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

In the matter of an appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer in Charge,
Police Station,
Thalangama.

Plaintiff
Vs

L.G.R.N.Perera,
555, Niranja, Athurugiriya Road,
Kottawa.

SC/Appeal 181/2010
SC/SPLA 76/2010
CA/PHC/78/2008
P.H.C. Avissawella 35/2007 (Rev)
Kaduwela M.C. 72849/66

1st Party Respondent

R. Malkanthi Silva,
40/8, Perera Mawatha,
Pelawatta.

2nd Party Respondent

AND BETWEEN

R. Malkanthi Silva,
40/8, Perera Mawatha,
Pelawatta.

2nd Party Respondent-Petitioner
Vs.

L.G.R.N.Perera
555, Niranja, Athurugiriya Road,
Kottawa.

1st Party Respondent-Respondent

Officer in Charge,
Police Station,
Thalangama.

Plaintiff–Respondent

The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

AND BETWEEN

R. Malkanthi Silva,
40/8, Perera Mawatha,
Pelawatta.

2nd Party Respondent - Petitioner - Appellant

Vs.

L.G.R.N.Perera,
555, Niranja, Athurugiriya Road,
Kottawa.

1st Party Respondent- Respondent- Respondent

Officer in Charge,
Police Station,
Thalangama.

Plaintiff–Respondent- Respondent

The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent- Respondent

AND NOW BETWEEN

R. Malkanthi Silva,
40/8, Perera Mawatha,
Pelawatta.

2nd Party Respondent - Petitioner – Appellant – Petitioner/Appellant
Vs.

L.G.R.N.Perera
555, Niranja, Athurugiriya Road,
Kottawa. (deceased)

1st Party Respondent- Respondent- Respondent- Respondent

1a. Abeykoon Don Sunil Silva

1b. Warakapitiyage Don Wohara Kavindi Abeykoon

1c. Warakaptityage Don Sachithra Erandi Abeykoon

All of 555, Niranja, Athurugiriya Road,
Kottawa.

Substituted 1st Party Respondent- Respondent- Respondent- Respondents

Officer in Charge,
Police Station,
Thalangama.

Plaintiff- Respondent- Respondent- Respondent

The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent-Respondent- Respondent- Respondent

Before: **Vijith K. Malalgoda, PC, J**

Murdu N.B. Fernando, PC. J., and

S. Thurairaja, PC. J.

Counsel: Rohan Sahabandu PC with Chaturika Elvitigala, Sachini Senanayake and Nathasha Fernando for the 2nd Party Respondent- Petitioner- Appellant-Appellant.

Dr. Sunil Coorey for the Substituted 1st Party Respondent- Respondent-Respondent- Respondent

Argued on: 01-12-2022

Decided on: 23.07.2024

Murdu N.B. Fernando, PC. J.,

This Appeal stems from an Order made by the Primary Court of Kaduwela on 20th June, 2007 pertaining to an application made by the Thalangama Police under Part VII of the Primary Courts' Procedure Act No. 44 of 1979.

The learned Magistrate by its Order declared that the 1st Party Respondent-Respondent- Respondent- Respondent ("the 1st Party/Respondent") is entitled to use a road-way and/or a right of way and directed the 2nd Party Respondent-Petitioner- Appellant-Appellant ("the 2nd Party/Appellant") not to obstruct the Respondent from using the said road-way and/or the right of way.

Being aggrieved by the said Order, the Appellant went before the Provincial High Court of Avissawella ("the High Court") and the High Court by its Order dated 28th August, 2008 dismissed the Appellant's Revision application with costs.

The Appellant then went before the Court of Appeal and the Court of Appeal on 26th March, 2010 dismissed the Appellant's appeal.

Thereafter, the Appellant came before this Court on a Special Leave to Appeal Application and on 02nd December, 2010 obtained Leave to Appeal on the following grounds and/or Questions of Law, referred to in sub paragraphs (a) to (f) of paragraph 24 of the Petition of Appeal dated 05th May, 2010.

The said six grounds were as follows;

a. The said Order is contrary to law and against the weight of evidence.

b. The Court of Appeal erred by holding that the 1st Party- Respondent had been vested with the right of using lot No. 30 of Plan 2314 as road-way by the original owner in 1971.

c. *The Court of Appeal erred in affirming the Order made under Section 69 of the Primary Courts' Procedure Act, when the 1st Party-Respondent had failed to establish that he was entitled to any right over lot No. 30 of Plan 2314.*
d. *The Court of Appeal erred by not properly applying the law as determined by the Supreme Court in* ***Ramalingam vs Thangarajah [1982] 2 SLR 693*** *and the judgement by Hector Yapa, J., delivered in* ***CA 863/90.***
e. *The Court of Appeal erred by failing to consider that the 1st Party-Respondent has two other road-ways, namely, Perera Mawatha and the 10 foot wide road towards the eastern boundary of the 1st Party-Respondent's land.*
f. *The Court of Appeal erred by failing to take into consideration that the 1st Party- Respondent did not reside at the land in suit and as such could not have been using lot No. 30 to gain access to the said land and therefore, could not institute proceedings under the Primary Courts' Procedure Act.*

When this Appeal was taken up for hearing [re-hearing] before this Bench, the learned President's Counsel for the Appellant intimated to Court, that he would limit his argument to a single ground of appeal, namely, the 4th ground referred to above.

The said ground of appeal refers to a judgement of this Court and a judgement of the Court of Appeal. Thus, in order to determine this Appeal, the said ground of appeal is rephrased as follows;

> *"Did the Court of Appeal err by not properly applying the law as determined by the Supreme Court in* ***Ramalingam v. Thangarajah [1982] 2 SLR 693*** *and the Court of Appeal in* ***Sriyawathie Jayasinghe v. Karunaratne CA 863/90 C.A.M. 04.06.1997?****"*

To appreciate the submissions made on behalf of the 2nd Party/Appellant and the 1st Party/Respondent, a brief narration of the facts, is essential.

The background facts

Based upon a complaint made by the 1st Party/Respondent to the police and upon investigations made, the Officer-in-Charge of the Police Station, Thalangama filed a report in the Primary Court of Kaduwela in terms of **Section 66 of the Primary Courts' Procedure Act** referring to a dispute affecting land where a breach of the peace was threatened and/or likely, between the 1st Party and the 2nd Party.

The case of the 1st Party before the Primary Court

- F E Perera, the father of the 1st Party (L G R N Perera) was the owner of a portion of land in extent AO R2 P15.8 from and out of a larger extent of land called Meegahawatta alias Meegahalanda in Thalangama;
- F E Perera's siblings also owned defined portions of the said larger land called Meegahawatta alias Meegahalanda;
- F E Perera's land was bordered on the west by a defined portion of a land in extent A3 R2 P30.9 owned by Gabriel Perera, one of the brothers of F E Perera;
- In or around 1960, the said Gabriel Perera gifted the said land to the Lanka Mahabodhi Society;
- In early 1970's, Mahabodhi Society sub-divided and blocked out the said land into 36 lots, comprising lots 1 to 29 and sold the said lots to the public. Lots 30 to 35 were to be used as roads and by-roads and a right of way was given over the said lots 30 to 35 to the respective vendees;
- **Lot 30 was a ten-foot wide roadway in extent 3.5 perches,** running between lots 28 and 29, leading to the land of F E Perera. This ten-foot by-road, branched off from lot 34, a twenty-foot wide road named Perera Mawatha, running through the larger land gifted to Mahabodhi Society by F E Perera's brother;
- The land owned by F E Perera in extent R2 P15.8 was surveyed in 1988 and was gifted by him, to his two daughters, L G R N Perera and her sister and was thereafter partitioned;
- L G R N Perera, the Respondent of this appeal, the 1st Party before the Primary Court was allotted the land abutting the larger land gifted to Lanka Mahabodhi Society;
- Thus, the land owned by the 1st Party was bounded on the west by lots 28 and 29 and by lot 30, the road-way. The deeds and the plans of the 1st Party, refer to lot 30, as a road-way leading to the land of the 1st Party;
- For more than 30 years, F E Perera (father of the 1st Party) and the 1st Party used and enjoyed the right of way over lot 30, the road-way, without any hindrance or obstruction to access their land;
- The original owners and subsequent owners of lots 28 and 29 too, used the said road-way (lot 30) together with F E Perera and the 1st Party, without any incident of a breach of the peace, except on one occasion in the year 1995 when F E Perera obstructed one Tissa Hewage, owner of lot 29 from using such road-way. A Section 66 application was filed and a direction was made to remove the obstruction and permit Tissa Hewage to have access to the road-way lot 30;

- The **2nd Party purchased lot 28 in 2003** and thereafter **disputed the 1st Party's** (the Respondent before this Court) **right to use the said right of way over lot 30**, the road-way;
- The 2nd Party blocked the entrance to lot 30 (the road-way) from the main road, *i.e.*, from lot 34 (Perera Mawatha), by affixing a gate and padlocking the gate and also parking motor bikes and letting out dogs on to the ten-foot road-way leading on to the land of the 1st Party;
- Although the 1st Party could access the road-way from her land (through the small gate affixed from the land of the 1st Party/Respondent), her movements and her access to lot 30 (Perera Mawatha), was obstructed and restricted, in view of the gate affixed by the 2nd Party being always kept locked;
- Thus, the 1st Party (Respondent) prayed from the Primary Court to issue an order that the 1st Party is entitled to use lot 30, as a road-way and direct the 2nd Party (Appellant) not to obstruct the 1st party (Respondent) from using such road-way.

The case of the 2nd Party

- In 1974, Lanka Mahabodhi Society conveyed the joint ownership and title of lot 28 to B A D Ramani and P D Jinadasa together with the right of way over lots 30 to 35. In 1997, the said co-owners conveyed lot 28 to one A U Wijayasuriya;
- Thereafter, in 2003, the said A U Wijayasuriya transferred the said lot 28 together with the right of way over lots 30 to 35 to the 2nd Party;
- The right of way granted by Lanka Mahabodhi Society was exclusively to owners of lots 1 to 29 and therefore, the roads and by-roads and right of ways cannot be used by any other persons;
- Hence, the 1st Party has no right or entitlement to the right of way over road-ways, *i.e.*, lots 30 to 35 and especially to lot 30, the road-way running between lots 28 and 29;
- Lot 30 is maintained by the 2nd Party at her expense;
- The 1st Party has an alternative access to her land and need not use lot 30 as an access from lot 34 (Perera Mawatha) to the property of the 1st Party;
- Therefore, the 2nd Party moved to dismiss the case of the 1st Party.

<u>The Order of the Primary Court</u>

The learned Magistrate acting in terms of the provisions of Section 69 of the Primary Courts' Procedure Act having examined the evidence before court (affidavits, supporting documents and photographs) and especially, an order made by the Magistrate Court of Colombo way back in February 1996, pertaining to the very same road-way lot 30 where the Magistrate Court of Colombo recognized lot 30 as a right of way to the property of the

1st Respondent, made order and declared that the ***1st Party is entitled to use the road-way and has a right of way over lot 30, and directed the 2nd Party to remove the obstacles and open up the road-way.*** The learned Magistrate also directed the parties to maintain peace and to abide by the directions made which were temporary in nature, until the dispute is finally adjudicated by a civil court.

The High Court Order

The *High Court rejected the Appellant's plea to exercise its revision powers* against the order of the Primary Court upon two grounds. The Appellant failed to aver any specific grounds or reasons and the order of the Primary Court was only a stop-gap measure in respect of maintaining peace between the parties, until the dispute *per se* is adjudicated by the parties, before a competent court.

The Judgement of the Court of Appeal

The Court of Appeal *rejected the appeal filed by the Appellant.*

It is manifestly clear from the Court of Appeal judgement, that the learned judges in determining the appeal had considered the pronouncements of Sharvananda, J., (as he then was) in **Ramalingam v. Thangarajah** (supra) and the dicta of Hector Yapa, J., in **Sriyawathi Jayasinghe v. Karunaratne CA 863/90 C.A.M. 04.06.1997** in coming to its findings.

Furthermore, the Court of Appeal had examined the provisions of Sections 66, 68 and 69 of the Primary Courts' Procedure Act and the blocked-out plan prepared by Lanka Mahabodhi Society in 1971, which demarcated a road-way across the larger land gifted to Lanka Mahabodhi Society by F E Perera's brother, and thereby accepted the right of access from the gifted land to F E Perera's land, over the blocked-out land, specifically over lot 30, the road-way.

Moreover, it is significant to note, that the learned Judges of the Court of Appeal, having distinguished the aforesaid judgements of **Ramalingam v. Thangarajah** and **Sriyawathie Jayasinghe v. Karunarathne** have categorically held, that the Respondent was not claiming *a right of way over Appellant's land,* but merely *using the road-way (lot 30) to have access to the Respondent's land.* Thus, the Court of Appeal held the road-way (lot 30) is not owned by any party. It is held in common by all parties.

The Court of Appeal in my view, has taken a very cautious approach in determining the appeal. This is clearly seen from the pronouncement, that '*this judgement should not be considered as authority for a person, who without any legal right uses somebody else's land as a road and thereafter claims a road-way upon the basis of a subsequent plan*.'

Moreover, the Court of Appeal in rejecting the appeal categorically stated that the order made by the Primary Court was to prevent a breach of the peace happening at that moment between the parties. It was not a full and final order and emphasized that the parties

are free to obtain a permanent solution to the dispute, from a civil court with competent jurisdiction.

The Appeal before the Supreme Court

Having considered the factual background relating to the matter in issue and the *impugned orders, which the courts below have held to be temporary in nature, and made to avert a likely breach of the peace,* let me now move on to consider the submissions made before this Court on behalf of the Appellant and the Respondent.

The Submissions of the Appellant

In brief, the submissions of the learned President's Counsel for the Appellant were threefold.

First,

The Primary Court has no jurisdiction to determine this matter, since Section 32(2) of the Judicature Act No 2 of 1978 lays down, that *any action for a declaratory decree including a declaration to the title to the land*, [vide item 12 in the 4th schedule] is excluded from the jurisdiction of the Primary Court.

To emphasise the said contention, the learned President's Counsel relied on the dicta in the case of **Ramalingam v. Thangarajah** (supra), wherein he submitted the word 'entitled' was considered as 'ownership'.

The argument put forward by the learned President's Counsel was that the order made by the Primary Court amounted to a 'declaration' that the party claiming the right is 'entitled' to the said right. Thus, it was contended that the order of the Primary Court amounted to a declaration that the 1st Party owned the right of way over lot 30 and the Primary Court has no jurisdiction to make such an order.

Secondly,

The Primary Court it was contended, has held that the right to use a road-way could be obtained either by a deed or by 'long use'. If the learned judge referred to 'prescriptive rights', by the use of the word 'long use', then yet again the Primary Court has no jurisdiction to determine this matter, as it amounts to prescriptive rights.

To justify this submission, the learned President's Counsel relied upon the dicta in the case of **Sriyawathie Jayasinghe v. Karunaratne** (supra), wherein he contended it was held that being 'a mere user' of a land and/or road-way is not sufficient, but must establish that he is entitled to use such land and/or road-way as of right, in order to determine the dispute.

Thus, the learned President's Counsel contended that 'mere use' is not sufficient and an 'entitlement' has to be proved and the Primary Court lacks jurisdiction to

examine 'entitlement' by way of acquisition of prescriptive rights, and therefore the order made by the Primary Court is bad in law.

Thirdly,

It was contended, that the Respondent has 'no right to use lot 30', but the Court of Appeal had gone on a voyage of discovery to ascertain and determine such a right upon the Respondent, and in doing so, surmised and conjectured and had drawn unreasonable and unwarranted inferences.

The Submissions of the Respondent

The submissions of the learned Counsel for the Respondent were as follows:

First,

It is a well-established principle in property law, that a party who has *'no soil rights'*, but only has '*a right of servitude or a right of way over a particular strip of land'*, has no right whatsoever to prevent or obstruct another party using the same strip of land as a right of way. This principle, the learned Counsel contended, stands good even in instances in which such other party has no servitude right to use that strip of land as a right of way. Hence, it was contended only an *'owner of soil rights'* could prevent or obstruct another party from using a right of way. The learned Counsel relied upon the judgement in **Fernando v. Wickremasinghe [1998] 3 SLR 37** to justify his contention pertaining to 'soil rights'.

Secondly,

The material on record clearly shows that the Respondent and her predecessor-in-title (her father, F E Perera) had been using the road-way for a long period of time and have acquired a prescriptive right of servitude to use the disputed road-way lot 30, along with the Appellant and the owner of lot 29.

Thirdly,

The Respondent is not claiming access to her land over the disputed road-way *'by way of necessity'* and therefore, there being an alternative access to the Respondent's land is immaterial when determining the Respondent's entitlement to use the disputed road-way.

Finally,

The order made by the Magistrate Court of Colombo way back in 1996 in another matter pertaining to lot 30, by which the right of way over lot 30 was recognized and the fiscal report pertaining to the execution of such order (by removing the fence put up by F E Perera on the southern boundary of lot 29 and thereby permitting the occupier of lot 29, access to lot 30) clearly indicates through official documents, that F E Perera the predecessor-in-title of the Respondent (father of the 1st Party)

had been using the road-way even in the year 1996 and had a right of way to his property over lot 30 for more than a decade.

Having referred to the submissions made by both parties, let me now consider the said submissions and the legal implications arising therein, in the light of the instant appeal.

The genesis of the instant appeal is a pure and simple Section 66 application.

Section 66 of the Primary Courts' Procedure Act, ("the Act") makes provision for a police officer to file a report or an information in the Primary Court, *in the event a dispute relating to land, which is likely to cause a breach of the peace has arisen.*

Section 67 of the Act makes provision for an expeditious inquiry (to be concluded within three months) and delivery of order (within one week of the conclusion of the inquiry), which amply emphasize the clear intention of the drafter, that the relief to be granted by the Primary Court is to find a solution fast and avert a breach of the peace. In my view, it is not to determine the rights of the parties which is a privilege empowered on a civil court.

Section 68 of the Act makes provision for a judge of the Primary Court to determine and make order, when the dispute relates to the *possession* of any land and **Section 69** of the Act refers to disputes in regard to *any other right* of any land, respectively.

Admittedly, the instant appeal is not in respect of 'possession' of any land and hence, does not come within **Section 68** of the Act.

This appeal is in respect of 'any other right' *viz,* relating to a right of way and/or a road-way, and thus falls within **Section 69** of the Act.

Section 69 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"* (emphasis added)

Thus, from a plain reading of the above provisions, especially the provisions of subsection (2) it is amply clear, that an order made to declare a person is 'entitled to any right', other than the right to possession of such land, is conditional, *i.e.,* such 'entitlement' is only temporary. It is a short-term order. It is not a permanent order. It is for maintaining of peace and/or to prevent a breach of the peace, at that particular moment. It is a type of a

restraining order made by an umpire to keep two warring factions to hold their peace. Such an order is valid and enforceable only until a competent court by an order or decree resolves the dispute or the points of contention between the parties.

At this instance, I wish to consider Section 66 of the Act, in greater detail.

Section 66 reads as follows;

> (1) Whenever owing to a **dispute affecting land a breach of the peace is threatened or likely**-
>
> (a) The police officer inquiring into the dispute
> (i) shall with the least possible delay file an information regarding the dispute in the Primary Court […]; or
> (ii) shall, if necessary in the interests of preserving the peace, arrest the parties […]
>
> (2) Where an information is filed in a Primary Court under sub section (1), **the Primary Court shall have and is hereby vested with jurisdiction to inquire into, and make a determination or order on**, in the manner provided for in this part, the dispute regarding which the information is filed." (emphasis added)

Thus, the Primary Court is empowered under this Act and is vested with jurisdiction to inquire into and make a determination, in a speedy manner where a breach of the peace is threatened or is likely, regarding a dispute affecting land.

In my view, the **paramount concern addressed by Section 66 is to keep peace and to maintain peace between disputing parties**.

The police force is tasked with the duty of maintaining peace. In the event a police officer inquiring into a dispute affecting land, is unable to or is not in a position to maintain peace, this section empowers such police officer to bring the issue before the Primary Court and for the Primary Court to look into the matter and make an order, as a stop-gap measure to maintain peace, until a competent court determines the issue. In other words, maintain the status-quo. It is a short term measure to avert a breach of the peace.

The Appellant in his post-hearing written submissions strenuously argued, that the Primary Court has no jurisdiction to inquire into matters affecting land. The first argument put forward on behalf of the Appellant was that **Section 32(2)** of the Judicature Act specifically excludes, matters referred to in the 4th schedule from the purview of the Primary Court and since 'any action for a declaratory decree including a declaration to the title to the land' is excluded by the 4th schedule to the Judicature Act, the Primary Court is devoid of jurisdiction, even to issue an order to maintain the status-quo.

However, it has to be borne in mind that during the hearing, the learned President's Counsel informed Court that he will not pursue this contention, since the said section has been omitted from the statute books. Thus, the Respondent too, has not responded to the submission pertaining to **Section 32(2)** of the Judicature Act.

Nevertheless, in the written submissions the Appellant has gone into an exhaustive analysis of the provisions of the Judicature Act and the number of amendments brought to **Section 32(2).** The learned President's Counsel for the Appellant, examines at length the said amendments and whether such amendments were *gazetted* or not and, the legal ramification of the amendments which were *gazetted* and the amendments which were *not gazetted.* He also refers to the establishment of Small Claims Courts and its jurisdiction.

I do not intend to go on an academic discourse pertaining to this contention of the Appellant. Suffice it to state that the Judicature Act provides for the establishment and constitution of a system of courts of first instance. It defines the jurisdiction of such courts and regulates the parameters of such courts. It is undisputed that the competent court to determine a civil dispute is the District Court, subject to the monetary value and other specific matters referred to in the Judicature Act and the Primary Court has no jurisdiction to hear and determine disputes affecting land.

However, the appeal before us, pertains to a ***breach of the peace situation*** *owing to a dispute affecting land*. In such instances, *i.e.,* a breach of the peace situation, there is clear and unambiguous provision in the Primary Courts' Procedure Act for the police to file a **Section 66** application in the Primary Court and the Primary Court to hear and determine such matter relating to the breach of the peace.

Furthermore, Chapter VII of the Primary Courts' Procedure Act, very clearly identifies that the provisions therein are only in relation to *'a dispute affecting land* ***where a breach of the peace*** *is threatened or is likely to happen'*. The dominant factor is the 'breach of the peace'. Then only the Primary Court has jurisdiction to consider such an application and make an order for the parties to maintain peace, *until a competent court makes a determination pertaining to the rights of the said parties.* Resorting to the provisions of the Primary Courts' Procedure Act is only a stop-gap measure to maintain peace or to uphold the status-quo and to prevent the happening of an unforeseen incident. This is more so, when the local police is unable to curb an incident and resolve the matter and prevent the happening of a disaster which would be of a much more magnitude.

Hence, my considered view, is that the Primary Court has jurisdiction to look into the instant matter. The argument of the Appellant pertaining to Section 32(2) of the Judicature Act has no merit. It has no bearing whatsoever, on the instant appeal.

The next contention of the learned President's Counsel representing the Appellant, pertained to **Sections 68** and **69** of the Primary Courts' Procedure Act. He submitted that there was a vast difference between **Sections 68** and **69** and the guiding factor or the pivotal point was the 'ownership'. He went on to contend, that **Section 68** is in respect of a determination when the *dispute is in regard to 'possession' where ownership is not an issue,* **Section 69** speaks of *'entitlement to a right'* where the dispute is woven around 'ownership'.

Thus, he submitted that 'ownership' is a *sine-qua-non,* when an application is filed under **Section 69** of the Act. The learned President's Counsel vehemently emphasized that *'entitlement is ownership',* and found solace in the dicta of Sharvananda J., in the case of **Ramalingam v. Thangarajah** (supra) to buttress his argument.

The aforesaid case is by citation, referred to in the only question of law to be determined by this Court. Hence, I wish to consider the said case in detail now.

The case of **Ramalingam v. Thangarajah** is in relation to an *Appellant dispossessing the Respondent, who was the owner of a land* in extent of 8 acres in Akkaraipattu. The Respondent had been cultivating the said land for decades. The Appellant dispossessed the Respondent forcefully and had begun to cultivate the said land as his own. The Primary Court upheld the Respondent's position and the Appellant challenged the said order, upon the basis it was null and void. However, in the said **Ramalingam's** case, the points of contention were the duty of a judge in a dispute pertaining to possession of a land and the consequences of a judge's failure to adhere to time limits laid down by the Act.

In the said case, this Court held that a judge in a **Section 66** inquiry should confine himself to questions of actual possession of the land on the relevant date. Further, it was held, that where affidavits and documents before the court were sufficient to make a determination, further inquiry embarked by the judge was not warranted. The Court also commented about the lackadaisical fashion in which the inquiry was conducted by the judge and went on to opine, that it revealed the judge's lack of appreciation of the proper scope and objective of an inquiry under Part VII of the Primary Courts' Procedure Act.

The observations of Sharvananda, J., with regard to possession in the aforesaid **Ramalingam's case** (supra at page 698 and 699) were as follows;

> "**That person is entitled to possession until he is evicted by due process of law**. A judge should therefore in an inquiry under Part VII of the aforesaid Act, confine himself to the question of actual possession […] He is not to decide any question of title or right to possession of the parties to the land. **Evidence bearing on title can be considered only when the evidence as to possession is clearly balanced and the presumption of possession which flows from title may tilt the balance in favour of the owner** and help in deciding the question of possession." (emphasis added)

Thus, the above dicta clearly signifies even in instances of possession, a judge has jurisdiction to consider evidence on title *i.e.,* ownership, in terms of **Section 68** of the Primary Courts' Procedure Act when making an order to maintain peace. If I be more specific, when making an order in respect of maintaining peace, title or ownership could also be considered.

The below referred paragraph relied upon by the learned Counsel for the Appellant, to put forward his contention, follows the above quoted passage. It reads as follows-

> "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)." (emphasis added)

The above quotation, in my view is obiter. But it clearly underscores that a Primary Court has the jurisdiction to determine *which party has acquired that right or is entitled for the time being to exercise that right.* It specifically states, 'the party for the time being exercising such right'. In my view, by this passage, Sharvananda, J., distinguishes Sections 68 and 69 and states, even in a Section 69 situation, which party is entitled or for the time being exercising such right ought to be considered, prior to making an order for maintaining peace.

In my view, this does not mean that the Primary Court, determines ownership. It only considers the acquisition of the right or the entitlement for the time being of the right. Hence, my considered view is that this paragraph should be viewed and understood in the said light and not in the manner contended by the Appellant, that the ownership is the paramount factor that a judge should consider in cases of this nature.

Thus, I see no merit in the submissions of the Appellant, that 'entitlement' equals or is the same as 'ownership', and in view of the jurisdiction relating to 'any action for a declaratory decree including a declaration to the title to the land' being taken away by the 4th schedule to the Judicature Act [vide Section 32(2)], that the Primary Court lacks jurisdiction to hear and determine this case.

In contradistinction to the submissions made on behalf of the Appellant, I am of the view that the judgement of **Ramalingam v. Thangarajah** (supra) clearly lays down, that a Primary Court has jurisdiction to determine which of the parties has acquired that right [right of way] or is **entitled for the time being to exercise such right** [right of way] prior to making an order under Section 69(2) of the Act.

If I may digress further and go to **Section 69(2)** referred to earlier, the said section clearly and unambiguously makes provision for a court to make order, declaring any person specified therein is entitled to any such right, **until such person is deprived of such right by virtue of an order or decree of a competent court**.

Thus, the argument of the Appellant that an order made by a Primary Court is a declaratory decree pertaining to the title to the land is erroneous and has no force in law. The order made by the Primary Court is not a final order. It is only a provisional order made to preserve the breach of the peace and to maintain the *status-quo*, until the party being deprived of the right, goes before a competent court and obtains an order or decree in its favour.

Hence in my view, the Primary Court has jurisdiction to make orders pertaining to land, in instances in which a breach of the peace is threatened or likely, as laid down in Section 66 of the Primary Courts' Procedure Act.

Another argument put forward by the Appellant to justify the lack of jurisdiction of the Primary Court, is the reference to 'long use' and 'prescriptive rights' in the impugned judgement of the Court of Appeal in the instant case. The Counsel argued that a 'mere user' cannot obtain a right under **Section 69** and relied upon the judgement of **Sriyawathie Jayasinghe v. Karunaratne** (supra). This judgement too, is referred to in the question of law raised before this Court.

In the aforesaid **Sriyawathie Jayasinghe v. Karunaratne** (supra) judgement, the grievance of the Appellant was that the Respondent was *falsely claiming a right of way over the land of the Appellant* and had started to walk over the land causing damage to the property. The defence of the Respondent was that he had a right of way twenty-foot wide, over the Appellant's land. The learned Magistrate, having visited the land one year after filing of the Section 66 application granted the Respondent the right of way over the Appellant's land. However, what was granted was not a twenty-foot wide road as contended, but a foot path.

Having considered the facts therein, the Court of Appeal in the said **Sriyawathie Jayasinghe's** case, held that the learned Magistrate has wrongly considered the provisions of Section 68, and set aside the order of the lower court upon the basis, that the learned Magistrate misdirected herself and applied a wrong principle. Further, the court held that the Magistrate should have considered the provisions of Section 69. In the order, the learned appellate judge in passing referred to **Ramalingam's** case and the dicta that a *person claiming a right of way should prove he is entitled to such right and 'mere user' will not determine the dispute.*

The learned President's Counsel for the Appellant, relying heavily on this **Sriyawathie Jayasinghe's** judgement and the reference to the aforesaid judgement in the impugned Court of Appeal judgement, contended that the 'entitlement' has to be proved and established. He re-iterated that the Primary Court lacks jurisdiction to consider such a complex question, *i.e.*, whether one had acquired a prescriptive right, which he contended, was one way in which 'ownership' can be acquired.

Once again, I see no merit in the said submission. As discussed in detail earlier in this judgement, the parameters of the Primary Court Judge or what the Primary Court has to decide is, who is 'entitled' to such right for the time being. Even if such party is a mere user, if he can establish that he has a right for the time being, he could obtain an order favourable to him. This order is not a final order. It is only to maintain peace in the interim. Nevertheless, a party deprived of a right could at any time obtain relief from a competent civil court and deprive the party who obtained an order favourable to him under Chapter VII of the Primary Courts' Procedure Act. Hence, my considered view, is that the contention of the Appellant is erroneous and misconceived in relation to Sections 68 and 69 of the Act.

The above provisions of Sections 68 and 69 are mirror images of Sections 62 and 63 of the Administration of Justice Law No 44 of 1973.

In the cases of **Kanagasabai v. Mylwaganam 78 NLR 280** and **Loku Banda v. Ukku Banda [1982]2 SLR 704,** in matters pertaining to the above Law No 44 of 1973, this Court quite rightly held that a Magistrate is not involved in an investigation into title or right to possession, which is the function of a civil court and the action taken by a judge is of a purely preventive and provisional nature.

Sharvananda, J., as he then was, in the case of **Kanagasabai v. Mylvaganam** case (supra) went onto opine as follows;

> *"Section 62 of the Administration of Justice Law confers special jurisdiction on a Magistrate to make orders to prevent a dispute affecting land escalating and causing a breach of the peace. The jurisdiction so conferred is a quasi-criminal jurisdiction. The primary object of the jurisdiction so conferred on the Magistrate is the prevention of a breach of the peace arising in respect of a dispute affecting land. The section enables the Magistrate temporarily to settle the dispute between the parties before the court and maintain the status-quo until the rights of the parties are decided by a competent civil court. All other considerations are subordinated to the imperative necessity of preserving the peace."(page 283)*

The aforequoted dicta was re-iterated word to word by Sharvananda, J., in **Ramalingam's case** (supra at page 700). The said **Ramalingam's** case, as stated earlier is referred to in the question of law, which this Court is to determine in this appeal.

Thus, I have no hesitation in holding that the scheme embodied in Part VII of the Primary Courts' Procedure Act is geared to achieve the object of prevention of a breach of the peace. The action taken by a Magistrate is purely preventive in nature. The orders made by the Magistrate is a stop-gap step and provisional, pending final adjudication before a competent civil court with regard to the rights of the parties. The rights could be 'possession' of a premises (business premises, agricultural or pastoral lands) by virtue of Section 68, or 'any other right' (a right to use a road-way or a water-way) by virtue of Section 69.

I am also mindful that **Section 68** makes provision for a period of two months for a party to come before court upon being disposed of his possession. However, **Section 69** has no time constraints.

Thus, when a party obstructs another from using a road-way, the statute law does not lay down a time period before which such party should come before court.

Hence, **if a party has been obstructed by another from using a road-way,** such party can come before court at any time and obtain from the Primary Court a preventive order, **if such dispute relating to land is *likely to cause a breach of the peace*.**

In an unreported judgement **CA 1082/87 C.A.M. 17-06-1988** pertaining to a road-way, to which our attention was drawn, S N Silva, J., (as he then was) observed as follows;

> *"The learned judge has not referred to any particular provision of the Act in his order. Clearly, the reference to a period of two months arises only where a dispute relates to the possession of land. Where the dispute relates to a right to any land other than the right to possession, the applicable section is 69.*
>
> *In the case of **Ramalingam** […] it was held that **where the dispute relates to a right in any land as described, the court has to determine which of the parties has acquired that right or is entitled for the time being to the exercise of that right.***
>
> *In this case the learned judge has **correctly addressed himself to the question whether the respondents are entitled to the road-way**, that is in dispute. He has come to the conclusion that the Respondents **have been using this road way that was in existence for a long period of time.** The evidence referred to above support this finding of the learned judge." (emphasis added)*

The above observation, in my view, gives credence to the fact, that in a dispute pertaining to a road-way, a trial court could consider 'long use' by a party as being 'entitled to the exercise of such right pertaining to the road-way'. It does not mean that ownership need be established and proved. Only an entitlement for the time being to exercise such right need be established. Nevertheless, prior to issuance of the preventive order, the Magistrate must be satisfied that there is a '*dispute affecting land'* between the parties.

In the aforesaid circumstances, I see no merit in the argument of the Appellant, that the Primary Court determines ownership or entitlement. As discussed earlier in this judgement, prior to issuance of an order to maintain the peace, the **Magistrate should be satisfied** that the aggrieved party has an 'entitlement' to the disputed matter. Without a party satisfying court that such a party has an entitlement, the Primary Court will not issue a preventive order, even if the dispute relates to land and the dispute is likely to cause a breach of the peace.

Hence, 'satisfying' court cannot in any way be construed as a Primary Court 'determining' ownership. A determination relating to a land is the prerogative of the civil court and only a civil court could make a finding pertaining to the ownership of a land or property or any other related right. Thus, the second point put forward by the Appellant to challenge the impugned order is also rejected.

The third and final ground relied upon by the Appellant to justify its contention was factual in nature, *i.e.,* the Respondent has no right to use lot 30, based upon the evidence before Court.

Upon perusal of the impugned orders of the Primary Court, the High Court and the Court of Appeal, it is quite clear, that the learned trial judge and the appellate judges have considered the evidence before the trial court, *i.e.,* the blocked-out plan, the layout of roads, *viz,* lots 34 and 35 (the twenty-foot main road) and lots 30, 31, 32 and 33 (the ten-foot by-roads which lead to specific residential blocks) and came to the finding that *lot 30 leads to the Respondent's land*. Further, the impugned orders indicate that the judges of the trial court and the appellate courts examined the documents, the orders and specifically the decree tendered to court relating to a Section 66 application filed in 1995 against one Tissa Hewage, where the Magistrate Court of Colombo, accepted lot 30 as a road-way. This order was made, way before the Appellant came to the picture and purchased lot 28 in the year 2003.

Hence, I see no reason to hold that the impugned order is pervasive or erroneous. Based on the factual matrix, the learned judge of the trial court correctly determined that the Respondent is entitled to use lot 30 as a road-way. The appellate courts rightly upheld this finding of the trial judge, for reasons morefully stated therein.

Thus, I see no merit in the contention of the Appellant, that the Primary Court, the High Court and the Court of Appeal have gone on a voyage of discovery and conjectured and surmised, to determine the ownership or entitlement of such right of the Respondent to use lot 30 as a road-way.

In my view, the learned trial judge has acted within his jurisdiction as specifically laid down in **Section 69(2)** of the Primary Courts' Procedure Act, and ascertained as to who is entitled to the right which is the subject of dispute. Moreover, the trial judge and the learned judges of the Court of Appeal, have emphatically stated, that the order of the Primary Court is not a permanent order and that the parties are entitled to obtain a permanent solution to the 'dispute', from a competent civil court.

If I may digress once more, the learned President's Counsel for the Appellant in his written submissions laboured very much to put forward the contention that the ownership of a land or a right to use a road-way is acquired by numerous ways and there is no order in favour of the Respondent from a competent court to such effect. In fact, the learned Counsel drew the attention of Court to modes of acquisition of lands or servitudinal rights by prescription, expropriation and testament etc.

Having referred to such modes of acquisition, the learned Counsel submitted that the Respondent is not entitled to obtain an order favourable to the Respondent from the Primary Court, as the Respondent has failed to prove her entitlement or ownership to lot 30 or the right to use lot 30 as a road-way through one of the said modes of acquisition.

In my view, the law provides for the Appellant to make these submissions before a competent civil court having jurisdiction and obtain an order in her favour, and thereafter deprive the Respondent of the right to use lot 30 as a road-way.

The impugned orders very clearly bear out that the learned Magistrate had been satisfied upon the evidence led, that the dispute relates to a land and since breach of the peace was threatened or was likely in this instance, made order that the Respondent has a right to use lot 30 as a road-way. Thus, issuance of the said order prevented a breach of the peace between the Appellant and the Respondent. In my view, the Thalangama Police have quite correctly placed this dispute before the Primary Court, for an order, since it might have escalated to a higher degree of dispute and caused a greater harm to the parties and a complete break-down of peace.

Nevertheless, it is observed that the object and the purpose of the Act has been defeated by the Appellant, by filing a revision application against the order of the Primary Court in the High Court and then an appeal to the Court of Appeal and thereafter to the Supreme Court and thereby prevented the implementation of the Primary Court order for a decade and a half.

Further, this Court observes, that the Appellant is relatively a newcomer to the area, having purchased lot 28 in the year 2003. Thereafter in the year 2005, according to the material tendered to the trial court, steps had been taken by the Appellant to put up a gate at the entrance to lot 30, *i.e.*, the road-way, and enclose and padlock it. Thus, the Appellant had taken steps to prevent and obstruct not only the Respondent, but the public at large from using lot 30, the road-way.

Moreover, during the said period, the Appellant used lot 30, the road-way, exclusively and thereby physically annexed lot 30 to lot 28. This Court observes, even at present, in view of the instant appeal, the Appellant is having exclusive possession of lot 30 debarring the Respondent and the public at large from using lot 30 as a road-way.

Admittedly, the Appellant has only a right of way over lot 30, according to the deeds produced in evidence before the trial court by the Appellant herself. Thus, the Appellant is not the owner of the soil rights of lot 30. The Appellant only has a servitudinal right. Nevertheless, the Appellant is enjoying lot 30 exclusively, to the detriment of all others and particularly the Respondent, as if the Appellant is the owner of soil rights of lot 30.

The contention of the learned Counsel for the Respondent before this Court, was that a person who has no soil rights, but only a servitude right over lot 30, *i.e.*, a strip of land, has no right whatsoever, to prevent or obstruct another party from using the said strip of land (lot 30) as a right of way. The learned Counsel for the Respondent strenuously argued that only an owner of soil rights can prevent others from using a strip of land, through which a servitude right is granted. The Respondent relied upon the judgement of **Fernando v. Wickramasinghe (1998) 3 SLR 37** to substantiate its submission.

In the aforesaid **Fernando v. Wickramasinghe** case, Weerasuriya, J., relied on two unreported judgements, namely, **M.D.B. Saparamadu v. Violet Catherine Melder CA 688/42F C.A.M. 22.03.1996** and **K.K.Gunadasa v. J. Subasinghe CA 92/95 C.A.M. 27.03.1995,** wherein the principle was accepted that a person who enjoys only a servitude of a right of way, will be debarred from seeking a declaration, that another has no claim for a servitude of a right of way.

Thus, in **Fernando v. Wickramasinghe** (supra) Weerasuriya, J., opined as follows;

> *"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."* (page 41)

Admittedly, the Appellant has only a right of way over lot 30, the road-way. The Appellant does not own the soil rights of lot 30. In such circumstances, I am in agreement with the contention of the Respondent, that the Appellant has no legitimate right and therefore cannot object to the Respondent using the said road-way or prevent or obstruct the Respondent from using the right of way over lot 30, the road-way leading to the Respondent's land.

In the said circumstances, I see no reason to disturb the findings of the Primary Court. Similarly, I see no rhyme or reason, to over-rule the findings of the High Court and the Court of Appeal which upheld the order of the Primary Court, that the Respondent is entitled to use lot 30 the road-way as a right of way, to access the Respondent's land.

Hence, I uphold the direction of the Primary Court issued to the Appellant which was upheld by the High Court and the Court of Appeal as correctly made. I direct the Appellant not to obstruct the Respondent from using lot 30, the road-way as a right of way leading on to the Respondent's land.

For reasons morefully adumbrated in this judgement, I uphold the judgement of the Court of Appeal dated 26th March, 2010 and answer the sole question of law, which the parties agreed would be the only matter this Court should examine and determine, in the negative and in favour of the Respondent.

The High Court judgment dated 28th August, 2008 and the judgment of the Primary Court dated 20th June, 2007 which correctly considered the matter in issue, are also upheld by this Court.

The appeal of the Appellant is thus dismissed, with costs fixed at **Rs. Nine Hundred Thousand (Rs. 900,000.00)**

The **Appellant is directed to abide by the orders made on 20th June, 2007 by the Primary Court forthwith,** and not obstruct the Respondent from using lot 30, the road-way as a right of way, leading onto the Respondent's land.

The Appellant is further directed to pay the sum of Rs. Nine Hundred Thousand as costs to the Respondent, within one month of the date of this judgement.

Since the Respondent has now been substituted by 1a, 1b and 1c Substituted 1st Party Respondent-Respondent-Respondent-Respondents, the 2nd Party-Respondent-Petitioner-Appellant-Appellant is directed to pay the costs fixed at Rs. Nine Hundred Thousand, in equal amounts of Rs. Three Hundred Thousand (Rs. 300,000.00), to 1a, 1b and 1c Substituted Respondents, within the stipulated period of one month from the date of this judgement.

The appeal of the Appellant is dismissed with costs fixed at Rs. Nine Hundred Thousand.

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J.
I agree

Judge of the Supreme Court

S. Thurairaja, PC. J.
I agree

Judge of the Supreme Court