

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

*In the matter of an Application under Article 138  
of the Constitution for Revision of Judgment  
delivered in HC REV 05/2017 in the Provincial  
High Court of Western Province (holden in  
Gampaha) dated 01.08.2018.*

**CA (PHC) 122/2018**

Provincial High Court of  
Gampaha Application No. HC  
REV 05/2017

Wattala Magistrate's Court Case  
No: 18463/16

**In the Magistrate's Court**

Krishnamoorthi Sivakumar, of No. 22/1,  
Kalyani Mawatha, Wattala.

Petitioner.

**Vs.**

Pathima Johara Packer, of No.22/1/1,  
Kalyani Mawatha,Wattala.

Respondent.

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**And Between in the High Court**

Pathima Johara Packer, of No.22/1/1,  
Kalyani Mawatha,Wattala.

Respondent-Petitioner.

**Vs.**

Krishnamoorthi Sivakumar, of No. 22/1,  
Kalyani Mawatha, Wattala.

Petitioner- Respondent.

\*\*\*\*\*

**And Between in the Court of Appeal in Appeal**

Krishnamoorthi Sivakumar, of No. 22/1,  
Kalyani Mawatha, Wattala.

Petitioner- Respondent-Appellant.

**Vs.**

Pathima Johara Packer, of No.22/1/1,  
Kalyani Mawatha,Wattala.

Respondent-Petitioner- Respondent.

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**And Now Between in application for Fresh  
Evidence in Appeal in the Court of Appeal  
under Section 773 of CPC.**

Krishnamoorthi Sivakumar, of No. 22/1,  
Kalyani Mawatha, Wattala.

Petitioner- Respondent-Appellant- Petitioner.

**Vs.**

Pathima Johara Packer, of No.22/1/1,  
Kalyani Mawatha,Wattala.

Respondent-Petitioner- Respondent- Respondent.

**Before: Prasantha De Silva, J.**

**Khema Swarnadhipathi, J.**

Counsel: Mr. S.A.D.S Suraweera A.A.L for the Petitioner-Respondent-Appellant.

Mr. C. Wijesooriya A.A.L with M/s Wathsala Dulanjali A.A.L for the  
Respondent-Petitioner-Respondent-Respondent.

Application  
supported on: 05.08.2021

Decided on: 21.10.2021

**Prasantha De Silva, J.**

### **Judgment**

It appears that the Petitioner- Respondent-Appellant- Petitioner [hereinafter sometimes referred to as the Petitioner] in this Application invoked the Jurisdiction of the Magistrate's Court of Wattala, in terms of Section 66(1) (b) of the Primary Courts' Procedure Act by way of a Private Plaint and instituted Action bearing No. 18463 against the Respondent-Petitioner- Respondent- Respondent [hereinafter referred to as the Respondent].

Apparently, the Petitioner's Complaint to the Magistrate's Court was that he is entitled to the right of way over the portions of land described in the 1<sup>st</sup> and the 2<sup>nd</sup> Schedules to the Private Plaint filed by the Petitioner, in which the Respondent had erected a fence obstructing the said right of way of the Petitioner.

Therefore, the Petitioner had prayed for an Order that he was entitled to the right of way over the lands described in the 1<sup>st</sup> and the 2<sup>nd</sup> Schedules to the Plaint/ information Affidavit and sought for an Order removing the purported obstructions and constructions by the Respondent.

However, after the conclusion of the inquiry, the learned Magistrate, who was acting as the Primary Court Judge delivered the Order on 28.02.2017, granting the reliefs prayed by the Petitioner, declaring that the Petitioner was entitled to the right of way over Lot 1B of Plan No. 1765 (marked as ௪75) and Lot 3 of Plan bearing No. 1521 (marked as ௫4).

Being aggrieved by the said Order, the Respondent had moved in Revision to the Provincial High Court of Colombo seeking to revise or set aside the said Order. However, the learned High Court Judge had affirmed the Order of the learned Magistrate and further Ordered to remove the parapet wall and the gate constructed by the Respondent-Petitioner.

Thereafter the Petitioner-Respondent-Appellant preferred an Appeal against the said Order of the learned High Court Judge to this Court.

