

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

In the matter of an Appeal under
and in terms of Article 154 (6) read
with Article 138 of the Constitution
of the Democratic Socialist
Republic of Sri Lanka

Hangamuwa Rdhage Dharmadasa,
Rathna Hangamuwa,
Ratnapura.

Petitioner

CA (PHC) 0123/2008
Provincial HC Ratnapura
Case No. Revision 146/07
M.C. Ratnapura No. 18185

-Vs-

1. O.R. Wimalawathie;
2. H.R. Ananda

Both at

Galthota Kade,
Rathna Hangamuwa,
Ratnapura.

Respondent

And Between

Hangamuwa Rdhage Dharmadasa,
Rathna Hangamuwa,
Ratnapura.

Petitioner-Petitioner

Vs.

1. O.R. Wimalawathie;

2. H.R.Ananda

Both at

Galthota Kade,

Rathna Hangamuwa,

Ratnapura.

Respondent-Respondent

And Now Between

1. O.R. Wimalawathie;

2. H.R.Ananda

Both at

Galthota Kade,

Rathna Hangamuwa,

Ratnapura.

Respondent-Respondent-
Appellants

Vs.

Hangamuwa Rdhage Dharmadasa,

Rathna Hangamuwa,

Ratnapura.

Petitioner-Petitioner-Respondent

BEFORE : Shiran Gunaratne J. &
Dr. Ruwan Fernando J.

COUNSEL : Nuwan Bopage with Ravikara
Pinnaduwa for the Respondent-
Respondent-Appellants

Migara Doss, with Kulani Ranaweera
for the Petitioner-Petitioner-
Respondent

ARGUED ON : 16.09.2020

WRITTEN SUBMISSIONS

: 17.08.2020 (by Respondent-
Respondent-Appellants)

07.08.2020 (by the Petitioner-
Petitioner-Respondent)

DECIDED ON : 23.11.2020

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal from the judgment of the learned High Court Judge of Ratnapura dated 11.11.2008. By that judgment, the learned High Court Judge of Ratnapura revised the order dated 05.11.2007 of the learned Additional Magistrate of Ratnapura and declared that the Petitioner-Petitioner -Respondent is entitled to use the roadway in dispute until an order or decree is made by a court of competent jurisdiction.

Affidavits of the Parties

[2] The Petitioner-Petitioner-Respondent (hereinafter referred to as the Respondent) filed an affidavit dated 01.01.2007 in the Primary Court of Ratnapura under the section 66 (1) (b) of the Primary Courts' Procedure Act No. 44 of 1979 praying for an order declaring that the Respondent is entitled to use the 4 feet wide roadway over the property of the Appellants morefully described in schedule "a" of the Affadavit.

[3] The Respondent stated in his affidavit *inter alia*, that (i) land called "Godellawatta" which is depicted as lot 6 in Partition Plan No. 161 filed in the District Court of Ratnapura case bearing No. 7472 was allotted to his father and upon his demise, he became entitled to the said land; (ii) he used a 4 feet wide roadway to reach his land over the land owned by the 1st and 2nd Respondent-Respondent-Appellants (hereinafter referred to as the Appellants) and the said land is morefully described in schedule "b" of the said Partition Plan; (iii) he used the roadway in dispute for a period of over 10 years and acquired prescriptive rights to the same and this is no other alternative access to his land; (iv) on or about 02.11.2006, the Appellants obstructed the said road by growing banana plants and tea plants on the road in dispute and he complained to the Grama Niladhari of the area; (v) although the Grama Niladhari informed the Appellants to referain from obstructing the road, the Appellants contined to obstruct the roadway in dispute; (vi) he made a complaint to the Police and the Mediation Board but the Appellants refused to settle the dispute before the Mediation Board and thus, an imminent breach of the peace is threatned or likely owing to the dispute.

[4] The 1st and 2nd Appellants filed their affadavits and stated *inter alia* that (i) the 1st Appellant's father purchased lot 1 depicted in Partition Plan No. 161 from the party who was allotted the said lot, which is morefully

described in schedule “b” of their Affadavit; (ii) in terms of the Partition Decree of the District Court of Ratnapura, the 2nd Appellants’ father was declared entitled to lot 6 depicted in the said Partition Plan No. 161 and lot 7 of the said Plan is described as a road reservation and allotted in common; (iii) the road access to the Respondent’s lot 6 is through the said road reservation depicted as lot 7 in Plan No. 161 and the Respondent had never used a road over their land depicted as lot 1 in the said Partition Plan.

Order of the Primary Court Judge

[5] Upon the perusal of the affidavits, marked documents and written submissions of the parties , the learned Primary Court Judge by order dated 05.11.2007 held that:

1. The Respondent had used the road in dispute to reach his land over the Appellants’ land as corroborated by the Police observation notes and the report of the Grama Niladhari and therefore, the Appellants’ contention that the Respondent did not use the road in dispute cannot be accepted;
2. The Respondent has, however, failed to establish that he continuously used the road in dispute for a period of 10 years since the Respondent had only used the road in dispute from May 2003, which is only 3 years from the day on which the dispute arose.

[6] Accordingly, the learned Primary Court Judge declared that the Respondent was not entitled to a declaration under section 69 of the Primary Courts Procedure Act.

Application in Revision to the Provincial High Court

[7] Being aggrieved of the said order of the learned Primary Court Judge of Ratnapura, the Respondent made an application in revision to the Provincial High Court of Ratnapura seeking to have the said order dated

05.11.2007 revised. After the inquiry, the learned High Court Judge by his judgment dated 11.11.2008 allowed the revision application, set aside the order of the learned Primary Court Judge dated 05.11.2007 and declared that the Respondent is entitled to use the said 4 feet wide roadway until an order is made by a competent Court.

Appeal to the Court of Appeal

[8] Being aggrieved by the said judgment of the learned High Court Judge of Ratnapura dated 11.11.2008, the Appellants have preferred this Appeal to this Court.

Main grounds of Appeal

[9] At the hearing, the learned Counsel for the Appellants confined his submissions to the following grounds of appeal and urged us to set aside the judgment of the learned High Court Judge of Ratnapura and affirm the order of the learned Primary Court Judge:

1. The learned High Court Judge has converted the present dispute relating to a right of way under section 69 of the Act into a dispute relating a right to possession of a land under section 68 of the Act and his judgment delivered under section 68 is contrary to the provisions of the Primary Courts' Procedure Act;
2. The learned High Court Judge has failed to consider that the Respondent had been lawfully granted a roadway in terms of the final partition decree depicted as lot 7 in Partition Paln No. 161 (2V1) and therefore, the Respondent is not entitled to claim another roadway over the Appellants' land;
3. The learned High Court Judge has totally failed to consider that the Respondent has failed to establish a servitude right over Appellants'

land and therefore, the Primary Court had no power to make a determination in favour of the Respondent.

Identity of the subject matter of the dispute

[10] The dispute which is the subject matter of this case relates to the right of the Respondent to use 4 feet wide roadway to his lot depicted as 6 in Plan No. 161 over the land of the Appellants, which is depicted as lot 1 of Plan No. 161 (2V1).

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

[11] A perusal of the information filed by the Respondent and the affidavits filed by the Appellants reveals that the dispute between the Respondent and the Appellants relates to any right to any land other than the right to possession of such land and therefore, section 69 of the Primary Courts' Procedure Act applies.

[12] Sections 69 of the Primary Courts' Procedure Act reads as follows:

69 (1) Where the dispute relates to the 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 sub-section (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.”

[13] In an inquiry into a dispute in relation to any right to any land or any part of a land under section 69 (1), the main point of decision is as to who

is entitled to the right which is subject of dispute. In the case of *Ramalingam v. Thangarajah* (1982) 2 Sri LR 694, Sharvananda J., (As he then was) observed at page 699 that “The word “entitle” here connotes the ownership of the right. The Court has to determine which of the parties has acquired that right, or are entitled for the time being to exercise that right.....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)”.

[14] The procedure of an inquiry under Part VII of the Act is *sui generis* and 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), at p. 699). Section 72 of the Primary Courts’ Procedure Act prescribes the material on which the determination under section 68 and 69 of the Act is to be based. The determination under Part VII of the Act 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.

[15] The determination in situation set out in section 69 on the question of right to use the road in dispute shall be made after the examination and consideration of matters set out in section 72 of the Act. In the present case, the information was filed in the Primary Court under section 66 (1) (b) of the Act. However, the learned Primary Court Judge had the

advantage of having the Police Report, observation notes and the Report of the Grama Niladhari filed on a direction made by the learned Primary Court Judge.

[16] A perusal of the order made by the learned Primary Court Judge reveals that he had acted under section 69 (1) of the Primary Courts' Procedure Act and determined that the Respondent is not entitled to a right to use the roadway in dispute as he had failed to prove the use of the roadway in dispute over a period of 10 years. The learned High Court Judge has however, taken the view that the use of the roadway for a period of 10 years plays no important role in terms of the provisions of the Primary Courts' Procedure Act and what is required to be considered is the position that prevailed 2 months before the date on which the information was filed in the Primary Court (Vide- page 2 of the judgment).

[17] While I agree with the learned Counsel for the Appellants that the learned High Court Judge was in error when he referred to section 68 instead of section 69, the pertinent question is whether the findings of the learned High Court Judge are based on the application of section 68 of the Primary Courts Procedure Act. A perusal of the findings of the learned High Court Judge reveals that he had revised the order of the learned Primary Court Judge on the basis that the Respondent had used the roadway in dispute for a period of 3 years as there was no other alternative road access and accordingly, the period of 10 years plays no role in the determination of the dispute in terms of the provisions of the Primary Courts' Procedure Act.

[18] It seems to me that the learned High Court Judge had not acted under section 68 of the Act and determined the dispute by the application of section 69 despite the wrong reference to a period of 2 months prior to the

date on which the information was to be filed as a requirement under the Act.

[19] In view of these findings, the first question that arises is whether the Respondent was using the disputed roadway over the Appellants' land despite the fact that he had been lawfully granted the road reservation depicted as lot 7 in partition plan No. 161 as submitted by the learned Counsel for the Appellants.

[20] The following matters are not in dispute in this case:

1. The land called "Godellawatta" in extent of 3 acres and 32 perches was partitioned in terms of the final decree of the District Court of Ratnapura case bearing No. 7471/P and lot 1 depicted in partition plan No. 161 which is morefully described in schedule "b" of the Appellants' affidavit was purchased by the father of the 2nd Appellant from the party to whom the said lot 1 was allotted;
2. Lot 6 depicted in the said plan was allotted to the father of the Respondent and upon his demise, the Respondent became entitled to the same and the said lot 6 is morefully described in schedule "a" of the Respondent's affidavit;
3. Lot 7 of the said Plan No. 161 described as a reservation in extent of 3 feet wide and allotted in common to be used by all the parties to the partition case (Vide- Plan No. 121 marked 2V1);

[21] At the hearing, the learned Counsel for the Respondent Mr. Migara Doss while conceding that the road reservation depicted as lot 7 in Plan No. 161 had been granted to all the parties in the partition action, submitted that it got washed away in May 2003 due to heavy rains and thus, no such road reservation existed after May 2003 as clearly confirmed by the Grama Niladhari in his Report. He further submitted that since May

2003, the Respondent enjoyed the roadway in dispute over the land of the Appellants as a right of necessity as there was no other alternative roads to reach his land depicted as lot 6 in Plan No. 161.

[22] The Grama Niladhari in his Report dated 19.04.2007 has stated that (i) the rodway which was used by the Respondent was located on a high elevation closer to the land owned by one Uderis and due to a slip of Uderis's land during heavy rains in May 2003, the road reservation was washed away, which made it impossible for the Respondent to use the said rodway; (ii) since the date of the non-existence of the said roadway, the Respondent used the roadway in dispute over the Appellants' land; (iii) the Appellants completely blocked the said roadway in May 2003 and the said road reservation which was destroyed in May 2003 cannot be repaid due to the nature of the destruction and the Respondent had no alterbnative roads to reach his land. His observations are to the following effect (Vide-page H58 of the brief):

ලේ අනුව එනම් 2006.11.04 (ප්‍රකාශ කළ දිනම) දින මා ස්ථාන පරීක්ෂණයක් කළමි. පෙන්සම්කරු ගමන් කළ මාර්ගය සම්පූර්ණයෙන් වසා දමා තිබුණි. එම පරීක්ෂණ සටහන් මගේ දිනපොතේ ඉහත දින අංක 435 පිටුවෙන් සටහන් තබා ගතිමි.

මිට පෙර පෙන්සම්කරු (2003 මයි 17 දින වාර්තාවට පෙර) ගමන් කළ මාර්ගය 2003 මයි 17 දින ඇති වු වර්ෂාවෙන් එහි උස් ස්ථානය වන එව්.ආර්. උදෝස් යන අයගේ ඉඩම් මායිමෙන් ඉවුරු ගැලවී වැට් තිබුණි. එම ඉවුරු වැට්මෙන් යාඛව පිහිටි එව්.ආර්. කුසුමාවනි යන අයගේ නිවසට භාජි විමෙන් රුපයෙන් ආධාර මුදල් ද ගෙවීමට සිදු වූ බව වාර්තා කර සිටිමි. එම මාර්ගය විනාශ වූ දින සිට පෙන්සම්කරු ගමන් කරනු ලැබුවේ රඳාගේ කුණුර මදින් පිහිටි මාර්ගයේ ගොස් වගෙන්තරකරුවන්ගේ පදිංචි නිවස පිටුපසින්ය. මැතකදී දෙපාර්ශවයේ පුද්ගලික ආරවුලක් මත ප්‍රවේශ මාර්ගය වසා දැමීමට හේතු වී ඇති බව වාර්තා කර සිටිමි.

කම්තින් ගමන් කළ මාර්ගය වර්ෂාවෙන් භාජි වී නිබෙන ආකාරයට නැවත සැකසීමට අසිරු තත්ත්වයක් ඇති බව වාර්තා කර සිටිමි. විකල්ප මාර්ගයක් සැකසීමට ද ඉඩකඩික් නොමැති බව පෙනී යයි.

[23] Police Sergeant 42670 who inspected the disputed road on 30.12.2006 had observed that the old roadway did not exist at the time of the

inspection and the Respondent had used the roadway in dispute for a long period to reach his land which had been completely blocked by the Appellants. His observations are to the following effect (Vide- page H34 of the brief);

ගල්නොටේ කඩී ඉදිරිපිටින් පිහිටි රඳාගේ කුණුර හරහා අඩි 05ක 06ක පමණ පළලකින් යුත්ත පාරකි. පැමිණිලිකරු හා ව/ල කාරියගේ නිවසට පැමිණි විට පාර පිහිටා ඇත. කාලයක සිට ගමන් කළ බවට සළකුණු ඇති පැරණි පාරක් බව බැඳු බැල්මට ඉහා පැහැදිලිය. මෙම පාර ව/ල කාරි ව්‍යුහවතිගේ නිවසට අසලට පමණක් ඉහත අඩි 05-06 කින් පළලින් යුත්තව ඇතන් එතැන් සිට ව/ල කාරියගේ ඉඩම හරහා නිවස අසලින් පැමිණිලිකරුගේ නිවසට පැමිණිමට කාලයක් සිට හාවිත කළ බවට සළකුණු ඇති අඩි පාරක් පෙනීමට ද ඇත. මෙම අඩි පාර මේ වන විට ගස්වල අනු තත්ත්කාල ආදිය කපා පාරට දමා පාරක් නොතිබූ බවට සැලසුම් කිරීම සඳහා දමා ඇති බවද මෙයින් පැහැදිලිය. මේ වන විට පැරණි කටු කම්බි සහිත වැටකින් පාර අවහිර කිරීමට ද කටයුතු කර ඇත. මෙම පාර ජ්ලේනට අනුව ස්ථීර පාරක් නොමැති බවද පැමිණිලිකරු කියා සිටියන් ජ්ලේනට අනුව ඇති ස්ථීර පාර පිහිටි ස්ථානය ද මහු විසින් මා හට පෙන්නා දුන්නා. එම ස්ථානයේ පාරක් තිබූ බවට සළකුණු නොමැති අතර එව්.අං්. උදෝරීස් යන අයගේ ඉඩමේ මායිම හරහා මෙම පාර තිබූණු බවට සඳහන්ව ඇතන් මේ වන විට එම පාර තැනීමට නියමිත උදෝරීස්ගේ ඉඩමේ මායිම විශාල බැවුමක් වන නිසා බැවුම පාර කඩා වැටී ගොස් ඇත. ඉඩම ව/ල කාරි ව්‍යුහවතිගේ ඉඩම හරහා ඇති අඩි පාර හැර පැමිණිලිකරුගේ නිවසට පැමිණිමට වෙනත් විකල්ප මාර්ගයක් නොමැත.

[24] The observations of Police Sergeant 42670 at page H61 of the brief further supports the position of the Respondent and the Grama Niladhari that the Respondent had used the roadway in dispute for a long period and the Appellants had blocked the said roadway and the old roadway could not be used due to a slip of the land owned by Uderis.

[25] The Respondent had clearly established that the road reservation depicted as lot 7 did not exist after May 2003 and the road which got washed away due to rains could not be repaired due to the land slip that occurred on the land of Uderis. The Respondent has further established that since May 2003, the Respondent had used the roadway in dispute over the Appellants' land for a period of over 3 years until such time it was blocked by the Appellants in November 2006 (Vide- Police Complaint

dated 24.11.2006 and Police Observations and the Report of the Grama Niladhari).

[26] Under such circumstances, the learned Primary Court Judge has clearly held that the Respondent had used the roadway in dispute over the Appellants' land for a period of 3 years from May 2003 and rejected the Appellants' contention that no such roadway existed over their land. The learned Primary Court Judge having held that the Respondent had used the roadway in dispute from May 2003 however, refused to make a declaration in favour of the Respondent on the sole ground that the Respondent had not proved the use of the disputed roadway for a period of over 10 years. In making this determination, he had heavily relied on the decision of the Court of Appeal in *Kandiah Sellappah v. Sinnakkuddy Masilamany* (CA Application 425/80C.A. Minute dated 18.03.1981).

[27] In *Kandiah Sellappah v. Sinnakkuddy Masilamany* (supra), Abdul Cader, J. with the concurrence of Victor Perera, J. held that the claimant of a footpath who started using it in 1966 August and was obstructed a few months before the prescriptive period of 10 years, in June 1978 was not entitled to a declaration under section 69 since there was no evidence to prove that the claimant exercised a right which had been in continuous existence for a period prior to his use.

[28] The decision in *Kandiah Sellappah v. Sinnakkuddy Masilamany* (supra) which was decided in 1981 was not followed in subsequent cases by the Court of Appeal as the requirement of 10 years plays no significant role in terms of section 69 and all what section 75 mandates is a "dispute in the nature of a servitude" and not a dispute in relation to a servitude *per se*. Section 76 of the 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 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".

[29] In *Ananda Sarath Paranagama v. Dharmmadhinna Sarath Paranagama and Others* C.A. (PHC) APN 117/2013 decided on 07.08.2014, Salam J., stated at page 19:

"I am of the view that the decision in Kandiah Sellappah's case has been entered per incuriam without properly defining or appreciating that all what section 76 mandates is a "dispute in the nature of a servitude" and not a dispute touching upon a servitude per se. Therefore, when the right concerned is in the nature of a servitude relating to a right of a pathway, the period of 10 years plays no important role..."

Since the dispute in this case therefore is a right connected with the land in the nature of servitude there is no doubt that the learned Magistrate had jurisdiction to adjudicate on the issue in terms of the Act.".

[30] I hold that the learned Magistrate was in error in holding that the Respondent was not entitled to a declaration in terms of section 69 due to his failure to adduce satisfactory evidence that the Respondent used the roadway in dispute for a continuous period of 10 years, relying on the decision in *Kandiah Sellappah v. Sinnakkuddy Masilamany* (supra) which does not represent at present the threshold proof that is required in the

determination of a dispute “in the nature of a servitude” relating to a right of way.

[31] The learned Counsel for the Appellants however, advanced an argument that in any event the mere use of the road in dispute by the Respondent is not sufficient under section 69 of the Act as he had failed to prove that he was entitled to a right of way over the Appellants’ land and thus, the learned Primary Court Judge was correct in refusing to make a declaration in his favour. He relied on the decision in *R. Malkanthi Silva v L. G. R. N. Perera C. A* (PHC) 78/2008 decided on 23.03.2010 wherein Sisira Abrew J., stated that:

1. *Under section of the Primary Courts’ Procedure Act even if the Primary Court Judge is satisfied that a person who was using the other person’s land as a road without proving his right to do so for over a period of 2 months immediately before the date on which the information was filed under section 66 of the Act, has been prevented from using the land as a road, he cannot make an order directing the person to be permitted to use the land as a road;*
2. *The reason is that mere using of the land under section 69 is not sufficient. He has to prove that he is entitled to such a right;*
3. *A person who without any legal right starts walking over another person’s land over a period of two months cannot claim that he is entitled to an order in his favour under the Primary Courts’ Procedure Act and it is not the duty of the Primary Court Judge to make an order that such a person is entitled to use such a land as a road;*
4. *A person claiming servitude or a right of way over another person’s land must, if he is seeking an order to use such a road under the Primary Courts’ Procedure Act, prove that he is entitled to such a*

right. Such a person is not entitled to an order in his favour under the Primary Courts' Procedure Act on the ground that he has been using such a land as a road.

[32] This decision is consistent with the threshold of the proof required in section 69 of the Act and the decision of the Supreme Court in *Ramalingam v Thangarajah* (supra) as noted. Section 69 mandates a Primary Court Judge to determine whether a claimant is entitled to the right, which is the subject of the dispute and in the determination of this question, the Judge must be satisfied whether (i) the claimant has acquired that right or (ii) he is entitled, for the time being, to exercise that right.

[33] The word “entitle” was described by Sharvananda in *Ramalingam v Thangarajah* (supra) to connote “the ownership of the right” and thus, for a declaration to be made under section 69, there must be proof either that (i) the claimant has acquired a disputed right; or (ii) the claimant is entitled for the time being, to exercise that disputed right. This means that a claimant cannot walk over another person’s land as a mere user for convenience without either acquiring a legal right (e.g. acquisition of servitude or without proof that he is entitled to such a right for the time being (e.g. not a right of servitude *per se*, but a right in the nature of servitude to be exercised temporarily or for the moment until he is deprived of such right by virtue of an order of a competent court).

[34] The two ways in which an entitlement to a right can be proved in a Primary Court under section 69 were clearly identified by Salam J., in *Ananda Sarath Paranagama v. Dharmmadhinna Sarath Paranagama and Others* (supra) as follows:

1. By adducing proof of the entitlement as is done in a civil court; (proof of the acquisition of a servitude in a District Court action); or

2. By offering proof that he is entitled to the right for the time being.

(the exercise of the right by the claimant temporarily or for the moment until such time such person is deprived of his right by virtue of a judgment of a Court of competent jurisdiction.

[35] The two way approach adopted by Sharvananda J., requires the Primary Court Judge to determine upon proof of the acquisition of a servitude like in the Civil Court or upon proof of his entitlement or enjoyment of a right until such time such person is deprived of his right by virtue of a judgment of a Court of competent jurisdiction.

[36] The rationale behind the second element of proof is in keeping with the legislative wisdom set out in Part VII of the Act which is intended to facilitate the temporary settlement of the dispute between the parties before the Court so as to prevent a breach of the peace and maintain the status quo until the rights of the parties are finally decided by a Court of competent jurisdiction.

[37] It becomes therefore important to determine whether the Respondent in this case has acquired a servitude or is **entitled to a right in the nature of a servitude** as contemplated by section 69 of the Act. The learned Counsel for the Respondent submitted that the Respondent has established that he is entitled to a right to use the roadway in dispute in the nature of servitude as the Respondent had enjoyed the use of the road in dispute **of necessity** since the road reservation depicted as lot 7 in Plan No. 161 was washed away due to rains in May 2003.

Way of Necessity as an entitlement of a right

[38] A servitudes can be created by various modes such as:

1. by grants;
2. by last will;

3. by prescription;
4. by ex-necessitate (right of necessity); and
5. by vetustas.

[39] A way of necessity is a right of way granted in favour of a property over an adjoining one, constituting the only means of ingress to and egress from the former property to the same place with which it must of necessity have a communicating link to enable access to a public road (*Grotius, 2.35.8 and 11*). In the present case, the Respondent had enjoyed the right to use the disputed roadway from May 2003 **of necessity** as the road reservation was washed away beyond repairs and he had no other alternative access to his land as clearly observed by the Grama Niladhari and the 2 Police Officers.

[40] The necessity arose due to the loss of the road reservation depicted as lot 7 in Plan No. 161 beyond his control and thus, the Respondent continuously enjoyed the roadway in question from May 2003 as it was the only means of access from his land to the public road. The Report of the Grama Niladhari and the Police Observations clearly have established that the Respondent had enjoyed a right in the nature of servitude of a way of necessity and thus, was entitled for the time being to exercise that right to reach from his land to a public road. The Respondent who enjoyed the right to use the roadway in question from May 2003, was not a mere user who walked over the land of the Appellants without any right as submitted by the learned Counsel for the Appellants. In my view, the Respondent who enjoyed the road in dispute from May 2003 as of necessity, was entitled, **for the time being**, to exercise such right and use the disputed roadway until such time he is deprived of such right by a court of competent jurisdiction.

[41] The Respondent has further adduced evidence and established that the Appellants had obstructed that roadway in question prevented the Respondent from exercising his right to use the roadway in dispute until such time he is deprived of such right by a Court of competent jurisdiction. For those reasons, I am of the view that the decision in *Malkanthi Silva v L. G. R. N. Perera* (supra) has no application to the facts of the present case.

[42] Accordingly, I am of the view that the final conclusion reached by the learned High Court Judge was not influenced by a mere reference to a period of 2 months at page 3 of his order when he clearly determined that the Respondent had used the roadway in dispute for a continuous period of 3 years after May 2003 as reported by the Grama Niladhari of the area.

[43] I hold that the learned Primary Court Judge was in error in insisting on the threshold period of 10 years when section 75 mandates a Primary Court Judge to determine a dispute relating to any “right in the nature of a servitude” and not a “dispute touching upon a servitude *per se*”, and thus, the period of 10 years plays no important role in the present case.

Conclusion

[44] For those reasons, I am of the view that the learned High Court Judge was correct in setting aside the order of the learned Primary Court Judge of Ratnapura dated 05.11.2007. I am also of the view that the conclusion reached by the learned High Court Judge that the Respondent is entitled, for the time being to use the 4 feet wide roadway over the Appellants’ land until the Respondent is deprived of such right by virtue of an order of a competent court is justified.

[45] In the result, the appeal filed by the Appellants is dismissed. The parties shall bear their own costs.

JUDGE OF THE COURT OF APPEAL

Shiran Gooneratne J.

I agree,

JUDGE OF THE COURT OF APPEAL