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

In the matter of an application for revision under and in terms of Article 138 of the Constitution, read with the High Court of the Provinces (Special Provisions) Act No. 19of 1990.

Officer In Charge,
Police Station, Dehiwala.

C.A./ CPA No. 28/2024 **PLAINTIFF**

High Court of Colombo Case
No. HCRA 09/2024
Magistrate Court of Mount Lavinia
Case No. 20175/23

v.

1. Mahawaduge Ashini Lakmali Fernando,
   247, Thalawatugoda Road,
   Pitakotte.

2. Nayana Wijesinghe,
   99/3, Quarry Road, Dehiwala.

RESPONDENTS

AND BETWEEN

Nayana Wijesinghe,
99/3, Quarry Road, Dehiwala.

2nd PARTY RESPONDENT - PETITIONER

v.

Officer In Charge,
Police Station, Dehiwala.

PLAINTIFF – RESPONDENT

1. Mahawaduge Ashini Lakmali Fernando,
   247, Thalawatugoda Road,
   Pitakotte.

1st PARTY RESPONDENT - RESPONDENT

AND NOW BETWEEN

Nayana Wijesinghe,
99/3, Quarry Road, Dehiwala.

2nd PARTY RESPONDENT – PETITIONER – PETITIONER

v.

Officer In Charge,
Police Station, Dehiwala.

PLAINTIFF RESPONDENT – RESPONDENT

Mahawaduge Ashini Lakmali Fernando,

247, Thalawatugoda Road,
Pitakotte.

1st PARTY RESPONDENT – RESPONDENT - RESPONDENT

BEFORE : M. Sampath K. B. Wijeratne J. &
M. Ahsan. R. Marikar J.

COUNSEL : Dushantha Kularathne for the 2nd Party Respondent – Petitioner - Petitioner.

Sanjaya Kodithuwakku for the 1st Party Respondent – Respondent - Respondent.

SUPPORTED ON : 09.10.2024.

DECIDED ON : 08.11.2024

M. Sampath K. B. Wijeratne J.

Introduction

The 2nd Party Respondent–Petitioner–Petitioner (hereinafter referred to as the 'Petitioner') has filed this revision application against the Plaintiff – Respondent-Respondent, officer in charge of Police Station, Dehiwala and 1st Party Respondent–Respondent–Respondent (hereinafter referred to as the 'Respondent'). The Petitioner seeks to canvass the judgment delivered by the learned High Court Judge of Colombo on 12th March 2024, refusing to revise the order made by the learned Magistrate of Mount Lavinia on 21st February 2024 instituted under Section 69(2) of the Primary Courts Procedure Act No. 44 of 1979 (hereinafter referred to as the 'Primary Courts Procedure Act').

The Petitioner further seeks to have the aforementioned order of the Magistrate set aside and the Petitioner be declared entitled to possess the land marked 'X'

in the sketch submitted by the police and/or the land described in the deed of declaration No. 1098, dated 23rd January 1990. Additionally, the Petitioner seeks the dismissal of the information filed by the Police, marked as 'P1'.

Factual background

On 20th July 2023, the Respondent lodged a complaint with the Dehiwala Police regarding an obstruction to a right of way. The Respondent claimed the right to access her sister's land over the disputed portion, on the strength of a Special Power of Attorney granted to her by her sister[1].

Following an inquiry into the complaint, the Officer in Charge of the Dehiwala Police Station submitted information to the Magistrate's Court of Mount Lavinia under Section 66(1)(a) of the Primary Courts Procedure Act.

The learned Magistrate declared that the Respondent is entitled to use the 10 feet wide road marked with arrows across Lot 'X' in the sketch submitted by the Police.

The aggrieved Petitioner moved the High Court to revise the order but was refused.

The Petitioner appealed the said decision to this Court.

Analysis

The Petitioner presented the following matters in her Petition as exceptional circumstances that warrant the intervention of this Court in exercising its extraordinary revisionary powers.

The learned Counsel for the Petitioner reiterated these grounds at the argument. Those are;

i. No breach of peace or threatened breach of peace.
ii. The Respondent does not have possession to the disputed land.

[1] Documents marked as 'X18' at the Magistrate's Court.

iii. The land owned by the Respondent's sister has thirty feet road frontage towards the Quarry Road which could provide access to the land.

Next, I will address the aforementioned grounds raised by the Petitioner.

i. No breach of peace or threatened breach of peace.

The officer in charge of Dehiwala Police Station filed an information in the Magistrate's Court indicating that the Respondent filed a complaint on 20th July 2023, alleging that the Petitioner obstructed their right of way, used for accessing their land for many years, by constructing a boundary wall and a gate. The report notes that during the inquiry at the Police Station, both parties refused to resolve the dispute in the District Court and exhibited agitated behavior. Consequently, the Police determined that there was a likelihood of a breach of the peace and referred both parties to the Magistrate's Court.

As it was held in the case of *Velupillai v. Sivanathan*[2] when an information is filed under Section 66 (1)(a) of the Primary Courts Procedure Act, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the Police Officer inquiring into the dispute. The Police Officer is empowered to file the information if there is a dispute affecting land and a breach of the peace is threatened or likely. In such an instance the Magistrate is not put on inquiry as to whether a breach of the peace is threatened or likely and the Court is vested with jurisdiction to inquire into and make a determination on the dispute.

In the more recent case of *Jayasinghe and others v. Loku Bandara*[3] His Lordship Samayawardhena J., (sitting in Court of Appeal as his Lordship then was) comprehensively analysed both the Sections 66 (1) and (2) and also compared those with the similar provisions in the repealed Administration of Justice Law[4] and the corresponding provision of the Indian Code of Criminal Procedure, 1973[5] and reaffirmed the decision in *Velupillai and others v. Sivanathan* regarding Section 66 (1)(a). His Lordship went a further step ahead and held that

[2] [1993]1 Sri L.R. 123.
[3] [2019]2 Sri L.R. 202.
[4] No. 44 of 1973.
[5] Section 145.

even when an information is filed by a party to the dispute under Section 66 (1)(b), the Magistrate is vested with jurisdiction to inquire into it.

Accordingly, I am satisfied that a threatened breach of the peace existed, and the learned Magistrate is vested with the jurisdiction to inquire into the matter.

ii. The Respondent does not have possession of the disputed land.

The Petitioner asserts that she was in ***'possession'*** of the disputed land at the time the Police filed information in the Magistrate's Court of Mount-Lavinia on 10th August 2023, and for at least two months prior to that date. The Petitioner contends that her claim to the disputed land is based on Deed No. 52[6], executed by D.S. Gamini, Notary Public, on 4th September 1991. This deed grants her title to an undivided 7.5 perches from Lot 'B' in Plan No. 994[7], dated 20th September 1970, prepared by H.S.B. Wijesekara, Licensed Surveyor.

Additionally, the Petitioner claims ownership of 0.7 perches from the same land, upon deed No. 1879 executed by M. N. P. Fernando, Notary Public, on 4th July 1992[8]. This 0.7-perch parcel is depicted in Plan No. 6013, dated 26th January 1991, prepared by L.J. Liyanage, Licensed Surveyor[9]. Notably, this parcel is adjacent to the 0.8-perch parcel owned by the Respondent's sister. Both parcels of land are situated between Quarry Road and the means of access shown in Plan No. 6013.

The Petitioner asserts her title to Lot 'E1' in Plan No. 2317[10], dated 12th June 1989, prepared by H.F.B. Wijesekara, Licensed Surveyor. This plan indicates that Lot 'E1' is a subdivision of Lot 'E,' as shown in Plan No. 994, which also depicts the lands described in the title deeds of both the Petitioner and the Respondent. Therefore, it is evident that by executing the aforementioned deed of declaration, the Petitioner has asserted her title to the common right of way illustrated in Plan No. 994.

[6] At page 205 to 208 of the brief.
[7] At page 330 of the brief.
[8] Marked as 'P8'in the Petition filed in this Court.
[9] At page 83 of the brief.
[10] At page 311 of the brief.

However, the learned Magistrate has noted in her order that the Respondent has established nonexistence of a Notary by the name of P.A.G.B. Abeyratne, who is alleged to have attested the deed of declaration No. 1038, dated 23rd January 1990. This was demonstrated by presenting the Registrar General's letter marked 'Y2'. Furthermore, the extracts marked 'X56', confirms that no such deed is registered at the Land Registry.

According to the Petitioner, there is no individual currently in actual physical possession of the land. The Petitioner contends that the address provided by the Respondent in her affidavit does not correspond to the location of the land owned by her sister, which bolsters this assertion. Notably, the Respondent has not claimed that she or her sister resides on the property. Instead, the Respondent states that she and her family lived on the land from her birth until 2017[11], after which the old house was demolished in 2018 at her sister's request to facilitate the development of the property[12]. The Respondent maintains that she and her family members have used the disputed right of way for over 50 years, until the current dispute arose[13]. To support her position, the Respondent submitted the documents referred to in her affidavit.

The Respondent has further asserted her right to direct rainwater into the Municipal Council drainage system via the disputed roadway[14]. In her counter affidavit[15], the Petitioner has countered this claim, stating that it was merely a bare assertion without supporting evidence. Nevertheless, the learned Magistrate, after considering the matter at hand, concluded that because water naturally flows from higher to lower elevations, it is reasonable to assume that rainwater passed through the means of access[16].

Another argument advanced by the Petitioner is that the Respondent did not establish the date of dispossession and did not even raise an issue as to the date

[11] Paragraph 3(d) of the affidavit.
[12] Paragraph 3(g) of the affidavit.
[13] Paragraphs 3(j) and 4(a) to (g) of the affidavit.
[14] Paragraph 4(b) of the affidavit.
[15] At paragraph 9 (ඇ), at page 335 of the brief.
[16] At page 27 of the order, at page 40 of the brief.

of forcible dispossession. However, the information submitted to the Magistrate's Court of Mount-Lavinia itself is on an obstruction caused to a right of way. Further, the Respondent's complaint made to the Police on the 20th July 2023 is also regarding an obstruction caused to her right of way. John Dimantha Kohomban Wickramage, who is said to have accompanied the Respondent to the land on the 20th July 2023 also confirms in his statement made to Dehiwala Police on the 20th July 2023 that the right of way was obstructed by putting up a wall and a gate.

Another argument presented by the Petitioner is that the Respondent has failed to establish the date of dispossession and did not raise any issue regarding the timing of the alleged forcible dispossession. However, the information submitted to the Magistrate's Court of Mount-Lavinia clearly pertains to an obstruction of a right of way. Additionally, the Respondent's complaint to the Police on 20th July 2023 also addresses the obstruction to her right of way. John Dimantha Kohomban Wickramage, who is said to have accompanied the Respondent to the land on that date, confirmed in his statement to the Dehiwala Police that the right of way was obstructed by the construction of a wall and gate.

In her statement responding to the complaint made by the Respondent, the Petitioner acknowledges that she constructed a wall for the safety of her property. However, she denies encroaching on any portion of the Respondent's land. The Petitioner asserts that the disputed right of way is her own property. As mentioned earlier in this order, her claim is based on the deed of declaration, the authenticity of which has not been established.

The Police Officer who investigated in to the complaint made by the Respondent also confirmed that there was an obstruction to the Respondent's right of way due to the construction of a new wall and gate[17]. According to the sketch prepared by the same officer, the matter pertains to a dispute regarding the obstruction of a right of way.

[17] At page 358 of the brief.

In the case of *Ramalingam v. Thangarajah*[18] His Lordship Sharvananda J., who later became Chief Justice, examined Section 62 of the repealed Administration of Justice Law[19], which was applicable before the enactment of Chapter VII of the Primary Courts Procedure Act. He made the following observations:

'In an inquiry into a dispute as to the possession of any land, where a breach of peace is threatened or is likely under Part VII, of the Primary Courts Procedure Act, the main point for decision is the actual possession of the land on the date of the filing of the information under section 66; but where forcible dispossession took place within two months before the date on which the said information was filed the main point is actual possession prior to that alleged date of dispossession. Section 68 is only concerned with the determination as to who was in possession of the land or the part on the date of the filing of the information under section 66. It directs the Judge to declare that the person who was in such possession was entitled to possession of the land or part thereof Section 68(3) becomes applicable only if the Judge can come to a definite finding that some other party had been forcibly dispossessed within a period of two months next proceeding the date on which the information was filed under section 66.'

His Lordship has further observed;

'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).'

[18] [1982]2 Sri L.R. 693.
[19] *Supra* note 4.

Under Section 145 of the Indian Criminal Procedure Code, which parallels our provisions, when the dispute concerns possession, similar to Section 68(3) of our Primary Courts Procedure Act, the Magistrate must determine whether the party claiming possession has been forcibly and wrongfully dispossessed within the two months preceding the filing of the information. In contrast, when the dispute involves rights other than possession, Section 147 of the Indian Code stipulates that if the dispute pertains to the right to use any land or water throughout the year, the Magistrate must confirm whether such a right has been exercised within three months prior to the filing of the information.

However, as previously mentioned, our law does not impose any specific time frame for disputes concerning rights other than the right to possession. Instead, the focus is on determining the entitlement to the right itself.

This dispute falls under the scope of Section 69(1) of the Primary Courts Procedure Act, rather than Section 68(2).

The learned Magistrate, in her impugned order, correctly identified the dispute as one affecting land that pertains to a right other than the right to possess the land.

Consequently, the learned Magistrate identified the following issues to be resolved during the inquiry:

i. Whether the Respondent has a right of way over the disputed land.
ii. Whether the Petitioner obstructed the right of way by constructing a wall and a gate.

In the cited quotation from the judgment in *Ramalingam v. Thangarajah*[20] His Lordship Sharvananda J. explains that the term *entitle* signifies ownership of the right. The Court's role is to ascertain which party has acquired that right or is currently entitled to exercise it.

[20] *Supra* note 18.

In the case of *Punchi Nona v. Padumasena and others*[21] (C.A.), His Lordship Ismail J. has observed that;

'*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.*'

Any order issued under Section 69(1) is a temporary measure that remains in effect until the dispute is conclusively resolved by a competent court, in this case, the District Court. Therefore, the standard of proof required to establish the right does not need to match that of a District Court action.

As correctly noted by the learned Magistrate, the entitlement to a right of way in an application under Section 66 of the Primary Court Procedure Act does not need to be established in the same manner as it would be in a civil action.

However, when the legislature uses the term '*right*' in a statute, it is intended to denote a right that is recognizable under existing laws. In instances where the right pertains to a servitude, Section 75 explicitly states that it has to be a right '*in the nature of a servitude*.' In an appropriate situation, it could be a *'way of necessity'* to address a fundamental necessity.

In my opinion, the definition of the term *'dispute affecting land'* provided in Section 75 is not exhaustive and may encompass other related disputes concerning land. The use of the word *'includes'* in Section 75 supports this perspective.

In the case at hand, when determining whether the Respondent has acquired any right to use the disputed roadway, it is important to note that both the Respondent and the Petitioner have right to its use as per their respective title deeds.

[21] [1994]2 Sri L.R. 117, at p. 117.

The Respondent's sister holds title to half of Lot 'A' in Plan No. 994[22] (Lot 1 in Plan No. 1562[23]) as per deed No. 1482 dated 13th September 2003, attested by T.G. Jayasekara, Notary Public. [24]. The remaining portion of Lot 'A' in Plan 994[25] (Lot 2 in Plan No. 1562) is conveyed to her by deed No. 1483, also dated 13th September 2003 and attested by the same Notary Public. Additionally, the Respondent's father had title to 0.8 perches of the same land under deed No. 1878 dated 4th July 1992, attested by M.N.P. Fernando, Notary Public[26]. Subsequently, through deed of rectification No. 1736 dated 29th January 2017, attested by T.G. Jayasekara, Notary Public[27], the parcel of land in an extent of 0.8 perches was also incorporated into the previously mentioned deed of transfer No. 1483.

The entitlement to use the right of way designated as Lot 'E' (a reservation for 10 feet wide road) is granted in both title deeds 1482 and 1483. Notably, the Petitioner also reserves the right to use this same right of way in her title deed No. 52 dated 4th September 1991, attested by D.M.S. Gamini, Notary Public. Therefore, I am of the view that both the Respondent and the Petitioner have sufficiently demonstrated their ownership of the right to use the disputed right of way, as required for an application under Section 66 of the Primary Courts Procedure Act.

iii. The land owned by the Respondent's sister has thirty feet road frontage towards the Quarry Road which could provide access to the land.

The next issue to consider is whether the Respondent's sister has alternative access to her land aside from the disputed right of way. As previously analyzed, the usage of Lot 'E' in Plan No. 994[28] is granted to the Respondent's sister, whom the Respondent represents under the Power of Attorney. Additionally, the

[22] At page 330.
[23] At Page 84.
[24] At page 86.
[25] At page 330.
[26] At pages 79 of the brief.
[27] At page 94 of the brief.
[28] At page 330 of the brief.

disputed right of way is illustrated in several subsequent plans included in the record as well[29].

As previously mentioned in this judgment, the Respondent stated that the public road, the Quarry Road, and the Respondent's sister's land are situated at different elevations. Therefore, although the Petitioner asserts that the Respondent's land has a thirty feet road frontage along the Quarry Road, the Respondent is unable to access her property through this route.

The fact that the disputed roadway has been depicted as providing means of access to the subdivided Lots 'A', 'B', and 'C' of Plan No. 994 and in all subsequent plans made[30] over nearly 50 years (from 1970 to 2018) supports the Respondent's position. This demonstrates that the Quarry Road may indeed be at a different elevation, rendering it inaccessible to the lower allotments of land.

While the Petitioner may have encroached upon part of Lot 'E', the means of access, and filled her property to facilitate access from the Quarry Road, this does not negate another person's legal right to access through the disputed roadway. Furthermore, established law stipulates that when land is subdivided, access must be provided within the same property.

In light of the above analysis, I am of the view that the Respondent **is entitled, for the time being**, to use Lot 'E' in Plan No. 994 as a means of access to Lot 'A'.

The learned Magistrate, after considering the information submitted by the Police, the affidavits, counter affidavits, and the documents presented by both parties, has rightly identified the conflict between the Petitioner and the Respondent as a land dispute concerning a right other than possession of the land or any portion of it. As a result, the learned Magistrate has determined that the

[29] Lot B, in Plan No.6013 dated 26th January 1991 made by L. G, Liyanage, License Surveyor, at page 83 of the appeal brief; Plan No. 1562 dated 24th November 1997 made by J.M.C. Fernando, License Surveyor, at page 84 of the appeal brief; Plan No. 13122 dated 6th March 2018 made by Gamini B. Dodanwela, at pages 98,112 and 362 of the appeal brief; Plan No. 2317 dated 12th June 1989 made by H.F.B. Wijesekara, License Surveyor, at page 200;

[30] Plan No. 2317 made on 12th June 1989, 6013 made on 26th January 1991, 1562 made on 24th November 1997, Plan No.13122 made on 6th March 2018.

Respondent is entitled to use the 10 feet wide disputed right of way and that the Petitioner has obstructed this right by constructing a wall and installing a gate.

Consequently, the learned Magistrate has proceeded to issue an order to remove the obstructions caused to the right of way and to remove the part of the wall and the gate as required to give effect to the order.

In the case of *Jamis v. Kanangara*[31] (C.A.) Palakindnar J. observed that;

'*The order that can be made under this subsection in regard to a right to any land other than the right to possession is a declaration of entitlement of such right after determination by the court subject to final determination by a competent court and prohibit all disturbance or interference with an exercise of such right by such party.*

The order therefore is clearly of a prohibitory nature preventing an interference with the exercise of such a right.

Whether such an order would lawfully include the removal of a structure is a matter which can only draw a negative reply. An order to remove the structure is not an order prohibiting the disturbance or interference with a declared right.'

As a result, His Lordship reversed the order issued by the learned Primary Court Judge that mandated the removal of the house.

In the more recent case of *Tudor v. Anulawathie and others*[32] (C.A.) Gunawardana J., declined to follow the decision in *Jamis v. Kanangara*[33] and observed that; '*there is no specific provision in the Primary Courts Procedure Act expressly enabling the court to order removal of obstructions in the way of restoration of the right to the person entitle thereto in terms of the determination made by the court; nor is there a prohibition either, against the court exercising such a power or making such an order. (...) the courts are not to act on the principle that the procedure is to be taken as prohibited unless it is expressly*

[31] [1989]2 Sri L.R. 350, at p. 351.
[32] [1999]3 Sri L.R. 235, at page 252.
[33] *Supra* note 31.

provided for by the Code but on the convers principle that every procedure is to be understood as permissible till it is shown to be prohibited by the Code.'

I prefer to adhere to the decision in the case of *Tudor v. Anulawathie*[34] *and others,* as it seems to be more reasonable and logical.

The Petitioner has sought the exercise of this Court's revisionary jurisdiction concerning both the order of the learned High Court Judge and the order of the learned Magistrate. In the case of *Hotel Galaxy (Pvt) Ltd and others v. Mercantile Hotels Management Ltd*[35]*,* Sharvananda C.J. observed that:

'*It is settled law that the exercise of revisionary powers of the Appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention.*'

In the case of *Divisional Secretary Kalutara v. Kalupahana Mestrige Jayathissa and others*[36] Supreme Court observed that;

'*It must be noted that the Respondents had invoked revisionary jurisdiction of this court, which is discretionary remedy. Thus, if relief to be granted, the party seeking the relief has to establish that, not only the impugned Order is illegal, but also the nature of the illegality is such, that it shocks the conscience of the court.*'

I observe that the learned High Court Judge has carefully examined the impugned order of the learned Magistrate, taking into account the pertinent statutory provisions and relevant judicial precedents. As a result, the learned High Court Judge has appropriately concluded that there are no exceptional circumstances warranting interference with the learned Magistrate's decision.

Based on the reasons articulated above, this Court finds that the Petitioner has not established a *prima facie* case or presented a matter that warrants further examination by this Court. Therefore, I see no grounds to interfere with the impugned orders made by either the learned High Court Judge or the learned

[34] *Supra* note 32.
[35] [1987]1 Sri L.R. at page 05.
[36] SC Appeals 246, 247, 249, 250/14.

Magistrate. After considering all the submitted materials and the arguments of both Counsel, this Court concludes that this application is without merit. Consequently, we are not inclined to issue formal notice to the Respondents.

In light of the above analysis, this Application is dismissed, with costs set at Rs. 50,000/-.

JUDGE OF THE COURT OF APPEAL

M. Ahsan. R. Marikar J.

I Agree.

JUDGE OF THE COURT OF APPEAL