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

In the matter of an Appeal after obtaining Leave to Appeal.

MADDUMAGE SIRISENA PERERA
No. 168, Bellanwila, Boralesgamuwa.
PLAINTIFF

MADDUMAGE SULOCHANA PRIYANGIKA PERERA
No. 107A, Sarabhoomiya,
Batakeththara, Piliyandala.
Presently at No. 24E, Nawakanda Road,
Jaltara,Ranala.
SUBSTITUTED PLAINTIFF

S.C.Appeal No.59/2012
S.C. HCCA Application No. 97/2011
WP/HCCA/Mt.Lav. Appeal No.40/2007/F
D.C.Mt. Lavinia Case No. 1218/99/L

VS.

1. **MADDUMAGE NIMAL GUNASIRI PERERA**
   No. 99, Bellanwila, Boralesgamuwa.
2. **GODAWELA WAHUMPURAGE LEELAWATHIE ALIAS MANIKE**
3. **RANASINGHE ARACHCHIGE GAMINI**
4. **RANASINGHE ARACHCHIGE GEETHANI**
5. **RATHNAYAKE SHANTHA PATHMASIRI**
6. **RANASINGHE ARACHCHIGE DILANI**
   All of No. 181, Bellanwila (near Junction), Boralesgamuwa.

DEFENDANTS

AND

MADDUMAGE SULOCHANA PRIYANGIKA PERERA
No. 107A, Sarabhoomiya,
Bataketh thara, Piliyandala.
Presently at No. 24E, Nawakanda Road,
Jaltara,Ranala.

SUBSTITUTED PLAINTIFF-APPELLANT

VS.

1. **MADDUMAGE NIMAL GUNASIRI PERERA**
   No. 99, Bellanwila, Boralesgamuwa.
2. **GODAWELA WAHUMPURAGE LEELAWATHIE ALIAS MANIKE**
3. **RANASINGHE ARACHCHIGE GAMINI**
4. **RANASINGHE ARACHCHIGE GEETHANI**
5. **RATHNAYAKE SHANTHA PATHMASIRI**
6. **RANASINGHE ARACHCHIGE DILANI**
   All of No. 181, Bellanwila (near Junction), Boralesgamuwa.

DEFENDANTS -RESPONDENTS

AND NOW BETWEEN

MADDUMAGE SULOCHANA PRIYANGIKA PERERA
No. 107A, Sarabhoomiya,
Bataketh thara, Piliyandala.
Presently at No. 24E, Nawakanda Road,
Jaltara,Ranala.

SUBSTITUTED PLAINTIFF-APPELLANT-PETITIONER/APPELLANT

VS.

1. **MADDUMAGE NIMAL GUNASIRI PERERA**
   No. 99, Bellanwila, Boralesgamuwa.
2. **GODAWELA WAHUMPURAGE LEELAWATHIE ALIAS MANIKE**
3. **RANASINGHE ARACHCHIGE GAMINI**
4. **RANASINGHE ARACHCHIGE GEETHANI**
5. **RATHNAYAKE SHANTHA PATHMASIRI**
6. **RANASINGHE ARACHCHIGE DILANI**
   All of No. 181, Bellanwila (near Junction), Boralesgamuwa.

DEFENDANTS -RESPONDENTS -RESPONDENTS

BEFORE: S.Eva Wanasundera, PC, J.
Anil Gooneratne J.
Prasanna Jayawardena, PC, J.

COUNSEL: Rohan Sahabandu, PC with Hasitha Amarasinghe for the Substituted Plaintiff-Appellant-Petitioner/Appellant.
Parakrama Agalawatte with Aruni De Silva for the 1st Defendant-Respondent-Respondent.

WRITTEN SUBMISSIONS FILED: By the Substituted Plaintiff-Appellant-Petitioner/Appellant on 09th May 2012 and 15th December 2016.
By the 1st Defendant-Respondent-Respondent on 01st June 2012 and 05th December 2016.

ARGUED ON: 24th November 2016.

DELIVERED ON: 18th January 2018.

Prasanna Jayawardena, PC, J.

The Plaintiff-Appellant-Petitioner/Appellant ["the plaintiff"] and the 1st Defendant-Respondent-Respondent ["the 1st defendant"] each own adjoining allotments of land situated in Bellantara, which is within the Dehiwela-Mt. Lavinia Municipal Council limits. The common boundary shared by the plaintiff's land and the 1st defendant's land is about 3.75 metres, which is a little over 12 feet, in length. The 1st defendant's land is to the north of this common boundary and the plaintiff's land is to the south of this common boundary. The plaintiff says he has no access to a public road from his land. One of the other boundaries of the 1st defendant's land is the Dehiwela-Maharagama road, which is on the north of the 1st defendant's land. The plaintiff wants a right of way across the 1st defendant's land, to the Dehiwela-Maharagama road.

The plaintiff filed action in the District Court of Mt. Lavinia claiming a right of way over the 1st defendant's land. The District Court dismissed his case. The plaintiff appealed to the Provincial High Court of Civil Appeal holden in Mt.Lavinia. The appeal was dismissed. The plaintiff then made an application to this Court seeking leave to appeal from the judgment of the High Court. He obtained leave to appeal on the five questions of law which are set out later on in this judgment.

The action was filed on 29th September 1999, in the District Court, against the 1st defendant and the 2nd to 5th Defendants-Respondents-Respondents ["the 2nd to 5th defendants"]. By his plaint, the plaintiff claimed a right of way over the 1st defendant's land, to enable the plaintiff to access the Dehiwela-Maharagama road over the 1st defendant's land. The plaintiff claimed this right of way on a twofold basis - *ie: firstly*, by prescription and, *secondly*, as a right of way of necessity. Neither the plaintiff nor the 1st defendant reside on their allotments of land. The 2nd to 5th defendants are members of a family who occupy the 1st defendant's land. They are, admittedly, encroachers.

The **plaintiff's allotment of land** is described in the First Schedule to the plaint and is shown as Lot 1 in plan no. 50/99 dated 03rd September 1999 prepared by V. Chandradasa, Licensed Surveyor, which was produced at the trial marked **"පැ1"**. This land is A:0 R:2 P:33 in extent. As set out in this plan no. 50/99 marked **"පැ1"**, Lot 1 - *ie:* the plaintiff's land - is a long and narrow rectangular shaped allotment of land called *"Digana Kumbura".* Approximately one quarter of this (about 28 perches) at the northern end is described as *"Garden"* and is high land. The remaining three quarters of the plaintiff's land (approximately 85 perches) is described as an *"Abandoned Paddy Field"*. The southern boundary of the plaintiff's land is a Canal named *"Depa Ela"*. This southern boundary has been earlier described as *"Maha Niyara"*. The northern boundary of the plaintiff's land consists of three separate allotments of land - *ie:* as

mentioned earlier, approximately 3.75 metres of the northern boundary of the plaintiff's land is the 1st defendant's land. The remainder of the northern boundary consists of a land claimed by one T.A.Sunil and part of another land claimed by one Nandawathie Walisundera. The eastern boundary of the plaintiff's land is another part of the land claimed by Nandawathie Walisundera. The western boundary of the plaintiff's land is another part of the land claimed by the 1st defendant. As can be seen from the boundaries described above, the plaintiff's Lot 1 does not have road frontage or direct access to a road.

The **1st defendant's allotment of land** (over which the plaintiff claims a right of way) is described in the First Schedule to the 1st defendant's answer and has been depicted as Lot No.s 1 and 2 in plan no. 302 dated 30th August 2000 prepared by R.Mahendran, Licensed Surveyor, which was produced at the trial marked **"පැ1"**. As depicted in this plan no. 302 marked **"පැ1"**, the 1st defendant's land is a rectangular shaped allotment of land which has a total extent of A:0 R:0 P:12.9. There is a small house, more like a shack, on the 1st defendant's land. The 2nd to 5th defendants live in it. There are many trees on the 1st defendant's land. As mentioned earlier, an approximately 3.75 metre section of the southern boundary of the 1st defendant's land, is the plaintiff's land. The remainder of the southern boundary of the 1st defendant's land is another and separate allotment of land belonging to the 1st defendant which extends also along the western boundary of the 1st defendant's land too. The eastern boundary of the 1st defendant's land is T.A.Sunil's land which, as mentioned earlier, forms a section of the northern boundary of the plaintiff's land. As stated earlier, the northern boundary of the 1st defendant's land is the Dehiwela-Maharagama road.

As set out in the amended plaint, the plaintiff's action, in brief is that: that the plaintiff owns and is entitled to the aforesaid allotment of land described in the First Schedule to the plaint which is described as Lot 1 in plan no. 50/99 marked **"පැ8"**; the 1st defendant owns the allotment of land which is part of the northern boundary of the plaintiff's land; the northern boundary of the 1st defendant's land is the Dehiwela-Maharagama road; the only and closest access to a road from the plaintiff's land is over the 1st defendant's land to the Dehiwela-Maharagama road; for over 30 years, the plaintiff and his predecessors in title have used and enjoyed a right of way over the 1st defendant's land, to access the Dehiwela-Maharagama road from the plaintiff's land; the 2nd to 5th defendants are in occupation of this area of the 1st defendant's land over which the plaintiff has a right of way and they have obstructed this right of way, in the month of August 1999, by constructing a lavatory and a sewage pit, by using a movable boutique within this right of way and by erecting a fence at the boundary of the plaintiff's land; in these circumstances, the plaintiff prayed for a declaration that, he has prescribed to the

aforesaid right of way, upon a First Cause of Action; and prayed for a declaration that he has a right of way of necessity, upon a Second Cause of Action.

The right of way claimed by the plaintiff over the 1st defendant's land is described in the Second Schedule to the plaint as the 12 foot wide and 40 foot long [This is a mistake. It should have read 80 foot long] strip within the 1st defendant's land and having the following boundaries: the plaintiff's land to the South, T.A.Sunil's land to the East, the Dehiwela-Maharagama road to the North and the rest of the 1st defendant's land to West. It is depicted as Lot No. 1 in plan no. 302 marked **"ඉ1"** and is A:0 R:0 P:3.60 in extent.

The 1st defendant filed answer denying the existence of any right of way over the 1st defendant's land and denying that the plaintiff or his predecessors in title had used or enjoyed any right of way over the 1st defendant's land. The 1st defendant also denied that the plaintiff was entitled to any right of way of necessity. The 2nd to 5th defendants filed answer denying that the plaintiff was entitled to a right of way. The 2nd to 5th defendants admitted that the 1st defendant was the owner of the land which they occupied and claimed that they were lawful tenants.

The District Court first issued a Commission to Mr. R.Mahendran, Licensed Surveyor to survey the relevant allotments of land and prepare a plan and submit his report. In pursuance of this Commission, Surveyor, Mahendran prepared the aforesaid plan no. 302 marked **"ඉ1"**.

At the trial, it was admitted that the 1st defendant has title to the allotment of land over which the plaintiff claims a right of way and that the 2nd to 5th defendants had constructed a lavatory and sewage pit and commenced using a movable boutique on the land over which the plaintiff claimed a right of way. These admissions were subject to an express denial that any right of way existed over the 1st defendant's land or was used by the plaintiff. Thereafter, the parties framed issues based on their pleadings.

The plaintiff gave evidence and also led the evidence of Surveyor, Mahendran and Surveyor, Chandradasa. The plaintiff and his witnesses produced the documents marked **"ඉ1"** to **"ඉ8"** in evidence. After the plaintiff closed his case, the 1st defendant gave evidence and produced the documents marked **"1වී 1"** to **"1වී 6"**. The 4th defendant also gave evidence. While the defendants were presenting their case, the plaintiff died and his daughter was substituted in his place.

In his judgment, the learned District Judge held that, the evidence of the 1st defendant, Surveyor,Mahendran and Surveyor,Chandradasa established that, there had been no

use of a right of way over the 12 foot wide and 80 foot long strip within the 1st defendant's land which is the alleged right of way claimed by the plaintiff. The learned trial judge held that, apart from the plaintiff's verbal claim that he and his predecessors had a right of way over the 1st defendant's land, the plaintiff has failed to adduce any other evidence in support this claim. The learned judge also observed that, the title deeds marked **"පැ6"** and **"පැ7"** under which the plaintiff claims title to his land, do not show the existence of any right of way over the 1st defendant's land. In these circumstances, the learned District Judge held that, the plaintiff had failed to prove any entitlement, by prescription, to a right of way over the 1st defendant's land.

With regard to the plaintiff's claim that he was entitled to a right of way of necessity, the learned trial judge observed that, although a Commission had issued to Surveyor, Mahendran to survey the plaintiff's land and 1st defendant's land and submit a report, the Surveyor had not been required to report on whether the plaintiff has no means of access to his land other than over the 1st defendant's land. Further, Surveyor, Mahendran's plan no. 302 marked **"පැ1"** has shown *only* a part of the plaintiff's land and did *not* show its entirety and this Surveyor had stated, in his evidence, that he could not ascertain from which direction the plaintiff's land could be accessed. The learned judge observed that, the plaintiff had failed to apply for a Commission to ascertain and report on whether there was no means of access to the plaintiff's land other than over the 1st defendant's land. The learned District Judge held that, in these circumstances, the plaintiff had failed to prove that he was entitled to a right of way of necessity, over the 1st defendant's land.

Having determined that, the plaintiff had failed to prove any entitlement to a right of way over the 1st defendant's land either by prescription or by way of necessity, the learned District Judge dismissed the plaintiff's action, with costs. In the course of his judgment, the learned District Judge also appears to have taken the view that, the plaintiff's cause of action claiming a prescriptive right of way and the plaintiff's cause of action claiming a right of way of necessity, were contradictory and could not be maintained in one action. In this connection, the learned judge comments ['එනම් පැමිණිල්ලේ සඳහන් නඩු නිමිති දෙක අතර පරස්පරතාවයක් තිබෙන බව අධිකරණයට පෙනී යයි']

The plaintiff appealed to the High Court. The learned High Court judges affirmed the judgment of the District Court and dismissed the plaintiff's appeal, with costs. The plaintiff then made an application to this Court seeking leave to appeal. This Court has given the plaintiff leave to appeal on the following five questions of law, which are reproduced *verbatim*:

(i) Was there evidence before Court to establish the fact that the plaintiff has no right of access to enter his land ?

(ii) In the circumstances of the case is the right of access claimed by the plaintiff over the land of the 1st defendant shortest and most convenient right of access to enter Dehiwela-Maharagama high road ?

(iii) Could the plaintiff plead a right of access by way of prescription and right of access by way of necessity as alternate cause of action in one case ?

(iv) If so is the plaintiff entitled to obtain right of access to his land over the land of the 1st defendant either by way of prescription and or by way necessity ?

(v) When the original plaintiff in his evidence and also by the evidence of the surveyor has stated that, the plaintiff has no other right of access to enter to his land isn't there a duty cast on the defendants show that there is an alternate right of access to enter the land of the plaintiff ?

It will be convenient to first deal with question of law no. (iii). When considering this question of law, it is useful to keep in mind that, in our law, a right of way across a land of another can be created by three main methods of creation: (*a*) a grant or testamentary disposition embodied in a notarially attested deed; or (*b*) by prescription; or (*c*) by a decree of Court declaring the existence of a right of way of necessity. For purposes of completeness, it should be mentioned that, there may also be other circumstances in which a right of way exists as a result of usage from time immemorial [*vetustas* or antiquity] or by dedication to the public made in terms of a deed executed by the owner of the land [*vide:* SANDRASEGRA vs. SINNATAMBY (25 NLR 139)] or by an order of Court in a partition action or other proceedings or by an order of a legislative or local authority which has the statutory authority to make such an order - *vide:* Maarsdorp's Institutes of Cape Law, Book 2 at p. 212-222.

Question of law no. (iii) relates to the second and third methods of creation of a right of way set out above and asks whether a plaintiff can, in one action, claim that he has prescribed to a right of way over the defendant's land *and also* make an alternate or separate claim that, in any event, he is entitled to a right of way of necessity over the defendant's land. The correct answer to this question can be found, when one considers the nature of these two claims.

With regard to a claim of a right of way by prescription, it has to be noted that, as Withers J stated in TERUNNANSE vs. MENIKE [1 NLR 200 at p.202], the effect of the

Prescription Ordinance No. 22 of 1871 was *"to sweep 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. That section determines the acquisition of a prescriptive title"*. Similar views were stated in several later decisions such as PERERA vs. RANATUNGE [66 NLR 337 at p.339] where Basnayake CJ observed, *"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 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 adverse prescription is no longer in force except as respects the Crown."*. Next, since section 2 of the Prescription Ordinance defines 'immovable property' as including *"rights, easements, and servitudes thereunto belonging or appertaining"* to immovable property, the provisions of the Prescription Ordinance will govern the determination of a claim by a plaintiff that he has acquired a right of way by prescription. Thus, in KANDIAH vs. SEENITAMBY [17 NLR 29 at p.31] De Sampayo J observed, *"In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance ….."*.

Therefore, 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.

However, **with regard to a claim of a right of way of necessity**, the claimant is not required to prove possession or user of the right of way. Instead, a claimant who seeks a declaration from Court that he is entitled to a right of way of necessity over the land of another, must satisfy the Court that: the situation of the claimant's land is such that, the *only* route which can be used from the claimant's land [without having to undergo unreasonable inconvenience or difficulty] to access a public road or other roadway from which a public road can be accessed, is by traversing over the land of another person and that, therefore, by reason of necessity, he is entitled to a declaration from Court that he is entitled to a right of way of necessity over that person's land to access the public road or roadway, subject, usually, to the payment of appropriate compensation to the owner of the servient land.

In such circumstances, the Court grants a declaration of a right of way of necessity since the Roman-Dutch Law will not allow a *blokland* - *ie:* a land which cannot be entered or exited from. Thus, in FERNANDO vs. SILVA [30 NLR 56 at p.58], Drieberg J observed that, *"The Roman-Dutch law proceeded on a general maxim that there could be no blokland….."*. Similarly, Maarsdorp comments [Institutes of Cape Law, Book 2 at p. 191], a declaration of a right of way of necessity is granted by the Court because there is *"….. a right which every owner of land has to communication with the world at large outside his ground, and, with this object in view (whenever no definite path or road has been allotted to him by way of grant or acquired by his land by prescription), to claim some means of access to the public roads of the country without which his land would be useless to him. This means of access is spoken of as a way of necessity or necessary way, which is the right of a landowner, in the absence of any express servitude, to cross over all properties intervening between his ground and the nearest public road."*.

Hall and Kellaway, describing a right of way of necessity, state [Servitudes, 1942 at p. 65-66] *"A way of necessity (via necessitatis, or noodweg) is a right of way granted in favour of a property over an adjoining one, constituting the only means of ingress to and egress from the former property to some place with which it must of necessity have a communicating link. It may be a permanent way to enable access to a public road (Grotius 2.35.8 and 11), for all lands which do not adjoin a highway or neighbour's road are entitled to the necessary access to these roads. (Wilhelm v. Norton 1935 E.D.L., p.152) ….. It can be claimed from the neighbouring owner as of right when circumstances warrant it (Voet 8.3.4) but the claim is restricted to the actual necessity of the case (Peacock v. Hodges 6. Buch., p.69)."*. It may be also mentioned, for purposes of completeness, that there could be limited circumstances where a right of way of necessity may be claimed to connect two lands owned by the claimant instead of to connect a land and a road – *vide:* MOHOTTI APPU vs. WIJEWARDENE [60 NLR 46] and Hall and Kellaway [p.66] who, citing Grotius [2.35.7], mention that there could be a right of way of necessity from cornfields to the dominant land.

Since the granting of a right of way of necessity over the land of another, curtails the right of ownership of the owner of the servient land, our Courts have consistently refused to grant a right of way of necessity unless the Court is satisfied that the right of way is, in fact, *a necessity*. As Drieberg J observed in FERNANDO vs. SILVA [at p.58] quoting De Villiers CJ in the well-known case of PEACOCK vs. HODGES [6 Buch. Reports 69], *"…..this road by necessity can be claimed no further than the actual necessity of the case demands."*.

If there is an alternative route available, the claimant, usually, will not be entitled to a right of way of necessity over the land of another unless the Court is satisfied that the alternative route is so inconvenient or difficult to use that it is unreasonable to expect the claimant to use that alternative route. Where the plaintiff has an alternative route, the fact that this alternative route is longer or inconvenient or even arduous will not entitle the plaintiff to obtain a shorter and more convenient right of way over the land of another unless, as mentioned earlier, the Court is satisfied that, the alternative route is unreasonably inconvenient or difficult to use. In MOHOTTI APPU vs. WIJEWARDENE [at p.48] CHANDRASIRI vs. WICKREMASINGHE [70 NLR 15] and SOMARATNE vs. MUNASINGHE [74 NLR 14], this Court has cited, with approval, the statement in LENTZ vs. MULLIN [1921 EDL 268 at p. 270] that, if the plaintiff who claims a right of way of necessity *"had an alternative route to the one claimed, although such route may be less convenient and involve a longer and more arduous journey, so long as the existing road gives him reasonable access to a public road, he must be content, and cannot insist upon a more direct approach over his neighbour's property".* In this regard, Hall and Kellaway state [at p.68], *"A person is entitled to a reasonable and sufficient means of access to a public road from his property. He is consequently not entitled to claim the best and nearest outlet on the ground of necessity if he has another although less convenient road (Gray v. Gray and Estcourt, 1907 28 N.L.R., p.154; Wilhelm v. Norton, 1935 E.D.L., p.169), nor a route which shortens the distance and enables him to avoid a bad portion of the road (Ellman v. Werth, 16 S.C., at p. 173; Carter v. Driemeyer and Another 1913 .N.P.D. 1). Nor may a person claim a road ex necessitate over his neighbour's land on the ground that this property alone intervenes between his land and a public road, whereas he has the use of a road giving access to another public road, but one which passes over a number of intervening properties whose owners may in the future object to his using it (Lentz v. Mullin, 1921 E.D.L. 268). ….. . "*. An example of a case where the Court held that a right of way of necessity should be granted because the alternative route which was available was unreasonably inconvenient or difficult, is ROSALIND FERNANDO vs. ALWIS [61 NLR 302] where this Court held that a right of way of necessity should be granted because the alternative route involved the dangerous exercise of walking 143 yards along a sea shore which was buffeted by a *"notoriously turbulent"* sea during the Monsoon season. Then in the South African case of ILLING vs. WOODHOUSE [1923 Natal LR 168], a right of way of necessity was granted because the alternative route which was available was 11 ½ miles long and required crossing a deep ravine [*kloof*] while in NEILSON vs. MAHOUD [1925 EDL 26], a right of way of necessity was granted because the alternative route which was available was along a sheer cliff [*krantz]* and was dangerous. In VAN SCHALKWIJK V. DU PLESSIS [1900 17 SC 464] De Villiers CJ went as far as to suggest that, the alternative route should be *"so difficult and inconvenient as to be practically impossible"* to use, if a claimant was to succeed in obtaining a right of way of necessity over the

land of another when an alternative route was available to the claimant. However, in our law, the decisions suggest that a claimant has to discharge the lesser burden of satisfying the Court that, the alternative route is so inconvenient or difficult to use that it is unreasonable to expect the claimant to use that alternative route. Each case has to be decided on its own facts.

It is clear from the aforesaid descriptions that, the basis on which a plaintiff may claim a Cause of Action for a right of way by prescription is quite *different* to the basis on which a plaintiff may claim a Cause of Action for a right of way of necessity. The first claim is founded on undisturbed and uninterrupted possession and use which is adverse to and independent of the rights of the owner of the servient tenement. The latter claim is based only on necessity and does not require any prior possession and use of the right of way.

Consequently, there is no reason why both these claims cannot be joined as separate causes of action in one action provided the other requirements to justify joinder of claims are met. In fact, there are several decisions of this Court, such as FERNANDO vs. FERNANDO [31 NLR 107], FERNANDO vs. DE LIVERA [49 NLR 250], CORNELIS vs. FERNANDO [65 NLR 93], CHANDRASIRI vs. WICKRAMASINGHE and SOMARATNE vs. MUNASINGHE, which have recognized that, the two claims may be joined, as separate causes of action, in one action and have separately considered the maintainability of each claim. In fact, in SOMARATNE vs. MUNASINGHE, Siva Supramaniam J stated [at p.16],*"The failure of the plaintiff to establish his claim based on prescriptive user will not necessarily disentitle him to a cartway of necessity. That question has to be considered on different grounds."*.

Accordingly, question of law no. (iii) is answered in the affirmative. A cause of action claiming a prescriptive right of way and a cause of action claiming a right of way of necessity may be properly joined in one action provided the other requirements to justify the joinder of claims, are met. The learned judges in both the District Court and High Court erred when they took the view that the two Causes of Action could not be joined in one action.

Next, the remaining questions of law no.s (i), (ii), (iv) and (v) can be considered together since they all raise issues connected to whether the learned judges, in both the District Court and High Court, erred when they held that, the plaintiff had failed to prove that he was entitled to a right of way over the defendant's land.

I will first consider whether the evidence established that, the plaintiff had proved that he had a right of way **by prescription**. I am required to do so because the manner in which

question of law no. (iv) is framed also poses the question of whether the plaintiff is entitled to a right of way of prescription.

As stated earlier, in order to establish a right of way by prescription, the plaintiff had to prove the requisites stipulated in section 3 of the Prescription Ordinance. In his written submissions, learned President's Counsel for the plaintiff has also cited and placed reliance on the principles of the Roman Dutch Law relating to the acquisition of a right of way by prescription. Since these submissions have been made, a brief consideration of the relevant principles of the Roman Dutch Law would be appropriate. In this regard, Hall and Kellaway [at p.29] go back to the Roman Law essentials of *"nec vi, nec clam, nec precario"* and state with regard to the requirements to establish a claim to a right of way by prescription under the Roman Dutch Law, *"Title to a servitude may be acquired by prescription. If the occupation or use of something over which a right is asserted has been exercised nec vi, nec clam, nec precario for a period of 30 years, prescription is proved; See Voet 8.4.4, and SCHULTZ v. SOMERSET EAST MUNICIPALITY (1931 E.D.L.., P.41). 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."*.

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 of undisturbed and uninterrupted use which is 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. It is perhaps that thinking which led Basnayake CJ to state in FERNANDO vs. DE LIVERA [49 NLR 350 at p.352] that, a plaintiff who claims a right of way by prescription must establish use of the right of way *nec vi*, *nec clam* and *nec precario* and to cite the aforesaid view of Voet [8.4.4], without expressly referring to section 3 of the Prescription Ordinance, which stipulates the requirements to be established, under our law, by a plaintiff who claims a right of way by prescription.

It may be also mentioned here that, another requirement of our law is that, a plaintiff who seeks to prove a right of way by prescription in the manner contemplated by section 3 of the Prescription Ordinance, must establish that, the possession and user of the right of way was of a course or track or path over a defined and identifiable area of the servient land. This requirement, which has been read into the requirement of possession and user stipulated in section 3 of the Prescription Ordinance, has been recognised and enforced in a *cursus curiae* commencing in the first decade of the last century - *vide:* In 1912, Lascelles CJ stated in KARUNARATNE vs. GABRIEL APPUHAMY [15 NLR 257 at p.259] *"In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly defined."* and, in the next year, in KANDIAH vs. SEENITAMBY [at p.31], De Sampayo J, quoting Wendt J in an earlier judgment, stated, *" the evidence to establish a prescriptive servitude of way must be precise and definite. It must relate to a defined track, and must not consist of proof of mere straying across an open land at any point which is at the moment most convenient."*.

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. The burden of proving this, was cast on the plaintiff.

When the evidence is examined, it is seen that, the only evidence the plaintiff placed before the Court in support of his claim to have prescribed to a right of way, were the plaintiff's statements that he used a right of way over the 12 foot wide and 80 foot long strip within the 1st defendant's land, which is described in the Second Schedule to the plaint. The 1st and 4th defendants denied that the plaintiff had used any such right of way. If the plaintiff did use the right of way, the probabilities are that, neighbours or the grama niladhari could have testified to such use. However, the plaintiff was unable to lead the evidence of such a witness. Surveyor,Chandradasa who surveyed the plaintiff's land three weeks before the institution of the action to prepare plan no. 50/99 marked **"පැ8"**, has not referred to or shown a right of way from the plaintiff's land over the defendant's land. When Surveyor,Chandradasa gave evidence, the plaintiff did not obtain any testimony from him which would suggest that there was evidence to show the *use* of a right of way over the defendant's land. Surveyor,Mahendran who surveyed both the plaintiff's land and the defendant's land, a year later, when he was preparing Plan No. 302 marked **"පැ1"**, has also not stated in his report marked **"පැ2"**, that there was evidence of use of a right of way over the defendant's land. In fact, when he was

cross examined, he stated that, he could not say that there was evidence of use of the alleged right of way. The evidence of Surveyor,Mahendran and his plan no. 302 marked **"පැ1"** also establishes that, there was a large 25-30 year old mango tree with a diameter of a little less than two feet in the middle of the 12 foot wide right of way which the plaintiff claims to have used. That would leave only about 5 feet on either side of this tree if a right of way had been used. In addition, there is a 15-20 year old Thelambu tree in the middle of the alleged right of way where it borders the Dehiwela-Maharagama road. There is also another tree within the alleged right of way. Surveyor, Mahendran states that, because of these trees, even a hand tractor can be driven on this alleged right of way, only with great difficulty ['ඩොහොම අමාරුවෙන්']. It is unlikely that these trees would be standing on the alleged right of way, *if* the plaintiff had, in fact, being using the alleged right of way for agricultural purposes as he claims. Finally, the plaintiff's deed marked **"පැ6"** and **"පැ7"** make no mention of a right of way over the defendant's land.

In the light of this evidence, the learned trial judge held that, the plaintiff had failed to establish the use of a right of way and rejected the plaintiff's claim to a right of way, by prescription. The High Court affirmed this determination. I cannot see how, in the light of the aforesaid evidence, the learned judges could have correctly held otherwise.

I will now proceed to consider the issues raised in questions of law no.s (i), (ii), (iv) and (v) with regard to whether the plaintiff had established that, he was entitled to a right of way of necessity.

With regard to the manner in which a right of way of necessity or *via necessitatis* is created, Hall and Kellaway state [at p.66] that, *"A via necessitatis must be constituted like other rights of way by grant, prescription or order of Court."*. The circumstances in which a Court will order or declare that the owner of a land is entitled to a right of way of necessity over the land of another, have been referred to earlier.

The onus of proving the existence of such circumstances lies on the person who claims the way of necessity. Thus, Hall and Kellaway state [at p.67] *"In a claim for a via necessitatis the onus of proving the necessity is upon the person alleging it."* and in DE VAAS vs. MENDIS [49 NLR 525 at p.527], Basnayake CJ observed, *" In a claim for a via necessitas the onus of proving the necessity is upon the person alleging it."*. Hall and Kellaway also observe [at p. 66] that, when a Court decides whether a right of way of necessity should be granted, *"The word 'necessity' is interpreted very strictly …."* This statement echoes Van Leeuwen [Roman Dutch Law 2.21.12] who commented that, when deciding whether a person was entitled to claim a way of necessity, the word *"necessity"* should be interpreted with extreme strictness. Thus, in DE VAAS vs.

MENDIS [at p.527], Basnayake CJ stated *"The comments of Voet, Van Leeuwen and Grotius indicate that the word `necessity' in this context should be very strictly construed."*. This rigorous standard is placed because the granting of a right of way prejudices the rights of the owner of the servient land.

In the present case, the plaintiff had to discharge the burden of proving that, the right of way he claimed was, in fact, a *necessity*. As mentioned earlier, this required the plaintiff to establish that he had no means of access, which he could be reasonably expected to use, from his land to a public road or other usable roadway, other than by traversing the defendant's land. As mentioned earlier, it is inherent in this requirement that, the plaintiff must satisfy the Court that, using any alternative route which may be available, would cause unreasonable inconvenience or difficulty.

In this regard, plan no. 50/99 **"පැ8"** describes the southern section of the plaintiff's land as an *"Abandoned Paddy Field"* and, in fact, the plaintiff's land bears the name *"Digana kumbura"*. Although Surveyor, Mahendran has described this section as *"thorny and muddy"*, there is no reason to suppose that an usable path did not exist or could not be made across this section. In any event, there is no evidence to suggest that this section was impassable. Therefore, it is reasonable to conclude that, the plaintiff could reach the southern boundary of the plaintiff's land, which is the canal named *"Depa Ela"*, earlier named *"Maha Niyara"*. The use of the term *"Maha Niyara"*, suggests that, the canal bank is of traversable size. In this connection, as learned counsel for the defendant has submitted, it is well known that, paddy fields are often accessed across a *"Niyara"* or along a canal bank. Next, the sketch annexed to the plaint marked **"පැ3"** shows that the Ratmalana-Attidiya road [the B389] runs parallel to the plaintiff's land in a southward direction. It appears from the scale of the sketch that, the distance from the plaintiff's land, along the Dehiwela-Maharagama road, to the Ratmalana-Attidiya road, is about 100 metres. Further, it appears that, the distance from the western boundary of the aforesaid southern section of the plaintiff's land to the Ratmalana-Attidiya road, is also about the same distance. In these circumstances, there could well have been a usable route to the Ratmalana-Attidiya road from the plaintiff's land. In fact, in his evidence, the 1st defendant said so when he said ''අත්තිඩිය පාරෙන් යන්න පුළුවන්''. In these circumstances, the plaintiff was required to discharge the burden of leading evidence to establish that he had no means of accessing the Ratmalana-Attidiya road (or some other roadway) from the southern boundary or western boundary of his land or, for that matter, from the eastern boundary of his land. The plaintiff could have easily sought to do so by applying for a Commission to issue to a Court Commissioner to survey the entirety of the plaintiff's land and report to the Court on whether the plaintiff has no usable alternative means of entering and exiting his land from the southern, western or eastern boundaries of his land. However, the plaintiff did not do so. A

perusal of the evidence of Surveyor,Mahendran, and Surveyor, Chandradasa, shows that neither witness was able to give clear evidence as to whether or not the plaintiff had an alternative means of entering and exiting his land from the southern, western or eastern boundaries of his land. In fact, when Surveyor Mahendran, was asked whether he could say the *only* access to the plaintiff's land was by the right of way sought over the defendant's land, he replied that he could not say so.

In these circumstances, I am of the view that, the plaintiff failed to discharge the burden of proof placed on him to establish that he had no alternative means of entering and exiting his land other than by traversing the defendant's land. In this connection, it is apt to recall Basnayake's CJ's comments in DE VAAS vs. MENDIS [at p.528] that, *"The plaintiff has made no endeavour to discharge the onus that rests on him. He expects to succeed in his claim on his bare word. He has not even called the surveyors who made the plans to explain them and assist the Court. A servitude will not be created by judicial decree for the mere asking. The person seeking such a decree must discharge the onus that rests on him."*.

In these circumstances, the District Judge and High Court have correctly held that, the plaintiff failed to discharge the burden of satisfying the Court that he had no alternative route to enter or exit from his land. Therefore, the questions of law no.s (i) and (iv), are answered in the negative.

Question of law no. (ii) is also answered in the negative since, as set out above, the mere fact that, the right of way sought is the *"shortest and most convenient"* does not entitle the plaintiff to the right of way prayed for in the plaint on the grounds of necessity.

Finally, with regard to question of law no. (v), learned President's Counsel for the plaintiff has submitted that, the defendants did not take up a position in the District Court that, there was an alternative route available to the plaintiff and that, therefore, this Court should not consider the possibility that there was an alternative route. I am unable to agree with this submission since the 1st defendant specifically stated that, the plaintiff had alternative routes available to him [*ie:* the 1st defendant stated: *"*තවත් කොට මාර්ග තිබෙනවා*"*; *"*වෙනත් කොට මාර්ග තිබෙනවා*"*; "නමුත් වෙන පාරක් තිබෙනවා*"* ,*"*මා කිව්වා හැම කුඹුරටම යන්න තිබෙන ඇළ වේලි පාර කියා කිව්වා'' and ''අත්තිඩිය පාරෙන් යන්න පුළුවන්''].

In any event, when the defendants had denied that the plaintiff was entitled to a right of way of necessity, the burden was firmly placed on the plaintiff to prove, *inter alia*, that he had no alternative route available to him. Unless and until the plaintiff led evidence to establish a *prima facie* case that he had no alternative route which could be used, there was no burden placed on the defendant to demonstrate that the plaintiff did have an

alternative route. However, as set out above, the plaintiff failed to establish a *prima facie* case that he had no alternative route. In fact, that is the basis on which the learned trial judge held that the plaintiff failed to prove that he was entitled to a right of way of necessity.

Accordingly, question of law no. (v) is also answered in the negative.

For the aforesaid reasons, the judgment of the High Court is affirmed and this appeal is dismissed, with costs.

Judge of the Supreme Court

S. Eva Wanasundera, PC, J.
I agree

Judge of the Supreme Court

Anil Gooneratne J.
I agree

Judge of the Supreme Court