

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

In the matter of an Application for
revision of an order of the Provincial
High Court in the exercise of its
revisionary jurisdiction.

C A (PHC) / APN 99 / 2015

Provincial High Court of

Southern Province (Tangalle)

Case No. HCRA 04 / 2012

Magistrate's Court Walasmulla

Case No. 20347

Galison Dodwell Jayasuriya

Weliamuna,

Walasmulla.

RESPONDENT - PETITIONER -

PETITIONER

Vs

1. Vijayamuni Kaluhami,

Thanayama Building,

Bowala Road,

Walasmulla.

2. Peduru Arachchige Kalyanawathie

Dodangahamada Watte,

Weliamuna,

Walasmulla.

3. Nammuni Arachchige Lili,

Polwatte,

Bowala Road,

Walasmulla.

4. Alankara Piyasiri,

No. 62/6,

Pragathi Place,

Beliaththa Road,

Walasmulla.

5. Saman Sri Lal Illangakoon,

Marmandiya,

Athpitiya,

Walasmulla.

PETITIONER - RESPONDENT -

RESPONDENTS

Before: K K Wickremasinghe J

P. Padman Surasena J

Counsel; J C Weliamuna PC with Seneera Abeysekara and S Serasinghe
for the Respondent - Petitioner - Petitioner.

Nilantha Kumarage with D Jayaratne for the Petitioner -
Respondent - Respondents.

Argued on: 2017-06-15.

Decided on : 2017 - 09 - 11

JUDGMENT**P Padman Surasena J**

The Petitioner - Respondent - Respondents (hereinafter sometimes referred to as the Respondents) had filed an information in the Primary Court of Walasmulla under section 66 (1) (b) of the Primary Courts Procedure Act, complaining about an existence of breach of peace between two parties. The said parties are Respondent – Petitioner - Petitioner (hereinafter sometimes referred to as the Petitioner) and the Petitioner – Respondent - Respondents (hereinafter sometimes referred to as the Respondents).

Learned Primary Court Judge having inquired into this complaint, had, by his order dated 2012-04-20, concluded that the Respondents are entitled to use the right of way that was the subject matter of the dispute.

Being aggrieved by the said order made by the learned Primary Court Judge, the Petitioner had filed an application for revision in the Provincial

High Court of Southern Province holden at Tangalle seeking a revision of the order made by the learned Primary Court Judge.

The Provincial High Court after hearing parties, had refused to revise the said order made by the learned Primary Court Judge and proceeded to dismiss the said revision application affirming the order of the learned Primary Court Judge.

The Petitioner has prayed in this application that the said order of the learned High Court Judge as well as the order of the learned Primary Court Judge be set aside by this Court.

In view of the reasoning given by the learned Primary Court Judge in this case, it would be more convenient to refer first to the law that should be applied to a case under section 69 (1) of the Primary Courts Procedure Act.

Section 69 of the Primary Courts Procedure Act is as follows;

" ... 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). ... "

It would be helpful at this stage refer to a passage from the judgment of the Supreme Court in the case of Ramalingam V Thangarajah¹ which had interpreted the above provision of law. It is as follows;

“ On the other hand, if the dispute is 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, section 69 requires the Court to determine the question which party is entitled to the disputed right preliminary to making an order under section 69 (2).”

Perusal of the judgment of the learned Magistrate dated 2012-04-20 shows that the conclusions contained in the said judgment are based on some photographs, Police observation notes including a sketch produced by Police, and some writings tendered by persons who claim to have used the impugned roadway.

¹ 1982 (2) Sri. L R 693.

It must be borne in mind that the relevant land is a big coconut land. The position taken up by the Petitioner who is the owner of this land is that the existing roadway is a road that is being used for transportation of coconut etc. inside his land. It must be remembered at the outset that the mere existence of a roadway across this land cannot by itself give a right for others also to use it. However, it can be seen that the learned Magistrate as well as the learned High Court Judge have heavily relied on the fact that there exists a roadway within the land. This Court has to observe that both the Courts have failed to appreciate the fact that the existence of a roadway by itself cannot be any license for others to claim an entitlement to use it. Further, even if the Respondents have used it a mere user by itself would not get an entitlement to use it.²

The Respondents in their affidavit³ filed at the Primary Court have sworn to the fact that they do not have an alternative road. However, it can clearly be seen that there exists a regular road⁴ for the Respondents to access their houses. This shows that there is a clear falsehood in their affidavits. However, learned Primary Court Judge had failed to appreciate the fact

² M D Siriyawathie Jayasinghe V K A Karunaratne, CA (APN) No. 863/90, Decided on 1997-06-04.

³ Sworn on 2011-11-09.

⁴ Other than the impugned roadway.

that such falsehood taints the truthfulness of the facts averred in the said affidavits.

What appears to this Court is that the Respondents have attempted to claim a roadway, right across the coconut land of the Petitioner to avoid taking somewhat circuitous path along their existing regular access way. This is manifest as at all times it has been the position of the Respondents that the impugned road is a road over the Petitioner's land. In almost all the statements they have made to police, the impugned roadway has been identified as "... ගාමිණී මහත්තයාගේ ඉඩම මැදින්⁵ ... " " ... අපි ගමන් කළේ ගාමිණී මහත්තයාගේ ඉඩම උඩින්ය ..⁶ " or in similar forms. The Respondents cannot be permitted to use such a roadway over somebody else's land without proving any lawful entitlement thereto.

It is the view of this Court that the Respondents have failed to prove to the satisfaction of Court that they are entitled to the impugned roadway.

In these circumstances and for the foregoing reasons this Court decides to set aside both the judgment of the learned Primary Court Judge dated

⁵ Statement produced marked පෙ 8.

⁶ Statement produced marked පෙ 10.

2012-04-20 and the judgment of the learned High Court Judge dated 2015-07-08. This Court makes order that the Respondents are not entitled to use the impugned roadway. Therefore, the petition filed in the Primary Court by the Respondents shall stand dismissed.

Petitioner is entitled to the costs of these litigations.

JUDGE OF THE COURT OF APPEAL

K K Wickremasinghe J

I agree,

JUDGE OF THE COURT OF APPEAL