

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

1. Expedit Cruis,
Paradise Beach Hotel (Pvt) Ltd.,
Luwis Place,
Kudapaluwa,
Negombo.
2. Paradise Beach Hotel (Pvt) Ltd.,
Luwis Place,
Kudapaluwa,
Negombo.
Respondent-Petitioner-Appellant

CASE NO: CA/PHC/113/2016

HC NEGOMBO CASE NO: HCRA/271/2013

MC NEGOMBO CASE NO: 74778

Vs.

Warnakulasuriya Raj Fernando,
No. 295,
Luwis Place,
Kudapaluwa,
Negombo.
Petitioner-Respondent-
Respondent

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: M.U.M. Ali Sabri, P.C., with Nuwan Bopage
and Samhon Munzir for the Respondent-
Petitioner-Appellant.
Buddhika Gamage for the Petitioner-
Respondent-Respondent.

Argued on: 23.10.2019

Decided on: 14.11.2019

Mahinda Samayawardhena, J.

The petitioner (Raj Fernando) filed this application in the Magistrate's Court of Negombo against the respondent (Paradise Beach Hotel) under section 66(1)(b) of the Primary Courts' Procedure Act seeking a declaration that he is entitled to use the road depicted as Lot 4 in Plan marked P1, and an order to remove all the obstacles placed by the respondent in the use of that road by the petitioner. The respondent denied any such right of way. After inquiry concluded by way of written submissions, the learned Magistrate granted the reliefs sought for by the petitioner, and that order was later affirmed by the High Court. This appeal by the respondent is from that order of the High Court.

When an application under section 66 is filed, a Magistrate can largely make two orders. One is under section 68, which relates to possession of any land. The other is under section 69, which relates to any right to any land other than the right to possession. The key word under section 68 is “possession” whereas the key word under section 69 is “entitlement”.

A dispute relating to a right of way falls under section 69 where the party who asserts such right shall establish that he is entitled to that right.

However, this does not mean that (a) he shall prove his entitlement as in a civil case filed before the District Court, and (b) that he can come before the Magistrate’s Court long after the alleged disturbance or denial of the exercise of his right.

Whether under section 68 or 69, the inquiry before the Magistrate’s Court cannot be converted to a civil trial; and the jurisdiction of the Magistrate cannot go beyond the objective to be achieved by this special piece of legislation, which is to make a provisional order in accordance with law, to prevent the breach of the peace, until the substantive rights of the parties are decided by a competent civil Court.

In response to what has been stated by the petitioner in his first information to Court¹, the position taken up by the respondent in his affidavit dated 10.12.2012 is that, when he purchased the land by Deeds in 2011, there was already a wall, and there was

¹ Vide the affidavit of the petitioner dated 23.10.2012 at pages 52-55 of the brief.

no road which he obstructed.² At paragraph 10 of that affidavit³ the respondent has stated that the petitioner broke a part of that wall on 28.09.2011 and thereafter he complained it to the police and the broken part of the wall was reconstructed.⁴

In response to paragraphs 10-12 of the respondent's said affidavit, the petitioner in paragraph 6 of his affidavit dated 28.01.2013⁵ has stated that, although the respondent in November made a complaint against him for falling over a portion of this wall constructed across the road, that dispute was settled on the promise that he (the petitioner) would be given an alternative road along the northern and eastern boundaries of the land, but such an alternative road has not been given to him so far.

That means, admittedly, this is a stale dispute, and not a new one as the petitioner has tried to portray in his first information filed before the Magistrate's Court. By the respondent's complaint dated 28.09.2011⁶, which has not been denied by the petitioner in the said affidavit, it is abundantly clear that the wall across the alleged road had been there at least by September 2011. The case has been filed by the petitioner under section 66 as a private plaint on 23.10.2012, which is, more than one year after the dispute.

² Vide pages 83-85 of the brief.

³ Vide page 84 of the brief.

⁴ Vide police complaints at pages 102-105 of the brief.

⁵ Vide pages 61-62 of the brief.

⁶ Vide page 102-103 of the brief.

Such disputes, in my view, cannot be decided by the Magistrate's Court under section 66 of the Primary Courts' Procedure Act. The petitioner should have filed the case more than one year after the dispute, not in the Magistrate's Court, but in the District Court.

This conclusion of mine shall not be taken to mean that a party who seeks relief under section 69 in relation to any right other than possession also shall come within two months of denial of the right. But he shall, in my view, come within a reasonable time. What is reasonable time shall be decided in the facts and circumstances of each individual case. In the facts of this case, the petitioner has not come within a reasonable time.

For the aforesaid reasons, I take the view that the learned Magistrate did not have jurisdiction to hear and determine the matter.

In the result, I set aside the Judgments of both the Magistrate's Court and the High Court and allow the appeal, but without costs. The petitioner's application in the Magistrate's Court shall stand dismissed.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal