFF

-Vs-

Kitulampitiye Jinawarawansa Thero,
No.36, Seelarathana Lane,
Aramaya Road, Dematagoda,
Colombo 09.

DEFENDANT

And

Ranasinghe Arachchige Munidasa,
No.35/7, Seelarathana Lane,
Aramaya Road, Dematagoda,
Colombo 09.

PLAINTIFF - PETITIONER

-Vs-

Kitulampitiye Jinawarawansa Thero
(Deceased),

No.36, Seelarathana Lane,
Aramaya Road, Dematagoda,
Colombo 09.

DEFENDANT - RESPONDENT

AND NOW BETWEEN

Ranasinghe Arachchige Munidasa,

No.35/7, Seelarathana Lane,
Aramaya Road, Dematagoda,
Colombo 09.

PLAINTIFF - PETITIONER

-Vs-

Habarakada Samitha Thero,

No.36, Sri Wickramasingharamaya,
Seelarathana Lane, Dematagoda,
Colombo 09.

SUBSTITUTED DEFENDANT - RESPONDENT

BEFORE

:

A.H.M.D. NAWAZ, J. and

H.C.J. Madawala, J.

COUNSEL : Rohan Sahabandu, P.C. for the Plaintiff-Petitioner.
B.O.P. Jayawardane for the Defendant-Respondent.

Decided on : 07.04.2017

A.H.M.D. NAWAZ, J.

This is a revision application from the order of the learned District Judge made in Case No. D.C. Colombo 15270/L refusing an application by the Plaintiff to re-execute the writ on the judgment entered in this case.

The dispute between the Plaintiff and the Defendant is over a right of way, depicted as Lot 5 in Plan No.364 filed in a previous partition action bearing No.1085/P in the District Court of Colombo. The plaintiff's land is situated on the northern side of this right of way and the defendant's land is on the southern side.

The plaintiff's contention is that he and his predecessors in title had been using this road for a long time as access to his lands and therefore he is entitled to use this right of way for himself. On or about 02.11.1987, the Defendant had forcibly entered the said roadway and had constructed a fence and thereby encroaching on a portion thereof. This had obstructed the Plaintiff in his free use of the said road.

But the Defendant, whilst denying the allegations of the plaintiff, states that the said road is a common road which provides access to Lots 1, 2, 3 and 4 in Plan No.364, which belong to the Defendant and that this is the only access road available to him. The Defendant further alleges that he too has a right to use this road.

Both parties make allegations against each other of having encroached on a portion of the said right of way. Since the Plaintiff was absent on the trial day, his action was

dismissed. The Defendant got judgment in his favour and at the execution stage a dispute arose again as to the execution of the decree, since there was uncertainty as to the width of the road. The learned District Judge, after inquiry rejected the plaintiff's application for re-execution of the writ, and this revision application is from that order.

The Plaintiff has filed this action for a declaration of title to Lots 1 and 2 in Plan No.364 made on 23.08.1952 in the said partition action and to remove the obstacle caused by the Defendant to the said road (Lot 5).

The plaintiff's contention is that he is entitled to the said right of way depicted as Lot 5 in Plan No.364 through his predecessors in title, and the width of road was 6 feet. Whilst the Plaintiff says that he re-erected the southern boundary wall of his land by shifting it northwards into his land and thereby left a portion of his land to the road to have a wider access to take vehicles to his house, the Defendant says that he was 'gracious enough to sacrifice 1 ½ feet from his land for the road', and it is the Plaintiff who has encroached on to the road.

The Court Commissioner Devasundera, at the execution inquiry, has clearly stated that the Plaintiff has encroached on to the road. The Plaintiff's Surveyor Wijeweera's evidence is not clear on this point. However, the Plaintiff has failed to prove, by cogent evidence, that the Defendant has encroached on to the road and thereby created obstacle for him to use the road.

At the inquiry into the plaintiff's application for re-execute the writ, the learned District Judge has gone into the evidence of the surveyors, the Court Commissioner Devasundera, and the Plaintiff's Surveyor Wijeweera. Devasundera has said that the road is still in existence, which has a width of 6 feet. The plaintiff's case is also that the road depicted as Lot 5 in Plan No.364 was 6 feet wide. According to this surveyor it was the Plaintiff who had encroached on to the road.

This case was filed by the Plaintiff about 26 years ago on 16.01.1991, for a declaration of title and for removal of the obstruction. The width of the road now is found to be 6 feet. This can be declared as a common access road which can be used not only by the party to this case but also other users in the neighborhood.

I am of the opinion, since the parties have erected permanent brick walls on their respective boundaries, it is futile to go into the question of ascertaining as to who has encroached on to the road. It is not prudent to go into question of breaking the permanent walls to expand the width of the road to make it more than 6 feet as it was not the position soon after the Partition Case No.1085/P. Lot No.5 in this partition case was declared to be a road which had a width of 6 feet. Since the purpose of the plaintiff is fulfilled, the question of breaking the wall will not arise. Since the roadway was demarcated as a permanent access road, it is my view that it should remain as such for the use of the plaintiff and other users of this road. The facts remains that the width of the road remains 6 feet and certainly would be convenient enough for the Plaintiff to take his car.

It would appear that the learned District Judge has gone into the evidence of the two surveyors led at the execution inquiry carefully and rejected the contention of the plaintiff as he failed to prove that the road was narrowed to or encroached on to by the Defendant.

In the circumstances, I am of the view that the learned District Judge has come to a fair conclusion in rejecting the plaintiff's application for re-execution of the writ. I would therefore affirm the order of the learned District Judge and dismiss this application for revision.

JUDGE OF THE COURT OF APPEAL

H.C.J. Madawala, J.
I agree

JUDGE OF THE COURT OF APPEAL