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

**C.A. Appeal No:**

**CA (PHC) 180/2004**

**HC Kegalle No:**

**1805/R**

**MC Warakapola No:**

**940/2003**

In the matter of an Appeal in terms of Article 154 P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 11(1) of the Provincial High Court (Special) Provisions Act, No. 19 of 1990 and section 66 of the Primary Courts' Procedure Act, No. 44 of 1979.

Officer-In-Charge,
Police Station, Alawwa.

**Plaintiff**

**VS.**

1. Solanga Arachchige Karunarathne,
   Othara, Kiriwanpola.

**1st Party-Respondent**

2. Subasingha Arachchige Thilakasiri
   Subasingha,
   Madawala, Keppetiwalana.

**2nd Party-Respondent**

***And between***

1. Solanga Arachchige Karunarathne,
   Othara, Kiriwanpola.

**1st Party Respondent-Petitioner**

**VS.**

1. Officer-In-Charge,
   Police Station, Alawwa.

**Plaintiff-Respondent**

2. Subasingha Arachchige Thilakasiri
   Subasingha,
   Madawala, Keppitiwalana.

**2nd Party Respondent-Respondent**

***And now between***

Subasingha Arachchige Thilakasiri Subasingha, Madawala Keppitiwalana.

**2nd Party Respondent-Respondent-Appellant**

**VS.**

1. Officer-In-Charge,
   Police Station, Alawwa.

**Plaintiff-Respondent-Respondent**

2. Solanga Archchige Karunarathna,
   Othara, Kiriwanpola.

**1st Party Respondent-Petitioner-Respondent**

**Before:** **M. T. Mohammed Laffar, J.**

**S. U. B. Karalliyadde, J.**

**Counsel:** Amarasiri Panditharatne for the 2nd Party Respondent- Respondent-Appellant.

Thanuka Nandasiri with P. Gunasinghe for 1st Party Respondent-Petitioner-Respondent.

**Written submissions tendered on:**

19.06.2018 by 2nd Party Respondent-Respondent-Appellant.

24.10.2019 by the 1st Party Respondent-Petitioner-Respondent.

**Argument on:** 18.03.2022 (concluded by way of written submissions)

**Decided on:** 03.08.2022

**S.U.B. Karalliyadde, J.**

This Appeal is against the Order dated 26.07.2004 of the learned Provincial High Court Judge of Kegalle in the revision application bearing No. Rev/1805. The said revision application has been filed against the Order dated 04.06.2003 made by the learned Magistrate of Warakapola in a case filed under section 66 (1) (a) of the Primary Courts' Procedure Act, No. 44 of 1979 (hereinafter referred as the Act). The dispute reported to the Magistrate's Court by the OIC of Wrakapola Police Station under section 66(1) (a) of the Act was over a right of way. The 1st party Respondent-Petitioner-Respondent (the Respondent) made a complaint to the Police that the 2nd Party Respondent-Respondent-Appellant (the Appellant) obstructed the right of way used by him and his predecessors on the land possessed by the Appellant initially by felling a tree and thereafter by erecting a barbed wire fence. The Appellant has denied the fact that the land he possesses is subject to a right of way. The learned Magistrate on 04.06.2003 held against the Respondent, consequent to which he filed a revision application in the Provincial High Court of Sabaragamuwa holden at Kegalle. The learned High Court Judge, by the impugned Order dated 26.03.2004 set aside the Order of the learned Magistrate.

Before considering the merits of this appeal, it is worth to consider as to what is the duty cast upon the Court of Appeal in hearing an appeal against an order made by a High Court Judge in a revision application which stems from an order of a Magistrate under Part VII of the Act. In the case of *Nandawathie and Others Vs. Mahindasena*[1] the Court of Appeal has taken the view that the right given to an aggrieved party to appeal to the Court of Appeal in a case file under Part VII of the Act should not be taken as an appeal in the true sense, but in fact an application to examine the correctness, legality or propriety of the order of the High Court in exercising its revisionary jurisdiction.

In the case of *Bandusena and others Vs. Gallakankanamge Chaminda Kushantha and Others*[2] it was emphasized by Surasena, J. that;

[1] (2009) 2 Sri LR 218.
[2] CA (PHC) No. 147/2009; CA Minutes of 27th September 2017; per P. Padman Surasena, J.

"*It would be relevant to bear in mind that appeal in this court (Appeal Court) is an appeal against the judgment pronounced by the Provincial High Court in exercising its revisionary jurisdiction. Thus, the task before this Court is not to consider an appeal against the Primary Court order but to consider an appeal in which an order pronounced by the Provincial High Court in the exercise of its revisionary jurisdiction is sought be impugned*" (emphasis added).

According to the above stated observations, this Court ought to examine the correctness, legality and propriety of the Order made by the learned High Court Judge. Bearing that in mind, I will now consider the instant appeal. On 10.03.2021, both parties agreed to abide by any judgement delivered by this Court on the written submissions. I will briefly mention here some relevant and important facts of this appeal elicited before the Magistrate's Court. There had been a partition action for the land which the Respondent claims the right of way. Final degree had been entered in that partition action on 27.03.2000. The Respondent made the police complaint about the dispute on 12.08.2002 which led the Police to file the Information report in the Magistrate's Court under section 66 (1) (a). The position of the Respondent before the Magistrate's Court was that he and his predecessors used the road in dispute over decades. Nevertheless, they had not claimed it before the District Court in the partition action consequent to which their alleged rights to the road had been wiped off after the judgement of the partition action. The dispute regarding the road arose in the year 2002, i.e., before lapse of ten years from the judgment of the partition action. Since the Respondent has not used the disputed road for 10 years to acquire prescriptive rights, the learned Magistrate has concluded that the Respondent is not entitled to the road he is claiming.

In the impugned Order, citing the authority of *Somarathne Vs Munasinghe*[3] it has been held by the learned High Court Judge that even if the Respondent has failed to establish his prescriptive rights to the road he claims, in the light of that authority, he could claim it as a right of a servitude by way of necessity. The argument of the learned Counsel appearing for the Appellant is that the impugned Order of the learned High Court Judge should be set aside for the reason that the authority relied upon by the learned High Court Judge is not relevant to a case filed under Part VII of the Act but it is relevant to a case filed in the District Court in deciding the civil rights of parties.

[3] (74 NLR 14).

Since the dispute reported to the Magistrate's Court is regarding the use of a road, the determination of the Magistrate should have been made under section 69(1) of the Act. The learned Magistrate has made her determination under that section and there is no dispute between parties about that fact. In terms of section 69(1) of the Act, the Primary Court Judge should determine as to who is **"entitled"** to the right, which is the subject of the dispute and make an order under subsection (2) of section 69. Now I will consider whether the conclusion of the learned High Court judge that in a case filed under Part VII of the Act, if a party who seeks for a right of way fails to satisfy the Court that he has acquired prescriptive rights to the right of way, could the Magistrate decide that he is entitled to a right of way by way of necessity. In the case of *Ramalingam Vs. Thangarajaha*[4] the Court observed as to what connotes the word **"entitled"** in section 69(1) of the Act and the question which the Court has to determine under that section. In that case Sharvananda, J. (as he then was) observed that;

"*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)*" (at page 699) (emphasis added).

In the case of *Ananda Sarath Paranagama Vs. Dhammadhinna Sarath Paranagama*[5] Salam, J. explaining as to what connotes the phrase "for the time being" in *Ramalingam's* decision observed thus;

"*The phrase "for the time being" as used in the decision in Ramalingam's case connotes the exercise of right by one party, temporarily or for the moment until such time such person is deprived of his right by virtue of a judgment of a Court of competent jurisdiction. If you describe a party as being entitled to enjoy a right but for the time being, it means that it will be like that for a period of time, but may change in the future. This is exactly in keeping with legislative wisdom embodied under Part VII of the Act.*

*The rationale behind this principle is that the conferment of the special jurisdiction on a Judge of the Primary Court under Chapter VII of the Act is quasi-criminal in nature and is intended to facilitate the temporary settlement of the dispute between the parties*

[4] (1982) 2 SLR 693.
[5] CA (PHC) APN 117/2013.

*so as to maintain the status quo until the rights of the parties are decided by a competent civil Court. Subject to this, every other concern however much prominent they may appear to be, will have to be placed next to the imperative necessity of preserving the peace.*

*As has been emphasized in the case of Ramalingam (supra) at an inquiry under Chapter VII, the action taken by the Judge of the Primary Court is of a purely preventive and provisional nature, pending the final adjudication of the rights of the parties in a civil Court and the proceedings under this Section are of a summary nature. Moreover, it is essential that they should be disposed of as expeditiously as possible. In the circumstances, although it is open to a party to prove the right he claims to be entitled to as is required under the substantial law dealing with a particular right, it is not impossible for him to be content with adducing proof to the effect that he has the right to enjoy the entitlement in dispute* ***for the time being****.*

*Even in a civil action when the plaintiff had failed to prove a clear case of servitude there had been instances where the Courts have issued restraining orders against the right of way being obstructed. One such case is Perera Vs. Gunatilleke where Bonsor, C. J. observed as follows:*

*It seems to me that, where a person establishes that he has used a way as of right openly and continuously for a long period and is forcibly prevented from using it, he is entitled to an injunction to restore him to the quasi possession of the way, irrespective of whether he can establish the existence of a servitude. We will treat this action as a possessory action and grant an injunction which will restore the status quo ante" [4 NLR 181]."*

As per the above stated observations of the Apex Courts, the duty cast upon the Magistrate in an action filed under Part VII of the Act is to facilitate a temporary settlement of the dispute between the parties to preserve peace and to maintain the status quo until the rights of the parties are decided by a competent civil court. In the instant action, considering the evidence adduced before the learned Magistrate that the Respondent has used a right of way on the land possessed by the Appellant to the date of the dispute, in view of preserving peace and maintaining the *status quo* the learned High Court Judge has decided that the Respondent is entitled to use that right of way for the time being until the rights of the parties are decided by a competent civil court.

Therefore, I hold that the impugn decision of the learned High Court Judge is in conformity with the provisions of section 69(1) of the Act and the authorities mentioned above. Therefore, I affirm the impugned Order of the learned High Court Judge and dismiss the Appeal with costs. The Appellant will pay Rs. 50,000/= as costs of this appeal to the Respondent.

*Appeal dismissed with costs.*

**JUDGE OF THE COURT OF APPEAL**

**M.T. MOHAMMED LAFFAR, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**