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

In the matter of an Appeal in terms of Article 138 read with Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No:
CA/PHC/88/2016
HC Ratnapura Case No:
HCRA 108/2010
MC Ratnapura Case No:
76601

Imbulpe Heenmudiyanselage Karunaratna,
Gallinna Road,
Ratnapura.

2nd Party Respondent-Respondent-Appellant

-Vs-

Pahala Baduwalage Nimal Jayasuriya,
No. 11, Gurugewatta,
Maudella, Marapana,
Ratnapura.

1st Party Respondent-Petitioner-Respondent

Officer in Charge,
Police Station,
Ratnapura.

Plaintiff-Respondent-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

Dr. Ruwan Fernando J.

Counsel : Krishan Fernandopulle, AAL for the Appellant.

Tharanga Edirisinghe for the 1st Party Respondent-Petitioner-Respondent.

Written Submissions: By the 1st Party Respondent-Petitioner-Respondent on 17/02/2020 and 27/07/2020

By the 2nd Party Respondent-Respondent-Appellant on 19/02/2020 and 27/07/2020

Argued on : 14/07/2020 and 20/07/2020

Judgment on : **27/08/2020**

A.L. Shiran Gooneratne J.

The Officer in Charge of the Ratnapura Police filed an information in terms of Section 66(1)(a) of the Primary Court's Procedure Act No. 44 of 1979 (as amended) in the Magistrates Court of Ratnapura, relating to a disputed roadway between the 2nd Party Respondent-Respondent-Appellant (hereinafter referred to as the Appellant) and the 1st Party Petitioner-Respondent-Respondent. (hereinafter referred to as the Respondent). Having considered the information, the affidavits and the supporting documents tendered, the learned Magistrate on 06/12/2010, made order preventing the Respondent from using the roadway, on the basis that

the Respondent has failed to substantiate his claim to have access to the disputed road. Aggrieved by the said order of the learned Magistrate, the Respondent preferred a revision application to the Provincial High Court of the Sabaragamuwa Province holden in Ratnapura. The learned High Court Judge by order dated 05/05/2016, set aside the said order and *inter alia*, held that the disputed roadway was the only access road to the Respondent's land. The Appellant is before this Court to set aside the said order dated 05/05/2016.

When this matter was taken up for argument the Appellant urged the following grounds in appeal.

1. when an alternate remedy exists, invocation of revisionary jurisdiction should be denied.
2. the availability of an alternate road to access the Respondent's land.

By Deeds No. 6162, dated 07/11/2002 and 6996, dated 24/03/2010, the Respondent became the owner of the land called "Dummala Akure Mukalana". The said potion of land is depicted as Lot. 463 in the final village Plan No. 92 marked "1෨11". (Vide page 116 in the brief). The existence of the roadway in dispute is not shown in the said plan. However, Dingiri Mahattaya, who was the previous owner of Lot. 463, in his affidavit filed of record marked "1෧6" (Vide page. 406 in the brief) states that, the only access road to the land was a 12 feet road which was in existence for 12 years at the time of transfer of the land to the Respondent. Even though, by subsequent affidavits, the said deponent denied the

transfer of the right to use the road, he has not denied the existence of such road. (Vide affidavits marked "2වී7" and "2වී7(අ)", at page 243 and 273 of the brief). According to the survey report of Plan No. 3759, it is stated,

"මෙම මාර්ගය හැරුණ විට ඉහත සඳහන් 3759 පිඹුරේ දැක්වෙන කැ.අ. 5ට සහ 6ට ප්‍රවේශ වීමට වෙනත් විකල්ප මාර්ග නැත."

It is also stated that access roads to the disputed land depicted as Lots 341, 342, 225 and 227 are unusable. The position of the Respondent was that, the 12 ft wide road, the only available road access to his land called "Dummala Akure Mukalana" of Marapana Colony was illegally blocked by the Appellant on 01/06/2010 and the Respondent relies on Plan No. 3759 marked "1වී10" (Vide page 208 in the brief) to assert his claim.

The said Dingiri Mahattaya in his statement to the Police dated 03/06/2010, (Vide page 211 in the brief) has admitted that the disputed road is the only road which could be used by both parties. The affidavits tendered by the Respondent too, supports the position that the disputed road is used by both parties. ("1වී13"-"1වී16" Vide page 212-215 in the brief). Police Inspection Report marked "P1(a)" states that the disputed road used by the Respondent was in existence for around 14-15 years and apart from the said road, the Respondent has no other alternate road to access his tea plantation.

The position of the Appellant is that the Respondent's plan annexed with the Affidavit tendered to the Magistrates Court (Vide page 232 marked "2අ2") shows that there are two alternate roads which the Respondent could use and further contends that the affidavits relied upon by the Appellant suggests that the disputed road was only used by the Appellant. (Vide page 245-272 of the brief).

The learned Magistrate having considered the affidavits and the supporting documents filed of record concluded that the Respondent had failed to establish his entitlement as of a servitude right or by an order of Court.

It is trite law that when a party is seeking relief under Section 69 of the Act, the party is not called upon to establish entitlement to the right in the manner required before a District Court by presenting cogent evidence.

In ***Ramalingam Vs. Thangarajah (1982) 2 SLR 693***, Sharvananda, J. (as he then was) stated that,

"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)."

There is no dispute between the parties regarding the existence of the disputed road. In the circumstances, when a party is to establish that he *"is entitled for the time being to exercise that right"* careful consideration should be given in order to determine as to whether the party claiming entitlement for the time being has used the disputed road. Existence of a road does not necessarily mean that a person's right to use it is established. The evidence before Court is that there are no alternate roads to access the Respondents land, the surveyor report and the police report confirms this position and the fact that the Respondent used the disputed road is established by the affidavits tendered on behalf of the Respondent, which strengthens the position of the Respondent's case.

"The ultimate object of s. 68, and s. 69 being to restore the person entitled to the right to the possession of land to the possession thereof or to restore the person entitled to the right (other than the right to possession of land) to the enjoyment thereof – the said provision of the law must be rationally construed to authorize by necessary implication if in fact they had not in terms done so, the removal of all obstructions if the need arise, in the process of restoring the right to the person held to be entitled to such right." ***(Tudor Vs. Anulawathie and Others (1999) 3 SLR 235)***

In terms of Section 74 of the Act, an order made under Section 69(2) of the Act *"shall not affect or prejudice any right or interest in any land which any person may be able to establish in a civil suit"*. Accordingly, the learned High Court Judge in terms of Section 69(2) of the Act, has made order declaring that the Respondent shall be entitled to any such right in or respecting the land or in any part of the land specified in the order until such person is deprived of such right by virtue of an order or decree of a competent Court. Therefore, a pending civil suit to determine the rights or interest in a land would not deprive a person's entitlement to the right which is the subject of the dispute until such person is deprived of such right by virtue of an order or decree of a competent Court. Therefore, the position taken by the Appellant that this case cannot be maintained due to the pendency of the District Court action is devoid of any merit.

In ***Welikakala Withanage Shantha Sri Jayalal and Another vs. Kusumawathie Pigera and Others (CA (PHC) APN 69/2009, C.A.M. 23.07.2013),*** where Salam J. held (at page 5-6);

"It does not mean, that the Petitioner who invokes the revisionary powers of the court should in his petition state in so many words that "exceptional grounds exist" to invoke the revisionary jurisdiction in addition to pleading the grounds on which the revision is sought...

It is actually for the court to find out whether the circumstances enumerated in the petition constitute exceptional circumstances."

In the circumstances, the learned High Court Judge has correctly determined that there are exceptional circumstances which warrants the exercise of revisionary jurisdiction to set aside the order of the learned Magistrate. We see no reason to interfere with the said decision and accordingly, both grounds of appeal urged by the Appellant are rejected.

For the foregoing reasons, we dismiss this appeal without costs.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL