

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

In the matter of an Application for Leave to Appeal in terms of Section 754 read together with Section 757 of the Civil Procedure Code and Section 5A of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Bambarawana Liyanagamage Dayawahie  
alias Daya Abeyawicsrama,  
No. 320, Galle Road,  
Mount Lavinia.

**Substituted Plaintiff-Respondent**  
**-Appellant**

**SC. Appeal No. 80/2011**

SC(HC) CALA Case No. 63/11

HCCAMT Case No. 118/07/F

D.C. Mount Lavinia Case No. 1316/00/L

**-Vs.-**

- Magage Nimal Dias,
- Magage Kumara Ranjith Dias
- Magage Sirisena Chandra Dias
- Magage Manel Dias

All of them at No. 314/2,  
Galle Road,

Mount Lavinia.

**Defendants-Appellants-Respondents**

**BEFORE** : Tilakawardane, J.  
Dep, PC., J. &  
Wanasundera, PC, J.

**COUNSEL** : Champaka Ladduwahetti for the Substituted  
Plaintiff-Respondent-Appellant.

Ranjan Suwandaradne for the Defendants-  
Appellants-Respondents

**ARGUED ON** : 18.10.2012

**DECIDED ON** : 07.12.2012

**TILAKAWARDENA, J**

Leave to Appeal was granted to the Substituted Plaintiff – Respondent – Appellant (hereinafter referred to as the Substituted Appellant) on 17th June 2011 as against the Judgment dated 17th January 2011 of the Provincial High Court of Civil Appeal of Mount Lavinia (hereinafter referred to as the Civil Appellate High Court) bearing case No. WP/HCCA/Mt/118/07 F.

The deceased Plaintiff (husband of the Substituted Appellant) instituted action in the District Court of Mount Lavinia bearing case No. 1316/00/L, against the 1st to the 4th Defendant – Appellant – Respondents (hereinafter referred to as the Respondents), seeking inter alia for a declaration that the deceased Plaintiff is entitled to commonly possess Lot ‘A3’ (described in No. 1 of the Schedule to the Plaint and No.2 of the Schedule of Deed No. 5301 dated 26th January 1976 attested by S. Wickremasinghe, Notary Public) together with other owners of that property, for an order directing the removal of all constructions and obstructions

caused to the Lot 'A3' and for a permanent injunction restraining the Respondents from constructing temporary and permanent structures within the said road way.

The Substituted Appellant's assertion is that the deceased Plaintiff became the owner of the property described in No. 1 of the Schedule to the Plaint together with the right of access described as the second land in the Schedule to the Plaint by way of Deed No. 5301 dated 26th January 1976 attested by S Wickremasinghe, Notary Public (marked as 'P1') and Plan No. 903 dated 05th September 1942 made by J. P. Melony, Licensed Surveyor, (marked as 'P2').

The Respondents deny inter alia the claims made by the deceased Plaintiff to the said road, expressing strongly that the deceased Plaintiff never used the said right of access in question and that it is only used for the purpose of gaining access to Lot 'A1' in Plan 'P2'.

The Learned District Judge entered Judgment in favour of the deceased Plaintiff. The Respondents thereafter sought relief by way of appeal to the Civil Appellate High Court bearing case No. WP/HCCA/Mt/118/07 F. The Learned Judges of the Civil Appellate High Court entered judgment in favour of the Respondents.

Being aggrieved by the said Judgment of the Civil Appellate High Court the Substituted Appellant seeks to, among other things, set aside the judgment of the Civil Appellate High Court dated 17th January 2011 and affirm the judgment of the District Court of Mount Lavinia dated 13th December 2007.

The questions of law to be individually concentrated on, as urged by Counsel for the Substituted Appellant, are;

- Can a person who has no soil rights to a right of way prevent another person from using the said right of way?
- Is the abandonment or non-user of a servitude created by a notarial grant form a part of Sri Lankan law?
- Under Sri Lankan law, does a person lose their right to property due to

mere non use or abandonment?

- Would an act of the party constitute an overt act in order to deprive that party of rights obtained by Deed?

The Substituted Appellant claims that the deceased Petitioner and his predecessor in title have a right of way over the land marked Lot 'A3' in view of the title Deed marked 'P1'.

The Respondents deny this on the grounds that the right of way was used for a long period of time to gain access to their properties and though the right of way was given to the deceased Plaintiff by Deed 'P1' he had not used the access for a long period of time after putting up the walls separating his land from the access. Therefore the deceased Plaintiff had abandoned his right of access by way of his Deed 'P1' and has no legal right to attempt to enforce a right which was abandoned several decades prior to the District Court case No. 1316/00/L was instituted.

Servitude maybe created by grant. In determining the nature and extent of real rights created by transfer, the provisions of the deed are decisive. The Substituted Appellant confirms ownership of the property in question by way of Deed 'P1' and Plan No. 903 (marked as 'P2').

The evidence in which the Respondents claim title to the said road access has been supported by Deed No. 1796 dated 22nd May 1965 attested by L W Jansz, Notary Public (marked as 'V1').

The schedule of the Deed 'V1' refers to a Plan numbered 1229 dated 15<sup>th</sup> December 1953 made by H W Fernando, Licensed Surveyor (marked as 'V3'). The Respondents have not submitted this Plan as evidence. The extent of land amounting to the road access in the Deed 'V1' submitted by the Respondents is 2.10 Perches, whereas the extent of land amounting to the road access in deed 'P1' is 2.6 Perches. Neither party has challenged the authenticity of these deeds, although the Deed 'V1' submitted by the Respondents, does not contain an address of the Notary Public.

By way of Deed 'P1' it is established that the Substituted Appellants own the soil rights of 'Lot A3'.

It is recognized law, as laid down in **Saparamadu V Melder** (2004) 3 SLR 148 decided in (1996), and affirmed in **Fernando V Wickremasinghe** (1998) 3 SLR 37 that an action for the use of a servitude could be filed by a person who owns the soil rights of the property in question.

It is important to note that the consideration underlying the attitude of the law is that a servitude affects the right of the owner of a land to the free and unfettered use of his land; **Suntangala V Appuhamy** (1945) 46 NLR 137 .

Once the Plaintiff has established soil rights, it is for the Defendant in such a situation to establish either an abandonment by the Plaintiff of his right or loss of by non-user - **Senathiraja V Marimuttu**(1949) 53 NLR 5.

The law is clear that a servitude or right of way acquired through notarial grant, as distinguished from one created by verbal agreement or use through prescription, could only be abandoned if such abandonment was deliberate and intentional **Nagamani V Vinayagamoorthy** (1923) 24 NLR 438. This principle was affirmed in **Paramount Investments Ltd. V Carder** (1986) 2 SLR 309. It was further held in this case that under our law, a mere non possession of a right does not amount to losing the said right or servitude.

Therefore, the burden is on the Respondents to prove that the Substituted Appellant or her predecessor deliberately and intentionally abandoned the right of way. However, such deliberation or intention to abandon has not been proved.

In order for the right to be abandoned, the abandonment should be continuous, rather than from time to time.

It is submitted in evidence by the Substituted Appellant that the said right of way was used from time to time, as access whenever there was an occasion (alms givings) on the property owned by the Substituted Appellant, to bring in firewood and also for repairs and construction on the building in the property marked 'Lot

A2’.

It is thus proven that the Respondents have proved neither deliberation and intention nor continuous abandonment.

According to Roman-Dutch Law, non-user or abandonment of the right should be for a third of a hundred years, i.e. 33 and 1/3rd years.

The deceased Plaintiff (the husband of the Substituted Appellant) in this case purchased the said land by way of deed ‘P1’ dated 26th January 1976. He initiated action in the District Court on or around 2<sup>nd</sup> May 2000. Therefore, the requirement of one third of a century is not met and thus would follow that according to the Roman Dutch Law, this does not constitute to an abandonment of the right.

A further question arises as to whether either party is obstructing the right of way. Particularly whether the Substituted Appellant is obstructing the right of way enjoyed by the Respondents by constructing a gate on the boundary of the wall owned by the Substituted Appellant, which provides access to the right of way.

According to South African Law, the owner of the servient tenement is entitled to protect his land, but only in such a way that the dominant owner has the free use of the path at all times. The position in South Africa is that the question whether an obstruction hinders free passage is purely a question of fact to be decided in light of the circumstances of each case. A gate across the path, which could be opened at any time, allows the use of the path and may be permitted. However obstruction is different.

In **Jayasekera Hamine V Agida Hamine** (1944) 46 NLR 38 Justice Krester commented;

‘The question was not whether the dominant owner could wiggle through the contrivance, but whether she had the full and free use of the path. That she has not, and the obstruction must be removed’.

Thus the question to be established is whether the Substituted Appellant has in any way obstructed the free use of the right of way by the Respondents.

Reference may be made to the judgment in **de la Harpe V Wickremaratne** (1956) 58 NLR 310 where the Court held;

‘in the case of a private right of way the ownership of the ways is in the owner of the soil, though such ownership does not entitle him to obstruct the way to any substantial degree. At the same time, the owner of the right is entitled only to reasonable user’.

The Court further held that;

‘Two main questions arise in the case of an obstruction to a private right of way. Firstly, whether the interference is substantial and, secondly, reasonable user of the way by the owner of the right’.

Therefore an obstruction of a private right of way is not actionable unless it is substantial.

For these reasons, in the instant case, it is the position of this Court that unless the Substituted Appellant, by way of a gate on her own boundary, has obstructed the free right to use the road way by the Respondents, there is no bar on the construction of such gate. However, it is stressed that there can be, at no time, an obstruction to the free use of the right of way by the Respondents.

Thus, the judgment of the Civil Appellate High Court dated 17th January 2011 is hereby set aside. The judgment of the District Court of Mount Lavinia dated 13th December 2007 is affirmed and a permanent injunction restraining the Respondents from constructing temporary and permanent structures within the said road way is granted.

**JUDGE OF THE SUPREME COURT**

**Dep, PC., J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**Wanasundera, PC, J.**

I agree.

**JUDGE OF THE SUPREME COURT**