

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

In the matter of an appeal against an order of the Provincial High Court of Kandy pronounced on 23.07.2014.

Hewa Pathiranage Sompala Munasinghe,  
No.276/1, D.S.Senanayake Veediya, Kandy.

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

Court of Appeal Case No:  
**CA (PHC) 70/2014**

**Vs.**

High Court Kandy Case No:  
CP/HC/Kandy/14/2013(Rev)

Magistrate's Court Kandy Case  
No. 55160

1. K.D.S.Subhasinghe,  
Inspector of Police,  
OIC Miscellaneous Complaints Branch,  
Police Station, Kandy.

**Complainant-Respondent**

2. Mario Joseph Josepin Punya Fernando,  
No.280/3, D.S.Senanayake Veediya, Kandy.

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

3. G.G.M.J.A Ahamed Afthab Jameel,  
No.276, D.S.Senanayake Veediya, Kandy.

**3<sup>rd</sup> Respondent-Respondent**

4. Safiya Hanim Jameel Marikkar,  
No. 276, D.S.Senanayake Veediya, Kandy.

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

5. Seyyad Mohamed Lebbe Marikkar,  
No. 276, D.S.Senanayake Veediya, Kandy.

**2<sup>nd</sup> Intervenient Respondent-  
Respondent**

**AND NOW**

Hewa Pathiranage Sompala Munasinghe  
No.276/1, D.S.Senanayake Veediya, Kandy.

**1<sup>st</sup> Respondent-Petitioner-Appellant**

**Vs.**

1. K.D.S.Subhasinghe,  
Inspector of Police,  
OIC, Miscellaneous Complaints Branch,  
Police Station, Kandy.  
**Complainant-Respondent-Respondent**
2. Mario Joseph Josepin Punya Fernando,  
No.280/3, D.S.Senanayake Veediya, Kandy.  
**2<sup>nd</sup> Respondent-Respondent-Respondent**
3. G.G.M.J.A Ahamed Afthab Jameel,  
No.276, D.S.Senanayake Veediya, Kandy.  
**3<sup>rd</sup> Respondent-Respondent- Respondent**
4. Safiya Hanim Jameel Marikkar,  
No. 276, D.S.Senanayake Veediya, Kandy.  
**1<sup>st</sup> Intervenient Respondent-  
Respondent- Respondent**
5. Seyyad Mohamed Lebbe Marikkar,  
No. 276, D.S.Senanayake Veediya, Kandy.  
**2<sup>nd</sup> Intervenient Respondent-  
Respondent- Respondent**

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

**Counsel:** Geeshan Rodrigo for the 1<sup>st</sup> Respondent-Petitioner-Appellant.  
David Weerathne instructed by M.T.N Ahamed for the 3<sup>rd</sup>, 4<sup>th</sup> and  
5<sup>th</sup> Respondent-Respondent-Respondents.

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

Written submissions : 05.09.2022 for the Petitioner-Appellant.  
tendered on 04.05.2021 for the 3<sup>rd</sup>,4<sup>th</sup> and 5<sup>th</sup> Respondent-Respondent-  
Respondents.

Order delivered on : 12.01.2023

**Prasantha De Silva, J.**

### **Judgment**

The Officer-in-Charge of the Police Station-Kandy had filed an information in the Additional Magistrate's Court of Kandy in case bearing No. 55160 in terms of Section 66(1) (a) of the Primary Courts' Procedure Act No. 44 of 1979, with regard to a roadway which had been used by the 1<sup>st</sup> Respondent and had been obstructed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

It is seen that the learned Additional Magistrate who was acting as the Primary Court Judge had taken all necessary steps stipulated in the Primary Courts' Procedure Act. After the conclusion of the inquiry, the learned Additional Magistrate had made an Order on the 24<sup>th</sup> of January 2013 and held that 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not entitled to have a servitudanal right of way over the land of 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

Being aggrieved by the said Order, the 1<sup>st</sup> Respondent-Petitioner had invoked the revisionary jurisdiction of the Provincial High Court of Kandy. It appears that the learned High Court Judge had observed the learned Additional Magistrate had correctly identified the dispute amongst parties as one relating to a roadway, which comes within the purview of Section 69(1) of the Primary Courts' Procedure Act.

Upon the evidence placed before the learned Additional Magistrate, it was revealed that the 1<sup>st</sup> Respondent-Petitioner is a licensee of 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> Respondents and had been living in the back yard of the land owned by the said Respondents with a separate access through Sri Dhammadhassi Mawatha. Apparently, the dispute has arisen among the parties as the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents had put up a gate to the entrance of their land to protect and safeguard the property from being used by strangers.

As such, it is observable that the learned Additional Magistrate had come to the correct finding of facts and law and held with the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents determining that 1<sup>st</sup> and 2<sup>nd</sup> Respondents are not entitled to a servitudanal right of way over the disputed road way across the land owned by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

In this respect, it is worthy to note the case of *Ananda Sarath Paranagama vs Dhammadhinna Sarath Paranagama and Kavitha Asmin Paranagama [CA PHC APN 117/2013]* where *Salam, J.* emphasized:

“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.”

It is noteworthy that the learned High Court Judge affirmed the said Order of the learned Additional Magistrate and dismissed the revision application filed by the 1<sup>st</sup> Respondent-Petitioner-Appellant on the ground that no exceptional circumstances warrant to invoke the revisionary jurisdiction of the High Court seeking to set aside the Order of the learned Additional Magistrate.

In this respect Court draws the attention to the decision in the case *Nandawathie vs. Mahindasena [2009] 2 SLR 218* which held;

“When an Order of a Primary Court Judge is challenged by way of revision in the Provincial High Court, the High Court can examine only the legality of that Order and not the correction of that Order.”

Moreover, by operation of law, right of appeal is conferred against an Order of the High Court exercising its revisionary jurisdiction, such appeal in the circumstances could not be considered as an appeal in true sense, but in fact the application could be considered to examine the correctness, legality or the propriety of the Order made by the learned High Court Judge in the exercise of revisionary powers.

It was emphasized by *Ranjit Silva, J.* in the said case *Nandawathie Vs. Mahindasena [supra]* that;

“Court of Appeal should not under the guise of an appeal attempt to rehear or re-evaluate the evidence led in the main case”.

As such, we are of the view that the task before this court is not to consider an appeal against the Magistrate’s 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.

It was the main contention of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents that the 1<sup>st</sup> Respondent-Petitioner-Appellant had failed to comply with the Supreme Court Rules and that the 1<sup>st</sup> Respondent-Petitioner-Appellant had not shown the existence of exceptional circumstances to invoke the revisionary jurisdiction of the Provincial High Court to revise or set aside the Order of the learned Additional Magistrate made under Section 69(1) of the Primary Courts' Procedure Act.

In the case of *Hotel Galaxy (Pvt) Ltd Vs. Mercantile Hotels Management Ltd [1987] 1 SLR 5* it was held that it is settled law the exercise of revisionary powers of the Appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention.

Furthermore, it has been observed in superior court decisions that superior courts have always declined to entertain revision applications when exceptional circumstances have not been averred in those applications.

It is imperative to note that the learned High Court Judge held the 1<sup>st</sup> Respondent-Petitioner-Appellant had not satisfied court that exceptional circumstances exist to exercise the revisionary powers of court.

Hence, the learned High Court Judge has judiciously dismissed the revision application made by the 1<sup>st</sup> Respondent-Petitioner-Appellant. Thus, we see no reason for us to interfere with the said dismissal of the application.

Thus, this 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**