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

In the matter of an application for leave to appeal under section 5 C of the High Court of the Provinces (Special Provisions) Act No.54 of 2006.

Illandari Devage Jayathilake,
Ginihigama South,
Pepiliyawala.

Plaintiff

SC/APPEAL 131/2011
SC/HC/CA/LA/438/2010
WP/HCCA/AV/858/2008(F)
District Court of Pugoda
Case No.331/L

Vs.

1. Illandari Devage Karunawathie,
2. Batepolage Dayaratne,

Both of
No.205/2,
Ginihigama South,
Pepiliyawala

Defendants

AND BETWEEN

Illandari Devage Jayathilake,
Ginihigama South,
Pepiliyawala.

Plaintiff-Appellant

1. Illandari Devage Karunawathie,
2. Batepolage Dayaratne,

Both of
No.205/2,
Ginihigama South,
Pepiliyawala

Defendants-Respondents

AND NOW BETWEEN

Illandari Devage Jayathilake,
Ginihigama South,
Pepiliyawala.

Plaintiff-Appellant-Petitioner

1. Illandari Devage Karunawathie,
2. Batepolage Dayaratne,

Both of
No.205/2,
Ginihigama South,
Pepiliyawala

Defendants-Respondents-Respondents

Before : **Vijith K. Malalgoda, PC. J**
Mahinda Samayawardhena, J
K. Priyantha Fernando, J

Counsel : Manohara de Silva, PC with
Ms. Sasiri Chandrasiri for the
Plaintiff-Appellant-Petitioner.

Niranjan de Silva with Sanjay Thambiah for the Defendants-Respondents-Respondents.

Argued On : 19.06.2023

Written Submissions Tendered On : 16.12.2011 on behalf of the Petitioner.
03.02.2012 on behalf of the Respondents.
02.08.2023 on behalf of the Respondents.

Decided On : 10.10.2023

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Appellant-Petitioner (hereinafter referred to as the appellant) in this case, preferred an appeal from the judgment of the learned High Court Judge of *Avissawella* dated 18.11.2010 which was given in favour of the Defendants-Respondents-Respondents (hereinafter referred to as the respondents). The appellant alleges that, he is the owner of the land to which the dispute relates to, and that the respondents should not be given a right of way by way of a servitude over the appellant's land.

2. This Court granted leave to appeal on the questions of law stated in (b),(d),(f) and (g) in averment No.11 of the petition dated 28.12.2009.

The facts in brief.

3. The appellant became the owner of the land described in the schedule to the plaint by deed No. 17714 dated 08.11.1987 attested by *P.M. Srimathie Suriapperuma*, Notary Public. The appellant has bought the said land from one *Thilakarathne* in 1987. As per the appellant, the appellant and his predecessors in title has had over 10 years of uninterrupted and undisturbed possession of the said land, and has also had prescriptive title to the same and further, there has been no servitudes over the said land. According to the Survey Plan No. 28/L, in District Court Case No. 33004/L drawn by surveyor *Mayadunne*, the land to which the dispute relates to is seven perches in extent.

4. The land which belongs to the appellant is situated facing the *Pepiliyawala-Dangalla* Road. The land belonging to the respondents in this case has been situated behind the land of the appellant, adjacent to the appellants' land towards the north-west. The respondents' land is far larger in extent than that of the appellant.

5. In March 1989, the appellant has started constructing a boutique in his land. Following this, a dispute has arisen between the appellant and the respondents. The respondents have lodged a complaint at the *Pugoda* police station on 10.06.1989, alleging that the said boutique blocks the footpath over the appellant's land that leads the respondents to the Pepiliyawala-Dangalla road. The footpath has been claimed from the right side of the building which rests on the appellant's land.

6. Consequent to this complaint, the case bearing No. 445/L has been instituted in the Magistrate's Court of *Pugoda,* under section 66 of the Primary Courts Procedure Act, and after inquiry, the respondents were permitted to use a 3 feet wide footpath over the southern end of the appellant's land.

7. Thereafter, the appellant has instituted action No. 33004/L in the District Court of *Gampaha* stating that the respondents were not entitled to a footpath over his land. However, as the appellant has not referred this dispute to the Mediation Board in the first instance, the appellant has withdrawn the action No. 33004/L, reserving the right to file a fresh action. After referring the case to the Mediation Board, a certificate of non-settlement was obtained.

8. Thereafter, the appellant has instituted action in the District Court of *Pugoda* bearing Case No. 331/L [the appeal brief is marked as 'X'] seeking a declaration that he is the owner of the land described in the schedule to the plaint, a declaration that the defendants have no right to use a foot path by way of a servitude over the plaintiff's (appellant)

land, a permanent injunction preventing the defendants from using a roadway over the said land, compensation and costs.

9. The appellant claimed that the disputed footpath was a new roadway which was demarcated on his land on 25.01.1990 by the Primary Court, and the respondents have no right of way over his land.

10. The respondents in their answer ['A-2' of 'X'] took up the position that, the respondents and their predecessors in title have been using the roadway over the appellant's land for about 18 years, that they have obtained prescriptive title over it, and that the roadway after being blocked by the appellant was reopened consequent to filing of the Case No. 445/L in the Magistrate's Court of *Pugoda*. It was also averred that the said roadway was the only way to reach the *Dangalla-Pepiliyawala* road and was the shortest way to reach the said road. Further, the respondents claimed that they have a right to claim a 10 feet wide roadway by way of necessity and prescription.

11. *Mayadunne*, Licensed Surveyor has prepared the Survey Plan No. 28/L dated 08.04.1991, on a commission taken by the appellant and this has been marked and produced in the District Court as ['P-2']. *K. G. Hubert Perera,* Licensed Surveyor has prepared the Survey Plan No. 4905/L on a commission taken by the respondents and this has been marked and produced in the District Court as ['V-1'].

12. The learned District Judge, by judgment dated 07.10.2002 ['A-4' of 'X'] dismissed the appellant's action and also dismissed the respondents' claim to a right of way by necessity. The learned Judge of the District Court held in favour of the respondents stating that, the respondents are entitled to a use of a 3 feet wide foot path by prescription.

13. Being aggrieved by the judgment of the learned District Judge, the appellant appealed to the Court of Appeal. Consequently, the case was transferred to the Provincial High Court of *Gampaha* and subsequently, to the Civil Appellate High Court of *Avissawella* bearing Case No. WP/HCCA/AV/858/2008(F).

14. The appellant in his submissions has taken up the position that the learned District Judge has failed to evaluate the evidence led at the trial, in granting a 3 feet wide roadway despite there being no prescriptive acquisition proved by the respondents. By judgment dated 18.11.2010 ['Z'] the learned High Court Judge dismissed the appellant's appeal and held for the respondents.

15. Being aggrieved by the decision of the learned Judges of the Civil Appellate High Court, the appellant preferred the instant appeal to this Court. Although eight questions of law were averred in the petition of appeal, the Court granted leave on the following questions of law,

    (b) The learned Judges of the High Court failed to duly consider the evidence led by the plaintiff (appellant).

    (d) The learned Judges of the High Court erred in holding that the defendants have acquired prescriptive title to the footpath.

    (f) The High Court failed to consider the evidence of *Thilakaratne* who is the plaintiff's (appellant) predecessor in title who stated that there was no foot path at the time he sold the land in suit for the plaintiff (appellant) in 1987.

    (g) The High Court failed to consider that the defendants have failed to prove physical use of the footpath for over 10 years.

Written submissions for the appellant

16. It was the position of the learned President's Counsel for the appellant that, the learned Judges of the High Court erred in holding that the defendants (respondents) have acquired prescriptive title to the footpath.

17. The learned President's Counsel for the appellant submitted that, the learned Judges of the High Court, by relying on the case of ***Mercin v. Edwin and Others [1984] 1 Sri.L.R. 224,*** which in turn relied on the South African case of ***Head v. Toit S.A.L.R [1932] C.P.D. 287*** and stating that, the mere enjoyment of the right of way for the prescriptive period is proof of adverse user in relation to a claim for a servitude based on prescription, and holding that the respondents have acquired prescriptive title to the footpath in question, has decided this case based on principles of Roman Dutch Law, ignoring the decisions of this Court and the Prescription Ordinance. It is his position that, as the Roman Dutch Law is no longer the law governing prescription in Sri Lanka, the learned Judges of the High Court have erred in their decision.

18. The learned President's Counsel further submitted that, the High Court, in arriving at the finding that the respondents have used the footpath in question for over 10 years, has placed heavy reliance on the Survey Plan No. 4905/L drawn by *Hubert Perera* ['V-1' at page 216 of 'X'] and the observations made by the learned Magistrate of *Pugoda* in Case No. 445/L. It is the position of the learned President's Counsel for the appellant that the said plan demarcating a footpath over the appellant's land, was drawn in the year 1992, which was after the order of the learned Magistrate of *Pugoda* dated 25.01.1990. It is his position that the footpath which was demarcated in the said plan came into existence after the order of the learned Magistrate of *Pugoda*. Therefore, it has been submitted that the High Court misdirected itself by relying on the Survey Plan drawn by

Hubert Perera, and failed to consider the evidence led by the appellant to show that footpath did not exist prior to the order of the learned Magistrate of *Pugoda*.

19. It was further submitted that, unlike the duty of a Magistrate under section 66 of the Primary Courts Procedure Act, the duty of a District Judge in a civil case is to determine the rights of the parties by examining whether there has been undisturbed and uninterrupted use of the footpath for over 10 years, and whether such use has been adverse to the rights of the owner of the land. It was the submission of the learned President's Counsel that, the learned Judges of the High Court have misdirected themselves in relying on the observation of the learned Magistrate in determining the rights of the parties.

20. The learned President's Counsel further submitted that, the respondents have failed to prove undisturbed, uninterrupted, and adverse physical use of the footpath for over 10 years. The learned Judges of the High Court in reaching their decision, in addition to the plan drawn by *Hubert Perera* and the order of the learned Magistrate, also relied on the evidence of *Sarath Wijesinghe* and *G. Piyasiri*. It was the submission of the learned President's Counsel that the testimony of the witnesses aforementioned were not specific, and that their testimony was limited to the fact that they themselves used the footpath across the appellant's land to reach the respondents' house, there is nothing to suggest that the respondents used the footpath to gain access to the respondents' land.

21. It was further submitted that, although both the witnesses said that they have been residents of the area since their childhood and know the area well, they both took up the position that they were unaware of another road to gain access to the respondents' land. However, the Survey Plan drawn by *Mayadunne* in 1991 ['P-2'] clearly shows two other access roads to the respondents' land [marked 'B' and 'C' in 'P-2']. Therefore, it was the submission of the learned

President's Counsel that, the evidence of the two witnesses, *Sarath Wijesinghe* and *G. Piyasiri* cannot be relied upon to establish that the respondents have physical user of the footpath for the prescriptive period.

22. It was also submitted that, there existed no clear and well-defined track as required by law. The purported right of way runs over the apron of a public well which has been in existence since 1942. Further, a telephone post has also been erected in the middle of the said footpath.

23. It was further submitted by the learned President's Counsel for the appellant that, the burden of proof of prescriptive title is on the party invoking the same, and that the respondents of this case failed to discharge the burden of proof that the use of the said footpath was for 10 years, undisturbed, uninterrupted and was adverse to the title of the appellant.

