

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

In the matter of an application for
Special Leave to Appeal

SC/APPEAL No. 58/14

SC/SPL/LA/119/12

CA/607/1998/(F)

DC/Panadura/171/L

1. Galgamuwa Kankanamlage Malani

2. Galgamuwa Kankanamlage Sarath

Dharmasiri both of No. 201,

Pamunugama, Alubomulla.

Defendants-Appellants-Appellants

-Vs-

Habaragamuwage Dickson

Peiris Thilakapala of No. 201,

Pamunugama, Alubomulla.

Plaintiff-Respondent-Respondent

BEFORE : EVA. WANASUNDERA, PC J.

SISIRA J. DE ABREW J. &

UPALY ABEYRATHNE, J.

COUNSEL : Rohan Sahabandu PC for the Defendants-

Appellants-Appellants.

Roshan Dayaratne with Thushari Hirimuthugoda for the
Plaintiff-Respondent-Respondent.

Written Submissions

filed on : 03.06.2014 and 11.10.2016

by the Defendants-Appellants-Appellants

07.08.2014 by the Plaintiff-Respondent-Respondent

ARGUED ON : 25.10.2016.

DECIDED ON : 17.1.2017

SISIRA J. DE ABREW J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) instituted action in the District Court of Panadura seeking a declaration of servitude for a ten feet wide road over the land of the Defendant-Appellant-Appellants (hereinafter referred to as the Defendant-Appellants) to access the Plaintiff-Respondent's house. In the alternative, the Plaintiff-Respondent sought the said road on the ground of necessity. The learned District Judge, by his judgment dated 11.6.1998, decided the case in favour of the Plaintiff-Respondent. On appeal

the Court of Appeal, by its judgment dated 31.5.2012 affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Court Appeal the Defendant-Appellants have appealed to this court. This court, by its order dated 28.4.2014, granted leave to appeal on the questions of law set out in paragraphs 20(a),(b),(c) and (d) of the petition of appeal dated 8.7.2012 which are stated below.

1. Was there a 10 feet wide right of access in existence for more than 10 years to obtain servitude over the land the 1st Defendant as shown as Lots 1 and 2 in plan 583?
2. Has the Plaintiff established the fact that he had used a 10 feet wide road access over the land of the 1st Defendant to obtain servitude?
3. Was there evidence to show that the Plaintiff has used a defined and distinct right of access of 10 feet wide without any disturbance or interruption to obtain a servitudinal right as claimed by prescription?
4. In the circumstances pleaded are the judgments of the Court of Appeal and the District Court correct and according to law?

The land of the Plaintiff-Respondent and the land of the Defendant-Appellants are adjoining lands. The Plaintiff-Respondent claims a road way over the land of the Defendant-Appellants. The Plaintiff-Respondent claims the said road way on the ground of necessity and servitude. I will first consider whether the Plaintiff-Respondent is entitled to the road way claimed on the ground of necessity. The Defendant-Appellants, at the trial, tried to establish that the Plaintiff-Respondent has an alternative foot path over the land of Asilin Perera. To prove this point the Defendant-Appellants called Y.B.K. Costa Licensed Surveyor who produced Plan No.2406 prepared by him. At the survey conducted by Y.B.K. Costa Licensed Surveyor, Defendant-Appellants have shown a foot path alleged to have been used by

the Plaintiff-Respondent. This foot path has been shown in the said plan by a dotted line leading to the cemetery road (the main road) from the land of the Plaintiff-Respondent over the land of Asilin Perera. However Y.B.K. Costa Licensed Surveyor in his report at page 232 has stated that he did not find such a footpath. Thus it appears that the attempt made by the Defendant-Appellants at the trial to prove that the Plaintiff-Respondent has an alternative road has not been successful. From the above facts it is clear that the Plaintiff-Respondent has no alternative road to have access to the main road and that if the road way over the land of the Defendant-Appellants is not granted, he will have no access to the main road. The Plaintiff-Respondent has taken up the position, at the trial, that he has no alternative road and that he is entitled to the road way over the land of the Defendant-Appellants on the ground of necessity. The most important question that must be considered is whether the Plaintiff-Respondent is entitled to a road way on the basis of necessity. I would like to consider certain judicial decision on this question. In *Mohotti Appu Vs Wijewardene* 60 NLR 46 Weerasooriya J held:

“A person can claim a way of necessity for the purpose of going from one land owned by him to another. The right of way will not be granted, if there is an alternative route to the one claimed although such route may be less convenient and involve a longer and more arduous journey.”

In *Rosalin Fernando Vs Alwis* 61 NLR 302 TS Fernando J held:

“that when a Court is called upon to decide a question of the grant of a right of way of necessity a proper test to be applied is whether the actual necessity of the case demands the grant of the right of way. In such a case it is not necessary that the plaintiff should establish that the way claimed is the only means of access from his land to the public road. If an alternative route is too

difficult and inconvenient, the actual necessity of the case is the determining factor.”

In Chandrasiri Vs Wickramasinghe 70 NLR 15 Thambiah J Held:

“A right of way of necessity cannot be granted if there is another though less convenient path along which access can be had to the public road.”

I have earlier pointed out that the plaintiff-Respondent has no alternative road and if the road way over the land of the defendant-Appellant is not granted, he will have no access to the main road. When I consider the above matters, I hold that the Plaintiff-Respondent is entitled to the roadway on the ground of necessity. The Plaintiff-Respondent presently uses a 7 feet wide roadway over the land of Defendant-Appellants. Mr. Shabandu President's Counsel who appeared for the Defendant-Appellants at the hearing before us accepted that the Plaintiff-Respondent uses a 7 feet wide roadway over the land of Defendant-Appellants. He contended that granting of ten feet wide road over the land of Defendant-Appellants is unreasonable as it will affect the compound of Defendant-Appellants. I now advert to this question. Y.B.K. Costa Licensed Surveyor called by Defendant-Appellants admitted in evidence that if 10 feet wide road is given over the land of the Defendant-Appellants, a strip of 5 feet would be left for the compound. When I consider this evidence, I cannot agree with the above contention of Mr. Sahabandu.

When I consider all the above matters, I hold that the Plaintiff-Respondent is entitled to have a ten feet wide roadway over the land of the Defendant-Appellants. In my view, there are no grounds to disturb the judgments of the District Court and the Court Appeal.

In view of the conclusion reached above, the first three questions of law do not arise for consideration. In answering the 4th question of law, I would like to state here that the judgments of the District Court and the Court of Appeal are correct.

For the above reasons, I affirm the judgments of the District Court and the Court of Appeal and dismiss the appeal. However considering all the circumstances of this case, I do not make an order for costs.

Judge of the Supreme Court.

EVA WANASUNDERA PC J

I agree.

Judge of the Supreme Court.

UPALY ABEYRATNE J

I agree.

Judge of the Supreme Court.