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

In the matter of an Appeal in terms of Rule 2(1) of the Court of Appeal from High Court Rules 1998 (as per extra Ordinary Gazette notification bearing No. 5496/64 dated 13.03.1998) read with Article 154 (P) (b) of the Constitution of Sri Lanka.

The Officer in Charge,
Police Station,
Narammala.

Court of Appeal Case No:
CA (PHC) 95/2016.

COMPLAINANT.

P.H.C Kuliyaptiya Revision Application No: HCR/96/2013.

Kuliyaptiya Magistrate's Court Case No: 10094/66.

-Vs-

Jayalath Peramunage Kusumalatha Piyaseeli Munasinghe,
'Thilakasiri',
Walakumbura, Dampelessa,
Narammala.

PARTY OF THE 1st PART.

Ranasinghe Arachchige Thilakarathne,
No.233/2, Uyanwatta,
Narammala.

PARTY OF THE 2nd PART.

AND

Ranasinghe Arachchige Thilakarathne,
No.233/2, Uyanwatta,
Narammala.

PARTY OF THE 2nd PART-PETITIONER.

-Vs-

The Officer in Charge,
Police Station,
Narammala.

COMPLAINANT-RESPONDENT.

Jayalath Peramunage Kusumalatha
Piyaseeli Munasinghe,
'Thilakasiri',
Walakumbura, Dampelessa,
Narammala.

PARTY OF THE 1st PART-RESPONDENT.

AND NOW

Ranasinghe Arachchige Thilakarathne,
No.233/2, Uyanwatta,
Narammala.

PARTY OF THE 2nd PART-PETITIONER-APPELLANT.

-Vs-

The Officer in Charge,
Police Station,
Narammala.

COMPLAINANT-RESPONDENT-RESPONDENT.

Jayalath Peramunage Kusumalatha
Piyaseeli Munasinghe,
'Thilakasiri',
Walakumbura, Dampelessa,
Narammala.

PARTY OF THE 1st PART-RESPONDENT- RESPONDENT.

Before: **Prasantha De Silva, J.**
Khema Swarnadhipathi, J.

Counsel: M.C Jayaratne P.C with H. Hettiarachchi A.A.L for the 2nd Party-Petitioner-Appellant.

Sapumal Bandara A.A.L with S. Jayawardene A.A.L for the 1st Party-Respondent-Respondent.

Written Submissions

Tendered on: By 2nd Party-Petitioner Appellant on 21.10.2020

By 1st Party-Respondent-Respondent on 03.03.2020.

Decided on: 03.11.2021

Prasantha De Silva, J.

Judgment

The Party of the 2nd Part of the Petitioner-Appellant [hereinafter referred to as the Appellant] had preferred this appeal seeking to set aside the Order/Judgment dated 05.07.2016 by the learned High Court Judge of the Provincial High Court of the North-Western Province, holden at Kuliyapitiya.

The facts of this case are as follows,

The Complainant-Respondent-Respondent being the Officer in Charge of the Police Station, Narammala had filed an information in terms of Section 66 of the Primary Courts' Procedure Act in the Magistrate's Court of Kuliyapitiya, holden in Narammala, against the Party of the 1st Part-Respondent-Respondent [hereinafter referred to as the Respondent] and the Appellant [2nd Part-Petitioner-Appellant] on the basis of a dispute relating to a land, which arose between the aforesaid Appellant and the Respondent.

It appears that the Complaint was made by the Respondent alleging that the Appellant was effecting an illegal construction adjoining to her building encroaching upon her Eaves (ඇලය) about 3 feet wide strip of land and has requested to stop the same. Since there was no settlement between the parties, the matter was referred to the Magistrate's Court of Kuliyapitiya for adjudication, by the said Complainant-Respondent-Respondent [Officer in Charge of the Police Station, Narammala].

After the filing of Affidavits, Counter Affidavits, and Written Submissions by the parties, while pending the matter for Order, the parties opted to call for site inspection. The learned Magistrate who was acting as a Primary Court Judge did the inspection and since there was no settlement between the parties, the matter was fixed for Order.

The learned Primary Court Judge delivered the Order on 17.07.2013 in favour of the Respondent. Being aggrieved by the said Order, the 2nd Part-Petitioner [Appellant] invoked the Revisionary Jurisdiction of the Provincial High Court of Kurunegala, later transferred to the High Court of Kuliyapitiya.

However, the learned High Court Judge had taken up the matter for inquiry and thereafter dismissed the Application of the 2nd Part-Petitioner [Appellant] and affirmed the Order of the learned Primary Court Judge. Being aggrieved by the said Order, the Appellant preferred this Appeal to set aside the Order/Judgment of the learned High Court Judge dated 05.07.2016 and seeking relief as prayed for in the prayer to the Revision Application bearing Case No. HCR/96/2013 (REV) of the High Court of Kuliyapitiya.

The Appellant has taken up the position in the Petition of Appeal that the 1st Respondent's First Complaint to the Narammala Police on 30.10.2012 was that "මේ ඔප්පු හැටියට අපේ ව්‍යාපාරික ස්ථානයත්, මේ අයිතිකරුගේ ඉඩමත් අතර අඩි තුනක අගුවක් ඇරීමට තිබෙනවා. ඒත් මේ අය ඒ අගුව වසා මේ ඉදිකිරීම් සිදු කරනවා. මේ ඉදිකිරීම මට තාවකාලිකව නවතා ගැනීමටත් මේ පැමිණිල්ල කරන්නේ". The Petitioner [Appellant] in his statement to the Police, admitted that there is an 'Aguwa'-අගුව**,** but it is only for his use and nowhere in the Proceedings that the Respondent has said that the Appellant has no right to use the said Aguwa [අගුව] which is in the Appellant's land. Therefore, the question before the Court was whether the Respondent has the right to use the Aguwa [අගුව] standing on in between the Petitioner's [Appellant] land and the Respondent's premises in terms of Section 69 of the Primary Courts' Procedure Act.

It was alleged by the Appellant that the learned Primary Court Judge held in favour of the Respondent, very strongly converting the entire action from the original form of 'අගුව' of 3 feet wide-strip of land (a Servitude) which comes under the purview of Section 69 of the Primary Courts' Procedure Act, which is contrary to the relief prayed for by the Respondent by her 1st Complaint to the Police dated 30.10.2012 which is a dispute with regard to an illegal construction covering an 'අගුව' of 3 feet.

The main contention of the Appellant was that he has a right to erect constructions of the said Eaves (අගුව) in question, referred to in the first Complaint by the Respondent.

Furthermore, the Appellant contended that the Respondent has no right to use the said Eaves (අගුව) as a right of way, whereas her shop premises ["සිටි ප්ලාසා බුවුන් හොටෙල්"] is facing Negombo-Kurunegala High Road, and in the instant case, the Respondent had failed to prove that she has a

right of way over the said Eaves (අගුව), of which she has no soil rights, in terms of Section 69 of the Primary Courts' Procedure Act. Therefore, the Respondent cannot in any way claim Possession as of a right in terms of Section 68 of the Primary Courts' Procedure Act. Thus, the information filed in terms of Section 66(1) of the said Act, clearly reported that the dispute between the Appellant and the Respondent is a dispute regarding an Eaves (අගුව) 3ft wide, which reads as follows.

" පළවන පාර්ශවකරු වන ජයලත් පෙරමුණගේ කුසුමලතා පියසීලි මුණසිංහ යන අය 30.10.2012 වන දින පැමිණිල්ලක් කරමින් නාරම්මල නගරයේ මීගමුව මාර්ගයේ "**සිටි ප්ලාසා බුවුන් හොටෙල්**" නමින් ව්‍යාපාරික ස්ථානයක් පවත්වාගෙන යන බවත්, මෙම ව්‍යාපාරික ස්ථානයේ අල්ලපු ඉඩමේ අයිතිකරු වන දෙවන පාර්ශවකරු විසින් තමාගේ බිත්තියට යා කර අලුතෙන් ඉදිකිරීමක් කරගෙන යන බවත් තමාගේ ඔප්පුවේ **මෙම ඉඩමෙන් අඩි 3ක පමණ අගුවක් තිබෙන බවත්** මේ අය විසින් **මෙම අගුව වසා ඉදිකිරීමක් කරන බවත්** මෙය නවතා දෙන ලෙස කියමින් පැමිණිල්ලක් කර ඇත".

As such, it was argued on behalf of the Appellant that according to the information filed in the Primary Court of Kuliyapitiya, it is a dispute between the Appellant and the Respondent in respect of an Eaves (අගුව) 3ft wide as a Servitudanal Right and not with regard to a Question of Possession in terms of Section 68 of the Act. Thus, the Primary Court Case bearing No. 10094/66 is falling under the purview of Section 69 of the Act.

As such, it was submitted by the Appellant that the learned Primary Court Judge misdirected himself by converting a Servitudanal Right into a dispute in relation to Possession and has erroneously made an Order in terms of Section 68 of the Act instead of Section 69 of the Act,

where the scope of the instant Action according to the information filed by the Police has been changed by the Respondent.

As such the Appellant has contended that the Appellant has a right to build on his own land up to the Eaves (අඟුල)-3ft wide, since an Eaves per se is a projection of a roof to an adjoining land or over hanging roof in which the Respondent does not have any soil right over the said Eaves (අඟුල). Apparently, the Counsel for Respondent urged Court that the information filed by the Police and the Affidavits, and the relevant documents produced by the Parties before the learned Primary Court Judge at the inquiry are in relation to possession of a 'strip of land' which is 3 feet wide, situated South to the land of the Party of the 1st Part-Respondent [Respondent].

The said 3 feet wide, strip of land are Eaves (අඟුල), which was in their possession for a period of over 60 years.

However, the contention of the Appellant is that the dispute between the parties is not in relation to 'Possession', but with regard to a Servitudanal Right. Thus, the learned Primary Court Judge should have made the Order in terms of Section 69 and not under Section 68 of the said Act.

It appears that the learned Primary Court Judge has drawn the attention to the affidavits and the documents produced before him by the Parties. According to the Affidavit of the Respondent, his predecessors and himself have been in possession of the block of land adjoining the disputed 3 feet wide strip of land adjacent to the Respondent's premises from time immemorial.

The said strip of land (අඟුල) has been used by the Respondent to have access to the rear portion of his shop premises.

It was revealed in the affidavit of the Respondent that the said strip of land was in between the Respondent's shop premises and the building belonged to the Appellant. After the demolition of the said building by the Appellant, the disputed strip of land was merged to the Appellant's land.

It is seen that the dispute arose between the parties when the Appellant started construction on his land encroaching upon the disputed portion of the Eaves (අගුව)-3 feet wide strip of land.

The learned Primary Court Judge has stated in his Order regarding the site inspection of the disputed portion of land as follows, "මා විසින් ස්ථානයෙහි කරන ලද නිරීක්ෂණ අනුව එම ස්ථානයෙහි දෙවන පාර්ශවය විසින් අලුතින් ඉදිකිරීම් සිදු කිරීම සඳහා පස් පෙරලීම සිදු කර ඇති බැවින් අඩි තුනක භූමිය සම්බන්ධයෙන් නිශ්චිතව නිරීක්ෂණ කිරීම අපහසු වී ඇත.
කෙසේ වෙතත් 1පා5 සිට 1පා8 දක්වා පළමු පාර්ශවකරුවන් විසින් ඉදිරිපත් කරන ලද දිවුරුම් ප්‍රකාශ මඟින් ප්‍රදේශයේ ව්‍යාපාර කරන ලද තැනැත්තන් විසින් මෙම ස්ථානයෙහි අඩි තුනක පමණ පළලින් යුක්ත අගුවක් තිබූ බවට කරුණු දිවුරුම් ප්‍රකාශ මඟින් සහතික කර අධිකරණයට ඉදිරිපත් කර ඇත".

The learned Primary Court Judge observed that the affirmants of the said affidavits 1පා5-1පා8 had affirmed that there was a 3 feet wide strip of a road in existence at the inspected site.

Furthermore, the learned Primary Court Judge observed that the plan 2ව2 submitted by the Appellant, clearly depicts a strip of land and also the Appellant had admitted that there were Eaves (අගුව) in between the shop premises of the Respondent and the Appellant's land.

In this instance, it is worthy to note the statement made on 03.11.2012 to the Narammala Police by the Appellant,

“මේ පැමිණිලිකාරියගේ කඩේට යාබදව මගේ බිම් ප්‍රමාණයක් තියෙනවා වරිපනම් අංක 102 නමින්. මේ අය කියන විදිහට ඒ අයගේ කඩේට හා මාගේ ඉඩම අතර කඩේ කිට්ටුව ‘අඟුවක්’ තිබුණු බව පිළිගන්නවා. නමුත් මේ අඟුව මාගේ ඉඩම ඇතුලේ තියෙන්නෙ කඩ කාමර වලට පිටුපසින්”.

According to the said statement of the Appellant, it amply proves that there were Eaves (අඟුව) adjoining to the Respondent’s shop premises and in between the Appellant’s land to access to the rear portion of the Respondent’s shop premises, and the Respondent and his predecessors had been using the same from time immemorial. Apparently, the said position was substantiated by the Respondent by producing the documents 1පා5-1පා8.

Since the learned Primary Court Judge could not identify the Eaves (අඟුව)-3 feet wide portion of land at the site inspection, it was observed by the learned Primary Court Judge that the dispute arose between the parties as a result of dispossessing the Respondent from the 3 feet wide strip of land ‘අඟුව’ by the Appellant. Thus, the learned Primary Court Judge has come to the conclusion that the Respondent has been dispossessed by the Appellant two months prior to the date of filing of the information before the Primary Court, in terms of Section 68 of the Primary Courts’ Procedure Act.

Nevertheless, the Appellant’s contention was the dispute between the parties, to an Eaves (අඟුව)-3 feet wide is not with regard to a Question of Possession in terms of Section 68 of the Act. The dispute between the parties falls under the purview of Section 69 of the Act since it involves a servitudanal right of an Eaves of 3 feet wide. Hence, the Order of the learned Primary Court Judge cannot stand against the Appellant, as it was made on the pretext of Section 68 of the Act and not in fact in terms of Section 69 of the Act.

It was argued on behalf of the Appellant that he has a right to build on his own land because the Respondent does not have any soil right over the said Eaves (අඟුව)-3 feet wide, Eaves per se is a projection of a roof to an adjoining land or an overhanging roof. This principle of Law has been accepted in the case of ***Saibo Vs James Appu 7 N.L.R 239***, which held that the Plaintiff was bound to remove the overhanging eaves notwithstanding that they have existed in that position for 30 years and that if the Defendant builds a house on their own land they should so finish and roof their houses that the Plaintiff's wall would not suffer in consequence of the removal of the eaves.

The Court's attention was drawn to the Order dated 17.07.2013 of the learned Primary Court Judge which has been decided under Section 68 of the Act, entirely based upon a Question of Possession.
"එකී අඩි 3ක පළලින් යුක්තව පළවන පාර්ශවකරුගේ ගොඩනැගිල්ලට යාබද බිම් තීරුව පළවන පාර්ශවකරුවන් විසින් තොරතුරු වාර්තා ගොනු කිරීමට ප්‍රථමයෙන් මාස දෙකකට පෙර භාවිතා කර ඇති බවත් එය දෙවන පාර්ශවකරු විසින් අහිමිකර ඇති බවත් තීරණය කරමි.
ඒ අනුව මෙම නඩුවෙහි පළවන පාර්ශවකරුගේ හා දෙවන පාර්ශවකරුගේ ඉඩම මධ්‍යයෙන් අඩි 3ක භූමි ප්‍රමාණයක් පළවන පාර්ශවකරුට හිමිවිය යුතු බවත් දෙවන පාර්ශවකරුට ඔවුන්ගේ නියෝජිත කුලීකාරාදීන්ට මෙයින් නියෝග කරනු ලැබේ".

It was submitted by the Appellant that, the above finding of the learned Magistrate of the Magistrate's Court of Kuliyapitiya acting as the Primary Court Judge is very strange and contrary to the dispute between the Parties, as regards to a Servitudanal Right of an Eaves. According to Law, "Eaves" do not involve a land, it is in fact an overhanging roof or a projection of a roof to the adjoining land and it does not attach to a soil right.

According to The Government Legal Glossary (at page 101), the word is described as “Eaves”, “පියසි කෙළවර”. It is also submitted that the said dispute emanated upon the said Eaves (Aguwa) according to the Police Complaint dated 30.12.2012 made by the 1st Respondent. Apparently, the impugned Order dated 17.07.2013 in question was delivered by the learned Primary Court Judge, that the 1st Respondent was **possessing a 3ft wide strip of land** and he was dispossessed from the said portion of land by the Appellant. Thereby the learned Magistrate has considered in the wrong footing that the said Action bearing No. 10094/66 in the Magistrate’s Court of Kuliyapitiya, is coming under the purview of Section 68 of the Primary Courts' Procedure Act, but in fact, the instant Case as originated upon a question of Eaves (Aguwa) which is a Servitudanal Right. Therefore, the Respondent should have been first proved in terms of Section 69 of the Primary Courts’ Procedure Act, before praying any claim under the said Servitude.

It is imperative to note the 1st Complaint dated 30.10.2012, made by the Respondent to the Narammala Police, which states that,

“……

……. වීදුරු කඩේ තිලක් යන අය මාගේ ව්‍යාපාරික ස්ථානයේ බිත්තියට යා කර අලුතින් ඉදිකිරීමක් කිරීමට පටන් ගෙන තිබෙනවා. මේ…….. භූමියට අපේ ව්‍යාපාරික ස්ථානයත් මේ අයිතිකරුගේ ඉඩමත් අතර අඩි තුනක අගුවක් ඇරීමට තිබෙනවා. ඒත් මේ අය ඒ අගුව වසා මේ ඉදි කිරීම් සිදු කරනවා.....”.

It is pertinent to note the word used by the Respondent in her said Complaint was ‘අගුව’. It was brought to the notice of the Court by the Appellant that the English word for අගුව is “Eaves”.

It is to be noted that the meaning of the word “Eaves” is described in the Oxford Dictionary as, “The part of a roof that meets or overhangs the walls of a building”.

Apparently, the word “අඟුව” is defined in the Carter’s Sinhala-English Dictionary as, “Portion of ground below the Eaves”. Therefore, it is clear that when the Respondent mentioned about a “අඟුව” in her 1st Complaint, it is not with regard to a part of a roof or underside of a projecting roof. It clarifies that the Respondent used the word “අඟුව” with reference to a 3 feet wide strip of land.

According to the Malalasekera English-Sinhala Dictionary, it defines the word “Eaves” as, පියැසි කොන; අඟුව; වහලේ පිටතට නෙරූ කොටස thus the word eaves, has two meanings. One is, part of roof or underside of a projecting roof and the other is the portion of ground below the Eaves.

As such, it clearly manifests that the Respondent referred to ‘අඟුව’ in his first complaint in respect of a 3 feet wide strip of a land below the Eaves.

In view of the material placed before the learned Primary Court Judge, it is apparent that an unauthorized construction was started by the Appellant by encroaching the 3 feet wide strip of land which the Respondent was in possession before a period of 2 months immediately prior to the date on which the information was filed under Section 66 of the Primary Courts’ Procedure Act.

As such, under such circumstances the learned Primary Court Judge was justified in holding that the Respondent was dispossessed by the Appellant from the disputed “අඟුව” 3 feet wide strip of land.

Similarly, the learned High Court Judge held that the Order made by the learned Primary Court Judge, acting in terms of Section 68 of the Primary Courts' Procedure Act is well founded and according to Law.

Thus, we see no reason to interfere with the Order/Judgment dated 05.07.2016 made by the learned High Court Judge dismissing the Application of the Appellant and the Order made by the learned Primary Court Judge on 17.07.2013.

Hence, we dismiss the Appeal with costs.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.
I agree.

JUDGE OF THE COURT OF APPEAL