

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

In the matter of an application in terms of Article 154(g) of the Constitution of Sri Lanka read with Section 5 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 364 of the Code of Criminal Procedure Act No. 15 of 1979 to set aside the Order of the High Court of the Southern Province holden in Hambanthota dated 04.05.2011 made in revision application bearing No. HC/RA/11/2010 by the Primary Court of Walasmulla in Case No.10364

1. Hewagarusinge Sugathadasa,
Mahakosgahahena,
Rajapuragoda, Walasmulla.
2. Rajapurage Dharmasiri,
Mahakosgahahena,
Rajapuragoda, Walasmulla.
3. Rajapurage Kularatne,
Mahakosgahahena,
Rajapuragoda, Walasmulla.

Respondents-Petitioners-Appellants

Case No. CA(PHC) 45/2011

Vs.

High Court of Hambanthota Case No. H.C.R.A. 11/2010

Magistrate Court of Walasmulla Case No. 10364

1. Wijayamunige Anulawathi,
Arachchigaha Koratuwa,
Pallekanda, Walasmulla.
2. Wijayamunige Sisira Senarathne,
Mahakosgahahena,
Rajapuragoda, Walasmulla.

Petitioners-Respondent-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Pulasthi Rupasinghe with N. Abeysuriya for the Respondents-Petitioners-Appellants

Ranga Dayananda for Petitioners-Respondents-Respondents

Written Submissions tendered on:

Respondents-Petitioners-Appellants on 9th April 2018

Petitioners-Respondents-Respondents on 11th May 2018

Argued on: 22nd February 2018

Decided on: 7th June 2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Southern Province holden in Hambanthota dated 04.05.2011.

On 09.11.2009 the Petitioners-Respondents-Respondents (Respondents) filed information in the Magistrates Court of Walasmulla against the Respondents-Petitioners-Appellants (Appellants) under Section 66(1)(b) of the Primary Courts Procedure Act (Act). They alleged that on 10.10.2009 the Appellants had forcibly constructed a road over the land of which the 2nd Respondent was a co-owner although there was an existing roadway leading to the houses of the Appellants around the land belonging to the 2nd Respondent.

The position of the Appellants was that they did not construct a new road but only developed the existing road. In addition to the affidavits and counter affidavits filed by parties the learned Magistrate also called for observations from the Officer-In-Charge of the Walasmulla Police Station. Thereafter he made order on 19.04.2010 stating that the Appellants have not established a right of way over the disputed land. He further held that the Respondents were entitled to the possession of the land in dispute.

The Appellants filed a revision application against the said order in the High Court of the Southern Province holden in Hambanthota which was dismissed. Hence this appeal.

The parties agreed on 22nd February 2018 that the appeal can be disposed by way of written submissions. Both parties have filed their written submissions.

The learned Counsel for the Appellants has urged the following grounds in appeal:

- (a) There was no site inspection carried out
- (b) Disregarding the co-owned rights of the disputed land
- (c) Failure of the Learned High Court Judge to consider that the learned Magistrate has not evaluated all available evidence

The issue in this case is whether the Appellants had a right of way over the land of the 2nd Respondent or whether they had an alternative road. The Appellants submit that the Respondents objected to a site inspection although the Appellants were willing which shows bad faith on the part of the Respondents. There may be some merit in this submission if taken in isolation. However, section 72 of the Act directs the Judge to make a determination and order after examination and consideration of (a) the information filed and the affidavits and documents furnished (b) such other evidence on any matter arising on the affidavits or documents furnished as the court may permit to be led on that matter and (c) such oral or written submission as may be permitted by the Judge of the Primary Court in his discretion. Thus, a site inspection is not mandated by the Act. It can be held only if parties consent and therefore in my view no adverse inference can be made merely because one party objects to a site inspection.

The Appellants further submit that the learned Magistrate had erred in disregarding the rights of co-owners having accepted the fact that the Appellants are the co-owners of the land and the road in dispute, but at the same time deciding that the Appellants do not have possession to the right of way. They rely on the decision in *Singho Appu v. Hendrick Appu*¹ where it was held that a co-owner is entitled to use the land for taking carts to his house which was on the land, provided by doing so, he did not unfairly curtail the rights of other co-owners.

¹ 24 N.L.R. 157

The dispute in the instant case is over a right of way. 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*² 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).”³ (emphasis added)

Hence it was incumbent on the learned Magistrate to have determined as to whether the Appellants were entitled to the right of way claimed by them. Their position was that no new road was built by them but that they developed the existing roadway. However, the learned Magistrate has concluded that the Appellants did have another roadway and that they had forcibly constructed a roadway over the land possessed by the Respondents which led to the present dispute. I have carefully considered the evidence led before the learned Magistrate and see no reason to interfere with his findings on this issue.

The final point urged on behalf of the Appellants is the omission on the part of the learned High Court Judge to consider the failure on the part of the learned Magistrate to evaluate all available evidence. It is submitted that the learned Magistrate erred in disregarding the documents marked “E.4”, “E.5” and “E.6”. The learned Magistrate has considered these three documents carefully. He has held that “E.4”, “E.5” and “E.6” refer to a public road whereas the roadway in

² (1982) 2 Sri.L.R. 693

³ Ibid. page 699

dispute is not a public road according to the material before Court and disregarded these documents. Furthermore, there were no intervenients after notices were exhibited by Court. There certainly would have been if the right of way in dispute was a public road. Therefore, I see no reason to interfere with the findings on this issue.

The learned Magistrate has in a well-considered order carefully examined all available evidence and the applicable legal principles before making the impugned order. The learned High Court Judge has correctly analyzed the impugned order and dismissed the revision application made by the Appellant.

The primary object of proceedings under Part VII of the Act is to prevent any breach of peace amongst the disputing parties in regard to any right to any land. The Court when exercising this jurisdiction would take only a preventive action. The order that would be made is of a provisional nature pending final adjudication of rights in a civil Court. The orders made in this case achieves this object.

For the foregoing reasons, the appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal