

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

C.A. PHC 83/2004

Priyangi Dharshani
No: 115/05,
Matara Road,
Akuressa.

Appellant

Vs.

J.S. Wijeratne
No: 115,
Matara Road,
Akuressa.

Respondent

C.A.(P.H.C.) 83/2004 : P.H.C. Matara Case No. 213/2003 (Rev.)

M.C. Matara Case No. 35021.

Before : K.T. Chitrasiri, J.&
Malinie Gunaratne, J.

Counsel : Saliya Peiris for the Appellant
Respondent is absent and unrepresented

Decided on : 28.11.2014

K.T. Chitrasiri, J.

Counsel for the appellant submits that he did not receive instructions from the appellant and accordingly he submits that he has no objection for the matter be taken up for argument in the absence of the parties. Accordingly, we decide to consider the merits of this appeal in the absence of the parties.

This is an appeal seeking to set aside the Judgment dated 18/08/2004 of the learned High Court Judge and to have the decision

dated 14/10/2003 of the learned Magistrate affirmed. The order of the learned Magistrate had been made pursuant to an application filed in the Primary Court under Section 66 of the Primary Courts Procedure Act No. 44 of 1979. The learned Magistrate having inspected the land in dispute has decided that the 1st Party Respondent-Appellant is entitled to a right of way leading to her house. Therefore, it is clear that this is an application by the Appellant, to use a right of way, as a right she possess. Therefore, it is clear that Section 69 of the Primary Courts Procedure Act is the provision in law that is applicable in this instance. The aforesaid Section 69 refers to disputes relating to any right in relation to a land. Therefore, it is to be noted that the claimant of that right should first establish the he/she is possessed with such a right.

In this instance, we do not see any material to establish that the Appellant has established that she has such a right namely a right of way to reach her house. Even though the Appellant has referred to a title deed in her affidavit, she has failed to show that she has a right of way to the land to which she has title. Therefore, it is our view that the learned Magistrate has failed to consider properly, the law referred to in Section 69 of the Primary Courts Procedure Act , when he decided to allow the Appellant to use the right of way.

Furthermore, it is an admitted fact that the 2nd Party Petitioner-Respondent has built a house over the strip of land claimed by the Appellant as a road-way. The learned Magistrate has inspected this place and in his observations, he has specifically stated that there is a building constructed over the road way claimed by the appellant. In his observation, he has clearly stated that it is a building constructed with cemented walls. Therefore, it is clear that there is a permanent construction over the road way claimed by the Respondent. In such a situation, the law does not permit to make an order demolishing such a construction when it comes to an application mad under the provisions contained in the part vii of the Primary Courts Procedure Act. This position in law had been held in that manner in the case of Jamis Vs. Kannangara [1989 (2) S.L.R. 350].

Therefore, relying upon the aforesaid decision, it is our view that the learned Magistrate should not have made an order to demolish the construction possessed by the Respondent allowing the Appellant to use the road-way over which a permanent construction is found.. In the circumstances, we decide to dismiss this appeal having affirmed the

decision of the learned High Court Judge. For the aforesaid reasons,
this appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Malinie Gunaratne, J.

I agree

JUDGE OF THE COURT OF APPEAL.

Cr/-