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

In an application under Articles 138 and 154(P) of the Constitution read with the High Court of the Provinces (Special Provinces) Act No.19 of 1990.

Court of Appeal Application No:
CA/PHC/230/2018

High Court of Ratnapura Application No:
RA/40/2015

Magistrate's Court of Ratnapura Case No:
58234

01. Officer in Charge,
Police Station,
Ratnapura.

Complainant

Vs.

01. Alapatha Manannalage Nandawathie,
Noragolla, Pitalanda, Alapatha.

02. Ratnayake Mudiyanselage Sanjeewa Bandara,
No.1, Warayaya, Godakawela.

1st and 2nd Party

AND BETWEEN

Ratnayake Mudiyanselage Sanjeewa Bandara,
No.1, Warayaya, Godakawela.

2nd Party Petitioner

Vs.

01. Officer in Charge,
Police Station,
Ratnapura.

Complainant-Respondent

02. Alapatha Manannalage Nandawathie,
Noragolla, Pitalanda, Alapatha.

1st Party Respondent

AND NOW BETWEEN

Ratnayake Mudiyanselage
Sanjeewa Bandara,
No.1, Warayaya, Godakawela.

2nd Party Petitioner-Appellant

Vs.

Alapatha Manannalage
Nandawathie,
Noragolla, Pitalanda, Alapatha.

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

Complainant-Respondent-Respondent

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

Counsel: Nishali Wickramasinghe for the 2nd Party Petitioner-Appellant.
Priyantha Alagiyawanna with Kalpanee Dissanayake for the 1st Party Respondent-Respondent.

Written Submissions tendered on: 22.07.2022 by the 1st Party Respondent-Respondent.
26.07.2022 by the 2nd Party Petitioner-Appellant.

Argued on: 24.05.2022

Decided on: 26.10.2022

Prasantha De Silva, J.

Judgment

This appeal emanates from the order made by the learned High Court Judge of the Provincial High Court of Ratnapura on 14.11.2018 in case bearing No. RA/40/2015 against the order of the learned additional Magistrate of Ratnapura.

It appears that Officer in Charge of the Police Station, Ratnapura had filed an information on 08.01.2007 in terms of Section 66(1) of Primary Courts' Procedure Act No.44 of 1979, since a breach of peace between parties is threatened or likely to be threatened. According to the information filed by the Complainant there is a dispute in respect of the roadway leading from Elapatha to Pitilanda.

"රත්නපුර පොලිසියේ සුළු අපරාධ අංශයේ ස්ථානාධිපති පො.ප. ජයදේව වන මම පහත සඳහන් පාර්ශවකරුවන් ගරු අධිකරණයට ඉදිරිපත් කරමින් ඉල්ලා සිටින්නේ රත්නපුර අධිකරණ බල ප්‍රදේශය ඇතුළත වූ ඇලපාත, පිටලන්ද, නොල්ලවත්ත පිහිටි ඉඩමේ පාරක අවුලක් සම්බන්ධව දෙපාර්ශවය අතර ඇතිවී තිබෙන ආරවුලේ දෙපාර්ශවය පොලීසියට ගෙන්වා සමාදානයෙන් බේරුම් කිරීමට උත්සාහ කළ මුත් එසේ සමථයට පත් කිරීමට නොහැකි විය. මෙම දෙපාර්ශවය සමථයකට පත් කිරීමට නොහැකි බැවින් ද, මෙම දෙපාර්ශවය අතර සාමය කඩවීමක් ඇති වී ලේ වැගිරීමක් දක්වා යාමට ඇති හැකියාව නිසා....."

It was alleged by the Respondent that on or around 01.02.2007, the Appellant forcefully blocked the roadway used by the Respondent to reach her house and Respondent had made a complaint on 02.02.2007 to the police station of Ratnapura stating that a footpath used by the Respondent to have access to her house has been obstructed by a wire fence by the Appellant. Consequently, the Appellant had given a statement to the police station of Ratnapura regarding the same dispute and thereafter Appellant had made a complaint to the Police Station of Ratnapura stating that the Respondent had obstructed the wire fence built by the Appellant.

However, the learned additional Magistrate acting as Primary Court Judge, having inquired into the matter had made an Order on 02.07.2007 stating that there is no necessity to grant a roadway in favour of Respondent since the Respondent had an alternative roadway.

Being aggrieved by the said order, the Respondent invoked the revisionary jurisdiction of the High Court of the Sabaragamuwa Province holden in Ratnapura. Thereafter, the learned High Court Judge by his Order dated 23.11.2013 had decided to set aside the Order of additional Magistrate and had directed both parties to file affidavits with documents and written submissions before the additional Magistrate's

Court of Ratnapura. On 11.08.2015, the additional Magistrate of Ratnapura, acting as Primary Court Judge had delivered the order in favour of Respondent and had held Respondent is entitled to use 3 feet roadway until the dispute is resolved by a civil court with competent jurisdiction as it appears that she has a servitudanal right over the land of Appellant.

Being aggrieved by the said order made by learned Magistrate of Ratnapura, the Appellant invoked the revisionary jurisdiction of the Provincial High Court of Sabaragamuwa holden in Ratnapura in case bearing No. 58234 seeking to revise or set aside the said order of the learned Magistrate made on 11.08.2015.

Consequently, the Respondent had filed statement of objections to the application and counter objections filed by the Appellant. Thereafter, parties agreed to dispose the inquiry by way of written submissions. Subsequently, learned High Court Judge delivered his order dated 14.11.2018 affirming the order of the learned additional Magistrate and dismissing the revision application of the Appellant.

It appears that the Appellant has preferred this appeal against the said order of the learned High Court Judge on the following grounds:

- Respondent is not entitled to a right of way.
- Magistrate failed to exercise the jurisdiction vested upon as per Primary Courts' Procedure Act to preserve peace.
- Learned High Court Judge failed to appreciate the exceptional circumstances in Appellant's case.

At the hearing, the learned counsel for the Appellant had submitted that the learned Magistrate and learned High Court Judge have erred in failing to consider the report of the Magistrate dated 04.05.2007 made in pursuant to a site visit.

The attention of court was drawn to the written submissions filed by the Appellant where the position that the learned High Court Judge has failed to evaluate that exceptional circumstances exist to the Appellant when reaffirming the order of Magistrate's Court was taken up. The Appellant had contended that there's an alternative right of way available to Respondent which amounts to be an exceptional circumstances before the learned High Court Judge.

The 1st Order pronounced by the learned Magistrate on 02.07.2007 and the site inspection notes has referred to a purported alternative right of way which was alleged by the Appellant as,

> "රබර් වත්තක් තුලින් ගමන් කර පුවක් දණ්ඩාව නමැති කුඹුරේ නියර මතින් ගමන් කිරීමේදී 1වන පාර්ශවකාරියගේ නිවසට ලඟා විය හැකි…"

According to the said site inspection notes, the Respondent has access to the rear side of the house along the "කුඹුරේ නියර". Since Ratnapura is an area where the flooding is frequent, the said road access along the "කුඹුරේ නියර" cannot be accepted as a roadway giving access to the Respondent's house.

It was submitted that Respondent had advanced credible evidence from owners and tenant cultivators from the surrounding paddy fields and Grama-niladari to substantiate the Respondent's position that there was no other alternative roadway to have access to her house. The said position has been clearly indicated in the sketch of the police inspection done by the police on 12.02.2012.

Since the dispute in the instant case is relating to a right of way, it clearly manifests that it has to be determined in terms of Section 69 of the Primary Courts' Procedure Act.

Section 69 (1) states that;

> "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 matter of the dispute and make an Order under Subsection (2)".

Section 69 (2) states;

> "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".

In the case of ***Ramalingam Vs. Thangarajah [1982] 2 SLR 693*** *Sharvannda J.* emphasized that;

> "…..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)."

Similarly, in the case of ***W.D. Leelawathie Vs. Wijeratne Manike and others CA (PHC) 07/2006 C.A.M. 14.01.2016,*** *Justice Walgama* cited while upholding the Judgment of the learned High Court Judge held that;

> "As the disputed matter relates to a road way, the Counsel for the Respondent had taken this Court through the legal propositions enumerated by the judicial pronouncement as stated below.
>
> It was observed in the case of ***Dammadhinna Sarath Paranagama Vs. Kamitha Aswin Paranagama CA (PHC) APN 17/2013 C.A.M 07.08.2014***, that there are two ways where the existence of such a road way can be proven in the Primary Court, They are:
>
> 1. By adducing proof of the entitlement as is done in a Civil Court,
> 2. By offering proof that he is entitled to the right for the time being.
>
> It was further held that "If you described a party as being entitled to enjoy a right but for time being, it means that it will be like that for a period of time, but may change in the future" (emphasis added)."

It is to be observed that the *ratio decidendi* of the said case is that a party does not need to establish a servitudanal right by cogent evidence as is usually considered in a civil court. The required proof of the user's right in terms of Section 69 (1) of the Act, is to consider a right in the nature of a servitude or long term use. Thus, it is sufficient to prove the enjoyment of the right at the time the dispute arose.

In the circumstances, it is clear that the said Section 69 of Primary Courts' Procedure Act requires the Magistrate's Court to determine who is entitled to the right in issue and/or who is entitled to the right for the time being.

In the case ***Maddumage Sulochana Priyangika Perera Vs. Maddumage Nimal Gunasiri Perera and others S.C. Appeal No.59/2012, S.C.M 18.01.2018*** *Justice Prasanna Jayawardena* held that,

> "..With regard to a claim of a right of way of necessity, the claimant is not required to prove possession or user of the right of way. Instead, a claimant who seeks a declaration from Court that he is entitled to a right of way of necessity over the land of another, must satisfy Court that: the situation of the claimant's land is such that, the only route which can be used from the Claimant's land [without having to undergo unreasonable inconvenience or difficulty] to access a public road or other roadway from which a public road can be accessed, is by traversing over the land of another person and that, therefore, by reason of necessity, he is entitled to a declaration from Court that he is entitled to a right of way of necessity over that person's land to access the public road or roadway.. [emphasis added]"

The said Judgment of the Supreme Court only speaks of proving a right of way in a civil matter and not in a Section 66 application under the Primary Courts' Procedure Act.

It is noteworthy that the police observation notes dated 12.02.2012 made by police constable Gunawardane stated as follows;

> "උතුරට වන්නට නන්දාවතීගේ ගේ පිහිටා ඇත. කම්බි වැටේ එළියට වෙන්න මෙම නිවාස පිහිටා ඇත. එය (එජ්) අකුරෙන් පෙන්වා ඇත. මෙම නිවසේ පදිංචිව සිටින අයට නිවසට යාමට පාරක් නැත. නිවස වටේටම ඇත්තේ පුරන් වී ඇති කුඹුරකි. (ජී) නමින් දක්වා ඇත. මෙම කුඹුරු වලට වැඩකිරීමේදී හරකුන් සහ ට්‍රැක්ටර් රැගෙන ගිය බව පෙනෙන්නට ඇත. මෙම නිවසට යන්න තිබූ එකම අඩි පාර මෙය බව පෙනෙන්නට ඇත..." [Emphasis added]

In view of the said observation notes, it is evident that the footpath qualifies to be a way of necessity for the Respondent to have access to her home. Thus, the obstruction done by the Appellant to the said footpath has denied the Respondent of her right of way.

It appears that in paragraphs 5, 6 and 7 of the counter affidavit filed by the Respondent on 28.11.2014, the Respondent has affirmed that she has been using this footpath since 1993, enabling her to claim servitudanal right to use the footpath. Moreover, this position had been reaffirmed by the Grama Niladhari of Karangoda division in his letter dated 01.02,2007 to the Complainant.

> "ඉහත අය පදිංචි නිවසට යාමට තිබූ අඩි පාර පාන්කඩේ කොරටුව යන ඉඩම මැදින් තිබූ අතර එම පාර අවහිර කිරීමෙන් පසු එම නිවසේ පදිංචිය හැර ගොස්...."

Thus, it appears that the Respondent had no other alternative to access her residence apart from the footpath obstructed by the Appellant.

The learned Magistrate delivered his Order on 11.08.2015 in favour of the Respondent, determining that the Respondent had a servitudanal right over the land of the Appellant.

By the said Order, the learned Magistrate further held that the Order was a temporary order and that both parties are entitled to initiate proceedings through a competent jurisdiction of a civil court.

It is worthy to note that the learned High Court Judge has affirmed the Order of the learned Magistrate having analysed and evaluated the evidence placed before the Magistrate. Therefore, the Order of the learned High Court Judge is well founded.

It is seen that according to the findings of the learned High Court Judge, the Appellant had not shown exceptional circumstances that shock the conscience of Court which thereby would warrant the intervention of the Provincial High Court by way of revisionary jurisdiction.

In view of the foregoing reasons, it is apparent that the learned High Court Judge is correct in affirming the Order of the learned Magistrate dated 11.08.2015 and in dismissing the application for revision made by the Appellant.

Hence, we see no reason for us to interfere with the Order of the learned Magistrate dated 11.08.2015 and the order of the learned High Court Judge dated 14.11.2018.

Thus, we dismiss this appeal with costs fixed at Rs. 35,000/-.

JUDGE OF THE COURT OF APPEAL

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

JUDGE OF THE COURT OF APPEAL