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

Court of Appeal Case No:
CA (PHC) 168/2012

High Court Kegalle Case No:
3771/Revision

Magistrate's Court Warakapola Case No:
53915

The Officer in Charge
Police Station,
Warakapola.

Complainant

Vs.
Rev. Mampita Hemaloka Thero,
Sri Bodi Rukkaramaya Piriwena,
Nape, Nelundeniya.

1st Party

1. Rev. Beddegama Sudassi Thero.
2. Rev. Kumburuwelyaye Dammarathana Thero.

First Part Intervenient Party

Vs.
Dissanayaka Rallage Nihal Chandrasiri Dissanayake.

2nd Party

Dissanayake Rallage Padmasiri Dissanayake,
Burunnawa, Tolangamuwa.
And 90 others.

2nd Party Intervenient Parties

AND
Rev. Mamapita Hemaloka Thero,
Sri Bodi Rukkaramaya Piriwena,
Nape, Nelundeniya.

1st Party-Petitioner

Vs.
Dissanayake Rallage Nihal Chandrasiri Dissanyake,
Burunnawa, Tolangamuwa.

2nd Party-Respondent

Dissanayake Rallage Padmasiri

Dissanayake,
Burunnawa, Tolangamuwa.
And 90 others.

2nd Party Intervenient Parties/Added Parties

AND BETWEEN

Dissanayake Rallage Nihal Chandrasiri
Dissanyake,
Burunnawa, Tolangamuwa.

2nd Party-Respondent-Appellant

Vs.

Rev. Mampita Hemaloka Thero,
Sri Bodi Rukkaramya Piriwena,
Nape, Nelundeniya.

1st Party-Petitioner-1st Respondent

Dissanayake Rallage Padmasiri
Dissanayake,
Burunnawa, Tolangamuwa.
And 90 others.

2nd Party Intervenient Parties/Added Parties-Respondents

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

Counsel: Rohan Sahabandu, PC with Hasitha Amarasooriya Senanayake for the 2nd Party-Respondent-Appellant.

Manohara De Silva, PC with Hirosha Munasinghe AAL for the 1st Party–Petitioner-Respondent.

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

Written Submissions tendered on: 19.05.2022 by the 2nd Party-Respondent-Appellant.
24.05.2022 by the 1st Party-Petitioner-Respondent.

Decided on : 25.10.2022

Prasantha De Silva, J.

Judgment

This appeal emanates from the Order made by the learned High Court Judge on 09.11.2012 exercising revisionary jurisdiction of the Provincial High Court of Sabaragamuwa Province Holden in Kegalle where the learned High Court Judge set aside the Order dated 19.02.2010 made by the learned Magistrate of Warakapola.

The Officer in Charge of Police Station-Warakapola had filed an information on 09.09.2009 in terms of Section 66(1) of the Primary Courts' Procedure Act No. 44 of 1979 naming Rev. Mampita Hemaloka Thero as 1st Party and Dissanayake Rallalage Nihal Chandrasiri as 2nd Party stating there was a dispute between the parties over a roadway.

It appears that Rev. Baddegama Sudassi Thero and Dissanayaka Rallalge Padmasiri had intervened as 1st Party-Intervenient Party and 2nd Party–Intervenient Party respectively. It was the contention of the 2nd Party-Respondent that the impugned roadway has been obstructed by the 1st Party–Respondent claiming that the said roadway is to be a private temple road.

It appears that the learned Magistrate who was acting as the Primary Court Judge has followed the procedure under Section 66 of the Primary Courts' Procedure Act by displaying the notices, and thereupon, 92 persons had intervened claiming that the said roadway was used by them to go through Burunnawa Road to Oththapitiya Road. The temple premises is on either side of the said road, and obstructions had been placed along Burunnawa Road in 3 places as seen in the sketch.

Subsequently, parties filed affidavits, counter affidavits with documents and the learned Primary Court Judge after perusing the material placed before him and subsequent to a site inspection, made a determination on 19.02.2010 that the impugned roadway has been obstructed by the 1st Party–Respondent.

Being aggrieved by the said determination, 1st Party–Petitioner-Respondent invoked the revisionary jurisdiction of the Provincial High Court of Sabaragamuwa (Kegalle) seeking to revise the said determination made by the Primary Court Judge.

Thereafter, the learned High Court Judge having allowed the application of the 1st Party-Petitioner-Respondent had made an Order dated 09.11.2012 setting aside the Order of the learned Primary Court Judge, holding that there is no servitudanal right for the 2nd Party-Respondent-Appellant to use the said roadway as of right as this was abandoned in January 2008. Thus, 2nd Party-Respondent-Appellant could not use his right to use the said roadway which existed only up to January 2008 and hence sought to exercise his right to use the roadway in 14.03.2009 after about one and a half years.

It is of the view of the learned High Court Judge that there was no consistent use by 2nd Party-Respondent of his servitudanal right, as for anyone claiming such right must use it continuously for over ten years. The learned High Court Judge is of the view that the right of the 2nd Party-Respondent-Appellant had been waived off in January 2008.

It is observable that the learned Primary Court Judge after a careful analysis of the evidence had rejected the contention of the 1st Party-Petitioner that the matter in issue comes under Section 68 of the Primary Courts' Procedure Act and the learned Magistrate has proceeded to make his Order under Section 69(2) of the Primary Courts' Procedure Act.

In this connection, Court draws the attention to the case ***Ramalingam Vs. Thangarajah*** reported in ***[1982] 2 SLR 693***;

> "That person is entitled to possession until he is evicted by due process of law. A Judge should therefore in an inquiry under Part VII of the aforesaid Act, confine himself to the question of actual possession on the date of filing of the information except in a case where a person who had been in possession of the land had been dispossessed within a period of two months immediately before the date of the information. He is not to decide any question of title or right to possession of the parties to the land. Evidence bearing on title can be considered only when the evidence as to possession is clearly balanced and the presumption of possession which flows from title may tilt the balance in favour of the owner and help in deciding the question of possession.
>
> 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 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).”

The law recognizes that right of way could be acquired in the following ways.

- By grant
- By prescription
- By way of necessity

It was submitted on behalf of the 1st Party-Petitioner-Respondent that right of way by prescription and right of way by necessity can be decided only by a Court of competent jurisdiction and to declare a right of way by prescription, Court has to enter a decree and for that purpose Court has to satisfy that legal requisites required by Section 3 of the Prescription Ordinance are fulfilled by evidence led.

It was further submitted on behalf of the 1st Party-Petitioner-Respondent that the Primary Court is not a Court of competent jurisdiction to decide matters related to rights acquired by prescription or necessity. It is the District Court that has jurisdiction to decide and determine property rights of the parties after admitting both oral and documentary evidence.

In 66 proceedings, if a decree and/or the Judgment of a Court of competent jurisdiction declaring the entitlement of a right of way by prescription on necessity was produced, then the Magistrate could act under Section 69(2) but not otherwise.

Attention of Court was drawn to Paragraph 2 of page 262 of the brief, where the Magistrate’s Court has determined that the 2nd Party hasn't acquired a right of way either by way of a deed or by way of a Court order. The 2nd Party has not produced any deed in proof of acquisition of servitude.

The attention of Court was drawn to Paragraph 9 of the 2nd Party-Respondent’s affidavit in which the 2nd Party admits that the land is dedicated to a temple. It was submitted that

when the 2nd Party admits the subject matter belongs to a temple, 2nd Party cannot claim prescriptive rights against the temple property in view of Section 34 of the Buddhist Temporalities Ordinance No. 19 of 1931. (i.e the title of temple property will not be affected by a claim of prescription by a 3rd Party). On behalf of the 1st Party-Petitioner-Respondent, it was submitted that 2nd Party-Respondent-Appellant cannot succeed in their claim for a right of way by prescription inasmuch as title of the temple can no way be prejudiced to a 3rd Party claim of prescription. Therefore, Court ought to have rejected any claim of 2nd Party-Respondent-Respondent-Appellant based on prescription.

Furthermore, on behalf of the 1st Party-Petitioner-Respondent, the position was taken up that after a field inspection learned Magistrate has observed an existence of an alternative road, which is a well-built tar road. The learned Magistrate has further observed that the said alternative road, is not a less convenient road.

Moreover, it was argued on behalf of the 1st Party-Petitioner-Respondent that if a person claiming a right of way has an alternative road to the one claimed, although such road is less convenient and involves a longer and more arduous journey, so long as the existing road gives reasonable access to a public road, he must be content and cannot insist upon a more direct approach over neighbour's property.

As such, it was the contention of the 1st Party-Petitioner-Respondent that even if the Magistrate has jurisdiction to decide on a right of way of necessity (which the 1st Party-Petitioner-1st Respondent does not concede), the 2nd Party cannot succeed in a claim for a servitude by necessity inasmuch as the learned Magistrate has conceded existence of an alternative road. Therefore, it was submitted that on the available material, Court could not have possibly granted a right of way on the basis of necessity or prescription.

It is worthy to note that the aforesaid contention of 1st Party-Petitioner-Respondent applies when deciding a right of way by way of necessity or on prescription in civil cases. In a dispute relating to a roadway emanating from an application under Section 66 of the Primary Courts' Procedure Act, court is not involved in an investigation into the title or the right to possession, which is the function 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. Court has to make a provisional order to prevent

the breach of the peace among parties until the competent civil jurisdiction solves the matter in dispute.

It is worthy to note that the complaint made by the 2nd Party-Respondent falls within Section 69(1) of the Primary Courts' Procedure Act which reads as follows;

> "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 of part thereof, the Judge of the Primary Court shall determine as to who is entitled to the right which is the subject of the dispute and make an order under subsection 2."

Section 75 of the Act defines a 'dispute affecting land' as follows;

> "In this Part 'dispute affecting land' includes any dispute as to the right to the possession of any land or part of a land and the buildings thereon or the boundaries there- of or as to the right to cultivate any land or part of a land, or as to the right to the crops or produce of any land, or part of a land, or as to any right in the nature of a servitude affecting the land and any reference to 'land' in this Part includes a reference to any building standing thereon."

Thus, in this case, what is required to be established by the 2nd Party-Respondent is not that he has a servitude but only that he is entitled to a right which is in the nature of a servitude.

Section 69(2) sets out power of the Primary Court Judge when inquiring into a complaint under Section 69(1).

> "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 ***Tudor Vs. Anulawathie and others [1999] 3 Sri LR 235*** the scope of an Order that could be made in terms of Section 69 of the Act was discussed in the following manner;

> "The above subsections, 69 (1) and (2), require the Primary Court after inquiry to-
> (i) Determine as to who is entitled to the right.
> (ii) Make an order that the person specified therein shall be entitled to such right until such person is deprived of that right by virtue of an order or decree of a competent Court.
> (iii) Prohibit all interference with or disturbance of that right other than under the authority of an order or decree of a competent Court."

It has been held in the case of ***Ananda Sarath Paranagama Vs. Dhammadinna Sarath Paranagama and Kamitha Aswin Paranagama CA (PHC) 117/2013 [C.A.M. 12.12.2013]***

> "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 apparent that proving the enjoyment of the right at the time the dispute arose is sufficient.

In this instance, Court draws the attention to ***Nandawathie and another Vs. Mahindasena [2009] 2 Sri LR 237*** where *Justice Ranjith Silva* held that;

> "In an application for revision before the High Court, there is no question of rehearing examination of the evidence in order to arrive at a court's decision. The task of the High Court is to decide not whether the decision is right or wrong but simply whether the decision is legal or illegal an order. When an Order of the Primary Court is challenged by way of revision in the High Court, Judge can examine only the legality of the Order and not the correctness of that order."

It is the duty of Court to ascertain whether the High Court acted lawfully/legally. It is not the correctness of the Order, but the legality of that Order that is in question. The High

Court is of the view that the right has to be exercised continuously, the reason being that there was a time lag or an interruption from January 2008 to March 2009 where the Appellant and the other Intervenients had not used the roadway voluntarily with consent. Moreover, it was stated that the Appellants and the Intervenients had waived that right to use the road in 2008 and can no longer claim a servitudanal right.

It is pertinent to note the fact that the impugned road is maintained by the Pradeshiya Sabawa. Apparently, this aspect has not been considered by the learned High Court Judge. Though the existence of a right of way in 2008 is admitted, the issue revolves around the period from January 2008 to March 2009 during which the roadway was not used.

It was submitted on behalf of the 2nd Party-Respondent-Appellant that the non-user (as emphasized by the High Court) is not set out as a mode of extinction of ownership of any corporeal thing. Under our law, title to immovable property cannot be lost by non-user (non-possession). A person does not lose the right to ownership of immovable property by non-user. This is not a question of not using the road for over 10 years where Section 3 of the Prescription Ordinance may apply.

Due to the Prime Minister's imminent visit to the temple, the roadway was temporarily put on hold. It is worthy to note that the learned High Court Judge did not say the right was abandoned but was only referring to non-user.

As per the rule, "once a street always a street" which was cited in the case of ***Municipal Council of Colombo vs. Hewavitharana [13 NLR 241]*** and upon the fact that this road is a public road maintained by the Pradeshiya Sabhawa, there is no issue of losing the right. Record shows that the Pradeshiya Sabhawa had taken many steps to repair this road and money was utilized for such purpose.

In view of the letter by Pradeshiya Sabhawa dated 14.07.2009 [1අ1], the 1st Party-Petitioner -Respondent was requested by the Chairman of Pradeshiya Sabhawa-Warakapola to remove the obstruction and allow the villagers to use the disputed roadway since the road way belongs to the said Pradeshiya Sabhawa and had been used over a long period of time by the villagers. Moreover, the letter by the Pradeshiya Sabhawa dated 25.09.2009 [1අ2], to

the 1st Party-Petitioner-Respondent had stated not to obstruct the said road and to have the illegal construction removed, failing which, legal action would follow.

It appears that the Pradeshiya Sabhawa had informed the Registrar of Court by letter dated 26.11.2009 [1අ3] of the unlawful steps taken by the 1st Party-Petitioner-Respondent. Furthermore, Grama Niladari's letter dated 28.10.2009 [1අ5] informed the Divisional Secretary of the unlawful and illegal steps taken by the 1st Party-Petitioner-Respondent in obstructing the roadway and the letter dated 18.11.2009 [X5] from the Grama Sevaka emphatically points out that this road has been in existence for over 20 years and money has been allocated to repair the road.

The letters X5A and X6 and the fact that money has also been released for the maintenance or repair [X7A] show that this roadway is maintained by the Pradeshiya Sabhawa for the public as it is a public road. It was argued that this is the reason for the Primary Court to state that non-use of a public road would not entitle another to claim a right over the road.

In this instance, it was submitted that the Order of the Primary Court is a provisional Order, and if any dispute exists over civil rights, one must resort to a civil action. The Primary Court was of the view that as there is a breach of peace and as the road has been classified as a public road and as a road maintained by the Pradeshiya Sabhawa, the Respondents are entitled to use the roadway and to have the right granted until the matter is finally decided by a civil Court with competent jurisdiction.

It appears that a large number of villagers were using this roadway. Moreover, the question of abandonment would not arise as the matter was pending before the Mediation Board. For abandonment to arise, it should be a complete waiver with the intent to give the right of way but the fact that it was before the Mediation Board shows that there was no abandonment of the right. Thus, the 2nd Party-Respondent-Appellant as well as the other Intervenients are entitled to use the roadway.

The difference between 'abandonment' and 'non user' was argued on behalf of the Appellant. It was submitted that abandonment bears the ingredient of "intention" and where 'non-user' is concerned, it does not bear the "intention". The learned High Court

Judge has not considered that this is a road maintained by the Pradeshiya Sabhawa for the public.

In view of the aforementioned reasons, it is relevant to note that the High Court has erred in law by not appreciating the legal position regarding extinction of servitudes. The evidence has shown that the road concerned was a public road maintained by the Pradeshiya Sabhawa for the villagers which villagers had used and vehicles went over this path over a long period of time except for a limited period. Moreover, the wall put up by the temple was shown as illegal as per the correspondence from the Pradeshiya Sabhawa by letters marked as 1අ1, 1අ2, 1අ3 and 1අ5.

It is seen that the learned Magistrate had correctly applied the relevant law to the facts of the case and had come to a correct finding based on the evidence placed before Court. Moreover, it is evident that the road has been used for over 10 years and was maintained by the Pradeshiya Sabhawa. The High Court has accepted that the impugned road was used by the villagers. However, the High Court has erroneously held that Appellant has lost the servitudanal rights on the basis that there was a waiver of the right by not having used it for over 1 year.

Moreover, the learned High Court Judge has failed to appreciate that this is a public roadway maintained by the Pradeshiya Sabhawa for the villagers. The documentary evidence submitted by the Appellant and the Intervenient parties have substantiated that the impugned road is maintained by the Pradeshiya Sabhawa and it is not the private property of the temple. The 1st Respondent had not substantiated that the disputed road was owned by the temple or that the temple was given exclusive right to use the impugned road.

In such circumstances, the Court has to consider whether the parties are entitled to use the disputed roadway as emphasized by *Justice Salam* in the case of ***Ananda Sarath Paranagama Vs. Dhammadinna Sarath Paranagama and Kamitha Aswin Paranagama [supra]***

It is evident that the disputed road used by the Appellant and the villagers does not belong to the temple or to the parties, but is a road maintained for the villagers by the Pradeshiya Sabhawa. Thus, the learned High Court Judge has erred in applying a wrong law with regard to servitudanal rights of the Appellant.

In view of the foregoing reasons, it amply proves that the Appellant and the other road users had "the required proof of the user's right in terms of Section 69(1) of the Act" when considering the right in the nature of a servitudanal rights or long terms use.

Therefore, I hold that the Appellant and the other road users are allowed to use a 10 feet roadway.

We allow the Appeal of the Appellant and set aside the Order of the learned High Court Judge dated 09.11.2012 and affirm the Order of the learned Magistrate dated 19.02.2010.

No Order is made regarding the cost of this appeal.

JUDGE OF THE COURT OF APPEAL

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

JUDGE OF THE COURT OF APPEAL