24. It was also submitted by the learned President's Counsel that, the High Court failed to duly consider the evidence led by the appellant, when the appellant led evidence of his predecessor in title *Thilakaratne* [pages 83 to 97 of 'X'] to the effect that the appellant and his predecessors in title has had over 10 years of uninterrupted and undisturbed possession of the land, and also have prescriptive title to the same and that there had been no servitudes over the said land. Further, at the time the said *Thilakaratne* sold the land to the appellant in 1987, there had been no right of way over the said land. The learned President's Counsel further submitted that, as there were two alternate roads to the respondents' land as depicted in plan ['P-2'] drawn by Surveyor *Mayadunne*, the respondents should not be entitled to the footpath in question.

<u>Written submissions for the respondents</u>

25. The learned Counsel for the respondents contended that, the learned Judges of the High Court have accurately considered the requirements to acquire a servitude of right of way, and

that the learned Judges of the High Court have not erred in law in considering *Mercin(supra),* as the said case was decided well after the enactment of the Prescription Ordinance. Further, that their Lordships of the High Court have taken into consideration and satisfied the requirements of the Prescription Ordinance as there was no leave or license in using the said footpath, the use was adverse. The learned Counsel further submitted that, principles of Roman Dutch law can be harmoniously used with the Prescription Ordinance and relied on the case of ***M.S. Perera v. M.N. Gunasiri Perera [S.C. Appeal No. 59/2012]*** **decided on 18/01/2018**.

26. It was submitted by the learned Counsel for the respondents that, the learned Judges of the High Court were correct in concluding that the footpath in dispute was not a new footpath which came into existence after the order of the learned Magistrate. The witness *Ruparatne Weerakkody* (who was the *Grama Seva Niladhari* of the area) called by the appellant stated in his cross examination that, there was no dispute as to the footpath in his period of service, which was from 1978 – 1985. Therefore, as there was also no argument by the appellant for disapproving the above contention, this negates the appellant's assertion as to the said footpath being a new footpath. It was further submitted that, the survey plan drawn by surveyor *Hubert Perera* cannot be dismissed on the basis that it was drawn after the observation of the learned Magistrate. The said plan was drawn in order to have it recorded in evidence, the said footpath did exist over a period of time and after the observation of the learned Magistrate of *Pugoda*, the respondents thought it wise to have the said right of way drawn by a surveyor to avoid any disputes in the future.

27. It was further submitted by the learned Counsel for the respondents that, the learned Judges of the High Court were correct in finding that the respondents have proved undisturbed, uninterrupted, and adverse physical use of the footpath for over ten years. When considering the evidence

of the witnesses that were called by both the appellant and the respondents, it is clear that the respondents have established by cogent evidence, the physical user of the footpath for over the full prescriptive period. *Ruparatne Weerakkody* in his evidence said that, there was no dispute relating to the said footpath during his period of service in the years 1978-1985 and the witness *Nimal Wijesiri* in his evidence revealed that, there was an amicable partition of the land adjoining the respondent's land in 1986 and thereafter the co-owners of the said land granted a roadway to the respondents. Further, witness *Sarath Wijesinghe* who was called by the respondents stated that he used the said footpath in 1989-1990 to gain access to the respondents' land. This position was confirmed by witness *G. Piyasiri*.

28. It was further submitted by the learned Counsel for the respondents that, the respondents have adduced cogent evidence through the evidence of the witnesses which makes reference to dates and facts which are undeniably relevant material to the said right of way, and discharged the burden of proof required by law.

29. It was the submission of the learned Counsel for the respondents that, the evidence of the witness *Thilakaratne* (the previous owner of the land belonging to the appellant) should be given minimal value. The learned Counsel made reference to the Indian Evidence Act, where *Stephen* classified the grounds for believing or disbelieving particular statements made by particular persons in particular circumstances. Referring to the *'Law of Evidence'* by *E.R.S.R. Coomaraswamy Volume II, Book 2, Page 1049* the learned Counsel submitted that, one must consider certain attributes which affects the power of the witness to speak the truth, those which affect his will to speak the truth, and those which depend on the probability or improbability of the statement.

30. I will first resort to answer the question of law (d) and consider whether the learned Judges of the High Court erred

in holding that the defendants(respondents) have acquired prescriptive title to the footpath.

31. At the hearing of this appeal, the main point in contention was that of prescription. The appellant urged that, after the enactment of the Prescription Ordinance in Sri Lanka, the Roman Dutch Law was no longer in force. However, the respondents took the position that principles of Roman Dutch law can be harmoniously used with the Prescription Ordinance.

32. I will now consider the applicability of Roman Dutch Law on prescription after the enactment of the Prescription Ordinance in Sri Lanka.

33. The appellant in his evidence has strenuously asserted that no footpath existed in his land which provided the respondents access to the *Pepiliyawala-Dangalla* road. The witness *Thilakaratne* who was the predecessor in title to the appellant's land in his evidence also takes a similar position. However, when considering the evidence of the witnesses *Ruparatne Weerakkody* (the *Grama Seva Niladhari* of the area), *Nimal Wijesinghe*, *Sarath Wijesinghe* and *G. Piyasiri* it is clear that a footpath has been in existence and it has in fact been used. Be that as it may, the mere physical user of the footpath is not sufficient to discharge the burden of proof and establish a claim for a servitude based on prescription. There exist certain other requirements that needs to be satisfied.

34. The respondents in their written submissions stated that, principles of Roman Dutch Law can be harmoniously used with the Prescription Ordinance and relied on the case of *M.S. Perera(supra)* where it was stated that,

> *"It seems to me that, the aforesaid requirements of use nec vi, nec clam and nec precario of the Roman Dutch Law, when taken in their totality, can be related to the requirements under section 3 of the Prescription Ordinance…"*

35. In the case of *M.S. Perera(supra)* the requirements of use *nec vi, nec clam* and *nec precario* were defined.

> *"… .The occupation or use must be peaceable (nec vi), for if it be in the face of opposition and the opposition be on good grounds the party endeavouring the establish prescription will be in the same position at the end as he was at the beginning of his enjoyment (Gale, pp. 204 and 205). It must be openly exercised (nec clam) and during the entire period of 30 years the person asserting the right must have suffered no interference at the hands of the true owner, nor must he by any act have acknowledged anyone as the owner (Paarl Municipality v. Colonial Govt., 23 S.C., pp.527 and 528). Finally, the occupation or use must take place without the consent of the true owner (nec precario); it must not be by leave and license or on sufferance and thus liable to cancellation at any time (Uitenhage Divisional Council v. Bowen 1907 E.D.C.,p.80; S.A.Hotels v. Cape Town City Council, 1932 C.P.D., p.236). It must be adverse, i.e., the exercise of a right contrary to the owner's rights of ownership."*

36. Further, in *M.S. Perera(supra)* it was stated that,

> *"Thus, if the plaintiff in the present case was to prove that he was entitled to a right of way by prescription over the defendant's land, he had to establish that, the plaintiff had possessed and used a right of way over the specific and defined area of land described in the Second Schedule to the plaint, for a minimum period of ten years,* ***in the manner stipulated in section 3 of the Prescription Ordinance****."*
>
> [Emphasis Mine]

37. His Lordship *Prasanna Jayawardene, J.* in *M.S. Perera(supra)* has clearly said that,

> *"…a plaintiff who claims a right of way by prescription must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in*

section 3, the plaintiff had to prove that: he has had undisturbed and uninterrupted possession and use of the right of way for a minimum of ten years and that such possession and user of the right of way has been adverse to or independent of the owner of the land and without acknowledging any right of the owner of the land over the use of that right of way."

38. Therefore, it is clear that, even in the above case, even though it is primarily acknowledged that the principles of Roman Dutch Law can be related to the requirements under section 3 of the Prescription Ordinance, when considering the above position, it is clear that finally the Prescription Ordinance is what needs to be applied when considering the law relating to Prescription in Sri Lanka. It has been decided since as far back as in 1918 by *Bertram CJ* in ***Tillekeratne et al. v. Bastian et al. [1918] 21 N.L.R. 12*** that our Prescription Ordinance is a complete code. This position is furthered by His Lordship *Prasanna Jayawardene, J.* in *M.S. Perera(supra).*

39. *Bertram CJ* in case of *Tillekeratne(supra)* said that,

"These are the principles of the Roman and Roman-Dutch law. They are, however, only of historical interest, as it is recognized that our Prescription Ordinance constitutes a complete code; and though no doubt we have to consider any statutory enactments in the light of the principles of the common law, it will be seen that the terms of our own Ordinance are so positive that the principles of the common law do not require to be taken into account. Let us, therefore, consider the terms of our own Ordinance."

40. In case of ***Perera V Ranatunge [1964] 66 NLR 337*** *Basnayake C.J.* said that,

"It is common ground that the Roman Dutch Law of acquisitive prescription ceased to be in force after Regulation

13 of 1882 and that the rights of the parties fall to be determined in accordance with the provisions of the Prescription Ordinance. It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession, and that the common law of acquisitive prescription is no longer in force except as respects the Crown."

41. Further, in case of ***Therunnanse v. Menike [1895] 1 NLR 200*** it was stated that,

"It has been laid down and constantly acted upon by this Court that the governing Ordinance No. 22 of 1871, and the previous Ordinance No. 8 of 1834, kept alive the repeal by regulation No. 13 of 1822 of " all laws heretofore enacted or customs existing" with respect to the acquiring of rights and the barring of civil "actions by prescription," and that the consequence of that regulation and those Ordinances was to sweep away all the Roman-Dutch Law relating to the acquisition of title in immovable property (including positive and negative servitudes) by prescription, except as regards the property of the Crown. Hence the only law relating to the acquisition of private immovable property by prescription is to be found in the 3rd section of the Ordinance No. 22 of 1871…"

42. The Prescription Ordinance No. 22 of 1871 as amended by Ordinance No. 2 of 1889 (Prescription Ordinance) provides that,

Section 2

"In this Ordinance, unless the context otherwise requires - "immovable property" shall be taken to include all shares and interests in such property, and all rights, easements, and servitudes thereunto belonging or appertaining."

Section 3

"Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs …"

43. The above provisions clearly set out that after the implementation of the Prescription Ordinance, any person asserting a servitude as to right of way must essentially prove the requirements of undisturbed and uninterrupted physical use of the right of way, for a minimum period of ten years and must also show such use of the right of way was adverse.

44. When considering the evidence before court, as explained in paragraph No. 33 of this judgment, it is clear that the respondents have established physical use of the footpath in question. However, although physical use is established, there is no evidence to show that the use of the right of way was adverse to the rights of the appellant.

45. The learned President's Counsel for the appellant took the position that, the learned Judges of the High Court have erred in holding that the mere enjoyment of the right of way for the period of prescription is proof of adverse user with regard to a servitude based on prescription. It was asserted that, the learned Judges of the High Court in relying on the case of ***Mercin v. Edwin and Others [1984] 1 Sri.L.R. 224*** which in turn relied on the South African case of ***Head v. Toit S.A.L.R 1932 C.P.D. 287*** have decided the instant case based on principles of Roman Dutch Law. However, it was the position of the learned Counsel for the respondents that, the learned Judges of the High Court have not erred in law in considering *Mercin(supra)* as it was decided after the enactment of the Prescription Ordinance.

46. *Athukorale J in case of Mercin(supra) referring to what was said in* ***Head v. Toit S.A.L.R 1932 C.P.D. 287*** *said,*

> *"… .In Head V Toit (1) it was urged that the plaintiff in a claim for a servitude based on prescription must prove not only user for the prescriptive period but must also establish that the user was adverse for which purpose the plaintiff must show positively that the user was not with the permission of the owner of the servient tenement. This contention was rejected by Sutton, J. who adopted the following statement of the law laid down by Maasdorp in Institutes of Cape Law (Vol. 1, p. 226). …*
>
> > *"in the case of an affirmative servitude… the mere enjoyment of the right in question is in itself an adverse act."*
>
> *I hold that on the facts in the instant case the plaintiff has proved adverse user of the right of way claimed by him for over the prescriptive period."*

47. The entirety of the above statement adopted by *Sutton J.* in the case of ***Head v. Toit S.A.L.R 1932 C.P.D. 287*** has been laid down in *Maasdorp in Institutes of Cape Law (Vol. 2, p.216).*

> *"**It is above all things necessary that the enjoyment be adverse**. In the case of an affirmative servitude, that is, one by which the owner of a dominant tenement is entitled to do something upon or with respect to the property or real rights of another, **the mere enjoyment of the right in question is in itself an adverse act, that is an act conflicting with the rights of the owner of the servient tenement.** Thus, where a person has used a certain road or a dam constructed upon his neighbor's land or has cut wood upon the same for the period of prescription, or where an upper riparian proprietor has for the same periods used the whole or a fixed quantity of the water of a public stream to the exclusion of a lower proprietor, the enjoyment is patently adverse, and a prescriptive servitude will by these means have been acquired by the person exercising these respective rights. …"*
>
> [Emphasis mine]

48. It seems to me that, the statement that, "*the mere enjoyment of the right in question is in itself an adverse act, that is an act conflicting with the rights of the owner of the servient tenement"* should be understood in its context.

49. The above extract clearly stipulates that, "*It is above all things necessary that the enjoyment be adverse*". Thus, it must nevertheless have the underlying requirement of an adverse act "*that is an act conflicting with the rights of the owner of the servient tenement*". I am unable to see how merely walking on a footpath for the period of prescription in this instance would in any sense be adverse. Thus, considering the facts and circumstances of this case, I am of the view that, mere use in the absence of an adverse act, is insufficient to establish a servitude of right of way by prescription as per section 3 of the Prescription Ordinance.

50. Merely walking on a footpath does not make it an adverse act conflicting with the rights of the owner. If prescription is allowed to be established merely by walking through someone's land, it would pave the way for countless claims to be levelled against owners of land. It would give rise to drastic consequences in village settings where people casually walk through the lands of each other as a practice. If all persons casually exercising physical use of footpaths across neighboring lands were to bring their claims stating that each such footpath constitutes a right of way by prescription simply by physical use, the doctrine of prescription would have far reaching and drastic consequences which were never intended by its proponents.

51. Therefore, as an essential element required under section 3 of the Prescription Ordinance has not been satisfied in the instant case, it is my position that the respondents have not aptly discharged the burden of proof in establishing prescriptive title to the footpath in question. It is also my position that, after the enactment of the Prescription Ordinance in Sri Lanka, the sole governing law with regard to establishing a claim by prescription is the Prescription Ordinance. Any claim under prescription should follow nothing but the Ordinance itself.

52. Thus, in answering the question of law (d), it is my view that the learned Judges of the High Court have erred in holding that the respondents have acquired prescriptive title to the footpath.

53. Finally, I will answer the questions of law (b),(f) and (g). These questions of law will be answered together. When considering the evidence presented in the testimony of witnesses, it is clear that sufficient and cogent evidence has been adduced in the District Court to show that the respondents have in fact used the said footpath for over a period of time. The High Court has duly considered the

evidence of the witnesses and has also proved physical use of the footpath for over 10 years.

54. However, for the reasons that I have stated from paragraph No. 33 to 52 of my judgment, even if the questions of law (b),(f) and (g) are answered in the negative, the appellant will succeed in the appeal.

55. Thus, I set aside the Judgment of the Provincial High Court in Case No. WP/HCCA/AV/858/2008(F) dated 18.11.2010. I also set aside the judgment of the District Court of *Pugoda* in Case No. 331/L dated 07.10.2002. I make no order with regard to costs.

The appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH K. MALALGODA, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MAHINDA SAMAYAWARDHENA

I agree

JUDGE OF THE SUPREME COURT