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

In the matter of an Appeal in terms of Article 154P(6) of the Constitution of Democratic Socialist Republic of Sri Lanka against judgement of the Provincial high Court exercising revisionary jurisdiction

Officer-in-Charge,
Police Station,
Yakkalamulla.

Complainant

Court of Appeal Case No.:
CA (PHC) 114/2012

PHC of Galle Case No:
756/2010 (Rev)

Magistrate Court of Kottawa Case No:
47253

Vs.

1. Okandawatta Hewage Dayawathee,
   Borupagodawatta,
   Hiriyamal Kumbura.

2. Mahadurage Sugathadasa
   Pahalawakanda,
   Hiriyamal Kumbura.

1st Party

1. Kariyawasam Mudalige Nalin
   Chaminda,

2. Hettigoda Liyanage Nilika Kumari

   Both of,
   Pahalawatta,
   Hiriyamal Kumbura.

2nd Party

AND

1. Kariyawasam Mudalige Nalin
   Chaminda,

2. Hettigoda Liyanage Nilika Kumari

   Both of,
   Pahalawatta,

Hiriyamal Kumbura.

2nd Party -1st and 2nd Petitioners

Vs.

1. Okandawatta Hewage Dayawathee,
   Borupagodawatta,
   Hiriyamal Kumbura.

2. Mahadurage Sugathadasa
   Pahalawakanda,
   Hiriyamal Kumbura.

1st Party-1st and 2nd Respondents

Officer-in-Charge,
Police Station,
Yakkalamulla.

Complainant-Respondent

AND NOW BETWEEN

1. Kariyawasam Mudalige Nalin
   Chaminda,

2. Hettigoda Liyanage Niluka Kumari

   Both of,
   Pahalawatta,
   Hiriyamal Kumbura.

2nd Party-1st and 2nd
Petitioner-Appellants

Vs.

1. Okandawatta Hewage Dayawathee,
   Borupagodawatta,
   Hiriyamal Kumbura.

2. Mahadurage Sugathadasa
   Pahalawakanda,
   Hiriyamal Kumbura.

   2A. Mahadurage Vineetha,
   'Namal', Kadhurugasehana,
   Hiyare, Yakkalamulla.

1st Party-1st and 2nd Respondent-Respondents

Officer-in-Charge,
Police Station,
Yakkalamulla.

Complainant-Respondent-Respondent

Before:	**Prasantha De Silva, J.**
	K.K.A.V. Swarnadhipathi, J.
Counsel:	Thanuka Nandasiri AAL for the 1st Party-1st and 2nd Petitioner-Appellants
	F. Rizana Izadeen AAL for the 2nd Party-1st and 2nd Respondent-Respondents
Written Submissions: filed on	Written submissions filed for the 2nd Party-1st and 2nd Respondent-Respondents and 2A substituted Respondent on 26.06.2023.
	Written submissions filed for the 1st Party-1st and 2nd Petitioner-Appellants on 24.02.2020.
Delivered on:	14.07.2023

Prasantha De Silva J.

Judgement

The Officer-in-charge of the Police station of Yakkalamulla being the Complainant, had filed an information on 23.03.2010 in the Magistrate court of Kottawa in terms of section 66(1)(a) of the Primary Court Procedure Act no 44 of 1979. It was informed to court by the said information that the breach of peace is threatened or likely to be threatened due to a dispute between the 1st Party and the 2nd Party.

The learned Magistrate who was acting as the Primary Court Judge had inquired into the matter between the said Parties and delivered the order on 13.07.2010 determining that 2nd Party is not

entitled to a servitudanal right over the subject matter and possession of the same was handed over to the 1st Party.

Being aggrieved by the said order the 2nd Party – 1st and 2nd Petitioners had invoked the revisionary jurisdiction of the Provincial high Court of the Southern Province holden in Galle. The learned High Court Judge having inquired the matter before him, and affirmed the order of the learned Magistrate.

Thereafter, the 2nd Party – 1st and 2nd Party Petitioners being aggrieved by the order of the learned High Court judge had preferred this appeal to the Court of Appeal seeking relief prayed in the prayer of the Petition of Appeal.

It is observable in the prayer to the Petition of Appeal, that the 2nd Party-1st and 2nd Petitioner-Appellants (herein after referred to as the Appellants) had prayed only to revise or set aside the order of the Learned Magistrate and not sought to set aside or revise the order of the learned High Court Judge against which this appeal was preferred.

Be that as it may, the facts of the instant case is as follows;

The dispute between the Parties is relating to a right of way claimed by the Appellants over a land belonging to the 1st Party-1st and 2nd Respondent-Respondents.

Therefore, it appears that the dispute affecting the subject matter comes within the purview of section 75(d) of the said Act (reproduced below).

Section 75(d): 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 thereof 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, it is the burden of the Appellants to prove that they have a right to use the disputed pathway in the nature of servitude.

It was submitted on behalf of the Appellants that the Appellants enjoyed the disputed pathway from 1990 – 1999 and the only access road to their land lies over the land belonging to the Respondent.

It was further submitted that the pathway which was originally used by the Appellants was closed by the Respondents and thereafter a new pathway was provided from the same land and the dispute arose after the said new pathway was closed.

It was the contention of the Appellants that they have been enjoying the disputed pathway as a right of way in the nature of a servitude and the said right has been created by enjoying the same since 1990 by the predecessor of the Appellants up-to date.

Thus, the learned Magistrate and the learned high Court Judge had failed to consider the aforesaid affidavit marked 2අ1, and the Appellants have the right to use the disputed pathway since 1990.

Furthermore, it was submitted that *Gramaniladari* has reported in his report that he was aware that the Appellants were enjoying the right of way over Dayawathi's land.

Moreover, the Appellants submitted that their supporting affidavits demonstrate that Appellant did not have an alternative roadway other than the disputed pathway.

However, it is imperative to note that according to the Appellants the roadway which was originally used was closed by the Respondents. Afterwards, Respondents provided a new pathway. Thus, it seems that the Respondents had given license to the Appellants to use the new pathway.

The section 72 of the Primary Courts Procedure Act stipulates that,

> *A determination and order under this Part shall be made after examination and consideration of-*
>
> *(a) the information filed and the affidavits and documents furnished;*
>
> *(b) such other evidence on any matter arising on the affidavits or documents furnished as the court may permit to be led on that matter; and*
>
> *(c) such oral or written submission as may be permitted by the Judge of the Primary Court in his discretion.*

The dispute between the Parties is a matter to be adjudicated by a competent civil court. On the other hand, it was revealed in affidavit evidence that the Appellants do not have an alternative road access to their land.

As such, it is also a matter to be determined by a civil court whether the Appellants can claim a servitudanal right by way of necessity or prescription.

The attention of court was drawn to the affidavit given by one Mahadurage Namaratne [marked as 2ඛ1]. According to the said affidavit the land occupied by the Appellants is a state land called *Walaemba Mukulana* in extent of 3 ½ acres.

The said Namaratne had enjoyed the property since 1990 and has handed over the same to the Appellants for them to apply for a permit in their name from the state. Subsequently, Appellants started enjoying the property since 1999.

It is seen that, the only access road to the said land enjoyed by the Appellants, lay over the land belonging to the Respondents.

Nevertheless, the Respondents have taken up the position that the said land occupied by the Appellants were not owned by them and it is a state land. Thus, the Respondents contended that the dominant land is a state land, and no prescription will run against a state land even though the Appellants have possessed the same for well over 10 years.

In this respect, it is worthy to note that the Appellants are claiming a right of way over the Respondents land and not claiming a prescriptive title over the state land.

Although the dominant land is a state land, it is not a matter to be considered in terms of section 66 of the Primary Court Procedure Act, since question regarding title of land does not arise.

The order of the court made in actions instituted under section 66 of the Primary Court Procedure Act are provisional orders, made to resolve the dispute temporarily to preserve the peace between/among the Parties.

It appears that the learned Magistrate held that no resident, occupying an unauthorised land can claim a servitudanal right by way of prescription.

It is settled law that under section 66 of the Primary Court Procedure Act, the Primary Court Judge has no jurisdiction to question or determine the title of the disputed land or the land relating to the dispute.

Therefore, it is imperative to note that the learned Magistrate had come to an erroneous conclusion that the Appellants are precluded by claiming a right of way over the Respondents land.

Hence, I hold that the learned Magistrate had misled himself and had not come to a correct finding of fact and law. Thus, the learned Magistrate had erred in law and thereby held against the 2nd Party-Respondent-Petitioner-Appellant.

In view of the aforesaid reasons, we set aside the order dated 13.07.2010 of the learned Magistrate and hold that the 2nd Party-Respondent-Petitioner-Appellant is entitled to use the impugned pathway to access the land occupied by the Appellants.

The learned Provincial High Court judge affirmed the findings of the learned Magistrate and dismissed the revision application on the ground that no exceptional grounds exist to revise the order of the learned Magistrate since we hold that the learned Magistrate had come to an erroneous conclusion and held against the 2nd Party-1st and 2nd Petitioner-Appellants, we set aside the order made by the learned Provincial High Court Judge dated 13.6.2012 as well.

Therefore, we allow the appeal of the 2nd Party-1st and 2nd Petitioner-Appellants and order the cost to be paid by the Respondents.

Appeal allowed with cost.

JUDGE OF THE COURT OF APPEAL

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

I agree.

JUDGE OF THE COURT OF APPEAL