

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.

In the Magistrate's Court

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

Petitioner

Vs.

Fathima Johara Packer,
No.22/1/1, Kalyani Mawatha,
Wattala.

Respondent

Case No: CA (PHC) 122/2018

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

**Wattala Magistrate's Court No.
18463/16**

And Between in the High Court

Fathima Johara Packer,
No.22/1/1, Kalyani Mawatha,
Wattala.

Respondent-Petitioner

Vs.

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

Petitioner-Respondent

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

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

Petitioner-Respondent-Appellant

Vs.

Fathima Johara Packer,

No.22/1/1, Kalyani Mawatha,
Wattala.
Respondent-Petitioner-Respondent

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

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

Petitioner-Respondent-
Appellant-Petitioner

Vs.

Fathima Johara Packer,
No.22/1/1, Kalyani Mawatha,
Wattala.

Respondent-Petitioner-
Respondent-Respondent

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

Parties agreed to dispose the matter by way of written submissions.

Written submissions 19.05.2022 by the Petitioner-Respondent-Appellant.
tendered on: 16.08.2022 by the Respondent-Petitioner-Respondent.

Decided on: 27.09.2022

Prasantha De Silva, J.

Judgment

The Petitioner namely Krishnamoorthy Sivakumar had invoked the jurisdiction of the Magistrate's Court of Wattala, in terms of Section 66(1) (b) of the Primary Courts' Procedure Act No. 44 of 1979 by way of a private plaint and had instituted action bearing No. 18463/16 against the Respondent namely Fathima Johara Packer. It

appears that 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 1st and 2nd schedules referred to in the private information filed by the Petitioner, over which the Respondent had erected a fence obstructing the said right of way of the Petitioner. Thus, the Petitioner had prayed for an order declaring that he is entitled to the right of way over the lands described in 1st and 2nd schedules referred to in the information affidavit and had sought for an order removing the purported obstructions and constructions done by the Respondent.

The learned Magistrate, who was acting as the Primary Court Judge, after conclusion of the inquiry had delivered the Order on 28.02.2017, granting reliefs prayed by the Petitioner, declaring that the Petitioner is entitled to the right of way over Lot 1B of plan No.1765 (marked as 035) and Lot 3 of Plan bearing No. 1521 (marked as 04).

Being aggrieved by the said Order, the Respondent had made an application by way of revision to the Provincial High Court of Colombo seeking to revise or set aside the said Order of the learned Magistrate made on 28.02.2017. The learned High Court Judge had affirmed the Order of the learned Magistrate and further ordered the removal of the parapet wall and gate constructed by the Respondent-Petitioner.

The learned Provincial High Court Judge having carefully analysed the evidence and material placed by the parties before the learned Magistrate and had come to the findings inter alia that:

- I. The Appellant had constructed a parapet wall leaving a small space of access for the Respondent.
- II. This dispute had arisen when the Appellant purchased a strip of land of 5 feet attached to the initial road of 5 feet and constructed a parapet wall and a gate limiting the Respondent's access only to the front part of her land.
- III. In response to that, the Respondent had erected the said fence.

Being aggrieved by the Order of the Learned High Court Judge dated 01.08.2018, the Petitioner-Respondent-Appellant (hereinafter referred to as Appellant) preferred an Appeal against the said Order.

It is settled law that exercising revisionary jurisdiction in court is confined to cases in which exceptional circumstances exist warranting its intervention. Since exercising revisionary jurisdiction is a discretionary remedy to grant relief, the Respondent-Petitioner has to establish not only that the impugned order is illegal but also that the nature of the illegality is such that it shocks the conscience of court. It appears that the Respondent-Petitioner had not shown any exceptional circumstances which shock the conscience of court.

It is seen that the Respondent-Petitioner-Respondent (hereinafter referred to as Respondent) instituted the instant action in terms of Section 66(1) (b) of the Primary Courts' Procedure Act to obtain a temporary order to have the existing situation prevail in order to maintain peace between the parties and the status quo as it is.

The learned Magistrate, has stated in his Order 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 said 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 appears that the learned High Court Judge too affirmed the Order of the learned Primary Court Judge. However, 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 Magistrate as well as the learned High Court Judge in terms of Section 66(1)(b) of the Primary Courts’ Procedure Act, those are Provisional Orders made for the purpose of preserving public peace in a dispute affecting land pending final adjudication of the rights of the parties in a competent civil Court.

It is interesting to note that in the case of *Punchi Nona Vs. Padumasena and Others [1994] 2 SLR 117*, it was held that 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 is to be observed 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.

The intention of the legislature in introducing Part VII of Primary Courts’ Procedure Act No.44 of 1979 is to prevent breach of the peace and not to embark on a protracted trial investigating title when deciding the matter in dispute.

Section 74(1) of the said Act, stipulates;

“(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 Judge 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.”

Thus, if the Appellant in this application wishes to establish his legal rights to the disputed portion of land, this is not the forum to adjudicate legal right of parties relating to the land in dispute.

Although Section 74 (2), does not confer any right of appeal against a decision of the learned Magistrate, 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.

However, it is desirable for parties to invoke the civil jurisdiction of a competent court to establish their rights, rather than preferring an appeal against a provisional order of the Magistrate's Court. It is incumbent upon the Court of Appeal to consider the legality of the order made by the learned High Court Judge when exercising its revisionary jurisdiction. Since the Court is not expected to adjudicate the property rights of parties relating to the land, preferring an appeal against the order of the High Court would not benefit either party in dispute. Thus it is prudent to invoke the civil jurisdiction of a competent court to adjudicate their civil rights to the disputed land.

It is imperative to note that preferring an appeal to the Court of Appeal would not serve the purpose behind the enactment or the intention of the Legislature in introducing Part VII of the Primary Courts' Procedure Act. Thus, it is felicitous for the party concerned to invoke the civil jurisdiction of a competent court rather than preferring an appeal to the Court of Appeal.

It is my view that the Primary Courts' Procedure Act No. 44 of 1979 stipulates that "no appeal shall lie against any Determination or Order under this Act" to prevent prolong and protracted hearings and also to prevent frittering away precious time of courts and parties. When examining the intention of the Legislature in including the 3 month time frame for a matter to be concluded before the Primary Court Judge, the implication is such that Legislature intended to discourage people from filing cases on frivolous grounds, devoid of merit.

Thus, in actual sense the suitable step is to have civil rights of the relevant parties adjudicated in the relevant competent civil court. Therefore, when filing an appeal against a provisional order given under the Primary Courts' Procedure Act, the party

concerned must come to a degree of certainty that their claim has merit and is likely to succeed and thereupon decide on the appropriate platform from which he can receive a fair remedy. It is incumbent upon the learned High Court Judges to direct parties to a competent civil Court for a final adjudication of their legal rights pertaining to the land in question. This will enable us to witness an efficient administration of justice in our Court system.

In this instance, Court draws attention to the petition of appeal filed by the Appellant. It appears that grounds of appeal are enumerated in paragraph 6 of the petition. It is significant to note that those grounds have to be adjudicated by a competent civil court and not in this forum. Furthermore, those grounds of appeal do not show the Order of the learned High Court Judge as illegal, improper or that it has caused any miscarriage of justice to the Appellant in proceedings under Section 69 of the Primary Courts' Procedure Act.

Therefore, I see no reason to interfere with the Order made by the learned Magistrate made on 28.02.2017 acting as the Primary Court Judge and the Order made by the Learned High Court Judge on 01.08.2018.

Hence, we dismiss this appeal with cost.

Moreover, it is observable that the Petitioner-Respondent-Petitioner has invoked the revisionary jurisdiction of this Court against the impugned order. Since this appeal is dismissed due to the grounds mentioned in the foregoing paragraphs, this Revision Application bearing No: CA PHC APN 106/2018 too is dismissed with cost.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.
I agree.

JUDGE OF THE COURT OF APPEAL