

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

In the matter of an application for Revision  
against the Judgment dated 17/11/2016  
delivered by the High Court of the North  
Western Province. In terms of Article 154(P) of  
the Constitution of the Republic

Court of Appeal Case No:  
**CA (PHC) APN 160/2016**  
HC Kurunegala Case No:  
**HCR 91/2014**  
MC Galgamuwa Case No: **1492/66**

1. Wehellige Wijedasa,
2. Kodagoda Vithanalage Janaki Swarnalatha,

Both of  
No. 384,  
Diullewa Road,  
Galgamuwa.

**1<sup>st</sup> Party Respondent-**  
**Respondent-Petitioners**

**-Vs-**

Samarakoon Mudiyansele Madawa  
Nimantha Karunasiri,  
In front of Fair,  
Galgamuwa.

**2<sup>nd</sup> Party Respondent-**  
**Petitioner-Respondent**

Officer In Charge of Police,  
Police Station,  
Galgamuwa.

**Plaintiff-Respondent-Respondent**

Attorney General,  
Attorney General's Department,  
Colombo 12.

**Respondent-Respondent**

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

**&**

**Mahinda Samayawardhena J.**

**Counsel :**                      Dr. Sunil Coorey with Amila Kiripitige for the Petitioner  
Niranjan De Silva with Kalhara Gunawardena for the 2<sup>nd</sup>  
Party Respondent-Petitioner-Respondent

**Written Submissions:** By the 1<sup>st</sup> Party Respondent-Respondent-Petitioners on  
17/09/2018

By the 2<sup>nd</sup> Party Respondent-Petitioner-Respondent on  
25/09/2018

**Argued on :**                      07/10/2019

**Judgment on :**                      **08/11/2019**

**A.L. Shiran Gooneratne J.**

The officer in charge of the Galgamuwa Police filed an information in the Magistrates Court of Galgamuwa, in terms of the provisions contained in Section 66(1)(a) of the Primary Courts Procedure Act No. 44 of 1979, (hereinafter referred to as the Act) over a disputed right of way between the 1<sup>st</sup> Party Respondent-Respondent-Petitioners (hereinafter referred to as the Petitioners) and the 2<sup>nd</sup> Party Respondent-Petitioner-Respondent (hereinafter referred to as the Respondent). The learned Magistrate by order dated 09/07/2014, held that the roadway depicted as Lot 250, is a private road used by the Petitioners and therefore, is entitled to the uninterrupted exclusive use of the roadway. By order dated 17/11/2016, the learned High Court Judge of Kurunegala, allowing a revision application against the said determination held that, the Respondent is entitled to a servitude of right of way over the disputed road. It is the said order that the Petitioner is seeking to canvass in this application.

The Petitioners contends that they acquired a prescriptive right to a 6 feet wide roadway marked as Lot No. 250 of the final village plan No. 3200 dated 19/10/1992, which gives exclusive access to the Petitioners land marked Lot No. 252.

The Respondent is in possession of Lot No. 253 of the said plan and operates a hotel in the said premises. In the affidavit filed in the Magistrates Court,

the Respondent denies that Lot No. 250 has been exclusively given to the Petitioners to access Lot No. 252, the land owned by the Petitioners. It is also contended that the said hotel has a separate parking lot and denies any obstruction being caused to the Petitioners in that regard.

The learned High Court Judge has observed that the Petitioners are in possession of Lot No. 252 of the final village plan No. 3200, dated 19/10/1992, by a grant given to them under Section 19(4) of the Land Development Ordinance. The Respondent is in possession of Lot Nos. 249 and 253 of the said final plan, by a deed attested with the approval of the Divisional Secretary. The road reservation depicted as Lot 250 in the final plan is State land which has not been given to the exclusive use of either party. The respective parties are in agreement with the above findings of the learned High Court Judge.

Therefore, the issue to be decided is whether the Petitioners who have no soil rights entitled in law to have a declaration that the Respondent has no claim for a servitude of a right of way in terms of Section 69 of the Act.

***In Ananda Sarath Paranagama Vs. Dhammadhinna Sarath Paranagama and another, CA (PHC) APN 117/2013, A.W.A.Salam J. held that;***

*“In dealing with the nature of the right, a Judge of the Primary Court is expected to adjudicate under Section 69 of the Act, Sharvananda, J (later Chief Justice) in the case of Ramalingam Vs. Thangarajaha 1982 Sri Lanka Law Report - Volume 2, Page 693 stated that in a dispute 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 of the Act, Section 69 requires the Court to determine the question as to which party is entitled to the disputed right preliminary to the making of an order under Section 69(2)."*

At page 11, His Lordship further held that;

*"There are two ways in which an entitlement can be proved in the Primary Court. They are:*

- 1. By adducing proof of the entitlement as is done in a Civil Court.*
- 2. By offering proof that he is entitled to the right for the time being."*

In **Ramalingam Vs. Thangarajaha (1982) 2 SLR 693**, the Court held 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)."*

The main object of the proceedings under Chapter VII of the Act is to prevent any breach of peace and to restore the party entitled to the right in the nature of a servitude or the possession of the land until the dispute is determined by a competent Court.

It is observed that in terms of Section 69(2) of the Act, a determination in respect of a right other than a right to possession is based on user rights acquired by a party.

In *Fernando Vs. Wickremasinghe (1998) 3 SLR 37*, on an application by the Plaintiff - Respondent to the District Court to restrain the Defendant - Petitioner from using the same right of way, Weerasuriya, J observed with approval, the findings in *M.D.B. Saparamadu Vs. Violet Catherine Melder CA 688/42F CAM 22.03.96* that;

*“where a person who enjoyed a servitude was obstructed, he could bring an action against the person who obstructed him from interfering with the enjoyment of the servitude. However, it was laid down that a person who had no soil rights in respect of a road reservation could not maintain an action for a declaration that defendant was not entitled to a servitude of right of way over such road reservation.”*

In *Fernando Vs. Wickremasinghe (supra)*, his lordship also cited with approval, ‘Hall and Kellaway’ in ‘The Law of Servitudes’ at page 2, where it is stated that;

*“Praedial Servitudes are constituted in favour of a particular praedium and can only pass with the land. The dominant owner cannot transfer the land to someone else and keep the servitude for himself or vice versa, nor can he let the servitude, or lend the use of it to strangers apart from the land.”*

In the absence of any evidence to the contrary, I am of the view that the roadway depicted in Lot No. 250 of the final village plan is a road reservation enjoyed by the Respondent as a servitude of a right of way which cannot be transferred to the exclusive use of the Petitioners.

For all the above reasons, I affirm the judgment of the learned High Court Judge and dismiss this application

Application dismissed without costs.

**JUDGE OF THE COURT OF APPEAL**

**Mahinda Samayawardhena, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**