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

S.Gunasiri De Silva
Mahagedara,Bopegoda,
Rathgama.

2nd Respondent-Petitioner-Appellant

Court of Appeal No. CA(PHC) 156/2012 **Vs.**

High Court of Galle Revision Application No. 44/2012

Magistrate Court of Galle No. 87286

01. Thenuwara Badalge
Swarnawathie
Anghandiya, Bopegoda,
Rathgama.
02. G.H.Magilin Nona,
Thotupola Watte,
Bopegoda,Rathgama.
03. Harumadura Rukmani de Silva,
Annasi Koratuwa,
Thotupola Watte,
Bopegoda,Rathgama.
04. Koralege Sumithra Perera,
Thotupola Watte,
Bopegoda, Rathgama.
05. The Officer in Charge,
Police Station,
Rathgama.

Respondents – Respondents - Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Farook Miskin for 2nd Respondent-Petitioner-Appellant

Jagath Abeynayaka with Pradeep Abeyrathna for 1st Respondent-Respondent-Respondent

Written Submissions tendered on:

2nd Respondent-Petitioner-Appellant on 2nd April 2018

Argued on: 2nd February 2018

Decided on: 14th May 2018

Janak De Silva J.

This is an appeal preferred by the 2nd Respondent-Petitioner-Appellant (Appellant) against the order of the learned High Court Judge of Galle dated 16th October 2012 by which he refused to issue notice in a revision application filed to set aside the judgement of the learned Additional Magistrate of Galle dated 21st September 2012 wherein it was held that the 1st Respondent-Respondent-Respondent (Respondent) had a right of way over the land owned by the Appellant. The learned Additional Magistrate of Galle further ordered the removal of the fence that had been put up obstructing this right of way.

The learned High Court Judge of Galle refused to issue notice on the basis that no exceptional circumstances have been established for the exercise of revisionary jurisdiction.

The learned Counsel for the Appellant submitted that the learned High Court Judge of Galle has arbitrarily and without assigning reasons refused notice. It is trite law that exceptional circumstances must exist for revisionary jurisdiction to be exercised. It is observed that the proceedings of 16.10.2012 [Appeal Brief page 44] only indicates that notice is refused. No reasons are given therein. However, the journal entry of 16.10.2012 contains a hand-written statement signed by the learned High Court Judge stating that notice is refused as there are no exceptional

circumstances. Hence, there is no merit in the submission of the learned counsel for the Appellant that the learned High Court Judge has failed to assign reasons for refusing notice.

However, it must be emphasized that reasons for refusing notice must be contained in the order refusing notice rather than in a journal entry. But even if the learned High Court Judge of Galle was in error in setting out the reasons for refusing notice in a journal entry, the proviso to Article 138(1) of the Constitution states that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. Therefore, if it is evident on a close examination of the totality of the evidence that the learned High Court Judge was correct in refusing notice, there is no prejudice to the substantial rights of the parties or occasioned a failure of justice and the order of the learned High Court Judge should not be disturbed.[1] I will now consider whether the totality of evidence supports the order made by the learned High Court Judge.

This matter arises out of an information filed by the Officer-in-Charge of the Ratgama Police under section 66(1)(a) of the Primary Courts Procedure Act (Act). Information was filed on 16.03.2012. The parties were permitted to file affidavits, counter affidavits and documents. The Respondent claimed that she had a right of way over the land of the Appellant to go to her house and that it had been blocked by the Appellant. The Appellant did admit the existence of a roadway over his land which was used by the Respondent as well as a few other families. He contended that as the said roadway was narrow and at the request of the Ratgama Pradeshiya Sabha and villagers he allowed part of his land to be used to construct a 12-foot roadway close to the existing road so that the said 12-foot roadway could be used instead of the existing narrow road. He further claimed that the Respondent has the ability to use the new road to go to her house and that the existing roadway was closed by the villagers and not him.

[1] *Victor and Another v. Cyril De Silva* [(1998) 1 Sri.L.R. 41]

The learned Counsel for the Appellant submitted that the learned Additional Magistrate of Galle has failed to act in terms of section 66(7) of the Act which is a fatal irregularity. He relied on the decision in *Ali v. Abdeen*[2] where U.de Z. Gunawardena J. held that the Primary Court Judge was under a peremptory duty to encourage or make every effort to facilitate a settlement of the dispute before assuming jurisdiction to hold an inquiry into the matter of possession and impose on the parties a settlement by means of Court order. The short answer to this objection is that the journal entry of 15.06.2012 shows that learned Additional Magistrate of Galle had fixed the case for 29.06.2012 to consider a settlement on which day it was informed that there was no settlement.

The dispute in the instant case is a right of way. Where the dispute relates to any right to any land such as a right of way or right to cultivate the Primary Court judge should make his order under section 69 of the Act.[3] The learned Additional Magistrate of Galle after a careful evaluation of the evidence correctly concludes that the dispute must be resolved by applying the provisions in section 69 of the Act. The learned Additional Magistrate of Galle has concluded that there exists a 10-foot roadway over the land owned by the Appellant which the Respondent used for a long period to go to her house. I see no reason to disturb this finding of the learned Additional Magistrate of Galle.

The learned counsel for the Appellant submitted that the learned Additional Magistrate had failed to consider that the road had deviated and that the new road is more convenient.

The question of whether a right of way can be replaced by another roadway created by the owner of the servient tenement without the consent of the owner of the dominant tenement did at one time have a difference of judicial opinion.

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[2] (2001) 1 Sri.L.R. 413

[3] *Weerasinghe v. Sepala and another* [(1996) 2 Sri.L.R. 229]

In *Marasinghe v. Samarasinghe*[4] it was held by Alles and De Krester J. (Fernando C.J., dissenting), that when a servitude of a right of way has been acquired by prescription, the owner of the servient tenement is entitled to offer a deviation of the route or track along which the right was acquired, provided that the proposed alternative route is equally convenient and serviceable to the owner of the dominant tenement. *Madanayake v. Thimotheus*[5], Fernando v. Fernando[6] and *Hendrick v. Sarnelis*[7] was overruled.

However, as the learned Additional Magistrate correctly points out this is not a question that the Primary Court need to determine in terms of section 69 of the Act. Section 69(2) of the Act enables the Primary Court judge to make order declaring 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. In *Ramalingam v. Thangarajah*[8] Sharvananda J. (as he was then) stated 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)."[9] (emphasis added)

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[4] 73 N.L.R. 433
[5] 3 C. Law Rec. 82
[6] 31 N. L. R. 126
[7] 41 N. L. R. 519
[8] (1982) 2 Sri.L.R. 693
[9] Ibid. page 699

The purpose of this jurisdiction is to prevent a breach of peace by restoring the person entitled to the right to the enjoyment thereof until the dispute is determined by a competent court. In the instant case, the dispute arose when the right of way used by the Respondent was blocked. That has been addressed by the order made by the Primary Court. The contention of the Appellant that the right of the Respondent can be replaced by a deviated route is a matter for a competent court.

The learned Additional Magistrate also made order for the removal of the fence that had been put up obstructing this right of way. In *Jamis v. Kannangara*[10] Palakidnar J. held that the order that can be made under section 69(2) of the Act in regard to a right to any land other than the right to possession is a declaration of entitlement of such right after determination by the court subject to a final determination by a competent court and prohibition of all disturbance or interference with the exercise of such right by such a party. It was further held that the order is of a prohibitory nature preventing an interference with the exercise of such a right and that this cannot include a positive order of removal of a structure. However, in *Tudor v. Anulawathie and others*[11] Gunawardena J. held that the ultimate object of s. 68 and s. 69 being to restore the person entitled to the right to the possession of land to the possession thereof or to restore the person entitled to the right (other than the right to possession of land) to the enjoyment thereof and that the said provision of the law must be rationally construed to authorize by necessary implication if in fact they had not in terms done so, the removal of all obstructions if the need arise, in the process of restoring the right to the person held to be entitled to such right. The reasoning in *Tudor v. Anulawathie and others*[12]is compelling which I shall adopt.

In view of the above circumstances, the learned High Court Judge of Galle correctly held that there are no exceptional circumstances which warrant the exercise of revisionary jurisdiction in respect of the judgement of the learned Additional Magistrate of Galle dated 21st September 2012.

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[10] (1989) 2 Sri.L.R. 350
[11] (1999) 3 Sri.L.R. 235
[12] Ibid.

For the foregoing reasons, I dismiss this appeal. No costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal