IN THE COURT OF APPEAL OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against judgment of Provincial High Court exercising its revisionary jurisdiction.

C A (PHC) / 89 / 2015

Provincial High Court of

Sabaragamuwa Province (Ratnapura)

Case No. HC / RA / 28 / 2014

Primary Court of Kalawana

Case No. 13493

1. Dasanayake Mudiyanselage
   Ariyarathne,
   9th Post,
   Kahanthenna,

Weddagala,

Kalawana.

2. Dasanayake Mudiyanselage

   Thusitha Priyanka Ariyarathne,

   9th Post,

   Kahanthenna,

   Weddagala,

   Kalawana.

2ND PARTY - RESPONDENT -

RESPONDENT - APPELLANT

-Vs-

1. Dasanayake Mudiyanselage

   Somaweera,

   9th Post,

   Kahanthenna,

   Weddagala,

   Kalawana.

1ST PARTY - RESPONDENT -

PETITIONER - RESPONDENT

2. Dasanayake Mudiyanselage
   Jayasooriya,
   9th Post,
   Kahanthenna,
   Weddagala,
   Kalawana.
3. Dasanayake Mudiyanselage
   Dharmarathne,
   9th Post,
   Kahanthenna,
   Weddagala,
   Kalawana.
4. Dasanayake Mudiyanselage
   Wijewardane,
   9th Post,
   Kahanthenna,

Weddagala,

Kalawana.

5. Dasanayake Mudiyanselage

   Senevirathne,

   9th Post,

   Kahanthenna,

   Weddagala,

   Kalawana.

6. Dasanayake Mudiyanselage

   Jayathissa,

   9th Post,

   Kahanthenna,

   Weddagala,

   Kalawana.

INTERVENIENT PARTY - RESPONDENT - RESPONDENT - RESPONDENTS

Before: P. Padman Surasena (P/CA)

K K Wickremasinghe J

Counsel; Chanaka Jayamanne with Mihiri Abeyratne for the 2nd Party Respondent - Appellant.

Anuruddha Dharmaratne for the 1st Party - Respondent - Petitioner - Respondent.

Argued on : 2017 - 10 - 23

Decided on : 2018 - 05 - 25

JUDGMENT

P Padman Surasena J (P/CA)

The Officer in Charge of Kalawana Police Station had filed the information relevant to this case in the Primary Court under section 66 (1) (a) of the Primary Courts Procedure Act No. 44 of 1979 (hereinafter referred to as the Act).

Learned Primary Court Judge having inquired into this information, by his order dated 2014-05-07, had held that the 1st Party Respondent - Petitioner - Respondent (hereinafter sometimes referred to as the 1st Party Respondent) has failed to prove that he is entitled to use the impugned right of way.

Being aggrieved by the said order of the learned Primary Court Judge, the 1st Party Respondent had filed a revision application in the Provincial High Court of Sabaragamuwa Province holden in Ratnapura urging the Provincial High Court to revise the order of the learned Primary Court Judge.

The Provincial High Court after hearing the parties, by its judgment dated 2015-07-27 had allowed the said application and revised the order of the learned Primary Court Judge holding that the 1st Party Respondent is entitled to use a six feet wide roadway to enable him to take a three wheeler vehicle.

It is against that judgment that the 2nd Party Respondent - Respondent - Appellants (hereinafter sometimes referred to as the 2nd Party Appellants) have filed this appeal in this Court.

In coming to the conclusion that the 1st party Respondent has failed to prove his entitlement to the impugned right of way, the learned Primary Court Judge has considered the following facts;

i. the fact that the 1st Party Respondent has not adduced any evidence to establish that any Court of law has granted him a right of way by any order of Court,
ii. the fact that the deeds produced by the 1st Party Respondent marked **1 වි 1** and **1 වි 2** do not show that any such right of way has been granted by the said deeds relied upon by the 1st Party Respondent,
iii. the fact that the relevant land is an undivided co-owned land,
iv. the fact that the documeht produced by the 1st Party Respondent marked **1 වි 3** also does not indicate granting such a right of way to him,
v. the fact that the electricity meter reader of the area in his affidavit has specifically stated that he had not used the impugned roadway to go to various houses in the area to read the electricity meters,
vi. the fact that the 1st Party Respondent has stated in his statement that he cut this road forcibly, and

vii. the fact that the 1st Party Respondent has stated that the 2nd Party Appellants had only granted him a temporary access road for the purpose of transporting building material to the site where he was constructing his house.

Further, the Perusal of the learned Primary Court Judge's order shows that the learned Primary Court Judge with the concurrence of the parties, had decided to inspect the relevant roadway. It appears that the learned Primary Court Judge had been in a better position to resolve the dispute in the instant case as he had visited the disputed road way and seen for himself the prevailing ground situation there.

It is on the strength of the above factual positions that it had become possible for the learned Primary Court Judge to conclude that the 1st Party Respondent is not entitled to use the impugned right of way.

It would be appropriate at this juncture for this Court to turn to the judgment of the Provincial High Court. As opposed to the learned primary Court Judge who has considered all the admissible material placed before him, the learned High Court Judge in her order has placed reliance only on some photographs and some contents in the notes of observations made by the police officers who had visited the scene. It is on those photographs

and the Police observation notes that the learned Provincial High Court Judge had set aside the learned Primary Court Judge's order and held that the 1st Party Respondent is entitled to use the impugned road way.

This Court is of the view that the photographs and the police observation notes at their best would only establish the fact that there is a roadway at some location at some point of time. The said point of time is the time of making such photographs or observation notes. The mere fact of the existence of a roadway cannot by itself confer any right to a third party to use that road. This Court has to underline the importance of differentiating 'the proof of existence of a road by the evidence collected after the dispute had arisen' and 'the proof of entitlement for a party to use such a road'. They are two concepts, which are completely different from one another. It is the view of this Court that the learned Provincial High Court Judge has fallen into a grave error in her judgement as she had failed to appreciate the above distinction.

This Court in the case of Galison Dodwell Jayasuriya Vs Vijayamuni Kaluhami and four others[1] had upheld a similar position. This Court is of the view that it would be in place to reproduce the following portion from

[1] C A (PHC) / APN 99 / 2015, decided on 2017 - 09 – 11.

that judgment. It would highlight the dangers posed by relying on the material such as photographs and Police observation notes in deciding whether a party is entitled to a right of way. The relevant portion is as follow.

"... Perusal of the judgment of the learned Magistrate dated 2012-04-20 shows that the conclusions contained in the said judgment are based on some photographs, Police observation notes including a sketch produced by Police, and some writings tendered by persons who claim to have used the impugned roadway.

It must be borne in mind that the relevant land is a big coconut land. The position taken up by the Petitioner who is the owner of this land is that the existing roadway is a road that is being used for transportation of coconut etc. inside his land. It must be remembered at the outset that the mere existence of a roadway across this land cannot by itself give a right for others also to use it. However, it can be seen that the learned Magistrate as well as the learned High Court Judge have heavily relied on the fact that there exists a roadway within the land. This Court has to observe that both the Courts have failed to appreciate the fact that the existence of a roadway by itself cannot be any license for others to claim an entitlement

to use it. Further, even if the Respondents have used it, a mere user by itself would not get an entitlement to use it.[2] .... "

It would also be helpful at this stage to reproduce the following passage from the judgment of the Supreme Court in the case of Ramalingam V Thangarajah[3] , which had interpreted the above provision of law. It is as follows;

" ..... 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). ....."

In these circumstances and for the foregoing reasons this Court concludes that the 1st Party Respondent has failed to prove any ownership of the

[2] M D Siriyawathie Jayasinghe V K A Karunarathne, CA (APN) No. 863/90, Decided on 1997-06-04.
[3] 1982 (2) Sri. L R 693.

impugned right. Therefore, the Provincial High Court could not have granted any right of way to the 1st Party Respondent.

This Court also need to mention here the judgment relied upon by the learned Provincial High Court Judge (C A (PHC) APN 117/2013, decided on 2014-08-07) has no application in a situation where there is no evidence to prove any entitlement of the disputed right.

One has to be mindful that in the instant case, what the Provincial High Court was called upon to exercise, was its revisionary jurisdiction.

As has been held by this Court in the case of Jayasekarage Bandulasena and others Vs Galla Kankanamge Chaminda and others[4], revisionary jurisdiction can be exercised to satisfy the revisionary Court as to the legality of any order, to satisfy itself as to the propriety of any order or to satisfy itself as to the regularity of the proceeding before the lower Court.

The provisional nature of the orders made by Primary Court under part VII of the Act was highlighted by this Court in the case of Punchi Nona V Padumasena and others[5] in following terms.

[4] C A (PHC) 147 / 2009 decided on 2017-09-27.
[5] 1994 (2) Sri. L R 117.

" ... The jurisdiction conferred on a primary Court under section 66 is a special jurisdiction. It is a quasi-criminal jurisdiction. The primary object of the jurisdiction so conferred is the prevention of a breach of the peace arising in respect of a dispute affecting land. The Court in exercising this jurisdiction is not involved in an investigation into title or the right to possession, which is the function of a civil Court. He is required to take action of a preventive and provisional nature pending final adjudication of rights in a civil Court ... "

The available material clearly demonstrate that there had been no illegality, irregularity or any impropriety in the impugned order pronounced by the learned Primary Court Judge. Therefore, it is clear that the Provincial High Court has had no ground to interfere with the order of the learned Primary Court Judge in the exercise of its revisionary jurisdiction.

In this backdrop, this Court is convinced that there has been no legal basis for the learned Provincial High Court Judge to exercise his revisionary powers to vary the findings of the Primary Court.

In these circumstances, and for the foregoing reasons, this Court decides to set aside the judgement of the Provincial High Court pronounced on

2015-07-27 and proceed to restore the order dated 2014-05-07

Pronounced by the learned Primary Court Judge.

The Appellants are entitled to the costs of all litigations.

Appeal is allowed with costs.

PRESIDENT OF THE COURT OF APPEAL

K K Wickremasinghe J

I agree,

JUDGE OF THE COURT OF APPEAL