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

In the matter of an application for revision made in terms of Article 138 read with Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka of the order dated 8th January 2020 made by the Provincial High Court of the Central Province holden in Kandy.

Officer in Charge,
Police Station,
Kandy.

Complainant

Vs.

1. Hewakaduge Hansika Padmangani Keerthi,
   No. 246, Ogastawatta,
   Kandy.
2. Upali Weerasinghe,
   No. 254,
   Ogastawatta,
   Kandy.

1st Party Respondents

3. Ranawana Hewa Vitharanalage Anoma Geethanjali Samarasena,
   No. 253,
   Ogastawatta,
   Kandy.

2nd Party Respondent

4. Badra Ilangakoon,
   No. 254/1,
   Ogastawatta,
   Kandy.
5. Pinwatte Kankanamalage Gnanawathi,
   No. 244,
   Ogastawatta,
   Kandy.
6. Chandra Alwis,
   No. 247/1,
   Ogastawatta,
   Kandy.

Court of Appeal Case No:
CA (PHC) 01/2020

High Court Kandy Case No:
CP/HC/REV/77/19

Magistrate's Court Kandy
Case No. 17095/17

7. Pushpa Tharanga Weerasinghe,
   No. 254 A,
   Ogastawatta,
   Kandy.
8. Musuppaththulage Kotuwe Gedara
   Shriyani Priyanka,
   No. 248,
   Ogastawatta,
   Kandy.
9. Uduwage Shamika Anuradha,
   No. 254/1,
   Ogastawatta,
   Kandy.
10. M.B. Samson Fernando.
11. Kamala Ilangakoon.

2nd Party Intervenient Respondents

AND THEN BETWEEN

Ranawana Hewa Vitharanalage Anoma
Geethanjali Samarasena,
No. 253,
Ogastawatta,
Kandy.

2nd Party Respondent-Petitioner

Vs.

Officer in Charge,
Police Station,
Kandy.

Complainant-Respondent

1. Hewakaduge Hansika Padmangani
   Keerthi,
   No. 246, Ogastawatta,
   Kandy.
2. Upali Weerasinghe,
   No. 254,
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4. Badra Ilangakoon,
   No. 254/1,
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   Ogastawatta,
   Kandy.
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   No. 254/1,
   Ogastawatta,
   Kandy.
10. M.B. Samson Fernando.
11. Kamala Ilangakoon.

2nd Party Intervenient Respondent-Respondents

AND NOW BETWEEN

Ranawana Hewa Vitharanalage Anoma Geethanjali Samarasena,
No. 253,
Ogastawatta,
Kandy.

2nd Party Respondent-Petitioner-Appellant

Vs.

Officer in Charge,
Police Station,
Kandy.

Complainant-Respondent-Respondent

1. Hewakaduge Hansika Padmangani Keerthi,
   No. 246, Ogastawatta,
   Kandy.
2. Upali Weerasinghe,
   No. 254,

Ogastawatta,
Kandy.

1st Party Respondent-Respondent-Respondents

4. Badra Ilangakoon,
   No. 254/1,
   Ogastawatta,
   Kandy.
5. Pinwatte Kankanamalage Gnanawathi,
   No. 244,
   Ogastawatta,
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   Ogastawatta,
   Kandy.
9. Uduwage Shamika Anuradha,
   No. 254/1,
   Ogastawatta,
   Kandy.
10. M.B. Samson Fernando.
11. Kamala Ilangakoon.

2nd Party Intervenient Respondent-Respondent-Respondents

Before: **Prasantha De Silva, J.**

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

Counsel: Priyantha Alagiyawanna with Isuru Weerasooriya and Heshani Gunawatne for the 2nd Party Respondent-Petitioner-Appellant instructed by Purnima Gnanasekara.
Anura Maddegoda PC with Nadeesha Kannangara for the 1st Party Respondent-Respondent-Respondent.

Written Submissions tendered on: 11.01.2021 by the 2nd Party Respondent-Petitioner-Appellant.

Argued on: 23.02.2022

Decided on: 13.10.2022

Prasantha De Silva, J.

Judgment

It appears that the Officer in Charge of the Police Station, Kandy being the complainant, had filed an information on 12.12.2018 in terms of Section 66(1) of the Primary Courts' Procedure Act No. 44 of 1979, due to a breach of the peace threatened or likely to be threatened between the 1st Party Respondents and the 2nd Party Respondents over obstructing a footpath used by the 1st Party Respondent to access her house.

After the intervention of the 2nd Party Intervenient Respondents, all parties filed their respective affidavits and counter affidavits and parties agreed to dispose the inquiry by way of written submissions. Subsequently, the parties had filed their written submissions and the learned Magistrate acting as a Primary Court Judge had delivered the order on 24.06.2019 in favour of the 1st Party Respondents.

Being aggrieved by the said order, the 2nd Party Respondent-Petitioner had invoked the revisionary jurisdiction of the Provincial High Court of the Central Province holden in Kandy seeking to set aside or revise the said order made by the learned Magistrate.

However, it is seen that the learned High Court Judge held the order of the learned Magistrate is well founded and that there is no necessity to intervene in the impugned order. Hence, the application for revision was dismissed with cost. Being aggrieved by the determination of the learned High Court Judge, the 2nd Party Respondent-Petitioner-Appellant had preferred this appeal to this Court.

It appears that the Appellant had taken up the position in this appeal that jurisdiction of the Magistrate's Court is not invoked properly. In this respect, it was submitted that jurisdictional objection has to be taken up at the earliest possible opportunity and that the Appellant is precluded from taking up such an objection at

this stage. However, the Appellant had preferred this appeal against the order made by the learned High Court Judge exercising revisionary jurisdiction.

It is settled law that to exercise revisionary powers against the order challenged, the impugned order must be manifestly erroneous, which goes beyond an error, defect or irregularity that occasions to a miscarriage of justice which tends to shock the conscience of Court.

As per Chapter VII of the Primary Courts' Procedure Act, there is no right of appeal given against an order. It appears that the Appellant had invoked the revisionary jurisdiction of the High Court against the order of the learned Magistrate acting as a Primary Court Judge in terms of Section 69(1) of the Primary Courts' Procedure Act No. 44 of 1979.

It was held in the case of ***Nandawathi and another Vs. Mahindasena [2009] 2 SLR 218***,

> "When an order of a Primary Court Judge is challenged by way of revision in the High Court, the High Court can exercise only the legality of that order and not the correction of that order".

It was emphasized by *Ranjith Silva J.* in the following manner;

> "I am of the opinion that this particular right of appeal in the circumstances should not be taken as an appeal in the true sense, but in fact as an application to examine the correctness, legality or the propriety of the order made by the High Court Judge in the exercise of revisionary powers. The Court of Appeal should not under the guise of an appeal attempt to re-hear or re-evaluate the evidence led in the main case".

It was highlighted in the case of ***Bandulasena and others Vs. Galla Kankanamge Chaminda Kushantha and others CA (PHC) 147/2005 [CA minutes 27.09.2017]***;

> "It would be relevant to bear in mind that the appeal before this Court is an appeal against a judgment pronounced by the Provincial High Court in exercising its revisionary jurisdiction. Thus, the task before this Court is not to consider an appeal against the Primary Court order but to consider an

appeal in which an order pronounced by the Provincial High Court in the exercise of its revisionary jurisdiction is sought be impugned."

Thus, it is apparent that under the guise of this appeal, the Appellant is not entitled to have the value of evidence placed before court re-heard or re-valued, which entirely falls within the domain of the jurisdiction of the Primary Court.

Since this appeal is preferred against the order made by the learned High Court Judge exercising revisionary jurisdiction, the Court of Appeal is empowered to evaluate the correctness of the order made by the High Court exercising revisionary jurisdiction.

The Provincial High Court should have been mindful when exercising revisionary jurisdiction in respect of the application made against the orders of the Magistrate's Court that this application is a revision application and not an appeal.

It is observable that the Appellant in his written submissions had taken up an objection in respect of the jurisdiction of the Primary Court [Magistrate's Court of Kandy] at the appeal stage and also proposed as to why the learned Primary Court Judge should have declared the entitlement of the impugned right of way in his favour.

In ***Nandawathi and another Vs. Mahindasena [supra]***, which stated that the right given to an aggrieved party to right of appeal in terms of Article 154 (3) b of the Constitution against an order of the High Court in a revision applications, should not be considered as an appeal in the true sense. The Court of Appeal is restricted in its scope and really have the power only to examine the propriety or the legality of the order made by the learned High Court Judge in the exercising of its revisionary jurisdiction.

It is to be noted that, it was the contention of the 1st Party Respondents that they are entitled to use the disputed foot path, which is described in the 3rd Schedule of their affidavits dated 23.01.2019.

Since the dispute was relating to a foot path, it is clear that the dispute between the parties comes within the purview of Section 69 of the Primary Courts' Procedure Act.

Section 69 stipulates that;

> "(1) 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 of the dispute and make an order under subsection (2).
>
> (2) 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."

On behalf of the Appellants, the case ***Ramalingam Vs. Thanagarajah [1982] 2 SLR 693*** *was cited*;

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

Furthermore, the attention of Court was drawn to the case of ***Ananda Sarath Paranagama Vs. Dhamadinna Sarath Paranagama CA (PHC) 117/2013 [C.A.M. 12.12.2013]*****,** which observed that there are two ways in which the existence of such a road way can be proved in the Primary Court, They are;

1. By adducing proof of the entitlement as is done in a Civil Court,
2. By offering proof that he is entitled to the right for the time being.

It was further held that, “if you described a party as being entitled to enjoy a right but for the time being, it means that it will be like that for a period of time, but may change in the future” (emphasis added).”

It was submitted on behalf of the Appellants that, in the circumstances it is clear that the Respondents were required to establish that they had an ownership/entitlement to the said right of way or right to use the said foot path.

However, it was the contention of the Appellant that the Respondents had failed to establish any entitlement to the purported right of way to use the foot path which is necessary to obtain an order in terms of Section 69(2) of the Primary Courts’ Procedure Act. As such, the learned Magistrate and the learned High Court Judge have erred in law by failing to identify the fundamental purpose of the Legislature in enacting Section 66 of the Primary Courts’ Procedure Act, which is to preserve the peace.

The learned High Court Judge has observed that since no party disputed the pathway described in the 3rd Schedule of the affidavit of the Respondents, the learned Magistrate had properly identified the disputed pathway and correctly decided the matter in terms of Section 69 of the Primary Courts’ Procedure Act.

It is worthy to note that the learned High Court Judge had stated in the order that;

“එහිදී විෂයගත මාර්ගය අවහිර කිරීම සම්බන්ධයෙන් 01.12.2018 වන දින උපාලි වීරසිංහ නමැති වගඋත්තරකරු විසින් මහනුවර පොලීසියේ විවිධ පැමිණිලි අංශයට කරන ලද පැමිණිල්ලක් සම්බන්ධයෙන් කරන ලද විමර්ශනයට අනුව පෙත්සම්කාරිය ගේ ස්වාමි පුරුෂයා වන ගාමිණී ද සිල්වා යන අය 02.12.2018 වන දින මහනුවර පොලීසියේ විවිධ පැමිණිලි අංශය වෙත ප්‍රකාශයක් ලබා දෙමින් විෂයගත මාර්ගය සම්බන්ධයෙන් තමාට විරුද්ධව පැමිණිලි කර ඇත්තේ උපාලි යන අය බවත් එම අය නිවසට යන්න තමාගේ ඉඩමේ අයිනෙන් අඩිපාරක් පාවිච්චි කළ බවත් මෑතක සිට.....
.....ඒ අනුව තමා නගර සභාවට දැනුම් දී තමාගේ වැට අයිනේ තිබූ අඩි පාර වසා දැමූ බවත්, ඔවුනට යාම සඳහා වෙනත් මාර්ගයන් ඇති බවත් පවසා ඇත.

එයට අමතරව විෂයගත ප්‍රාථමික අධිකරණ නඩුවේ, වසමේ ග්‍රාම සේවා නිලධාරීන් විසින් පොලීසිය වෙත ලබාදී ඇති කටඋත්තරය ප්‍රකාරව 27.11.2018 වන දින තෙක් මෙම විෂයගත මාර්ගය පළමු

පාර්ශවයේ වගඋත්තරකරු විසින් සහ ගම්වාසීන් විසින් භාවිතා කර ඇති බවට සහ විෂය මාර්ගය දෙවන පාර්ශවයේ තුන්වන වගඋත්තර කාරිය විසින් හෝ නියෝජිතයන් විසින් අවහිර කිරීමක් කර ඇති බව ඉදිරිපත් වී ඇති කරුණු වලට අනුව සනාථ වේ.”

It clearly manifests that the complaint made by the Respondents to the Police Station, Kandy falls within the purview of Section 69 of the Primary Courts' Procedure Act which read as follows;

> “(1) 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 of the dispute and make an order under subsection (2).”

In view of Section 75 of the Primary Courts' Procedure Act, it defines a dispute affecting a land as follows;

> “dispute affecting land” includes any dispute as to the right to the possession of any land or part of a land and the buildings thereon or the boundaries thereof or as to the right to cultivate any land or part of a land, or as to the right to the crops or produce of any land, or part of a land, or as to any right in the nature of a servitude affecting the land and any reference to “land” in this part includes a reference to any building standing thereon.”

The case of ***Tudor Vs. Anulawathi and another [1993] 3 SLR 235 at 245***, explained the scope of an order that could be made in terms of Section 69 of the Act.

According to Section 69 (1) and 69 (2), after an inquiry,

a) the learned Primary Court Judge has to determine as to who is entitled to the right.
b) make an order that the person specified therein shall be entitled to such right until such person is deprived of that right by virtue of an order or decree of a competent court.
c) prohibit all interferences with or disturbances of that right other than under the authority of an order or decree.

The Respondents had to establish that they are entitled to the use of the impugned foot path as a servitudanal right as opposed to the mere use of that servitude.

It was discussed in the case of ***Ramalingam Vs. Thanagarajah [supra]*****,** according to Section 69(1), is who is entitled to the right which is subject of dispute. The word "entitle" here connotes the ownership of the right. The Court has to determine which of the parties has acquired that right, or is entitled for the time being to exercise that right.

It was stated by the Appellant that the 1st Respondent has an alternative road way to enter their premises. However, Primary Court may not have considered the availability of an alternative right of way, if there was any, to deny the right of way used by the Respondents over the disputed portion of land, when making an Order under Section 69 (2) of the Primary Courts' Procedure Act.

Since the dispute between the parties is relating to a roadway, it appears that Section 69 of the Primary Courts' Procedure Act is applicable and according to Section 69 of the Act, there is no necessity to consider the availability of an alternative roadway.

The learned Primary Court Judge had determined that the 1st and 3rd Respondents had not proved the fact that the roadway was used for more than 10 years, and thereby as not being entitled to claim their ownership by way of prescription. The learned Primary Court Judge has further stated that even the 3rd Petitioner had not established her rights to use the disputed roadway.

By virtue of Section 69 of the Primary Courts' Procedure Act, there is no need to prove rights as it is done in a civil suit. The case ***Ramalingam Vs. Thanagarajah [supra]*** held the following;

> "On the other hand, if the dispute is in regard to any right to any land other than right of possession of such land, the question for decision, according to Section 69(1) is, who is entitled to the right which is subject of dispute. The word entitle here connotes the ownership of the right. The Court has to determine which of the parties has acquired that right or is entitled for the time being to exercise that right. In contradiction to Section 68 of the Act,

Section 69 requires the court to determine the question as to which party is entitled to the disputed right of way prior to the making of an order under Section 69(2)."

It was held in the aforementioned case that the entitlement can be proved in the Primary Court by adducing proof of the entitlement as done in a Civil Court or by offering proof that he is entitled to the right for the time being.

The said contention was analyzed by *Justice A.W.A. Salam* in the case titled ***Ananda Sarath Paranagama Vs. Dhamadinna Sarath Paranagama [supra]*****,** in which *Salam J.* emphasized of the need to understand that the proof of acquisition of the right is totally different from proving the enjoyment/existence of the right at the time the dispute arose.

It has been held in the case of ***Punchi Nona Vs. Padumasena and Others [1994] 2 SLR 117***, 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, right to possession or entitlement, which are functions 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.

The attention of Court was drawn to the police observation report. It reveals that the 1st Respondent and her family members have used the disputed roadway for an extensive period of time. Furthermore, the said report states that the said roadway in dispute has been shut off by a fence and was further blocked with the use of coconut leaves. The report further goes on to say that the neighbours of the 1st Respondent has used the roadway in dispute to reach the 1st Respondent's house. The Appellant has also given a statement to Police objecting to 1st Respondent's the use of the disputed roadway.

The observation report produced by the police contains the following, and shows that the Respondents to this case has used this roadway.

"මීටර් 10ක් පමණ දිගට කාලයක් පාවිච්චි කරන ලද පාරක් තිබූ බවට සලකුණු ඇත."

"දැනට දින කිහිපයකට පමණ පෙර මෙම පාරේ තැනින් තැන වලවල් කපා ඉඩමට සුද්ධ කරන ලද ලකුණු දමා අවහිර කර පාර වසා ඇත."

"වැටේ මෙම දිනවලම ඉනි සිටුවා කටු කම්බි ගසා අමු පොල් අතු ඉණි අතරට දමා අවහිර කර ඇත."

In view of the aforesaid observation notes of the Police Officer, it amply proves that the Respondent has been using the disputed roadway as a right by way of necessity, to lot L, to the 1st Respondent's house.

According to Section 75, it mandates the Primary Court to deal with "a dispute in the nature of servitude" and need not touch upon servitude per se. The Primary Courts (Magistrate's Court) are precluded from dealing with matters described in Schedule 04 of the Judicature Act No. 2 of 1978. The excluded matters *inter alia*;

- Any action for a declaratory decree including a decree for the declaration of title of a land (item 12) in the 4th Schedule.
- For obstruction to or interference with the enjoyment of any servitude or the exercise of any right over property (item 24 (i)).

In civil cases, right of way can be established as a servitudanal right by prescription or by way of necessity. It was held in ***Sumangala Vs. Appuhamy 46 NLR 131*** that a servitude, such as a right of foot path must be established by cogent evidence, as it affects the land owner's right to a free and unfettered use of land.

The attention of Court was drawn to the case of ***Ananda Sarath Paranagama Vs. Dhamadinna Sarath Paranagama [supra]*** which dealt with the interpretation of the word "entitlement". It appears that a party does not need to establish a servitudanal right by cogent evidence as is usually considered in a Civil Court. The required proof of the user's right in terms of Section 69 (1) of the Act, is to consider a right in the nature of a servitude or long term use. Thus, proving the enjoyment of the right at the time of the dispute arose is sufficient.

Therefore, it is clear that the learned High Court judge had analyzed and evaluated the evidence placed before the Primary Court and also applied the relevant law, and had affirmed the order of the learned Magistrate who was acting as the Primary Court Judge. Thus the Order of the learned High Court judge is well founded.

In view of the findings of the learned High Court Judge, the Appellants had not disclosed exceptional circumstances, which would warrant the intervention of the Provincial High Court by way of an application for revision.

Thus, it clearly manifests that the learned High Court Judge had correctly affirmed the Order of the learned Magistrate and had dismissed the Appellant's application for revision. As such, we see no reason for us to interfere with the Order dated 08.01.2020 by the learned High Court Judge and the Order dated 24.06.2019 by the learned Magistrate.

Hence, we dismiss the appeal with cost fixed at Rs. 50,000/-.

JUDGE OF THE COURT OF APPEAL

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

JUDGE OF THE COURT OF APPEAL