Before the Appeal was taken up for Argument, the Petitioner-Respondent-Appellant-Petitioner has made an Application to call for Fresh Evidence in Appeal. It appears that in the Caption of the Petition dated 30.09.2020, the said Application was made under Section 773 of the Civil Procedure Code. Apparently in Prayer (a) of the said Petition, the Petitioner prays that;

- a) Allow the Petitioner-Respondent-Appellant-Petitioner to admit as Fresh Evidence in this Appeal under Section 773 of the Civil Procedure Code, Deed No. 2604 dated 26.05.2016 & 31.05.2016 executed by Vinitha Senticumaran Notary Public, which is marked as W<sub>3</sub>. Thus it is clear that the Petitioner has made the said Application to call for fresh evidence in this Appeal under the Civil Procedure Code.

According to the Caption of the Petition of the said Application, it was made under Section 773 of the Civil Procedure Code. Nevertheless, when this Application was being supported, the learned Counsel for the Petitioner mentioned to Court that the said Application has been made in terms of Article 139(2) of the Constitution read with Section 773 of the Civil Procedure Code.

Apparently, the Petitioner had sought in terms of Section 773 of the Civil Procedure Code to call for fresh evidence in this Appeal to produce the Deed bearing No. 2604 dated 26.05.2016 & 31.05.2016 [W<sub>3</sub>] attested by Vinitha Senticumaran Notary Public.

It is needless to say that the Petitioner instituted the instant Action in terms of Section 66(1) (b) of the Primary Courts' Procedure Act to obtain a Temporary Order to prevail the existing situation to maintain the peace between the Parties and to remain the status quo as it is.

It is seen that the learned Magistrate, who was acting as the Primary Court Judge, stated in the Judgment that,

“ඒ අනුව උක්ත පනතේ 69(2) වගන්තිය යටතේ ක්‍රියා කරමින් තවදුරටත් සුදුසු අධිකරණයකින් මෙම නියෝගය ප්‍රත්‍යාවර්තනය කරන තෙක්, ඉඩම් සම්බන්ධව සිවිල් අධිකරණයකින් සුදුසු ආඥාවක් හෝ තීන්දුවක් කරන තෙක් මෙම නියෝගය බල පැවැත්වෙන බවද, එකී අයිතිවාසිකම භාවිතා කිරීමේදී පෙත්සම්කරුට බාධාවක් වන ආකාරයෙන් දැනට සකස් කර ඇති වග උත්තරකාරිය විසින් ඉදිකරන ලද කොන්ක්‍රීට් කණු සහ කම්බි දැල් යොදන ලද වැට ගලවා ඉවත් කළ යුතු බවටද නියෝග කොට ආඥා කරමි”.

It is imperative to note that the Order made by the learned Primary Court Judge is a Provisional Order, thus it is apparent that the rights of the Parties have to be adjudicated by invoking Civil Jurisdiction of a competent Court.

It is worthy to note that the learned High Court Judge too affirmed the Order of the learned Primary Court Judge and also the learned High Court Judge acting in revision had varied part of the Order of the learned Primary Court Judge stating that,

“..... මෙම ආරවුලට පෙර පැවති තත්වය එසේම පැවතිය යුතු ආකාරයට පවත්වාගෙන යා යුතු බවට මෙම නඩුවේ වග උත්තරකරුට නියෝග කරමි. ඒ අනුව තවදුරටත් පැහැදිලි වීම සඳහා මහේස්ත්‍රාත් අධිකරණයට ඉදිරිපත් කර ඇති වා22 සහ ව22 යන දළ සැලැස්මේ දැක්වෙන පරිදි මෙම නඩුවේ වග උත්තරකරුවන් විසින් ඉදි කරන ලද එකී මායිම් තාප්ප කොටස සහ ගේට්ටුව ද කඩා ඉවත් කල යුතු බවට තව දුරටත් නියෝග කරමි”.

In view of the said Orders made by the learned Primary Court Judge and the learned High Court Judge under the Primary Courts’ Procedure Act, it is evident that those Orders are of a purely Preventive and Provisional nature for the preservation of Public Peace in a dispute affecting land pending final adjudication of the Rights of the Parties in a competent Civil Court. The said position was observed by his Lordship Justice Sharvananda in the Case of *Kanagasabay Vs. Mylvaganam* [78 N.L.R 280 at 283].

