IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section 5(C) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

S C Appeal No. 31/2019

SC/HCCA/LA/308/2015

SP/HCCA/KAG No. 995/2012(F)

DC Kegalle Case No. 3666/L

Pathirana Mudiyanselage Leelawathie,
Divula Watta
Kehelwathugoda,
Dewalegama.

PLAINTIFF (Deceased)

1a. Vitharanage Indunil Priyantha,
1b. Vitharanage Biso Menike,
1c. Vithranage Hiran,
All of Kehelwathugoda,
Dewalegama.
1d. Vitharanage Anura,
Horanapola,
Kuliyapitiya.
1e. Vitharanage Nadeera,
Kehelwathugoda,

Dewalegama.

SUBSTITUTED PLAINTIFFS

Vs.

Peramuna Gamlath Ralalage Gunerathne,

Divula Watta,

Kehelwathugoda,

Dewalegama.

DEFENDANT (Deceased)

1a. Soma Gunarathne,

1b. Pushpa Kumuduni Kumari Gunarathne,

1c. Chandra Sisira Kumara Gunarathne,

1d. Geethani Kumari Gunarathne,

1e. Damayanthi Kumari Gunarathne.

SUBSTITUTED DEFENDANTS

AND BETWEEN

(In the Provincial High Court of Sabaragamuwa)

1a. Soma Gunarathne,

1b. Pushpa Kumuduni Kumari Gunarathne,

1c. Chandra Sisira Kumara Gunarathne,

1d. Geethani Kumari Gunarathne,

1e. Damayanthi Kumari Gunarathne.

SUBSTITUTED DEFENDANT-APPELLANTS

Vs.

1a. Vitharanage Indunil Priyantha,
1b. Vitharanage Biso Menike,
1c. Vitharanage Hiran,
All of Kehelwathugoda,
Dewalegama.
1d. Vitharanage Anura,
Horanapola,
Kuliyapitiya.
1e. Vitharanage Nadeera,
Kehelwathugoda,
Dewalegama.

SUBSTITUTED PLAINTIFF-RESPONDENTS

AND NOW BETWEEN

(In the Supreme Court)

1a. Vitharanage Indunil Priyantha,
1b. Vitharanage Biso Menike,
1c. Vitharanage Hiran,
All of Kehelwathugoda,
Dewalegama.
1d. Vitharanage Anura,
Horanapola,
Kuliyapitiya.
1e. Vitharanage Nadeera,
Kehelwathugoda,
Dewalegama.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANTS

1a. Soma Gunarathne

1b. Pushpa Kumuduni Kumari Gunarathne

1c. Chandra Sisira Kumara Gunarathne

1d. Geethani Kumari Gunarathne

1e. Damayanthi Kumari Gunarathne

All of Kehelwathugoda,

Dewalegama.

SUBSTITUTED DEFENDANT-APPELLANT-RESPONDENTS

Before: **P. PADMAN SURASENA J**

E. A. G. R. AMARASEKARA J

M. A. SAMAYAWARDHENA J

Counsel: Dr. Sunil Coorey with Ms. Sudarshani Coorey for the Substituted Plaintiff-Respondent-Appellants

Vidura Gunaratne for the Substituted Defendant-Appellant-Respondents

Argued on: 19-02-2021

Decided on: 03-08-2021

P. PADMAN SURASENA J

As can be seen from the caption above, both the Plaintiff and the Defendant have been substituted by the relevant substituted parties who now stand in their respective places. Nevertheless, I would for convenience, use the terms 'the Plaintiff' and 'the Defendant' to identify the two rival parties in this judgment.

The Plaintiff filed plaint dated 04-07-1986, in the District Court of Kegalle against the Defendant seeking *inter alia:*

a. A declaration that the Plaintiff is entitled to the servitude of right of way of a foot path over the land of the Defendant called "Divulgaspitiyawatta" to access

the Kegalle-Polgahawela main road from the land called "Parana Walawwe Watta" in which the Plaintiff resides;

b. the removal of the barbed wire fence constructed by the Defendant obstructing the use of the said right of way;

c. damages in a sum of Rs. 8000/- together with continuing damages at the rate of Rs. 500/- per month until the Plaintiff is granted the use of the sought right of way.

The Defendant filed an answer dated 01-06-1987 denying all material averments and sought the dismissal of the Plaintiff's action together with costs. Thereafter, the learned District Judge at the instance of the Plaintiff, issued a commission on M B Ranatunga Licenced Surveyor to survey and prepare a plan as shown by the Plaintiff. The Licenced Surveyor accordingly surveyed the land on 29-01-1988 and returned the commission with the prepared plan (plan No. K 2294 dated 17-02-1988, hereinafter sometimes referred to as the commission plan) and the report. The said plan and the report have been produced respectively marked **P 1** and **P 2**.

After the return of the commission, having considered the commission plan, the Plaintiff had filed an amended plaint dated 29-08-1988 and the Defendant had filed an amended answer dated 03-01-1989.

The Defendant in the said amended answer has stated the following.

a. It is the barbed wire fence which is shown as a line marked from point "**A**" to "**B**" in the commission plan.

b. High voltage electricity lines have been laid over the said line marked "**A**" to "**B**" in the commission plan. The Licenced Surveyor, in the commission plan has depicted by a square between the points "**A**" and "**B**", the said high voltage electricity posts carrying the warning sign board "අන්තරායයි".

c. The Plaintiff has hitherto been using the roadway shown as "**C**" "**D**" "**E**" in the commission plan.

d. What is shown as "**D**" to "**E**" in the commission plan is a road maintained by the Village Council and what is shown as "**D**" to "**C**" in the commission plan is a bund belonging to the Department of Irrigation maintained by the Agrarian Services.

e. What is shown as "**X**" to "**Y**" in the commission plan is not a public road but a private road giving access to the lands belonging to S A Gunathillake, D M Podihamine and W K M Weerasinghe.

f. What is shown as "**X**" is a culvert and there is only 300 feet from the said culvert "**X**", to access the Kegalle-Polgahawela main road.

g. No cause of action has been accrued to the Plaintiff to maintain the action.

h. There was never a footpath used by the Plaintiff, over his land.

The Defendant prayed for the dismissal of the Plaintiff's action on the above basis.

After the conclusion of the trial, the learned District Judge, by her judgment dated 24-07-2012 held that the Plaintiff had failed to prove, the claimed prescriptive rights over the use of a right of way of a footpath over the Defendant's land.

However, the learned District Judge by her judgment, granted the Plaintiff, a declaration that the Plaintiff is entitled to use a servitude of right of way of necessity over the Defendant's land and directed the Plaintiff to pay the Defendant a sum of Rs. 40,000/- as compensation for using the said right of way. The learned District Judge in her judgment considered the following in granting the said declaration.

a. Although the Plaintiff has an alternative of using the Village Council road from the point "**E**" to "**D**" in the commission plan, the rest of the alternative access goes across a paddy field called "Ambadeniya Kumbura". Owners of the said paddy field had raised objections and had not permitted the Plaintiff to use that as a road preventing the Plaintiff from using that as a right of way. This has resulted in the Plaintiff being landlocked. Therefore, there is no conclusive evidence as to the availability of an alternative roadway for the Plaintiff.

b. The alternative roadway shown by the Defendant, is in fact not a road but is a footpath that goes across a paddy field which becomes non-usable during the rainy season, rendering it incapable of being considered as an alternative road way.

c. In the absence of an alternative route, the Plaintiff is entitled to claim a right of way by necessity.

Being aggrieved by the judgment of the learned District Judge, the Defendant appealed to the Provincial High Court of Sabaragamuwa holden in Kegalle.

The Provincial High Court, after the conclusion of the argument of the said appeal, by its judgment dated 27-08-2015, set aside the decision of the learned District Judge to grant the Plaintiff a declaration that he is entitled to use a servitude of right of way of necessity over the Defendant's land. In making that conclusion, the Provincial High Court made the following observations.

a. The Plaintiff had purchased her land from the owner of the larger land without an access roadway, becoming landlocked due to her own action.

b. The only remedy available to the Plaintiff is to enforce her rights against the seller who sold the landlocked portion to her from a larger land.

Being aggrieved by the judgment of the Provincial High Court, the Plantiff appealed to this Court. When the leave to appeal application pertaining to the instant appeal was supported, having heard the submissions of the learned Counsel for both parties, this Court by its order dated 25-06-2018, has granted leave to appeal in respect of the questions of law set out in sub paragraphs (i), (ii) and (iii) of Paragraph 13 of the petition dated 25-09-2015. The said questions of law are reproduced below:

i. Did the High Court err by holding that the Plaintiff had lost her rights to a roadway due to her own fault?

ii. Did the High Court err by holding that, the only remedy available to the Plaintiff is to file an action against the owner of the larger land who sold her a part of a larger land leaving the Plaintiff landlocked?

iii. Did the High Court err in failing to appreciate that a right of way of necessity cannot be given over D to C, when the surveyor was informed by the owners of paddy lands called Ambadeniya that they oppose to a right of way being granted over the ridges of their paddy fields?

The Plaintiff (and her husband Danawala Withanage Nandoris) admittedly, had purchased half an acre portion from a larger land of 30 Acres from Kuda Banda alias Sisil Bernard Panabokke (who is the owner of the larger land), by the Deed of Transfer No. 48782 attested on 17-02-1958 by David Charles Samarawickrema Seneviratne Karunathilake Notary Public.[1] The Plaintiff has produced this deed marked **P 3**. The said deed (**P 3**) clearly shows that it is a part (1/2 acre) of a larger land (the larger land being of thirty acres in extent) which has been transferred to the Plaintiff. In the said deed (No. 48782) there is no mention about any roadway to access the part of the land transferred. The deed also does not refer to any plan. The said thirty acre larger land is the land called Parana Walawwe Watta.

The Defendant's land is Lot No. 5 which is depicted in plan No. 2973 dated 24-11-1964 prepared by Licensed Surveyor J Aluvihare. The Deed of Transfer No. 1945 attested on 01-08-1966 by Edward Christopher Nugawela Notary Public, is the Deed of Transfer by which the Defendant claims title to his land. It is clear by the said Deed of Transfer No. 1945 that the Defendant's land is Lot No. 5 in plan No. 2973 dated 22-11-1964 made by J Aluvihare Licensed Surveyor containing in extent two roods and sixteen perches. This Deed of Transfer has been produced marked **වි 2**.

The aforesaid Plan No. 2973 clearly shows in its extreme east, the aforesaid thirty acre larger land called Parana Walawwe Watta. The said plan also clearly shows the Lot No. 4 therein, as the access road to said Parana Walawwe Watta. That is the road marked **X** to **Y** in the commission plan. Thus, it is clear that the Plaintiff when purchasing half an acre block from the aforesaid thirty acre larger land, had been content either to access her land from the alternative road **C D E** shown in the commission plan or to make arrangements with the owners of the larger land to obtain access to the road marked **X** to **Y** over the larger land. That is why the learned judges

[1] Paragraph 2 of the amended plaint and deed of transfer No. 48782.

of the Provincial High Court had stated that the Plaintiff has lost her right to a roadway due to her own fault. Our Courts in the past have considered the question whether a person who has bought a landlocked subdivided portion of a larger land, could seek a way of necessity over his neighbour's land, without making a claim for such right of way against his vendor or the owners of the other subdivided lots of the larger land. I would now turn to consider that aspect.

The above question was considered in the case of K. Nagalingam et al Vs Kathirasipillai et al.[2] I would briefly advert to the facts of that case.

In that case, the plaintiff's allotment (Lot No. 4) had originally formed part of a larger land (including Lot Nos. 1, 2, and 3) belonging to her parents. The northern boundary of this larger land was a different public lane and the entire property was later subdivided amongst the members of that plaintiff's family. The said Plaintiff had got the title to the Lots 3 and 4 together with, inter alia, a right of way and watercourse leading to a well (situated on Lot 1) which almost adjoins the northern lane. The said plaintiff later conveyed Lot 3 to her daughter together with similar servitudes. It was thereafter that the said plaintiff claimed a right of way along a path which was to the south of Lot 4. This path had at one stage formed part of a different land, owned in common by the others and the defendants in that case. The basis of that plaintiff's claim was that the owners of Lots 1 and 2 would not permit him a right of way over their lands, so that he must of necessity be granted a servitude along the path which is the common property of those defendants. The learned Commissioner in that case, had accepted the said Plaintiff's argument and entered judgment in favour of that Plaintiff as prayed for. The defendants in that case, then appealed to the Supreme Court. His Lordship Justice Gratiaen having considered the question whether a plaintiff, after becoming an owner of a sub divided allotment of land, was thereafter entitled to a right of way of necessity over its neighbour's land, stated in his judgment as follows:

> "*The plaintiff's claim clearly cannot be sustained. Lot 4 originally formed part of a larger land which was admittedly served by the Northern lane. Upon the subdivision of the larger land, each person who received an allotment which would otherwise*

[2] 58 NLR 371.

be land-locked automatically became entitled under the Roman Dutch Law to a right of way over the allotment or allotments adjoining the public lane. Maasdorp (Edn. 7th) 11, pp 182-183. As was pointed out in Wilhelm v. Norton[3] :

"When a piece of land is split up into two or more portions, the back portion must retain its outlet over the front portion even though nothing was said about it, because the splitting of the land cannot impose a servitude upon the neighbours."

This very sensible principle would have applied in the present case even in the absence of an express reservation of a servitude."

His Lordship Justice Gratiaen on the above basis, proceeded to allow the appeal and dismiss the plaintiff's action in that case, with costs.

Our Courts have consistently applied the above legal principle whenever they were called upon to decide whether a person who has bought a landlocked subdivided portion of a larger land, could seek a way of necessity over his neighbour's land without making such a claim from the owners of the other subdivided lots of the larger land. The cases such as Costa Vs Rowell,[4] Godamune Vs Magilin Nona,[5] are instances where the Court of Appeal has refused to grant such relief. The instant case cannot be an exception. Therefore, the same legal principle will apply. On this point alone, the Plaintiff cannot succeed in this action. Even if it is argued that the above ground was not raised as an issue in the original courts, the burden is on the Plaintiff to prove that she, as the owner of the dominant tenement, is eligible to claim a right of way on the ground of necessity. The answers given by the substituted Plaintiff (at Page 117) proves that they bought this portion from the larger land, disqualifying the Plaintiff to claim a right of way over the Defendant's land. However, there is a more fundamental issue glaring in this case. It is to that issue I will now turn.

In an action of this nature, the plaintiff must clearly identify the dominant tenement and the servient tenement. One of the reasons for such a requirement, as Chief Justice Basnayake stated in the case of Velupillai Vs Subasinghe and another,[6] is because the

[3] (1935) E. D. L. 143 at 169.
[4] 1992 (1) SLR 5, at page 9.
[5] 2009 (1) SLR 109.
[6] 58 NLR 385.

Courts, in case the Plaintiff succeeds in such an action, must be in a position to enter a clear and definite judgment declaring the servitude of a right of way and such definiteness is crucially important when executing the judgment and decree entered. The plaintiff in the aforesaid Velupillai 's case,[7] claimed the right to use the cart-way over the land leased to the defendants in that case, in order to get to the high road. He based his claim on prescription and alternatively prayed for a right of way of necessity. The defendants denied that the plaintiff was entitled to the right of the cart-way as claimed either by virtue of prescriptive user or by way of necessity. Although there were 22 issues framed at the trial, the learned trial Judge first tried only two of them as they went to the root of the case. Those issues are as follows:

> *Issue No. 14* –
>
> *Even if issue No. 5 is answered in the affirmative can the plaintiff acquire and claim a servitude of cart-way either by prescription or by way of necessity?*
>
> *Issue No. 15* –
>
> *If issue No. 14 is answered in the negative has the plaintiff any cause of action and can he maintain the present action?*

The learned trial Judge in that case, after hearing the submissions on the law, answered issues 14 and 15 in the negative. The Plaintiff in that case, then appealed from that decision. His Lordship Basnayake Chief Justice, having considered the submissions, dismissed that appeal with costs, stating the following in his judgment.

> *"The kind of servitude claimed in the instant case is a real or praedial servitude. Such a servitude cannot exist without a dominant tenement to which rights are owed and a servient tenement which owes them. A servitude cannot be granted by any other than the owner of a servient tenement, nor acquired by any other than by him who owns an adjacent tenement. Here the plaintiff who is the lessee and not the owner of the land claims a servitude from the defendant who is also not the owner but the lessee of the land. …"*

In the case of David V. Gnanawathie,[8] the Court of Appeal also had the occasion to cite the above judgment and quote the afore-stated Basnayake CJ's statement. The

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[7] Ibid.
[8] 2000 (2) SLR 352.

plaintiff in David's case claimed from the defendant in that case, a servitude of right of way by prescriptive user and alternatively a servitude of a way of necessity. The said defendant in his answer, inter alia, pleaded that: the plaintiff never exercised a servitude of right of way over the defendant's land; the plaintiff had no legal right to claim and assert a right of way as prayed for in her plaint; and the plaint disclosed no cause of action against the defendant. In issue eight in that case, the said defendant had raised the question whether the plaintiff in that case, was legally entitled to claim a way of necessity over the servient tenement. The said defendant had framed issue nineteen as a consequential issue raising the question: if the servient tenement and the dominant tenement are lands owned by the State, was the plaintiff in that case, entitled to maintain that action claiming a servitude of a right of way by prescription or a way of necessity? During the course of the trial, it was agreed and conceded by both parties in that case, that the dominant tenement and the servient tenement were both lands owned by the State and lands which had been vested in the Mahaweli Authority. Jayasuriya J in the judgment of the Court of Appeal stated as follows.

> *"The plaintiff not being the owner of the dominant tenement cannot legally claim or exercise this servitude of right of way. Likewise the plaintiff cannot assert that she is claiming a servitude for the Mahaweli Authority. The defendant who is not the owner of the servient tenement cannot legally grant or create this particular servitude. Thus the answers to issue eight and nineteen have necessarily to be in the negative. The learned trial Judge has wrongly answered issue eight in the affirmative, but correctly answered issue nineteen in the negative. Although he has correctly answered issue nineteen in the negative he has wrongly entered judgment in favour of the plaintiff in terms of prayer one and two of the plaint. If the answer to issue nineteen is in the negative, the learned District Judge ought to have refused the claims in prayer one and two of the plaint."*

More recently also, in the case of Matara Kiri Liyanage Mary Agnes Fernando & seven others Vs. Madapathipola Lekamge Patricia Fonseka and others,[9] His Lordship Justice Gamini Amarasekara cited with approval, the judgment of Chief Justice Basnayake in

[9] SC Appeal 129/2014, decided on 18.12.2020.

Velupillai Vs Subasinghe[10] and also the judgment of Justice Jayasuriya in David V. Gnanawathie.[11] Thus, this Court has been consistent in applying the above principle of law.

In the instant case, the Licensed Surveyor has clearly stated that the right of way claimed by the Plaintiff from point **A** to point **B** is situated within Lot No. 6 of plan No. 2973. More importantly, learned counsel for the Plaintiff has intensely cross examined the Defendant on the basis: that the claimed right of way from point **A** to **B** is situated within Lot No. 6 of plan No. 2973 produced marked **පී 1**; that the said Lot No. 6 is a separately demarcated block according to the plan No. 2973; that the Defendant had put up a barbed wire fence encompassing Lot No. 6 and amalgamating it to Lot No. 5 blocking the claimed right of way situated in Lot No. 6. Thus, it is important to observe that the Plaintiff has advanced her case on the basis that the claimed right of way is situated within Lot No. 6 in plan No. 2973 and the Defendant is not the owner of the said Lot No. 6.

As has been stated earlier, the case advanced by the Plaintiff as per the plaint and the issues framed, is a case claiming right of way over the Defendant's land. That is not a case on any cause of action arising out of any encroachment made by the Defendant. However, in the course of the trial what the Plaintiff has established is that the claimed right of way from point **A** to **B** is situated outside the Defendant's land which is Lot No. 5 in plan No. 2973. If that is the case advanced by the Plaintiff, it would suffice to state that the claimed right of way must be obtained from the person who owns Lot No. 6. That right of way is not obtainable from the Defendant as the Plaintiff admittedly has taken up the position that the Defendant is not the owner of the block of land (Lot No. 6) in which the claimed right of way from point **A** to **B** is situated.

Thus, on this point alone the plaint is misconceived.

In these circumstances and for the foregoing reasons, I answer the questions of law in respect of which this Court has granted leave to appeal, as follows.

[10] Supra.
[11] Supra.

Question of law No. (i) – The Provincial High Court has not erred by holding that the Plaintiff had lost her rights to a roadway due to her own fault.

In view of the foregoing conclusions, adjudication over questions of law No. (ii) and (iii) would not arise. Moreover, as the owner of the larger land is not a party to the instant proceedings, in my view, it would be best to refrain from pronouncing something which would be to the detriment of that person. The Plaintiff should advice herself as to the course of actions available to her.

For the foregoing reasons, I affirm the judgment of the Provincial High Court, dated 27-08-2015 and proceed to dismiss this appeal with costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA J

I agree,

JUDGE OF THE SUPREME COURT

M. A. SAMAYAWARDHENA J

I agree,

JUDGE OF THE SUPREME COURT