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

S.C. Appeal 43/2016

S.C. Leave to Appeal Application
No. SC (HC) CALA 312/2010

High Court Case No.
WP/HCCA/GPH/20/2003
Final

D.C. Gampaha Case
No. 25792/L

1. Hewa Dewage Josalin.

2. Suduwa Dewage Jamis Somadasa
alias Somadasa Gamage
both of
Pahala Karagahamuna,
Kadawatha.

PLAINTIFFS

- VS -

1. Nawalage Winson Cooray,
No. 279/2/A,
Pahala Karagahamuna,
Kadawatha.

2. Nawalage Mallika Cooray,
No. 369, Neligama,
Ragama.

3. Somadasa Silva,
No. 276/1, Pahala Karagahamuna,
Kadawatha.

4. K. K. Seelawathie,
No. 276/2, Pahala Karagahamuna,
Kadawatha.

5. Mervin Mendis,
   No. 276/2/B,
   Pahala Karagahamuna,
   Kadawatha.

6. D.A. Hewage,
   No. 276,
   Pahala Karagahamuna,
   Kadawatha.

7. G. A. Evgin Perera,
   No. 276/1,
   Pahala Karagahamuna,
   Kadawatha.

8. Nawalage Pabilis Cooray,
   No. 308, Neligama,
   Ragama.
   (N.E. Cooray)

DEFENDANTS

AND

1. Nawalage Winson Cooray,
   No. 279/2/A,
   Pahala Karagahamuna,
   Kadawatha.

2. Nawalage Mallika Cooray,
   No. 369, Neligama,
   Ragama.

3. Somadasa Silva,
   No. 276/1, Pahala Karagahamuna,
   Kadawatha.

4. K. K. Seelawathie,
   No. 276/2, Pahala Karagahamuna,
   Kadawatha.

5. Mervin Mendis,
   No. 276/2/B,
   Pahala Karagahamuna,
   Kadawatha.

6. D.A. Hewage,
   No. 276,
   Pahala Karagahamuna,
   Kadawatha.

7. G. A. Evgin Perera,
   No. 276/1,
   Pahala Karagahamuna,
   Kadawatha.

8. Nawalage Pabilis Cooray,
   No. 308, Neligama,
   Ragama.

DEFENDANT – APPELLANTS

- VS -

1. Hewa Dewage Josalin.

2. Suduwa Dewage Jamis Somadasa
   alias Somadasa Gamage
   both of
   Pahala Karagahamuna,
   Kadawatha.

PLAINTIFF – RESPONDENTS

AND NOW BETWEEN

- VS –

1. Hewa Dewage Josalin. (died)

2. Suduwa Dewage Jamis Somadasa
   alias Somadasa Gamage (died)

2a Kalanchige Sisilin
2b Sudu Dewage Shiroma Nishanthi
   Gamage
2c Sudu Dewage Anoma Nilmini
   Gamage
2d Sudu Dewage Champika Neel
   Gamage
2e Sudu Dewage Anushka
   Shayamali Gamage
   All of No.275,
   Pahala Karagahamuna,
   Kadawatha.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANTS

-VS-

1. Nawalage Winson Cooray,

1a Nawalage Sunil Cooray

1b Nawalage Sarath Coorey

No.279/2/A,

Pahala Karagahamuna,

Kadawatha.

2. Nawalage Mallika Cooray,

No. 369, Neligama,

Ragama.

3. Somadasa Silva,

No. 276/1, Pahala Karagahamuna,

Kadawatha.

4. K. K. Seelawathie,

No. 276/2, Pahala Karagahamuna,

Kadawatha.

5. Mervin Mendis,

No. 276/2/B,

Pahala Karagahamuna,

Kadawatha.

6. D.A. Hewage,

No. 276,

Pahala Karagahamuna,

Kadawatha.

7. G.A. Evgin Perera,
   No. 276/1,
   Pahala Karagahamuna,
   Kadawatha.

8. Nawalage Pabilis Cooray,
8a Nawalage Thamara Coorey
   No. 308, Neligama,
   Ragama.

DEFENDANT – APPELLANT – RESPONDENTS

Before : E. A. G. R. Amarasekara, J.
Kumudini Wickremasinghe, J.
Achala Wengappuli, J.

Counsel : Chandana Liyanapatabendy, P.C instructed by Shamika Senevirathna for the Plaintiff – Respondent – Appellants.

W. Dayaratne, P.C with Ms. R. Jayawardena for the Defendant – Appellant – Respondents.

Argued on : 17.06.2022

Delivered on : 23.05.2025

E A G R Amarasekara, J.

Original 1st Plaintiff was the mother of the 2nd Plaintiff who had conveyed the subject matter of the Plaint to the 2nd Plaintiff subject to her life interest and after their demise 2a to 2e

substituted Plaintiff-Respondent-Appellants were substituted in their place. This is an appeal filed by the original Plaintiff – Respondent – Appellants against the Judgement of the Civil Appellate High Court of the Western Province at Gampaha delivered in Case No. WP/HCCA/GPH/20/2003 (Final) dated 26.03.2010 allowing the appeal of the Defendant – Appellant – Respondents by which the said Civil Appellate High Court held in favour of the Defendant – Appellant - Respondents and set aside the Judgement of the District Court of Gampaha dated 21.03.2003.

The original Plaintiffs "(hereinafter the "Plaintiffs) instituted this action on or around 06.07.1983 against the 1st to 8th Defendants (hereinafter the "Defendants") seeking a declaration that the said Defendants have no right of servitude over their land which was morefully described in the schedule to the Plaint and a permanent injunction restraining the Defendants from entering the said land and or constructing a roadway over the said land. In the Plaint, the Plaintiffs described how the title to the said land devolved upon them. The allegation in the Plaint was that the Defendants were trying to construct a cart road over the said land belonging to them on an alleged claim of an existing servitude. It was also stated in the Plaint that the Plaintiffs made a complaint to the police and the Police filed an action in the Magistrate Court and the parties agreed to get the dispute resolved through a civil action. The land referred to in the schedule was a land named Millagahawatte of 13 ¾ perches.

The Defendants filed a joint Answer and denied they tried to construct a roadway across the Plaintiffs' land but stated that the Plaintiffs had obstructed the roadway they used to go to their houses from Ragama Kadawaha road over the said land belonging to the Plaintiffs. The position of the Defendants was that they used a 12 feet wide cart road to go to their lands depicted in plan no. 23101 of D.S.J Perera L.S as Lots 1, 2, 3, 4 and 7 to 12 for over 50 years. They further took up the position that the said right of way was confirmed by the final decree of the partition action No.12229 of Gampaha District Court and they are entitled to this servitude by prescription due to long and uninterrupted user over 50 years. They also had averred that the said roadway is depicted in plan No. 810/1956 of Croos Dabarera L.S dated 02.12.65 and part of it is shown in plan No..2022 of M.D.J.V Perera L.S dated 30.10.71. Alternatively, they had stated that this is the shortest and most convenient roadway and is the only roadway. As such they are entitled to the same as a way of necessity. The Defendants in their joint Answer had referred to their title deeds and stated that on the strength of them they are entitled to the respective lands described in the schedules to the Answer. Even though, the Defendants had

averred that they have a right of way over the Plaintiffs' land, they have not prayed for a servitude of right of way in their Answer and prayed mainly for the dismissal of the Plaint and costs of the action. It is clear, as per the averments in the Answer, what is stated in defense by the Defendants is the existence of a servitudinal right of way over the Plaintiffs 'property by prescription or in the alternative by way of necessity. Neither in the answer nor through issues raised at the trial, it had been contended that the purported roadway is a public road that belongs to the local authority or a public servitude that came into existence by *Vetustas,* in other words by immemorial user which is different from acquisitive prescription. It must be also noted that, even though the position of the Defendants' prayer for the dismissal of the plaint is based on their purported entitlement to a servitude of a right of way as aforesaid, no servient tenement or servient tenements, if the servitude exists over many lands, is/are described in their Answer. Anyway, as the Plaintiff has described his land in his Plaint and the Answer was filed in reply to the said Plaint, one may be able to identify the land described in the Plaint as a servient tenement, but it appears that it is not the only servient tenement over which the alleged servitude exists. Other servient lands had not been revealed in the Answer, nor had there been any request for bring the owners of those servient tenements to be made parties to the action. In **Fernando v Dona Maria** 32 N L R 166, it was held that, to establish a right of way over one servient tenement, when there are intervening properties, it is necessary to prove the existence of the servitude over the said intervening properties and for that purpose it is necessary to bring the owners of those properties as parties to the action. However, in **De Silva v Nonohamy** 34 N L R 113, the majority was of the view that it is not necessary to bring the owners of the other servient tenements as parties. Anyhow, it appears, that the need to prove the existence of the servitude over the other servient tenements over which the right of way passes over is necessary due to the indivisibility of praedial servitudes.

It has to be assumed that each separate lot allegedly owned by each Defendant is the dominant tenement for the purpose of each of the Defendant's claim that there is a right of way over the property. It must be noted that in **Fernando V De Silva** 30 N L R 56, where the plaintiffs who owned distinct allotments of lands sued the defendant claiming a cartway of necessity over the defendant's land, it was held that the action was bad for misjoinder of parties and causes action. In the matter at hand, the Defendants have listed their separate lots in the schedules to the Answer. How each of them has a right of way by prescription or how and to what extent necessity arises depends on the facts relating to each Defendant. As no objection has been taken for misjoinder before the trial commences, it should not be considered now, but this will not

release each Defendant from establishing how each of them acquired a right of way by prescription or how a way of necessity has arisen to each of them and to what extent. (For e.g. Whether the need is for a footpath or a cart road etc.).

The Plaintiffs' action can be identified as an *actio negatoria* while Defendants' position, even though they had not prayed for a declaration of it, is based on a claim of a right of way making it similar to *actio confessoria*. In Roman Dutch Law *actio negatoria* permits an owner to deny the existence of an alleged servitude or other rights entitling the Defendant to cause physical disturbance to his land. Thus, what the Plaintiffs have to prove is the ownership and existence of an identifiable property and the conduct of the Defendants that infringes his rights, either because it amounts to an excessive exercise of an acknowledged limited real right or because the Defendant is exercising a non-existing limited real right.

The Plaintiffs, at the re-trial before the learned District Judge (there had been a previous trial where re-trial was ordered in Appeal) had marked their title deeds as P5 and P6 and it is common ground that the Plaintiffs are the owners of the land in the schedule to the Plaint. On the other hand, Defendants impliedly had accepted the title of the Plaintiffs to the land as they claim a servitudinal right of way as such right is one that is claimed over the servient tenement belongs to the owner of that servient land. Further the 2nd Plaintiff have stated in evidence regarding an attempt to construct a road way across their land, the police complaints made, the magistrate Court case instituted by the Police and thereafter filing of this civil action to resolve the matter. Even the Grama Niladari who gave evidence on behalf of the Defendants have stated about complaints received regarding the dispute over the alleged obstructions caused by the Plaintiffs. Even though the Defendants deny that they attempted to construct a roadway, it is clear that they rely on an existence of a right of way. It appears that there were occasions that where the Defendant attempted to clear and use the road way and the Plaintiffs obstructed the using of the road way. Thus, in my view there were sufficient grounds for the Plaintiffs to institute an action in the nature of *actio negatoria* as the Defendants claim a right of way over their land.

The learned High Court Judges in their Judgment dated 26.03.2010 have stated as below;

"*The learned District Judge identified the Plaintiff's land as the Lot E in preliminary plan V2 and the learned Counsel for the defendants argued that the defendant(sic) had not prayed for*

a declaration of title to the Lot E in the said Plan. The, learned District Judge, as I observed, has not paid his attention to this aspect of the case."

It appears there is a typographical error in what is quoted above, as what would have been meant was that the Plaintiffs had not prayed for a declaration of title and the learned District Judge has not paid his attention to it. On the other hand, Defendants had not claimed title to the Plaintiffs' land. While claiming a servitude of right of way, they cannot claim title to it. However, in an *actio negatoria* filed to deny a servitude, in my view, the Plaintiff, the owner need not pray for a declaration of title to his land, but he has to prove his title to obtain a declaration that there is no servitude over his property. As said before, it was common ground at the trial that the ownership of the land in the schedule to the Plaint was with the Plaintiffs. Hence, it appears that the learned High Court Judges misconceived that there should be a prayer for declaration of title by the Plaintiff.

Again, in the Judgment of the High Court, the learned High Court Judges have stated as follows;

"*The main argument of the Defendant in this case raised before this Court as well as in the District Court was that the Plaintiff has not proved servitude rights over the land described in the schedule to the Plaint*."

Here also it is apparent that the learned High Court Judges either misconceived the nature of the case or facts relating to it, since the Plaintiffs' prayer is to declare that there is no servitude over his land. It appears to be the argument of the Plaintiffs that the Defendants did not prove servitudinal rights over his land.

As explained above, the Plaintiffs' title to the land in the schedule to the Plaint was established and, on the other hand, a claim of right of way over it which affects the free enjoyment of Plaintiffs' ownership rights were also present. Then what had to be looked into by the learned District Judge was whether in fact, such a right of way existed or not.

C.G. van der Merwe, M.J.de Waal in **The Law of things & Servitudes**, Butterworths at page 200, referring to Voet and other authorities state as follows;

"*There is a rebuttable presumption that the ownership of a thing is unencumbered and free of servitudes. A servitude must therefore be strictly construed, that is, it must be given the construction which is the least cumbersome*."

G.L Peiris in his book titled '**The Law of Property in Sri Lanka- Volume.3 – Servitudes and Partition**" at page 17 and 18 states as follows;

'*It must be noted that a presumption against the existence of a servitude is made by law. As Basnayake J, put in* ***Adonis Fernando v Livera***[1] *"A matter that should always be borne in mind when considering a claim for servitude is that our law does not favour anything in the nature of servitude.*"

A similar attitude has been adopted by the courts of South Africa. In ***Van Heerden v Pretorius***[2] *Lord de Villiers C.J said "It is settled rule that a person claiming a servitude over the land of another should give clear and convincing proof of the existence of such right*."'

The above clearly indicates that in an action in the nature of *actio negatoria,* once the Plaintiff proves that he is the owner of the land and that there is a threat of claiming a servitude, the party claiming the servitude has to prove the existence of a servitude. Thus, in the case at hand, the Defendants have to prove their stance of having a servitude by prescription or in the alternative, by way of necessity, a right of way over the land of the Plaintiffs described in the schedule to the Plaint.

Before proceeding further, it is necessary to state this Court's observations regarding certain documents and facts emanating from or related to them which are relevant to this Judgment.

1. Plan No.4401 marked V1: -

   This is the plan which shows lots of land where the Defendants reside. The roads shown in the said plan indicates that those lots have access from a cart road situated towards the East that leads to Kadawatha Ragama Road as well as from a cart road situated towards the North. It appears from the evidence that the right of way they claim is connected to one of these access roads. However, no plan or sketch is produced in evidence to show how it connects with the purported right of way over the Plaintiff's land and it is also not shown how many lands belongs to other people situate in between

[1] 49 N L R 350 at 352
[2] 1914 A.D. 69

with the lots shown in this plan marked V1 and the land in the scheduled to the Plant other than the lots found in plan marked V2.

2. Plan No. 810/1965, marked V2, made by Croos de Dabarera L.S which is the preliminary plan in the partition case No. DC Gampaha No.12229/P which shows Lots A to E: -

   It is common ground that Lots A and E in this plan were excluded from the final partition. It is this Lot E which the learned High Court Judge has referred to as the land identified by the learned District judge as the Plaintiff's land relating to this case at hand. There is no dispute as to this identification of the Plaintiff land. In fact, the land in the schedule to the plaint is 13 ¾ perches while the land Lot E 13.9 perches. A road is shown as Lot F in this plan running from the Ragama Kadawatha Road on the East towards West across Lot E, B and A. Lot F is around 16 perches. As per the drawing of the plan this road runs beyond Lot A. It must be noted that if this portion of the road (of Lot F) going over Lot E is considered as a separate lot that does not belong to the Plaintiffs, the Defendants' case must fail as a servitude is a claim over another's land and then the Defendants should reveal the soil ownership of that Part of lot F going over the Lot E to claim a servitude over it. In fact, it has to be noted Lot A, B, C, D, E and F were shown as one land in the preliminary plan for the purpose of Partition, and it is for the purpose of identification of various areas within that corpus those lots are separately shown. Thus, Lot F has to be a depiction of a road running over the said main corpus shown in the preliminary plan unless it was identified as a public road running across the said land. As described above, no one has taken up the position that it is a public road. Thus, the part of said Lot F running over Lot E of said V2 Plan has to be identified as one running over Lot E as part of Lot E even though there may be a difference of extent with the addition of this portion to Lot E from the extent mentioned in the Schedule to the Plaint. The two stances taken by the Plaintiffs and the Defendants (denying of a servitude as the owner and claiming of a servitude over plaintiffs' land) make it clear that both parties consider this as part of Plaintiffs' land described in the schedule to the plaint. Plaintiffs' position is that this is a road shown for their use to go from Lot E to Lot A which are excluded from the final partition. This exclusion of Lot E and A from partition is also not in dispute. The Defendants' position is that Lot F was a road used by them to access their lots in V1. On the other hand, merely because a surveyor had shown this as a road on a plan like V2, it does not establish a right of way

on behalf of the Defendants as signs of a roadway may be found on a land even when the owners himself use it for such purpose or may have given permission for some others to use it as an access. As said before, a right of way has to be proved by the person who claim it. However, this is evidence for that the surveyor who did the said survey for the preliminary plan observed a track of a roadway across the land he surveyed during the preliminary survey for the said partition action. However, it must be said that to claim a servitude along the part of Lot F that runs over Lot E in this plan successfully, the Defendants must prove that the servitude that they claim exists over Lot B and A of this Plan and any other intervening lands, if any, as their lands are situated beyond Lot A. As said before, no other servient tenement had been included in their Answer nor has they shown the entire servitude that commences from their lands (dominant tenements) till the Ragama Kadawatha Road either through a plan or sketch.

3. A settlement entered between the Plaintiffs in this case and one Seelawathie who appears to be the sister of the 2nd Plaintiff of this case in District Court Gampaha Case No. 21255/L, marked V4: -

   Through this settlement, it was decreed that the portion of land south to the said road depicted in Lot A of aforesaid V2 which was excluded from the final partition in the aforesaid partition action to be given to Seelawathie and the portion of land North to the said road to be given to the Plaintiffs. However, the Plaintiffs' position is that this road (Lot F) in V2 is for their use including the said sister of the 2nd Plaintiff, Seelawathie and not for others. It appears that a part of the Seelawathie's portion is now occupied by one Ahamed. However, said V4 decree is also of evidence of a road but merely the existence of a road does not give Defendants a right of way by Prescription or as a way of necessity as it can be for a private access. The burden is on the Defendants to establish there is a right of way over the Plaintiffs' land.

4. Plan No. 1379/1968 dated 17.11.1968 in the aforesaid partition action No. 12229/P made by Croos Dabarera L.S marked as V5 and V6 at the trial of the case at hand: -

   This is the final partition plan of the aforesaid partition case after the exclusion of Lot A and E in preliminary plan marked V2 above. This plan indicates a road over Lot 1 as Lot 6 and as per the diagram it extends over the boundary of the Lot 1 to the East into the Lot E which was excluded from the final partition and on the other side it extends over the boundary to the West of the Lot 1 into the Lot A which was excluded as

aforesaid from the final partition. The part of the road that runs over Lot 1 has been shown as Lot 6. It is not in dispute that the said Lot 6 is part of Lot F (road) shown in plan V2 mentioned above. The Plaintiffs attempt to argue, as the boundaries to Lot 6 (road over lot 1 in V5) on the East and West have been described as Lot E and Lot A respectively, that the said road is only between Lot E and A. However, as said before the diagram shows that the road extends beyond the boundaries of Lot 1. Lot 6 is the identifier given to the part of that falls within the Corpus of the partition action. The Defendants in their Answer had taken the position that the Partition Decree confirmed their right of way. However, it is important observe the final decree marked as V7, observations on which is mentioned below.

5. The Final Decree in the said Partition action No.12229/P marked V7 at the trial: -
As per this final decree, Lot 6 of the plan marked V5 mentioned above has been named as a road reservation but has not been stated on whose behalf it is kept as a road reservation. It is not identified as a public road. As it is not stated that it is kept as a road reservation for Lot E and A or on behalf of the 4th and 5th Defendants who are the Plaintiffs in this case, the Plaintiff cannot say that it is allocated for them as a road reservation for them in that partition action. At the same time, the Defendants in the present action appear to have not intervened in that partition action to claim a right of way over the land sought to be partitioned in that action and the final decree had not kept the said Lot 6 reserved for them. What appears is that the learned District Judge appears to have found a possible roadway over the land to be partitioned and kept it reserved for people who has right over it to prove and claim it later on in a similar manner certain portions of lands are kept unallotted in a final decree. However, the Defendant has not taken any interest to get the owner of Lot 1 in P5 plan made a party to this action and establish a right of way over said lot 1 through said lot 6 or to claim a right of way over said lot 6 some other manner. As said before, even though it may not be necessary to made the owners of all other intervening lands parties to the action it is necessary to prove the existence of the servitude in favour of the Defendants over the intervening lands as the servitude is indivisible. As explained later on in this judgment, without establishing the existence of a right of way over Lot 1 in V5 plan and over Lot A in V2 plan and over other lands in between Lot A in V2 plan and the Defendants Lots in V1, the Defendants cannot establish a right of way over Lot E which

is the last piece of land on the said purported right of way as there cannot be a right of way without a right of way over those lands.

6. Proceedings dated 25.03.73 of the case No.16262/L Gampaha District Court marked as V9:-

This document shows that there had been another case between the 2nd Plaintiff and the 1st Defendant and some others regarding a land named Millagahawatta Idam Kebella (Portion of Millagahawatta). The 2nd Plaintiff was the plaintiff in that matter and it appears that there were five defendants and the 1st Defendant of this case was the 1st Defendant in that matter too. As per evidence, it appears it was regarding the same roadway. As per the issues raised in that case, the Plaintiff in that matter had alleged a construction of roadway of 12 feet by force and unlawfully by the Defendants in that case, and the Defendants in that case had taken up the position that it was road used by villagers to go to the village. Thus, the first Defendant's and others claim in that case was not based on prescription or necessity but rather as a road used by the public to go to the village for a long period. Thus, it appears that the position taken in that case was rather based on *vestustas* or it was *via vicinalis*, a road existed from time immemorial via usage by members of the public. This is different from a person claiming a right of way by prescription by adverse user for ten years or more. However, it should be noted in the present case, the Defendants including the 1st Defendant who was a party to the case No.16262/L, for some reason had not taken such a position through their Answer or issues in the present action to say that the road they claim and now in issue is a public road by proclamation by a local authority or by *Vestustas* or it is a *via vicinalis.* A Court cannot go on a voyage of discovery and come to a conclusion beyond the case presented to it by parties – vide **Pathmawathie v Jayasekara** (1997) 1 Sri L R 248. The aforesaid case No. 16262/L had been withdrawn reserving the right to file a new case by the Plaintiff in that case who is the 2nd Plaintiff in this case. The learned High Court Judges in their Judgment have taken the view that the Defendants were using the said road from that time and therefore entitled to the roadway as the 2nd issue in that case was whether the Defendants in that case constructed a road and used it in the month of March in 1970. Further, the learned High Court Judges have observed that the witness of the Plaintiff at one occasion has admitted that the Defendants use this road. But the learned District Court Judge had taken the view that there is no sufficient evidence to hold that the said road was used continuously by the Defendant after the withdrawal of

the said case. Prescription has to be proved in terms of Section 3 of the Prescription Ordinance and a servitude must be proved according to the law regarding servitudes. Those will be considered below in this judgment. However, merely there was a case filed for damages (as per the issues raised in that action) over an attempt to construct road and withdrawal of it cannot itself say that the Defendants of this case used the road way thereafter. On the other hand, if there was such a regular use of the purported right of way, it is not probable that the Plaintiffs would wait till 1983 to file another action. Such use must be proved by leading necessary evidence. It is also stated in evidence by the witness Ariyarathne called by the Plaintiffs that there exists a part of the house (a hood), where the Defendants claim the roadway, which has to be demolished to give a roadway. He also had spoken about the attempt by the Defendants to make the road which made the Plaintiff to make the police complaint. As per the Defendants' witness said part of the house (hood) was not there and later on, came in to existence. However, if this roadway was used regularly, it is difficult to think the said structure would come in to existence without objection and litigation in that regard. The evidence indicates attempts to use the roadway as well as occasions of putting up obstacles to such use and litigations or going to police on such occasions.

As said before, mere showing of a track of a road through plans does not establish a right of way as it may be an access used by the owners itself or by some with the permission of the owners or a right of way limited to some other persons for their dominant tenements etc. It is also stated above in this judgment that the burden of proving the existence of a right of way is on the person who claim the existence of such right of way. As per what is discussed above, it is this Court's view that there was a track that can be identified as an access road as shown by the plans even from the time of said partition case. Whether the Defendants have a right of way over the land of the Plaintiffs to use that track of road has to be proved by the Defendants. Even though this Court observes that the plans marked in this action show a track of a road that commences from the Kadawatha Ragama road running across the land shown in Plan marked V2 (preliminary plan of the aforesaid partition action) including Lot E which is the Plaintiffs' land in the schedule to the plaint, for the reasons mentioned below, this Court has to decide that the Defendants failed to prove a right of way to use that track as a right of way by prescription or as a way of necessity.

1. The position of the Defendants is that they have a right of way by prescription or as a way of necessity which falls within the category of praedial or real servitude which belongs to a person as an owner of a certain house or land (in the matter in hand on the basis of their purported ownership to the lands described in schedule to the Answer or to the lots in plan marked V1). Thus, when a right of way is established, it has to be established in relation to an ownership of a dominant land over the servient land.

   While the praedial servitude is an encumbrance over the servient land, the benefit to and the burden of a praedial servitude are inseparable from the land to which they are attached; They pass with the land to every succeeding owner. The right to the servitude cannot be separated even temporarily from the right to the land.[3]

   At the re-trial, four witnesses had given evidence on behalf of the Defendants. They are Dayasoma Siriwardane (Gramaseva Niladari), A.M. Piyatissa, K.A.D Philip and Mallika Coorey (Substituted 2nd Defendant). Thus, only the substituted 2nd Defendant was the only party Defendant who gave evidence for the Defendants. The aforesaid Mallika Coorey, even though had stated that the Defendants are residents of lots in said Plan marked V1, no deed had been marked to prove the ownership of the purported dominant lands stated in the schedule to the Answer. It must be noted that no admissions had been recorded as to the ownership of purported dominant lands. Although the witness A. M. Piyatissa had also stated that certain lots in plan marked V1 belonged to certain Defendants but without marking the relevant deeds. As he is not a Defendant himself, if he says that certain lots in V1 belongs to certain Defendants it must be due to the fact that he came to know that fact from some other source which is not produced before Court, thus hearsay. Even the Mallika Coorey's evidence as to the ownership of other Defendants has to be considered as hearsay on the same footing. Her evidence as to the Lot that belonged to her father, the original 2nd Defendant was too without marking the relevant deed in evidence, and one cannot be allowed to speak to the facts, and lead secondary evidence to prove a fact that contain in a deed unless it is shown that circumstances fall within the ambit of section 65 of the Evidence Ordinance - vide Sections 91 and 65 of the Evidence Ordinance. The position of the Answer and the issue No.7 raised at the re-trial indicates that the Defendants state their entitlement to the

[3] G. L. Peiris, The Law of Property Vol.3, p.27 referring to The South African Law of Property, Family Relations and succession, p4 by Lee and Honore

right of way based on the ownership to the lands described in the Answer. As per the evidence led at the trial, it appears that the Defendants came to the said lots in V1 after an auction took place relating to them, but whether they bought them directly from the auction or from a party who bought them from the auction is not clear. As the deeds are not marked, the Defendants have failed to prove their entitlement to the purported separate dominant lands described in the Answer. Even though the learned District Judge answered the said issue No.7 as "not proved", the learned High Court Judges have failed to observe that fact that they have not proved their title to the dominant lands, which they say they are the owners and which is the basis of their claim.

2. This is not a claim of a right of way over the adjoining land to the Defendants' purported dominant lands. As per the documents already marked the Plaintiffs' land, Lot E is at the end on the east of the right of way they claim. Before reaching Lot E, as per the plans tendered in evidence, it has to run through intervening lands between Defendants' lands in V1 and Lot E in plan marked V2, which are lands between Defendants' land in V1 and Lot A in plan marked V2, Lot A in Plan marked V2 and Lot 1 in the plan marked V5. It is also not revealed how many lands are there in between said Lot A in plan marked V2 and the Defendants' Lots in plan marked V1. It must be noted that basic rule is that all praedial servitudes are in their nature indivisible, so that they can neither be created or acquired, nor taken away in part.[4] Hence, to claim a servitude over said Lot E, it is necessary to prove the existence of the same right of way over the other lands in between Lot E and the Defendants' lands in plan marked V1. Neither a plan nor a sketch showing the road from Lot A (or Lot F in V2) to Defendants' Lots in V1 or connecting the disputed road to roads shown in V1 had been marked in evidence. If the servitude had been extinguished at one point over such lands the whole servitudes extinguish. Thus, without proving the existence of the same servitude over other intervening lands the Defendants cannot be successful in their claim of right of way over Plaintiffs' land against the Plaintiffs. To prove such a right of way over intervening lands, those must be shown and described. In this regard this Court will quote the following from '**The Law of Property in Sri Lanka, Volume 3,** By G. L. Peiris at pages 3 and 4.

[4] See G. L. Peiris, The law of Property in Sri Lanka, Volume Three. At page 2 with a foot note reference to C. G Hall and E.A. Kellaway, servitudes 3rd Edition.

"*The principle pertaining to the indivisibility of servitudes has been given expression in another context.*
Where a servitude is claimed over a servient tenement not adjacent to the dominant tenement, it must be shown that the intervening tenements are subject to the same servitude (Voet 8.4.19). Once a servitude has been acquired, there really comes into existence one servitude over several servient tenements. That servitude is one and indivisible. Where the servitude is extinguished with regard to one of the intervenient tenements, the whole servitude is generally extinguished."

In **de Silva v Nonohamy** 34 N L R 113**,** it was stated **"***Servitud***e** *is one and indivisible, in the sense that it must be shown legally to exist at each and every point on the strip of land over which it is claimed and, if the claimant fails to prove its existence at any one of such points, the servitude disappears not at the point only but at every other point*"

In **Fernando v Dona maria** 32 N L R 166 it was held that "*If the plaintiffs wish to establish that they are entitled to the declaration of right they claim, they must establish their contention that all the intervening lots are subject to the right of way. For that purpose, it seems to me the owners of the intervening properties must necessarily be heard, and the plaintiffs bring them before the Court. The Plaintiffs have not shown they are entitled to a right of way over the intervening lots, and I have come to the conclusion that they cannot maintain the action"*

However, it appears that the need to add owners of the intervening lands is not necessary due to the majority decision of afore-mentioned **de Silva v Nonohamy**. However, the existence of the purported servitude in between the Defendant's land and the Lot A in Plan marked V2 has not been Proved by submitting a plan or a sketch in that regard.

Further without proving the existence of the same servitude over the said intervening lands the Defendants cannot prove the existence of the right of way over the Plaintiffs land as the servitude is indivisible.

3. On the other hand, Lot 1 in the final plan of the partition action marked V5 was allocated to party in that action as per the final partition decree marked V7, and lot 6 over it has been reserved for a road reservation without allocating it to anybody. Which means that

until it is proved that there is a right of way that belongs to the Defendants through said lot 6, it is only a reservation for a road. If there was any right over it prior to the final decree to any person, until it is proved and claimed that right has to be considered as not established after the partition decree, as it is kept as a road reservation for the people who are entitled to it to be claimed. It appears that no step had been taken after the partition decree to establish the Defendants' right of way over said lot 6 and the owner of it has not been made party at least to establish that in this case, as reservation of a roadway in the partition action has to be considered as one unallotted till the right to it is proved. Thus, indivisibility of the servitude is broken until the entitlement of the Defendants to Lot 6 is proved.

4. On the other hand, if one claims a right of way by prescription, he has to prove prescription over a well-defined and identifiable track which was used adversely over a period of ten years. See **Kandaiah v Seenithamby** 17 N L R 29, **Fernando v Fernando** 31 N L R 126. As servitude is indivisible. The Defendants should have proved this definite track that existed as a right of way which they acquired by prescriptive user. Nothing was placed before the District Court to show the part of the right of way that existed between the Defendants' lots in V1 and Lot A in plan marked V2. As the servitude claimed is a praedial servitude which is indivisible, it is not sufficient to show only a part of the said servitude to prove prescriptive entitlement.

5. On the other hand, the Defendants have to prove prescription in accordance with Section 3 of the Prescription Act. They must prove adverse user of the right of way and they can tag on to the adverse user of the predecessors in title to them, but not anyone else. Out of the Defendants, only substituted 2nd Defendant had given evidence. No other Defendant had given evidence to prove their adverse user in terms of section 3 of the Prescription Ordinance. Even though the Plaintiffs' witness Rajaneththi Devage Ariyaratne had stated that the Defendants attempted to construct a roadway, at one place in his evidence, had admitted that the road was shown by the surveyor (may be in the partition action) and now the Defendant uses the roadway. The Grama Niladari who gave evidence for the Defendants had also stated that he observed the Defendants using the roadway in issue, but he had come to the area as Grama Niladari only after the filing of the case. A. M. Piyatissa appears to be the Plaintiff in case No.25163 filed against the 2nd Plaintiff in this case who was the Defendant in that case, alleging that the

Plaintiff in this case obstructed the road way. This witness Piyatissa had bought the land in 1976. He too has stated that he saw the Defendants using this road. He has also spoken of an obstruction caused by the Plaintiff. As this case was filed in 1983, the witnesses mentioned above does not place sufficient material to prove uninterrupted user for 10 years of the road way. K.A.D Philip who gave evidence for the Defendants had stated that it was his father who sold the land to the father of the 2nd Plaintiff in or around 1940 and it seems that he was about 10 years old at that time. He had spoken about using this road to come home during school days. If it was his father's land at that time, it is not definite evidence to show it was a road for others too. His evidence does not establish sufficient facts to hold that the Defendants had acquired right of way by prescription over what the Defendants' now claim as a right of way. On the other hand, the use of this witness of a road access in his father's land as far back as 1940 or later to visit someone very infrequently, as stated in his evidence, is not a user that the Defendants can tag on to in terms of Section 3 of the Prescription ordinance as they did not obtained title from him. It appears that it is the position of the Defendants that all the Defendants obtained title as per an auction plan found on the auction notice marked P15. Even if it is not so, it is clear they claim that they are the owners of various lots in plan marked V1 and it is their own averment in the Answer which says that they became owners to their lots by deeds referred to in the answer. In fact, as the deeds of the Defendants had not been produced, it is difficult find whose adverse user can be tagged on to by the Defendants as there is nothing to prove who the predecessors in title to the dominant land or lands were. On the other hand, if their right of way was given through another access road by those deeds, it may affect their claim for a way of necessity. Thus, not presenting the title deeds to their lots (to purported dominant lands) in evidence by the Defendants affect their claim in two ways, firstly, there is no proof to say that they are the owners of the dominant lands which is the base of their claim, and they cannot tag on to the user of the predecessor in title without proving who he/she is. On the other hand, producing it may affect their claims in this case if there is anything contrary to their claim included in the deed.

The last witness for the Defendants was the substituted 2nd Defendant, Mallika Coorey. She in her evidence-in-chief, while admitting that she occupies the Lot 12 in V1 which was the property of the original 2nd Defendant, has attempted to say that the other Defendants bought their lots from her father, the original 2nd Defendant. This may be an attempt to tag her father's alleged user of the purported road way to the benefit of

other Defendants but as said before the other Defendants have not marked their title deeds to show that they are the owners of the purported dominant land as well as to show their predecessor in title. On the other hand, as per the Answer filed by the Defendants, even the original 2nd Defendant had obtained title through a deed to a separate lot in 1967 as other Defendants did in different years. Thus, the position of this substituted 2nd Defendant that her father sold the relevant lots to the other Defendants cannot be relied upon. During her cross examination she admits that there was an auction and P15 was the auction notice. As per the said notice the auction date was 19.04 1966. In view of the averments in the Answer, the Defendants have become the owners of the relevant lots in view of the deeds mentioned therein. None of the defendants, other than the substituted 2nd Defendant has given evidence to substantiate their prescriptive user of the purported right of way. None of the Defendants have marked their title deed to prove their ownership of the dominant land and show who is their predecessor in title of whose user they can tag on to prove right of way by prescription. Even if it is accepted that the 2nd substituted Defendant's evidence that the Defendants used the purported road, without establishing the ownership to the dominant tenement, right of way over the intervening lands, and the definite track they used as the right of way beginning from their lots to the plaintiffs' land described in the schedule to the plaint as described above in immediately preceding item 1 to 3, the Defendants cannot successfully prove a servitudinal right over the Plaintiffs' land found in the schedule to the Plaint by showing prescriptive user only to a part of the servitude which is indivisible. As the Defendants have separate lots for their ownership as per the Answer, each of them must prove the commencement of ten years period of user relating to those separate lots but, except the substituted 2nd Defendant, have not given evidence to prove that. If they rely on the commencement of the prescriptive user by a predecessor prior to the auction at a time when all those lots formed a single landholding. Then they must mark the deeds and prove who the predecessor in title was and his commencement of the use of this purported road way adverse to the Plaintiffs' rights and their entitlement to tag on to that adverse user of the predecessor in title. When it was suggested to the substituted 2nd Defendant that the original owners were Elaris Coorey and Luis Coorey she has clearly said that she does not know. Thus, who the predecessor in title when the separate lots were one land is not revealed and therefore each Defendant has to prove his or her entitlement to the right of way by

proving his or her adverse user for uninterrupted 10-year period, which has not been done.

6. Plan marked V1 shows the existence of an alternative road. Even the witnesses called by the Defendants have not stated that right of way claimed in this action is the only road available for them. Especially, the substituted 2nd Defendant in her evidence had admitted that there is an alternative road. This shows that their averment in the Answer that there is no other road way is a lie made knowingly. The fact that the right of way claimed in this action is more convenient is not a ground to grant a way of necessity. The availability of an alternative road prevents the granting of a right of way as a way of necessity.

   "*There is no doubt about the correctness of the principle that a right of way of necessity cannot be granted if there is another- although less convenient- path along which access can be had to the public road*" – vide G L Peiris, The Law of Property Vol. 3 p 125.

For the reasons discussed above, this Court is of the view that the Defendants who claimed that there is a right of way over the property of the Plaintiffs failed in proving such right that exists over the Plaintiffs' property. As there is a presumption against the existence of a servitude and it is the burden on the party who claims the existence of a servitude to prove such existence of a servitude, even though there may be minor errors in the reasoning of the learned District Judge, the learned District Judge's final conclusion to grant relief as prayed for by the Plaintiffs is correct and must stand. Thus, learned High Court Judges erred in granting relief to the Defendants and dismissing the Plaint when the Defendants have not proved the servitude in the manner they should have proved it.

As per the minutes dated 24.02.2016, certain questions of law have been allowed and they are quoted below with the answers.

Q. 1) *"Whether the learned judges of the High Court of the Civil Appeal have erred and misdirected himself in law and in fact, when failing to take into judicial consideration that:*

ii. the Respondents have caused hindrance to the enjoyment of the said land by the Petitioners,

iii. there was no right of way over the said land belongs to the Petitioners accrued to and enjoyed by the Respondents,

iv. upon the entering of the final decree in the partition case bearing No. 12229/P, the Respondents or their predecessors have not acquired any right of way as a servitude over the said land described in the Schedule to the Plaint dated 06.07.1983, until the present action was instituted in June 1983.?

A. Answered in the affirmative.

Q. 2) *Whether the Defendant is entitled only to the reliefs prayed for in the answer dated 06/03/1984?*

A. In the Negative as the Defendant is not entitled to the reliefs prayed for.

Q. 3) *Have the Defendants raised issue No. 12 with regard to prescriptive title to the right of way over the Plaintiff's land?*

A. Answered in the affirmative.

Q. 4) *Have the Learned Judges of the High Court of Civil Appeal considered the said issue and come to the conclusion that the Defendants have prescribed to the right of way which is depicted as Lot 6 of the final plan of the Partition Case No. 15229/P?*

A. Answered in the affirmative but the learned High Court Judges erred in deciding that there is a right of way acquired by prescription.

Thus, this appeal is allowed and the Judgment of the learned High Court Judge is set aside and the final conclusion of the learned District Judge to grant relief as prayed for by the Plaint is restored.

Appeal Allowed.

……
Judge of the Supreme Court

Hon. Kumudini Wickramasinghe, J.

I agree.

……..
Judge of the Supreme Court

Hon. Achala Wengappuli, J.

I agree.

……..
Judge of the Supreme Court