In the Case of *Punchi Nona Vs. Padumasena and Others* [1994] 2 SLR 117, the Primary Court exercising Special Jurisdiction under Section 66 of the Primary Courts’ Procedure Act, is not involved in an investigation into the title or the Right to Possession, which is the function of a Civil Court. What the Primary Court is required to do is to take a Preventive Action and make a Provisional Order pending Final Adjudication of Rights of the Parties in a Civil Court.

It was held in the Case of *M. M. Kayas Vs A. M. Nazeer and two others* reported in 2004 (3) S.L.R page 202 and 2003 BLR 30, where a breach of the Peace is threatened or is likely to be threatened under Part VII comprising Section 66-76 are neither in the nature of a Criminal Prosecution or Proceeding nor in the nature of a Civil Action or proceeding. These proceedings are of a special nature, since Orders that are being made are of a Provisional Nature to maintain status quo for the

sole purpose of preventing a breach of the Peace and which are to be superseded by an Order or decree of a competent Court.

Since the instant Case is filed under Section 66(1) (b) of the Primary Courts' Procedure Act, it is clear that it is not a Civil Action or Proceeding and the Order made by the learned Magistrate acting as a Primary Court Judge under Section 69 (2) of the Primary Courts' Procedure Act is a Provisional Order for the purpose of preventing the breach of the Peace.

It is observable that Section 66 of the Primary Courts' Procedure Act has not granted the Legal Competency to investigate and ascertain the Ownership or Title to the disputed rights which is a function of the District Court.

Furthermore, in Proceedings under Section 66 of the Primary Courts' Procedure Act; the Law requires Parties to file only Affidavits and documents in support of their claims and Oral Evidence is an exception in a fit Case to be permitted at the discretion of Court.

It is to be observed that in terms of Section 67 (1) of the Act, the inquiry should be concluded within three months of its commencement and in terms of Section 67 (2), the Court should deliver the Order within one week of its Conclusion.

As such, it clearly manifests the intention of the Legislature is to have a short Summary Inquiry and a speedy decision to prevent the breach of the Peace and not a protracted trial with regard to the investigation of Title to decide the Ownership Rights of the Parties.

In this respect, Court wishes to draw the attention to the observations made by Justice Wigneshwaran, in the Case of *Rupananda Piyasiri Jayaweera Vs. Kalupage Danoris and others H.C Revision Application No.09 of 1991* decided on 11.10.1991, Provincial High Court of the Western Province, reported in *The Sri Lanka Law College Review 1992* at Page 18;

“.....Therefore the Order of the Primary Court under Section 69(2) has to be a Provisional Order for the purpose of preventing a breach of the Peace. Since an Order on the Title Deeds has to be a Final Order on the Title Deeds, the Primary Court is precluded from the examination of the Title Deeds. It has only to make an Order on the user in fact. The Court has to determine only a question of fact and not a question of Law. It has to determine the fact whether there has been an actual user or not”.

Apparently, the Order of the Primary Court, is to have validity only till the pronouncement of the District Court in that matter. If the Order of the Primary Court is final then it cannot be invalidated by an Order of the District Court because both are Original Courts. Therefore, the Law intended the Order of the Primary Court to be Provisional and tentative”.

It is worthy to note Sections 74(1) and (2) of the said Act, which stipulate that;

74(1) An Order under this part shall not affect or prejudice any right or interest in any land or part of a land which any person may be able to establish in a Civil Suit; and it shall be the duty of a Primary Court who commences to hold an inquiry under this part to explain the effect of these Sections to the persons concerned in the dispute.

(2) An Appeal shall not lie against any determination or Order under this part.



In view of Section 74, it is relevant to note that if the Petitioner in this Application is sought to establish his legal right to the disputed portion of land, this is not the forum to call fresh evidence in appeal.

Apparently, Section 74 (2) does not confer any Right of Appeal against the determination of the learned Magistrate. However, if there is a miscarriage of Justice or any injustice caused to a Party, the aggrieved Party can invoke the Revisionary Jurisdiction of the High Court. If a Party is aggrieved by the Order of the High Court exercising Revisionary Jurisdiction, the aggrieved Party is allowed to prefer an Appeal to the Court of Appeal by operation of Law.

In this instance, the Court of Appeal has to consider whether the Order made by the High Court is legal in terms of Part VII of the Primary Courts' Procedure Act No 44 of 1979. Therefore, the Court of Appeal need not allow a Party to call fresh evidence in Appeal to introduce new material.

On the other hand, since the Sections of Part VII of the Primary Courts' Procedure Act administer with a special procedure, no Application in terms of the Civil Procedure Code could be entertained.

On this premise, it is relevant to note the Judgment *Kayaz V Nazeer and other [2004 (3) S.L.R 204]* where, Justice Weerasuriya emphasized that;

“If any matter should arise for which no provision is made in the Act, the provisions in the Code of Criminal Procedure Act governing a like matter which the case or proceeding is a Criminal prosecution or proceedings, and the provisions of the Civil Procedure Code governing a like matter where the case is a Civil action or proceeding shall with suitable adaptations as the justice of the Case may require be adopted and applied.”

Section 2 of the Primary Courts' Procedure Act stipulates that subject to the provisions of the Act and other written Law, the Civil and Criminal jurisdiction of the Primary Court shall be exclusive. Part III of the Act comprising Sections 24-36 provides for the mode of institution of Criminal prosecution; while Part IV of the Act comprising Sections 37-53 provides for the mode of institution of Civil actions. Thus, Section 78 has been designed to bring in provisions of the Code of Criminal Procedure Act or the provisions of the Civil Procedure Code only in situations where either a Criminal prosecution or a Civil action within Part III or Part IV of the Act respectively are involved. Inquiries into disputes affecting land where a breach of the peace is threatened or is likely to be threatened under Part VII comprising Sections 66-76 are neither in the nature of a Criminal prosecution or proceeding nor in the nature of Civil action or proceeding. These proceedings are of special nature since orders that are being made are of a Provisional nature to maintain status quo for the sole purpose of preventing a breach of the peace and which are to be superseded by an Order or a Decree of a competent Court. Another significant feature is that Section 78 while making reference to Criminal prosecutions or proceedings and Civil actions or proceedings, has not made any reference to disputes affecting land. This exclusion would reveal the legislative intent that Section 78 is not intended to be made use of, for inquiries pertaining to disputes affecting land under Part VII of the Act.

Further, it is my considered view that a party should not be allowed to call fresh evidence in this appeal, since the disputes adjudicated under Section 66 of the Primary Courts' Procedure Act are temporary in nature and are not deciding the legal rights of the Parties.

Therefore, allowing to lead fresh evidence will only defeat the very purpose of enacting Section 66 of the Primary Courts' Procedure Act to maintain breach of peace until a Court of Civil Jurisdiction determines the rights of the Parties.

The position taken up by the Petitioner that fresh evidence could be admitted under Article 139(2) of the Constitution is also not correct.

Article 139(2) states that the Court of Appeal may further receive and admit new evidence “additional to, or supplementary of, **the evidence already taken in the Court of first instance**” touching the matters at issue in any original Case, Suit, Prosecution or Action, as the Justice of the Case may require.

In this instance, the High Court was exercising Appellate Jurisdiction and not original Criminal Jurisdiction. Article 139 (2) which would apply to a situation where the High Court was exercising original Jurisdiction and had “taken” evidence and not when it was exercising Appellate or Revisionary Jurisdiction.

Thus, it is also necessary to draw our attention to Section 11(3) of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990.

Section 11(3) states that, The Court of Appeal may further receive and admit new evidence “additional to, or supplementary of, the evidence **already taken in any High Court**” established by Article 154P of the Constitution, touching the matters at issue in any original Case, Suit, Prosecution or Action, as the justice of the Case may require.

The Court of Appeal could admit new evidence under Section 11 (3) of the Act No 19 of 1990 only in “addition to or supplementary of the evidence already taken in any High Court”. It is

important to note that in the instant Case the High Court had not taken any evidence and the High Court was not acting in its capacity as Court of first instance exercising original Jurisdiction in terms of Article 154 P (3) (a) but under Article 154 P (3) (b) as a Court exercising supervisory Jurisdiction over Courts of first instance.

Therefore, Section 11 (3) had no application to the present Case. The Jurisdiction of the Court of Appeal was invoked under Article 138 (1) read with Article 154 P (6). The Court of Appeal is required to correct errors committed by the High Court in the exercise of the Appellate Jurisdiction and not of the Courts of first instance.

Hence, the Application made on behalf of the Petitioner-Respondent-Appellant-Petitioner seeking to call fresh evidence in this Appeal is dismissed with costs.

**JUDGE OF THE COURT OF APPEAL**

**Khema Swarnadhipathi, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**