

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

In the matter of an application for leave to  
Appeal to the Supreme Court against the  
judgment dated 29<sup>th</sup> July 2015 in  
WP/HCCA/14/2009 (F) D.C.Matugama  
Case No.2057/L

SC Appeal 206/2016  
SC/(HC)CALA 276/2015  
WP/HCCA/KAL/14/2009(F)  
DCMatugamaCaseNo.2057/L

**IN THE DISTRICT COURT**

1. ILLEKUTTIGE HELEN STELLA  
PHILOMINA FEENANDO  
Menikkurunduwatta, Devalamulla, Govinna
2. THUDUWAGE DONA  
KARUNAWATHIE PERERA  
Govinna Junction, Govinna
- PLAINTIFFS**

Vs.

GOVINI THANTHRIGE PREMASIRI  
Wanawitiya, Devamulla, Govinna

**DEFENDANT**

**IN THE HIGH COURT OF CIVIL  
APPEAL KALUTARA**

ILLEKUTTIGE HELEN STELLA  
PHILOMINA FEENANDO  
Menikkurunduwatta, Devalamulla, Govinna

**FIRST PLAINTIFF -APPELLANT**

Vs

GOVINI THANTHRIGE PREMASIRI  
Wanawitiya, Devamulla, Govinna

**DEFENDANT-RESPONDENT**

THUDUWAGE DONA  
KARUNAWATHIE PERERA  
Govinna Junction, Govinna

**SECOND PLAINTIFF-RES**

**NOW IN THE SUPREME COURT**  
ILLEKUTTIGE HELEN STELLA  
PHILOMINA FEENANDO  
Menikkurunduwatta, Devalamulla, Govinna  
**First Plaintiff-Appellant-Ptitioner-Appellant**

VS

GOVINI THANTHRIGE PREMASIRI of  
Wanawitiya, Devamulla, Govinna  
**Defendant-Respondent- Respondent- Respondent**

THUDUWAGE DONA KARUNAWATHI PERERA  
Govinna Junction Govinna

KARUNAWATHIE PERERA of Govinna  
Junction, Govinna  
**Second Plaintiff-Respondent-Respondent-Respondent**

Before : Sisira J De Abrew J  
Anil Gooneratne J  
Nalin Perera J

Counsel : JAJ Udawatta with Anuradha N Ponnampereuma  
for the 1<sup>st</sup> Plaintiff-Appellant-Petitioner-Appellant  
Defendant-Respondent-Respondent-Respondent  
is absent and unrepresented  
Second Plaintiff-Respondent-Respondent- Respondent is  
absent and unrepresented

Argued on : 16.10.2017  
Decided on : 28.11.2017

**Sisira J De Abrew J.**

Notices have been sent to the 2<sup>nd</sup> Plaintiff-Respondent-Respondent-Respondent and the Defendant-Respondent-Respondent-Respondent on 9.9.2015 and 19.11.2015. But they have not responded to the said notices. The 1<sup>st</sup> Plaintiff-

Appellant-Petitioner-Appellant (hereinafter referred to as the 1<sup>st</sup> Plaintiff-Appellant) and the 2<sup>nd</sup> Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the 2<sup>nd</sup> Plaintiff) filed action bearing Number 2057/L in the District Court of Mathugama to get a declaration that the road described in the 2<sup>nd</sup> schedule to the Plaintiff is a private road and the to prevent the Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) from using the said road.

The learned District Judge by his judgment dated 6.1.2009 dismissed the Plaintiff. Being aggrieved by the said judgment, the 1<sup>st</sup> Plaintiff-Appellant appealed to the Civil Appellate High Court (hereinafter referred to as the High Court). The High Court by its judgment dated 29.7.2015 dismissed the appeal. Being aggrieved by the said judgment of the High Court, the 1<sup>st</sup> Plaintiff-Appellant appealed to this court. This court by its order dated 2.11.2016 granted leave to appeal on questions of law stated in 18(a) and 18(e) of the Petition of Appeal dated 30.8.2015 which are set out below.

1. Did the High Court err by holding that the disputed road way is to be considered as a public road as the said right of way is being used by the Public?
2. Did the High Court err in failing to consider that for a road to be a public road it should either be used as such from time immemorial or that there should be clear evidence of vesting such road way in a local authority.

The Defendant-Respondent in the District Court took up the position that the disputed road was a public road. Therefore, the most important question that must be decided in this case is whether the disputed road is a public road or a private road. The 1<sup>st</sup> Plaintiff-Appellant in her evidence took up the position that the

disputed road was shown as Lot No.6 and 7 in plan No.1254 of H.S Samarasekara Licensed Surveyor marked as P2(a) which had been produced in DC Mathugama Case No.404. The No. 6 and 7 were declared as a common road among allottees in Partition Case No.404 in DC Mathugama (marked as P9). If it is a public road, this road would have been excluded in the Partition case. But no such thing was done. In DC Kalutara L202, parties entered a settlement to the effect that the disputed road in this case was a private road. The above evidence was given by the 1<sup>st</sup> Plaintiff-Appellant. The Defendant-Respondent in his answer filed in this case (page 58) took up the position that the disputed road was a portion of a public road known as Devamulla-Kurunduwatta-Diyagantota Road which has been vested with the Village Council by Gazette No.12182 dated 12.8.1960 marked V2 (page 399). A perusal of the aforementioned gazette reveals that the Local Authority had resolved to repair and maintain the Devamulla-Kurunduwatta-Diyagantota Road. But this road has not been vested with the Local Authority. Senadheera Archchige Pathmasiri who is an officer attached to the Local Authority Bulathsinhala at page 295 and 296 stated in evidence that Devamulla-Kurunduwatta-Diyagantota Road had not been vested with the Local Authority. Therefore, it appears that the stand taken up by the Defendant-Respondent is not correct. The learned Judges of the High Court have observed that the disputed road was being used as a Public Road. But it is to be noted that no such vesting was done by the aforementioned gazette. The learned District Judge has observed that even without a vesting order with consent of parties a private road can be converted to a Public Road. Where is the consent of parties in this case? The 1<sup>st</sup> Plaintiff-Appellant and the 2<sup>nd</sup> Plaintiff seek a declaration in this case to the effect that the disputed road is a public road. In this connection it is relevant to consider the judicial decision in *Allishamy Vs Arnolishamy* (1898) I Thambya Reports 26 which was quoted with approval in the case of *Samarasinghe Vs Chairman VC Matara* 34 NLR 39 wherein it was

observed thus: “No amount use by the public is sufficient to make a road a public road where road was made within the memory of man.”

When I consider all the above matters, I hold that the 1<sup>st</sup> Plaintiff-Appellant and the 2<sup>nd</sup> Plaintiff have proved their case on a balance of probability and that the Defendant-Respondent has not proved that the disputed road was a public road. I further hold that both courts below have reached wrong conclusions. For the aforementioned reasons, I answer the above questions of law in the affirmative and grant reliefs claimed by the 1<sup>st</sup> Plaintiff-Appellant and the 2<sup>nd</sup> Plaintiff in their Plaint. I set aside both judgments of the District Court and the High Court and allow the appeal with costs. I direct the learned District Judge to amend the decree in accordance with this judgment.

*Appeal allowed.*

Judge of the Supreme Court.

**Anil Gooneratne J**

I agree.

Judge of the Supreme Court.

**Nalin Perera J**

I agree.

Judge of the Supreme Court.