

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

An Appeal under and in terms of Article 138 and 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka read with High Court of the Provinces (*Special Provisions*) Act No. 19 of 1990.

1. Officer-in-Charge,
Police Station,
Borella

Complainant

CA PHC No: **179/2013**

HC Revision Application No.
138/2013

MC Colombo Case (Primary
Court) No: 753/2/2012

Vs.

1. Maththaka Jinadasa Gamage
2. Sirima Chandra Kanthi
Both of No: 1038/05,
Maradana Road,
Borella

1st Party-Respondents

2a. Thotawaththe Dona Manuwel Subhash De Silva
1038, Maradana Road, Borella

2b. Thelge Jayanthi Peiris
1038/ 1B, Maradana Road, Borella

2c. Herath Mudiyansele Ramya Neranjala
1038/ 22, Maradana Road, Borella

2nd Party-Respondents

3. Thusitha Priyashantha Soorasinghe
No. 36, Mahawatta Road,
Kandana

Interventient Respondent

AND BETWEEN

1. Maththaka Jinadasa Gamage
No: 1038/05,

Maradana Road,
Borella.

1st Party-1st Respondent-Petitioner

Vs.

1. Officer in Charge,
Police Station,
Borella.

Complainant- Respondent

2a. Thotawaththe Dona Manuwel Subhash De Silva.
1038, Maradana Road, Borella

2b. Thelge Jayanthi Peiris
1038/ 1B, Maradana Road, Borella

2c. Herath Mudiyansele Ramya Neranjala
1038/ 22, Maradana Road, Borella

2nd Party- Respondent-Respondents

3. Thusitha Priyashantha Soorasinghe
No. 36, Mahawatta Road,
Kandana

Intervenient Respondent-Respondent

Sirima Chandra Kanthi
Both of No: 1038/05,
Maradana Road,
Borella

1st Party-2nd Respondent (Deceased)

AND NOW BETWEEN

1. Maththaka Jinadasa Gamage
No: 1038/05,
Maradana Road,
Borella

**1st Party-1st Respondent-Petitioner-
Appellant (Deceased)**

Udith Ishantha Gamage
No: 1038/05,
Maradana Road,
Borella

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

Vs.

1. Officer in Charge,
Police Station,
Borella

**Complainant- Respondent-
Respondent**

2a. Thotawaththe Dona Manuwel Subhash De Silva.
1038, Maradana Road, Borella

2b. Thelge Jayanthi Peiris
1038/ 1B, Maradana Road, Borella

2c. Herath Mudiyansele Ramiya Neranjala
1038/ 22, Maradana Road, Borella

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

3. Thusitha Priyashantha Soorasinghe
No. 36, Mahawatta Road,
Kandana

**Intervent Respondent-
Respondent-Respondent**

Sirima Chandra Kanthi
Both of No: 1038/05,
Maradana Road,
Borella

1st Party-2nd Respondent (Deceased)

Before: **Prasantha De Silva, J.**
K.K.A.V. Swarnadhipathi, J.

Counsel: Asthika Devendra with Milinda Sarachchandra and Aruna
Madushanka for the substituted 1st Party-1st Respondent-Petitioner-
Appellant.

**Written Submissions
Tendered on:** 09.08.2018 by the substituted 1st Party-1st Respondent-Petitioner-
Appellant.
2nd Party-Respondent-Respondent-Respondents –Absent and
unrepresented.
Intervient Respondent-Respondent-Respondent –Absent and
unrepresented.

Argued on: 18.10.2021

Decided on: 03.02.2022

Prasantha De Silva, J.

Judgement

The 1st Party-1st Respondent-Petitioner-Appellant had made a complaint to the Borella Police Station saying that he has been occupying premises No. 1038/05, Maradana Road, Borella for more than 32 years and he is operating a motor garage named “Gamage Motors” in the said premises. The 2(a) 2nd Party-Respondent-Respondent had obstructed his entrance to the said premises by constructing a gate.

It appears that 2(a) 2nd Party-Respondent-Respondent had made a statement to the Borella Police Station that the land bearing assessment No. 1038 had been inherited by him from his father and that there are three families occupying the said premises. The 1st Party-Respondent-Respondent-Appellant and his family were occupying the questioned premises as tenants. Since they are no longer in occupation of the premises and upon the request of the other occupants, 2(a) 2nd Party-Respondent-Respondent had constructed a gate for security purposes.

In the circumstances, the Officer-in-Charge of the Police Station-Borella filed information on 18.02.2013, under Section 66 of the Primary Courts' Procedure Act in the Magistrate's Court of Colombo, case bearing No.753/2/2012, on the basis of a breach of the peace over the right of way to the property in dispute.

The Court ordered to affix notices on the disputed premises and thereafter the Intervient Respondent-Respondent-Respondent had intervened in the said Case.

After following the procedure stipulated in Part VII of the Primary Courts' Procedure Act, parties had filed their respective affidavits, counter affidavits and the documents.

It is pertinent to note that a separate case had been filed under Section 66 of the Primary Courts' Procedure Act in the Magistrate's Court, Case bearing No. B 5749/02/12, in respect of the said premises bearing assessment no. 1038/5.

Since this case at hand was regarding the entrance and/or the roadway to enter to the premises bearing no. 1038/5, the learned Magistrate acting as the Primary Court Judge reserved the Order to be pronounced after the pronouncement of the Order of the aforesaid case bearing no.B 5749/02/12.

The learned Judge delivered the Order of the said case bearing no. B 5749/02/12 on 20.03.2013, not granting possession to either of the parties.

Subsequently, the learned Judge pronounced the Order in the instant case bearing No. 753/02/2012 on 17.05.2013, which states inter alia;

- I. There was another application before this court under section 66 of the Primary Courts' Procedure Act bearing case no. 5749/02/12 between the Appellant, his wife, 2nd Party- Respondents and the Intervient Respondent of this Case;
- II. The aforesaid case was regarding the possession of the property containing a house and the Order of the said case had been delivered on 20.03.2013;

- III. The present case bearing no. 753/02/2012 is about blocking the entrance of the aforesaid land containing a house.
- IV. The application of the Appellant and his wife in the case bearing no. 5749/02/12 was dismissed and the Appellant and his wife were not granted the possession of the land containing the house since the Appellant and his wife had failed to prove the possession of the land containing the house.
- V. Therefore, the right of way to the aforesaid land will not be decided in this case and parties are directed to resolve the matter regarding the ownership and possession of the land and the right of way to the land in a competent Court.

Being aggrieved by the said Order, the 1st Party-Respondent-Respondent-Appellant invoked the Revisionary Jurisdiction of the Provincial High Court of Colombo by application dated 05.03.2013.

The said application was supported on 07.10.2013, seeking notices on the Respondents and having reserved the right to support for interim relief *inter-partes*. However, the learned High Court Judge pronounced the Order on 06.12.2013, refusing to issue notice on the Respondents on the basis that there were no sufficient grounds to issue notice on the Respondents.

Being aggrieved by the said Order of the learned High Court Judge, the 1st Party-Respondent-Petitioner-Appellant [hereinafter sometimes referred to as the Appellant] invoked the Appellate Jurisdiction of this Court to set aside the Order on the grounds mentioned in paragraph 19 (a)-(o) in the Petition of Appeal.

According to the information filed under Section 66 of the Primary Courts' Procedure Act by the Officer-in-Charge of the Police Station-Borella, and also the facts contained in the affidavits filed by the respective parties, the dispute had arisen among the parties with regard to the premises bearing No.1038/5 by fixing a gate blocking the access roadway.

In this respect, it is important to consider the affidavits filed by the respective parties in the instant Case.

The 1st Party in the Primary Court matter filed their affidavit on the main matter dated 28.03.2012 with documents marked 1⊕1 to 1⊕9 and had sought inter alia;

- I. To declare that the Appellant and 1st Party-2nd Respondent have a servitude/roadway/right to access, to use the roadway which is morefully reflected in 1⊕9, to enter the house and the business premises of the Petitioner;
- II. To make an Order removing the gate which obstructs the entrance which is morefully reflected in 1⊕9 as B1;
- III. To make an Order prohibiting all the disturbances relating to the right of way of the Appellant and 1st Party-2nd Respondent.

The 2nd Party-Respondents filed their affidavits dated 28.03.2012 with documents marked 1⊕1 to 1⊕3 and had sought inter alia;

- I. To declare that the 2nd Party-Respondents have the right to fix the gate which had been fixed in the manner without disturbing any of the 1st Party Respondents (Appellant and 1st Party-2nd Respondent);
- II. To declare that the 2nd Party-Respondents have the right to fix the gate since the lessee (Intervient Respondent, who is as claimed by him as lessee) is not objecting to the same;

The Intervient Respondent filed his affidavit dated 28.03.2012 seeking inter alia;

- I. To make an Order declaring that the Intervient Respondent is entitled to the possession of the premises bearing assessment No: 1038/5 from 03.10.2010 to 02.10.2011;
- II. To make an Order prohibiting all the disturbances of such possession.

After counter affidavit and written submissions were filed by all three parties, the case was fixed for Order.

It is to be noted that before pronouncing the Order in the instant case, the 2nd Party-Respondent-Respondents and the Intervient Respondent-Respondent had informed Court that a separate application under Section 66 of the Primary Courts' Procedure Act had been filed before the Magistrates' Court of Colombo, case bearing No. B 5749/02/12, regarding the possession of the premises bearing assessment no. 1038/5. Since the instant case was in relation to the roadway to enter the premises bearing no 1038/5, application was made by the 2nd Party-Respondent-

Respondents and the Intervient Respondent-Respondent to halt the proceedings of the instant Case until final determination of the said Case bearing No. B 5749/02/12. Hence, the learned Primary Court Judge reserved the Order to be pronounced after the pronouncement of the Order of the aforesaid Case bearing No. B 5749/02/12.

The learned Primary Court Judge pronounced the Order on 20.03.2013 of case bearing No. B 5749/02/12, not granting possession to either of the parties and decided the instant Case on the premise that, since the Appellant and his wife have failed to prove the possession of the land with the house on the disputed premises in case bearing No. B 5749/02/12, it was held that the right of way to the disputed land in the instant case [B 5749/02/12] will not be decided and parties were directed to resolve the matter regarding the ownership and possession of the land and the right of way to the land in a competent Court.

Since the dispute is relating to a roadway in the instant case, it clearly manifests that it has to be determined in terms of Section 69 of the Primary Courts' Procedure Act.

Section 69 (1) states that;

“Where the dispute relates to any right to any land or any part of a land, other than the right to possession of such land or part thereof, the Judge of the Primary Court shall determine as to who is entitled to the right which is the subject matter of the dispute and make an Order under Subsection (2)”.

Section 69 (2) states;

“An Order under this Subsection may declare 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”.

Apparently, the learned Primary Court Judge had failed to consider Section 69(1) of the Primary Courts' Procedure Act, where it is provided that the Primary Court Judge shall determine as to who is entitled to the right of possession which is the subject of the dispute and shall make an

Order under Section 69(2) of the Act and declare that any person specified therein shall be entitled to the rights in dispute. Instead, the learned Primary Court Judge first dealt with the case bearing No: B 5749/02/12 in terms of Section 68 of the said Act and decided that no person shall be entitled to the possession of the disputed premises, but had not decided who is entitled to the right to possession of the disputed portion of land.

In view of Section 69(1) and 69(2) of the Primary Courts' Procedure Act, it is a fundamental duty of the Primary Court Judge, to determine as to who is entitled to the right which is the subject of the dispute and make an Order under subsection 2 of section 69 of the Primary Courts' Procedure Act which is also a mandatory provision.

It is noteworthy that in the instant Case, the learned Primary Court Judge had depended on the Order of the Case bearing No. 5749/02 and refused the application of the first Party **only on that ground**. The relevant citation of the Order of the learned Primary Court Judge is as follows;

...එකී අංක 5749/02 දරණ නඩුවෙන් පළවන පාර්ශවයට එම නිවස සහිත ඉඩමේ භුක්තිය සහ සන්තකය ලබා දීමක් සිදු නොවූ අතර, පළවන පාර්ශවයේ ඉල්ලීම නිශ්ප්‍රභ කරන ලදී. මෙම නඩුවේදී පළවන පාර්ශවය එකී පුද්ගලයින්ම වන අතර, ඔවුන් මෙම නඩුවෙන් ඉල්ලා සිටින්නේද එකී ආරවුල්ගත පරිශ්‍රයට යැම් ඊම් සඳහා තිබෙන මාර්ගය භාවිතා කිරීමේ නිරවුල් අයිතිය වේ. නිවස සහිත ඉඩමේ භුක්තිය සහ සන්තකය පළමු පාර්ශවය එකී නඩුවේ තහවුරු කර නොමැති හෙයින්, ඔවුන් හට එකී ආරවුල්ගත පරිශ්‍රයේ භුක්තිය හා සන්තකය නොලැබුණ හෙයින්, මෙම නඩුවෙන් එකී මාර්ගය භාවිතා කිරීමේ අයිතිය පිළිබඳ තීරණයක් ලබා දීම සිදු නොකරන අතර,....

It is apparent that the learned Primary Court Judge has not properly evaluated and analysed the evidence placed before her when she made the impugned Order.

It was submitted on behalf of the Appellant that, the learned Primary Court Judge ordered to affix notices on the questioned premises on 18.01.2012 which were returnable on 01.02.2012. On this day Intervenant Respondent appeared in Court and intervened in the instant Case. Thereafter, the learned Primary Court Judge had warned the parties not to make any changes to the disputed premises. However, despite the said warning by the learned Primary Court Judge, the 2nd Party-Respondent-Respondents had demolished the garage run by the Appellant.

The Court observes that the said garage is situated adjacent to the questionable premises [the roadway] in the instant Case.

After demolition of the garage, the Appellant and the 1st Party-2nd Respondent filed an affidavit and sought an interim Order on 15.02.2012. Subsequently, the 2nd Party-Respondents and the Interventient Respondent filed their objections to the said application and the learned Primary Court Judge concluded to consider the Interlocutory Order at the pronouncement of the final determination of the Case.

It is evident from the journal entry dated 19.09.2012, that the Respondent had agreed to hand over a key to the 1st Party (The Appellant and the 1 Party-2nd Respondent). It clearly shows that the Respondents had admitted the Appellant's right to access to the disputed land.

According to the statement dated 01.12.2011, made by the 1st Respondent of the 2nd Party to the Borella Police, he had admitted the Appellant's possession and his right to enter to the premises stating that they were fixing the gate without blocking the Appellant's entrance.

“මම අද දින ගේට්ටුව දැමීමට සූදානම් වූයේ එම ගමගේ මෝටර්ස් ආයතනයට ඇතුලු වන මාර්ගයේ නොවෙයි. මෙම අය හිතාගෙන තිබෙන්නේ මෙම ප්‍රධාන මාර්ගය අවහිර කරලා කියලා තමයි පැමිණිලි කරලා තියෙන්නේ. මම කෙසේවත් ඔය වගේ වැඩ කරන්නේ නැහැ. මේ අය බොරුවට තමයි මෙලෙස වරද්දා ගෙන පැමිණිලි කරලා තියෙන්නේ”.

Furthermore, the 2nd Party-Respondents have sought an Order from the Primary Court by their affidavit stating that they have a right to fix the gate since they have not disturbed the possession/entrance of the Appellant and his wife

Prayer (1) - අප විසින් අපගේ ආරක්ෂාවට 1වන වගඋත්තරකරුවන්ගෙන් කිසිවෙකුට අවහිරයක් නොවන ලෙස තබන ලද ගේට්ටුව සවි කිරීමට අපට අයිතියක් ඇති බව ප්‍රකාශ කරන ලෙසත්,

The 2(c)-2nd Party-Respondent had admitted in her police statement that the Appellant resides near her residence at premises bearing no. 1038/22, Maradana Road, Borella.

... පදිංචි ලිපිනය 1038/22, මරදාන පාර, බොරැල්ල, කොළඹ 08 යන අය මෙසේ කියා සිටියි. මා ඉහත ලිපිනයේ පදිංචි ව සිටින අතර මා ප්‍රකාශය දෙනු ලබන්නේ අපේ නිවස අසල පදිංචි ගමගේ මෝටර්ස් අයිති ජිනදාස ගමගේ යන අය වත්තට ඇතුළු වන මාර්ගයට ගේට්ටුවක් දැමීමට විරුද්ධ වීම සම්බන්ධවයි...

Thus, the Respondents have never denied the Appellant's and his wife's right to access to the questioned premises in their affidavits filed in the instant case. The Appellant and his wife had stated in their affidavit as follows in paragraphs 13 and 15 of the affidavit;

13. අපගේ නිවසට ඇතුළු වීමට ඇති ප්‍රවේශ අයිතිය පමණක් නොව මෙම ඉඩමේ අයිතිය ද කාලාවරෝධය යටතේ අපට එනම් මත්තක ගමගේ ජිනදාසට පැවරී ඇති බව කියා සිටිමු.

15. මෙම ආරවුලට අදාළ පරිශ්‍රයෙන් අපව නෙරපා දැමීමට කොළඹ දිසා අධිකරණයේදී මෙකී 2 වන පාර්ශවයේ 1වන වගඋත්තරකරු වන සුභාෂ් සිල්වාගේ සහෝදරයන් විසින් පවරන ලද 17643/L නඩුවේ ඉහත ලකුණු කල 1ව8 දරණ ලේඛණයේ ඇතුළත් ව4 දරණ අධිකාරී පත්‍රය මත ප්‍රසිද්ධ මානක එස්. ඩී. එදිරිවික්‍රම විසින් මැන සකසන ලද 01.12.1997 දින දරණ අංක 1018 පිඹුර 1ව9 ලෙස සලකුණු කොට ඉදිරිපත් කරමු. එම පිඹුරේ අප සන්නකයේ ඇති පරිශ්‍රයට ඇති ප්‍රවේශය (Road) යනුවෙන් සඳහන් වේ. අප විසින් එය කහ පාටින් සලකුණු කොට ඇති අතර එම ප්‍රවේශයට බාධා කරමින් සාදා ඇති ගේට්ටුව ඊ1 වශයෙන් සලකුණු කොට සිටිමු.

It is relevant to note that section 72 of the Primary Courts' Procedure Act provides for the learned Primary Court Judge to determine the matter on the evidence placed before him.

According to Section 72 of the Act ;

A determination and Order under this part shall be made after examination and consideration of the following:

(a) the information filed and the affidavits and documents furnished;

(b) such other evidence on any matter arising on the affidavits or documents furnished as the Court may permit to be led on that matter; and

(c) such oral or written submission as may be permitted by the Judge of the Primary Court in his discretion.

Therefore, it is apparent that the learned Magistrate had not considered the evidence which had been placed before the Primary Court by the parties, which clearly demonstrates the Appellant's right to use the said disputed portion of land as a roadway.

In this respect, it is to be observed that the roadway in question is the only road to access the premises bearing assessment no. 1058/5 of Maradana Road, Borella, which the Appellant claimed the possession of, in Primary Court Case bearing no: B 5749/02/12.

In *Ramalingam Vs. Thangarajah (1982) 2 SLR 693* at page 699, it was held that,

“On the other hand, if the dispute is with regard to any right to any land other than the right of possession of such land, the question for decision, according to Section 69(1), is who is entitled to the right which is the subject of dispute. The word "entitle" here connotes the ownership of the right. The Court has to determine which of the parties have 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)”.

In view of the said Judgment, it is pertinent to note that the Order dated 17.05.2013 of the learned Primary Court Judge, not giving the right of way to the Appellant is made without considering the relevant provisions of Law. Thus, the learned Magistrate has misdirected herself and made the impugned Order. The learned Primary Court Judge has erred in Law when she decided that no person shall be entitled to the possession of the disputed premises, since she has a legal duty to determine who is entitled to the possession after examination of the information filed by the police, affidavits and documents filed by respective parties.

Apparently, the learned Primary court Judge had not given the possession of the premises bearing assessment No. 1038/5 of Maradana Road, Borella to any party by the Order made in Case bearing No. B 5749/02/12.

It is observed that the learned Primary Court Judge had made the Order in the instant case considering the facts of the case bearing No. B 5749/02/12, when she was arriving at the decision of the said Case.

Therefore, it is seen that the learned Primary Court Judge had not considered the evidence placed before her in the instant Case, and had arrived at a conclusion based on the Order made in Case bearing No. B 5749/02/12.

Hence, the learned Primary Court Judge had erred in Law and facts and had dismissed the 1st Party-1st Respondent-Petitioner-Appellant's Case which caused a grave injustice to the rights of the Appellant.

In view of the aforesaid reasons, it clearly shows that the learned High Court Judge has failed to properly evaluate the Law and facts of this case, when he decided that there was no sufficient cause to issue notice on the Respondents. The learned High Court Judge has failed to appreciate that there were exceptional circumstances of this case in order to invoke the Revisionary Jurisdiction of the High Court;

Hence, I hold that the Order made by the learned Primary Court Judge dated 17.05.2012 is bad in Law and should be set aside.

Similarly, the Order of the High Court dated 06.12.2013 dismissing the application of the Appellant, which caused a grave injustice to the Appellant is also to be set aside.

Hence, we allow the appeal of the Substituted 1st Party-1st Respondent-Petitioner-Appellant. No cost is awarded in this appeal and parties have to bear their own costs.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL