

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

In the matter of an application under and in
terms of Article 154(P) which should be
read with Article 138 of the Constitution of
the Democratic Socialist Republic of Sri
Lanka

Court of Appeal Case No:

CA (PHC) 136/2012

PHC Galle Case No:

663/2008 (REV)

MC Galle Case No: **1607**

1. Dewa Ariyawathi de Silva,
Paranawatta,
Bussa.

2. Siddhadura Inoka Priyadarshani,
Paranawatta,
Bussa.

3. Dewa Ostin,
Weligodawatta,
Kahawa.

1st, 2nd and 4th Party Respondent-

Petitioner-Appellants

-Vs-

3rd Party Respondent-Respondent-Respondent

Complainant-Respondent-Respondent

Counsel : O.L. Premaratne for the Respondent-Petitioner-Appellants.

Written Submissions: By the 1st, 2nd and 3rd Respondent-Petitioner-Appellants
on 02/10/2019

Argued on : 28/11/2019

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A.L. Shiran Gooneratne J.

The Officer in Charge of the Rathgama Police filed information 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) in the Magistrates Court of Galle against the 1st, 2nd and 3rd Respondent-Petitioner-Appellants (hereinafter referred to as the Appellants) and the Respondent-Respondent-Respondent, (hereinafter referred to as the Respondent) over a disputed right of way. The learned Magistrate by order dated 08/07/2008, held that the Appellants were entitled to use the common right of way granted by a final decree in a partition action and has no other alternate right of way as claimed. The Appellants being aggrieved by the said order filed a revision application in the Provincial High Court of the Southern Province holden in Galle. By order dated 11/09/2012, the learned High Court Judge of Galle, dismissed the said application. It is the said order that the Appellants are seeking to canvass in this Court.

The information filed by the police dated 18/01/2008, refers to an application in terms of Section 66(1)(a) of the Act. The police having conducted an investigation to the complaint made by 1st Appellant was satisfied that there is an imminent breach of the peace or a likelihood, and therefore has filed information before the learned Magistrate.

The Appellants claim that a roadway existed over a co-owned land described as Lot 15 in survey Plan No. 528 A, marked "3 ⊗ 1", for over 10 years. The 2nd Appellant submits that she resides in Lot 27 and 28 and accessed the disputed roadway which is across Lot 15 in the said plan. The Plan marked "3⊗1",

tendered to the District Court in partition action bearing No. 16189, clearly shows a roadway as Lot 31 accessible by Lot 27 and 28, which leads to the V.C. road. The Appellants in addition to the said existing road are claiming a right of way over the co-owned property depicted as Lot 15.

From the sketch and the observations submitted by the police officer, it is observed that there is a roadway marked 'C' (At page 155 of the brief). The learned Magistrate has correctly identified the said road which has access to Paranawatta Road. The certificate issued by the Gramasevaka of the area dated 23/04/2008, certified by the Divisional Secretary Hikkaduwa, confirms that the 2nd Appellant resides in Lot 27 and 28 and has access to the said land through Lot 31, the common right of way. Therefore, the contention of the 2nd Appellant that there is no other road to access Lot 27 and 28 other than the disputed roadway is unfounded.

The Appellants rely on the sketch produced by the police officer and the affidavits filed in support marked "2 ⊕ 2" and "2 ⊕ 3" to substantiate their claim to establish a right of way by prescription. However, the documents and the evidence before Court does not identify a 10 to 12 feet wide roadway over Lot 15, adversely used by the Appellants.

In *Thambapillai Vs. Nagamanipillai* 52 NLR 225, it was held that;

"it is a pre-requisite to the acquisition of a right of way by prescription that a well-defined and identifiable course or track should have been adversely used by the owner of the dominant tenement for over ten years."

"the evidence to establish a prescriptive right of way must be precise and definite. It must relate to a define track and must not consist of proof of mere straying across open land at any point which is at the moment most convenient."
(*Kandaiah Vs. Seenitamby 17 NLR 29*)

The Appellants can obtain a declaration to a right of way on prescription or on necessity by institution of an action in the District Court. It is observed that the right of way given by Lot 31 was left in common by a partition decree. Presently, the parties are before the District Court in partition action No. 16189, to vindicate their rights over the disputed right of way over co-owned Lot 15. In the circumstances, I find no reason to interfere with the findings of the learned High Court Judge. Therefore, I affirm both the orders given by the Courts below and dismiss this application.

Application dismissed without costs.


JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.


JUDGE OF THE COURT OF APPEAL