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

Court of Appeal Case No:
CA (PHC) 125/2018

High Court of Kandy Revision Application No: HC/Rev/88/2016

Primary Court of Gampola Case No: 92728

Officer in Charge,
Miscellaneous Complaints Branch,
Headquarters Police Station,
Gampola.

Complainant

Vs.

1. Mahamarakalage Kurukulasuriya Patabedige Anura Kumarasiri Perera,
   No. 58/1, Bowathura,
   Gampola.

2. Rajapakshe Mudiyanselage Hettiyadeniye Korale Arachchilage Nalani Kumarihami,
   No. 35, Gampathi Niwasa,
   Alugolla, Dolosbage.

Respondents

AND BETWEEN

Rajapakshe Mudiyanselage Hettiyadeniye Korale Arachchilage Nalani Kumarihami,
No. 35, Gampathi Niwasa,
Alugolla, Dolosbage.

2nd Respondent-Petitioner

Vs.

Mahamarakalage Kurukulasuriya Patabedige Anura Kumarasiri Perera,
No. 58/1, Bowathura,
Gampola.

1st Respondent-Respondent

AND NOW BETWEEN

Rajapakshe Mudiyanselage Hettiyadeniye Korale Arachchilage Nalani Kumarihami,
No. 35, Gampathi Niwasa,
Alugolla, Dolosbage.

2nd Respondent-Petitioner-Appellant

Vs.

Mahamarakalage Kurukulasuriya Patabedige Anura Kumarasiri Perera,
No. 58/1, Bowathura,
Gampola.

1st Respondent-Respondent-Respondent

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

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

Counsel : S. V. Niles for the 2nd Respondent-Petitioner-Appellant.
Shyamal. A. Kollure for the 1st Respondent-Respondent-Respondent.

Argued on : 23.05.2022

Written Submissions tendered on : 01.02.2022 and 15.09.2022 by the 2nd Respondent-Petitioner-Appellant.

25.08.2022 by the 1st Respondent-Respondent-Respondent.

Decided on : 11.01.2023

Prasantha De Silva, J.

Judgment

It appears that the Officer-in-Charge of the Miscellaneous Complaints Branch of the Police Station of Gampola initiated proceedings in the Magistrate's Court of Gampola on 03.09.2015 by filing an information under Section 66 (1) (a) of the Primary Courts' Procedure Act No. 44 of 1979. According to the said information, the 1st Respondent had made complaints dated 20.08.2015 and 23.08.2015 against the 2nd Respondent stating that the 2nd Respondent had uprooted the fence that existed along the access to his land separating the land belonging to the 2nd Respondent and that three concrete boundary posts were also removed altering the demarcation of boundaries to effect construction.

The learned Magistrate who was acting as the Primary Court Judge, had taken up all necessary steps stipulated in the Primary Courts' Procedure Act and thereafter the matter was fixed for inquiry.

According to the said information and sketch tendered to Court by the police, the affidavits, counter-affidavits and the documents furnished by the Appellant, the dispute is in respect of access to 1st Respondent-Respondent's land depicted in Plan bearing No. 3262 prepared by S.M. Abeyratne, Licensed Surveyor, which is at page 131 of the Appeal Brief. The position of the 1st Respondent-Respondent was that a fence separating the said access road from the Appellant's land existed.

After both parties filed written submissions, the learned Primary Court Judge of Gampola in the Order dated 01.06.2016 had determined that subject matter of the case is the access road depicted as Lot 9 in Plan bearing No. 3262 dated 12.09.2000 prepared by S. M. Abeyratne, Licensed Surveyor; and a fence thereof.

It was further held that the 2nd Respondent removed the fence that existed up to the 2nd Respondent's land along the said access. Hence, the learned Judge of the Primary Court had ordered that the boundaries of the access road concerned ought to remain as it was situated. Further, the 2nd Respondent was ordered not to alter the access road in question.

The report filed by the Registrar/Deputy Fiscal of the Court demonstrates that the Order of the Primary Court was executed on 11.07.2016 by restoring the fence so uprooted/removed by the Appellant.

Being aggrieved by the said Order dated 01.06.2016 of the learned Primary Court Judge of Gampola, the 2nd Respondent-Petitioner had invoked the revisionary jurisdiction of the Provincial High Court of the Central Province holden at Kandy by her application dated 30.08.2016, seeking to set aside the said Order.

It appears that the 1st Respondent-Respondent had filed Statement of Objections and affidavit dated 08.02.2017 in the Provincial High Court to show that the width of the access road that had been used over a period of time; had been 4 feet and 3 inches on the ground.

The Appellant, in her Counter Affidavit dated 22.03.2017 contended that the said access road became about 6 feet wide when the impugned Order of the learned Primary Court Judge was executed.

However, after the conclusion of the inquiry, the learned Judge of the Provincial High Court by Order/Judgment dated 10.07.2018 refused the application in revision of the Petitioner-Appellant on the premise that the Petitioner-Appellant had not disclosed reasons sufficient enough warranting to revise the Order of the learned Primary Court Judge and further, that an alternative remedy was available to the Petitioner-Appellant to resolve the matter.

Being aggrieved by the said Order, the Petitioner-Appellant had preferred an appeal to this Court seeking to revise or set aside the Order made by the learned High Court Judge as well as the learned Primary Court Judge. It is seen that the real dispute in the instant case is as to the width of the access to the 1st Respondent-Respondent's land.

The learned Primary Court Judge had ordered "ඒ අනුව මෙහි විෂය වස්තුව ලෙස විස්තර කරන්නට යෙදී ඇති ප්‍රවේශ මාර්ගයෙහි මායිම් පෙර තිබූ පරිද්දෙන් පැවතිය යුතු බවට නියෝග කරමි."

It is imperative to note that the dispute between the parties is over the width of an access road to the Respondent's property. According to deed bearing No. 3580 [X5] and plan bearing No. 3262, it indicates the width of the access road as only 3 feet.

However, the investigation officer had observed and mentioned in the investigation notes that the width of the disputed access road situated on earth is only 4 feet wide, bordering the Appellant's land. Thus, it is prima facie evident that the Respondent had been using this 4 feet wide roadway to access her land.

The learned Magistrate had stated in her Order that;

> "ඒ අනුව පෙනී යන්නෙ පළමු වගඋත්තරකරුගේ ඉඩමට ප්‍රවේශ වීම සඳහා පවතින ප්‍රවේශ මාර්ගය දෙවන වගඋත්තරකාරියගේ ඉඩම තෙක් කොන්ක්‍රීට් කණු සිටුවා මනාව සකස් කරන ලද වැටක් ලෙස තිබී ඇති බවයි. එම කොන්ක්‍රීට් වැට දෙවන වගඋත්තරකාරිය රාජපක්ශ මුදියන්සේලාගේ හෙට්ටියාදෙනියේ කෝරලේ ආරච්චිලාගේ නාලනී කුමාරිහාමිගේ ඉඩම අසලදී ගලවා දැමීමක් කර ඇති බවද පොලිස් තොරතුරු වාර්තාව අනුව පෙනී යයි. පාරට අයත් වන බිම් ප්‍රමාණය වෙනස් වීමක් සිදු සිදු විය හැකි බැවින් මෙම ආරවුල ඇති වී ඇති බව පෙනී යයි."

In view of the Magistrate's Order, the learned Magistrate had come to a correct finding of fact and law and determined the matter in terms of Section 69 of the Primary Courts' Procedure Act, although the said Section is not mentioned in the

Order. As such, the learned Magistrate had correctly ordered to have the boundaries of the access roadway as before, prior to the dispute between parties arose.

Therefore, it clearly shows that the learned Magistrate had made the Order on the assumption that the 1st Respondent-Respondent is entitled to use the disputed road to her land.

It is relevant to note that the impugned Order of the Magistrate was executed on 11.07.2016. The learned Magistrate in her Order dated 01.06.2016 had directed parties to adjudicate the matter in a civil forum. However, it was not disclosed by either party that a civil case had been instituted in respect of the impugned dispute in this matter.

The revisionary jurisdiction can be exercised if there is no other remedy available. Since the Petitioner-Appellant had not resorted to the available remedy, revision is not available to the Petitioner-Appellant.

Therefore, in view of the aforesaid reasons, it is observable that there is no miscarriage of justice or any injustice caused to the Petitioner-Appellant to invoke the revisionary jurisdiction of the Provincial High Court. Moreover, the Petitioner-Appellant had not disclosed that exceptional circumstances warrant to invoke the revisionary jurisdiction of the Provincial High Court.

As such, the learned High Court Judge had dismissed the revision application of the Petitioner-Appellant. Thus, we see no reason to interfere with the Order dated 10.07.2018 of the learned High Court Judge and the Order dated 01.06.2016 of the learned Magistrate.

Hence, the appeal is dismissed with tax cost.

JUDGE OF THE COURT OF APPEAL

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

JUDGE OF THE COURT OF APPEAL