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

In the matter of an Appeal in terms of Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 154P(6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A (PHC) No. 65/2003

Provincial High Court of Western Province
Kalutara Case No. HCRA 16/2002

Magistrate's Court of Kalutara Case No. 38745

1. Aluthhewage Harshani Chandrika.

2. Medagamage Jayantha Chandrasiri.

   Both of No. 21, Wijesekara Place,
   Kalutara South.

2nd Party Respondents – Respondents-Appellants

Vs.

Officer-in-Charge,
Police Station,
Kalutara South.

Complainant – Respondent - Respondent

Aluthhewage Swarna Nilanthi,
No. 142, Old Road,
Kalutara South.

1st Party Respondent - Petitioner-Respondent

Before:	**Mahinda Samayawardhena, J** **Arjuna Obeyesekere, J**
Counsel:	Manohara De Silva, P.C., with Bhoopathi Kahathuduwa for the 2nd Party Respondents – Respondents - Appellants Ms. Vindhya Dullewa for the 1st Party Respondent – Petitioner - Respondent
Written Submissions	Tendered on behalf of the Appellants on 22nd May 2017 Tendered on behalf of the Respondent on 30th May 2017 and 7th August 2020
Decided on:	21st September 2020

Arjuna Obeyesekere, J

The learned Counsel for all parties have moved that this Court pronounce judgment on the written submissions that have already been tendered by the parties.

The 2nd Party Respondents – Respondents – Appellants (the Appellants) have filed this appeal seeking to set aside the judgment dated 4th December 2002 delivered by the learned High Court Judge of the Provincial High Court of the Western Province, holden at Kalutara.

The facts of this matter very briefly are as follows.

The 1st Appellant and the 1st Party Respondent – Petitioner – Respondent (the Respondent) are sisters. Their mother, Wanniarachchige Chandrani Hemalatha had become the owner of the entire property relevant to this action, containing in extent 1R 14.2P, after the death of their father. In 1982, Hemalatha had executed a Deed of Gift[1] in favour of the 1st Appellant in respect of the land bearing assessment No. 28, Gnanodaya Road, Kalutara. In 1985, Hemalatha had executed a Deed of Gift[2] in

[1] Deed of Gift No. 1009 attested by Siri Perera, Notary Public, has been produced in the Magistrate's Court marked '2P1'

[2] Deed of Gift No. 1239 attested by Siri Perera, Notary Public, has been produced in the Magistrate's Court marked '1V1', read together with Deed of Rectification No. 684 attested by S.S.K.Wijayawikrama, Notary Public.

favour of the Respondent in respect of the land bearing assessment No. 28/1, Gnanodaya Road, Kalutara, which is the balance part of the land owned by Hemalatha.[3] It appears from Plan No. 2468[4] filed in the Magistrate's Court that Gnanodaya Road is situated to the north of premises No. 28, while premises No. 28/1 is situated to the south of premises No. 28.

On 5th October 2001, the Respondent had lodged a complaint at the Kalutara North Police Station, stating that she had been in occupation of premises No. 28/1 for about 10 years and that the rain water collecting on the said land flows through a drain which is situated on premises No. 28 belonging to her sister, the 1st Appellant, to a drain situated on Gnanodaya Road. She alleged that the Appellants had put earth over the drain situated on the premises belonging to the 1st Appellant and closed it, thereby preventing the flow of rain water from her premises, to the drain on Gnanodaya Road, resulting in her premises being inundated with water during rainy days. The crux of the Respondent's complaint therefore was that the Appellants are interfering with a right that she has enjoyed for a long period of time.

It appears that the Police did not take any steps on this complaint, prompting the Respondent to lodge a further complaint on 4th November 2001. In this complaint, the Respondent had stated that her premises had been flooded due to the rains that had occurred during this time, and that when her husband tried to open the drain, the 1st Appellant, together with her husband, the 2nd Appellant had tried to assault the Respondent's husband.

Fearing a breach of the peace, the Officer-in-Charge of the Kalutara Police Station had inquired into the said complaint and as the matter could not be amicably resolved, had reported facts to the Magistrate's Court of Kalutara on 19th November 2001 under Section 66(1) of the Primary Courts Procedure Act No. 44 of 1979, as amended (the Act). I have examined the said report, and observe that the Police have not inspected the premises in question, prior to reporting facts to the Magistrate's Court.

[3] The assessment number has since been changed to No. 142, Old Road, Kalutara.
[4] This plan has been produced in the Magistrate's Court, marked '1V3'.

Part VII of the Act contains provisions that enable a judge of the Primary Court to inquire *into disputes affecting land where a breach of the peace is threatened or likely*. The complaint made by the Respondent falls within Section 69(1) of the Act, which reads as follows:

> "*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 75 of the Act defines a 'dispute affecting land' as follows:

> "*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*.

Thus, in this case, what is required to be established by the Respondent is not that she has a servitude but only that she is entitled to a right which is in the nature of a servitude.

Section 69(2) sets out the power of the Primary Court Judge when inquiring into a complaint under Section 69(1) and reads as follows:

> "*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*."

The scope of an order that could be made in terms of Section 69 of the Act has been explained in the following manner in **Tudor vs Anulawathie and another**[5]:

> "*The above subsections, 69 (1) and (2), require the Primary Court after inquiry to-*
>
> *(i) determine as to who is entitled to the right.*
>
> *(ii) make an order that the person specified therein shall be entitled to such right until such person is deprived of that right by virtue of an order or decree of a competent Court.*
>
> *(iii) prohibit all interference with or disturbance of that right other than under the authority of an order or decree of a competent Court*."

The learned Magistrate, by his Order delivered on 25th March 2002 had stated that the report filed by the Police does not disclose any details relating to a drain on the said land and that the parties too have failed to disclose to Court details such as the size and location of the drain. He thus held that he could not make any order with regard to the use of a drain, if such drain cannot be identified, as his Order will not be capable of being given effect to. On this basis, the learned Magistrate held that the report filed by the Police is faulty and directed the parties to maintain the status quo until a suitable order is obtained from a competent court and not to cause any breach of the peace in the interim.

Dissatisfied by the said Order, the Respondent invoked the revisionary jurisdiction of the Provincial High Court of the Western Province, holden at Kalutara. The learned High Court Judge, by his judgment delivered on 4th December 2004 set aside the order of the learned Magistrate, which has resulted in this appeal being filed.

In considering this appeal, it would perhaps be appropriate to bear in mind the following passage from the judgment of this Court in **Bandulasena and Others vs Galla Kankanamge Chaminda Kushantha and Others:**[6]

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[5] 1999 (3) Sri LR 235 at 245.

[6] CA (PHC) No. 147/2009; CA Minutes of 27th September 2017; per P. Padman Surasena, J.

"*It would be relevant to bear in mind that the appeal before this Court is an appeal against a judgment pronounced by the Provincial High Court in exercising its revisionary jurisdiction. Thus, the task before this Court is not to consider an appeal against the Primary Court order but to consider an appeal in which an order pronounced by the Provincial High Court in the exercise of its revisionary jurisdiction is sought be impugned.*

It is relevant to observe that this Court in the case of Nandawathie and another V Mahindasena[7] *also had taken the above view. It is noteworthy that this Court in that case*[8] *had stated that the right given to an aggrieved party to appeal to the Court of Appeal in a case of this nature should not be taken as an appeal in the true sense but in fact an application to examine the correctness, legality or the propriety of the order made by the High Court Judge in the exercise of its revisionary powers.*"

The dispute between the parties, with which the learned High Court Judge had to deal with, was two-fold. The first is with regard to the existence of a drain on the 1st Appellant's property to carry the rain water that is collected on the property of the Respondent, with the Appellants denying the existence of a drain. The second is regarding the entitlement of the Respondent to use the said drain.

In her affidavit filed in the Magistrate's Court, the Respondent had stated that this entire property had been owned by her father as one land and that after his death, her mother, who had become the owner of the property, had sub-divided the said land. She had stated further that even though access to her premises is from Old Road, which is on the western boundary of her land, Old Road is situated on a higher elevation than her land, and therefore rain water that is collected on her property cannot be diverted to the drain on Old Road. It is not disputed that Old Road is situated on a higher elevation than the Respondent's property. The Respondent states further that Gnanodaya Road, from which the 1st Appellant has access, is at a lower elevation than her land. She had stated further that from the time of her father, when the entire land was one land, the excess water from the southern end of the land which is presently owned and occupied by the Respondent, had been

[7] [2009] 2 Sri LR 218.
[8] Ibid. at page 238.

diverted to the drain situated on Gnanodaya Road through a drain which was situated on the property which is now owned by the 1st Appellant.

The Respondent had also stated that the Appellants had blocked the opening that was there on the wall separating the two properties, through which the drain proceeded from her premises. She had stated further that the drain itself had been covered up with earth and rubble by the Appellants. Photographs depicting the opening on the wall had been annexed to the affidavit of the Respondent,[9] and even though the learned High Court Judge seems to have had the benefit of the said photographs, they do not form part of the appeal brief and are not available in the record.

The Respondent states that pursuant to a complaint made by her on 8th October 2001 to the Kalutara Urban Council,[10] the Public Health Inspector had inspected the said property and issued a report dated 31st December 2001, which has been annexed to her affidavit, marked '**1V9**'. In this report, the Public Health Inspector had stated as follows:

> ''කළුතර දකුණ, පරණ පාරේ අංක 142 දරණ ස්ථානයේ පදිංචි ඒ.එස්. නිලන්ති යන අය විසින් නගර සභාව වෙත යොමු කර තිබූ පැමිණිල්ල 2001.10.08 දින මවිසින් ස්ථානිය පරීක්ෂාව සිදු කළෙමි.
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> මෙම පරණ පාරේ පිහිට අංක 142 දරණ ඉඩමට ප්‍රවේශ මාර්ගය ලෙස පරණ පාර භාවිතා කරති. ඉඩමට වඩා උස් භූමි මට්ටමක පරණ පාරේ නගර සභා කාණුව පිහිටා ඇත. මෙම අංක 142 දරණ නිවසේ වැසිකිලි අපවිත්‍ර ජලය සහ මුළුතැන්ගෙයි අපවිත්‍ර ජලය ගලායාමට වෙනම වලවල් සකසා ඇත.
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> ඉඩමේ එක් පසෙක එනම් ඥානෝදය පාර කාණුවට සම්බන්ධ වනසේ වැසි ජලය ගලායාමට කාණුවක් තිබූ බව පැමිණිල්ලේත් කියවෙන අතර **<u>දැනට එම කාණුව වසා දමා ඇති බව නිරීක්ෂණය කළෙමි.</u>**
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> මෙම කාණුව වසා දැමීමෙන් වැසි ජලය එක් රැස්වී තිබීම නිරීක්ෂණය කල අතර එසේ ජලය එක්රැස් වීම නිසා මදුරුවන් බෝවීම තදින් තිබූ බැවි නිරීක්ෂණය කළෙමි.
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> අංක 142 දරණ ඉඩමේ ප්‍රවේශ මාර්ගය වන පරණ පාරේ පිහිට නගර සභා කාණුවට වැසි ජලය හරවා යැවීමට නොහැකි වන්නේ පරණ පාරට වඩා පහත් මට්ටමක ඉඩමේ භූමි කොටස පිහිටා ඇති බැවිනි.

[9] The photographs have been marked as '1V4' – '1V8'.
[10] A copy of the said complaint had been produced before the Magistrate's Court, marked '1V0'.

පැමිණිල්ලේ සඳහන් පරිදි දිරාඟ කාලයක් වැසි ජලය ගලා පැරණි කාණුවක් මගින් ඥානෝදය කාණුවට බව පවසා සිටි.

මෙම ඉඩමේ වැසි ජලය බැසයාමට ඥානෝදය මාවත කාණුව හැර වෙනත් කාණුවක් නොමැති බව නිරීක්ෂණය කලෙමි.''

In the affidavit filed in the Magistrate's Court by the Appellants, they denied the existence of a drain and alleged that the Respondent has made false complaints with a view of obtaining a drain across their land. The Appellants had annexed to their affidavit, a letter issued by the Priest who is operating a school on premises No. 28, denying the existence of a drain. The Appellants have annexed to their counter affidavit, an affidavit from Hemalatha, the mother of the 1st Appellant and the Respondent, who too had denied that there was a drain. However, as Hemalatha's affidavit was annexed only to the counter affidavit of the Appellants, the Respondent had been denied an opportunity of countering the matters set out therein.

The Appellants have also sought to challenge the report of the Public Health Inspector on the basis that it's not an independent report as it has been obtained on the instructions of the Respondent's Attorney-at-Law.

The learned High Court Judge, having considered the above material, held that the learned Magistrate had erred when he held that there was no drain and that he had failed to consider the report of the Public Health Inspector which referred to the existence of a drain and that in this background, to dismiss the application on the basis that the Police report is incomplete, was erroneous.

The learned High Court Judge had thereafter made the following Order:

"මේ අනුව ප්‍රතිශෝධන අයදුමට ඉඩ දෙමින් මා කළුතර මහේස්ත්‍රාත් තුමාට නියම කර සිටින්නේ යලි කළුතර මහේස්ත්‍රාත් අධිකරණයේ පැවතුනු 38745 අංක දරණ නඩුව විවෘත අධිකරණයේ අද දින සිට වැඩ කරන දින 07 ක් ඉක්මවීමට පෙර එනම් දෙසැම්බර් 12 හෝ 13 වන දින කැඳවා පහත සඳහන් අන්දමට ප්‍රකාශිත මෙම අධිකරණයේ නියෝගය ක්‍රියාත්මක කිරීම නියම කිරීම අධික්ෂණය කරන ලෙසය. එනම් පලමුවන පාර්ශව කාර පෙත්සම්කාරියට අළුත්හේවාගේ ස්වරණා නිලන්ති නැමැත්තියට සිය ඉඩමෙහි එක්රුස්වන ස්වභාවික වැසි ජලය බැස්සවීමේ අයිතිවාසිකම 2, 3 වගඋත්තරකරුවන් වන අළුත්හේවාගේ හර්ෂනි චන්ද්‍රිකා සහ මැදගමගේ ජයන්ත ප්‍රේමසිරි ගේ ඉඩම මතින් පිහිටා ඇති කානුව තුලින් සිදුකිරීමේ අයිතිවාසිකම ඝෂණිකව යලි සැලැස්විය යුතු බවත් උචිත සිවිල් අධිකරණයකින් මේ පිලිබඳ ස්ථිරවූ නියෝගයක් ප්‍රකාශ

කරන තුරු එසේ බාධාවෙන් තොරව එම කානුව එසේ භාවිතා වීමට ඉඩදිය යුතු බවත් නියම කරන්නට යෙදුනි."[11]

I observe that the learned Magistrate refused to make an order not on the basis that there was no drain but on the basis that it is difficult to identify a drain. I am in agreement with the view expressed by the learned High Court Judge that the Act has provided the learned Magistrate with an opportunity of clarifying any doubt about the existence of a drain or where the report of the Police lacked clarity, and in that context, I am in agreement with the decision of the learned High Court Judge to set aside the order of the learned Magistrate.

When one considers the evidence of the Respondent especially the fact that it was one land that was later sub-divided, and the report of the Public Health Inspector, which is the only independent report regarding the existence of the drain, it appears that a drain existed as claimed by the Respondent. I therefore hold that the learned High Court Judge was right when he accepted the report of the Public Health Inspector confirming that there was evidence to the effect that the drain had been closed.

Having reached the above conclusion, I shall now consider the issue of entitlement to a right in the nature of a servitude in favour of the Respondent.

In the written submissions filed on behalf of the Appellants, it was submitted that since what the Respondent is claiming is a servitude, the Respondent must establish that she is entitled to the said servitude as opposed to the mere use of that servitude and that the Respondent has failed to establish same.

What is meant by '*entitled*'[12] and the approach that should be adopted by the Primary Court when considering whether a party is entitled to a right, was considered by this Court in **Ananda Sarath Paranagama vs Dhammadhinna Sarath Paranagama and others**[13] where it was held as follows:

[11] In Tudor vs Anulawathie and others (supra), it was held that the Primary Court has the power to 'restore the right to that person who is found or determined by the Primary Court to be entitled to that right if, in fact, that person who is held to be entitled to that right had been deprived of it."'

[12] Vide Section 69(1) and (2).

[13] C A (PHC) APN 117/2013; CA Minutes of 7th August 2014; per A.W.A.Salaam, J (P/CA)

"The question that arises for determination at this stage is whether a party claiming a right to any land other than the right to possession should establish his right precisely as he is expected to do in a civil case or whether he could succeed in obtaining the declaration as contemplated in Section 69, merely by proving that he enjoyed the right as at the time when the dispute arose. It is to be understood that the proof of the acquisition of the right is totally different from proving the enjoyment/existence of the right at the time the dispute arose.

In dealing with the nature of the right, a Judge of the Primary Court is expected to adjudicate under Section 69 of the Act, Sharvananda, J (later Chief Justice) in the case of Ramalingam Vs Thangarajaha[14] *stated that in a dispute 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 of the Act, Section 69 requires the Court to determine the question as to which party is entitled to the disputed right preliminary to the making of an order under Section 69(2). (Capitalization is mine)*

According to the decision in Ramalingam (supra) the Judge of the Primary Court has two options, in deciding as to which of the parties should be declared entitled to the right. Since the word "entitle" as used in Section 69 implies ownership of the right, the Judge of the Primary Court could determine as to who in fact has acquired the disputed right. In the larger sense it means any kind of proof of the acquisition of the disputed right as envisaged by any law dealing with the ingredients to be proved. For instance, if the disputed right is the existence of a right of way, the party who desires the Court to pronounce his entitlement may establish the uninterrupted and undisturbed use of the pathway, by a title adverse to or independent of the owner that is to say, a use of the pathway unaccompanied by any payment from which an acknowledgment of a right existing in another person would fairly and naturally

[14] [1982] 2 Sri LR 693.

be inferred for ten years previous to the filing of the information under Section 66 of the Act.

There are two ways in which an entitlement can be proved in the Primary Court. They are ...
1. By adducing proof of the entitlement as is done in a civil Court.
2. By offering proof that he is entitled to the right FOR THE TIME BEING.

The phrase "for the time being" as used in the decision in Ramalingam's case connotes the exercise of right by one party, 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. If you describe a party as being entitled to enjoy a right but for the time being, it means that it will be like that for a period of time, but may change in the future. This is exactly in keeping with legislative wisdom embodied under part VII of the Act.

The rationale behind this principle is that the conferment of the special jurisdiction on a Judge of the Primary Court under Chapter VII of the Act is quasi -criminal in nature and is intended to facilitate the temporary settlement of the dispute between the parties so as to maintain the status quo until the rights of the parties are decided by a competent civil Court. Subject to this, every other concerns however much prominent they may appear to be, will have to be placed next to the imperative necessity of preserving the peace.

As has been emphasised in the case of Ramalingam (supra) at an inquiry under Chapter VII, the action taken by the Judge of the Primary Court is of a purely preventive and provisional nature, pending the final adjudication of the rights of the parties in a civil Court and the proceedings under this Section are of a summary nature. Moreover, it is essential that they should be disposed of as expeditiously as possible. In the circumstances, although it is open to a party to prove the right he claims to be entitled to as is required under the substantial law dealing with a particular right, it is not impossible for him to be content with adducing proof to the effect that he has the right to enjoy the entitlement in dispute for the time being.

Insistence on the proof of a right as in the case of a civil dispute, in this type of proceedings, would lead to two original Courts having to resolve the identical dispute on the same evidence, identical standard of proof and quantum of proof twice over. This would indeed an unnecessary duplicity and is not the scheme suggested by the Criminal Courts Commission and could neither be the intention of the Legislature.

One has to be mindful of the fact that there are still judicial officers in this country who function simultaneously as Judges of the Primary Court, Magistrates, and Judges of the Juvenile Court, Judges of the family Court and District Judges. If disputes affecting lands under the Primary Court Procedure Act are to be heard by the Primary Court Judges and later the civil case as District Judges on the same evidence, same standard of proof and identical quantum of proof, it would not only result in the utter wastage of the precious time of the suitors and the Courts but will be a meaningless exercise as well."

It appears from the facts of this appeal that before the land was divided, the natural flow of rain water was from the south of the property to a drain situated on Gnanodaya Road, which is admittedly at a lower elevation to the said land. **C.G. Hall and E.A. Kellaway** in their book titled "Servitudes"[15] had explained the law relating to servitudes as follows:

"*The liability of a lower-lying land to receive water draining from the property above it can originate in three different ways,viz:-*
(a) Owing to its natural situation (natura loci);
(b) By agreement, i.e., servitude (lex);
(c) By prescription or vetustas.
Every owner of property is bound to receive the water which naturally drains onto his property from the land lying on a higher level than his own, nor may he raise any obstruction on his land whereby the water is dammed back on the property above him (Retief v. Louw, 4 Buch. p. 174; Ludolf v Wegner, 6 S.C. 193)."

[15] [1942] Juta & Co., Ltd., at page 86.

The above passage has been cited with approval by this Court in the case of **Hunter and Company Limited vs. Delmage Forsyth and Company Limited**[16] where it was held as follows:

> *"The common law posits that the upper tenement has a right to discharge its ordinary rainwater on to the lower tenement which abuts the upper tenement, but subject to certain limitations, namely:(l) the two lands, namely, the dominant tenement and the servient tenement must be contiguous, (2) the dominant tenement must establish that it has a servitude over the servient tenement, (3) that servitude is proved to be a servitude of ius fluminis… In the leading South African case of Ludolph v Wegner de Villiers, C.J quite poignantly alluded to two modes of creation of the right of the upper tenement to discharge water on to the lower tenement:*
>
> > *"A right to discharge water upon a neighbour's land may exist by virtue of a duly created servitude, or by virtue of the natural situation of the locality."*
>
> *In addition to the aforesaid two modes of acquisition of the right to discharge water to the low-lying neighbour's land namely, agreement, i.e. servitude (lex) and creation owing to natural location (natura loci), the learned Chief Justice of South Africa also alluded to the other modes of acquiring a drainage right viz by prescription or vetustas. He explained vetustas thus:*
>
> > *"Where water has flowed in an artificial channel for thirty years or more it may be presumed, in the absence of evidence to the contrary, to have flowed immemorially."*

In **Marikar v. de Rosairo**[17], Lascelles CJ observed:

> *"I do not think that it is material that the difference in level is small, provided that it is enough to direct the water from the upper tenement to the lower tenement. A natural servitude of this nature is, of course, limited in its extent.*

[16] CA Appeal No. 411/1997 (F); CA Minutes of 18th January 2016; per Nawaz J (as he then was)
[17](1912) 15 NLR 507.

The lower proprietor is obliged only to receive such water as flows in the ordinary course of nature from the upper tenement."

Thus, taking into consideration the facts placed before the learned Magistrate by the parties, I am of the view that the Respondent has established a prima facie entitlement to a right which is in the nature of a servitude across the 1st Appellant's land for the time being and that the said entitlement is '*pending the final adjudication of the rights of the parties in a civil Court.'*

I therefore do not see any merit in the argument of the Appellants. This appeal is accordingly dismissed, without costs.

Judge of the Court of Appeal

Mahinda Samayawardhena/J

I agree.

Judge of the Court of Appeal