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

1. Kankanachchi Kankanamge Champa Wilasini,

2. Marakkalage Shammi Priyantha,

Both at No. C/26/1, 1st Lane,
Ampara.

2nd Party Respondents-Petitioners-Appellants

Case No. CA(PHC) 85/2007

H.C. Ampara Case No. HC/AMP/REV/284/2006

M.C. Ampara Case No. 21382

Vs.

1. Abesinghe Kodippili Mahavidana
Muhandiramge Berty Silva,
No. C/30, 1st Lane,
Ampara. (Deceased)

1A. Abesinghe Kodippili Mahavidana
Muhandiramge Erdele Senarath,
No. C/30, 1st Lane,
Ampara.

Substituted 1A 1st Party Respondent-Respondent-Respondent

2. Abesinghe Kodippili Mahavidana
Jagath Keerthi Muhandiramge Erdele
Senarath,
No. C/28, 1st Lane,
Ampara.

1st Party Respondent-Respondent-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Anura Ranawaka with Oshada Maharachchi for 2nd Party Respondents-Petitioners-Appellants

Anura Gunarathne for 1st Party Respondent-Respondent-Respondent

Written Submissions tendered on:

2nd Party Respondents-Petitioners-Appellants on 19.05.2017

1st Party Respondents-Respondents-Respondents on 21.09.2018

Argued on: 05.10.2018

Decided on: 07.12.2018

Janak De Silva J.

This is an appeal against the judgment of the learned High Court Judge of the Eastern Province holden in Ampara dated 06.06.2007.

This matter arises from proceedings instituted under section 66(1)(a) of the Primary Court Procedure Act (Act). The first report filed by the Police indicates that there is a dispute between the parties over a right of way.

According to the 1st Party Respondents-Respondents-Respondents (Respondents) they are occupying lot 388 in කඩිඉම් සිතියම් 280007 (Plan 280007) and the accessway to the said lot is lot 367 of Plan 280007. They claimed that the 2nd Party Respondents-Petitioners-Appellants (Appellants) are occupying lot 387 of Plan 280007 and that the Appellants are trying to build a wall in a way which will prevent the Respondents from using the accessway they have over lot 367 of Plan 280007. The Appellants by their affidavits admitted that the respective parties are occupying the respective lots specified by the Respondents. The point of contest between the parties was whether the Respondents had a right of way over lot 367 of Plan 280007. The Appellants submitted that the Respondents had an alternative route over lot 389 of Plan 280007.

The learned Magistrate concluded that the Respondents have established a right of way over lot 367 of Plan 280007. The learned High Court Judge dismissed the revision application on two grounds, namely that (i) the learned Magistrate was correct in placing much emphasis on Plan 280007 and (ii) the Appellants have failed to establish exceptional circumstances which warrant the exercise of revisionary powers. It is against this judgment that the Appellants have tendered this appeal.

In this regard it is important to bear in mind the principle that the right of appeal granted under Article 154P(3)(b) of the Constitution is a right to challenge the judgment of the High Court exercising revisionary powers and not to impugn the Primary Court judge's order by way of an appeal [*Jayantha Gunasekera v. Jayatissa Gunasekera and others* (2011) 1 Sri.L.R. 284 at 295]. The appeal in the strict sense is not one against the determination of the judge of the Primary Court but against the judgment of the High Court exercising revisionary powers [Ibid. page 296].

Was the learned Magistrate correct in placing much emphasis on Plan 280007?

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* [(1982) 2 Sri.L.R. 693 at 699] 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)." (emphasis added)

A right of way can come into existence by an agreement duly registered, by Crown Grant, by prescriptive acquisition, by dedication to the public, or by a declaration by a competent statutory authority that a way of necessity has been granted [*Lowe v. Dahanayake and another* (2005) 2 Sri.L.R. 413].

The learned Magistrate held that the Respondents have a right of way over lot 367 of Plan 280007 having placed much emphasis on that plan. This plan has been prepared by the Superintendent of Survey, Ampara District. The Appellant submits that the learned Magistrate was wrong in doing so without placing reliance on the other material. According to Section 83 of the Evidence Ordinance Court shall presume that maps, plans, or surveys purporting to be signed by the Surveyor-General or officer acting on his behalf were duly made by his authority and are accurate. Plan 280007 falls within these provisions and as such the learned Magistrate was correct in relying on it [*Dehiwela-Mount Lavinia Municipal Council v. Fernando and others* (2007) 1 Sri.L.R. 293].

Plan 280007 clearly shows that lot 367 is an accessway for lots 382,384,385,386,387,388,382 and 368. Thus lot 367 is an accessway to the Appellant as well as occupants of the other lots referred to above. This is sufficient to establish a right of way by dedication or alternatively amounts to a declaration by a competent statutory authority that a right of way of necessity has been granted. In my view, this is sufficient evidence for the learned Magistrate to have decided that the Respondents have established their rights to the right of way in lot 367 of Plan 280007. Accordingly, the learned High Court Judge was correct in concluding that there was nothing wrong in the learned Magistrate placing much emphasis on Plan 280007.

Were there exceptional circumstances?

The learned High Court Judge dismissed the revision application also on the basis that the Appellants have failed to establish exceptional circumstances. Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted. If such a selection process is not there revisionary jurisdiction of court will become a gateway of every litigant to make a second appeal in the garb of a revision application or to make an appeal in situations where the legislature has not given a right of appeal [*Dharmaratne and another v. Palm Paradise Cabanas Ltd. and others* (2003) 3 Sri.L.R. 24]. I will now consider whether the matters urged by the Appellants establish exceptional circumstances warranting the High Court to have exercised its revisionary powers.

The Appellants submits that while they have been able to establish some legal entitlement to the land, they are occupying the Respondents have failed to do so. The issue before the Magistrates Court is not on title but a right relating to land. Therefore, there was no need for the learned Magistrate to have examined the question of title which in any event is not a matter for the Magistrate Court. However, it must be noted that the documents on which the Appellants rely on in regard to a legal entitlement to the land occupied by them is based on it been identified as lot 387 of Plan 280007. The Appellants then cannot seek to ignore the fact that the same plan identifies lot 367 as an accessway to lots 382,384,385,386,387,388,382 and 368.

The learned Counsel for the Appellants submitted that the Magistrates Court did not have jurisdiction to entertain the application under section 66(1)(a) of the Act as the subject matter was state land. It was submitted that in terms of section 32(2) of the Judicature Act read with the Fourth Schedule thereto the learned Magistrate did not have jurisdiction to interfere with the alienation process that the Divisional Secretary was doing, by ordering/declaring a right of way over such land.

Section 32(2) of the Act states that Primary Courts have no jurisdiction in respect of the disputes referred to in the Fourth Schedule thereto, irrespective of the value of such claim. The Fourth Schedule refers to several **actions** under the heading "Actions excluded from the jurisdiction of Primary Courts". However, the learned Counsel for the Appellant did not specify which of those actions within which the proceedings before the Primary Court fell. In the absence of such specificity the Court can only surmise what was meant or alternatively examine whether the proceedings fell within any of those actions. I have considered the different types of actions specified in the Fourth Schedule to the Judicature Act. The proceedings before the Primary Court does not fall within any of the actions specified therein.

In view of the above circumstances, the learned High Court Judge of Ampara correctly held that there are no exceptional circumstances which warrant the exercise of revisionary jurisdiction in respect of the judgment of the learned Magistrate of Ampara.

For the foregoing reasons, I see no reason to interfere with the judgment of the learned High Court Judge of the Eastern Province holden in Ampara dated 06.06.2007.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal