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

Officer-in-Charge,
Police Station,
Beliaththa.

**Complainant**

Court of Appeal Case No:
**CA (PHC) 125/16**

High Court Tangalle Case No:
HCRA 18/13

Magistrate's Court Tangalle Case No:
11522

**Vs.**

1. Jasing Bastian Arachchige Udeni Mangalika
   Nandna Srasi,
   Hakmana Road,
   Kambassawala,
   Beliaththa.

2. Lalith Wittahachchi,
   No. 220, 1st Lane,
   Kambassawala East,
   Beliaththa.

3. Vepitiage Saminona,
   Godawana Gedara,
   Kambassawala,
   Beliaththa.

**Respondents**

**AND**

1. Jasing Bastian Arachchige Udeni Mangalika
   Nandna Srasi,
   Hakmana Road,
   Kambassawala,
   Beliaththa.

3. Vepitiage Saminona,
   Godawana Gedara,
   Kambassawala,
   Beliaththa.

**1st and 3rd Respondent-Petitioners**

**Vs.**

2. Lalith Wittahachchi,

No. 220, 1st Lane,
Kambassawala East,
Beliaththa.

**2nd Respondent-Respondent**

Officer-in-Charge,
Police Station,
Beliaththa.

**Complainant-Respondent**

**AND NOW BETWEEN**

2. Lalith Wittahachchi,
No. 220, 1st Lane,
Kambassawala East,
Beliaththa.

**2nd Respondent-Respondent-Appellant**

**Vs.**

1. Jasing Bastian Arachchige Udeni Mangalika
Nandna Srasi,
Hakmana Road,
Kambassawala,
Beliaththa.

3. Vepitiage Saminona,
Godawana Gedara,
Kambassawala,
Beliaththa.

**1st and 3rd Respondent-Petitioner-Respondents**

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

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

Counsel: Dilan Kappage AAL with Harsh De Silva AAL for the 2nd Respondent-Respondent-Appellant.
Ashan Nawarathne AAL and Piyumi Kumar AALfor the 1st and 3rd Respondent- Petitioner-Respondents.

Both Parties agreed to dispose the inquiry by way of Written Submissions.

Written Submissions tendered on: 29.04.2022by the 2nd Respondent-Respondent-Appellant.
08.04.2022 by the 1st and 3rd Respondent-Petitioner-Respondents.

Decided on: 27.05.2022

**Prasantha De Silva, J.**

## Judgment

It appears that the Complainant, being the Officer-in-Charge of Beliaththa Police Station had filed an information in the Primary Court of Tangalle in case bearing No. 11522, under Section 66 of the Primary Courts' Procedure Act regarding a dispute between the 1st Respondent-Petitioner-Respondent [hereinafter sometimes referred to as the 1st Respondent] and the 2nd Respondent-Respondent-Appellant [hereinafter sometimes referred to as the Appellant] in respect of an obstruction of a roadway over the portion of lands marked as M and N in Plan bearing No. 226 dated 12.03.1965.

The learned Primary Court Judge thereafter made an Order to affix notices on the subject matter and following the notices, the 3rd Respondent-Petitioner-Respondent [hereinafter sometimes referred to as the 3rd Respondent] had intervened in the said case. Subsequent to both parties filing respective affidavits, the matter was fixed for inquiry, and parties were allowed to file written submissions to dispose the inquiry. Thereafter, the learned Primary Court Judge of Tangalle delivered the Order on 25.07.2013 determining that the 1st and the 3rd Respondents have failed to prove there was a right to use 10 feet wide roadway and hence dissolved the Interim Order made on or about 14.03.2013.

Being aggrieved by the said Order, the said Respondents had invoked the revisionary jurisdiction of the High Court of Tangalle to revise the Order dated 25.07.2013 made by the learned Primary Court Judge of Tangalle.

The 2nd Respondent-Respondent-Appellant had filed objections in respect of the revision application bearing No. HCRA 18/13 and parties had filed their respective written submissions and made oral submissions at the inquiry. Following it, the learned High Court Judge of Tangalle delivered the Order on 17.10.2016 setting aside the Order made by the learned Primary Court

Judge of Tangalle in case bearing No.11522 dated 25.07.2013 and had permitted the 1st and 3rd Respondents to use 10 feet wide-10 meters long roadway over the subject matter.

Being aggrieved by the said Order dated 17.10.2016, the Appellant had preferred this appeal to revise and/or to set aside the Order pronounced by the learned High Court Judge of the Provincial High Court of Tangalle.

The impugned roadway is described as Lot M in Plan No. 226 dated 12.03.1965, in schedule to the Petition dated 31.10.2016. According to 1st and 3rd Respondents, the impugned roadway was used by them as access to Lot L in plan No. 226. However, on or above 16.01.2013 the Appellant had obstructed the said roadway.

It was submitted by the Appellant that there is no roadway over lot M as access to lot L and that there is a separate road providing access to the said lot L according to the said plan. It was the contention of the Appellant that there was no such roadway over the said lot M and that Appellant is in possession of all the lots namely M, N, O, P, Q, R and T.

The attention of Court was drawn to the document marked as 3V1 and 3V2. 3V1 is the final Partition Decree in case bearing No. P 717, and it was submitted to substantiate that the 3rd Respondent's mother has obtained ownership to the portions of land; lot M and lot N. However, it appears that the disputed roadway cuts across lot M according to the said plan 226 marked as 3V2.

Therefore, the Respondents contended that the Appellant is not the lawful owner of lot M and N in plan 3V2 and admitted the Appellant has ownership only to the portions of land in lots O, P, Q and R. As such, it is apparent that the Appellant had unlawfully blocked the impugned roadway over lot M, which the 1st and 3rd Respondents had been using as access to their lot L in plan 3V2.

When considering the affidavits and the counter affidavits of the parties to this case, it is seen that the 1st Respondent's husband is an owner of a three-wheeler and has further stated that they did not have an alternate roadway to get the three-wheeler into the 1st Respondent's premises.

It was stated by the Appellant that the 1st Respondent has an alternative road way to enter their premises. However, Primary Court may not have considered the availability of an alternative right of way, if there was any, to deny the right of way used by the Respondents over the disputed

portion of land, when making an Order under Section 69 (2) of the Primary Courts' Procedure Act. Since the dispute between the parties is relating to a roadway, it appears that Section 69 of the Primary Courts' Procedure Act is applicable and according to Section 69 of the Act, there is no necessity to consider the availability of an alternative roadway.

The learned Primary Court Judge had determined that the 1st and 3rd Respondents had not proved the fact that the roadway was used for more than 10 years, and thereby as not being entitled to claim their ownership by way of prescription. The learned Primary Court Judge has further stated that even the 3rd Petitioner had not established her rights to use the disputed roadway.

By virtue of Section 69 of the Primary Courts' Procedure Act, there is no need to prove rights as it is done in a civil suit. The case ***Ramalingam Vs. Thangarajah [1982] 2SLR 693*** held the following;

"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 contradiction 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 of way prior to the making of an order under Section 69(2)."

It was held in the aforementioned case that the entitlement can be proved in the Primary Court by adducing proof of the entitlement as done in a Civil Court or by offering proof that he is entitled to the right for the time being

The said contention was analyzed by *Justice A.W.A. Salam* in the case titled ***Ananda Sarath Paranagama Vs. Dhamadinna Sarath Paranagama CA (PHC) 117/2013*** [C.A.M. 12.12.2013], in which *Salam J.* emphasized of the need to understand that the proof of acquisition of the right is totally different from proving the enjoyment/existence of the right at the time the dispute arose.

It has been held in the case of ***Punchi Nona Vs. Padumasena and Others [1994] 2 SLR 117***, that the Primary Court exercising special jurisdiction under Section 66 of the Primary Courts' Procedure Act, is not involved in an investigation into the title, right to possession or entitlement, which are functions of a Civil Court. What the Primary Court is required to do is to take a

preventive action and make a provisional order pending final adjudication of rights of the parties in a Civil Court.

The attention of Court was drawn to the police observation report. It reveals that the 1st Respondent and her family members have used the disputed roadway for an extensive period of time. Furthermore, the said report states that the said roadway in dispute has been shut off by a fence and was further blocked with the use of coconut leaves. The report further goes on to say that the neighbours of the 1st Respondent has used the roadway in dispute to reach the 1st Respondent's house. The Appellant has also given a statement to Police objecting to 1st Respondent's the use of the disputed roadway.

The observation report produced by the police contains the following, and shows that the Respondents to this case has used this roadway.

"මීටර් 10ක් පමණ දිගට කාලයක් පාවිච්චි කරන ලද පාරක් තිබූ බවට සලකුණු ඇත."

"දැනට දින කිහිපයකට පමණ පෙර මෙම පාරේ තැනින් තැන වලවල් කපා ඉඩමට සුද්ධ කරන ලද ලකුණු දමා අවහිර කර පාර වසා ඇත."

"වැටේ මෙම දිනවලම ඉනි සිටුවා කටු කම්බි ගසා අමු පොල් අතු ඉණි අතරට දමා අවහිර කර ඇත."

In view of the aforesaid observation notes of the Police Officer, it amply proves that the Respondent has been using the disputed roadway as a right by way of necessity, to lot L, to the 1st Respondent's house.

According to Section 75, it mandates the Primary Court to deal with "a dispute in the nature of servitude" and need not touch upon servitude *per se*. The Primary Courts (Magistrate's Court) are precluded from dealing with matters described in Schedule 04 of the Judicature Act No. 2 of 1978. The excluded matters *inter alia*;

- Any action for a declaratory decree including a decree for the declaration of title of a land (item 12) in the 4th Schedule.
- For obstruction to or interference with the enjoyment of any servitude or the exercise of any right over property (item 24 (i).

In civil cases, right of way can be established as a servitudanal right by prescription or by way of necessity. It was held in ***Sumangala Vs. Appuhamy 46 NLR 131*** that a servitude, such as a right

of foot path must be established by cogent evidence, as it affects the land owner's right to a free and unfettered use of land.

In view of the aforesaid reasons, it is to be noted that the learned Primary Court Judge in his Order dated 25.07.2013 has held against the Respondents by not giving the right of way to the Respondents without considering the relevant provisions of law. It is seen that the learned Primary Court Judge had misdirected himself and had made the impugned order against the Respondent.

As such, the learned Primary Court Judge has erred in law when he decided that the Respondents are not entitled to use the impugned road in dispute. In view of the aforesaid reasons, it is imperative to note that the learned Primary Court Judge has erred in law and facts, when he decided the matter in favour of the 2nd Party-Respondent-Appellants.

Hence, we see no reason to interfere with the Judgment of the learned High Court Judge of Tangalle setting aside the Order of the learned Magistrate.

Thus, we affirm the Judgment dated 17.10.2016 by the learned High Court Judge and 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**