

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

Arappalage Ruwan Saviour
Bernard,
No.7, Fisheries Houses,
Seththappaduwa,
Pamunugama.

2nd Party Respondent-Petitioner-
Appellant

CASE NO: CA/PHC/177/2015

HC COLOMBO CASE NO: HCRA/614/2013

MC NEGOMBO CASE NO: A84229

Vs.

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

Respondent-Respondent

Rankaduge Emmanuel Fernando,
No.58,
Seththappaduwa,
Pamunugama,
Molawatta.

And 4 Others

1st Party-Respondent-
Respondent-Respondents

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

Counsel: Shanaka Ranasinghe, P.C., with Niroshan
Mihindukulasuriya for the 2nd Party-
Appellant.
Jacob Joseph for the 1st Party-Respondents.
Kanishka De Silva, S.S.C., for the Attorney
General.

Argued on: 06.12.2019

Decided on: 13.12.2019

Mahinda Samayawardhena, J.

This appeal was filed by the 2nd party respondent-petitioner-appellant (hereinafter “the appellant”) against the Judgment of the High Court dated 19.11.2015, which affirmed the order of the Magistrate’s Court dated 10.10.2013.

The police filed the first information in the Magistrate’s Court of Negombo under section 66 of the Primary Courts’ Procedure Act, No.44 of 1979, as amended.

The dispute relates to a roadway along the northern boundary of the fisheries harbour (□□□□ □□□□□□), depicted in the police sketch tendered to the Magistrate’s Court with the first information.¹ The building marked “B” therein is the appellant’s business premises. The dispute, to be more precise, is the

¹ Vide page 34 of the brief.

appellant using the said stretch of the coast to go to his business premises by vehicle. The 1st party respondents (hereinafter “the respondents”) dispute the appellant doing so.

It is significant to note that, as the learned counsel for the respondents stated at the argument, the respondents do not object to the appellant using that roadway to go to his business premises on foot. According to the respondents, there is only a footpath and not a motorable road.

As seen from the affidavits tendered by several people in the neighbourhood, this roadway is used not only by the appellant, but by several fishing families.²

The position of the respondents is that allowing the appellant to use such motorable roadway along the boundary of the fisheries harbour to have access to his place of business, hinders the use of this part of the coast as a fisheries harbour or boat yard.³

There is no dispute that both parties are in the fishing trade. If I may say so, the respondents catch fish, whereas the appellant is engaged in fish processing in his business premises, which abuts the disputed road.

The appellant provides employment to several fishing families through this business.⁴

The Divisional Secretary of the area, by 1P1, has stated that although there is no documentary evidence to say there is a

² Vide 2V3-2V6 tendered by the appellant with his affidavit.

³ Vide 1P6 at pages 87-90 of the brief.

⁴ Vide 2V11 at page 110 of the brief.

roadway across this fisheries harbour, upon local inspection it was revealed that the residents of the area walk across the fisheries harbour for their daily activities.⁵

The Divisional Secretary, by 2V9, has also stated that the fishing community of the neighbourhood is greatly benefited by the said fish processing factory run by the appellant, and, therefore, the Divisional Secretary has no objection to allowing the appellant to use a vehicle to transport his products along the disputed road, without disturbing the activities of the fisheries harbour.⁶

The Director of the Department of Fisheries and Aquatic Resources, by 2V10, has also expressed the same.⁷

The Chairman of the Negombo Lagoon Management Authority has issued a letter marked P9, strongly in support of the appellant, stating that the said Authority has no objection to the appellant using his vehicle to go to his factory along this road, as other fishing families do.⁸

The learned Magistrate, in the impugned order, has come to the conclusion that the subject land, or rather the part of the shore, is a fisheries harbour, and the appellant shall not disturb the respondents use of it as a fisheries harbour. The learned Magistrate has further held that the appellant has failed to prove that the subject land has been used as a road.⁹

⁵ Vide page 118 of the brief.

⁶ Vide page 108 of the brief.

⁷ Vide page 109 of the brief.

⁸ Vide page 120 of the brief.

⁹ Vide the last paragraph of the order.

There is no issue whether or not this is a fisheries harbour. Everybody, including the appellant, accepts that it is so.

Similarly, there is no issue that the stretch of the coast along the northern boundary, as per the police sketch, is used by the fishing community at least as a footpath.

The real issue is whether the appellant can be permitted to use that path to take his vehicle(s) to his factory, where he conducts his fish processing business.

It is not clear by reading the impugned order, under which section of the Primary Courts' Procedure Act—section 68 or 69—the learned Magistrate came to that conclusion; nor is it clear on what basis the learned Magistrate disregarded the aforementioned letters of the State officials, which are in favour of the appellant. It appears to me that those letters were issued on the basis that both parties are in the same trade and the fishing community is also benefited by the said business of the appellant.

There is no argument that a dispute relating to a right of way falls within the ambit of section 69.

The learned Magistrate seems to have taken the view that the appellant failed to produce evidence that he has been using this stretch of the coast as a vehicular access road for some time.¹⁰ In my view, long use is not decisive in resolving this matter.

¹⁰ Vide page 53 of the brief.

Let me first explain the legal position in this regard and then apply it to the facts of this case.

When an application under section 66 of the Primary Courts' Procedure Act 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 land other than the right to possession. The key word under section 68 is "possession", whereas the key word under section 69 is "entitlement".

Section 69 reads as follows:

(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.

This section corresponds to section 147 of the Indian Code of Criminal Procedure, 1973, which reads as follows:

(1) Whenever an Executive Magistrate is satisfied from the report of a police officer or upon other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water within his local jurisdiction, whether such right be claimed as an easement or otherwise, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader on a specified date and time and to put in written statements of their respective claims.

(2) The Magistrate shall then peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary and, if possible, decide whether such right exists; and the provisions of section 145 shall, so far as may be, apply in the case of such inquiry.

(3) If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right including, in a proper case, an order for the removal of any obstruction in the exercise of any such right.

It may be seen that as much as there is a notable difference between section 68 and 69 of our Primary Courts' Procedure Act, there is a remarkable difference between section 69 of the Primary Courts' Procedure Act and section 147 of the Indian Code of Criminal Procedure.

Under section 69 of the Primary Courts' Procedure Act, the party who asserts such right shall establish that he is entitled to that right.

Section 147 of the Indian Code of Criminal Procedure refers to "right of user of any land". It requires the Magistrate to "decide whether such right exists" and then "make an order prohibiting any interference with the exercise of such right".

Whereas the Indian Code of Criminal Procedure looks for the existence of a right, our Primary Courts' Procedure Act looks for the entitlement to a right. It appears that our section expects a heavier proof than its Indian counterpart.

In *Ramalingam v. Thangarajah* [1982] 2 Sri LR 693 at 699, Sharvananda J. (later C.J.), had this to say on the scope of section 69 of our Act:

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). (emphasis mine)

This means, in order to succeed under section 69, in respect of a right other than the right to possession, a party shall satisfy the Court:

- (a) that he acquired that right; or
- (b) that he is entitled *for the time being* to exercise that right.

There is a common misbelief that a high degree of proof of all the necessary ingredients to establish such right is necessary even under section 69 of the Primary Courts' Procedure Act. It must be emphasised that a party seeking relief under section 69 need not establish entitlement to the right in the manner required before a District Court. For the purpose of this section, it would be sufficient for such party to satisfy the Magistrate that he "is entitled for the time being to exercise that right".

It must be made clear that whether under section 68 or 69, the inquiry before the Magistrate's Court cannot be converted to a full-blown civil trial. The jurisdiction of the Magistrate cannot exceed the objective of this special piece of legislation, which is to make a provisional order, in terms of law, to prevent a breach of the peace until the substantive rights of the parties are established, as seen from section 73 of the Act, "in a civil suit". If the same is expected to be established before the Magistrate's Court in section 66 proceedings, there is no necessity to go before the District Court for the second time. If that is what is expected, it is meaningless to say in section 73 that the order of the Magistrate "*shall not affect or prejudice any right or interest in*

any land or part of a land which any person may be able to establish in a civil suit”.

In my view, the word “entitled” appearing in section 69 need not be given undue weight or importance. It is interesting to note that the word “entitled” appears in section 68 as well, although we never give any importance to it. Section 68(1) expects the Magistrate to “make order as to who is entitled to possession of such land or part thereof”. Similar words are found in section 145 of the Indian Code, which corresponds to section 68 of our Act. Referring to the term “entitled to possession” found in the Indian Code of Criminal Procedure, Sarker on Criminal Procedure Code, 6th edition (1992), at pages 323-324 states: *“Entitled to possession” obviously means “to retain possession” until eviction by law. It does not of course mean that the Magistrate is given power to decide title or right to possession.”* The term “entitled to the right” found in section 69 shall be given a liberal meaning and not an overly restrictive meaning.

For completeness I must state the following. Under section 68, in relation to the right to possession, the party dispossessed, if he is to be successful, shall come before the Magistrate’s Court within two months from the date of dispossession. Under section 69, when it comes to any right other than the right to possession, there is no such time stipulated in the Act.

In India, this has been provided for by the proviso to section 147(3) of the Indian Code of Criminal Procedure, which runs as follows:

Provided that no such order shall be made where the right is exercisable at all time of the year, unless such right has been exercised within three months next before the receipt under sub-section (1) of the report of a police officer or other information leading to the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such receipt.

According to the Indian Code, section 147 comes into play if the right is exercised within three months of the filing of the action in cases of rights exercisable at all times of the year or exercised on the last particular occasion or season of periodically recurring rights.

Then the question is whether a party who was disturbed or denied such other right under section 69 of our Primary Courts' Procedure Act can come before the Magistrate's Court at any time. This shall be answered in the negative, given the intention of the legislature in enacting this Act, which is solely to prevent breach of the peace from land disputes of this nature. Such party shall come before the Magistrate's Court within reasonable time. What constitutes reasonable time shall be decided on the unique facts and circumstances of each individual case.

Let me now revert to the instant case.

Long use or long possession, which the learned Magistrate laid emphasis on, is not the only basis for establishing a right of way. There are other ways of establishing the appellant's

entitlement for the use of that right of way, at least, for the time being.

In my view, in the facts and circumstances of this case, especially in view of the letters issued by the State agencies including the Divisional Secretary, the appellant has established that he is entitled to use the disputed road, for the time being, to take his vehicles to his business premises.

The next question is the scope of that right established by the appellant. During the course of argument, the learned President's Counsel for the appellant drew the attention of the Court to the photographs marked 2V12 and 2V13 and the affidavit of the building material supplier marked 2V7, to argue that two small lorries travelling in opposite directions can pass by each other easily on this road.

However, the appellant in his statement to the police dated 10.04.2013 has spoken about taking his small lorry (commonly known as *Batta* Lorry) and three-wheeler to his factory, and the obstruction caused by the respondents.

Hence, I decide that the ends of justice will be met by allowing the appellant to take his small lorry and the three-wheeler along the disputed road.

The learned counsel for the respondents at the argument made a passing observation that new laws have been enacted to protect coastal areas and, therefore, the approvals/recommendations given by the said State agencies need to be reviewed. In these section 66 proceedings, which are provisional in nature, there is

no necessity to go into minute detail of those new laws, which the learned counsel did not particularly mention except by way of a passing remark.

The respondents, if they are so desirous, can make representations to the proper authorities in that regard and request that they reconsider their standpoints.

This order will not be an impediment for the proper authorities in charge of the coastal zone to take any decision on this specialised subject in accordance with the law.

It may be noted that, in terms of section 69(1), the order made by the Magistrate in favour of a party is valid “until such person is deprived of such right by virtue of an order or decree of a competent court”. In *Podisingho v. Chandradasa* [1978/79] 2 Sri LR 93 at 96, Atukorala J. gave an extended meaning to the term “competent court” to encompass “Tribunal of competent jurisdiction”.

The Judgment of the High Court is without substance. The High Court has merely dismissed the revision application on the grounds that (a) the appellant has not established a servitude of right of way and (b) no right has been accrued to the appellant by the letters of the State agencies, as they have been issued in their official capacity. I fail to understand how those letters lack validity if they have been issued by the respective State officials in their official capacity. There is no room for consideration of a servitude of right of way. The servient tenement does not belong to the respondents. The owner of the servient tenement, the coast, belongs to the State. The State has no objection to the

disputed road being used by the appellant as a means of ingress to and egress from his workplace by his vehicles.

For the aforesaid reasons, I set aside the order of the Magistrate's Court and the Judgment of the High Court, and allow the appeal of the appellant without costs.

Until another directive is given by the proper authorities or until a contrary order is made by a competent Court, the appellant can use the disputed road to take his small lorry and the three-wheeler to and from his fish processing factory.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal