

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

In the matter of an Appeal made under Article 154P (3) (b) of the Constitution of Sri Lanka, read with Section 11 of High Court of the Provinces (Special Provinces Act No. 19 of 1990).

Court of Appeal Case No:  
**CA (PHC) 21/2014**

Officer-in-Charge,  
Police Station,  
Hanguranketha.

**Plaintiff**

Kandy High Court Case No:  
Rev 27/2010

**Vs.**

1. D.M.W.G. Danepola  
Adikarigama, Gonaganthenna.
2. A.C.D. Ariywansa Fonseka,  
Adikarigama, Gonaganthenna.
3. A.M. Sudumanika,  
Walikada, Gonaganthenna.
4. D.M.M. Ranmanika,  
Walikada, Gonaganthenna.
5. Dinesh Kulathunga,  
Adikarigama, Gonaganthenna.

Kandy Primary Court Case No:  
17943

Presently,  
264/2B, Atigala Mawatha,  
Heeneti Kumbura Road,  
Battaramulla.

**Respondents**

**AND**

Dinesh Kulathunga,  
Adikarigama, Gonaganthenna.

Presently,  
264/2B, Atigala Mawatha,  
Heeneti Kumbura Road,  
Battaramulla.

**5<sup>th</sup> Respondent-Petitioner**

**Vs.**

1. Officer-in-Charge,  
Police Station,  
Hanguranketha.

**Plaintiff-Respondent**

2. D.M.W.G. Danepola,  
Adikarigama, Gonaganthenna.
3. A.C.D. Ariywansa Fonseka,  
Adikarigama, Gonaganthenna.
4. A.M. Sudumanika,  
Walikada, Gonaganthenna.
5. D.M.M. Ranmanika,  
Walikada, Gonaganthenna.

**Respondent-Respondent**

**AND NOW BETWEEN**

Dinesh Kulathunga,  
Adikarigama, Gonaganthenna.

Presently,  
264/2B, Atigala Mawatha,  
Heeneti Kumbura Road,  
Battaramulla.

**5<sup>th</sup> Respondent-Petitioner-Appellant**

**Vs.**

1. D.M.W.G. Danepola,  
Adikarigama, Gonaganthenna.
  2. A.C.D. Ariywansa Fonseka,  
Adikarigama, Gonaganthenna.
  3. A.M. Sudumanika,  
Walikada, Gonaganthenna.
  4. D.M.M. Ranmanika,  
Walikada, Gonaganthenna.
- Respondent-Respondent-Respondents**

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

**Counsel:** Shrinath Perera, PC with Anjela Josey for the 5<sup>th</sup> Respondent-  
Petitioner-Appellant.  
Ranga Dayananda with A.Wickremasinghe for the 2(a)-2(c)  
Respondent-Respondent-Respondents.

Both parties agree to dispose the matter by way of written submissions.

Written Submissions 09.04.2022 for the 5<sup>th</sup> Respondent-Petitioner-Appellant.  
tendered on:

Decided on: 19.10.2022

**Prasantha De Silva, J.**

### **Judgment**

This appeal emanates from the Order of the learned High Court Judge exercising revisionary jurisdiction in case bearing No. ෩෯/27/2010 made against the Order of the Primary Court dated 04.01.2010. It appears that the Officer-in-Charge of Hanguranketha Police Station had filed an information in terms of Section 66 of the Primary Courts' Procedure Act No. 44 of 1979 in the Primary Court of Kandy in case bearing No. 17943.

The said information was filed consequent to a complaint made to the Police by the 1<sup>st</sup> Respondent-Respondent-Respondent alleging that the 2<sup>nd</sup> Respondent-Respondent-Respondent has obstructed the road used by him to access his parent's house. Later, the 3<sup>rd</sup> and the 4<sup>th</sup> Respondent-Respondent-Respondents had intervened in the said case with the 5<sup>th</sup> Respondent-Petitioner-Appellant [hereinafter referred to as the Appellant].

The Primary Court had issued an Interim Order on the submissions of the Appellant granting right of way to the Appellant and to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent-Respondent-Respondents over a 10 feet wide road in terms of Section 67 of the Primary Courts' Procedure Act.

It was submitted by the Appellant that before the said Interim Order was enforced, the wife of the Respondent had instituted action No. DLM/22/09 in the District Court of Kandy and obtained an Enjoining Order and notice of Interim Injunction on 17.07.2009, prohibiting felling of trees, cutting of roads, making roads and digging drains in the disputed land on which the approach road is located.

Prior to the pronouncement of the Final Order of the Primary Court of Kandy in the said case bearing No. 17943, the Enjoining Order and the notice of Interim Injunction issued by the District Court of Kandy were brought to the notice of Court. On that account, the Appellant alleged that the learned Primary Court Judge when pronouncing the Final Order in case bearing No. 17943 had disregarded the Interim Order granted by himself on

02.07.2009 and permitted the Appellant and other Respondent-Respondent-Respondents to use an approach road 3 feet wide in accordance with the Interim Injunction issued by the District Court in case bearing No. DLM/244/09.

Being aggrieved by the said Final Order of the Primary Court dated 04.01.2010, the Appellant had invoked the revisionary jurisdiction of the Provincial High Court of Kandy seeking to set aside the said Order dated 04.01.2010 and praying for a confirmation of the Interim Order of the learned Primary Court Judge dated 02.07.2009 and to have it declared that they have a right to use the access road 10 feet wide in terms of the said Interim Order.

However, the learned High Court Judge having inquired into the said application of the Appellant had pronounced the Order on 05.03.2014 in case bearing No. 373/27/2010 dismissing the said application and upholding the Final Order of the learned Primary Court Judge.

Being aggrieved by the said Order in case bearing No. 373/27/2010, the Appellant had preferred this appeal on the grounds stated in (a), (b), (c), (d) and (e) of paragraph 10 of the Petition of Appeal.

- a) The learned High Court Judge in pronouncing his Order has disregarded the provisions in Section 66 of the Primary Courts' Procedure Act No. 44 of 1979.
- b) When pronouncing the Order, it is erroneous to apply the contents of the Interim Injunction and the Enjoining Order of the Case No. DLM 244/09 of the District Court of Kandy.
- c) The Order made by the learned High Court Judge disregarding the facts of law stated in the judgment of *Kanagasabai Vs. Mylavaganam [1978 NLR 280]* in relation to concurrent jurisdiction pertaining to the Interim Injunction is erroneous.
- d) Since the Interim Order issued by the Primary Court on 02.07.2009 has been issued prior to the District Court Order in case No. DLM 244/09 made on 17.07.2009, it is erroneous for the learned High Court Judge to pronounce his Order without deciding that it was incorrect to apply the contents of the Interim Injunction and the Enjoining Order in the said Interim Order.
- e) Since the person named Charlet Abeygunasekara who filed case No. DLM/244/09 in the District Court of Kandy was not a party to the immediate case No. 17943 of the Primary Court, it is erroneous to pronounce the Order without determining that it is

incorrect to make the contents of the said Order of the case, the basis of the dispute between the parties.

In this respect the attention of Court was drawn to the Order of the learned Primary Court Judge referring to the Judgment *Kanagasabai Vs. Mylavaganam [supra]*.

“ඉහත කී නඩු නීත්‍යානුකූල අනුච්ඡේදන නඩුවල වන්නේ මෙම අධිකරණය විසින් පනතේ 68 හෝ 69 වගන්තිය යටතේ නියෝගය සිදුකරනු ලබන විට එම ආරවුල සම්බන්ධයෙන් දිසා අධිකරණය මගින් ලබාදී ඇති අවසාන හෝ අතුරු නියෝගයකට අනුකූලව එම නියෝගය පදනම් කරගෙන මෙම අධිකරණය අවසාන නියෝගය ලබා දිය යුතු බවයි.”

As per the extract above, when an Order is made by a Magistrate under Section 68 or 69 of the Act, the said Order should be restricted to/consistent with the Interim of Final Order of the District Court.

The case of *Kanagasabai Vs. Mylavaganam [supra]* it was emphasized that the mere fact of a suit pending in a Civil Court does not deprive the Magistrate of jurisdiction to make an Order under Section 62 and 63 of the Administration of Justice Law No. 44 of 1973, which corresponds to Act No. 44 of 1979; Primary Courts’ Procedure Act. In the said case, Magistrate held that in view of the application pending before the District Court, he should not proceed to act under Section 62 of the Administration of Justice Law.

However, in the instant Primary Court case, it was brought to the notice that the District Court of Kandy had issued notice of Interim Injunction and an Enjoining Order, in case bearing No. DLM/244/09.

Moreover, the said Enjoining Order was issued *ex-parte* and an Interim Injunction was not granted but only notice of Interim Injunction was issued. Since the said District Court action had not been concluded, the learned Primary Court Judge had misdirected himself and had made his decision based on the Enjoining Order and notice of Interim Injunction issued in the District Court case.

Moreover, it is apparent that the learned Primary Court Judge had erroneously concluded by stating the said right of way should be subjected to the Interim Order issued by the District Judge in case bearing No. 244/09.

It is important to note that the District Court had issued an Enjoining Order and notice of Interim Injunction *ex parte*. At the Interim Injunction inquiry, if the Court refuses to grant

an Interim Injunction, the Enjoining Order will have to be dissolved. In such a situation, Enjoining Order cannot be considered as a permanent order. Thus, the Magistrate should not bow out from his functions under the Primary Courts' Procedure Act.

In the case of *Kanagasabai vs. Mylwaganam [supra]*, it was emphasized that if the Civil Court has already given a decision, Final or Interim, prior to Magistrate making an Order under Section 63 of Administration of Justice Law, as the dispute between the parties is decided by a competent Court, the Magistrate would be justified in making his Order on the basis of such decision. Further, it was held that if the Magistrate has already made an Order under Section 63 of the Administration of Justice Law, the Civil Court will not have jurisdiction to make any Interim Order which will in any way prejudice the right of a party who has succeeded in getting an Order in his favour under Section 63 of the Act.

In the case at hand, the learned Magistrate had issued an Interim Order granting a right of way for a road 10 feet wide to the Appellant before the life interest holder of the Respondent obtained an Enjoining Order from the District Court.

Moreover, it is significant to note the case of *Kanagasabai vs. Mylwaganam [supra]*, which held that "in terms of Section 63(2) and 63(6), the successful party will be entitled to be in possession until he is ejected therefrom under the Judgment, Order or Decree of a competent court and all disturbances of such possession otherwise than by a Judgment, Order or Decree of a competent court is prohibited."

In view of the findings of the case *Kanagasabai vs. Mylwaganam [supra]*, it is imperative to note that the learned Magistrate has misdirected himself and had disregarded the Interim Order already issued by him on 02.07.2009 and adhered to the Enjoining Order made by the learned District Judge permitting the Appellant and 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents to use an approach road which was only 3 feet wide. Therefore, I hold that the Order made by the learned Magistrate is erred in law. Thus, it ought to be set aside.

In this instance, Court draws attention to the investigation report and the observation notes tendered to Court by the Officer-in-Charge of Police Station Hanguranketha. The observation notes are as follows:

"මෙම ආරවුල සහිත පාර (මාර්ගය) මා පෙන්වා සිටියා. මෙම ආරවුල සහිත මාර්ගය බස් නැවතුම්පොළ අසලින් ආර්යවංශ ෆොන්සේකාට අයත් ඉඩමේ වම්පසින් කුමාර අබේසේකරට අයත් පැළ ඉනිවැටට ආසන්නව පිහිටා තිබූ බවට සලකුණු ඇත. බස් නැවතුම් පොළ අසලින් මෙම

මාර්ගයෙ පිට වන ස්ථානයේ අඩි දහයක් පමණ පළලට මාර්ගය තිබූ බවට සලකුණු ඇති අතර, එම මාර්ගය අතුරා තිබූ බවට නිරීක්ෂණය වේ. මෙම මාර්ගය ආරම්භ වන ස්ථානය අඩි තුනක් පමණ වන ආකාරයට පටු වන ලෙසට කොන්ක්‍රීට් කණු හතරක් පමණ සිටුවා කමිඳි ඇද ඇත. එම කමිඳි කණු අතරින් පාරක් වන ලෙසට මාර්ගය ඉතිරි කර ඇත. එම සිමෙන්ති කණු මීට දින කිහිපයකට පෙර සිටුවා ඇති බව නිරීක්ෂණය වන අතර එම කමිඳි කණු හා කටු කමිඳි අලුත්ම කණු හා කටු කමිඳි වේ.

තවද ආර්යවංශ ගොත්ඤ්ඤාගෙ ඉඩම අවසන් වන විට .... හා එමි කුලතුංග යන අයගේ නිවසට යන මෙම මාර්ගයේ අඩි දහයක් යටින් බෝක්කුවක් ද ඇත. එයද මට අවුරුදු කිහිපයකට පෙර මාර්ගයේ ... අතර එම බෝක්කුව තුළින් ඉහලින් පැමිණෙන කළුරේ ජලය බැසගොස් ඇත ... ගොත්ඤ්ඤා විසින් හිනාමනාම මෙම මාර්ගය අවහිර කර ඇති බවට නිරීක්ෂණය ... ගමන් කිරීමට වෙනත් විකල්ප මාර්ග කිසිවක් නැත."

Furthermore, it is observable that the learned Magistrate, when making the said Interim Order allowed the 5<sup>th</sup> Respondent-Petitioner-Appellant to adduce oral evidence.

It is apparent that the learned Magistrate had come to the correct finding of fact and reached the conclusion that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Respondent-Respondent-Respondents and 5<sup>th</sup> Respondent-Petitioner-Appellant are entitled to use 10 feet road way over the disputed land.

Hence, we set aside the Order made by learned Magistrate on 04.01.2010 and the learned High Court Judge on 05.03.2014 and hold that the 5<sup>th</sup> Respondent-Petitioner-Appellant is entitled to use the disputed 10 feet wide road over the property in question as indicated in the said Interim Order dated 02.07.2009 by the learned Magistrate.

Appeal allowed. Parties have to bear their cost in all litigations.

**JUDGE OF THE COURT OF APPEAL**

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

I agree.

**JUDGE OF THE COURT OF APPEAL**