

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

**In the matter of an Appeal from the
Civil Appellate High Court.**

Kambapolegedara Sumith Jayalath,
Walgama, Yatagama, Rambukkana.

Plaintiff

SC APPEAL No. 55/2013
SC/HCCA/LA/No. 492/2012
SP/HCCA/KEG/No. 829/11
D.C.Kegalle No. 5276/L

Vs

Athaudagedara Siriyawathie,
Walgama, Yatagama, Rambukkana.

Defendant

AND

Kambapolegedara Sumith Jayalath,
Walgama, Yatagama, Rambukkana.

Plaintiff Appellant

Vs

Athaudagedara Siriyawathie,
Walgama, Yatagama, Rambukkana.

Defendant Respondent

AND NOW BETWEEN

Athaudagedara Siriyawathie,
Walgama, Yatagama, Rambukkana.

Defendant Respondent Appellant

Vs

Kambapolegedara Sumith Jayalath,
Walgama, Yatagama, Rambukkana.

Plaintiff Appellant Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
PRIYANTHA JAYAWARDENA PCJ. &
L. T. B. DEHIDENIYA J.

COUNSEL : Rasika Dissanayake with Chandrasiri
Wanigapura for the Defendant
Respondent Appellant.
Dr. Sunil Cooray with Sudarshani Cooray
For the Plaintiff Appellant Respondent.

ARGUED ON : 23. 10. 2018.

DECIDED ON : 21. 11. 2018.

S. EVA WANASUNDERA PCJ.

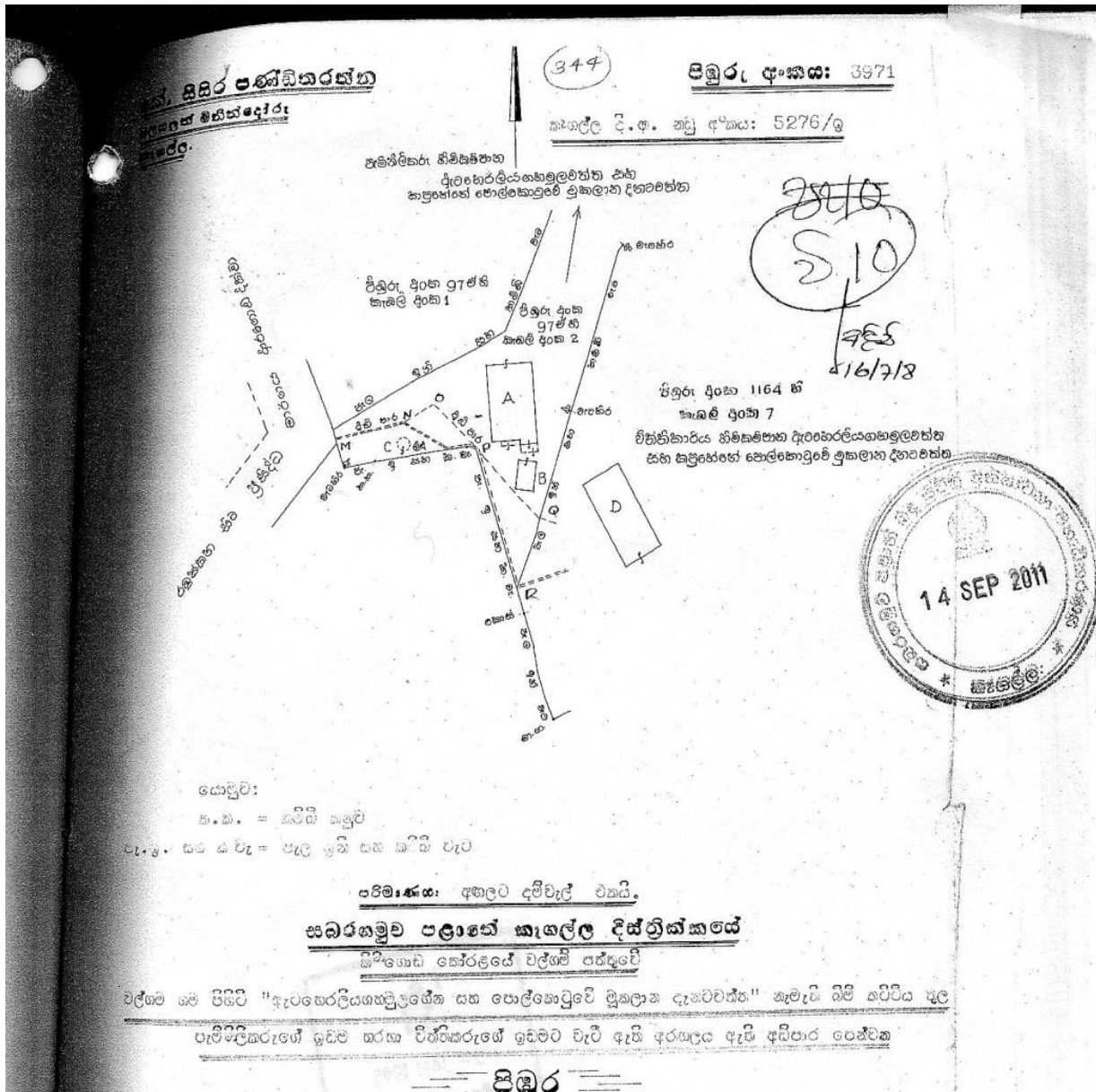
This Court had granted leave to appeal on the questions of law pleaded by the Defendant Respondent Appellant (hereinafter referred to as the Defendant) in the Petition dated 09.11.2012 in paragraph 12(a) to (g) which read as follows:-

- (a) Whether the judgment dated 02.10.2012 of the **Civil Appellate High Court of Kegalle is contrary to law** and/or against the materials placed before Court?
- (b) Whether the Civil Appellate High Court has erred in law by failing to appreciate the fact that the Petitioner has duly **established her right of way** over the Respondent's land?
- (c) Whether the Civil Appellate High Court has erred in law by disregarding the correct findings of the District Judge of Kegalle as to the fact that the Petitioner has acquired **the prescriptive title to the access road in dispute?**
- (d) Whether the Civil Appellate High Court has erred in law by failing to appreciate the fact that the **Respondent as well as the surveyor** who prepared the plan marked as **Pe 8** have admitted that there is **no alternative road way** to have access to the Petitioner's land and therefore the Petitioner is entitled to use the said access road as a way of necessity?
- (e) Whether the Civil Appellate High Court has erred in law by disregarding the fact that the **dispute arose** due the fact that the Respondent **obstructed** the Petitioner's **one and only access road** by erecting a fence?
- (f) Whether the Civil Appellate High Court has erred in law by disregarding the fact that the Respondent has **not rebutted the evidence of the Petitioner** in any manner?
- (g) Whether the Civil Appellate High Court has erred in law by **failing** to appreciate the fact that there is **no valid reason** whatsoever to **interfere with the judgment of the District Judge?**

The Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) Jayalath and the Defendant Siriyawathie have been neighbours living in the houses built on the allotments of land **adjacent to each other**. Both of them have quite good legal title to the said allotments of land, namely Lot 2 of Plan No. 97A made by T.M.T.O. Tennekone Licensed Surveyor and Lot 7 of Plan No. 1164 made by J. Aluwihare Licensed Surveyor. Those allotments are indicated **in the same way** by the Court Commissioner in the present case in **Plan No. 3971 dated 31.10.1994** done by the Court Commissioner, Licensed Surveyor K. Sisira Panditaratne who did the survey on a Commission issued by the District Court. This Plan has been marked in evidence before the District Court of Kegalle **as V10 as at page 344** of the brief before this Court. The extent of the land of Jayalath is,

1 Rood and 18.4 Perches. The extent of the land of Siriyawathie is, 3 Roods and 18.7 Perches.

The report of the Commissioner is annexed to the Plan No. 3971. It states that the Defendant Siriyawathie claims that she earlier went to her house marked D on her land through the dotted line marked as M ->N ->O ->P ->Q in this Plan 3971 but **now she walks** on the foot path marked as **M->N->P->R** as a dotted line. I would like to reproduce the said Plan as follows:-



Siriyawathie lived in the house in Lot 7 as indicated in the Plan above and Jayalath lived in the house on Lot 2 as indicated in the Plan above. The descriptions of the said allotments are specifically described in the Commission Papers filed of record. Siriyawathie's last title deed No. 3950 is dated **27.09.1988** and attested by K. Wijayasundera Notary Public. The land was transferred by the Vendor, Muhandiram Rallage **Bandara Menike to Siriyawathie** subject to the life interest of Athauda Gedera Tikiribanda for a consideration of Rs. 10000/- paid to the Vendor by both of them. It is marked as **V7** in evidence at the trial. The Plaintiff Jayalath had bought the land by Deed No. 6686 dated **30.07.1990** attested by H.L.A. Don Henry Seneviratne Notary Public. It is marked as **P6** before the trial court. So, it is obvious that Jayalath became the owner of that land after Siriyawathie had bought and built a house thereon, according to her capability without electricity and water service etc.

According to Siriyawathie's evidence, she had been on her land from 1983 when Bandara Menike had given her permission to be in possession of the land. She had got married and then only she got title to the said land, by way of the deed of transfer. She had built the house on the land and in her evidence, she says that the material to build was taken by putting them on the head and walking on this three feet wide walking path up to the place where the house was built. She states that she has been using the roadway which is the subject matter of this action from the year 1983. She had lost her husband when the children were very young and now lives in this house with her two children.

The Plaintiff had bought the adjacent land in 1990 and had lived in a small hut on the land which is shown marked as B, even in the Plan which was made by the Court Commissioner. Later on, he had built a new house marked as A and after that only the Plaintiff had not liked the Defendant using the path running close to the back side of the new house. The water well marked C on the Plan does not have any water in it and it is not used to draw water from, by any person. It is an empty well. I observe according to the Plan 3971 that Siriyawathie's access path runs mostly along the boundary of the Plaintiff's land. It is at the commencement of the foot path that Siriyawathie enters through the middle of the boundary of the Plaintiff's land.

The width of the foot path according to Siriyawathie is three feet. A small portion of the Eastern side of the Plaintiff Jayalath's land opens to the public road from Rambukkana to Aragoda. **The said land is on a higher level than the road.** The evidence before the trial court shows that the Defendant Siriyawathie had gone down, stepping out of the Plaintiff Jayalath's land on to this public road **over two or three coconut tree trunks placed downward** at an angle from the high land to the flat road on a declining foot path. It can be imagined as a man-made ditch sloping down, on the soil, running downwards with coconut tree trunks to walk on, for convenience from the higher elevation to the road on the flat lower elevation.

The Police had filed a case under Section 66 of the Primary Courts' Procedure Act in the Magistrate's Court even during the former years, under case number 15012/94 when the person named Abeywardena the predecessor in title to the said land prior to the Plaintiff got title obstructed this path. He had closed the path by putting up a fence blocking the path to the Defendant's house. At that time, the then Magistrate had granted Siriyawathie the right to use the said road way leading to her land and the house. From then onwards for certain and prior to that time, she had been using the said roadway.

The Plaintiff **did not close the roadway** with a fence until the time he himself built a new house. After he built the new house, on or around **18.10.1993**, the Plaintiff had put up a **fence obstructing the roadway** to the house of the Defendant. Siriyawathie had complained to the Police on that very day, i.e. on 18.10.1993. The Police Officer who visited the place on the next day, i.e. on 19.10.1993, had returned to the Police and entered his observations in the Information Book that **the obstruction was done with barbed wire and drawn a sketch as well.** These two entries in the IB has been marked as **V2** and **V8**. On the next day, i.e. on 01.11.1993, the Plaintiff had **denied** in his statement to the Police at the inquiry held by the Police, **that there is a road way** over his land. The Police Officer had seen the specific roadway and the obstruction and noted it down in his notes with a sketch of the same.

The stance taken up by the Plaintiff Jayalath is that there is **another roadway** from some other side to reach Siriyawathie's house.

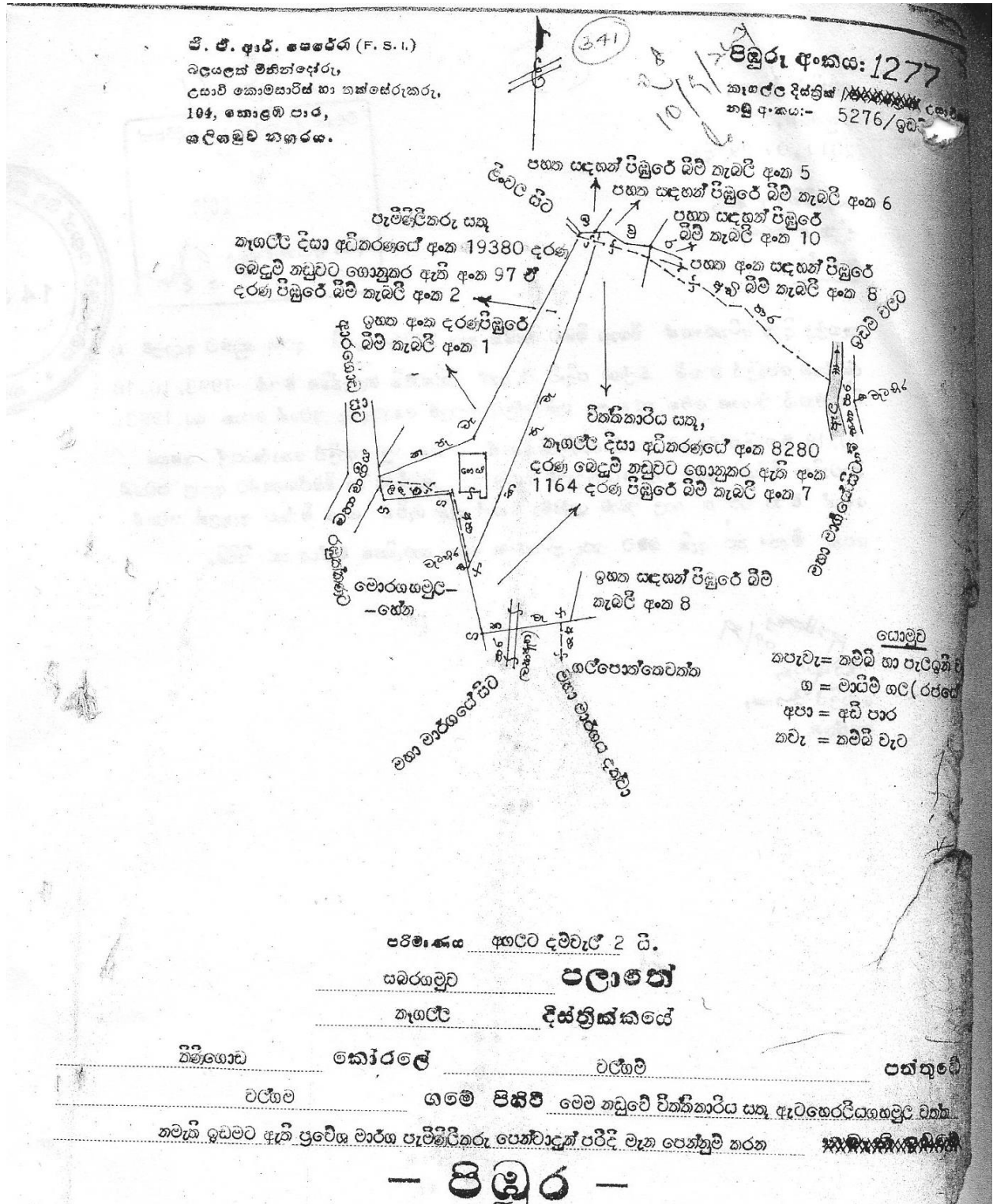
However the Plaintiff had moved Court to grant another Commission to another Surveyor to demonstrate that there is some other access road to the Defendant's land. The trial Judge had allowed that application and on 16.07.1994, the second Court Commissioner and Licensed Surveyor G.A.R.Perera had drawn Plan No. **1277 dated 23.07.1994**. In that document, the Court Commissioner specifically states that **it is drawn as shown to him by the Plaintiff**. On the face of the said Plan there is **no showing of a specific clear roadway reaching the house and land of the Defendant**.

This Plan was marked and produced as **Pe 8**. This Surveyor G.R.Perera had given evidence on 10.05.2004 and his evidence commences in page 148 of the brief. In cross examination at page 154, the Surveyor who had drawn Pe8 had stated that "in Pe8, the **house of the Defendant is not shown**"; "the roads shown on that plan are **not shown to be connected to public roads**" etc. The evidence of the said surveyor **does not show at all that there exists another roadway** connecting the Defendant's house and land to any other main public road. He accepts that he has not seen or does not know any other road **but stresses that he had drawn the Plan 1277 according to what the Plaintiff had told him**.

The Plaintiff had got down a driver of a tractor to give evidence on his behalf and his evidence was that he brought bricks, cement etc. in the tractor which belonged to some other person. He was employed to be the driver of the tractor by the owner of the tractor. His evidence was to the effect that he brought the tractor over a broad motorable path over some land from the Gamsabha road which is towards the east of the Plaintiff's land, with material **to build the house of the Plaintiff**. He does not say that he brought anything for the Defendant Siriyawathie. His evidence does not show any other road to Siriyawathie's house. He only confirmed that Siriyawathie lives next door to the Plaintiff and that he has seen Siriyawathie living in the house nearby, when he came in the tractor with the building materials for the Plaintiff.

However, I observe that the Plaintiff has tried to impress upon the Court that there is another access but I feel that this alleged access road if at all is over many many blocks of land with many other names such as Galpottawatta and Kapuhene Polkotuwe Mukalana etc. Those lands belong to many other persons.

Anyway, I would like to reproduce the said Plan No. 1277 marked as Pe 8 as follows:



It is only the Plaintiff who believes and suggests that there is an existing road over which even motor vehicles and tractors can be driven on but the Plaintiff has failed to prove or show any such road even through the Plan drawn by the Commissioner who had surveyed the area, that there exists any other access road from any public road up to the Defendant's house.

It is observed by me that the Surveyor Perera has not shown any road to reach the Defendant Siriyawathie's house and land. Even in the said Surveyor's evidence he specifically states that there was a *visible roadway/path on the ground* over **some land** but **does not say** over whose land or over what land etc. It looks like such a pathway had been there over **other people's lands, if at all** and even though the Surveyor himself has said so in evidence, **he has not done his duty in marking the roadway/path from any public road to the Defendant's house** through and over any other person's lands. He has not done what the Court has directed him to do so by the commission which was allowed at the request of the Plaintiff.

The Defendant has asked for this foot path of 3 feet wide as " a roadway of necessity" which allegedly she has gained by way of having used the same from 1983.

The Defendant Siriyawathie was cross examined by the Counsel for the Plaintiff and I observe that her only 'problem' was trying to save the 'foot path' she has been using to reach her house from the public road. She stated that she is only asking for the foot path she has been using to reach her house. When cross examined she was asked whether there are other 'roads' or 'paths' anyone can use to reach her land. At page 223 of the brief her answer to that is given. She says;

" there is a pathway that people use, i. e. through and over Walgama estate, and thereafter over A.R.Karunaratne's land, and then over Kulatunga Bandara's land and even thereafter over Galpotta land which is occupied by a lot of people who live in several allotments of Galpotta land. It is a long time ago that such a foot path existed."

At page 213 of the brief, the Defendant states that " there is **no other path or roadway at all** to reach my house. I am in need of the road **for that reason alone.**"

She is not asking for a wide roadway but **only a foot path of 3 feet wide**. The walking distance over the foot path from the main public road to the land of Siriyawathie is only about 125 feet, according to the evidence before the trial court.

A retired Grama Seveka of 76 years of age had given evidence on 03.12.2008. He had been the Grama Seveka for about 13 years in charge of an area which included the houses and lands of the parties. His evidence commences at page 233 of the brief.

At page 234 he states as follows:-

- ප්‍ර. කොහෙන්නද ඒ අඩිපාර වැටිලා තිබුනේ. ප්‍රධාන පාරට සම්බන්ධ වෙන්නේ කොහොමද ?
- උ. ප්‍රධාන පාරේ ඉඳලා වැට අයිනෙන් වගේ පැනලා යන්න පොල් කොට දාලා තිබුනා.
- ප්‍ර. කාලේ ඉඩමට යන්නද පොල්කොට දාලා තිබුනේ ?
- උ. ජයතිලක සහ සිරියාවතීගේ වත්තට යන්න.
- ප්‍ර. සුමිත් ජයතිලක මහතා ?
- උ. ඔව්.

At page 236 he states as follows:-

- ප්‍ර. අරගොඩ පාරේ තමා කියන හැටියට පැමිණිලිකරුගේ ඉඩමට පොල්කොට දාලා තිබුණු පාර හැර වෙනත් පාරක් විත්තිකාරියට යන්න තිබුණාද ?
- උ. නැහැ.
- ප. ඔය ග්‍රාම නිලධාරී වසමේ තමුන් දිරිස කාලයක් සේවය කර තිබෙනවා ?
- උ. ඔව්.

At page 238 he states as follows:-

- ප්‍ර. තමා කියන්නේ විත්තිකාරියට සුමිත් ජයතිලක යන අයගේ පාරෙන් විතරද යන්න තියෙන්නේ ?
- උ. ඔව්. වෙන පාරක් නැහැ.

According to this Grama Seveka's evidence, it is clear that this foot path had been used by the Plaintiff and the Defendant to reach their lands which are adjacent to

each other and that the Defendant has no other access other than this foot path to her land and house thereon.

It is obvious that the Plaintiff has tried to present to Court the idea that the Defendant can use another way to reach her land without using the foot path which she is claiming. Yet , the surveyor has not shown that path at all in his plan on the commission issued to him. It seems a very awkward suggestion to say that the Defendant can walk over many person's lands and reach her house rather than use the foot path which she has been using even prior to herself building her house. I find that the Plaintiff has failed to prove that there is another alternative road for the Defendant to reach her house.

The learned High Court Judges of the Civil Appellate High Court has failed to analyze the evidence before the trial court in the proper way. The big picture created by the evidence of all the witnesses before the trial court has to be seen with eyes wide open and the essence has to be drawn thereafter, before deciding the matter in issue. It is the wrong analysis of the evidence by the High Court Judges which has ended with the conclusion that the Defendant has an alternative road to reach her house.

In the case of *Alwis Vs PiyasomaFernando 1993, 1 SLR 119*, Chief Justice G.P.S. de Silva has stated that, " It is well established that the findings of primary courts are not to be lightly disturbed in Appeal."

Yet, the Civil Appellate High Court has gone against the factual findings of the District Judge who had seen and heard the evidence in the case and had weighed the demeanor of the witnesses prior to concluding that the foot path over the Plaintiff's land along the boundary of the said land was the only access to the Defendant's house. The High Court has erred in arriving at the conclusion that there is another access road, when the weight of the evidence showed otherwise.

The Counsel for the Plaintiff **argued** that the ratio decidendi in the case of *Suppu Namasivayam vs Kanapathipillai 32 NLR 44* is quite appropriate to the case in hand and on the same line of reasoning, the Defendant is not entitled to the right of way sought on necessity. In the said case it was held that " An owner of land, **who by his own act deprives himself to a road**, is not entitled to claim a way of

necessity to the road over the land of another.” In this particular case , Justice Maartensz had analyzed the evidence and found out that , the Plaintiffs in that case who had sought to a ‘roadway of necessity’, had by themselves gifted Lot A which belonged to them over which they quite well **had the right of way** to their land and **thereafter sought to get a right of way of necessity over another outsider’s land**. It was held that they were not entitled to use that roadway out of necessity.

In the case in hand, Siriyawathie is supposed to have walked over very many lands belonging to others and the Plaintiff Jayalath is of the view that Siriyawathie should walk over all those lands and reach her house as she had used to do a long time ago. The Plaintiff makes accusations against Siriyawathie pointing out that she had fallen out with one of the owners of one of the lands and that is the reason she is now not using that roadway and asking for the roadway across the Plaintiff’s land. I am of the view that the facts of the case in ***Suppu Navasivayam Vs Kanapathipillai (supra)*** is different from the case in hand and as such, the Defendant Siriyawathie’s need for the right of way she had been continuously using cannot be compared to the prayer for such a right in the reported case.

In ***MohottiAppu Vs Wijewardena 60 NLR 46*** it was held that “ A person can claim a way of necessity for the purpose of going from one land owned by him to another. The right of way will not be granted if there is an alternative route to the one claimed although such route may be less convenient and involve a longer and more arduous journey.”

In ***Fernando Vs De Silva 1928, 30 NLR 56*** it was held that “ The owner of a land which has access to the high road by a path cannot claim a cart way unless the actual necessity of the case demands it.”

On a balance of probabilities of the evidence of many witnesses before the trial judge as well as the documentary evidence brought out by the two commissions issued to two licensed surveyors by the trial court, it is amply proven that the Defendant has been using the path from around the year 1983 and that it has been used as a roadway of necessity by the Defendant. There does not exist any other roadway to her house and land.

I have considered the questions of law as enumerated above arising out of the Judgment of the learned Civil Appellate High Court Judges. I answer the questions of law in favour of the Defendant Respondent Appellant and against the Plaintiff Appellant Respondent.

I hold that the High Court Judges have erred in their judgment. I do hereby set aside the Judgment of the Civil Appellate High Court of Kegalle dated 02.10.2012 and I affirm the judgment of the learned District Judge of Kegalle dated 20.01.2011.

The Appeal is allowed with costs.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.

I agree.

Judge of the Supreme Court

L.T.B. Dehideniya J.

I agree.

Judge of the Supreme Court

