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

Ganemulla Lekamlage Dilrukshi Ganemulla,
No. 189, Edurapotha,
Kegalle.

Petitioner.

Vs.

Ganemulla Lekamlage Ananda Tissa,
No. 184, Edurapotha,
Kegalle.

Respondent.

AND BETWEEN

Ganemulla Lekamlage Ananda Tissa,
No. 184, Edurapotha,
Kegalle.

Respondent- Petitioner.

Vs.

Ganemulla Lekamlage Dilrukshi Ganemulla,
No. 189, Edurapotha,
Kegalle.

Petitioner- Respondent.

AND NOW BETWEEN

Ganemulla Lekamlage Ananda Tissa,
No. 184, Edurapotha,
Kegalle.

Respondent-Petitioner-Appellant.

Case No: CA (PHC) 209/2017

PHC/Kegalle/5006/REV

MC Case No: 34420

Vs.

Ganemulla Lekamlage Dilrukshi Ganemulla,
No. 189, Edurapotha,
Kegalle.

Petitioner-Respondent-Respondent.

Before:	**Prasantha De Silva, J.**
	K.K.A.V. Swarnadhipathi, J.
Counsel:	S.A.D.S. Suraweera A.A.L with Shamila Seneviratne Fernando A.A.L for the Respondent-Petitioner-Appellant.
	Anura Ranawake A.A.L with B.M. Somadheera A.A.L for the Petitioner-Respondent-Respondent.
Argued on:	11.10.2021
Written Submissions tendered on:	11.11.2021 by the Respondent-Petitioner-Appellant. 10.12.2021 by the Petitioner-Respondent-Respondent.
Decided on:	06.01.2022.

Prasantha De Silva, J.

Judgment

This appeal emanates from the Order of the learned High Court Judge of Kegalle, dismissing the application for revision made by the Respondent-Petitioner-Appellant in Case bearing No. PHC/Kegalle/Rev 5006.

It appears that the Petitioner-Respondent-Respondent instituted action bearing No. 34420 in the Magistrate Court of Kegalle by filing an information in terms of Section 66(1) (b) of the Primary Courts' Procedure Act No. 44 of 1979, on the basis that there was a dispute on the usage of a roadway, which caused the breach of the peace between the Petitioner-Respondent-Respondent [hereinafter sometimes referred to as the Respondent] and the Respondent-Petitioner-Appellant [hereinafter sometimes referred to as the Appellant].

After supporting the application by the Respondent, Court issued notice on the Appellant. Thereafter, both parties filed their respective affidavits and counter affidavits. After the conclusion of the inquiry, the learned Magistrate acting as the Primary Court Judge delivered the Order on 08.01.2016 deciding that the Respondent was entitled to the roadway in dispute and ordered to remove all obstructions to the respondent's access.

Being aggrieved by the said Order of the Primary Court Judge, the Respondent-Petitioner-Appellant invoked the revisionary jurisdiction of the High Court of Kegalle to revise the said Order. However, after making oral submissions and tendering written submissions by both parties, the learned High Court Judge dismissed the application of the Respondent-Petitioner-Appellant by Order dated 23.11.2017.

Admittedly, the Appellant and the Respondent are co-owners to the premises in dispute and the Appellant had instituted a partition action bearing No. 28904/P in the District Court of Kegalle making the Respondent as a Defendant.

As such, it was submitted by the Respondent that since the Respondent is a co-owner to the premises in dispute thus she is entitled to an undivided portion of land including soil rights to the disputed roadway.

Hence, the Appellant has no right to obstruct the Respondent's right of way which was used in common by both of them.

The Appellant has constructed a gate at the entry to the roadway promising to handover a key to the Respondent. When the Appellant failed to do so, the dispute arose effectively shutting out the Respondent from entering the portion of land occupied by the Respondent.

Apparently, the Appellant had taken up a different position that the disputed roadway is a private roadway acquired by the Appellant and his predecessors through an adjoining land for their own private use.

According to the statement made by the Appellant, the roadway leading to his residence was only used by him and the actual access to the land was from the other side of the land and that was the access used by the Respondent to gain access to the premises occupied by her.

On behalf of the Appellant, it was submitted that a partition action bearing No. 28904/P is pending in the District Court of Kegalle in respect of the premises in dispute, where the preliminary plan too had been prepared.

It was further submitted that the Respondent was present before the surveyor at the preliminary survey but the Respondent had not claimed any right of way over the disputed roadway nor had she preferred any counter claim when the appellant claimed that the said roadway was exclusively a road to access his portion of land.

Moreover, the Appellant submitted that since the District Court action was pending at the time the dispute arose between the parties, the Respondent could not have maintained the instant action and also the learned Magistrate could not have assumed jurisdiction to hear and determine the said Case.

On this premise, it was the position taken up by the Appellant that the said Order in terms of Section 66 of the Primary Courts' Procedure Act is made until such time a Court with competent civil jurisdiction makes a final Order in relation to a civil dispute between the parties in order to prevent a breach of the peace.

Since there was already a civil action pending in the District Court at the time of instituting proceedings under Chapter VII of the Primary Courts' Procedure Act, the Respondent was not without recourse to obtain any relief from that Court which has jurisdiction to grant suitable relief.

The attention of Court was drawn to the following Case law in view of the aforesaid submissions made by and on behalf of the Appellant;
In ***Kanagasabai Vs. Mylvaganam 78 N.L.R 280 at 284*** - *Sharvananda J.* as his Lordship's then was held,

"As stated earlier, the mere pendency of a suit in a civil Court is an irrelevant circumstance for the Magistrate to take into consideration when making an order under Section 62 and 63 of the Administration of Justice Law. His primary function is to maintain Law and order. If the mere institution of a suit in a civil Court is sufficient to divest the Magistrate of his jurisdiction, the whole purpose of Section 62 will be defeated. A scheming party will be enabled to play hide and seek".

In the said Judgment, his Lordship quoted with approval (at page 282) the Judgment in the Indian Case of ***Imambu Vs. Hussenbi AIR 1960 Mys 203*** as follows;

"*But the mere pendency of a suit in a civil Court is wholly an irrelevant circumstance. That does not take away the dispute which had necessitated a proceeding under Section 145 Criminal Procedure Code. The possibility of a breach of peace would still continue. If the mere institution of a suit in a civil Court is sufficient to deprive the Magistrate of his jurisdiction, anomalous results might follow*".

In the case of ***Mutha Merenngya Keerthi Rohan Vs. Koralage Upali Senarath CS (PHC) 25/2014*** decided on 24.06.2016, where *Walgama J.* held,

"*It is intensely relevant to note that the mere fact, a civil action is pending in the District Court, will not fetter a Magistrate to make any Order in respect of an application filed under Section 66 of the Primary Courts' Procedure Act".*

Furthermore, it was submitted on behalf of the Appellant by the time the dispute arose between the parties, the Respondent had already filed her statement of claim in the said partition action. Nevertheless, in her statement of claim she had not claimed any right over the disputed road way nor had she claimed any such right before the surveyor at the preliminary survey.

It is worthy to note that the Respondent had filed the statement of claim in the partition action on 3rd December 2013 and in her counter affidavit filed at the Primary Court, it was clearly stated that the said preliminary survey was done on 4th August 2014 whilst the obstruction to her access by the Appellant was on or about 4th August 2015. Hence, it appears that the said submission on behalf of the Appellant is without merit.

It is interesting to note that the learned Magistrate has very correctly held that, "වග උත්තරකරු සිය දිවිරුම් ප්‍රකාශ හා හරස් දිවිරුම් ප්‍රකාශ මගින් දිසා අධිකරණයේ බෙදුම් නඩුවක් පවතින හේතුවෙන් එම නඩුවෙන් නියෝගයක් ලබා ගන්නා තුරු මෙම මාර්ග අයිතිවාසිකම සම්බන්ධයෙන් නියෝගයක් ලබා නොදිය යුතු බවටද කරුණු දක්වා ඇති බව පෙනී යයි. ප්‍රාථමික අධිකරණ නඩු විධාන පනතේ පරමාර්ථය වන්නේ නිසි අධිකරණයකින් නියෝගයක් ලබා ගන්නා තුරු අදාල පාර්ශවකරුවන්ගේ අයිතිවාසිකම් ආරක්ෂා කිරීම මිස ඔවුන්ට ඒ දක්වා ඇති සහනයන් අවහිර කරමින් දිසා අධිකරණ නියෝගය ලැබෙන තුරු ඔවුන්ගේ අයිතිවාසිකම් අවහිර කිරීම නොවේ".

Apparently, the Law is well settled in this respect that there is no restriction to maintain an action under Part VII of the Primary Courts' Procedure Act even though there is a civil action pending in the District Court. As such, the aforesaid submission of the appellant is untenable in Law.

It was the contention of the Respondent that the Appellant being the Plaintiff in the partition action had admitted the fact that the Respondent too is a co-owner to the land in suit thus he could not have prevented another co-owner from using the right of access to the main land.

However, the Appellant contended the said position of the Respondent and had taken up the position that the disputed roadway is a private roadway acquired by the Appellant and his predecessors through an adjoining land for their own private use at the time when the proper means of access was from the eastern boundary of the land.

As such, the respondent could not claim any right over a private access way when there is a separate access to the land for the mere reason that she is a co-owner to the land to which such access is provided.

On the contrary, the Respondent has clearly stated in her affidavits that the Appellant had attempted to show the investigating officer a marshy land to the alternative roadway available to the Respondent. "9. පැමිණිල්ල විභාග කිරීමට පැමිණි විටදී වෙනත් ස්ථානයකින් ගමන් කල හැකි බවට අසත්‍ය ලෙස වගුරු බිමක් වග උත්තරකරු විසින් පෙන්වා ඇති අතර එම ස්ථානයෙන් කිසි විටෙකත් ගමන් කල නොහැකි බවත්, එම වගුරු බිම පවා වෙනත් අයකු සතු බවත්, පොලිස් නිලධාරීන් විසින් පැහැදිලිව නිරීක්ෂණය කරන ලද බව කියා සිටියි".

Similarly, the Respondent had stated in her counter affidavit that "14. මාගේ අයිතිය වෙනුවෙන් මා භුක්ති විඳගෙන එමින් සිටින ඉඩම් කොටස සහ එහි ඉදිකරන නිවසට පැමිණීමට ඇත්තේ වග උත්තරකාර ඥාති සොහොයුරා විසින් අවහිර කරනු ලැබූ ප්‍රවේශ මාර්ගය බවත්, මෙම ප්‍රවේශ මාර්ගය මාද මාගේ පූර්වගාමීන්ද විසින් මාගේ ඥාති සොහොයුරා වන වග උත්තරකරු සන්තකය දරණ ඉඩමේම පිටුපස කොටස බැවින් එකී ඉඩමට පැමිණීමට මෙම ඉඩමට ඇතුල්වීමට ඇති වග උත්තරකරු සන්තකය දරණ ඉඩම් කොටස තුලින් පැමිණ එහි පිටුපස පිහිටි මාගේ ඉඩම් කොටසට ඇති ප්‍රවේශ මාර්ගය, ඉඩමේ හවුල් අයිතිකරුවකු ලෙසින් එකී ඉඩමේම කොටසකට ඇති ප්‍රවේශ මාර්ගය ලෙස දස වසරකට අධික කාලයක් තිස්සේ භුක්ති විඳගෙන එමින් අයිතිය ලබා ඇති බවත්, වග උත්තරකරු විසින් සාමය කඩ වෙන පරිදි ආරවුල් කර, මා එසේ භුක්ති විඳගෙන පැමිණි මාර්ග අයිතිය අවහිර කරනු ලැබීම නිසා මා හට පිරිමසාලිය නොහැකි මහත් පාඩු සිදු වී ඇති බව ප්‍රකාශ කර සිටිමි".

In these circumstances, it is the duty of Court to look into the matter and decide which party substantiated their respective positions at the inquiry and whose version is plausible to accept in determining the real issue.

According to the Appellant, the disputed roadway was only used by the Appellant, and it was never used by the Respondent.

It is observable that the disputed right of way was clearly indicated in the sketch made by the investigating police officer marked and produced as පෙ-3.

It is seen that the disputed right of way was clearly indicated by marking as "G" in the sketch [පෙ-3] and stated "පැමිණිලිකාරියගේ ඉදි කරන නිවසට යාමට භාවිත කල පාර".

It is to be noted that the investigating officer has further stated that the "Newly constructed gate was present at the entry to the land and the same was causing an obstruction to use the said right of way".

Therefore it clearly shows that the Appellant could not substantiate his contention that the Respondent never used the road which was depicted in the sketch [පෙ-3] as "G". It was only used

by the Appellant, and it was not proved that the Respondent used a private road or Respondent had alternative access road to the premises occupied by her.

Apparently, the learned Magistrate has accepted the said evidence and has held that the Respondent is entitled to the impugned roadway and ordered the Appellant to remove all obstructions to the Respondent's access in terms of Section 69 (1) of the Primary Courts' Procedure Act.

The learned High Court Judge held that the Appellant had not adduced any exceptional circumstances for Court to exercise revisionary Jurisdiction.

It is noteworthy that the learned High Court Judge, analysed and evaluated the evidence placed before the learned Magistrate by both parties and also the findings of the learned Magistrate and held that the Appellant has not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction of the High Court and dismissed the application of the Respondent-Petitioner-Appellant, affirming the Order of the learned Magistrate.

It appears that the learned counsel for the Respondent had raised an objection in this appeal that the Appellant had failed to adduce any exceptional circumstances, which would warrant the intervention of the Provincial High Court by way of an application for revision.

In this respect it was submitted by the learned counsel for the Appellant that its well settled Law that when a right of appeal of a party has been expressly taken away by statute, the only remedy available to an aggrieved party is to invoke the revisionary jurisdiction of a superior Court and under the said circumstances, it is not a requirement for such party to establish exceptional circumstances. Establishing exceptional circumstances in a revision application will only apply in cases where a party fails to exercise his statutory right of appeal but seeks redress from a superior Court by way of revision. Under the said circumstances, a party is required to show as to why the Court should exercise its' discretion to grant relief by way of revision at a time when there was a statutory right of appeal available to such party.

But when a right of appeal has been expressly taken away from a party by statute, an aggrieved party only has to satisfy Court that there are questions of Law to be determined by the appellate Court and the illegality of the impugned Order. This legal principle is clearly laid down in the Case of ***C.A Jayatillaka Vs. R.M.M. Ratnayaka CA (PHC) Appeal No. 82/97 C.A Minutes of 24.10.2007***.

Apparently, the said Judgment reported in ***2007(1) S.L.R 299*** held;

(i) That the appellant alleged that the application to the Magistrates' Court was defective as it contains the wrong district namely 'Kandy' instead of 'Nuwara-Eliya'.

(ii) That the name and address of the appellant were not mentioned.

(iii) That the application refers to a wrong plan.

In view of the aforesaid Judgment, the Appellant has to show illegality or some procedural impropriety in the impugned Order made by the learned High Court Judge.

Nevertheless, the Counsel for the Appellant had not shown any impropriety, procedural defect or illegality in the impugned Order of the learned high Court Judge dated 23.11.2017.

Therefore, we see no reason to interfere with the said Order of the learned high Court Judge and the Order dated 08.01.2016 by the learned Magistrate and dismiss this appeal with costs filed at Rs. 35,000/-.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.A.V Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL