

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

In the matter of an application in Revision under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka against the Order of the learned High Court Judge of the Eastern Province in Trincomalee dated 27.11.2019 in Revision Application No HCT/Rev/594/2019.

Officer in Charge,  
Harbour Police Station, Trincomalee.

**Complainant**

**Vs.**

Niranjan Manikkavasagar,  
No 34A, De Saram Road, Mount Lavinia.

**Party of the First Part**

Dr.Sivaguru Jeyamanoharan  
No 15, 55<sup>th</sup> Lane, Colombo 06.

**Party of the Second Part**

**AND BETWEEN**

Dr.Sivaguru Jeyamanoharan  
No 15, 55<sup>th</sup> Lane, Colombo 06.

**Party of the Second Part-Petitioner**

Niranjan Manikkavasagar,  
No 34A, De Saram Road, Mount Lavinia.

**Party of the First Part-Respondent**

**AND NOW BETWEEN**

Court of Appeal Case No:  
**CA/CPA/155/2019**

Provincial High Court of Trincomalee  
Application No: **HCT/REV/594/2019**

Primary Court of Trincomalee Case No:  
**PPC 61/66/2018/1**

Niranjan Manikkavasagar,  
No 34A, De Saram Road, Mount Lavinia.

**Party of the First Part-  
Respondent-Petitioner**

**Vs.**

Dr.Sivaguru Jeyamanoharan  
No 15, 55<sup>th</sup> Lane, Colombo 06.

**Party of the Second Part-  
Petitioner-Respondent**

Officer in Charge  
Harbour Police Station,  
Trincomalee.

**Complainant-Respondent**

**Before: Prasantha De Silva, J.  
K.K.A.V. Swarnadhipathi, J.**

Counsel: Ronald.C.Perera P.C with Dushith Jhonthasan A.A.L, Sanjeewa Anthony A.A.L and Niruja Fenando A.A.L for the Party of the First Part-Respondent Petitioner.  
Diani.C.Millavithanachchi and Rathini Sheralingam for the Party of the Second Part-Petitioner-Respondent.

Hearing on: 20.01.2022

Written Submissions 09.03.2022 by the Party of the Second Part-Petitioner-Respondent.

tendered on: 04.03.2022 by the Party of the First Part-Respondent-Petitioner.

Decided on: 25.05.2022

**Prasantha De Silva, J.**

### **Judgment**

The Officer-in-Charge of Harbour Police Station - Trincomalee had filed an information in terms of Section 66 of the Primary Courts' Procedure Act No. 44 of 1979 in the Primary Court of

Trincomalee in case bearing No. PPC 61/66/2018/1 to prevent the breach of peace threatened or is likely to be threatened between the Party of the 1<sup>st</sup> Part and Party of the 2<sup>nd</sup> Part.

The Magistrate who was acting as the Primary Court Judge followed the provisions applicable under Part VII of the Primary Courts' Procedure Act No. 44 of 1979, allowing the aforesaid parties to file affidavits and counter affidavits and held the inquiry by way of written submissions. Thereafter, the learned Magistrate delivered the Order on 24.06.2019 in terms of Section 68 (1) of the Primary Courts' Procedure Act declaring that the 1<sup>st</sup> Party was in possession of the land in dispute. Further, acting under Section 68 (2) of the Primary Courts' Procedure Act, the learned Magistrate granted the possession of the disputed land to the 1<sup>st</sup> Party restraining the 2<sup>nd</sup> Party from preventing the 1<sup>st</sup> Party occupying the same.

Being aggrieved by the said Order, the 2<sup>nd</sup> Party-Petitioner-Respondent invoked the revisionary jurisdiction of the Provincial High Court of Trincomalee seeking to set aside or revise the said Order. Subsequent to the filing of limited objections and the statement of objections by the 1<sup>st</sup> Party-Respondent-Petitioner, Court allowed both parties to file written submissions. Thereafter, the learned High Court Judge delivered the Order on 27.11.2019 setting aside the Order of the Magistrate's Court dated 24.06.2019.

Being dissatisfied with the said Order of the Provincial High Court, the 1<sup>st</sup> Party-Respondent-Petitioner had invoked the revisionary jurisdiction of this Court seeking to set aside or revise the said Order of the Provincial High Court dated 27.11.2019. Consequent to the said application, the 2<sup>nd</sup> Party-Petitioner-Respondent had filed statement of objections and thereafter the matter was fixed for hearing.

It appears that the dispute has arisen between the parties in respect of a right of way marked as Lot X2E leading to the Hindu temple. The 1<sup>st</sup> Party had made a complaint against the 2<sup>nd</sup> Party saying the 2<sup>nd</sup> Party had broken the padlock which was put to the gate by the 1<sup>st</sup> Party in the disputed portion of land which leads to the Hindu temple.

The 1<sup>st</sup> Party claims that the portion of land marked as X2E is a private right of way which belongs to the 1<sup>st</sup> Party. Court draws attention to the Deed of Transfer bearing No. 1289 dated

03.07.2015 [marked as 1i10] by which the 1<sup>st</sup> Party-Respondent became the lawful owner of the land marked as Lot X2A and the right to reservation for road marked as X2B.

It was submitted on behalf of the 2<sup>nd</sup> Party-Petitioner-Respondent that originally one Kanagasabai Jayabalasingham became the lawful owner of the land depicted as Lot X2A and Lot X2B (reservation road) shown in plan bearing No. 659 dated 22.12.1980 which is part of the entire land under and by virtue of Deed of Transfer bearing No. 693 dated 13.05.1981 [1j5]. Thereafter, the said Kanagasabai Jayabalasingham and his wife transferred a portion of the said land Lot X2A and Lot X2B (only reservation for road) to the 1<sup>st</sup> Party by Deed bearing No. 1289 dated 03.07.2015.

It is seen that the said Kanagasabai Jayabalasingham and his wife had only transferred the reservation for road [X2B] to the 1<sup>st</sup> Party, but not the said right to the 1<sup>st</sup> Party-Respondent. Apparently, no right of way has been given on X2E (reservation road) to the 1<sup>st</sup> Party-Respondent by virtue of the said Deed bearing No. 1289 dated 03.07.2015.

It appears that schedule of the Deed of Transfer No. 1290 dated 03.07.2015 [marked as 1i11] annexed to the affidavit of the 1<sup>st</sup> Party-Respondent [vendee] describes lot No. X2C as follows;

North by: lot No. X2B reservation for 10 feet wide shown in plan No. 659

East by: lot No. X2E road reservation 10 feet wide

South by: lot No. X2D

West by: Inner Harbor Road

According to the affidavit of the 1<sup>st</sup> Party-Respondent, X2B road reservation in plan No. 659 is in his possession and X2E road reservation is also in his possession.

Since the said 10 feet wide roadway X2E is the disputed pathway of the instant action, the learned High Court Judge had come to a determination that the learned Primary Court Judge had misdirected himself and had delivered the Order in favour of the 1<sup>st</sup> Party-Respondent in terms of Section 68 (1) and Section 68 (2) of the Primary Courts' Procedure Act.

Furthermore, in terms of Section 72 of the Primary Courts' Procedure Act, a determination has to be made under Section 68 and 69 of the Primary Courts' Procedure Act after considering the following matters;

- a. the information filed and the affidavits and documents furnished;
- b. such other evidence on any matter arising on the affidavits or documents furnished as the court may permit to be led on that matter; and
- c. such oral or written submission as may be permitted by the Judge of the Primary Court in his discretion.

It appears that according to the information filed in the Primary Court/ Magistrate's Court, and the affidavits filed by the respective parties, the dispute between the parties is relating to a block of land marked as lot X2E, which is admittedly a right of way.

It is seen that when an application is made in terms of Section 66 of the Primary Courts' Procedure Act, a Magistrate can largely make two Orders; one is under Section 68 which relates to the possession of any land, whereas, the other is under Section 69 which relates to any right to land other than the right to possession. The keyword under Section 68 is 'possession' whereas, the keyword under Section 69 is 'entitlement'.

In the case of *Arappalage Ruwan Saviour Bernard Vs. Hon. Attorney General CA (PHC) 177/2015*, CA Minutes 13.12.2019, *Mahinda Samayawardane J.* has observed that there is a notable difference between Section 68 and 69 of the Primary Courts' Procedure Act with the corresponding 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. Similarly, Section 147 of the Indian Code of Criminal Procedure refers to "right to use 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.

Interestingly, the Indian Code of Criminal Procedure looks for the existence of a right, whereas our Primary Courts' Procedure Act looks for the entitlement to a right. It is observable that, our Section 69 of the Primary Courts' Procedure Act expects a heavier proof than its Indian counterpart.

On the available evidence, it is worthy to note that the 1<sup>st</sup> Party-Respondent does not have any soil right to the impugned right of way (X2E) and the 1<sup>st</sup> Party has right of way only to X2B. It was submitted on behalf of the 1<sup>st</sup> Party that his affidavit marked as X4 established that the 1<sup>st</sup> Party commenced work to raise the wall and to install an electrical panel with industrial electrical sockets in or about April 2018 and installed a new gate by replacing the existing one on or about 15<sup>th</sup> July 2018.

The fact that the gate was customized and built for the 1<sup>st</sup> Party by Elcardo Corporation is evident by the receipt marked as 1 14. The affidavits marked 1 18 to 1 18 corroborated the position of the 1<sup>st</sup> Party that he fixed the electrical panel, raised the wall and replaced the existing gate with a new gate on or about April 2018.

It was further submitted on behalf of the 1<sup>st</sup> Party that the only documents along with the affidavits dated 06.11.2018 submitted by 2<sup>nd</sup> Party to support the purported use of the impugned roadway were 2P12 and 2P14.

It was contended by the 1<sup>st</sup> Party that these affidavits appear to have been made for the purpose of this case and thus, have no veracity. It is also further submitted that these documents were not documents made or executed in the ordinary course of business. However, the receipt marked as 1 14 was obtained during the course of the transaction and not for the purpose of this case.

It is noteworthy that the Harbour Police instituted the said action bearing No BR/1141/2015 PC against the 1<sup>st</sup> and 2<sup>nd</sup> Parties under Section 98 of the Criminal Procedure Code. The learned Magistrate Judge of Trincomalee delivered the Order stating there was a public nuisance by the 1<sup>st</sup> Party (Niranjan Manickavasagar) and therefore to remove the fence constructed by the 1<sup>st</sup> Party and not to prevent the devotees of the said temple from using the impugned right of way. The said Order marked as 2P15 to the 2<sup>nd</sup> Party's affidavit which clearly shows that the 1<sup>st</sup> Party had illegally and unlawfully preventing the devotees of the said temple from using the right of way without any right.

The attention of Court is drawn to the information filed by the Complainant under and in terms of Section 66(1) (a) of the Act marked as X1. It appears that the information was filed by the

Complainant on or about the 2<sup>nd</sup> of October 2018 after inquiring into the complaint by the 1<sup>st</sup> Party that the gate was broke opened, and attempts were made to remove it on or about the 27<sup>th</sup> of September 2018.

The learned Primary Court Judge determined that the 2<sup>nd</sup> Party without any rights has attempted to interfere with the possession of the 1<sup>st</sup> Party who had been in possession of the subject matter on the date on which information was filed. Thus, the learned Primary Court Judge had made a determination under the provisions of Section 68(1) of the Act stating that the 1<sup>st</sup> Party was entitled to possession in terms of Section 68(2) of the Act.

As such, it clearly manifests, the learned Primary Court Judge has acted within the purview of the provisions of Section 68 (1) & 68 (2) of the Act. On this premise, it is worthy to note Section 68 (1) and 68 (2) of the Primary Courts' Procedure Act which stipulates,

“68 (1) Where the dispute relates to the possession of any land or part thereof it shall be the duty of the Judge of the Primary Court holding the inquiry to determine as to who was in possession of the land or the part on the date of the filing of the information under section 66 and make order as to who is entitled to possession of such land or part thereof.

68 (2) An order under subsection (1) shall declare any one or more persons therein specified to be entitled to the possession of land or part in the manner specified in such order until such person or persons are evicted therefrom under an order or decree of a competent court, and prohibit all disturbance of such possession otherwise than under the authority of such an order or decree.”

It was submitted on behalf of the 2<sup>nd</sup> Party that the 1<sup>st</sup> Party did not annex any document to show that he was in possession at the time the information was filed against the 2<sup>nd</sup> Party. Therefore, it appears that the 1<sup>st</sup> Party has not satisfied Section 68(1) of the Primary Courts' Procedure Act. It is evident that the 1<sup>st</sup> Party had installed a new gate on or about 15.07.2018 on the impugned roadway. It was alleged by the 1<sup>st</sup> Party that the said gate was broke open and attempts were made to remove it on or about 27.09.2018.

However, since the information was filed on 02.10.2018, it is the task before this Court to ascertain whether the 1<sup>st</sup> Party was in possession of the block of land relating to the disputed roadway in terms of Section 68 (1) of the Act on the date of filing of the information.

It is pertinent to note that since the gate was broke opened on 27.09.2018, it is apparent that the obstruction was cleared. Thus, the disputed roadway which led to the Hindu Temple was opened for the use of devotees. Therefore, the 1<sup>st</sup> Party has not substantiated his contention that he was in exclusive possession of the disputed portion of land on the date (02.10.2018) on which the information was filed.

Hence, in view of Section 68 (2) of the Act, it is noteworthy that the learned Primary Court Judge has erred in Law by declaring that the 1<sup>st</sup> Party is entitled to the possession of the disputed roadway marked as X2E in plan bearing No. 659 dated 17.12.1980 [ 2P17]

The attention of Court was drawn to the Order made by the learned Magistrate in case bearing No. BR/1141/PC/2015, filed under Section 98 of the Criminal Procedure Code, where the learned Magistrate held ;

“එබැවින් තෝට්ටත්තුපිල්ලෙයාර් කෝවිලට යන මාර්ගය නැවතත් විවෘත කර ඊට සිදුකර ඇති බාධාවන් වහා ඉවත් කිරීම පිණිස අදාළ ගේට්ටුව බැහැර කරන ලෙසත්, අදාළ මාර්ගය වැළැක්වීම පිණිස එම මාර්ගයේ කිසිදු බාධාවන් ඉදි නොකල යුතු බවටත් තහනම් කෙරෙන අතර අදාළ මාර්ගයට බාධාවක්ව ඉදිකර ඇති අවහිරතා බාධාවන් සියල්ල ඉවත් කරන ලෙසත් 01 වන පාර්ශ්වකාර 02 වන වගඋත්තරකරුට නියෝග කරමි.

තවද තෝට්ටත්තුපිල්ලෙයාර් කෝවිලට යන මාර්ගය වළක්වමින් සිදුකර ඇති බාධාවන් ඉවත් කිරීමට 01 වන පාර්ශ්වකාර 02 වන වගඋත්තරකරුට මාසයක කල් ලබා දීමක් සිදු කරනු ලබයි.”

It appears that the learned Magistrate had given a direction to the 1<sup>st</sup> Party in the said case to remove the obstructions on the disputed roadway heading to Thotathupillai Kovil within one month from the Order dated 24.07.2018. It is observable that the 1<sup>st</sup> Party had not complied with the said Order until the 2<sup>nd</sup> Party had removed the obstruction on or before 27.09.2018.



In view of the aforesaid reasons, it amply proves that the 1<sup>st</sup> Party has no entitlement whatsoever in respect of lot X2E, the impugned disputed roadway in this matter. It is relevant to note that the learned High Court Judge had come to the correct findings of fact and law and decided the disputed right of way as a public pathway. Thus, 1<sup>st</sup> Party had no right to prevent the 2<sup>nd</sup> Party from using the disputed right of way.

Therefore, it is apparent that the learned Primary Court Judge had erred in Law by deciding the case under Section 68 (1) and Section 68 (2) of the Act, which the 1<sup>st</sup> Party has failed to substantiate in his contention.

Hence, the learned High Court Judge has correctly set aside the Order of the learned Primary Court Judge dated 24.06.2019. As such, we see no reason for us to interfere with the Order/Judgment of the learned High Court Judge dated 27.11.2019.

Thus, the appeal is dismissed with costs fixed at Rs. 35,000/-.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**K.K.A.V. Swarnadhipathi, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**