

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

In the matter of an appeal under Article 154(P), read with Section 9 of Act No. 19 of 1990 Provincial High Court (Special provisions), against the judgment delivered in Provincial High Court of Southern Province Revision Application No. 17/2010

C.A. Case No: **CA/PHC/105/2010**

HC Matara Case No:

HCRA 17/2010

MC Matara Case No: **12496**

Officer in Charge,
Police Station,
Akuressa.

Complainant

-Vs-

Gamwasam Padigamage Soma 'Kumudu'
Walpita, Akuressa.

2nd Part-Respondent-Appellant

-Vs-

1. Wickramasinghe Male Pathirana Upuli
Nishanthi,
No. 26, Paasal Mawatha,
Rahula Road, Matara.
2. Weerasinghe Pathiranage Bandula,
No. 26, Paasal Mawatha,
Rahula Road, Matara.

1st Part-Petitioner-Respondents

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

&

Mahinda Samayawardhena J.

Counsel : Saliya Pieris, PC with Sunil Wanigapura for the 2nd
Party-Respondent-Appellant

Dr. Sunil Coorey for the Respondent

Written Submissions: By the Appellants on 14/12/2018

By the Respondent on 09/11/2018

Argued on : 13/05/2019

Judgment on : 21/06/2019

A.L. Shiran Gooneratne J.

The Respondent-Appellant (hereinafter referred to as the Appellant) is before this Court to have judgment dated 27/10/2010, of the High Court of Matara granting the use of a 12 feet wide roadway located between the land called "Waththegewaththa" and Paranawatta set aside. The dispute to the roadway was initiated when the officer in charge of the Akuressa police filed information dated 11/11/2009, under Section 66(1)(a) of the Primary Courts Procedure Act No. 44 of 1979, complaining of a breach of peace between the Appellant and the Petitioner-Respondent (hereinafter referred to as the Respondent).

The learned Magistrate by order dated 03/02/2010, held in favor of the Appellant on the basis that the Respondent has not proved the right of way to the roadway in dispute. The contention of the Appellant is that the Respondent has failed to adduce any evidence with certainty to establish adverse possession against the rights of the Appellant and other co-owners, however, has used the roadway with the permission of the Appellant's husband and other co-owners, as a permissive licensee, and further states that there is an alternate access to the land belonging to the Respondents. However, the evidence does not satisfy the stand taken by the Appellant of the existence of an alternate access road to the land.

In the affidavit filed, the Appellant takes up the position that the Respondents been permissive users, used the road on and off for about 5 years. The use of a 12 feet wide road claimed by the Respondent of having a servitude

right of way is disputed by the Appellant. This position has been contradicted by the Appellant in her statement to the police where it is stated that the Respondents had never used the road and presently, was in the process of using the road by placing cylinders along the drain in the land owned by the Appellant.

In Ananda Sarath Paranagama vs. D. Sarath Paranagama and others CA(PHC)APN 117/2013, CA minutes dated 7/8/2014, held that, Section 69 is only concerned with the determination as to who was the actual user of the right of way in question at the time the obstruction was placed.

According to the observations made by the police officer attached to the information report, a clearly defined 12 feet road has been identified from the Ransegoda main road, which leads to the house of the Appellant and the Respondent. The Respondent has filed several affidavits and statements (at pages 144 to 148 and 151 to 158 of the brief) in support of the usage of the roadway, which is described as the only available road used for well above the prescriptive period in order to gain access to their house. According to the affidavit in support at page 152 of the brief, the Respondent has been a long time user of the road "waththegewaththa" which has access from the Ransegoda main road. The affidavit filed at page 144 confirms that the Respondent has been using this road continuously from 1985. It is also contended that the alternate road to the Respondents land mentioned in the affidavit is a steep mountain slope and access is impractical and impossible. The observation by the police officer who conducted investigations confirms this fact.

In order to acquire a right of way by a prescriptive user there has to be a land over which servitude is exercisable. It is noted that a partition case is pending before the District Court of Matara, where the Respondent has claimed to have a right of way by prescription.

“a person claiming servitude or a right of way over another person’s land must, if he is seeking an order to use such a road under the Primary Court’s Procedure Act, prove that he is entitled to such a right”. (CA. (PHC) 78/2008, decided on 26/03/2010).

The learned Magistrate when evaluating the available evidence has not given due consideration to the inconsistency of the Appellant’s assertion to the time period relating to the use of the roadway by the Respondent. In the statement to the police, the Appellants position was that the Respondent had never used the said road prior to the dispute however, in her affidavit to Court, the Appellant admits that the Respondent was a permissive user of the disputed road.

Therefore, it is my view that the Respondent has proved the enjoyment of the right to establish the right of way over the servient tenement.

The Appellant has also questioned the Respondents failure to disclose exceptional circumstances and therefore, whether the learned High Court Judge has erred in deciding the availability of exceptional circumstances. It is observed that the Appellant never took up this objection before the learned High Court Judge.

The learned Magistrate has failed to consider the relevant facts and the legal principles which supports the contention of the Respondents using the disputed roadway as an access to their house, which is clearly established by the affidavits and the statements referred to above. The findings of the learned Magistrate that the Respondent has not established a right of way and failed to prove a defined and an identifiable 12 feet wide road is contrary to the evidence led in the case, which by itself would establish exceptional circumstances warranting the High Court to have exercised its revisionary powers.

In the circumstances, I see no reason to interfere with the judgment of the learned High Court Judge and therefore affirm the said judgment and dismiss the Appeal.

Appeal is dismissed with costs fixed at Rs. 10,000/-.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL