

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

Lahuruge Mary Nona of
Thanamalwila,
Uva Kuda Oya.

2nd Party Petitioner-Petitioner

Court of Appeal Case No:
CA (PHC) 155/2014
HC Monaragala Revision
Application No: **27/2013**
MC Wellawaya Case No:
76577/2013

-Vs-

Arthur Mahendra Weligamage
Thanamalwila,
Uva Kuda Oya.

1st Party Respondent-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

Mahinda Samayawardhena J.

Counsel : Ranjan Suwandarathne, PC for the Petitioner.

J.A.J. Udawatta for the Party of the 1st Part Respondent-
Respondent.

Written Submissions: By the 2nd Party Petitioner-Petitioner on 04/09/2018

By the Party of the 1st Part Respondent-Respondent on
24/09/2019

Argued on : 19/09/2019

Judgment on : 23/10/2019

A.L. Shiran Gooneratne J.

The officer in charge of the Thanamalwila police filed an information in the Magistrates Court of Wellawaya, in terms of the provisions contained in Section 66(1)(a) of the Primary Courts Procedure Act No. 44 of 1979 (hereinafter referred to as the Act), over a disputed right of way between the 2nd Party Petitioner-Petitioner (hereinafter referred to as the Petitioner) and the 1st Party Respondent-Respondent (hereinafter referred to as the Respondent). The learned Magistrate by order dated 25/07/2013, held that the Respondent is entitled to the unobstructed access to the land which he is in possession. By order dated 03/12/2014, a revision application to set aside the said order filed by the aggrieved Petitioner was refused by the High Court of Monaragala. It is the said order that the Petitioner is seeking to canvass in this application.

The Respondent claims that he is in possession of an allotment of land adjoining his house, where he had constructed a warehouse and access to the land was on permission granted by the state which is obstructed by the Petitioner. By letter dated 05/12/2012, the Divisional Secretary of Wellawaya had informed the Thanamalwila Police that the access road to the land on which the warehouse is

built belongs to the Road Development Authority. The Petitioner in her statement to the Thanamalwila Police dated 05/06/2012, admits that construction material brought to build her house had obstructed the roadway to the warehouse and therefore has undertaken to clear the building material obstructing the said roadway within 3 days.

The learned Magistrate having taken into consideration the information, affidavits and documents filed by the respective parties has concluded that the Petitioner has admitted the existence of a warehouse which was used to store paddy. The existence of a roadway has been admitted by the Petitioner in the statements given to the Thanamalwila Police. The affidavit filed by the sub-post master of Uva-Kudaoya, confirms that the roadway was in existence since 1991.

It is observed that the Respondent had instituted a civil action bearing No. RE/ 1339 in the District Court of Monaragala against the Petitioner for ejection from the disputed land, which was dismissed for want of appearance. A revision application preferred against the said judgment was also dismissed.

Taking into consideration, the facts of the case the learned Magistrate correctly held that the question in issue needs to be determined in terms of Section 69 of the Act, in order to decide the right of access to the land.

During the hearing of this application the learned Presidents Counsel for the Petitioner submitted that the Respondent is not entitled to get a declaration in terms of Section 69 of the Act, since a party is not entitled in law to claim a servitude of right of way over a road reservation granted by the state.

The learned Counsel for the Respondent has referred to the case of *Ananda Sarath Paranagama v. Dhammadinna Sarath Paranagama and Others (CA (PHC) APN 117/2013 where A.W.A. Salam J.* held that;

“Unlike in the case of a dispute relating to possession of immovable property, no time frame has been laid down to the length of time during which the right should have been enjoyed in relation to the purported entitlement. In resolving such a dispute the Judge of the Primary Court is expected to determine as to who is entitled to the right which is the subject matter of the dispute and make an Order under Section 69(2).”

At page 11 of the said Judgment, it was further held that;

“There are two ways in which an entitlement can be proved 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.”*

The learned Counsel has also drawn attention to the decision in *Ramalingam v. Thangarajaha (1982) 2 SLR 693*, where the Court held that;

“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 main object of the proceedings under the Primary Courts Act is to prevent any breach of peace and to restore the party entitled to the right until the dispute is determined by a competent Court.

It is observed that in terms of Section 69(2) of the Act, a determination in respect of a right other than a right of possession is based on user rights acquired by the parties.

In *Fernando vs. Wickremasinghe (1998) 3 SLR 37*, on an application by the Plaintiff - Respondent to the District Court to restrain the Defendant - Petitioner from using the same right of way, Weerasuriya, J. observed with approval, the findings in *M.D.B. Saparamadu v. Violet Catherine Melder CA 688/42F CAM 22.03.96*, that;

"where a person who enjoyed a servitude was obstructed, he could bring an action against the person who obstructed him from interfering with the enjoyment of the servitude. However, it was laid down that a person who had no soil rights in respect of a road reservation could not maintain an action for a declaration that defendant was not entitled to a servitude of right of way over such road reservation."

In *Jamis v. Kannangara (1989) 2 SLR 350 Palakidnar J.* held that:

"the order that can be made under section 69(2) of the Act in regard to a right to any land other than a right to possession is a declaration of entitlement of such

right after determination by a court subject to a final determination by a competent court and prohibition of all disturbance or interference with the exercise of such right by such a party”

Therefore, as provided for in part VII of the Act, the proceedings held before the learned Magistrate was to determine as to the person entitled to the servitude of right of way which is the subject matter of the dispute and make an order in terms of Section 69 of the Act. The said entitlement of a right to possession would in no way preclude the determination of rights of parties before a competent Civil Court.

In the circumstances, I am of the view that the learned Magistrate and the learned High Court Judge correctly evaluated the relevant facts in arriving at their conclusions, which are consistent with the law. Therefore, I affirm the order given by the learned High Court Judge and the Court below and dismiss this application.

Application is dismissed with costs fixed at Rs. 10,000/-

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL