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

In the matter of an Application for Appeal under and in terms of Article 138 and Article 154P(6) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 6 of the Provincial High Court (Special Provisions) Act No. 19 of 1990.

CA. (PHC) 16/2020

HC/ REV/ 290/2018 (Galle)

Magistrate Court Case No. 86922

Officer In Charge,
Police Station,
Habaraduwa.

Complainant

Vs.

Priyantha Amal Sudusinghe,
"Singha Sewana", Welikonda, Angulugaha.

1st Party

1. Koswatta Liyange Ariyawnsha
   No. 347, Mahagoda, Dorape, Angulugaha.

2. Sarangu Hewage Pathma Kumuduni,
   No. 347, Mahagoda, Dorape, Angulugaha

2nd Party

1. Galbokka Hewage Premawathi
2. Laila Badathuruge Sarath Kumara
3. Nishantha Indika Sudusinghe
4. Saman Chaminda Gamage
5. Galbokka Hewage Padmini
6. Hemantha Pushpakumara Sudusinghe

All at “Sirimadura”, Welikonda,
Angulugaha

Intervening Parties

AND

Priyantha Amal Sudusinghe,
“Singha Sewana”, Welikonda, Angulugaha.

1st Party-Petitioner

Vs.

1. Koswatta Liyange Ariyawnsha
2. Sarangu Hewage Pathma Kumuduni

Both at No. 347, Mahagoda, Dorape,
Angulugaha

2nd Party–1st and 2nd Respondents

1. Galbokka Hewage Premawathi
2. Laila Badathuruge Sarath Kumara
3. Nishantha Indika Sudusinghe
4. Saman Chaminda Gamage
5. Galbokka Hewage Padmini
6. Hemantha Pushpakumara Sudusinghe

All at “Sirimadura”, Welikonda,
Angulugaha.

Intervening Party-Respondents

Officer In Charge,
Police Station,
Habaraduwa.

Complainant- Respondent

AND NOW

Priyantha Amal Sudusinghe,
"Singha Sewana", Welikonda, Angulugaha.

1st Party-Petitioner-Appellant

Vs.

1. Koswatta Liyange Ariyawnsha
2. Sarangu Hewage Pathma Kumuduni

Both at No. 347, Mahagoda, Dorape, Angulugaha

2nd Party–1st and 2nd Respondent-Respondents

1. Galbokka Hewage Premawathi
2. Laila Badathuruge Sarath Kumara
3. Nishantha Indika Sudusinghe
4. Saman Chaminda Gamage
5. Galbokka Hewage Padmini
6. Hemantha Pushpakumara Sudusinghe

All at "Sirimadura", Welikonda, Angulugaha.

Intervening Party–Respondent-Responndents

Officer In Charge,
Police Station,
Habaraduwa.

Complainant – Respondent- Respondent

Before:	Damith Thotawatte, J. K.M.S. Dissanayake, J.
Counsels:	Nuwan Bopege with Dinusha Thiranagama for the 1st Party–Petitioner–Appellant. Geeth Karunarathne for the Respondents.
Argued:	01.10.2025
Written submissions tendered on:	26.06.2025 by 2nd Party-Respondent–Respondents. 22.11.2024 & 11.11.2025 by 1st Party–Petitioner-Appellant.
Judgement Delivered:	13.01.2026

Thotawatte, J.

This appeal is against the order dated 26.02.2020 pronounced against the 1st Party-Petitioner-Appellant (hereinafter sometimes referred to as the "Appellant") and in favour of the 2nd Party-Respondent-Respondents (hereinafter sometimes referred to as the "Respondents") by the learned Judge of the High Court of the Southern Province holden in Galle, exercising revisionary jurisdiction, under Article 154P(3)(b) of the Constitution, whereby the said Court dismissed the revision application filed by the Appellant and affirmed the order dated 23.05.2018 made by the learned Magistrate of the Magistrate's Court of Galle, acting as the Primary Court Judge under the provisions of the Primary Courts' Procedure Act No. 44 of 1979 (hereinafter sometimes referred to as the "PCP Act"), in proceedings instituted upon an information filed by the Officer-In-Charge of the Habaraduwa Police Station under Section 66 of the PCP Act that there was a likelihood of a breach of the peace.

The subject matter of the dispute between the Appellant and the Respondents is a road access over the land called "Welikonda Mahawatte Ovita" (hereinafter sometimes referred to as the "Mahawatte"), which is claimed by the Appellant to extend from the road along

the Southern boundary of the said land up to the land belonging to the Appellant called "Kongahawatta", which is situated along the northern boundary of "Mahawatte".

The Appellant's position is that the subject matter of the dispute was a roadway approximately 10–12 feet in width, which he had used openly and continuously for several decades to access his land known as "Kongahawatta". He maintains that the roadway lay within land known as "Mahawatte", in which he had acquired an undivided share by deed dated 19 June 2017, thereby rendering him a co-owner of the "Mahawatte". The Appellant asserts that the dispute arose only when the Respondents obstructed his long-standing use of the roadway, when he commenced construction of a new house on "Mahawatte" land [as a co-owner], and that the matter fell squarely within the ambit of Section 69 of the PCP Act.

The Respondents' position, in contrast, is that the disputed strip of land, which is claimed by the Appellant as a roadway, formed part of their privately owned land inherited by them. They deny that the Appellant possessed any co-ownership or shared rights over the land in question and contend that the Appellant was unlawfully attempting to widen a temporary access across their land. The Respondents further maintained that the Appellant had a clearly identifiable alternative access route to his property, and as such, there is no necessity for the Appellant to make use of their land to access "Kongahawatta".

In September 2017, the Respondents had lodged a complaint with Habaraduwa Police alleging that the Appellant had attempted to widen an access across land belonging to the Respondents, and the Appellant had lodged a counter-complaint, alleging obstruction of access by the Respondents. Although the police had intervened to maintain peace, the dispute had persisted, and on 13 January 2018, the Appellant had again complained to the police alleging continued obstruction. Having formed the view that the dispute was not capable of settlement and that its continuance posed a real and imminent risk of a breach of the peace, the Police initiated proceedings by filing Information under Section 66(1) of the PCP Act in the Magistrate's Court of Galle on 7 February 2018.

Upon consideration of the affidavits, submissions, and material placed before the court, the learned Magistrate delivered an order dated 23 May 2018, concluding that the Appellant and the intervening parties had access to their respective lands through an alternative roadway and that they were therefore not entitled to claim a right of way over the land of the 2nd Party Respondents. The Magistrate accordingly restrained the Appellant and the intervening parties from disturbing the possession or rights of the Respondents.

Being dissatisfied with the order of the learned Magistrate, the Appellant had invoked the revisionary jurisdiction of the High Court seeking to set aside the order of the Magistrate's Court on the basis that the learned Magistrate had misdirected himself in law in the exercise of jurisdiction under the PCP Act.

Before the High Court, the Appellant had contended *inter alia* that the learned Magistrate had misdirected himself in law by exceeding the limited statutory scope of an inquiry under Sections 66 and 69 of the PCP Act, in particular by treating the existence of an alternative access route as determinative. The 2nd Party Respondents resisted the application, maintaining that the Magistrate's order was a proper preventive measure and that no exceptional circumstances warranting revisionary interference had been established. Upon consideration of the submissions, the learned High Court Judge, by order dated 26.02.2020, dismissed the revision application and affirmed the order of the Magistrate's Court, holding that "he" (the Judge of the High Court) cannot see any reason to vacate or change the impugned order of the learned Magistrate.

Being aggrieved by the order of the High Court dated 26.02.2020, the Appellant has preferred the present appeal to this Court. The substance of the Appellant's grievance is that both the Magistrate's Court and the High Court erred in law in the exercise of jurisdiction under the PCP Act. In particular, it is contended that the learned Magistrate failed to apply the correct statutory test under Section 69 by not determining whether the Appellant was entitled, *for the time being*, to exercise the disputed right of way, and instead proceeded to consider matters such as the existence of alternative access, which, according to the Appellant, fall outside the limited scope of the preventive jurisdiction. It is further contended that the High Court, in dismissing the revision application, failed to correct these alleged misdirection's and improperly declined to exercise its supervisory jurisdiction.

It is pertinent to observe that the learned Magistrate grounded the impugned order exclusively on a single factual premise, namely, the alleged availability of an alternative access route to the Appellant's land known as "Kongahawatta" and on that basis alone, concluded that the Appellant was disentitled to assert a right of way over "Mahawatte." In doing so, the Magistrate failed to evaluate the remaining evidence or to undertake the requisite inquiry as to whether, for the time being, the Appellant was entitled to the use of the disputed roadway.

Section 69(1) of the PCP Act reads as follows:

> 69
>
> (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).

Section 69(1) of the PCP Act addresses the nature of such rights as follows:

> 75 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.
>
> [Emphasis is mine]

In refusing relief to the Appellant solely by reference to the availability of an alternative roadway, the learned Magistrate appears to have proceeded on the assumption that the Appellant was under no necessity to utilise the purported roadway over the land claimed by the Respondent.

The concept of *necessity* in relation to a right of way is a doctrine of civil servitude, relevant to the creation or recognition of permanent rights under substantive property law and falling within the jurisdiction of the District Court. The authorities consistently hold that such considerations are alien to proceedings under section 66 of the PCP Act, which are preventive in character and confined to determining possession or entitlement for the time being, without reference to necessity or alternative access.

In ***Lowe*** v. ***Dahanayake and another***[1] "necessity" is identified as a mode of creating a civil servitude;

> "A right of way can come into existence, by an agreement duly registered, by Crown Grant, by prescriptive possession, by dedication to the public or by a declaration by a competent statutory authority that a right of way of necessity has been granted".[2]

In ***Abdul Hasan Mohamed Mubgarak*** V. ***Officer-in-Charge, Sri Lanka Police, Aluthgama and Others***[3] his lordship Dr. Ruwan Fernando, J clarifying that proceedings under Section 69 of the PCP Act do not require proof of as required by civil servitude has stated:

> "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."[4]

In continuation, His Lordship Fernando J., building upon prior authority, articulated with particular clarity the two distinct alternative bases upon which entitlement under Section 69 of the Primary Courts' Procedure Act may be established, as:

> *(1) by adducing proof of the entitlement as is done in a civil court; or*
> *(2) by offering proof that he is entitled to the right for the time being.*

Having regard to Section 75 of the PCP Act, the inquiry under Section 69 is directed not to the existence of a servitude established as understood in law of property law, but to the existence of a right in the nature of a servitude. It follows that proceedings under Section 69 do not require proof a servitude established in the manner in accordance with civil law; and as such, even in the absence of such proof, the Primary Court Judge is under a mandatory duty to consider whether the applicant has established entitlement for the time being to exercise the disputed right. Such entitlement being interim and conditional, and liable to be displaced by an order or decree of a competent civil court.

In ***R. Malkanthi Silva*** v. ***L.G.R.N. Perera and others***[5] her Ladyship Murdu N.B. Fernando, PC, J., expressly recognised that relief under the PCP Act is not founded on the doctrine of necessity.

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[1] [2005] 02 Sri L.R 413, CALA 37-2005 CAM 2.11.2005
[2] *Id. at* page 414 ([2005] 02 Sri L.R 413)
[3] CA No. PHC 167/2013 CAM 30.09.2020
[4] *Id. at* page 11
[5] SC Appeal No. 181/2010 Decided on 23 July 2024

> "The Respondent is not claiming access to her land over the disputed roadway 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 roadway."

In the circumstances, it is apparent that the learned Magistrate has misapprehended the nature and scope of the proceedings under the PCP Act, thereby committing a material error of law. The learned Judge of the Provincial High Court has likewise erred in affirming the said order. Inasmuch as the learned Magistrate has failed to analyse the evidence adduced by the Appellant for the purpose of determining whether an entitlement to the right of way for the time being has been established, this court is of the view that the matter ought to be remitted to the Magistrate's Court of Galle for reconsideration according to law.

However, as the appellant had since 19 June 2017, been a co-owner of "Mahawatte" ["Welikonda Mahawatte Ovita"], during the pendency of this instant case, had filed a partition action (Plaint dated 30.09.2021) in the District Court of Galle under case No. P 18453, making the Respondents the 5th and 6th Defendants.

According to the written submissions of the Respondents, in addition to final partition relief, the Appellant had sought interim orders permitting him to: use the disputed roadway, across "Mahawatte". By order dated 15.02.2022, the learned District Judge refused to grant the interim reliefs sought by the Appellant in respect of the roadway. Thereafter the Appellant has filed leave to appeal against the District Court's refusal of interim relief under case No SP/HCCA/GA/04/2022F (LA 03/2022). During the pendency of LA 03/2022, the Appellant and the 2nd Party-Respondents entered into a settlement, which was recorded by the Civil Appellate High Court. The settlement related specifically to the use of the disputed roadway pending further proceedings.

Certified copies of the plaint in the partition case, certified copies of the proceedings with regard to the settlement, the order of the Civil Appellate High Court, two transfer deeds with written submissions, have been filed by the Appellant by motion dated 22 November 2024. Upon perusal of the settlement recorded in the Civil Appellate High Court, it appears that the parties have agreed that the Appellant shall have access up to the location where the appellant is carrying out construction within "Mahawatte" from the Southern boundary of "Mahawatte".

Under this settlement, the Appellant's access will not extend from the construction site within "Mahawatte" to the Northen boundary of "Mahawatte" where his land "Kongahawatta" is situated. However, the Appellant admittedly has alternate access to his land "Kongahawatta" through a different road.

The Appellant acknowledges the settlement recorded and also the fact that all issues regarding the disputed roadway will get resolved at the end of the partition action. However, he contends that he wishes to pursue this instant appeal against the order of the learned Magistrate, as it is relevant as a peace-preserving, interim measure pending final civil adjudication.

Agreeing to partially open the disputed roadway by consent between the rival parties, and the order made by the Civil Appellate High Court based on the said agreement has essentially caused the order of the learned Magistrate to be vitiated. In addition the very fact that such a settlement was reached militates against the likelihood of a breach of the peace. Upon considering of the order of the Civil Appellate High Court, it is apparent that the future conduct of the parties with regard to the disputed roadway will be governed by the said order dated 27 February 2023, pending the final determination of their respective rights.

In the totality of the circumstances, and particularly in view of the subsequent partition proceedings and the settlement recorded before the Civil Appellate High Court regulating the use of the disputed roadway, the preventive purpose underlying proceedings under the Primary Courts' Procedure Act has been rendered superfluous. Accordingly, this Court is of the view that no useful purpose would be served by this continuing a challenge to the order of the learned Magistrate dated 23 May 2018. This appeal is therefore dismissed, with costs.

Judge of the Court of Appeal

K.M.S. Dissanayake, J.

I agree

Judge of the Court of Appeal