

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

In the matter of an appeal in terms of Article 138 read with Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer in Charge  
Sri Lanka Police,  
Aluthgama.

**Petitioner**

**C.A. No. PHC 167/2013**

**H.C. Kalutara No. HCRA 62/09**

**MC. Kalutara No. 04/09**

-Vs-

Ahmed Bawa Mohamed Asham,  
No. 97/05, Hospital Street,  
Seenawatta, Aluthgama.

**First Party - Respondent**

Abdul Hasan Mohamed Mubarak,  
No. 43, Masjith Road,  
Seenawatta, Aluthgama.

**Second Party - Respondent**

1. Mohamed Laffir Alim Abdul Ahla,  
No. 20/4, Dharmarama Road,  
Kalutara.
2. Abdul Hasan Mohamed Fazmi  
No. 79/03, Hospital Street,

Seenawatta, Aluthgama.

**Second Party-Intervenient-**

**Respondents**

**AND**

Abdul Hasan Mohamed Mubarak,  
No. 43, Masjith Road,  
Seenawatta, Aluthgama.

(Appear by his duly appointed Power  
of Attorney holder, Seinulabdeen  
Marikkar Mohamed Rameez of No.  
43, Masjith Road, Seenawatta,  
Aluthgama).

**Second Party - Respondent -**  
**Petitioner**

-Vs-

Officer in Charge,  
Sri Lanka Police,  
Aluthgama.

**Petitioner - Respondent**

Ahmed Bawa Mohamed Asham,  
No. 97/05, Hospital Road,  
Seenawatta, Aluthgama.

**First Party - Respondent -**  
**Respondent**

1. Mohamed Laffir Alim Abdul Ahlar,

No. 20/4, Dharmarama Road,  
Kalutara.

2. Abdul Hasan Mohamed Fazmi  
No. 79/03, Hospital Road,  
Seenawatta, Aluthgama.

**Second Party - Intervenient -**  
**Respondent - Respondents**

**AND NOW BETWEEN**

Abdul Hasan Mohamed Mubgarak,  
No. 43, Masjith Road,  
Seenawatta, Aluthgama.

(Appear by his duly appointed  
Power of Attorney holder,  
Seinulabdeen Marikkar Mohamed  
Rameez of No. 43, Masjith Road,  
Seenawatta, Aluthgama).

**Second Party - Respondent -**  
**Petitioner - Appellant**

-Vs-

Officer in Charge  
Sri Lanka police  
Aluthgama.

**Petitioner - Respondent -**  
**Respondent**

Ahmed Bawa Mohamed Asham,  
No. 97/05, Hospital Road,

Aluthgama.

First Party - Respondent -  
Respondent- Respondent

3. Mohamed Laffir Alim Abdul Ahla,  
No. 20/4, Dharmarama Road,  
Kalutara.
4. Abdul Hasan Mohomad Fazmi  
No. 79/03, Hospital Road,  
Seenawatta, Aluthgama.

Second Party - Intervenient -  
Respondent - Respondent-  
Respondents

<b>BEFORE</b>	:	Shiran Gooneratne, J. &  Dr. Ruwan Fernando J.
<b>COUNSEL</b>	:	Sanjeewa Dissanayake with Dilini Premasiri for the 2 <sup>nd</sup> Party Respondent-Petitioner-Appellant  Amindika Rathnayake for the 1 <sup>st</sup> Party Respondent-Respondent- Respondent
<b>ARGUED ON</b>	:	21.07.2020
<b>WRITTEN SUBMISSIONS</b>	:	07.08.2020 (by the 2 <sup>nd</sup> Party Respondent-Petitioner-Appellant)

21.09.2020 (by the 1<sup>st</sup> Party  
Respondent-Respondent-  
Respondent)

**DECIDED ON : 30.09.2020**

**Dr. Ruwan Fernando, J.**

**Introduction**

[1] This is an appeal from the judgment of the learned High Court Judge of Kalutara dated 08.10.2013 dismissing the revision application filed by the 2<sup>nd</sup> Party-Respondent-Petitioner-Appellant to have the order of the learned Primary Court Judge of kalutara dated 17.12.2009 set aside in the exercise of its revisionary jurisdiction under Article 154P (3) (b) of the Constitution.

[2] The Officer in Charge of Aluthgama Police Station filed an information in the Magistrate's Court of Kalutara 04.02.2009 under the provisions of Section 66 (1) (a) of the Primary Courts' Procedure Act No. 44 of 1979 to the effect that there is a dispute over a roadway between the 1<sup>st</sup> Party-Respondent-Respondent-Respondent and the 2<sup>nd</sup> Party-Respondent-Petitioner-Appellant, and that his efforts to effect a peaceful settlement failed and that due to this dispute, a serious breach of the peace is threatened or is likely to occur.

**Affidavits of the Parties**

[3] The 1<sup>st</sup> Party-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) filed his affidavit and claimed, *inter alia*, that he is the owner of a land called "Mahagederawatta *alias* Ellupitiya" depicted as lot 1 in plan no. 4160 made by W. Seneviratne, Licensed Surveyor and the 2<sup>nd</sup> Party-Respondent-Petitioner-Appellant (hereinafter

referred to as the Appellant) is the owner of lot 2 depicted in the same plan. He claimed that the right of way called "Bakinigahawatta" which is depicted as lot 4 in plan no. 4160 marked P3 is leading to his land from the hospital road and that he has been using the said right of way for over a period of 100 years without any disruption. He further stated that the said right of way is also shown as "PATH" in plan no. 2720 made by U.M.de Silva, Licensed Surveyor for the purpose of the partition case bearing no. P/489 (P5 and P6). The Respondent alleged that the said right of way which is the only means of access to his land was blocked by the Appellant by erecting a foundation and a gate across the said right of way and sought an order for the removal of the said obstructions.

[4] The Appellant filed his affidavit and while admitting that his land is lot 2 depicted in plan no. 4160 marked 2P4/P3, claimed that the disputed roadway is a private road and the Respondent never used any right of way as a means of access to his land. He further claimed that the Respondent was a defendant to the partition case bearing no. P/7402 which was filed to partition the southern portion of the Respondent's land called "Mahagederawatta" depicted in plan no. 386 made by U.M.de Silva, Licensed Surveyor. He stated in the affidavit that the defendants in the said partition case claimed that they were using a road from the northern and western side of their land as a means of access to their land and sought the permission of the court to obtain water and electricity connection to their property along the said road which is more fully depicted in plan no. 386.

[5] The Third-Intervenient-Respondent and the fourth-Intervenient-Respondent were added as intervenient Respondents and they filed

their respective affidavits in support of the position taken by the Appellant.

### **Order of the Primary Court**

[6] After the filing of affidavits, counter affidavits, marked documents and written submissions, the learned Magistrate by order dated 17.12.2009 identified the subject matter of the action as a right of way dispute, which is depicted as lot 4 in plan No. 4160 made by W. Seneviratne, Licensed Surveyor. After having evaluated the affidavits, documents and written submissions, the learned Magistrate held that the Respondent is entitled to use said right of way as a means of access to his land depicted as lot 4 in plan no. 4160 from the Hospital Road and the Appellant had obstructed the said right of way.

[7] Accordingly, the learned Magistrate directed the Appellant to remove all obstructions and not to interfere with the exercise of the said right of the 1<sup>st</sup> Party Respondent other than under the authority of an order or decree of a competent court.

### **Revision Application to the Provincial High Court**

[8] Being aggrieved by the said order of the learned Magistrate of Kalutara, the Appellant made an application in revision to the Provincial High Court of Kalutara and after inquiry, the learned High Court Judge by his judgment dated 10.08.2013 affirmed the order of the learned Magistrate of Kalutara and dismissed the revision application.

### **Appeal to the Court of Appeal**

[9] Being aggrieved by the said judgment of the learned High Court Judge of Kalutara dated 10.08.2013, the Appellant has preferred this Appeal to this Court.

### **Grounds of Appeals**

[10] At the hearing of this appeal, the learned Counsel for the Appellant sought to challenge the judgment of the learned High Court Judge on the following grounds:

1. The learned High Court Judge has failed to consider that the learned Magistrate has erred in holding that the Respondent has and his predecessors had used the disputed right of way for more than 100 years when the Respondent has failed to establish his entitlement to the disputed right of way in terms of section 69 of the Primary Courts' Procedure Act;
2. The learned High Court Judge has failed to consider that the learned Magistrate has erred in not considering the fact that the disputed right of way is a private right of way to the Appellant's land;
3. The learned High Court Judge has failed to consider that the learned Magistrate has erred in not considering the fact that the Respondent has an alternative means of access to his property as shown in plan no. 386 made by M.M.de Silva, Licensed Surveyor;
4. The learned High Court Judge has erred in holding that the Appellant has failed to establish exceptional circumstances which warrant the intervention of the High Court.

### **Identity of the subject matter of the action**

[11] It is not in dispute that the subject matter of the dispute relates to a right of way called "Bakinigahawatta Road" which is depicted as lot 4 in

plan no. 4160 made by W. Seneviratne, Licensed Surveyor, dated 19.06.1985, for the purpose of partition action bearing no. 4849/P in the District Court of Kalutara marked P3. The learned Magistrate has clearly identified the subject matter of the dispute in his order and held that the disputed right of way is depicted as lot 4 in Plan No. 4160 made by W. Seneviratne, Licensed Surveyor, dated 19.06.1985, for the purpose of partition action bearing no. 4849/P in the District Court of Kalutara marked P3. The subject matter of the dispute is, thus, in regard to a right of way which falls within the ambit of section 69 of the Primary Courts' Procedure Act.

### **Scope of the Inquiry under Section 69 of the Primary Courts' Procedure Act**

[12] Before I proceed to discuss the main points urged by the Counsel for the Appellant, it is important to identify the scope of the inquiry under section 69 of the Primary Courts' Procedure Act. Section 69 of the said Act relates to the determination of any right to any land or part thereof, other than the right to possession of such land or part thereof under section 68 of the Act.

[13] The important question that arises for determination is the nature of the right to be established by a party who claims a right of way to any land other than the right to possession in obtaining a declaration as contemplated in section 69 of the Act. Section 69(1) reads as follows:

*"(1) 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 or 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);*

(2) 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".

[14] In an inquiry into a dispute as to a right of way to any land, where a breach of peace is threatened or is likely under Part VII of the Primary Courts' Procedure Act, the main point for decision is who is entitled to the right of way which is the subject of dispute between the parties. In *Ramalingam v. Thangarajah* 1982 (2) Sri LR 693, Sharvananda, J (as he then was) interpreted the above provision as regards the nature of the right, a Judge of the Primary Court is expected to determine under section 69. Sharvananda, J. at page 699 stated:

*"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 contradiction 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 (2)".*

[15] Salam, J. in referring to the decision in *Ramalingam v. Thangarajah* (supra) held in *Ananda Sarath Paranagama v. Dhammadhamma Sarath Paranagama and others* 2011 (1) Sri LR 284 that the two ways in which an entitlement to enjoy a right under section 69 can be proved in the Primary Court 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.

[16] In determining whether a person is to be declared entitled to a right under section 69(2), the Judge of the Primary Court is obliged to consider first, as to which party has acquired the disputed right of way by offering proof of his entitlement as done in a civil action until he is deprived of such right by virtue of an order or decree of a competent court. Even if there is no proof of his entitlement to any acquisition of a right of way as done in a civil action, the Judge of the primary Court is also obliged to consider whether, he had offered any proof that he is entitled to exercise such right **for the time being** until he is deprived of such right by virtue of an order or decree of a competent court.

[17] The nature of the dispute affecting the right of way to any land in section 69 relates only to a dispute *in the nature of a servitude* as defined in section 75 of the Act. Section 75 of the primary Courts Procedure Act reads 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 thereof or as to the right to cultivate any land or part of a land or as 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".*

[18] The right intended to be declared under section 69 is definitely **not with regard to servitude *per se*, but a right in the nature of a servitude** and thus, the period of 10 years plays no important role as it is not a dispute touching upon a servitude relating to a right of way like in a civil action (*Ananda Sarath Paranagama v. Dhammadhamma Sarath Paranagama and others* (supra)).

[19] The procedure of an inquiry under Part VII of the Act is *sui generis* and thus, the procedure to be adopted and the manner in which the proceedings are to be conducted are clearly set out in sections 66, 71 and 72 of the Act (*Ramalingam v. Thangarajah* (supra)). Section 72 prescribes the material on which the determination under section 68 and 69 of the Act is to be based and such determination under Part VII 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 submissions as may be permitted by the Judge of the Primary Court in his discretion.

[20] A wide discretion has been given to the Primary Court judge under section 72 of the Act to decide on the type of evidence and material on which he should act in making his determination under section 68 or 69 of the Act. As Sharvananda, J. observed in *Ramalingam v. Thangarajah* (supra) at page 701, “The determination should, in the main, be founded on the “information filed and the affidavits and documents furnished by the parties”. Adducing evidence by way of affidavits and documents is the rule and oral testimony is an exception to be permitted only at the discretion of the Judge. That discretion should be exercised judicially, only in a fit case and not as a matter of course and not be surrendered to parties or their counsel”.

[21] While the rule is that the determination should be founded on the information filed and the affidavits and documents furnished by the parties, oral testimony is an exception to be permitted only at the discretion of the

judge and such discretion should be exercised judicially only in a fit case and not as a matter of course (*Ramalingam v. Thangarajah* at p. 701). When possession or dispossession by any of the parties at the relevant time is disputed, then the Court may permit oral evidence of the parties to be led and the witnesses should be directed to that question only, namely, for the purpose of ascertaining the true position without however, converting the inquiry into a full scale trial of civil issues, as in a civil case (supra).

### **Entitlement of the Respondent to the disputed right of way**

[22] It is not disputed that the Respondent is residing in lot 1 depicted in plan no. 4160 and the Appellant is residing in lot 2 depicted in the same plan. Lot 4 depicted in the said plan is the disputed right of way which is situated on the northern boundary of the Appellant's land and it is shown as a means of access from the Centre Road as depicted in plan no. 4160 marked P3. It is also not in dispute that the disputed right of way is shown as the "PATH" in plan no. 2720 marked P5 made by M. P. de Silva Licensed Surveypr dated 25.01.1983 and the said "PATH" is lot "A" depicted in the said plan no. 2720 marked P5.

[23] At the hearing the learned Counsel for the Appellant heavily relied on the Respondent's deed bearing no. 1790 dated 01.10.1997 marked P1 and plan no. 4160 marked P3/2P4 and submitted that the Respondent has failed to establish that he had a right to use the disputed right of way. He submitted that the Respondent has failed to prove any existence of a right of way in his deed bearing No. 1790 dated 01.10.1997 attested by Y.S.de Silva, Notary Public (P1) as it does not refer to any right of way on the northern boundary of his lot "1A2" depicted in plan no. 8926 dated 07.10.1995.

[24] According to the said deed bearing no. 1790 dated 01.10.1997 marked P1, the vendors of the said deed are Mohamed Marikkar Fathhuma Haneeda, Aboobucker Lebbe Ahamed Bawa Mohamed Munawwa Ali, Aboobucker Lebbe Ahamed Bawa Packeer Zamsil Luha, Aboobucker Lebbe Ahamed Bawa Packeer Yasmin. The vendees are Aboobucker Lebbe Ahamed Bawa Mohamed Aslam (Respondent) and his brother Aboobucker Lebbe Ahamed Bawa Mohamed Iynas. The said deed describes the relevant part of the schedule as follows:

*"All that right and interest into and upon all that divided and defined allotment of land called lot 1A2 of Mahagederawatta alias Elupittiyawatta as depicted in Plan No. 8076 dated 07.10.1995 and made by W. Seneviratne, Licensed Surveyor, .....bounded on the North by Illayawatta, East by Irakkumara-Kkalayawatta and Pelawatta wherein Kabbe Lebbe Marikkar resided, South by Lot 1C and Lot 1B of the same land, and on the West by Lot 1A1 of the same land and containing in extent Thirty Three Perches (A-0 R 0 P- 33)."*

[25] The learned Counsel for the Appellant further submitted that plan no. 4160 shows that the northern boundary of lot 1 is demarcated by a "wire fence" and thus, the access to Lot 1 over Lot 4 of the said plan is not shown on the face of the said plan. A perusal of the plan no. 4160 dated 19.06.1985 however, reveals that it was a preliminary plan prepared for the District Court of Kalutara partition case bearing no. P/4849 and the disputed road ends at the entrance to lot 1, which is the land of the Respondent as depicted in the said plan no. 4160.

[26] Although the learned Counsel for the Appellant submitted that the boundary of lot 1 is demarcated by a "wire fence", the Surveyor Mr. Seneviratne who prepared the said plan no. 4160 on 19.06.1985 has clearly stated in his Report marked P4 that the **means of access to lot 1 is along lot**

**4 over lot 2 at its North Western point.** Item No. 10 of his Report at page 184 of the brief reads as follows:

*"10-Existing means of access to the land from the nearest Public Road: Centre Road from the Eastern boundary of 2 and 3 in my plan. The access to lot 1 is Lot 4 and over Lot 2 at its North Western point".*

[27] A perusal of the oldest Plan No. 2720 dated **25.01.1983** marked P5 prepared for the D.C. Kalutara Case No. 4819 by U.M. de Silva, Licensed Surveyor further reveals that lot "B" in extent of 1 rood and 16 perches is the identical lot 2 depicted in plan no. 4160 marked P3. Lot "A" depicted in plan no. 2720 is the "PATH" which goes along the northern boundary of lot "B" depicted in plan no. 2720. The said "PATH" is the identical lot 4 in extent of 3.62 depicted in plan no. 4160 marked P3. It seems to me that there is no indication whatsoever, in plan no. 2720 that the northern boundary of lot "B" in plan no. 2720 is demarcated by a "wire fence" as claimed by the Appellant. It is to be noted that both Surveyors had not indicated in their reports that lot 4 depicted in plan no. 4160 or "PATH" depicted in plan no. 2720 is the means of access to the Appellant's land.

[28] On the other hand, the said two plans and the said two reports clearly confirm the position of the Respondent that the disputed right of way had been in existence on the ground when both Surveyors made their plans in **1983 and 1985** and that the said right of way is the only means of access to lot 1 depicted in plan no. 4160 marked P3.

[29] Moreover, the Grama Sevaka Niladhari, Beruwela in his Report marked P22 has clearly confirmed that (i) the disputed right of way existed when he assumed his duties in 1993, as a means of access to the Railway Station from the Hospital Road which is also the Centre Road referred to by the Police Officer in his Report at page 109 of the brief and Surveyor

U.M.de Silva in his plan no. 2720 marked P5; (ii) the said right of way existed over the land called “Mahagederawatta *alias* Ellupitiyawatta” of which the Respondent is constructing a house; (iii) the entire land called “Mahagederawatta *alias* Ellupitiyawatta” was blocked out and the southern and western boundaries of the said land was connected to “Bathalagahawatta Road” blocking the disputed right of way; (iv) the Respondent’s land was blocked out adjoining and connecting to the disputed right of way called “Bakinigahawatta Road”; (v) the Appellant and his sibling had blocked the entrance to the disputed right of way by erecting a foundation and two gates. His observations at page 204 and 205 of the brief are as follows:

“අංක 97/8 රෝහල පාර සිනවත්ත අලුත්ගම පදිංචි A.B. මොනොමධි අභාම් සහ අංක 79/2 රෝහල පාර සිනවත්ත අලුත්ගම පදිංචි A.H. මොනොමධි මූබාරක් මහනා අතර රෝහල පාර් සිට ආරම්භ වන බඩිනිගහවත්ත පාර ඇති අනුර මාර්ගයට ආරවුලක් හටගනී ඇත. මම 1993 ව්‍යෙෂයේ සිනවත්ත ග්‍රාම නිලධාරී වසමට සේවයට පැමිණුන වට මෙම බඩිනිගහවත්ත පාර් සිට දුම්රිය මාර්ගය දක්වා ගමන් කිරීමට අඩි පාරක් තිබුණි. එම අඩි පාර වැඩි තිබුණ් මොනොමධි අභාම් මහනා නව නිවසක් ඉදිකරගෙන යන මහයෙදරවත්ත තොනොත් එල්ලපිටියවත්ත නැමැති ඉඩම භරහුයි. 1993 ව්‍යෙෂය වන වට මෙම ඉඩම නිවාස තොනොති අක්කර 1 1/2 ක් පමණ විශාල පොල් ඉඩමකි. පසුව මෙම ඉඩම කොටස් කර විකිණීමේදී මෙම අඩි පාර අවහිර වී ඇත. මෙම මහයෙදරවත්ත තොනොත් එල්ලපිටියවත්ත ඉඩම කොටස් කිරීමේදී ඉඩමේ දකුණු මායිමන් සහ බස්නාහිර මායිමන් බහළවත්ත පාරට සම්බන්ධ වන ලෙස ඉඩම කොටස් කර ඇත. මොනොමධි අභාම් මහනා නිවාස ඉදිකරගෙන යන ඉඩම කොටස බඩිනිගහවත්ත පාර නැමැති මාර්ගයට සම්බන්ධ වන ලෙස කොටස් කර ඇත. මෙම ආරවුල ඇති වන්නේ මොනොමධි අභාම් මහනා මහුගේ නිවාස ඉදි කිරීමට බඩිනිගහවත්ත පාර භාවිත කරමින් ගොඩිනාගේ ද්‍රව්‍ය ගෙන ඒමේදී ය. මෙහේ මොනොමධි මූබාරක් මහනා සහ මහුගේ සහෙයුරු සහෙයුරියන් බඩිනිගහවත්ත පාර ඔවුන්ගේ ඉඩමට ඇති යෙදුළුවෙන් පාරක් බව පවසම්න් මොනොමධි අභාම් මහනා මෙම පාර භාවිත කිරීමට බාධා කරන ලදී. පසුව මොනොමධි අභාම් මහනාගේ ඉඩමේ උනුර මායිම දිගේ තාප්පයක් බැඳීමට මොනොමධි මූබාරක් මහනා අන්තිචාරමක් දමන ලදී. මෙම අන්තිචාරම නිසා මොනොමධි අභාම් මහනාගේ ඉඩමට බඩිනිගහවත්ත පාර දිගේ ඇති පිටිසුම් මාර්ගය අවහිර වෙයි. බඩිනිගහවත්ත පාර් ගේවුපුල දෙකක් දමා පාර අවහිර කර ඇත.

[30] According to the letter issued by the Member of the Beruwela Pradeshiya Sabawa who was also the Chairman of the Aluthgama Town Council marked P19, he had used the disputed “Bakinigaha Road” as an

access road to reach lands situated on the northern side of the Hospital Road from 1960. In addition, the letters marked P20 and P21 issued by the Secretary of the Beruwela Pradeshiya Sabawa confirm that upon an inspection being made by the Council, it had been revealed that the Appellant had blocked the disputed road which is used as private a right of way by erected a gate at the entrance to the appellant's land.

[31] Upon a consideration of the above-mentioned material, it is crystal clear that the Respondent has produced material before the Magistrate's Court and proved that the disputed right of way had been in existence on the ground for a long period of time as a means of access to lot 1 depicted in Plan No. 4160 and Respondent and his predecessors-in-title had been using the disputed right of way for a long period of time as correctly decided by the learned Magistrate in his order.

#### **Relevancy of the disputed right of way as a private road**

[32] The learned Counsel for the Appellant further submitted that the disputed road is a private road to the Appellant's land and thus, the 1<sup>st</sup> Respondent cannot claim a right of way over his private land. The Appellant relied on the second letter issued by the Secretary of the Beruwela Pradeshiya Sabawa marked P20 to establish that the disputed right of way is a private road and thus, the Respondent is not entitled to claim the disputed right of way.

[33] The letter marked P20 only states that upon a site inspection, it was revealed that the right of way that had been blocked is a private road. The letter issued by the same Secretary of the Beruwela Pradeshiya Sabawa marked P21 states that upon a site inspection, it was found that the Appellant had blocked the disputed right of way and thus, the Pradeshiya Sabawa had directed the Appellant not not block the right of way.

[34] The letter relied on by the Appellant marked P20 does not support the Appellant's case whatsoever, as it only confirms that the disputed right of way is not a common road owned by the Pradeshiya Sabawa but a private road. The Appellant has not, however, produced a single document to contradict the entries made in Survey plan no. 4160 or plan no. 2760 and establish that the disputed right of way is being exclusively used by him as a right of way or that such entries in the Surveyors' Reports are erroneous.

[35] As noted, plan no. 4160 and plan no. 2720 do not indicate that the disputed right of way is the means of access to the Appellant's lot 2 depicted in plan no. 4160 or his lot B depicted in plan no. 2720. On the other hand, the report at page 184 clearly indicates that access to lot 1 is along lot 4 over lot 2 at its north western point. For those reasons, the learned Magistrate has correctly held that the letter marked P20 does not establish the fact that the disputed right of way is being exclusively used by the Appellant.

#### **Existence of an alternative roadway**

[36] The learned Counsel for the Appellant further relied on the contents of the petition filed by the defendants, including the Respondent in the District Court of Kalutara case bearing no. P/7402 and the Plan No. 386 marked "E" to establish that there exists a regular road as a means of access to the Respondent's land as they had claimed utilities to their property along the "Bathalawatta Road" which is situated on the Southern portion of "Elluvapitiya". The learned Counsel for the Appellant brought to our attention paragraphs 1, 2 and 4 of the said Petition, which read as follows:

1. බෙදීමට යෝජිත මහගේදරවත්ත නොහැන් එල්ලුපිටිය වත්තේ දකුණු මායිම 04.11.01 සහ 2005.03.21 සහ 04.04 යන දිනයන්හි මෙන සාදා මෙම නඩුවට ගොනුකර ඇති අංක 386 දරුනු පිළුවේ නිවාසවල සිට රෝහල පාර “Road” වගයෙන් පෙන්වා ඇති මාර්ග ප්‍රවේශය ඉහත සඳහන් පෙන්සම්කරුවන් සහ මුවන්ගේ පෙර උරුමකරුවන් විසින් වසර 30කට අධික කාලයක් අඛණ්ඩව, තිරුවල්, බාධාවකින් තොරව බෙදීමට යෝජිත ඔබමේ උනුර බස්නාහිර මායිමේ පිනිරා ඇති මුවන්ගේ නිවාසවල සිට රෝහල පාර දක්වාන් නැවත රෝහල පාර් සිට මුවන්ගේ නිවාස දක්වාන් යාම ඒම තිරීමේ පර්වගනාවක් වගයෙන් භූක්ති විදින දේ බවත් කියා සිටී.
2. එකී මාර්ග ප්‍රවේශය වස්සේ මුවන්ගේ නිවාසවලට යාම ඒම තිරීම සඳහා පර්වගනාවයක් වගයෙන් වසර 30 කට අධික කාලයක් භූක්ති විදින බවත් කියා සිටී.
4. තවද මෙම පෙන්සම්කරුවන්ගේ නිවාසවලට විදුලිය ලබා ගැනීම සඳහා විදුලි කතු සිටුවා ඇත්තේ ද මෙම මාර්ග ප්‍රවේශය වස්සේ බවත් වැඩිදුරටත් කියා සිටී.

[37] The Appellant has, however, admitted in his first affidavit dated 18.03.2009 that the assessment number of the Respondent's house is 97/08 and 4 of his siblings are residing in houses bearing assessment numbers 97/05, 97/06 and 97/07. A perusal of the Police Sketch at page 109 of the brief, the sketch prepared by the Grama Sevaka Niladhari at page 205 of the brief and the Appellant's own sketch marked 2P1 and 2P1 at pages 42 and 208 of the brief clearly reveal that while the Respondent's house is situated facing the disputed road, his siblings' houses are situated behind his land and facing the “Bathalawatta Road”.

[38] The Report of the Grama Sevaka Niladhari marked P22 clearly confirms that when the larger land called “Mahagederawatta” was blocked out, the Respondent's land was blocked out adjoining and connecting to the “Bakinigahawatta Road” and the Appellant had blocked the right of way at the entrance to the Respondent's land. Under such circumstances, the learned Magistrate has correctly decided that the Respondent cannot be deprived of his right of way for the mere reason that he had obtained water and electricity connection along the “Bathalawatta Road”.

[39] As noted, when a party is seeking relief under section 69 of the Primary Courts' Procedure Act, it is not necessary to establish his right in a manner as required in a District Court case. All what the Court has to determine is whether a party had acquired a right of way or whether he is entitled, **for the time being**, to exercise a right of way in the nature of servitude until such party is deprived of such right by virtue of an order or decree of a competent court.

[40] Section 74 of the Act provides that an order made under section 68 or 69 of the Act "shall not prejudice any right or interest in any land or part of a land which any person may be able to establish in a civil suit. Thus, it is clear that the order to be made by the Primary Court Judge under section 69 of the Act is a temporary one and the objective is to prevent a breach of peace until such time a court of competent jurisdiction resolves the dispute on a permanent basis.

[41] The Respondent has adduced sufficient material to establish the existence of the disputed right of way for a long period of time and that he and his predecessors had been using the said right of way depicted as lot 4 in plan no. 4160 marked P3 as a means of access to his land and thus, he is entitled, for the time being to exercise that right until a court of competent jurisdiction resolves the dispute on a permanent basis.

[42] When the Respondent has established that he is entitled to use the disputed right of way which is the subject of the dispute, he shall be declared entitled to the said right of way as correctly decided by the learned Magistrate. The Respondent has further established that the Appellant had blocked the disputed right of way by erecting a foundation and two gates across the right of way and thus, the Judge of the Primary Court is obliged to prohibit all disturbance or interference with the exercise of such right and remove all such disturbance as required by section 69(2) of the Act.

## **Exceptional Circumstances**

[43] The final submission of the learned Counsel for the Appellant was that was that the learned High Court Judge was wrong in holding that the Appellant has failed to adduce any evidence as to the existence of any exceptional circumstances which warrant the intervention of Court by way of revision.

[44] The Appellant sought to exercise the revisionary jurisdiction of the High Court to have the order of the learned Magistrate set aside. It is true that in the present case, no appeal lies against the order of the learned Magistrate made under section 69 of the Primary Courts Procedure Act and thus, his only remedy is to come by way of a revision. It is trite law that the purpose of revisionary jurisdiction is supervisory in nature and that the object is the proper administration of justice (*Attorney-General v. Gunawardena* (1996) 2 Sri LR 149, at p. 156). In *Marian Beebee v. Seyed Mohamed* 58 NLR 36, Sansoni CJ has clearly stated the reasons for the exercise of the extraordinary power of revisionary jurisdiction by Appellate Courts as follows:

*"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that unless the power is exercised injustice will result."*

[45] In *Rasheed Ali v. Mohamed Ali* (1981) 1 Sri LR 262 (CA) Soza, J. referring to the decisions in *Atukorale v. Samynathan* (1939) 41 N.L.R. 165, *Silva v. Silva* (1943) 44 N.L.R. 4, *Fernando v. Fernando* (1969) 72 N.L.R. 549 and *Rustom v. Hapangama* (1978-79 (2) Sri LR 225) stated at

page 34 that “it is well established that the powers of revision conferred on this Court are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal where it lies has been taken or not. But this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the Court.”

[46] On appeal to the Supreme Court, Wanasundera, J. while affirming the views expressed by Soza, J. stated in *Rasheed Ali v. Mohamed Ali* (1981) 1 Sri LR 262 (SC) at page 265:

*“The powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. Where the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances.. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm.”*

[47] On the other hand, there are other instances, where the Courts have held that the Appellate Court has power in revision to set aside an erroneous decision of the District Court. In *Ranasinghe v. Hentry* (1896) 1 NLR 303, it was held that where order of the trial Court is wrong *ex facie*, it will be quashed by way of revision even though no appeal may lie against such order. In *Sinnathangam v. Meeramohaideen* 60 NLR 393, T.S.Fernando, J. stated that:

*“The Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security.”*

[48] In *Welikakala Withanage Shantha Sri Jayalal and Another v. Kusumawathie Pigera and Others* (CA (PHC) APN 69/2009 decided on 23.07.2013, Salam, J. held at pages 5-6 that

*"It does not mean that the Petitioner who invokes the revisionary powers of the court should in his petition state in so many words that "exceptional grounds exist" to invoke the revisionary jurisdiction in addition to pleading the grounds on which the revision is sought... It is actually for the court to find out whether the circumstances enumerated in the petition constitute exceptional circumstances."*

[49] Where the order of the Primary Court Judge is shown to be *ex facie* erroneous, it would constitute an exceptional circumstance warranting the intervention of the High Court and thus, the High Court is bound to revise such erroneous order, as the order was allowed to operate, would cause a miscarriage of justice.

[50] The learned High Court Judge in my view has analysed the order of the learned Magistrate to find out whether the circumstances enumerated in the petition by the Appellant in the High Court constitute exceptional circumstances. As noted, the Appellant has failed to satisfy that the order of the learned Magistrate is erroneous and thus, learned High Court Judge was correct in holding that upon the consideration of the material placed before him, the learned Magistrate has correctly held that the Respondent was entitled to use the right of way depicted as lot 4 in Plan No. 4160.

[51] Under such circumstances, the learned High Court Judge has correctly held that the order of the learned Magistrate is not erroneous and thus, the circumstances enumerated in the Petition filed by the Appellant in the High Court did not constitute exceptional circumstances warranting the intervention of the High Court in the exercise of its revisionary powers.

## **Conclusion**

[52] In my view, the learned Magistrate and the learned High Court Judge are justified in their conclusions and thus, I do not see merit in any of the grounds urged by the learned Counsel for the Appellant to interfere with the decision of the learned Magistrate of Kalutara or the learned High Court Judge of Kalutara.

[53] I accordingly, affirm the order of the learned Magistrate of Kalutara dated 17.12.2009 and the judgment of the learned High Court Judge of Kalutara dated 08.10.2013 and dismiss the appeal with costs.

**JUDGE OF THE COURT OF APPEAL**

**Shiran Gooneratne J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**