

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF**

**SRI LANKA**

In the matter of an appeal under Rule 2 (1) of Part I of the Court of Appeal (Procedure for appeals from High Courts) Rules 1988

Officer in Charge,  
Police Station,  
Padukka.

**Complainant**

**Vs.**

Court of Appeal Case No:  
**CA/PHC/150/2013**

Provincial High Court of Avissawella Case  
No: **70/2009 (Rev)**

Magistrate's / Primary Court of  
Avissawella Case No: **98553**

1. Vajira Kalyani Padmaperuma,  
No. 25, Ingiriya Road,  
Padukka.

**1<sup>st</sup> Party Respondent**

2. Kalupahanage Somadasa,  
No. 83/3, Arukwatta,  
Padukka.

**2<sup>nd</sup> Party Respondent**

**AND BETWEEN**

Kalupahanage Somadasa,  
No. 83/3, Arukwatta,  
Padukka.

**2<sup>nd</sup> Party Respondent-Petitioner**

**Vs.**

Vajira Kalyani Padmaperuma,  
No. 25, Ingiriya Road,  
Padukka.

**1<sup>st</sup> Party Respondent-Respondent**

Tharuka Amarasekara,  
“Lakshmi Shanthi”,  
Arukwatta, Padukka.

**Intervient Respondent-Respondent**

**AND NOW BETWEEN**

Kalupahanage Somadasa,  
No. 83/3, Arukwatta,  
Padukka.

**2<sup>nd</sup> Party Respondent-Petitioner-  
Appellant (Deceased)**

Dulan Shaminda Kalupahana,  
No. 83/3, Arukwatta,  
Padukka.

**Substituted 2<sup>nd</sup> Party Respondent-  
Petitioner-Appellant**

**Vs.**

Vajira Kalyani Padmaperuma,  
No. 25, Ingiriya Road,  
Padukka.

**1<sup>st</sup> Party Respondent-Respondent-  
Respondent**

Tharuka Amarasekara,  
“Lakshmi Shanthi”,  
Arukwatta, Padukka.

**Intervenient Respondent-Respondent**

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

**Counsel:** Amith Rajapaksha A.A.L with Sudharma. K. Gamage A.A.L for the  
2<sup>nd</sup> Party Respondent-Petitioner-Appellant.  
Asthika Devendra A.A.L with Wasantha Vidanage A.A.L for the  
Intervenient-Respondent.  
No representation on behalf of 1<sup>st</sup> Party-Respondent-Respondent-  
Respondent.

**Argued on:** Parties agreed to dispose this matter by way of written submission.

**Written Submissions  
tendered on:** 23.03.2022 by the Intervenient-Respondent.  
28.01.2019 by the 2<sup>nd</sup> Party Respondent-Petitioner-Appellant.

**Decided on:** 24.05.2022

**Prasantha De Silva, J.**

### **Judgment**

The Officer in Charge of Police Station-Padukka had filed an information under Section 66 of the Primary Courts' Procedure Act No. 44 of 1979 in case bearing No. 98553 in the Magistrate's Court of Awissawella in order to prevent the breach of the peace threatened or likely to be threatened among the parties.

The said information was filed in pursuant to a complaint made by one Vajira Kalyani Padmaperuma, the 1<sup>st</sup> Party-Respondent, stating that Kalupahanage Somadasa (Deceased), the original 2<sup>nd</sup> Party-Respondent, had interrupted using of the roadway by 1<sup>st</sup> Party-Respondent by way of constructing a wooden fence in front of the land belonging to 2<sup>nd</sup> Party-Respondent depicted in lot 5 in plan bearing No. 1175, marked 102, 20 feet in length and the said fence has been constructed so as to encroach about 6 feet of the said roadway.

Apparently, both the 1<sup>st</sup> Party-Respondent and 2<sup>nd</sup> Party-Respondent had filed affidavits, counter affidavits and also written submissions at the inquiry and the matter was fixed for Order on 12.06.2008.

However, both parties agreed to enter to a settlement in respect of the width of the roadway mentioned in survey plan bearing No. 1175 dated 29.08.1946 made by A.C.S. Rodriguez licensed surveyor. The attention of Court was drawn to the relevant portion of the settlement entered on 12.06.2008.

“මෙහිදී දෙපාර්ශවය අතර ආරවුල් හටගෙන ඇත්තේ, මාර්ගයේ පළල පිළිබඳ පමණක් නිසා මේ වන විටත්, 29.08.1946 වන දින සකස් කරන ලද පිඹුරු පතක් ඇති බැවින් එහි මෙම මාර්ගය සඳහන්ව ඇති බැවින්, එම පිඹුරේ සඳහන් ආකාරයට බලයලත් මිනින්දෝරු අශෝක වැලිකල විනාන මහතා ලවා මෙම ආරවුල් සහගත කොටස වන අංක 5 සහ 6 දරන ඉඩම් කැබැල්ලට ඇතුළු වීම සඳහා භාවිතා කරනු ලබන මාර්ගයේ කොටස පමණක් පිඹුරේ සඳහන් පරිදි මැනීම කටයුතු කර අදාළ මාර්ගයේ පළල වශයෙන් තීරණයකට එළඹීමට දෙපාර්ශවය එකඟ වන බවය.”

It was submitted on behalf of the 2<sup>nd</sup> Party-Respondent-Petitioner-Appellant that on 10.10.2008 the 1<sup>st</sup> Party Respondent supported the matter requesting for a court commission, with no notice to the Appellant. Pursuant to the said commission, plan No. 586 dated 02.12.2008 was made by Mr. Asoka Welikalavithanage Licensed Surveyor. The said plan and report was produced to Court on 03.12.2008. It was further submitted that as per the settlement entered on 12.06.2008, the parties agreed on the roadway as described in the survey plan No. 1175 dated 29.08.1946. However, in plan No. 586, the roadway is not identical to what is marked in plan No. 1175. As such, 2<sup>nd</sup> Party-Respondent-Petitioner-Appellant had objected to the court commissioner’s plan through his Attorney-at-Law.

Thereafter, the 2<sup>nd</sup> Party-Respondent-Petitioner-Appellant filed a revision application bearing No. 29/2009 dated 02.03.2009 in the Provincial High Court of Avissawella. Apparently, by Order dated 01.04.2009, the learned High Court Judge dismissed the said revision application holding that the learned Magistrate's Order was for further steps and thereby gives the party an opportunity to make submissions on the matter.

In the meantime, the 1<sup>st</sup> Party Respondent obtained a writ of possession according to plan No. 586. On 17.03.2009 the fiscal has filed his report on the fulfillment of the terms of settlement to Court. As per to the fiscal report, possession was handed over according to plan No. 586, thus the Appellant contended that it is contrary to the terms of settlement.

The 2<sup>nd</sup> Party-Respondent-Petitioner-Appellant filed objections by way of written submissions and the 1<sup>st</sup> Party Respondent also filed counter objections by way of written submissions.

Thereafter, the learned Magistrate delivered the Order on 12.06.2009, held that although the 2<sup>nd</sup> Party-Respondent-Petitioner-Appellant claims that the roadway in commission plan No. 586 dated 02.12.2008 is not identical to the roadway described in plan No. 1175, the Appellant has not objected to it at the time the survey was done. Further, the learned Magistrate held that though the parties were present in Court twice after the fiscal's report was produced, no objections were taken up by the parties. Therefore, the learned Magistrate held that there is no reason to set aside the Commission or the new plan, as no prejudice was caused to the Appellant.

Being aggrieved by the said Order, the 2<sup>nd</sup> Party Respondent-Petitioner-Appellant had filed a revision application bearing No. PHC 70/2009, in the Provincial High Court of Avissawella.

It is to be noted that when this matter was taken up for argument, the parties agreed to have the Surveyor General to prepare a new plan and the roadway to be demarcated according to plan No. 1175. However, the survey that was carried out by the Surveyor General included part of a land which belonged to one Tharuka Amarasekara and thereafter she intervened to the case as the Interventient Respondent.

The Interventient Respondent's petition had been taken up for inquiry on 27.02.2013. On that date, the parties agreed to set aside the commission issued to the Surveyor General. As a result, the

learned High Court Judge made an Order setting aside the said commission and fixed the matter for hearing as between the original parties to the revision application. Since the impugned dispute arose only between the 1<sup>st</sup> Party Respondent and the 2<sup>nd</sup> Party Respondent-Petitioner-Appellant, there is no reason for the Intervient Respondent to be aggrieved by the said Order, setting aside to issue a commission to the Surveyor General and her rights would not be prejudiced.

After the hearing of the said application, the learned Provincial High Court Judge of Avissawella by Order dated 18.09.2013 held that even though the parties have not prayed to set aside the settlement dated 12<sup>th</sup> June 2008, the High Court has special power to set aside any Order made by the lower Court, if the said order causes injustice to a party. Therefore, the learned Judge set aside all orders made in relation to the settlement dated 12<sup>th</sup> June 2008 stating the practical difficulty to come for a settlement based on a plan made in the year 1946. The learned Judge further directed the learned Magistrate to take steps to remove all obstructions specified in the observation notes made by Police Sergeant 9357. It states that;

“මෙම ආරවුලට පාදකවී ඇති බාධකයන් ප්‍රතිශෝධක විසින්, වගඋත්තරකාර පාර්ශවය පොලීසියට පැමිණිලි කිරීමට දින කිහිපයකට පෙර කර ඇති, තාවකාලිකව ඉදි කර ඇති වැටි සහ ඉතිරි බාධාවන් හෙයින් එම බාධාවන් ඉවත් කිරීමටත්, බාධාවන් ලෙස සැලකිය හැක්කේ පො.සැ. 9357 ගේ නිරීක්ෂණ වල යොදා ඇති බාධාවන් බවටත් තීරණය කරමි. එම බාධා ඉවත් කිරීමට අදාළ කටයුතු කිරීමට උගත් මහේස්ත්‍රාත් තුමාට දන්වා සිටිමි.”

Against the said order of the learned Provincial High Court Judge of Awissawella dated 18.09.2013, the 2<sup>nd</sup> Party Respondent-Petitioner-Appellant [hereinafter sometimes referred to as the Appellant] had preferred this appeal seeking the following reliefs.

1. Affirm the part of the Order dated 18.09.2013 made by the learned High Court Judge wherein she set aside the following Orders/decisions by the learned Magistrate/Primary Court Judge-
  - a) To issue the court commission to the surveyor as requested by the motion dated 10.10.2008 filed by the Attorney-at-Law for the 1<sup>st</sup> Party Respondent;
  - b) To take steps as per plan No. 586 dated 02.12.2008;
  - c) To handover possession according to plan No. 586 as requested by motion dated 27.02.2009 by the 1<sup>st</sup> Party Respondent;
  - d) To file the report demarcating the roadway marked as Lot. 1 in plan No. 586 dated 17.03.2009 made by Ashoka Welikalavithanage Licensed Surveyor; and

e) The Order dated 12.06.2009.

2. Set aside the part of the Order dated 18.09.2013 made by the learned High Court Judge wherein she ordered to remove all obstructions as per the notes of Police Sergeant 9357.

As such, it is clear that the Appellant affirm a part of the said Order and challenges a part of the Order, in which it was ordered to remove the obstructions made by the Appellant.

Apparently, the learned High Court Judge in the said Order dated 18.09.2013 decided that the settlement dated 12.06.2008 could not be implemented practically, and made Order setting aside the said settlement.

However, instead of sending the case back to the Primary Court for fresh inquiry, the learned High Court Judge makes a determination that the Appellant has made the obstructions that are mentioned in the Police Sergeant's observation notes, and directs the said obstructions to be removed. Thus, the Appellant contended that the impugned Order is an illegal Order that cannot stand.

It was the contention of the Appellant that the learned High Court Judge is at fault, when she was relying on the observation notes of the Police Sergeant as effectively conclusive evidence, without any analysis of the evidence adduced by the parties before the Primary Court in their respective affidavits and counter affidavits.

The attention of Court was drawn to the observation notes dated 02.03.2008 made by Police Sergeant 9358.

According to the observation notes, there is a wooden fence about 20 feet in length built approximately 2-3 days prior to his visit, which is obstructing the roadway leading to the house of the 1<sup>st</sup> Party-Respondent. He further observed that the roadway is 8 feet wide and the fence was built encroaching 6 feet of the roadway.

It was submitted by the Appellant that the learned High Court Judge has failed to consider the fact that the fence was built after it was destroyed by the 1<sup>st</sup> Party Respondent to take a three-wheeler into lot No. 6, which is the reason why the fence appeared to be new.

Furthermore, the learned High Court Judge based her Order entirely on the observation report, which was made only in the presence of the aggrieved party. There was no representation made by the Appellant. As such, it was alleged that the Police Sergeant tends to be biased in his report as he comes to the conclusion that the Appellant has encroached the roadway without knowledge of the original demarcation of the roadway. Therefore, the Order made by the learned High Court Judge based on these observations are prejudicial towards the Appellant and a violation of natural justice.

In this respect, it is noteworthy the observations made by the Police Sergeant 9358;

“මෙම වැට අසල ඇති නිවසේ වගලත්තරකරු පදිංචිව සිටී. මෙම අය කලබලකාරී පුද්ගලයෙක් බැවින් ප්‍රකාශයක් දීම ප්‍රතික්ෂේප කරයි. මෙම අවස්ථාවේදී කලබල කරමින් හැසිරෙන්නට විය. මොහුට පොලිස් ස්ථානයට පැමිණීමට දැනුම් දෙමි.”

As such, it is worthy to note that as per the appellant’s said position, at the time of inspecting the premises in dispute and making observations, only the aggrieved party was present and it was done in the absence of the Appellant, which contradicts the said observation report. Thus, the Appellant was at the disputed premises at the relevant time and refused to make a statement. Apparently, the Appellant had mislead Court by saying that he was not present at the relevant time of inspecting the premises in dispute.

It was the contention of the Appellant that the learned High Court Judge committed a grave error in Law by relying on the observation notes of the Police Sergeant as conclusive evidence without any analysis of the evidence adduced by the parties before the Primary Court Judge in their respective affidavits and counter affidavits.

It appears that the Appellant’s said contention is erroneous for the reason that the learned High Court Judge in her Order dated 18.09.2013, specifically analyzed the evidence placed before the learned Primary Court Judge and had come to the correct findings of fact and Law and decided the dispute between the parties.

The said Order states that;

“ඒ අනුව ඉහත කරුණු සහ මෙම නඩුව මුල් අවස්ථාවේදී මහේස්ත්‍රාත් අධිකරණය වෙත යොමු වීමට මුල් වූ කරුණු ද, එයට අදාලව පොලිස් නිරීක්ෂණ වාර්තාවේ ඇති කරුණු ද, පාර්ශවකරුවන්ගේ ඉල්ලීම මත නිකුත් කර ඇති නඩු පොතට ගොනුවී ඇති කොමිෂන් වාර්තාවේ කරුණුද සලකා බලමි.”

Therefore, it is apparent that the learned High Court Judge had analyzed the evidence adduced before the Primary Court and had come to the correct conclusion and made the impugned Order, in which we see no reason to interfere with.

It is clear that the impugned dispute in the instant case is purely civil in nature. Therefore, the learned High Court Judge has made an Order directing the parties to resolve the matter in a competent jurisdiction in respect of the subject matter.

Further, the learned High Court Judge had directed the learned Primary Court Judge to take necessary actions to remove the wooden fence erected by him and the other obstructions stated in the observation report.

Hence, we affirm the Order dated 18.09.2013 by the learned High Court Judge and dismiss this appeal with costs fixed at Rs. 50,000/-.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

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

I agree.

**JUDGE OF THE COURT OF APPEAL**