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

In the matter of an application for leave to Appeal under Article 128 of the constitution read with Sec. 5C of the Provincial High Court (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC/APPEAL/NO. 129/14.

SC/HC/(CA) LA/25/2014

WP/HCCA/GAM/143/2008(F)

D.C. Negombo No. 4807/L

1. Matara Kiri Liyanage Mary Agnes Fernando
2. Weliwita Wedage Anita Mary Vivian Fernando
3. Weliwita Wedage Anthony Leo Fernando
4. Weliwita Wedage Tekla Mary Jacinta Fernando
5. Weliwita Wedage Emmanual Rekshi Fernando
6. Weliwita Wedage Neville Ananda Sirimal Fernando
7. Weliwita Wedage Hyacinth Mary Chamali Fernando
8. Weliwita Wedage Anslem Ajith Kumar Fernando

All of 189, Fathima Lane (Behind Playground), Kochchikade.

Plaintiffs.

Vs.

1. Galabodage Thiboshius Silva.
2. Madithapola Lekamge Patricial Fonseka
3. Galabodage Samantha Silva.

   All of 185, Fathima Lane, Kochchikade.

Defendants.

NOW

1. Matara Kiri Liyanage Mary Agnes Fernando
   1.(a)Weliwita Wedage Anthony Leo Maximus Fernando
2. Weliwita Wedage Anita Mary Vivian Fernando
3. Weliwita Wedage Anthony Leo Fernando
4. Weliwita Wedage Tekla Mary Jacinta Fernando
5. Weliwita Wedage Emmanual Rekshi Fernando
6. Weliwita Wedage Neville Ananda Sirimal Fernando
7. Weliwita Wedage Hyacinth Mary Chamali Fernando

8. Weliwita Wedage Anslem Ajith Kumar Fernando

All of 189, Fathima Lane (Behind Playground), Kochchikade.

Plaintiff- Appellants.

Vs.

1. Galabodage Thiboshius Silva.
2. Madithapola Lekamge Patricia Fonseka
3. Galabodage Samantha Silva.

All of 185, Fathima Lane, Kochchikade.

Defendant-Respondents.

And Now

1. Matara Kiri Liyanage Mary Agnes Fernando
   1.(a). Weliwita Wedage Anthony Leo Maximus Fernando
2. Weliwita Wedage Anita Mary Vivian Fernando
3. Weliwita Wedage Anthony Leo Fernando
4. Weliwita Wedage Tekla Mary Jacinta Fernando
5. Weliwita Wedage Emmanual Rekshi Fernando
6. Weliwita Wedage Neville Ananda Sirimal Fernando

7. Weliwita Wedage Hyacinth Mary Chamali Fernando
8. Weliwita Wedage Anslem Ajith Kumar Fernando

All of 189, Fathima Lane (Behind Playground), Kochchikade.

Plaintiff- Appellant-Petitioners

Vs.

1. Galabodage Thiboshius Silva (deceased)
   1(a). Madithapola Lekamge Patricia Fonseka
   1(b). Galbodage Samantha Silva
2. Madithapola Lekamge Patricia Fonseka.
3. Galaboage Samanth Silva.

All of 185, Fathima Lane, Kochchikade.

Defendant-Respondent-Respondents

Before: Vijith K. Malalgoda PC J
Murdu N. B. Fernando PC J
E.A.G.R. Amarasekara J.

Counsel: S.N. Vijithsingh for the Plaintiff – Appellant – Petitioners
Gamini Hettiarachchi for the 1st and 2nd Defendant – Respondent – Respondents.

Argued On: 27th June 2019

Decided On: 18th December 2020

E. A. G. R. Amarasekara J.

The Plaintiff – Appellant – Petitioners (hereinafter referred to as the plaintiffs or Appellants) instituted this action in the District Court of Negombo inter alia seeking for a declaration of a right of way with regard to an alleged 10 feet wide roadway based on prescriptive user and/or as a way of necessity, and the removal of the obstruction caused to it, and to have free and complete possession to use and enjoy the said 10 feet wide strip of roadway marked as P.Q in a sketch adduced along with the plaint, with a permanent injunction to stop further obstructions. Allegedly, this roadway was situated on the western boundary of the land of the Defendant – Respondent – Respondents (hereinafter referred to as Defendants or Respondents). The said land of the Defendants is described in the second schedule to the plaint which is lot B of plan no.5196 dated 11.09.1936 made by J. C. Fernando, Licensed Surveyor. In terms of the first schedule of the same, the Plaintiffs' land is Lot A of the same Plan. Their stance in the plaint is that this 10 feet wide road they claim leads to the 15 feet wide public road, from their land described in the first schedule to the plaint. According to paragraph 8 of the plaint, the Defendants had obstructed the roadway on 01.03.1993 by fixing fences across the purported roadway on two points marked as P and Q in the aforesaid sketch.

The Defendants had filed their answer dated 26.05.1995 and later, after the returns of commissions taken by both the parties, filed the amended answer dated 11.12.1998. After the filing of the original answer, the Plaintiffs had filed their replication dated 08.12.1995.

The plan No. 5196 made on 11.09.1936 that depicts the lands of the Plaintiffs and the Defendants in the schedules to the plaint as lot A and lot B respectively, had been marked during the trial as P3 (Hereinafter sometimes referred to as P3). It is explicit from the plan marked P3 as well as the descriptions contained in the

schedules, that both the lands are bounded on the west by a path. However, the said path is not situated within the boundaries of the Defendants' land or Plaintiffs' land but outside them and is positioned as the boundary to the Defendants' land as well as to the Plaintiffs' land- vide pages 77 and 92 of the brief.

The plaintiffs' first commission to depict the roadway they claimed was issued and W.S.S. Perera, Licensed Surveyor executed the same and prepared the plan No. 2618 dated 09.09.1994. The said plan and the report had been marked at the trial as "p1" and "p1(a)" respectively (They are also marked as P4 and P4a with the petition and hereinafter may be referred to as P1 and P1a) - vide pages 88 and 86 of the brief. Thereafter, the aforesaid commissioner has prepared the plan no. 3465 and its report by superimposing the plan No. 5196 (P3) dated 11.09.1936 mentioned above. The said plan no. 3465 and report had been marked at the trial as P2 and P2 a (They are also marked as P5 and P5a with the petition and hereinafter may be referred to as P2 and P2a)- vide pages 89 and 90 of the brief. Defendants also, on a commission, had surveyed and prepared the plan no. 3187 dated 17.07.1997 through Prasad Wimalasena, Licensed Surveyor to depict an alternative roadway to the Plaintiffs' land. The said plan and report had been marked as V1 and V1a at the trial (They are also marked as P6 and P6a with the petition and hereinafter may be referred to as V1 and V1a) - vide pages 96 and 97 of the brief.

In the amended answer dated 11.12.1998 filed subsequent to the execution of aforesaid commissions, the Defendants stated *inter alia* that;

a) Since the Defendants are not the sole owners of the land described in the second schedule to the plaint, the Plaintiffs' action cannot be maintained.
b) The Plaintiffs do not have any right to claim a roadway from any part of the divided portion of the land which belongs to the Defendants either by prescriptive user or on necessity.
c) The Plaintiffs have an alternative road access to their land and the Plaintiffs have deliberately suppressed the said fact.
d) As supported by the aforesaid plan no. 2618 and its report marked P1 and P1a, on the purported land strip claimed as a roadway, there are Croton

trees and Pomegranate trees, Coconut and King coconut trees and Bougainvillea bushes etc. of or about 10 - 15 years old.

e) The 2nd Defendant is in possession of the purported Defendants' land for a period of more than 55 years and the road depicted in the plan No. 3465 (P3) was never used by the Plaintiffs or Defendants or any other person.
f) There is a road constructed by the Municipal council, named Fathima Lane which provides access to the house of the Defendants and prior to that, they entered the main road through the land allocated for the playground which had been now acquired by the Municipal Council.
g) They are unaware of the said road depicted in the plan No. 3465(P3) and the Plaintiffs did not claim any right to such a road till the institution of this action.
h) The land described in the plaint does not correspond to the roads surveyed by the Plaintiff for the purposes of this case.
i) A cause of action arose for the Defendants to claim damages since the Plaintiffs unlawfully destroyed the fence of the Defendants' land.

Without prejudice to the above the Defendants in their answer further stated that;

- Although there is a road depicted in plan No. 3465(P3), it is not within the Defendants' land and, even if there was such a road, it had been abandoned by the non-user for a period of more than 55 years.
- If the court allows to use such a road the Defendants' land will be unusable causing an irreparable damage to the Defendants.
- The Plaintiffs after they bought their land and, prior to that, their predecessors too used the road depicted in the plan No. 3187 (V1) mentioned above.

In the District Court as well as in appeal in the Civil Appellate High Court, the Plaintiffs failed in establishing their case and, when leave to appeal application was considered, leave was granted by this Court on the questions of Law stated in paragraph 16(C) and 16(D) of the petition dated 17.01.2014 which are reproduced in verbatim below – vide Journal entry dated 22.05.2014.

"(c) whether the Honorable judges of the Civil Appellate High Court of Gampaha erred in law by failing to consider whether the petitioner is entitled to a servitude right, by way of necessity to use the right of way, when there is no alternative road available?

(d) whether the Honorable judges of the Civil Appellate High Court of Gampaha erred in law by failing to consider whether the petitioner could restrict his right of way for an extent of 8.8 feet, which is less than 10 feet in the circumstances of the case?"

It appears from certain averments in the plaint, and certain parts of evidence led at the trial as well as due to the plan made and tendered in evidence as a superimposition of the path shown in P3 which is situated outside the Defendants' land, and the written submissions filed before this court, that the Plaintiffs on certain occasions attempt to imply that their claim relates to the path shown in P3 which is outside the land that belongs to the Defendants, namely the land in the second schedule to the plaint. In fact, that path in P3 is the western boundary to the Plaintiffs' as well as Defendants' lands which would have existed at the time of the making of that plan in 1936.

Thus, it is necessary to recognize the nature of the action filed before the District Court; especially whether its cause of action was based on a violation of a servitude, namely right of way belonging to the Plaintiffs or some other cause of action.

A servitude can be defined as '*a real right constituted for the exclusive advantage of a definite person or definite piece of land, by means of which single discretionary rights of user in the property of another belongs to the person entitled*' - **Vide Von Vangerow, Pandekten, Volume III, page 338**[1]. *'In other words, it is a right constituted over the property of another, by which the owner is bound to suffer something to be done with respect to his property, or himself to abstain from doing something on or with respect to his property, so that another person may derive some advantage from it.*'[2] Thus, a servitude is a right one has over another's property.

The Plaint does not directly say that the roadway claimed by the Plaintiffs exists over the land that belongs to the Defendants which is in the 2nd schedule to the plaint. The Plaint also does not expressly describe the Plaintiffs' land and defendants' land as the dominant tenement and the servient tenement

[1] The Law of Property Volume Three- 2nd edition by G L Peris at pages 1 and 2
[2] Maasdorp's Institutes of South African Law, Vol. 11, The Law of Things, eighth edition by C. G. Hall at page 125

respectively. As per the body of the plaint, they claim a roadway that is there on the western boundary (බස්නාහිර මායිමේ තිබෙන) of the Defendants' land. Even the issue no.3 raised before the trial uses the term 'along the western boundary' (බස්නාහිර මායිම ඔස්සේ). Thus, the said words used do not definitely state whether the right claimed is over the land of the Defendants or whether it is situated outside the Defendants' land. However, paragraphs 5 and 7 of the plaint use the word "adjoining" (යාබදව) which indicate that the roadway is not within the Plaintiffs' land. Contrarily, on certain occasions, the 3rd and the 2nd Plaintiffs had stated in evidence of using a roadway over the Defendants' land.

However, it is clear from the issues raised by the Plaintiffs that the cause of action relied upon by the Plaintiffs, had nothing to do with any encroachment caused by the Defendants of a roadway adjoining the land of the Defendants. Neither any averment in the Plaint nor any issue raised by the Plaintiffs indicate that the Defendants became entitled to such encroached portion as part of their land by prescription or otherwise, and thereafter, the Plaintiffs acquired a right of way over the Plaintiffs' land that includes the encroached portion. It must be noted that there is neither an averment in the plaint nor an issue raised in relation to the soil rights of the said path shown on the western boundary of P3 or of the purported roadway they claimed and, also no proof was adduced in establishing such soil rights. It should be also noted that no stance was taken by the Plaintiffs to indicate that the path shown in P3 on the western boundary or the purported roadway they claim was a public road that all members of the society including the Plaintiffs had access. Thus, it is clear that the action filed by the Plaintiffs is not based on soil rights or on an alleged right of the Plaintiffs to use a public roadway or on an alleged encroachment caused by the Defendants. As mentioned above, their cause of action was based on obstructions caused to a right of way and they prayed for a declaration of right of way by prescription and on necessity indicating that their claim was based on a servitutal right of way. Further, the plaint was filed against the purported owners of the land described in the 2nd schedule to the Plaint, namely the Defendants, and no one else while describing only the Plaintiffs' land and Defendants' land in its schedule.

Hall and Kellaway on Servitudes 2nd edition at pages 135 and 136 states that;

"the actions recognized by Roman Dutch Law were the actio confessoria and the actio negatoria or contraria, the former being an action to enforce servitude, and the latter to

declare a property free from a servitude. The actio confessoria embraced (a) the removal of all obstructions or replacement of anything destroyed, through which the servitude is rendered useless (b)…(c)…. (Voet, 8.5.3). the actio negatoria could be brought by an owner against anyone claiming the right to exercise servitude over his property for the purpose of ascertaining whether the servitude existed."[3]

Accordingly, this action filed by the Plaintiffs can be identified as an *actio confessoria* since they assert a right of way by prescription as well as of necessity.

Maasdorp observes: "The *action will in any case lie against the owner of the servient tenement and, if there are several joint owners, all will have to be joined……..".* – vide **Institutes of Cape Law (2nd Edition), volume II, page 229.**[4]

Nathan states: "Generally*, this action (the actio confessoria) lies against the owner of the servient tenement; and, if there are two or more owners, against each of them for the whole servitude (in solidum*)". – vide **Common Law of South Africa (2nd edition), Volume I, page 543.**[5]

Chief Justice Basnayake in **Velupillai Vs Subasinghe 58 NLR 385 at 386** delivering the judgment succinctly remarked as follows;

"*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 the servient tenement, nor acquired by any other than by him who owns the adjacent tenement*."

As was correctly observed by the Chief Justice Basnayake, the existence of a dominant and a servient tenement is crucial in establishing a servitutal right.

Yet, the mere existence of a dominant and a servient tenement is not good enough, they must also be defined.

"*Strict compliance with the provisions of Section 41 of the Civil Procedure Code is necessary for the judge to enter a clear and definite judgment declaring the servitude of a right of way and such definiteness is crucially important when the question of execution of the judgment and decree entered arises for consideration. The fiscal would be impeded in the execution of the decree and the judgment if the servient tenement is*

[3] Also quoted in Karunadasa V Subasinghe – Hultsdorp Law Journal 2018 at page 285
[4] The Law of Property Volume Three- 2nd edition by G L Peris at page 156
[5] Ibid at page 156

not described with precision and definiteness as spelt out in section 41 of the Civil Procedure Code." - Vide **David Vs Gunawathie 2000 (2) Sri LR page 352 at page 366**

Hence, to bring a successful *actio confessoria*, the Plaintiff must correctly define the servient tenement and he must file the action against the owner/s of the servient tenement. If it is the position of the Plaintiffs that the right of way they claim is what is shown as a path in P3 which is not within the purported Defendants' land, namely lot B of the same plan, they have failed in naming the owner of the correct servient tenement as a Defendant and/or defining the correct servient tenement since the second schedule to the plaint consists of only lot B of P3 and nothing else, which does not include area belonging to the path shown in P3. Hence, if the Plaintiffs' claim is for a servitude of a right of way that exist outside the land described in the second schedule to the plaint, the plaint has to be considered misconceived.

It is clear from the body of the Plaint and from its prayer as well as from the relevant issue no.3 raised at the trial, that the Plaintiffs claim a right of way by prescriptive user and/or on necessity. Only the purported owners of the land in the second schedule, namely the Defendants, are made the Defendants to the action filed by them and no one else. No other land is described in the plaint other than lot B of P3 which can be considered as servient tenement. Hence, it is filed as an action to get a right of way asserted through courts as a servitude against the Defendants and apparently over their land described in the second schedule to the plaint even if some averments in the plaint had described the road way as one adjoining to it. It can be presumed that the words used in the said issue no. 3 to connote that the roadway exists along the western boundary of the defendants' land was used to indicate a roadway running over the Defendants land by the western boundary. Otherwise the plaint has to be construed as misconceived as explained above. Once issues are raised pleadings recede to the background- vide **Hanaffi V Nallamma (1998) 1Sri L R 73**.

The land in the second schedule to the plaint, namely Lot B of P3, which can be considered as the servient tenement does not include the path on the western boundary in P3. Further, the 3rd and 2nd Plaintiffs while giving evidence had described the roadway they claim as one running over the land of the Defendants- vide pages 120,124 and 176.Thus, this court cannot come to the

conclusion that the learned High Court Judges or the Learned District Judge erred in coming to the conclusion that the Plaintiffs' action was against the Defendants to declare and enforce a servitutal right of way, apparently over the land in the second schedule to the plaint .

The first two issues raised at the trial by the Plaintiffs focused on the ownership of the lands in the first and second schedules of the Plaint, namely whether they belong to the Plaintiffs and the Defendants Respectively. It appears that the ownerships of dominant and servient tenements were put in issue by those issues as it is necessary to prove those facts to claim servitutal right of way. Findings over those two issues are not challenged in this appeal. The 3rd and 4th issues raised by the Plaintiffs put in issue whether the Defendants disturbed the use of 10 feet wide right of way running along the western boundary which is claimed by the Plaintiffs on prescription as well as a way of necessity, on 01.03.1993.

In order for the Plaintiffs to be successful there must be sufficient material before the trial court to establish that plaintiffs have acquired the said right of way by prescription, or it is needed as a way of necessity.

As indicated by the decisions mentioned below in this judgment, to claim a right of way as a servitude by prescription, one has to establish that the adverse user of the right has been used in relation to a particular defined area over the servient tenement.

In **Karunaratne V Gabriel Appuhamy 15 NLR 257 at 259**, Lascelles CJ held that '*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'.*

The action of the Plaintiff was dismissed in **Kandaiah V Seenitamby 17 N L R 29** where the Plaintiff could not prove the user of a definite path but only proved that he had generally walked across the land of the defendant for more than 10 years. De Sampayo A. J. quoted Wendt J in **C.R. Mallakkam 16,800 S.C. Minutes 26.01.1909** to say that '*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*.' This principle was restated in **Fernando V Fernando 31 N L R 126 at 127** where Fisher C J held that "*user of a definite track is the only way in which a right*

of way over the land of another can be acquired by prescription." Our courts articulated a similar view in **Morgappa V Casie Chetty 17 N L R 31, Hendrick V Saranelis (1940) 17 C L W 87, Marasinghe V Samarasinghe 73 N L R 433**. However, in **Thambapillai V Nagamanipillai 52 N L R 225** Gratiaen J followed the same principle and expressed in obiter that a slight deviation of the route that may take place for the convenience and with the concurrence of all the parties may be permissible.

Thus, as per our law, to claim a right of way by prescription it is necessary to prove that a defined area over the servient tenement was used through the prescriptive period.

The learned District Judge among other things rejected the claim of the Plaintiffs for a servitutal right of way based on prescription on the grounds that the Plaintiffs failed in proving the user of 10 feet wide road and the user of a definite strip/ track of land. It is apparent from the judgment given by the learned High Court Judges that they too conceded the above reasons.

As per the sketch tendered with the plaint, the 10 feet wide roadway claimed by the Plaintiffs was shown along the western boundary of the Defendants' land as a straight strip of land. Even the plan no.2618 marked as P1 depicts the purported 10 feet wide roadway shown by the Plaintiffs as a straight strip of land along the western boundary of the Defendants' land placed in between the Defendants' land and the Municipal Playground. Neither P1 nor its report P1a clearly indicate whether this strip of land is within or belongs to the Defendants' land described in the second schedule to the plaint which is also the lot B in plan marked as P3. As elaborated above, if this strip of land is situated outside the Defendants' land, the Plaint has to be considered as misconceived in law. Even if it is presumed that this strip of land was shown within the purported servient tenement described in the second schedule to the plaint, it is depicted as a straight strip of land which can be identified with definite boundaries as per plan P1. However, the report marked P1a made by the witness for the Plaintiffs, W. S. S. Perera, Licensed Surveyor, clearly states that there is no sign to indicate that this strip had been used as a road. Further, the said report reveals that there are five Coconut and King Coconut trees of around 10 to 15 years old within this strip of land. The aforesaid witness in his evidence had stated that these trees are situated in an irregular

manner within the said strip but not in a line. This evidence shows that the purported roadway claimed by the Plaintiffs was at least not in use during the last 10 to 15 years prior to the making of the said plan marked P1 in the manner shown by the Plaintiffs. Further, it indicates that the obstructions caused on 01.03.1993 by the Defendants as alleged in the plaint may not be the correct representation of facts since those trees would have been planted or allowed to be grown many years prior to that. The aforesaid surveyor in his evidence had stated, due to the trees mentioned above, it cannot be used as a road and a cart cannot be taken using that. However, the 3rd Plaintiff and the 2nd Plaintiff in their evidence had attempted to indicate that a cart road was used over the Defendants' land to bring cadjan leaves to thatch a house in their land evading the trees. This may be an afterthought due to the irreconcilability caused by the existing trees on the strip of land shown by them with their stance of user of 10 feet wide roadway till the alleged obstruction. On the other hand, these two plaintiffs were not consistent in this regard since as per the 3rd Plaintiff, last occasion a cart was so taken with Cadjan leaves was in 1979 or 1980 and thereafter they were taken through the playground while according to the 2nd plaintiff last occasion was in 1992. Other than the issue of reliability, this clearly indicates that even if it is true that they have not shown the definite track or the path they purportedly used as a cart road through plan marked P1 since it cannot be a straight strip of land as per the evidence given by the aforesaid Plaintiffs. Nevertheless, taking a cart with Cadjan leaves to thatch a house that may happen once within 12 to 18 months over the neighbour's land as per the evidence given cannot be considered as using permanent cart road adverse to the interests of the owner of the land. However, contrary to the position of using a cart road over the Defendants' land which is, as per the plaint, described in the second schedule to the plaint as well as lot B of plan marked as P3, to show the roadway, the Plaintiffs have taken another commission to superimpose plan marked P3 which indicates a path outside the aforesaid Defendants' land. It appears, as per the evidence led before the District Court, that the intention of producing this superimposed plan no 3465, marked as P2 at the trial, was to indicate how the path shown in P3 would position on the ground. The tendering of this superimposed plan does not reconcile with claiming a servitude over the Defendants' land because the roadway or path depicted in P3 is situated outside the Defendants' land. Further, it is contrary to the claim that a roadway was used

evading trees of the Defendants' land since what is shown in P3 is a straight path which lies outside the Defendants' land.

Even though the surveyor W.S.S. Perera, almost at the tail end of his evidence-in-chief, had stated that even at present there is a permanent boundary between the roadway shown in P3 and the land-(vide page 109 of the brief) indicating that the roadway in P3 even now is situated outside the defendants' land, under cross examination he had stated that as per the superimposition, now the roadway shown in lot B of P3 is within the Defendants' land- vide page 112 of the brief. As observed above, it must be said that, as per P3, there is no roadway within lot B but only as the boundary of lot B. Even the second schedule to the plaint indicates that roadway is the boundary and not a part of lot B. The aforesaid surveyor in his evidence has stated that he received a commission to superimpose P3 with P1 and his superimposition is satisfactory- vide pages 111 and 108 of the brief. However, in his evidence he did not give reasons to say as to why he found it satisfactory. He had not explained how many identified points in P3 plan tallied with the other plan. As per the evidence given by the 3rd Plaintiff, aforesaid surveyor only surveyed the road on the first occasion and after the second commission, surveyed plaintiffs' land but not the defendants' land – vide pages 142,143 and 144of the brief. Now it is important to observe what the surveyor has stated in his superimposition plan no. 3465 and its report marked as P2 and P2a respectively. Neither the notes on plan marked P2 nor the report marked P2a states that the surveyor superimposed P3 with the Plan no.2618 (P1) as per the commission issued. The notes on the P2 plan which describe the plan P2 states that he surveyed the Siyabalagahawatte claimed by the Defendants and superimposed it with lot A of Plan no. 5196 (P3). Ironically, the said note speaks of a superimposition of the Defendants' land with the Plaintiffs' land since lot A in P3 is the Plaintiffs' land. However, the report marked P2a states that he surveyed the plaintiffs' land and superimposed it with the corresponding lot A in P3. Nonetheless, the facts mentioned above establish that the notes on the superimposition plan marked P2 is contradictory to the contents of its report and, the superimposition plan and report does not show that it was prepared in compliance with the commission issued. As such, it is not proper to rely on the mere statement of the surveyor who made it, saying that it was a satisfactory superimposition. In the said report marked P2a the surveyor had stated the

roadway (Path) shown in P3 was 6 feet wide and in his evidence, he had stated that now it is within the Defendants' land and it is 6 feet 3 inches wide implying that the defendants have encroached it.

