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

In the matter of an application under Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka read with provisions of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

Officer in Charge

Police Station,

Hikkaduwa.

Plaintiff

Case No: CA(PHC) 288/2005

H.C. Galle Case No: Rev 399/2004

M.C. Galle Case No: 18541

Vs.

1. Labuna Hewage Siripala
   Berethuduwa Road,
   Gonapinwala.

1st Party Respondent

2. Dias Dharmasiri Ginige
   Berethuduwa Road,
   Gonapinwala.

2nd Party Respondent

AND BETWEEN

Dias Dharmasiri Ginige

Berethuduwa Road,

Gonapinwala.

2nd Party Respondent-Petitioner

Vs.

Labuna Hewage Siripala

Berethuduwa Road,

Gonapinwala.

1st Party Respondent-Respondent

Officer in Charge

Police Station,

Hikkaduwa.

Plaintiff-Respondent

AND NOW BETWEEN

Dias Dharmasiri Ginige

Berethuduwa Road,

Gonapinwala.

2nd Party Respondent-Petitioner-Appellant

Vs.

Labuna Hewage Siripala

Berethuduwa Road,

Gonapinwala.

1st Party Respondent-Respondent-Respondent

Officer in Charge

Police Station,

Hikkaduwa.

Plaintiff-Respondent-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Rohan Sahabandu P.C. with Chathurika Elvitigala for 2nd Party Respondent-Petitioner-Appellant

Nadun Fernando for 1st Party Respondent-Respondent-Respondent

Written Submissions tendered on:

1st Party Respondent-Respondent-Respondent on 25.09.2018

Argued on: 23.07.2018

Decided on: 04.04.2019

Janak De Silva J.

This is an appeal against the judgment of the learned High Court Judge of the Southern Province holden in Galle dated 19.10.2005.

The Plaintiff-Respondent-Respondent (Plaintiff) instituted proceedings in the Magistrates Court of Galle in the above styled application in terms of section 66(1)(a) of the Primary Courts Procedure Act (Act). The report stated that there was a dispute affecting land between the 1st Party Respondent-Respondent-Respondent (Respondent) and 2nd Party Respondent-Petitioner-Appellant (Appellant) indicating an imminent breach of peace and sought appropriate orders from court.

Parties were permitted to file affidavits and counter affidavits. Thereafter with the consent of parties' court held a site inspection to ascertain whether any settlement is possible. Since there was none court made order on 11.05.2004 holding that the Appellant did not have a right of way over the land in dispute of the Respondent and that the Respondent is entitled to possession of the said land in dispute.

The Appellant filed a revision application in the High Court of the Southern Province holden in Galle which was dismissed by the learned High Court Judge and hence this appeal.

In this appeal this Court must consider the correctness of the order of the High Court. It is trite law that 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 this 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 [Amaratunga J. in *Dharmaratne and another v. Palm Paradise Cabanas Ltd. and others*[(2003) 3 Sri.L.R. 24 at 30].

In *Siripala v. Lanerolle and another* [(2012) 1 Sri.L.R. 105] Sarath De Abrew J. held that revision would lie if -

(i) aggrieved party has no other remedy
(ii) if there is, then revision would be available if special circumstances could be shown to warrant it
(iii) Party must come to court with clean hands and should not have contributed to the current situation.
(iv) he should have complied with the law at that time
(v) acts should have prejudiced his substantial rights
(vi) acts should have occasioned a failure of justice.

I will now consider whether the grounds urged by the Appellant comes within these principles.

The learned Magistrate held that the dispute before court was on a right of way and therefore court must make order 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* [(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].

In the instant case the Respondent in his first complaint to the Police stated that the Appellant had encroached onto his land and built a road to his house over part of the land belonging to the Respondent. On the other hand, the Appellant in his statement to the Police while admitting that he had encroached onto a portion of the land of the Respondent submitted that there was in fact an old road over the disputed land and that after the Respondent blocked it, he cleared the road again. The sketch and report prepared by the Police state that it appears that the Appellant had constructed a new road to his house over a portion of land belonging to the Respondent. The Appellant failed to adduce any evidence of the previously existing roadway.

In this context the learned Magistrate was correct in determining that the Respondent is entitled to possession of the said land in dispute. This appears to be an order made under section 68 of the Act although the order is silent on that point.

In fact, the learned High Court Judge concludes that it is an order made under section 68 of the Act. The learned Magistrate began the inquiry by stating that it is one where an order must be made under section 69 of the Act. This is the correct approach as the dispute was alleged to be over a right to a roadway. Where such a right is established by a party then an order must be made under section 69 of the Act. However, where such a right to the land in dispute is not established but the evidence shows that in order to try and establish such a right a party has been dispossessed from the land in dispute within a period of two months immediately before the date on which information was filed under section 66 of the Act, like in this case, then court has the power to act under section 68(3) of the Act and order restoration of possession. This is precisely what the learned Magistrate did.

Accordingly, the learned High Court Judge was correct in concluding that the Appellant had failed to establish any exceptional circumstances warranting the intervention of court by way of revision.

For the aforesaid reasons, I see no reason to interfere with the judgment of the learned High Court Judge of the Southern Province holden in Galle dated 19.10.2005.

Appeal dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal