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

C.A. (PHC) 152/2007

P.H.C. Ratnapura

No.HCR/RA/90/05

P. C /Ratnapura
No.14735 (66)

Nimalasena Jayakody,
Dambuluwana,
Ratnapura.
Petitioner-Petitioner-Appellant

Vs.

1. J.M. Mallikaratne,
   Dambuluwana,
   Ratnapura.

2. Dharsana Rupasinghe,
   Niriella,
   Udaniriella.

3. B. Sawwa,
Dambuluwana,
Ratnapura.

Respondent-Respondent-Respondents

BEFORE : **A.W.A. SALAM, J. (P/CA) &**
P.W.D.C. JAYATHILAKA, J.

COUNSEL : C. Paranagama for the Petitioner-Petitioner-Appellant and
Chandana Premathilake for the 1st and 3rd Respondent-Respondent-Respondents.

ARGUED ON : 19.05.2014.
DECIDED ON : 26.08.2014.

A.W.A SALAM, J.(P/CA)

The petitioner-petitioner-appellant (appellant) invoked the jurisdiction of the Primary Court under chapter VII of the Primary Court Procedure Act, No 44 of 1979 complaining that

the respondents-respondents-respondents (respondents) obstructed the right of way used by him and the villages, over a period of 10 years. He further complained that by reason of the obstruction he was not able to take out the three wheeler purchased him 10 months prior to the dispute.

Notices having been issued on the application filed by the appellant, the respondents tendered their affidavits denying that they ever of obstructed the right of the question. The learned Magistrate having inquired into the matter refused the application of the appellants. Aggrieved by the said determination, the appellant invoked the revisionary jurisdiction of the High Court and the learned High Court judge refused the revision application, on the ground that no special circumstances have been revealed to invoke the revisionary powers of the High Court. This appeal has been preferred against the said judgment of the learned High Court Judge.

The learned Magistrate in his order dated 22 August 2005 has arrived at the conclusion that it is the burden of the appellant to establish in order to succeed in his claim for a right of cart way that he had used the same over a period of 10 years as

servitude. Section 75 of the Primary Court Procedure Act does not speak of the existence of servitude but the right in the nature of a servitude.

On a perusal of the determination of the learned Magistrate it is quite apparent that he has totally misunderstood the effect of Section 69 of the relevant Act read together with Section 75. For purpose of ready reference Section 75 of the Primary Court Procedure Act is reproduced below....

> 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. (Emphasis Added)

In the light of the above definition is quite clear that there is no burden on the appellant to establish servitude strictly as he has to prove a civil dispute. It is open to persons to prove such

a right either as in the case of a civil dispute or that he enjoyed the right at the time of obstruction. This interpretation has been given in the case of Ananda Sarath Paranagama vs D. Sarath Paranagama and Others CA. (PHC) APN 117/2013 - C.A. Minute dated 07.08.2014.

It was explicitly held in the above case that it is left to a party claiming a right of way to establish his right for purpose of obtaining a declaration under Section 69 aforementioned in two ways. Firstly, he may resort to the ordinary way of proof as is done in a right of the case in a civil court. In the absence of such proof, he may also prove have the satisfaction of court that the right of way in question had been enjoyed or used by him for the time being when the obstruction was placed. To this extent the learned Magistrate has misdirected himself on the question of law and the learned High Court judge has failed to address his mind. Had the learned judge of the High Court properly addressed his mind to this issue, he could possibly not have come to the conclusion that the appellant has failed to adduce exceptional circumstances.

In the circumstances, I am of the view that the appellant is entitled to succeed in this revision application. Accordingly, the revision application is allowed and it is sent back to the

Learned High Court Judge to consider the merits of it and enter judgment after hearing both parties.

There shall be no costs.

President/Court of Appeal

P.W.D.C. Jayathilaka, J.

I agree.

Judge of the Court of Appeal

KRL/-