

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

In the matter of the appeal under Article 154P of the
Constitution of the Democratic Socialist Republic of
Sri Lanka

Court of Appeal case no. CA/PHC/42/2007

H.C. Rathnapura case no. HCR/RA/141/2006

M.C. Rathnapura case no. 17313

Amarathunga Arachchige Podimahattaya Perera
No. 75/16, Ellewala Mawatha,
Batugedara, Rathnapura

Petitioner

Vs.

Amarathunga Arachihige Danawansa Perera
"Amara book shop"
No. 46, Private Bus Stuan, Rathnapura.

Respondent.

AND NOW

Amarathunga Arachchige Podimahattaya Perera
No. 75/16, Ellewala Mawatha,
Batugedara, Rathnapura

Petitioner Petitioner

Vs.

Amarathunga Arachihige Danawansa Perera
"Amara book shop"
No. 46, Private Bus Stuan, Rathnapura.

Respondent Respondent

AND NOW BETWEEN

Amarathunga Arachihige Danawansa Perera

“Amara book shop”

No. 46, Private Bus Stuan, Rathnapura.

Respondent Respondent Appellant

Vs

Amarathunga Arachchige Podimahattaya Perera

No. 75/16, Ellewala Mawatha,

Batugedara, Rathnapura

Petitioner Petitioner Respondent

(Now deceased)

1A. Kalapuhena Mesthrige Seelawathie

1B. Kanchana Madhudharshinie

1C. Veruni Wijayanthie Perera

1D. Amarathunga Arachchige Thanuja

Samindinee Maheshi Perera

1E. Kaniska Ashani Perera

All of No. 75/16, Ellewala Mawatha,

Batugedara, Rathnapura

Substituted Petitioner Petitioner Respondents

Before : H.C.J.Madawala J.

: L.T.B. Dehideniya J.

Counsel : Shantha Jayawardana with Kamal Perera for the Respondent
Respondent Appellant.

: M.Premachandra for the Substituted Petitioner Petitioner
Respondents.

Argued on : 06.12.2016

Written submissions filed on 10th and 17th of January 2017

Decided on : 22.05.2017

L.T.B. Dehideniya J.

This is an appeal from the High Court of Rathnapura.

The Petitioner Petitioner Appellant (the Respondent) filed information under section 66 of the Primary Court Procedure Act in the Magistrate Court Rathnapura on a land dispute threatening the breach of the peace. The dispute is over the road way used by the Petitioner as the access road to his residence. The Petitioner's case is that the road that he used for about 20 years to access his house was through his brother the land of the Respondent Respondent Appellant (the Appellant). With the consent and the financial assistance of the Respondent a gate was erected at the entrance but himself and his brother used the road without any obstacle. On or about 12.01.2016 the Appellant padlocked the gate and obstructed the usage of the road and on or about 1.01.2016 a barbed wire fence was erected and further obstructed the read way. Questioning on this a breach of the peace became likely. The Appellant's case is that the Respondent never used this road but they have an alternative road through the railway track.

The learned Magistrate determined that the Respondent has established that he has used this road for a period of time but has failed to prove that he used for 10 years to accrue the prescriptive right over the road and on revision the High Court set aside the order of the Magistrate Court and ordered that the Respondent is entitle to use the road. Being aggrieved, the Appellant presented this appeal.

The learned Magistrate has accepted the fact that the road in question was used by the Respondent. He further considered that the electricity and

the telephone lines were laid out though this road. The significant fact of the two mail boxes giving the addresses of the two houses of the Appellant and the Respondent was also considered by the learned Magistrate in his order. All these facts direct only on one direction; that is that the road in question was used by the Respondent for a long time.

The question is that how long it has been used. The learned Magistrate was of the view that the Respondent has failed to establish that he used it for ten years. The learned Magistrate has failed to consider the affidavit evidence of the neighbours. Several neighbours have testified that this road was used by the Respondent for more than 10 years. P18, P19, P20, P21 and P22 are affidavits sworn by the neighbours to the effect that the said road was in Respondent's use for more than 10 years.

Though the Respondent submitted in his affidavit that this road was in the Appellant's land, the plan No. 3082 prepared by the Licensed Surveyor B.A.Thambaiyah shows that it is a separate block of land reserved as a road way. This further establishes by the Appellant's deed No. 1789 attested by the NP B.L.Abeyrathne where the southern boundary of the Respondent land is describe as the "Common Road depicted as lot 21" which is the road in question. This deed was attested on 30th April, 1979. The road was in existence even then.

The learned High Court Judge has correctly decided that the Respondent had used the road for more than 10 years.

Whether there is an alternative road is not a question that has to be considered in this case. In an action in a competent civil court for a right of way of necessity this matter can be considered. Therefore whether the railway track can be used as a roadway or not does not arias for consideration.

Under these circumstances, I do not see any reason to interfere with the finding of the learned High Court Judge.

Accordingly the appeal is dismissed with costs fixed at Rs. 10,000.00

Judge of the Court of Appeal

H.C.J. Madawala J.

I agree.

Judge of the Court of Appeal