

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

In the matter of an application under and in terms of
Article 138 of Constitution of the Democratic
Socialist Republic of Sri Lanka.

Officer-in-Charge,
Minor Offences Branch,
Police Station,
Ratnapura.

Complainant

CA PHC No: **85/2014**

Vs.

HC Ratnapura Case No:
RA 108/2011

1. Weragoda Arachchilage Anjana,
Nalaka Weragoda,
Yakdehiwatta,
Niwithigala.

1st Party-Respondent

MC Ratnapura Case No:
69209

2. Kurana Arachchilage Karunawathi,
No 124/11, Pothgul Vihara Mawatha,
Ratnapura.

2nd Party-Respondent

AND NOW

Kurana Arachchilage Karunawathi,
No 124/11, Pothgul Vihara Mawatha,
Ratnapura.

2nd Party-Respondent-Petitioner

Vs.

1. Officer-in-Charge,
Minor Offences Branch,
Police Station,
Ratnapura.

Complainant-Respondent

2. Weragoda Arachchilage Anjana,
Nalaka Weragoda,
Yakdehiwatta,
Niwithigala.

1st Party-Respondent-Respondent

3. Ajith Hapuarachchi,
124/10, Pothgul Vihara Mawatha,
Ratnapura.

Respondent

AND NOW BETWEEN

Kurana Arachchilage Karunawathi,
No 124/11, Pothgul Vihara Mawatha,
Ratnapura.

**2nd Party-Respondent-Petitioner-
Appellant**

Vs.

Weragoda Arachchilage Anjana,
Nalaka Weragoda,
Yakdehiwatta,
Niwithigala.

**1st Party-Respondent-Respondent-
Respondent**

Ajith Hapuarachchi,
124/10, Pothgul Vihara Mawatha,
Ratnapura.

Respondent-Respondent

Officer-in-Charge,
Minor Offences Branch,
Police Station,
Ratnapura.

Complainant-Respondent-Respondent

Before:

Prasantha De Silva, J.

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

Counsel: Dharshana Kuruppu AAL with Thanuja Dissanayake AAL for the 2nd Party-Respondent-Petitioner-Appellant.

Gihan Liyanage AAL for the 1st Party-Respondent-Respondent Respondent.

Written Submissions tendered on: 23.10.2018 and 20.07.2021 by 2nd Party-Respondent-Petitioner-Appellant.

Both parties agreed to dispose this matter by way of written submissions.

1st Party-Respondent-Respondent-Respondent had not filed written submissions after notices being issued on several occasions.

Decided on: 08.03.2022

Prasantha De Silva, J.

Judgment

Officer-in-Charge of Minor Offences Branch at Police Station-Ratnapura being the Complainant had filed an information under Section 66 (1) of the Primary Courts' Procedure Act No. 44 of 1979 in the Additional Magistrate's Court of Ratnapura in case bearing No. 62209. It was informed that there is a dispute between the 1st Party-Respondent and the 2nd Party-Respondent regarding a pathway and of an imminent danger of a breach of peace.

The said 1st Party-Respondent and the 2nd Party-Respondent appeared in Court and filed their respective affidavits and counter affidavits with documents. Thereafter, the learned Magistrate acting as the Primary Court Judge delivered the order on 29.06.2009 which held that the 2nd Party-Respondent is entitled to use the disputed pathway as a foot path.

Subsequently, the Counsel for the 1st Party-Respondent, by way of a motion prayed that the order of the learned Primary Court Judge be enforced through the Fiscal Officer and accordingly, the Court made an order to handover the possession of the disputed pathway as per the journal entry dated 16.07.2009.

“නියෝගය
අවසන් නියෝගය අනුව භුක්තිය ක්‍රියාත්මක කරන්න”.

On 31.07.2004, the Fiscal Officer of the Magistrate’s Court of Ratnapura had gone to handover the possession of the disputed pathway. At that time the 1st Party-Respondent had pointed out a pathway to the right-hand side of the boutique which belonged to one Dayawansha.

However, the 2nd Party-Respondent had informed the Fiscal Officer that it is not the pathway which she claimed and the pathway which she claimed is on the left side of the boutique of Dayawansha and not on the right-hand side.

Apparently, the Fiscal Officer had pointed out to 2nd Party-Respondent-Petitioner-Appellant, the pathway referred to in the schedule to the order of the learned Primary Court Judge dated 29.06.2009 and had further advised the 2nd Party-Respondent to comply with such order or otherwise to inform facts to Court to obtain relief.

However, on 27.08.2009, the learned Primary Court Judge identified the subject matter of the case through the investigation notes and the sketch filed by the Police and the report of the Grama Niladhari. Thereafter, the learned Primary Court Judge had ordered the possession of the disputed pathway to be handed over to the 2nd Party-Respondent.

In compliance with the said order dated 16.07.2009 [අවසන් නියෝගය අනුව භුක්තිය ක්‍රියාත්මක කරන්න], the 2nd Party-Respondent had filed license papers [භුක්ති පත්‍ර] through a motion on 02.02.2010 and had claimed the possession of the pathway as per the final order of the learned Primary Court Judge dated 29.06.2009.

The Fiscal Officer of the Ratnapura Magistrate’s Court had gone to the disputed pathway on 18.01.2011 and had reported to Court that he was unable to handover the possession of the pathway to the 2nd Party-Respondent since he could not identify the disputed roadway.

Thereafter, Counsel for the 2nd Party-Respondent had filed a motion dated 10.01.2011 and had informed Court about the facts relating to the handing over of the possession of the disputed

pathway. Consequently, the learned Primary Court Judge made an order on 19.05.2011, and held that it has to be decided whether the possession of the disputed pathway is to be handed over according to his predecessor's order or not and thereafter had ordered to comply with his predecessor's order.

Being aggrieved by the orders made by the learned Primary Court Judge on 16.07.2009, the 2nd Party-Petitioner had preferred an application for revision to the Provincial High Court of Ratnapura in case bearing No. RA/108/11. Apparently, the learned High Court Judge dismissed the said application of the 2nd Party-Respondent-Petitioner on the grounds that, there were no exceptional circumstances pleaded by the 2nd Party-Petitioner-Respondent and that there is an inordinate delay in exercising the discretionary remedy of revision by the Appellant.

Being aggrieved by the said Order of the learned High Court Judge of Ratnapura dated 13.06.2011, the 2nd Party-Respondent-Petitioner-Appellant had preferred an Appeal seeking to set aside the said Order of the learned High Court Judge and also sought reliefs prayed in the prayer to the petition of the said revision application.

It was submitted on behalf of the 2nd Party-Petitioner-Appellant [hereinafter sometimes referred to as the Appellant] that the learned High Court Judge has failed to address his mind to the following exceptional circumstances exist to invoke the revisionary jurisdiction of the High Court.

- a) That the disputed pathway has not been subjected to proper identification owing to the failure of learned Primary Court Judge of Ratnapura to conduct a scene inspection.
- b) That the 3rd Party (Respondent-Respondent) has been adversely affected by the Order of the learned Primary Court Judge of Ratnapura, which has negated the prime purpose behind applications under Section 66 under Primary Courts' Procedure Act.

Furthermore, it was submitted that the learned High Court Judge has erred in dismissing the revision application of the 2nd Party-Respondent-Petitioner-Appellant when the same was filed within a reasonable period of time.

According to the journal entries, although the main order was delivered on 05.03.2014, the 2nd Party-Respondent-Petitioner-Appellant could not execute the Writ of Possession for various reasons. The learned Primary Court Judge had made an order on 13.06.2011 with regard to the execution of Writ of Possession. Since the 2nd Party - Petitioner- Appellant has invoked the Revisionary Jurisdiction on 02.12.2011, the Appellant is not guilty of laches. Hence, the delay is not a ground for the learned High Court Judge to dismiss the revision application of the Petitioner.

Importantly, the main objectives behind Section 66 applications under Primary Courts' Procedure Act are to prevent a breach of the peace, preserve the peace and also to maintain the status quo until the rights of parties are determined by a competent Civil Court.

The learned Primary Court Judge has specifically mentioned that he identified the disputed pathway through the observation notes made by the Investigating Officer of Police Station Ratnapura and report of the Grama Niladhari.

It is worthy to note that the learned Primary Court Judge has complied with Section 66(4) of the Primary Courts' Procedure Act by making an order to affix notice on the pathway under dispute on 22.09.2008 and the Fiscal Officer of the Magistrate's Court of Ratnapura has affixed such notice on the disputed pathway. It was reported to Court on 06.10.2008. In this instance, Court draws the attention to the Investigating Officer's notes and observations pertaining to the disputed pathway made by the Police Officer.

“පැමිණිලිකරුගේ නිවස ඉදිරිපිට දකුණු පැත්තේ මෙම ආරවුල ඇති පැත්තේ කොන්ක්‍රීට් කම්බි කණු දෙකක් හා ජම්බු ගසක් සිටුවා මායිමේ ඇති අතර මෙම ආරවුල ඇති ස්ථානයේ දුරකථන කම්බි පහළ නිවාස වලට අදින ලද දුරකථන කුළුණක්ද ඇත. තවද මෙම වැට මායිම පිහිටි ස්තානයේ දුරකතන කුළුණට හා දයාවංශ ගේ කඩයට මායිම්ව මෙහි ව-උගේ නිවසට යාමට තාවකාලික පාරක් හදා ගෙන ඇති අතර මෙම දයාවංශ යන අයගේ කඩයට දකුණු පැත්තේ මෙම නිවාසවලට යාමට පාරක් ඇති අතර එම පාර ඇති ස්ථානයේ බ්ලොක් ගල් වලින් තාප්පයක් බැඳ වහලයට ඇස්බැස්ටෝස් තහඩු යොදා කඩයක් සඳහා ඇත. එම කඩ සාදා ඇති ස්ථානයටත් නඩුවක් ඇති අතර මෙම ව-උගේ නිවාස වලට යාම සඳහා මුවගම ප්‍රධාන පාලම පසුකර පලාවෙල පැත්තට එන විට මෙම පාලම පසු කරනවාත් සමගම පහළට ඇති පාරේ 10m පමණ ගිය විට වම් පැත්තට ස්ථිර පාරෙන් මෙම නිවාසවලට යාමට පාරක් ඇත. එම පාරෙන්

ව-උගේ නිවසට යාමට පාරක් ඇත. එම පාරෙන් ව-උගේ නිවසට යා හැක. දළ රූපය පහත අදිමි”.

According to the said observations and the sketch of the Police, it is seen that the Investigating Officer has recognized the disputed area on the right side of the house of the 1st Party-Respondent, and a pathway adjacent to a boutique of one Dayawansha. Furthermore, it is seen that there is a road way which leads to the houses on the right side of the boutique of the said Dayawansha.

The observations made by the learned Primary Court Judge in this respect should be noted;

“..... ප්‍රාදේශීය ලේකම් වාර්තාව සමග ඉදිරිපත් කර තිබෙන ග්‍රාම නිලධාරී වාර්තාව ද, එයට අදාළ දළ සටහන් ද, පරීක්ෂා කිරීමේදී පැහැදිලි වන්නේ දයාවංශ යන අයගේ වෙළඳසැලට යාබදව පිහිටා ඇති ප්‍රවේශ මාර්ගය සම්බන්ධයෙන් මෙම ආරවුල හටගෙන ඇති බවය.....
.....මෙම ආරවුලට අදාළව ඉදිරිපත් කර තිබෙන සියලු කරුණු සැලකිල්ලට ගැනීමේදී දයාවංශ යන අයගේ වෙළඳසැලට දකුණු පසින් පිහිටා තිබෙන අධි පාර භාවිතා කිරීමේ අයිතිවාසිකම සම්බන්ධයෙන් මෙම ආරවුල හටගෙන ඇති බව මා තීරණය කරමි”.

The Primary Court Judge has observed that in the affidavit of the 2nd Party-Respondent in which it was stated that; the 1st Party-Respondent attempted to fence the disputed pathway and erect concrete pillars to block the same.

It is pertinent to note that the Police Officer has marked the disputed pathway as ‘F’, in his observation notes, and it is referred to in the schedule to the license papers [භුක්ති පත්‍ර] as follows;

“ඉහත කී උපලේඛණය

සබරගමු පළාතේ.....
.....පොත්ගුල් මාවතේ වරිපනම් අංක 20/1 දරන දේපල නැගෙනහිරට-අධිපාර, දකුණට-මාර්ග රක්ෂිතය සහ බස්නාහිරට-ඒ ලිලියන් හිමිකම් කියන බාලයාගේ ඕවිට, පොත්ගුල් විහාර මාවතේ වරිපනම් අංක 132 දේපලට මායිම්වූ පර්චස් 7.2ක් වපසරිය ඇති ඉඩම්

කැබැල්ලේ දකුණු මායිමේ ඇති මෙම නඩුවට ගොනුකර ඇති පොලිස් නිරීක්ෂණ සටහන් වල ‘එඟ්’ අක්ෂරයෙන් දක්වා ඇති අඩි පාර.....”

It is relevant to note the observations made by the learned Primary Court Judge in this respect;

“මෙම නඩුවේ පළමු පාර්ශවකරු තම දිවුරුම් ප්‍රකාශයේ මෙම ආරවුල් ප්‍රවේශ මාර්ගය අලුතින් සකස් කර ගැනීමට දෙවන පාර්ශවකාරිය විසින් උත්සාහ කල බවට දක්වා ඇතත්, තම හරස් දිවුරුම් ප්‍රකාශයේ පළමු පාර්ශවකරු දක්වා ඇත්තේ පොලිස් නිරීක්ෂණ සටහනෙහි “එඟ්” අක්ෂරයෙන් පෙන්නුම් කර ඇති ස්ථානයේ අඩි පාරක් තිබූ බවය”.

Considering the observation notes and the sketch submitted by the Informant P.C. 64096 Gnana Keerthi of the Police Station-Ratnapura, it clearly states that;

“මෙම ස්ථානයේ පැමිණිලිකරුගේ නිවස පිහිටා ඇති අතර පැමිණිලිකරුගේ නිවස ඉදිරිපිට දකුණු පැත්තේ මෙම ආරවුල ඇති ස්ථානයේ කොන්ක්‍රීට් කණු දෙකක් හා ජම්බු ගසක් සිටුවා ඇති අතර මෙම ආරවුල ඇති ස්ථානයේ දුරකථන කම්බි පහළ නිවාස වලට අදින ලදී. තවද මෙම වැට මායිම් පිහිටි ස්තානයේ දුරකථන කුළුණට හා දයාවංශ ගෙ කඩයට මායිම්ව මෙහි එන වගඋත්තරකරු ගේ නිවසට යාමට තාවකාලික පාරක් සාදා ගෙන ඇති අතර, මෙම දයාවංශ යන අයගේ කඩයට දකුණු පැත්තේ මෙම නිවාස වලට යාමට පාරක් ඇති අතර එම පාර ඇති ස්ථානයේ බිලොක් ගල් වලින් තාප්පයක් බැඳ වහලයට ඇස්බැස්ටෝස් තහඩු යොදා කඩයක් සාදා ඇත”.

According to the said sketch, it clearly shows that the disputed pathway is on the right side of the 1st Party-Respondent-Respondent-Respondent’s [hereinafter sometimes referred to as the 1st Party-Respondent] premises. However, the sketch does not show the boutique of Dayawansha. According to the 2nd Party-Respondent-Petitioner-Appellant, she got rights to use the disputed pathway adjacent to Dayawansha’s boutique. Since the 1st Party-Respondent had shown the disputed roadway to the right side of Dayawansha’s boutique, Court therefore has to determine whether the disputed pathway is on the left side of Dayawansha’s boutique or on the right side.

It was the position taken up by the 2nd Party-Respondent-Petitioner-Appellant that the pathway shown to the Fiscal Officer by the 1st Party-Respondent is a part of the land that belongs to one

Ajith Hapuarachchi, who was not a party to the said Primary Court case. The 2nd Party-Respondent-Petitioner-Appellant contended that she did not claim the right of way to the said path that belongs to the Respondent-Respondent namely the said Ajith Hapuarachchi and that the dispute between the 1st Party-Respondent and 2nd Party-Respondent-Petitioner-Appellant was only regarding the pathway claimed and shown to the Fiscal by the 2nd Party-Respondent-Petitioner-Appellant.

It appears that on 27.08.2009, the 2nd Party-Respondent-Petitioner-Appellant and the said Respondent-Respondent namely Ajith Hapuarachchi filed a motion and had informed the Primary Court Judge that the disputed pathway has not been properly identified. It was further brought to the notice of Court, that the notice under Section 66 (4) of the Primary Courts' Procedure Act has not been affixed on the pathway shown by the Fiscal Officer on the right side of the boutique of Dayawansha and it had instead been affixed on the pathway claimed by the 2nd Party-Respondent on the left side of the boutique.

It was further brought to the notice of Court that the pathway shown by the Fiscal Officer through a building, belonged to the Respondent-Respondent and that there is a pending case for the said land in the District Court of Ratnapura in case bearing No. 22960.

Therefore, it is clear that the disputed pathway is on the left side of the said Dayawansha's boutique. This Court observes that, although the Investigation Officer had mentioned about Dayawansha's boutique and the disputed pathway in observation notes, he had not shown Dayawansha's boutique in the sketch and had shown the disputed area as (F), which seems a fatal irregularity. Thus, the Investigating Officer had not performed his duty with due diligence, which caused an injustice to the Appellant.

According to the investigation notes, it is observable that there is a pathway leading to the 2nd Party-Respondent-Petitioner-Appellant's house, adjacent to the boutique of the said Dayawansha. The learned Primary Court Judge declared that the Appellant is entitled to use the disputed pathway. However, has confusingly stated:

“දයාවංශ යන අයගේ වෙළඳ සැලට දකුණු පසින් පිහිටා තිබෙන අඩි පාර භාවිතා කිරීමේ අයිතිවාසිකම් සම්බන්දයෙන් මෙම ආරවුල හට ගෙන ඇති බව මා තීරණය කරමි”.

In this instance, Court observes that although the learned Primary Court Judge held against the 1st Party-Respondent, he had taken steps to execute the writ of Possession and had shown a pathway on the right side of the boutique of Dayawansha to the fiscal. Perhaps, the learned Primary Court Judge got confused and had inadvertently referred to the ‘right side of Dayawansha’s boutique’, instead of the left side of the boutique. As such, I hold that the disputed roadway is on the left side of the said Dayawansha’s boutique. Thus, it is corrected in the order dated 29.06.2009 by the learned Primary Court Judge in terms of Section 78 of the Primary Courts’ Procedure Act read with Section 189 of the Civil Procedure Code.

However, it clearly manifests that on several occasions, the 2nd Party-Respondent-Petitioner-Appellant had moved to take possession of the disputed pathway. Regardless of it, she was not allowed by the Court Officers to execute the Writ in order to obtain possession, despite the Order made by the learned Primary Court Judge in favour of the Appellant. Without a doubt, it seems that Court is at fault by not allowing the 2nd Party-Respondent-Petitioner-Appellant to reap the fruits of her victory. According to the legal maxim “*Actus curiae neminem gravabit*”, ‘No one should be prejudiced by an act of Court’. Therefore, it is evident that great injustice has been caused to the 2nd Party-Respondent- Petitioner-Appellant by an act of Court, which amounts to a miscarriage of Justice. As such, exceptional circumstances exist for the 2nd Party-Respondent-Appellant to invoke the revisionary jurisdiction of the provincial high Court of Ratnapura.

Therefore, in the light of the aforesaid reasons, it clearly manifests that the learned High Court Judge has not considered the entitlement of the Appellant, thereby has erred in Law by dismissing the application of the Appellant.

Hence, we set aside the Order of the learned High Court Judge dated 05.03.2014 and grant reliefs prayed in the prayer of the petition dated 02.02.2011 invoking the revisionary jurisdiction of the High Court.

Thus, we set aside the Order dated 16.07.2009 by the learned Primary Court Judge and the Orders made by the Primary Court thereafter.

For the foregoing reasons, we direct the incumbent Magistrate of the Magistrate's Court of Ratnapura to act as a Primary Court Judge and inspect the premises in order to identify the disputed pathway and finally, to handover the possession of the same to the 2nd Party-Respondent-Petitioner-Appellant.

Hence, we allow this appeal. No cost is awarded in this appeal.

JUDGE OF THE COURT OF APPEAL

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

I agree.

JUDGE OF THE COURT OF APPEAL