

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

**In the matter of an Appeal from the
Civil Appellate High Court.**

1. Dodampahala Gamage Gunapala
2. Dodampahala Gamage Weerasinghe
3. Dodampahala Gamage Sumaderis
All of Ambagahawatte, Kandeketiya,
Ratmalwala.

Plaintiffs

SC APPEAL 20/2015

SC HCCA LA 292/2013

SP HCCA TA 32/2009(F)

DC HAMBANTHOTA 3024/M

Vs

1. K.P.Nuwan Ranjan De Silva,
Helekada, Angunukolapelessa.
2. Angunukolapelessa Pradeshiya Sabhawa
Angunukolapelessa

Defendants

AND THEN BETWEEN

1. K.P.Nuwan Ranjan De Silva,
Helekada, Angunukolapelessa.
2. Angunukolapelessa Pradeshiya Sabhawa
Angunukolapelessa

Defendant Appellants

Vs

- 1.Dodampahala Gamage Gunapala
- 2.Dodampahala Gamage Weerasinghe
- 3.Dodampahala Gamage Sumaderis
All of Ambagahawatte, Kandeketiya,
Ratmalwala.

Plaintiff Respondents

AND NOW BETWEEN

- 1.Dodampahala Gamage Gunapala
- 2.Dodampahala Gamage Weerasinghe
- 3.Dodampahala Gamage Sumaderis
All of Ambagahawatte, Kandeketiya,
Ratmalwala.

Plaintiff Respondent Appellants

Vs

1. K.P.Nuwan Ranjan De Silva,
Helekada, Angunukolapelessa.
2. Angunukolapelessa Pradeshiya Sabhawa
Angunukolapelessa

Defendant Appellant Respondents

**BEFORE : S. EVA WANASUNDERA PCJ.
H.N.J. PERERA J. &
VIJITH K. MALALGODA PCJ.**

**Counsel : Ms. L.M.C.D. Bandara instructed by Ms. M. Namali
Perera for the Plaintiff Respondent Appellants.
Shihan Ananda for the 1st and 2nd Defendant Appellant
Respondents.**

Argued on : 29.08.2018.

Decided on : 16.10.2018.

S. EVA WANASUNDERA PCJ.

Leave to Appeal was granted on 02.02.2015 , on the questions of law contained in paragraph 14(i), (ii) and (iii) of the Petition dated 16.07. 2013. They read as follows:-

1. Have their Lordships the Judges of the Civil Appellate High Court erred in law and have been misdirected in coming to the finding that, the action of the Petitioners was not an acquilian action and that it is an action based on servitudal rights?
2. Have their Lordships misdirected in law by applying the principle of “us fleminis”, when the Petitioners’ Action was an Action clearly based on the damages caused to them by the actions of the Respondents?
3. Have their Lordships the Judges of the Civil Appellate High Court misdirected in construing the pleadings of the Petitioners to suit to that of a case based on a servitude, where in fact the plain reading of the Plaint and the issues raised by the Petitioners clearly demonstrate the basis of an Action of Res Acquia?

The Plaintiffs filed action on 22.06.2002 against the Pradeshiya Sabha of Angunukolapelessa and its Chief Executive Officer in the District Court of Hambantota. The Plaintiffs were the father and two sons who had been cultivating the land of about 15 Acres for a long time. There had been permanent plantations such as coconut trees, Jak trees, Mango trees, Lime trees and Orange trees. According to the Plaint the number of coconut trees of 3 years of age were 227. In addition to these permanent cultivations, there had been short term plantations as well. They were 150 Banana trees, 2000 Manioc bushes, Green Gram, Chillie Plants, Brinjal Plants, Long Beans, Cowpea, peanuts and corn.

The Plaintiffs were in possession of 15 Acres from and out of a bigger land of 30 Acres. They had explained that there was an existing partition action in the same District Court under P 1/93 and had produced the Plan No. 865 surveyed by the Licensed Surveyor Ruban Meegama dated 27.01.1995, which is at page 271 of the

brief before this court. The Plaintiffs had produced the papers relating to the handing over possession of 15 Acres out of 30 Acres to the 3rd Plaintiff, the father of the other two Plaintiffs, on 24.07.1990 by the fiscal in the Primary Court Case in the Angunakolapelessa No. 20294. The name of the land is Pallattaragoda. The fact that the Plaintiffs were cultivating the said land was not disputed by the Defendants.

The Plaintiffs complained that the road which was used by the villagers to go from one village to the other was on the Eastern Side of the border of this land in which they were cultivating. It was running parallel to the said land. The elevation of this public road which ran alongside the eastern boundary of the Plaintiffs' land by about 5 feet by the Defendants, obstructed the natural flow of water from the east to the west of the said land. The Pradeshiya Sabhawa of Angunakolapelessa representatives had brought to the site of doing this elevation of the road two concrete cylinders with a circumference of three feet to be placed across the road. Yet they failed to do so thereby causing the natural water to get collected on the Appellants' land.

Then one day it rained and continued to rain for a few more days, according to the evidence and the pleadings of the Plaintiffs. The water got collected like in a reservoir and all the plantation was damaged due to the stagnating water. The Plaintiffs could not do anything to get the water flow in the natural way that it used to, prior to the elevation of the road. The Plaintiffs claim that their crops worth of Rs. 150000/- was damaged. They are **claiming damages for the loss of the crop due to the wrongful action** of the Defendants by not having placed the concrete cylinders across and under the portion of the road which was elevated to a higher level.

The Defendants in their answer had stated that the property in the two schedules to the Plaintiffs was a low lying land which was named as Pallattarawewa which was not cultivable. They had again pleaded that the Plaintiffs were occupying the land unlawfully. They had submitted that the land which the Plaintiffs were claiming to have cultivated is a lake and the road was the bund. The Defendants had reconstructed the bund without intending bad to anybody but for the benefit of the public using the road. In the answer they had placed a counter claim of double the sum claimed as damages by the Plaintiff, i.e. Rs. 300000/-.

The documents P1 and the Fiscal's Report regarding the land was evidence to show that the land on which the Plaintiffs had cultivated was not a lake but high land. The Plaintiffs gave evidence as to what was cultivated and how the crop was taken to the town and sold every six months or so for certain crops and at different other periods for other crops as well.

Once the Plaintiffs and the Defendants had concluded evidence, the learned District Judge had delivered judgment on 26.05. 2009 answering the issues in favour of the Plaintiffs. Yet, the relief granted was limited to paragraph 1 of the prayer to the Plaintiffs, and damages against the Defendants were not granted. The Defendants appealed to the Civil Appellate High Court. At the end of that hearing the High Court set aside the Judgment of the District Court. Thus, the Plaintiff Respondent Appellants has come before this Court challenging the Judgment of the Civil Appellate High Court.

The analysis of the High Court of the case in hand is as follows. 'The Plaintiffs were seeking a positive order against the Defendants to construct culverts across the road. They are seeking to exercise a right outside their land and over another person's land. The Plaintiffs were trying to enforce a right to conduct rain water to the lower tenement and as such **it is a servitudal right** across the road.'

The High Court Judges have come to that conclusion having said as follows in page 4 of the Judgment: "Case of the Plaintiffs is that the natural flow of the rain water accumulated within their land was towards the eastern boundary and across the road and after raising the level of the road thus preventing the flow of water in to the road the water accumulated in plaintiffs' land and it was flooded. That is the cause of action disclosed by the plaintiffs and that is the right in the plaintiffs which was violated by the defendants- the right to conduct rainwater to the lower tenement. Therefore it is clear that the plaintiffs are claiming a servitudal right across the road. Therefore I cannot agree with the submission of the learned counsel for **the Plaintiff Respondents that this is an acquilian action**".

I have gone through the Plaint and Answer, the issues and the evidence of all who have given evidence in this case before the trial judge. Nowhere has any party complained that the main cause of action is 'the right to conduct rain water to the

lower tenement'. It is not taken as an issue. When a trial case is conducted according to the provisions of the Civil Procedure Code, the issues are raised after the admissions are recorded. Then the pleadings get behind the scene and the case is taken forward mainly on the issues. The issues are at pages 58, 59 , 60 and 61 and they are 23 in number.

Neither of the parties are placing their case on a servitude. The pleadings speak about the damages caused to the plaintiffs due to inaction of not having placed the concrete cylinders at the proper place and at the proper time. The learned High Court Judges have misunderstood the cause of action in the first instance and gone a long way trying to analyze "ius fluminis", "the dominant tenement", "praedial dominans", etc. and referred to the case of **David Vs Gunawathie 2000, 2 SLR 352** which was written by Justice F.N.D. Jayasuriya.

The case in hand was **not argued on those lines by either party** before the Civil Appellate High Court. The Judges had taken it up, on a line of argument which they had thought it fit to be carried on to arrive at a conclusion. The High Court has finally allowed the Appeal with costs in favour of the Defendants. I find that such action on the part of the **appellate court** was highly unnecessary.

The cases we judges hear , belong to the parties themselves. We have to consider their arguments since they bring forward before a court of law, the case of their clients. The trial Judges in fact cannot go beyond the issues at the trial. In the same way, the appellate court judges cannot go beyond the points of argument or take up new arguments on their own, pushing away the arguments put forward by the Counsel of the parties. In the case in hand, I find that the Civil Appellate High Court has acted in quite an incorrect manner having completely misconceived the nature of the case and the cause of action.

I answer the questions of law enumerated above in favour of the Plaintiff Respondent Appellants and against the Defendant Appellant Respondents.

I set aside the Judgment of the Civil Appellate High Court dated 20.06.2013. I affirm the Judgment of the District Court dated 26.05.2009.

The Appeal is allowed with costs.

Judge of the Supreme Court

H.N.J.Perera J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda PCJ.
I agree.

Judge of the Supreme Court.