

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

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

**Court of Appeal case no. CA/PHC/200/2006**

**H.C. Balapitiya case no. MCBRA 597/2004**

**M.C. Elpitiya case no. 15577**

The Officer In Charge,  
Police Station, Urugasmanhandiya.

**Plaintiff**

**Vs.**

1. Warahena Liyanage Prmathilake
2. Weerasekara Mudiyanseelage Sumanadasa  
(Both residing at Eluwahugoda, Haburugala)

**Respondents.**

**AND**

Weerasekara Mudiyanseelage Sumanadasa

**Second Respondent Petitioner**

**Vs.**

Warahena Liyanage Prmathilake

**First Respondent Respondent**

**AND NOW**

Warahena Liyanage Prmathilake

**First Respondent Respondent Appellant**

**Vs.**

Weerasekara Mudiyanseelage Sumanadasa

**Second Respondent Petitioner Respondent**

**Before** : H.C.J.Madawala J.

: L.T.B. Dehideniya J.

**Counsel** : Chathura Galhena with Madeesha Alwatta and  
M.Gunawardane for the 1<sup>st</sup> Respondent Respondent  
Appellant.

: P.P.Gunasena for the 2nd Respondent Petitioner  
Respondent.

**Argued on** : 27.10.2016

**Written submissions filed on** : 15.12.2017 & 19.01.201

**Decided on** : 24.03.2017

**L.T.B. Dehideniya J.**

This is an appeal from the High Court of Balapitiya.

The dispute in this appeal is with regard to a right of way. The 2<sup>nd</sup> Party Respondent Petitioner Respondent (hereinafter sometimes called and referred to as the Respondent) made a complaint to the Elpitiya police stating that the 1<sup>st</sup> Party Respondent Respondent Appellant's (hereinafter sometimes called and referred to as the Appellant) started taking heavy vehicles through his land without any right. The police, after investigations, filed information before the Magistrate Court of Elpitiya,

under part vii of the Primary Court Procedure Act. The learned Magistrate after completing the pleadings and the written submissions, made the determination that the Respondent is entitled for a right of way of 5 feet to be used only as a foot path and did not permit to take motor vehicles. Being aggrieved, the Respondent moved in revision in the High Court of Balapitiya where the learned High Court Judge acted in revision and removed the prohibition imposed on motor vehicles and allowed the Respondent to take three wheelers through the 5 feet roadway. Being aggrieved by the order of the learned High Court Judge, the Appellant presented this appealed to this Court seeking to set aside the order of the learned High Court Judge.

The Learned Magistrate has duly considered the affidavits and the relevant documents filed by the parties and has come to the conclusion that there were no evidence to establish the usage of a motorway through the land of the Appellant but only a foot path has been established. Accordingly the learned Magistrate correctly allowed the foot path. Though the Appellant challenge the order of the learned Magistrate in these proceedings, he has not challenged it at the proper forum, no revision application filed by the Appellant against the order of the learned Magistrate and there is no prayer in the petition of appeal to set aside the order of the learned Magistrate. Therefore he cannot challenge the order of the learned Magistrate at the argument stage.

In the revision application to the High Court, the Counsel for the Respondent (the petitioner in the revision application) suggested that a motorway for the use of heavy vehicles is no longer necessary, now the necessity is only to take a three wheeler to his house and it can be done without expanding the width of the roadway. Considering these submissions the learned High Court Judge has come to the conclusion that

a three wheeler can be taken in a 5 foot wide road and it will not prejudice the other party. on this footing the learned High Court Judge acted in revision and removed the prohibition of using the path as a motorway and allowed to take a three wheeler.

The extraordinary power of revision is vested in appellate courts for the due administration of justice. But it has its own limits. A Court cannot make orders in the guise of reviving an order of a lower Court without considering the legal provisions governing the situation. Under section 69(1) of the Primary Court Procedure Act the learned Magistrate has to determine whether the party has established his entitlement to the right. Unless the entitlement is established, the Court cannot make order under section 69(2). The section reads thus;

69 .

*(1) Where the dispute relates to any right to any land or any part of a land, other than the right to possession of such land or part thereof, the Judge of the Primary Court shall determine as to who is entitled to the right which is the subject of the dispute and make an order under subsection (2).*

*(2) An order under this subsection may declare that any person specified therein shall be entitled to any such right in or respecting the land or in any part of the land as may be specified in the order until such person is deprived of such right by virtue of an order or decree of a competent court, and prohibit all disturbance or interference with the exercise of such right by such party other than under the authority of an order or decree as aforesaid.*

In the present case the learned Magistrate has come to the conclusion that a right to use a motorway was not established by the

evidence. The learned High Court Judge, without considering any of the evidence presented by the parties, only on the premise that taking a three wheeler will not prejudice the land owner; has allowed the three wheeler to be taken through the land.

The right of a foot path and a right to use a motorway are two different rights. Just because that there was a 5 feet foot path, he does not become entitle to use the path to take vehicles less than 5 feet wide unless he proves that he is entitle to use the road as a motorway. In this case the Respondent has failed to establish the use of a motorway.

De Kretser J. held in the case of Jayasekera Hamine vs. Agida Hamine 46 NLR 38 that the servitude of footway (iter) includes the right to use a bicycle or wheelbarrow. But a three wheeler is a motorized vehicle which moves faster making a noise not like a bicycle or a wheelbarrow. Therefore I believe that a three wheeler cannot be put in to the category of a "bicycle or a wheelbarrow". It is a vehicle of its own.

My view is that the learned High Court Judge has misdirected himself in allowing three wheelers to be taken through the foot path. Accordingly I set aside the order of the learned High Court Judge and affirm the order of the learned Magistrate.

Appeal allowed.

Judge of the Court of Appeal

**H.C.J. Madawala J.**

I agree.

Judge of the Court of Appeal