

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

The Officer in Charge

Police Station,

Kadawatha.

Petitioner

Case No: CA(PHC) 78/2007

P. H.C Gampaha Case No: 91/2005/Rev

M.C. Gampaha Case No: 10769/P.C.A

Vs.

1. Aluthwalahewa Sarath Jayarathna
No.66, Soorigama Junction,
Kadawatha.

2. Sumith Kamkanampathirana
No.169, Mahara Nugegoda,
Kadawatha.

Respondents

AND

Aluthwalahewa Sarath Jayarathna
No.66, Soorigama Junction,
Kadawatha.

1st Party Respondent-Petitioner

Vs.

Sumith Kamkanampathirana
No.169, Mahara Nugegoda,
Kadawatha.

2nd Party Respondent-Respondent

AND NOW BETWEEN

Aluthwalahewa Sarath Jayarathna
No.66, Soorigama Junction,
Kadawatha.

**1st Party Respondent-Petitioner-
Appellant**

Vs.

Sumith Kamkanampathirana
No.169, Mahara Nugegoda,
Kadawatha.

**2nd Party Respondent-Respondent-
Respondent**

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Kuvera Ranasinghe for 1st Party Respondent-Petitioner-Appellant

Esara Wellala for 2nd Respondent-Respondent-Respondent

Written Submissions tendered on:

1st Respondent-Petitioner-Appellant on 09.01.2017

2nd Respondent-Respondent-Respondent on 26.01.2017

Decided on: 21.06.2012

Janak De Silva J.

This is an appeal against the judgment of the learned High Court Judge of the Western Province holden in Gampaha dated 14.06.2007.

This matter arises from proceedings instituted by the Kadawatha Police in terms of section 66(1)(a) of the Primary Courts Procedure Act (Act) in relation to a dispute affecting land between the parties.

The 2nd Respondent-Respondent-Respondent (Respondent) complained that the 1st Respondent-Petitioner-Appellant (Appellant) has put up four pillars encroaching onto his land. The observations made by the Police indicate that the Appellant has put up the pillars attaching them to the building of the Respondent [Appeal Brief page 88].

Parties agreed for a site inspection by the learned Magistrate which was done on 08.10.2004 the proceedings of which is found at pages 101-102 of the Appeal Brief. At the site inspection the Appellant admitted that he had built the pillars beyond his boundary and agreed to remove them and further agreed not to build any structure which was attached to the building of the Respondent or protruding beyond the boundary. On 22.10.2004 parties agreed to act according to the settlement and the proceedings were concluded [Appeal Brief page 96].

On 12.11.2004 the lawyer for the Respondent had filed a motion to get the matter recalled and after a few calling dates on which the Respondent was absent the case has been terminated on 24.02.2005 [Appeal Brief page 97].

Again on 24.06.2005 the case has been called on the application of the Respondent (as corrected vide journal entry 08.07.2005) on the basis that the Appellant had violated the terms of settlement. On 29.07.2005 both parties agreed to have another site inspection [Appeal Brief page 99].

The second site inspection was held on 09.09.2005 and the proceedings are found at pages 104-5 of the Appeal Brief. There the Appellant admitted that the slab of his building protrudes beyond the boundary. The learned Magistrate ordered the slab that was constructed over the boundary to be removed.

The Appellant then filed a revision application in the High Court of Gampaha which was rejected and hence this appeal.

The main ground urged by the Appellant is that the learned High Court Judge disregarded the fact that the case was terminated for the want of appearance by the Respondent on 24.02.2005 and thereafter the matter could not have been revived by filing a motion as was done by the Respondent. It is submitted that the Respondent should have filed a petition and affidavit.

In *Beatrice Perera vs. The Commissioner of National Housing* (77 N.L.R. 361 at 366) Tennakoon C.J. made the following observation:

*"Lack of competency may arise in one of two ways. A Court may lack jurisdiction over the cause or matter or over the parties; **it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court.** Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or a defectus triationis."* (emphasis added)

The complaint of the Appellant is about a latent lack of jurisdiction. It is trite law that an objection to the jurisdiction of a court must be raised by a party at the earliest available opportunity, unless the jurisdictional objection impugns a patent lack of jurisdiction. This position is best illustrated by an observation made by Soza J in *Navaratnasingham vs. Arumugam* [(1980) 2 Sri. L. R. 1]:

“Where a matter is within the plenary jurisdiction of the Court, if no objection is taken, the Court will then have jurisdiction to proceed and make a valid order. In the present case, the objection to jurisdiction was raised for the first time when the matter was being argued in the Court of Appeal and the objection had not even been taken in the petition filed before that Court” (emphasis added)

The Appellant agreed for a second site inspection after the case was revived by a motion and he cannot now seek to challenge the procedure adopted as he did not object at the earliest available opportunity. Therefore, I have no hesitation in rejecting the position urged by the Appellant.

The learned counsel for the Respondent submitted that since the Appellant agreed to the inspection he cannot have and maintain this application. Reliance was placed on the decision in *Suriapperuma v. Senanayake* [(1989) 1 Sri.L.R. 325] where it was held:

“Where parties agree to abide by the court decision after an inspection, there is implied in it a waiver of all defences taken in the answer and a total acceptance of the outcome of the court’s decision after the agreed inspection. The judgment and decree then are of consent of the parties and there is no right of appeal.”

However, the Appellant moved in revision to the High Court and it is this order that is the subject of this appeal. It appears that even where parties agreed to an inspection the remedy by way of revision is available [*Carlo Perera v. Lakshman Perera* (1990) 2 Sri.L.R. 302].

However, in order to successfully impugn the judgment of the learned High Court Judge the Appellant must establish exceptional circumstances which he has failed to do.

For the foregoing reasons, I see no reason to interfere with the judgment of the learned High Court Judge of the Western Province holden in Gampaha dated 14.06.2007.

The appeal is dismissed with costs fixed at Rs. 50,000/=.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal