

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

In the matter of an appeal in terms of Section 11 of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 read with Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Thambiliyagoda Gamage Padmasiri,
‘Sri Niwasa’, Galanigoda, Galkaduwa,
Imaduwa.

PETITIONER

CA No. CA/PHC/0072/2019

PHC - MT/REV/57/2018

MC MATARA

Case No. 79647

v.

1. Isirawathi Nanayakkara. Nalawana Watte,
Wahala, Kananke Imaduwa.
2. Leelawathi Nanayakkara.
3. Dayakanthi Nanayakkara.
4. Nimal Kantha Nanayakkara.
5. Kottawa Gamage Jayantha Premalal

(now deceased)

All of Nalawanage watte, Kananke, Wahala, Imaduwa.

RESPONDENTS

And now between

1. Isirawathi Nanayakkara
2. Leelawathi Nanayakkara
3. Dayakanthi Nanayakkara
4. Nimal Kantha Nanayakkara

All of Nalawanage watte, Kananke, Wahala, Imaduwa.

PETITIONER – RESPONDENT

And now between

1. Isirawathi Nanayakkara
2. Leelawathi Nanayakkara
3. Dayakanthi Nanayakkara
4. Nimal Kantha Nanayakkara

Nalawanage watte Kananke Imaduwa

RESPONDENT – PETITIONER – APPELLANTS

v.

Thambiligoda Gamage Padmasiri
'Sri Niwasa', Galanigoda Galkaduwa
Imaduwa.

PETITIONER – RESPONDENT – RESPONDENT

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

COUNSEL : W. Dayaratne, P.C., with R. Jayawardene
for the Respondent – Petitioner -
Appellants.

Shamal A. Collure with A. P. Jayaweera
and Prapath S. Amarasinghe for the
Petitioner – Respondent - Respondent.

ARGUED ON : 10.06.2024

DECIDED ON : 12.07.2024

M. Sampath K. B. Wijeratne J.

Introduction

The Petitioner - Respondent – Respondent, the Respondent in this appeal, (hereinafter referred to as the ‘Respondent’) filed information in the Magistrate Court of Matara exercising jurisdiction under Section 57 of the Primary Courts’ Procedure Act No. 44 of 1979 (hereinafter referred to as the ‘Primary Courts’ Procedure Act’) under Section 66 (1)(b) of the same Act against the 1st, 2nd and 3rd Respondent - Petitioner - Appellants, the Appellants in this appeal, (hereinafter referred to as the ‘Appellant’). The Respondent alleged that the Appellant obstructed the Petitioner’s peaceful possession of the land in question. The 4th Respondent-Petitioner-Appellant and the 5th Respondent-Petitioner (now deceased) subsequently intervened in the case.

In his order dated 28th August 2001¹, the learned Magistrate held in favour of the Respondent and ordered the Appellants not to disturb the Respondent's possession until the rights of the parties are determined by a competent court.

Dissatisfied with the order of the learned Magistrate, the Appellants filed a revision application in the High Court of Matara against the Magistrate's order, which was assigned case No. REV/132/2001. By his order dated 15th October 2003, the learned High Court Judge dismissed the Appellant's application and ordered the Appellants to pay costs to the Respondent, jointly and severally².

The Appellants appealed to the Court of Appeal against the judgment of the learned High Court Judge, which was assigned case No. CA (PHC) 271/2003³. Despite the appeal, the 4th Appellant also filed a revision application, No. CA (PHC) APN 266/2003, in the Court of Appeal against the same judgment.

However, since both an appeal and a revision application were filed against the same judgment, the revision application was subsequently withdrawn⁴. When the appeal was taken up for hearing on 15th July 2015, the learned Counsel for the **Appellant** informed the Court that the **Respondent** had filed partition action No. 21089/P in the District Court of Matara concerning the land subject to this case. It was submitted that if the Respondent could give an undertaking to maintain the *status quo* until the final determination of the partition action, the Appellant would be willing to withdraw the appeal. In response, the learned Counsel for the Respondent informed the Court that the Respondent was willing to maintain the *status quo* until the final determination of the partition action. Consequently, the Counsel for the Appellant moved to withdraw the appeal, and the Court allowed the application for withdrawal, dismissing the appeal without costs in the Court of Appeal. The proceedings before the Court on the day the appeal was withdrawn are as follows⁵:

¹ *Vide* order of the Magistrate's Court at pp. 63 to 71 of the 2nd set of the documents in the appeal brief.

² *Vide* order of the High Court, at pp. 90 to 97 of the 2nd set of documents in the appeal brief.

³ *Vide* the order filed of record at p. 98 of the 2nd set of documents in the appeal brief.

⁴ *Vide* the copy filed of record at p. 98 of the 2nd set of documents

⁵ *Vide* the copy filed of record at p. 98 of the 2nd set of documents.

‘Counsel for the appellant submits, the partition case bearing No. 21089/P has been filed by the Petitioner – Respondent – Respondent in the District Court of Matara, in respect of the land subject to in this case.

Further, he submits if the respondent will give an undertaking to maintain the status quo until the final determination of the partition case, he is willing to withdraw this appeal. Counsel for respondent submits that he will maintain the status quo until the final determination of the partition case.

In the above circumstances, Counsel for the appellant moves to withdraw this appeal. Application is allowed and appeal is dismissed without cost.’

Upon consideration of the above order made by this Court, it is apparent that it was the learned President’s Counsel for the Appellant who brought to the Court’s attention that the Respondent had filed a partition action in the District Court of Matara concerning the subject matter. He also indicated that if the Respondent was willing to give an undertaking to maintain the *status quo* until the final determination of the partition action, the Appellant would be willing to withdraw the appeal. In response, the Respondent agreed to maintain the *status quo* until the final determination of the partition action. Consequently, the learned Counsel for the Appellant moved to withdraw the appeal, and the Court dismissed the appeal without costs in the Court of Appeal.

Subsequently, the Respondent submitted a bill of costs along with a motion dated 11th August 2016, to the High Court of Matara, claiming the payment of costs ordered by the learned High Court Judge in the judgment of case No. REV/132/2001. The learned High Court Judge accepted the motion and, on 9th September 2016, ordered the Registrar to assess the bill of costs and refer the matter to the Magistrate’s Court for recovery⁶.

Thereafter, the learned Magistrate issued notice to the parties and, without proceeding to recover the bill of costs submitted by the High Court, allowed the parties to file objections, counter-objections, and written submissions on the question of payment of costs. Subsequently, the matter was fixed for the Court’s

⁶ At page 155 of the appeal brief.

order. However, upon realizing that the Magistrate's duty was to recover the costs ordered by the High Court, an order was made to pay the costs jointly or severally.

Thereafter, the Appellant filed revision application No. REV/57/2018 in the High Court of Matara against the order made by the learned Magistrate on 26th January 2018.

The learned High Court Judge entertained the application and issued notice to the Respondents. Subsequently, the Respondents filed objections, and both parties submitted their written submissions. During the argument, the learned Counsel for both parties made their submissions. On 14th June 2019, the learned High Court Judge delivered a judgment dismissing the revision application and affirmed the order made by the learned Magistrate on 26th January 2018. However, the learned High Court Judge did not make any order regarding the costs of the revision application.

Being aggrieved by the judgment of the learned High Court Judge of Matara, the Appellants appealed to this Court, filing the instant appeal.

Analysis

On 20th August 2001, the learned Magistrate of Matara delivered an order in an application filed by the Respondent under Section 66(1)(b) of the Primary Courts' Procedure Act. The Magistrate held that the Respondent was in possession at the relevant time and could continue in possession. Further, the Magistrate ordered that the Appellants should refrain from interfering with the Respondent's possession until the rights of the parties are determined by a competent civil jurisdiction⁷.

The Appellants moved in revision to the High Court of Matara to revise the order of the learned Magistrate. On 15th October 2003, the learned High Court Judge dismissed the revision application and ordered the Appellants (Petitioners in that

⁷ The order of the Primary Court Judge dated 28th August 2001 is at page 63 of the second set of documents.

case) to pay costs. Since the learned High Court Judge did not specify the amount, it is presumed to be taxed costs.

The aggrieved Appellants filed both a revision application and an appeal in this Court against the order of the learned High Court Judge⁸. Subsequently, the revision application was withdrawn on 19th March 2004, without any costs being ordered. Similarly, the appeal was withdrawn on 15th July 2015, based on terms agreed upon by the parties, also without any costs being ordered. During these proceedings, the Appellants informed the Court that the Respondent had initiated a partition action concerning the subject matter of this case. The Appellants indicated that they would withdraw the appeal if the Respondent agreed to maintain the *status quo* until the partition action is concluded. In response, the Respondent gave an undertaking to maintain the *status quo* until the final determination of the partition action, and accordingly, the Appellants withdrew their appeal.

Notably, when the appeal was dismissed by this Court upon the Appellant's application to withdraw it, this Court did not make any order regarding the costs that were ordered by the High Court in revision application No. REV/132/2001. Neither the Appellants nor the Respondent made any application regarding costs ordered in the High Court.

The obvious result of withdrawing both the appeal and the revision application filed in the Court of Appeal is that the judgment delivered by the High Court in case No. REV/132/2001 on 15th October 2003, and the original order made by the learned Primary Court Judge on 28th August 2001, remain intact. Therefore, the order for the payment of costs in the judgment of the learned High Court Judge also stands.

In light of the analysis provided above, it is my considered view that the Appellants are liable to pay costs ordered in the High Court case No. REV/132/2001. Consequently, this appeal ought to be dismissed.

⁸ CA(PHC) 271/2003.

The next matter that requires consideration of this Court is awarding of costs in this appeal.

As I have already analysed above in this judgement the Appellants being aggrieved by the decision of the learned Magistrate moved in revision to the High Court. The learned high Court Judge having considered the merits of their application dismissed the same subject to costs. Thereafter, against the above judgment the Appellant's filed a revision application as well as an appealed to this Court. Subsequently, both were withdrawn. Thereafter, when an application for the payment of costs ordered by the High Court was made the Appellants resisted. The amount of costs claimed by the Respondent was Rs. 20,750/= which was reduced to Rs. 9,000/- by the Registrar of the High Court upon his calculation. The Appellants, refusing to pay, proceeded to file objections and written submissions before the Magistrate, which were countered by the Respondent. When the learned Magistrate ordered the payment of costs the Appellants moved in revision to the High Court. Upon dismissal of their revision application by the learned High Court Judge the Appellant's filed the instant appeal in this Court.

It is pertinent to note that apart from the costs ordered by the learned High Court Judge in case No. REV/132/2001, the Appellants were not ordered to pay costs in any other instances, despite there being numerous applications arising from the order of the learned Magistrate.

Costs are ordered by courts to cover the expenses incurred for litigation by the successful party. The costs typically include fees, charges, and disbursements. Costs are usually ordered in the discretion of the Court. However, the discretion must be exercised judicially. Costs are also ordered by Court suggesting its disapproval of a party's conduct.⁹

I acknowledge the Appellant's right to contest any order in a higher forum. However, I am of the view that in this instance, the Appellants have challenged

⁹ 'A Dictionary of Law', L. B. Curzon, 2nd Edition, at p. 86.

every Court order in higher forums, potentially to harass the Respondent or to hinder the recovery of the costs ordered, amounting to Rs. 9,000/- only.

In the case of *Leon Peris Kumarasinghe v Samantha Weliverya Director General, Sri Lanka Broadcasting Corporation*¹⁰ Her Ladyship Tilakawardane J., in refusing to grant special leave to Appeal to the Supreme Court in a matter arose out of a decision of a Magistrate's Courts made the following observations.

'(...) This Court cannot over emphasize the need to appropriately deal with litigants who attempt to abuse the process of Court and thereby cause unnecessary delay and costs to other parties in order to ensure that, in the future, litigants will not be tempted to indulge in such ill-conceived practices. Thus, considering the conduct of the Petitioner and the fact that he has abused the process of Court by filing several applications in different Courts at different times without vacating from the land and premises in question for more than three years, we direct the Petitioner to pay a sum of Rs. 200, 000 as costs to the Director General, Sri Lanka Broadcasting Corporation within a period of one month from today...'

Her Ladyship also cited the following authorities from foreign jurisdictions to support the above contention.

In the case of *Wilkes v. Woods*¹¹ it was observed that costs are ordered not only as a satisfaction to the injured person, but also as a punishment to the guilty, to deter from any such proceedings in the future.

In the cases of *Kwan v. Kaplan*¹², it was held that a punitive costs order would serve a dual role; to hold the Petitioner accountable and to serve as a mark of the disapproval and displeasure of the Court with regard to the conduct of the Petitioner.

¹⁰ S.C.Spl.L.A.No.37/2012.

¹¹ (1964) 98 ER 489.

¹² (2012) (ZAGPJHC 36) and *Mohapi and others v. Magashule and others* (2007) (ZAFSHC 45).

The Supreme Court of U.S.A. in *Smith v. Wade*¹³, noted that the primary justification for such an award is punishment and to deter similar actions in the future.

The Supreme Court of Papua New Guinea in the case of *Polye v. Papaki and another*¹⁴, determined that the jurisdiction of the Supreme Court was invoked without reasonable cause which amounted to a misconduct on the part of the Appellant resulting in unnecessary expenditure by the Respondents and granted punitive damages accordingly.

Her Ladyship Tilakawardane J. in the aforementioned case further observed that having two separate appeals stemming from the same order simultaneously squanders valuable time and resources available to the legal system, justifying the imposition of punitive costs. In this case, the Appellants had previously filed both a revision application and an appeal against the order made by the High Court in case No. REV/132/2001. They later withdrew both the revision application and the appeal. However, as mentioned earlier, this Court did not award any costs in either instance.

Conclusion

In the above circumstances, I am of the view that this is an appropriate instance to order the Appellants to pay exemplary costs to the Respondent. Therefore, I dismiss this appeal and order the Appellants to pay Rs. 100,000/- to the Respondent as costs of this appeal.

JUDGE OF THE COURT OF APPEAL

M. Ahsan. R. Marikar J.

I Agree.

JUDGE OF THE COURT OF APPEAL

¹³ (1983) (461 U.S. 30)

¹⁴ [2001] 1 LRC 170.