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

In the matter of an appeal from the Judgment of the Civil Appellate High Court of Colombo in the Western Province dated 20.11.2013.

S.C. Appeal No. 217/2014
HCCA Colombo Appeal Nos.
WP/HCCA COL. 96/2005(F)A
WP/HCCA COL. 96/2005(F)B
DC Colombo Case No.18861/L

Sathyajith Deshabandu Welaratne
Presently at No.15, Gainsburry Lane,
Acton, London
United Kingdom

By his Attorney

U.D. Welaratne
No. 57/14.
Jayaweera Mawatha,
Ethul Kotte.

Plaintiff

Vs.

1. G.N. Perera
2. H. Damayanthi Samarasekara
   Both of No.50/1, New Jayaweera Mawatha, Ethulkotte.

Defendants

AND BETWEEN in
WP/HCCA COL. 96/2005(F)A

1. G.N. Perera (deceased)
2. H. Damayanthi Samarasekara
   Both of No.50/1, New Jayaweera Mawatha, Ethulkotte.

Defendant-Appellants

Vs.

Sathyajith Deshabandu Welaratne
Presently at No.15, Gainsburry Lane,
Acton, London
United Kingdom

By his Attorney

U.D. Welaratne
No. 57/14.
Jayaweera Mawatha,
Ethul Kotte.

Plaintiff-Respondent

AND BETWEEN in
WP/HCCA COL. 96/2005(F)B

Sathyajith Deshabandu Welaratne
Presently at No.15, Gainsburry Lane,
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U.D. Welaratne
No. 57/14.
Jayaweera Mawatha,
Ethul Kotte.

Plaintiff-Appellant

Vs.

1. G.N. Perera (deceased)
2. H. Damayanthi Samarasekara
   Both of No.50/1, New Jayaweera Mawatha, Ethulkotte.

Defendant-Respondents

AND NOW BETWEEN

2. H. Damayanthi Samarasekara
No.50/1, New Jayaweera Mawatha,
Ethulkotte.

2nd Defendant-Appellant-Appellant and 2nd Defendant-Respondent-Appellant

Vs.
Sathyajith Deshabandu Welaratne
Presently at No.15, Gainsburry Lane,
Acton, London
United Kingdom

By his Attorney

U.D. Welaratne
No. 57/14.
Jayaweera Mawatha,
Ethul Kotte.
Plaintiff-Respondent-Respondent
and
Plaintiff-Appellant-Respondent

BEFORE : **MURDU N.B. FERNANDO, PC, CJ.**
E.A.G.R. AMARASEKARA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Jagath Wickramanayake, PC, with Ms. Pujanee De Alwis instructed by Ms. Nimesha Nicholas for the 2nd Defendant-Appellant-Appellant and 2nd Defendant-Respondent-Appellant.

Manohara de Silva, PC, with Ms. Sasiri Chandrasiri for the Plaintiff-Respondent-Respondent and Plaintiff-Appellant-Respondent.

ARGUED ON : 31st January, 2023

DECIDED ON : 11th June, 2025

ACHALA WENGAPPULI, J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as "the Plaintiff") through his power of Attorney holder instituted an action against the 1st and 2nd Defendant-Appellant-Appellants (hereinafter referred to as "the 1st and 2nd Defendants") and sought *inter alia* a declaration of Court of his entitlement to the land described in the 1st schedule to the Plaint, a declaration in respect of the disputed land strip as a reserve for a common access roadway described in the 2nd schedule, and he is entitled to use the said roadway. The Plaintiff also prayed for an order of Court directing the Defendants not to cause any obstruction to the said roadway and remove any obstacles that had been placed on it, which prevented him from gaining access to his land over the said section of the roadway.

In seeking the dismissal of the Plaintiff's action as the primary relief, the Defendants, in their joint answer, have claimed that the said roadway is used by them as a 'private roadway' to access their property and also disclosed the fact that the Plaintiff has a separate access to his land, along his Eastern boundary. They also claimed that the Plaintiff never used this roadway to access his land. After the Defendants have tendered their joint answer, a commission was issued by the District Court on licensed

surveyor *C.C. Wickramasinghe,* who returned that commission with the Plan No. C/343.

Parties proceeded to trial after settling for a total of 12 issues between them. The Power of Attorney Holder, and three surveyors gave evidence for the Plaintiff and tendered the Power of Attorney No. 801 (P1), Deed Nos. 943 (P2), 555(P9) and 1391 (P10) along with Plan Nos. 518 (P3), 2451 (P4), 880 (P5) and C/343 (P7), its report (P8) in addition to a statement made by the mother of the Plaintiff to *Welikada* Police Station on 16.02.1999 (P6), in support of his case. The 1st Defendant, who was 89 years of age at that time, and the 2nd Defendant gave evidence before the trial Court. They have tendered Plan Nos. 693 (V1), 425 (V2) and 866 (V3), along with the certified copy of the proceedings held before the Chief Magistrate's Court, in case No. 97737/4, and its order dated 30.09.1999 (V5).

At the conclusion of the ensuing trial, the District Court has held with the Plaintiff and granted relief as prayed for, except for prayer "ඇ". The 2nd Defendant, being aggrieved by the conclusion reached by the trial Court in the said judgment, preferred an appeal against it. The Plaintiff, in spite of the fact that the District Court has held with him, also preferred an appeal against the said judgment, apparently due to the fact that the trial Court recognised his right of way over the disputed land strip only up to a point and thereby leaving out a portion of that strip of roadway, which is in an extent of about 5.6 perches and formed the disputed portion of the roadway, in the hands of the Defendants.

During the hearing of the appeals before the Civil Appellate High Court, both the appeals were consolidated and a common judgment was pronounced. The appellate Court affirmed the impugned judgment of the

District Court, and having partly allowed the Plaintiff's appeal, dismissed the 2nd Defendant's appeal. The High Court of Civil Appeal granted the right of way of the roadway to the Plaintiff in its full extent, inclusive of the said portion of land depicted as Lot No. A in Plan No. C/343, left out by the District Court to the Defendants.

Thereupon, the 2nd Defendant sought leave to appeal against the judgment of the High Court of Civil Appeal and, after hearing the parties on 19.11.2014, this Court granted leave on the following questions of law:

a. Have their Lordships of the Civil Appellate Court erred in losing sight of the fact –
    i. That a right of way is a servitude which must necessarily appertain to a dominant tenement?
    ii. That on the Respondent's own showing the dominant tenement is in respect of which he has claimed the alleged right of way in question was in respect of Lot 2A in Plan No. 2451 produced at the trial, marked P4?
    iii. That as per the Respondent's Deed No. 943 (P2) and as per the boundaries given in the 2nd schedule to the Plant, the physical boundary on the Western side of the "reservation for the road 20 ft wide" depicted as Lot A2 in Plan 518 (P3) was the canal and such reservation for road did not extend beyond it?

b. If the aforesaid questions of law are answered in favour of the Appellant, are the findings of their Lordships of the Civil Appellate Court based on irrelevant considerations?
c. Have their Lordships of the Civil Appellate Court erred in holding that due to the fact that the 1st Defendant did not have soil rights to the disputed roadway he could not have objected to the use of the disputed roadway by the Respondent?

Before I embark on the onerous task of considering the three questions of law, it is necessary to present a gist of the individual cases that were presented before the trial Court by the contesting parties, as well as to make a brief reference to the evidence they have placed before that Court, in support of their respective cases.

The Plaintiff's case is based on an entitlement conferred on him by his title deeds to have egress and ingress over the disputed roadway whereas the Defendants' case was that the disputed roadway is used exclusively by them to gain access to their land and being used as a 'private road'.

Paragraph 4 of the Plaint describes the manner in which the Plaintiff became entitled to the right of way on which he moves the trial Court to issue a declaration to that effect. The Plaintiff averred in the said paragraph that he became the rightful owner to the Lot No. 2A, depicted in Plan No. 2451, through the Deed of Transfer No. 943, executed on 18.11.1996. The Lot No. 2A of Plan No. 2451 was carved out of Lot 2 in Plan No. 880, after making a sub-division, and with the execution of the

Deed of Transfer No. 943, the rights over that land were transferred in favour of the Plaintiff, along with its rights appertaining to the use of two roadways. He further averred in paragraph 6, that the roadway depicted as the Northern boundary of the said Lot No. 2A, is the strip of land forming a part of *Jayaweera Mawatha,* and is described in the schedule 2 to the Plaint. Except for the declaration sought from Court to the effect that he is the rightful owner of the land depicted as Lot No. 2A in Plan No. 2451, more fully described in the first schedule to the Plaint, the other reliefs that were prayed for by the Plaintiff relates to the land described in the second schedule to the Plaint, which is as follows:

"දෙවන උප ලේඛනය

කෝට්ටේ, මහ නගර සභා සීමාව තුල පිහිටා ඇති ක්ලයිව්ස් ලන්ඩ් ෆාම් නමැති ඉඩම මැන වර්ෂ 1967 පෙබරවාරි මස 18 වන දින සී. සී. වික්‍රමසිංහ මානක තැන සකස් කරන ලද අංක 518 සිතියමේ පෙන්වා ඇති ලොට් අංක 'ඒ2' දරන අඩි 20ක් පළල ඇති පාරක් සඳහා වෙන් කරන ලද යථාතීරුවයි. එයට මායිම් :- උතුරට :- එම ඉඩමේම කොටසක්, නැගෙනහිරට :- වී. ඒ. ඇල් සේනාරත්න මානක තැනගේ අංක 2630 හා 1963 අප්‍රේල් 17 වන දින සිතියමේ ලොට් බී දරන ඉඩම්ද දකුණට :- 518 දරන සිතියමේ ලොට් ඒ1 වශයෙන් පෙන්වා ඇති කැබැල්ල හා එම ඉඩමේම කොටසින්ද, බස්නාහිරට :- ඇලද යන මායිම් තුල පර්වස් තිස් නමයයි දශම එකක් (අ:0, රූ:0, පර්: 30.01) විශාල බිම් තීරුවයි."

The Plaintiff, although seeking a declaration of title to the parcel of land, depicted as Lot No. 2 in Plan No. 2451, for the purpose of declaration of his entitlement to the right of way, relied on Plan No. 518, in which the roadway, including the disputed portion of it, is depicted as Lot No. A2, and named "*road reservation 20 ft wide*".

In view of these factors, it is necessary to peruse the title deeds on which the Plaintiff relied on, in support of his case, particularly to examine

the manner in which the right of way he attempts to establish is actually described.

The Plaintiff acquired title to Lot No. 2A of Plan No. 518, through a Deed of Transfer No. 943, executed on 18.11.1996 by its vendor *Stanly Devaraj Moses.* As already noted, Lot No. 2A is a part of Lot No. 2 depicted in Plan No. 880 before its subdivision made by Plan No.2451, forming it into two Lots bearing Lot Nos. 2A and 2B. It was *Stanly Devaraj Moses,* who subdivided Lot 2 of Plan No. 880, after acquiring its title, through the Deed of Transfer No. 555, executed on 23.07.1974. A section of the roadway, depicted as Lot No. A2 in Plan No. 518, is also shown in the Plan Nos. 880 and 2451 and described the same as a "*reservation for road*".

Thus, in establishing the right of way and its alleged obstruction by the Defendant, the Plaintiff must place heavy reliance on the Deed No. 555, by which his predecessor in title had obtained his bundle of rights over Lot No. 2, depicted in Plan No. 880.

The vendor of the Deed of Transfer No. 555, conveyed his rights over Lot No. 2 of Plan No. 880, "… *fully and particularly described in the First Schedule hereto* <u>*together with the right of way and user over the reservations for roads in the Second Schedule hereto fully described*</u>" to its vendee *Stanley Devraj Moses* (emphasis added). The Second Schedule to the said Deed makes a reference to " *[A]ll that divided allotment of land marked Lot A2 reservation for a road (20 feet wide) in Plan No. 518 dated 18th February 1967 made by C.C. Wickramasinghe, Licensed Surveyor …".*

The vendee of the said Deed No. 555 (*Stanley Devraj Moses*), after subdividing Lot No. 2 of Plan No. 880, by Plan No. 2451, as Lot Nos. 2A

and 2B, thereupon transferred his rights over Lot No. 2A to the Plaintiff by executing Deed of Transfer No. 943 by conveying its title " *[T]ogether with the right of way in over under along, … All that divided and defined allotment of land marked Lot A2 (Reservation for Road 20 feet wide) depicted in Plan No. 518 dated 18th February 1967 made by C.C. Wickramasinghe, Licensed Surveyor …"* along with *"[A]ll that divided and defined allotment of land marked Lot 10 (Reservation for Road 20 feet wide) depicted in Plan No. 880 dated 24th March 1969 made by C.C. Wickramasinghe, Licensed Surveyor…".*

Upon perusal of the Plan Nos. 2451, 518 and 880, the following factors could be observed;

a. Lot No. 2A of Plan No. 2451 is a rectangular block of land which is in an extent of 9.8 perches,
b. The Northern and Eastern boundaries of the said Lot No. 2A forms reservations made for 20 feet wide roads,
c. Owner of Lot No. 2A was conferred with a right of way along its Northern boundary by Deed No. 943 with "*… [A]ll that divided and defined allotment of land marked Lot A2 (Reservation for Road 20 feet wide) depicted in Plan No. 518 dated 18th February 1967 made by C.C. Wickramasinghe, Licensed Surveyor …",*
d. Similarly, the owner of Lot No. 2A was also conferred with a right of way along its Eastern boundary by Deed No. 943 with *"[A]ll that divided and defined allotment of land marked Lot 10 (Reservation for Road 20 feet wide) depicted in Plan No. 880 dated 24th March 1969 made by C.C. Wickramasinghe, Licensed Surveyor…",*

e. Therefore, the owner of Lot No. A2 of Plan No. 518 (the Plaintiff), became entitled to use either or both of these roadways to gain access to the said parcel of land,

f. Lot No. A2 of Plan No. 518, which depicts the road reservation 20 feet wide runs from East to West along the Northern boundary of Lot No. A2 of Plan No. 518, as per superimposition done by Plan No. C/343 on 09.04.2001,

g. The said Lot No. A2 of Plan No. 518, depicting the road reservation 20 feet wide has its terminal end of the said roadway ending with a "*Canal*", forming the Western boundary of that roadway,

h. Plan No. C/343, prepared by the Court Commissioner, depicts the disputed land area of the said road reservation, as Lot No. A,

i. Lot No. A of Plan No. C/343 shows a "*Canal*" to the Western boundary of the section of the roadway(*New Jayaweera Mawatha*), now separated by a concreate structure erected across the said roadway, by the 1st Defendant from the rest of the and thus forming the said Lot No. A of Plan No. C/343, depicted in the said Plan marked as "X" and "Y", whereas the Eastern most boundary of the said roadway (*New Jayaweera Mawatha*), is depicted as its end marking the point at which it connects to the main public road,

j. The said Lot No. A of Plan No. C/343 forms its Southern boundary, becoming the Northern boundary of Lot No. A2 of Plan No. 518,

k. The said Lot No. A of Plan No. C/343 forms its Northern boundary, becoming the Southern boundary of the land held by the 1st Defendant.

It is in view of these items of evidence, that were presented before the trial Court for its consideration, that the Plaintiff sought to establish his legal right of access to his land through the section of the roadway, shown as the Lot No. A of Plan No. C/343. Both the 1st Defendant and 2nd Defendant gave evidence before the trial Court, but did not tender any title deed by which either of them became entitled to use the servitude of right of way over the said roadway, referred to as *New Jayaweera Mawatha,* along with the section that was separated by the erection of a concreate structure across the said roadway by the 1st Defendant, marked "X" and "Y". That erection resulted in the isolation of a portion of roadway (*Jayaweera Mawatha)* from the rest, and now depicted as Lot No. A of the commission Plan No. C/343.

In his evidence, the 1st Defendant stated that when he bought the land located to the north to the parcel of land owned by the Plaintiff, separated by the disputed roadway in between, it was a marshy land and therefore he had created an access road to his land by filling over that section of the roadway with gravel. It is on this footing the 1st Defendant claims that the access road, now known as *New Jayaweera Mawatha,* is a 'private road', to which the Plaintiff had no right to use in accessing his land at all. In support of his claim, the 1st Defendant tendered Plan No. 693C of 26.12.1968, prepared by licensed surveyor *C.C. Wickramasinghe,* marked as "V1", Plan No. 425 of 10.07.1995, prepared by licensed surveyor

C.H. Dias Abeywardene, marked as "V2" and Plan No. 866 of 02.03.1998, prepared by licensed surveyor *S.J. Jayawickrema*, marked as "V3" in order to impress upon the trial Court of the position that the disputed roadway is in fact a private road. The 1st Defendant also relied on an order made by the Chief Magistrate's Court of *Colombo* on 30.09.1999 in Case No. 97737/4, in which his name and the name of the mother of the Plaintiff are cited as the two disputants.

During cross examination, no challenge was made by any of the Defendants to any of the title deeds presented by the Plaintiff. Learned President's Counsel who appeared for the Plaintiff, in addition to inviting attention of this Court to that evidence, also submitted that, when the two Defendants held back their own title deed, without presenting it before Court, the Plaintiff during his cross examination of the 2nd Defendant, produced it marked as "P10" (Deed of Transfer No. 1391).

Perusal of the said deed (P10) revealed that it was executed on 07.02.1969, in favour of the 1st Defendant for the purpose of conveying title to a land in extent of 1A-2R-18.7P depicted in Plan No. 693C of 26.12.1968 and prepared by licensed surveyor *C.C. Wickramasinghe* as Lot No. 1 , "… *together with the right of way for both foot and vehicular traffic and other rights hereinafter mentioned in common with others having similar rights in over along and above the said Lots 6 and 7 (reservation for road 20 feet wide) …".*

The Plan referred to in the said title deed is the one tendered to Court by the 1st Defendant, marked "V1". This Plan was prepared in order to sub divide Lot No. A of Plan No. 4559 of 05.10.1934, into seven lots. In the said plan, Lot No. 1 was shown with a "*reservation for Road 20 feet wide*" at its Southern boundary, depicted therein as Lot No. 7, and another

"*reservation for Road 20 feet wide*" as its Eastern boundary, depicted as Lot No. 6, also with the description "*reservation for Road 20 feet wide*", serving as the access road to Lot Nos. 2, 3, 4 and 5 of that Plan.

Thus, similar to the Lot No. 2A of Plan No. 2451 (the parcel of land owned by the Plaintiff), the Lot No. 1 of Plan No. 693C, (the parcel of land owned by the 1st Defendant) had his right of way over Lot No. 7 and also over Lot No. 6 of Plan No. 693C of 26.12.1968. According to Plan No. 2451, Lot No. 2A, which belong to the Plaintiff, also has two roadways over which it could be accessed. Plan No. 2451 depicts a roadway along the Eastern boundary of Lot 2A, depicted in Plan No. 880 as Lot No. 10 and named "RES FOR ROAD 20 FT WIDE" and another, by forming its Northern boundary, as the road reservation "*now known as Jayaweera Mawatha*" leading up to the public road, identified as *Kotte* Road.

Learned President's Counsel for the Plaintiff contended that his client and the 1st Defendant have both acquired right of way over the same road reservation (known as Lot No. A2 of Plan No. 518 and also known as Lot No. 7 of Plan No. 693C, according to their title deeds.

Since the dispute relates to a part of the road reservation of 20 feet wide, named as *Jayaweera Mawatha,* it must be investigated into whether the "*reservation for Road 20 feet wide*" depicted as Lot No. 7 in Plan No. 693C (over which the 1st Defendant was conferred with his right of way to Lot No. 1 of the said Plan, in terms of his title Deed No. 1391) and the "*Road Reservation 20 ft wide*" depicted as A2 in Plan No. 518, by which the Plaintiff was conferred his right of way to Lot No. 2A of Plan No. 2451, in his title deed No. 943, is one and the same.

The report and the evidence of the Licensed Surveyor, who was commissioned by Court to conduct a survey and report over the disputed portion of the roadway, indicate that indeed it is so. Not only Lot No. 7 of Plan No. 693C, but also the Lot No. A2 in Plan No. 518 was superimposed during the preparation of the commission Plan No. C/343, in which the boundaries that were so superimposed from the two previous plans were clearly depicted in his Plan using different colours. The 1st Defendant, during his cross examination of the licensed surveyor, had further clarified this issue from him and the witness answered it in the affirmative.

In view of the documentary proof presented before the trial Court, the Plaintiff was able to establish that the denial of his right of way over a section of *Jayaweera Mawatha* by the Defendants, who also have identical rights over the same as him, in terms of the title deed No. 1391.

The conclusion reached by the District Court that the Plaintiff has established his right of way over the disputed portion of *Jayaweera Mawatha* is therefore well supported by evidence and is a correct finding both in fact and in law. The affirmation of the said judgment by the High Court of Civil Appeal, in the determination of the appeals before it, too could not be faulted for that very reason. In dismissing the appeal, the appellate Court added that the Defendants, who had no soil rights over the land, cannot prevent the Plaintiff from using same as a means of ingress and egress to his land following the judgment of ***Fernando v Wickramsinghe*** (1998) 3 Sri L.R. 37. In addition, in determining a ground of appeal presented by the 2nd Defendant on the basis of abandonment of a servitude of a right of way, in favour of the Plaintiff, the High Court of Civil Appeal, adopted the view that an abandonment of a servitude of

right, created by a notarial grant, could not be lost by mere non user, following the *dicta* of the judgment of ***Paramount Investments Ltd., v Cader*** (1986) 2 Sri L.R. 309.

With this backdrop of factual narrative, I now turn to consider the questions of law on which the instant appeal was argued on.

The question of law, whether the findings of their Lordships of the Civil Appellate Court are based on irrelevant considerations, could be narrowed down to the three instances that are referred to in the said question of law, are as follows:

i. That a right of way is a servitude which must necessarily appertain to a dominant tenement?

ii. That on the Respondent's own showing the dominant tenement is in respect of which he has claimed the alleged right of way in question was in respect of Lot 2A in Plan No. 2451 produced at the trial, marked P4?

iii. That as per the Respondent's Deed No. 943 (P2) and as per the boundaries given in the 2nd schedule to the Plaint, the physical boundary on the Western side of the "reservation for the road 20 ft wide" depicted as Lot A2 in Plan 518 (P3) was the canal and such reservation for road did not extend beyond it?

These considerations, which the Defendant now trying to impress this Court with, are based on the principles of law in relation to servitudes.

However, among the issues that were raised before the trial Court there was no issue on the servitudes and the relevant principles of law, regarding the right of way. Of the four issues raised by the Defendants were on the points; whether the Plaintiff used his Eastern boundary to have access to his land; whether the Plaintiff used the disputed roadway at any point of time; whether the disputed roadway is used by the Defendants to have egress and ingress to their respective houses; and if any of these issues are answered in the negative, should the action of the Plaintiff be dismissed made no reference to any other point. Interestingly, the Defendants also failed to raise any issues on the principle of law of abandonment of servitude, or on prescription.

The consideration of the law applicable to servitudes arose in the appeal before the High Court of Civil Appeal, when the 2nd Defendant, in seeking to challenge the findings made against her by the District Court, contended that "*only a soil rights owner can confer the right of a user of a roadway to the third party. Unlike the claims by prescription, the claim based on a deed or a grant, should indicate the grant made by the owner of the soil rights*" citing ***Servitudes*** by *Hall* and *Kellaway* – Juta & Co Ltd, (1942 Ed, at p. 18), in support of the proposition that "*no evidence is available to establish that Watson Jansen, the grantor of the Deed No. 555 (P9) was the soil owner of Lot No. A2 in Plan No. 518 and that the plans produced by the Plaintiff do not indicate any such grant by the said soil owner*."

This was due to the fact that the Defendants collective contention before the District Court was that the servitude of a right of way could be lost due to some means known to law and there was no evidence presented to Court that the predecessor in title of the Plaintiff, *Stanley*

Devraj Moses, ever used the disputed roadway as an entrance to the allotment of land he had purchased. The Defendants therefore contended that particular factor, coupled with the evidence that there was no entrance opening up to the disputed part of the roadway from the Plaintiff's land, gives rise to the presumption that the said *Stanley Devraj Moses* has "*intentionally abandoned the said right of way as there was no reason or purpose to use the said right of way*."

In view of this contention, it is convenient to deal with this factual issue at this stage, before I proceed to consider the contention advanced by the 2nd Defendant on the principles of law that are applicable in relation to servitudes pertaining to conferment of a right of way.

However, in this instance, the Plaintiff is a person who owns soil rights of the dominant tenement, and also enjoys the servitude of right of way over *Jayaweera Mawatha* to access his land. Similarly, the two Defendants too have such rights over *Jayaweera Mawatha* in respect of their respective lots. Clearly, this is not a situation where an action is instituted by a person who owns the dominant tenement and seeking to vindicate his right over a servitude that runs over a servient tenement held by the two Defendants. This is an action instituted by the Plaintiff, against the two Defendants, for causing obstruction to the enjoyment of his right of way over *Jayaweera Mawatha* who too incidentally are entitled to the same servitude. In this respect, both the Plaintiff as well as the Defendants, who own soil rights to their respective lands, could be considered as owners of dominant tenements, who have their respective rights of way over *Jayaweera Mawatha,* the servient tenement.

Interestingly, when the Defendants claim that the disputed portion of the roadway as a "*private road*" used by them exclusively, they obviously claim acquisition of soil rights over same. The title deeds that were presented by the parties before the trial Court clearly indicate that all of them are only entitled to access their respective lands over *Jayaweera Mawatha,* in addition to soil rights over their individual parcels of land. When the Defendants, in addition to their claim of "*private road*", also claim that an "abandonment" of the servitude of right of way by the Plaintiff's predecessor in title, they contradict their already declared position that it is a "*private road*", and thereby blowing hot and cold.

The Defendant relied on a quotation from a text on servitudes and the principle it refers to in order to contend that the Plaintiff's predecessor in title had no soil rights to grant the servitude over the disputed roadway. It is the 1st Defendant's contention that his predecessor in title, *Henry Edward Clive Goonesekera,* who owned the all the lands depicted in Plan No. 693C (inclusive of s Lot No. 1) in its totality, and had transferred his rights over that parcel of land to *George Nelson Perera,* (the 1st Defendant), along with the right of way over Lot No. 7 of the same plan.

In contrast, *Stanley Devraj Moses,* who transferred his rights over Lot No. 2A of Plan No. 2451 to the Plaintiff, had derived that title from *Waltson Mackslin Jansen* who received the same also on a transfer, and since the said *Jansen* being not the soil rights owner over the disputed roadway, the 2nd Defendant contends that there is no proof of the fact that Lot No. A2, which is the reservation for a road 20 feet wide in Plan No. 518 (the Plan relied on by the Plaintiff), too was owned by *Henry Edward Clive Goonesekera* at any point of time.

It is correct that Deed No. 1391 (P10), being executed on 07.02.1969, is the oldest of the deeds that were tendered before the trial Court. The vendor, named in the said instrument, *Henry Edward Clive Goonesekera,* states in its page 2, " … *the vendor caused 7 divided portions marked Lots 1, 2, 3, 4, 5, 6, and 7 depicted in Plan No. 693C dated 26.12.1968 made by C.C. Wickramasinghe, Licensed surveyor, …".* Thus, when he granted right of way over Lot No. 7 of Plan No. 693C, had the soil rights over that Lot No. 7 and therefore could grant such a servitude on that road reservation.

Now the question is whether the devolution of title to Lot No. 2A of Plan No. 2451 could be traced back to the said *Henry Edward Clive Goonesekera,* enabling the owner of the said parcel of land also could use Lot No. 7 of Plan No. 693C to egress and ingress from his lot.

The answer to this question could easily be found in the Plan No. 693C itself. It is already referred to the fact that *Goonesekera* had subdivided Lot No. A of Plan No. 4559, into seven lots by Plan No. 693C and granted the servitude of right of way over Lot No. 7 to the said subdivided parcels of land. In that Plan No. 693C, Lot No. 7 is depicted as a roadway running across a larger land from its Eastern boundary to the Western boundary, and thereby bisecting the same, and thereby forming the two parts of the land located on the Northern side of Lot No. 7 and also on its Southern side. The land area shown in the said plan to the South of the Lot No. 7 is also referred to as "*Part of the same land*" by the surveyor, meaning that part too was owned by *Goonesekera.*

Immediate predecessor in title to that of the Plaintiff is *Stanley Devraj Moses,* who purchased his rights over Lot No. 2A of Plan No. 2451, from *Waltson Mackslin Jansen,* upon execution of the Deed of Transfer No. 555. In

the recital of the said deed, the vendor *Jansen* states that "… *under and by virtue of Deed No. 393 dated 26th September 1969, attested by the Notary attesting these presents is the owner and proprietor and is seized and possessed of or sufficiently entitled to all that allotment of land marked Lot 2 depicted in Plan No. 880 dated 24th March 1969 made by C.C. Wickremasinghe, Licensed Surveyor fully and particularly described in the First Schedule hereto together with the right of way and user over the reservation for roads in the Second Schedule hereto fully described"*(emphasis added).

The Second Schedule contained in the said deed refers to "*[A]ll that divided allotment of land marked Lot A2 reservation for a road 20 feet wide in Plan No. 518 dated 18th February 1967 made by C.C. Wickremasinghe, Licensed Surveyor …".*

Plan No. 518 refers to two lands that sits either side (Northern and Southern) of a roadway depicted therein as Lot No. A2, as already noted in the preceding paragraphs. The land located to its north is described as "*Part of the same land (Remaining Part of Lot A)*", whereas the land located to the South of that lot, is also described as "*Part of the same land (Remaining Part of Lot A)*". In the same plan, a reference is made to a Plan No. 4559, as it states " … *being a divided portion of Lot A in Plan No. 4559 dated 5th October 1934 made by M.G. de Silva, Licensed Surveyor …".* Therefore, it is clear that Lot No. A referred to in Plan No. 518 is taken from the description given to that lot by Plan No. 4559.

The Plan No. 4559 also features in the Deed of Transfer No. 1391, by which the 1st Defendant had derived title from. In the recital of the said deed, its vendor states that " … *all those contiguous allotments of land forming*

one field marked "A" in Plan No. 4559 …" which was then sub divided into seven lots by Plan No. 693C.

The Deed No. 1391(P10) was executed on 07.02.1969 and the Deed No. 393 was executed on 26.09.1969, just over seven months apart, in respect of Lot No. A of Plan No. 4559. This is a fact that strongly suggests that the execution of both these deeds are the acts of the owner of the land, *Henry Edward Clive Goonesekera,* who had the soil rights over that land, and therefore possessed the power to confer a right of way to the several vendees, who bought different allotments from the Northern part of Lot A of Plan 4559 as well as to those who did from the Southern part of the said lot, carved out of the said larger land, which was bisected by the roadway reservation A2 in Plan No. 518.

Predecessor in title to the Plaintiff, *Stanley Devraj Moses,* who purchased his rights over Lot No. 2A of Plan No. 2451, from *Waltson Mackslin Jansen,* received whatever rights his vendor has parted with in relation to the roadway. When *Waltson Mackslin Jansen,* acquired title to Lot 2 of Plan No. 880, and his vendor in describing his title derived from the vendor to Deed No. 393 dated 26.09.1969, that deed would have, in all probability, executed by the original owner of the larger land, *Henry Edward Clive Goonesekera.*

Thus, it is clear from the documentary evidence presented before the trial Court, in the form of title deeds and survey plans, makes the Plaintiff entitled to the use of the roadway now referred to as *Jayaweera Mawatha* up to its terminal point, being the Western most boundary of said Lot No. A2, and is depicted in Plan Nos. 518, 693C and C/343 (the commission plan) as a "*Canal*". This is due to the fact that the Plaintiff's right of way over

Jayaweera Mawatha could be traced back to *Henry Edward Clive Goonesekera,* who had soil rights to the land in its entirety before he parted with it after subdividing it while reserving the right of way of those subdivided plots of land.

Professor G.L. *Peiris*, in his book ***The Law of Property*** (Vol. 3, at p. 60), quotes *Voet* (8.4.16) where it is stated "*[M]any different servitudes can be granted in or over the same place, provided in each case the prior holders of servitudes are not prejudiced by any subsequent grant.*" In view of this principle, the right of way over Lot No. 7 of Plan No. 693C also described as Lot A2 of Plan No. 518, could be granted and enjoyed by the 1st Defendant as well as the Plaintiff along with others who are similarly circumstanced.

Since these factors do have a bearing over the determination of the rights the Plaintiff had over the disputed part of *Jayaweera Mawatha* they indeed qualify to be considered as relevant facts, in terms of Sections 6 and 7 of the Evidence Ordinance and the contention that the Courts below had considered irrelevant material could not be accepted as a valid one. The said question of law is therefore ought to be answered in the negative.

The Defendants also brought up the issue of abandonment of a servitude and harped on the admission made by the Plaintiff that when he bought Lot No. 2A of Plan No. 2451 on 18.11.1996, the 1st Defendant had already erected the concrete structure across the disputed roadway, separating Lot No. A of Plan No. C/343 from the **rest** of the roadway (*Jayaweera Mawatha*). It was also highlighted by the 2nd Defendant that when the Court commissioner surveyed the land, he reported back of a king-coconut tree of about 7 years and a coconut tree of about 5 years were

there planted on the roadway depicted as Lot No. A of Commission Plan No. C/343. Strangely, the 1st Defendant did not claim credit for **planting** these trees. Nonetheless, they contend that *Stanley Devraj Moses,* who owned the servitude of right of way over it, had abandoned that right, when he failed to object to the act of planting of these two trees on the roadway. The Defendants relied on the *dicta* of the judgment of *De Sampayo* J, in ***Nagamani v Vinayagamoorthi*** (1923) 24 NLR 438, where his Lordship, followed the *dicta* of the judgment of ***Fernando v Mendis*** (1911) 14 NLR 101, that "*… under the Roman Dutch law a servitude may be lost by abandonment, whether by express abandonment or implied abandonment.*"

In view of this contention, it is helpful if an attempt is made to understand the grievance of the Plaintiff he wishes to remedy through this action.

The Plaintiff in his evidence stated that when he acquired ownership to Lot No. 2A of Plan No. 2451 from *Stanley Devraj Moses,* it was a bare land of 9.8 perches. The land had two access roads. Lot No. A of Plan No. C/343 also referred to as Lot A2 of Plan No. 518, which now known as *Jayaweera Mawatha* is one, and the lane off *Jayaweera Mawatha,* depicted as Lot No. 10 of Plan No. 2451, is the other. He then constructed a house facing his Eastern boundary, as shown in Plan No. 2451. In answer to Court, the Plaintiff stated that what he wants is to have access to his land along his Northern boundary all the way up to the "*Canal*", which is being prevented by the concrete construction, erected across the roadway by the 1st Defendant, and shown in Plan No. C/343 as "X" and "Y". The reason for him to demand his right was to have access to the rear of his house.

It could be seen that *Stanley Devraj Moses* held the ownership of the land depicted as Lot No2A of Plan No. 2451 for over a period of 22 years, since 1974. The Plaintiff became its owner on 18.11.1996. The Court Commissioner conducted his survey on 05.04.2001. When considered in this light, the coconut tree that stood on Lot No. A of Plan No. C./343 could not have been planted during *Moses's* time. Even the planting of king-coconut tree just few months before the sale of the land, cannot add much weight to the 1st Defendant's claim.

The erection of a concrete structure is the remaining factor that was relied on by the Defendants to impress upon this Court that the servitude of right of way over Lot No. A of Plan No. C./343 was effectively abandoned.

The Plaintiff, tendered a certified copy of a statement made by his mother to *Welikada* Police on 16.02.1999 in support of his case. This was made after a period of over two years since the Plaintiff purchased that property, and in response to a complaint made against them by the 1st Defendant. In that statement, Plaintiff's mother states that they are in the process of constructing a house on her son's property and when they attempted to bring in building materials to the land through the Northern boundary of that land, the 1st Defendant objected. She further stated that in order to protect building materials, they have constructed a temporary fence using corrugated metal sheets along the Northern boundary. She also mentioned laying three concrete cylinders to gain access to the land over the ditch on their Northern boundary, a fact confirmed by the learned Magistrate who made an inspection.

Despite the objections by the 1st Defendant, they were using the entrance kept open in the said boundary to bring in building materials. On that morning (referring to the date of the statement), she has alleged that when a lorry came to unload some building material, the 1st Defendant offered resistance and when she opened the entrance by removing gate with corrugated sheets, noticed that a concrete construction, which was not there before, was erected across the roadway.

None of the Defendants have offered to explain this statement by presenting their version of events, either in conformation or contradicting. Thus, the contents of the said item of evidence, remained before Court without any form of challenge.

This dispute between the Plaintiff's mother and the 1st Defendant had reached the Chief Magistrate's Court, when the Police reported facts under Section 66(1) of the Primary Courts Procedure Act No. 44 of 1979. On 30.09.1999, learned Magistrate, having visited the disputed portion of the roadway observed that the boundary that separates the Plaintiff's land with that part of the roadway was covered with corrugated sheets, and despite the fact that there was evidence to show that the Plaintiff's mother had constructed an entrance from that portion of roadway to the land using concrete cylinders over the ditch that separates her Northern boundary from the roadway, he could not notice that she had used that entrance to have access to the land in the "recent past" and therefor concluded that she was not in 'possession' of the disputed roadway.

The 1st Defendant, during his evidence did not claim that he constructed any concrete structure across the roadway. But the evidence is clear that there were consistent unfriendly interactions between the parties

over the use of the disputed roadway, depicted as Lot No. A of Plan No. C/343. Clearly, there was no abandonment either express or tacit in nature of the servitude of right of way neither by *Stanley Devraj Moses* nor by the Plaintiff.

On the contrary, the Plan Nos. 425 (V2) and 866 (V3), prepared for the purpose of subdividing the land held by the 1st Defendant and submitted for approval of the local authority for its approval, did not include the section of the roadway depicted as Lot No. A of Plan No. C/343 and is limited to depicting only the Southern boundary of his land. The Plaintiff accused the 1st Defendant of annexing Lot No. A of Plan No. C/343 to his land. If there was an abandonment, then it was the 1st Defendant who tacitly abandoned his rights over the said Lot No. A of Plan No. C/343, when he decided to leave out that portion of the roadway from those two plans, which he is entitled to use, to access his land.

One of the complaints made by the learned Counsel for the 2nd Defendant over the issue of abandonment is that the High Court of Civil Appeal erroneously followed the *dicta* of the judgment in ***Paramount Investments Ltd., v Cader*** (1986) 2 Sri L.R. 309. In view of the 2nd Defendant's understanding of the said judgment, it was submitted on behalf her that the *dicta* relied on by the appellate Court " … *is inapplicable to the present case simply because the Respondent [the Plaintiff] has failed to prove his entitlement to the roadway, which he asserts before Court to have been granted by deed*".

The High Court of Civil Appeal in its judgment referred to the head note of judgment of this Court in ***Paramount Investments Ltd., v Cader*** (*ibid*) where it is stated that *"[A] servitude of right of way can be lost by*

abandonment express or tacit. A servitude is lost by express abandonment when the dominant owner clearly and intentionally abandons it. Tacit abandonment takes place where the servient owner is permitted to do something which necessarily obstructs the exercise of the servitude and makes the servitude inoperative. Where, as in the instant case, express abandonment based on, non-user owing to a wall built by the dominant owner's predecessor-in-title is what is relied on, the position is that under our law a servitude of right of way created by notarial grant cannot be lost by mere non-user.

Seneviratne J, in delivering the said judgment stated (at p. 323) that *" [I] hold that under our Law a person does not lose the right to any ownership of immovable property e.g., a land, a servitude by mere non-possession (non-user)."*

In view of the overwhelming evidence, that has been referred to and considered in detail in the preceding paragraphs, the contention that the Plaintiff failed to establish his right of way over the disputed portion of the roadway must be rejected in its totality. The contention based on the abandonment of a servitude of right of way appears to be a half-hearted attempt by the 2nd Defendant to offer a justification for the construction of a concrete structure attributed to the 1st Defendant, across a roadway which meant to provide means of access to the multiple tenements, and also to cover up their own lapse, in failing to raise an issue on that point before the trial Court.

The other question of law that remains to be considered by this Court is set out as follows;

> *"[H]ave their Lordships of the Civil Appellate Court erred in holding that due to the fact that 1st Defendant did not have soil rights to the disputed*

roadway he could not have objected to the use of the disputed roadway by the Plaintiff ?"

Perusal of the judgment of the High Court of Civil Appeal reveals that the said Court arrived at the conclusion, now being impugned by the Defendants, upon following the judgment of ***Fernando v Wickremasinghe*** (1998) 3 Sri L.R. 37, pronounced by *Weerasuriya* J, who in turn relied on the judgment of ***Saparamadu v Melder*** (although decided in 1996 but reported in (2004) 3 Sri L.R. 148) in arriving at that conclusion. This principle was considered by this Court once more in ***Malkanthi Silva v Perera and Others*** (SC Appeal No. 181/2010 – decided on 23.07.2024).

This is an instance where, the appellant before that Court only had a right of way over the disputed roadway (Lot No. 30). He did not own soil rights over the said Lot No. 30. *M.N.B. Fernando J* (as she then was) accepted the contention of the respondent, that the appellant before her Ladyship, in the absence of any soil rights over Lot No. 30, "… *cannot object to the Respondent using the said road-way or prevent or obstruct the Respondent from using the right of way over lot 30, the road-way leading to the Respondent's land"*.

In arriving at the said conclusion, her Ladyship considered the judgments of ***Fernando v Wickramasinghe*** *(supra),* ***Saparamadu v Violet Catherine Melder*** (*supra*) and ***Gunadasa v Subasinghe*** (CA 92/95 – decided on 27.03.1995), and quoted the view held by *Weerasuriya*, J., in ***Fernando v Wickramasinghe*** (*supra*) that "*a person who had no soil rights in respect of a road reservation could not maintain an action for a declaration that defendant was not entitled to a servitude of right of way over such road reservation*", with approval.

I find no reason to depart from the said view taken by this Court after much deliberation and therefore proceed to answer the relevant question of law in the negative.

In view of the reasoning contained in the preceding paragraphs of this judgment and the answers provided to the questions of law, the judgment of the High Court of Civil Appeal is hereby affirmed and the District Court is directed to enter the decree in the lines of the said judgment pronounced by the appellate Court.

The appeal of the Defendants is accordingly dismissed and the Plaintiff is entitled to the costs of this appeal.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC,C J.

I agree.

CHIEF JUSTICE

E.A.G.R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT