

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

In the matter of an appeal to the
Supreme Court of the Democratic
Socialist Republic of Sri Lanka.

SC. Appeal 83/2012

SC/HCCA/LA 163/2010
SP/HCCA/RAT/122/2007(F)
D.C. Embilipitiya No. 6166/L

Rygamage Dona Kamalawathie
Diwrumpola, Godakawela.

Plaintiff

Vs.

Godakawela Kankanamge Sirisena
No. 17, Diwrumpola,
Godakawela.

Defendants

And

Rygamage Dona Kamalawathie
Diwrumpola, Godakawela.

Plaintiff-Appellant

Vs.

Godakawela Kankanamge Sirisena
No. 17, Diwrumpola,
Godakawela.

Defendant-Respondent

And Now Between

Rygamage Dona Kamalawathie
Diwrumpola, Godakawela.

Plaintiff-Appellant-Appellant

SC. Appeal 83/2012

Vs.

Godakawela Kankanamge Sirisena
No. 17, Diwrumpola,
Godakawela.

**Defendant-Respondent-
Respondent**

* * * * *

BEFORE : **Chandra Ekanayake, J.**
Eva Wanasundera, PC.J. &
Buwaneka Aluwihare, J.

COUNSEL : S.N. Vijith Singh for the Plaintiff-Appellant-Appellant.

W. Dayaratna, PC. with Ms. R. Jayawardena and Ms. D.N. Dayaratna for Defendant-Respondent-Respondent.

ARGUED ON : **16-06-2014**

DECIDED ON : **17-10-2014**

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Eva Wanasundera, PC.J.

Leave to Appeal was granted on 10.05.2012 on questions of law set out in paragraph 26(i), (iii), (v), (vi) and (vii) of the petition dated 31.05.2012 . They are as follows:-

- 26(i) Did the High Court of Civil Appeal err in law by failing to take into account the issue raised by the Petitioner claiming a right of way by way of necessity?
- (iii) Did the High Court of Civil Appeal misdirect itself by not taking into consideration the evidence adduced by the Petitioner in relation to the right of way by way of necessity?
- (v) Whether the Petitioner has adduced sufficient evidence pertaining to her claim for the right of way by virtue of prescriptive user?
- (vi) Did the High Court of Civil Appeal misdirect itself by coming to a conclusion that the Petitioner was not entitled to a plea of prescription as the Petitioner has filed the District Court action in 1988?
- (vii) Did the High Court of Civil Appeals err in law by failing to consider the evidence led that three sides of the Petitioner's land was surrounded by the lake and that there is no alternative route for the Petitioner to have access to her land which were not challenged by the Respondent?

In this case the Plaintiff-Appellant-Appellant (hereinafter referred to as the "Appellant") filed action in the District Court of Embilipitiya against the Defendant-Respondent-Respondent (hereinafter referred to as the "Respondent") seeking a declaration of a right to the use of a 10 feet wide road, over the land of the Respondent as access to his land and house thereon.

It was common ground that from 1983 there was a right of way but it was only a foot path along the boundary of the land of the Respondent. In 1988 there was a Primary Court case filed due to the Respondent trying to obstruct the right of way and a Court order was given to use a road way 3 feet wide. The length of the roadway was 169 feet. In 1983, the Appellant used the roadway with the consent of the Respondent, when he started building his house on this land. The District

Court refused to grant a 10 feet wide road but granted a 3 feet wide road. This road as it was used, according to a sketch done by the Grama Sevaka, was about 3 feet wide at the beginning and 8 and 10 feet wide in some parts of the road along the roadway. At no time of the case, quite surprisingly, was a survey done by any order of court with regard to this matter. The Appellant appealed to the Civil Appellate High Court from the judgment of the District Court dated 25.09.2003. The High Court dismissed the appeal on 07.04.2010. Thereafter the Appellant appealed to the Supreme Court on the aforementioned questions of law to be decided by this Court.

Starting from the District Court up to the Supreme Court the parties were advised to enter into a settlement which never happened. The Appellant has failed to show with evidence that there was a road way 10 feet wide at any time. The evidence showed that it was only after the Appellant bought a car that the 10 feet road was necessitated, to run the car over the road from the Godakawela-Ratnapura main road up to the doorstep of the house. It is at this time that the Appellant had filed the District Court action.

The Appellant claims that the land and property he is living on, is land-locked and she has prescribed to a roadway of 10 feet wide and as such the right of way is one of necessity used under 'adverse possession' against the Respondent for over ten years.

The Appellant had filed action in the District Court on 10.07.1998. She had stated that she became the owner of the land in 1983. Even though she claimed that she used a 10 feet wide road to reach her land, evidence was not to that effect. Evidence in Court established that a roadway 3 feet wide was used from 1983. The Appellant had used a 3 feet wide road for over 10 years by the time she filed a District Court action in 1998. The High Court Judge had erroneously taken the date of filing the action as 1988 instead of 1998 and said that prescription was not proven. I observe that the Appellant had proved a right of way by prescription for a 3 feet wide road over 10 years. Even though there was no proper plan drawn during the proceedings of the District Court case, a sketch

had been produced through the Grama Sevaka marked ' P2' as a document. By this document, it is seen that this land of the Appellant is water- locked by three sides and land locked by one side. So, a road way through the Respondent's land to reach the Appellant's land and premises is of necessity. There seems to be no alternate road available for the Appellant to reach her house.

I observe that the High Court Judge has gone wrong in dismissing the appeal regarding prescription and necessity. I answer the questions of law aforementioned in the affirmative. I hold that the Appellant has got the right to use a 3 feet wide road of a length of 169 feet, out of sheer necessity and prescription by user for over ten years. I further hold that this 3 feet wide road be demarcated from the Godakawela-Ratnapura main road up to the land and premises of the Appellant.

For the reasons set out above, I answer the questions of law in favour of the Appellant. I set aside the judgment of the High Court of Civil Appeal of Ratnapura dated 27.04.2010 and the judgment of the District Court of Embilipitiya dated 25.09.2003, subject to the reliefs granted as aforementioned. Thus, I allow the appeal. I order no costs.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

Buwaneka Aluwihare, J.

I agree.

Judge of the Supreme Court