As explained above, what the plaintiffs claimed against the defendants was a right of way on prescription as well as on necessity. As said before, there is no cause of action relied on an encroachment of a soil right. As observed above, if the Plaintiffs' implied position is that the Defendants encroached the path existed outside lot B of P3 and/or the Defendants acquired title to it by way of prescription or otherwise and the servient tenement is the land that consists of Lot B of P3 as well as the portion of the path so encroached, then those facts should have been so pleaded and the servient tenement should have been described in the plaint accordingly not limiting it to Lot B of P3. On the other hand, such a position may be inimical to their claim on right of way since it also implies that the Defendants have prescribed against their rights.

The 3rd and the 2nd Plaintiffs while giving evidence had stated that the roadway they claimed had been referred to in their deed and plan -vide pages 132 and 198 of the brief. The deed no.21172 executed in 1957 marked as P4 is a transfer deed which convey only lot A of P3 to the Plaintiffs' predecessor in title. It has not given any right of way over the Defendants land or any other land. It neither state that the Plaintiffs or their predecessors in title have soil rights or any other right to the path mentioned therein as the western boundary to lot A and B of P3 nor that it is the road access reserved for the said lot A. The path shown in P3 is shown outside the Defendants' land and not within it. The said plan made in 1936 only indicates that there was a path along the boundary of their land and the plaintiffs' land when it was made. It may even be a path used by someone else to some other land since, as per P3, it does not seem to end at the Plaintiffs' land. However, the Plan marked V 2 and V2a indicates that there was no such path along the western boundary of the Plaintiffs' land when it was made in 1987. As per the said Plan, the western boundary is the Municipal Play Ground which belongs to the State. Even W J M G Dias, Licensed Surveyor had stated in evidence that he did not observe any sign indicating a roadway on the western boundary when he made that plan. Thus, it appears that the roadway claimed by the Plaintiffs were not in existence by 1987. The Grama Niladari summoned as a witness by the Defendants had revealed that people went across the Municipal Ground prior to 1977 and the

officer of the municipal council sub office who was summoned to give evidence for the Defendants had further revealed that due to the problems faced by people who used a road access over the playground, an alternative roadway, namely Fathima Cross Road was made during the decade that started from 1970. Perhaps, this may be the reason for disappearance of the path shown in P3 in the plan made in 1987. The Defendants had marked plan No.3187 made by Prasad Wimalasena, Licensed Surveyor to show that there is an alternative access from Fathima Cross Road to the Plaintiffs land.

To claim a 10 feet wide right of way by prescriptive user, the Plaintiffs should have proved the adverse user for 10 years of a roadway over a definite track or strip of land which is within the servient tenement belonging to the Defendants but the contents of the plaint as well as the evidence led by the Plaintiffs demonstrate the indecisiveness of the Plaintiffs with regard to;

- whether the claim made by them relates to a straight track of 10 feet wide roadway over the servient tenement (lot B in P3) which is described in the 2nd schedule to the plaint.
- whether the claim made by them relates to 10 feet wide roadway that runs through the servient tenement (lot B in P3) described in the 2nd schedule to the plaint evading trees, which cannot be a straight track or strip of land and is also not shown in any of the plans submitted.
- Whether the claim by them relates to the path shown in P3 which is not within the servient tenement (lot B in P3) described in the second schedule to the Plaint.

The confusion with regard to their own cause of action arisen due to the aforesaid indecisiveness is further visible by citing **Saparamadu V Melder (2004) 3 Sri L R 148** and stating in their written submissions, that to stop a person travelling through a path or a road, the person who blocks the road must have soil rights. **Saparamadu V Melder** was an action filed to declare a property free from servitude, in other words, it was an *actio negatoria*. When the Plaintiffs filed this action against the Defendants for a declaration of a right of way by prescription and on necessity describing the Plaintiffs' and Defendants' lands in the schedules to the Plaint, the action as explained above is *actio confessoria*, and if their cause of action was with regard to the encroachment of the path shown in P3 or

obstructing of the said path, the disputed land or the path has to be described in the schedule to the plaint as per the Section 41 of the plaint and described the cause of action accordingly. Further, as elaborated above, they should have named the necessary parties and/or correct servient tenement as the case may be.

In the above circumstances this court cannot find fault with learned District Judge or the High Court Judges for their conclusions that the plaintiff failed in proving a right of way gained by prescription since the plaintiffs failed in proving a prescriptive user of a definite track or strip of land.

Nevertheless, the Plaintiffs now in this court by way of an issue of law attempt to raise whether the Learned High court Judges could have considered the Plaintiffs' entitlement to an 8.8-feet wide right of way which is lesser than the width of 10 feet. This would have been raised owing to the fact that the learned High Court Judges have observed that there is a gap of 8.8 feet from the eaves of the building in V2 plan to the boundary of the roadway.

Firstly, this observation made by the Learned High Court judges is not correct since there is no roadway on the western boundary as per the said plan made in 1987. As per the evidence given by the surveyor who made that plan, the said gap is the width up to the wire fence from the eaves of the house.

Secondly, the surveyor who prepared P1 plan for the Plaintiffs had testified stating that some of the trees that he found within the 10 feet wide strip shown as the roadway by the Plaintiffs were in the middle of the said strip and some were situated only 4 feet away from the western boundary. Thus, there cannot be an 8.8 strip of land used as a road way along the western boundary and within the lot B of P3 which is the land in the second schedule to the plaint.

Thirdly, the Plaintiffs themselves superimposed P3 and attempted to show through the evidence of the surveyor who did the superimposition, that, on the western boundary, there was a 6 feet or 6.3 feet wide strip which is the roadway found in P3. As said before, this superimposition cannot be considered as reliable but it was what the Plaintiffs tried to convince the original court through marking the said superimposition plan. If there is a 6.3 feet strip of land that originally was the path shown in P3, the issues raised at the trial by the Plaintiffs do not focus on a cause of action based on encroachment to meet such a stance. On the other

hand, this purported encroached portion does not form part of the second schedule to the plaint (Lot B of P3) which has to be considered as the servient tenement for the purposes of this case. Furthermore, a superimposition can only prove comparative state of the boundaries of the present survey with the old one. The prescriptive user has to be proved by other evidence. The indecisiveness of the plaintiffs' position with regard to the track or strip of land they used over the Defendants' land which is described as Lot B of P3 in the plaint shall make the plaintiffs fail in their claim on prescription. There was no reliable evidence before the original court in relation to a definite track or strip of land of either 10 feet wide or 8.8 feet wide or 6.3 feet wide or 6 feet wide over lot B of P3 which is the land described in the second schedule to the Plaint.

The other question of law is based on the claim of the Plaintiffs to use a right of way as a way of necessity. The Plaintiffs appears to argue that the learned High Court Judges erred in not considering their entitlement to such servitutal right. What the learned High Court Judges have stated in their judgment was that, as per plan marked V1, the Plaintiffs had prayed for a right of way to take vehicles instead of the foot path and the learned District Judge had lawfully rejected their claim since the Plaintiffs had not proved their necessity of a roadway that can take vehicles to their land - vide the last paragraph of the judgment of the High Court dated 12.12.2013. It must be observed that V1 was not a plan submitted by the Plaintiffs. It was the plan tendered by the Defendants to show the existence of an alternative roadway. Whether there is an alternative road is a matter of fact and the Learned District Judge who heard the evidence of the surveyor who made that plan had come to the conclusion that the Plaintiffs could use the said alternative roadway- vide answer to issue no 10 of the District Court Judgment. Neither the High Court nor this Court sitting in appeal is better equipped to decide on facts and nothing is there to decide that it was a perverse finding. However, towards the Plaintiffs' land the width of the said access is only 4 feet. The Plaintiffs claim is not related to the widening of the said access shown in V1 but a 10-feet right of way over the Defendants' land. The learned District Judge had observed in his Judgment that the Plaintiffs were not using any private vehicles and even as per the nature of their livelihood it is not apparent that they have any need to use a private vehicle. No evidence seems to have led to show that a fair need to take a vehicle regularly to the Plaintiffs' land had arisen. The Plaintiffs had

only testified of a cart bringing Cadjan leaves to thatch a hut that may happen once in 12 months or 18 months. As mentioned above, one Plaintiff had testified that this was done lastly in 1979/1980 over the roadway they claim while the other had contradictorily stated it was in 1992 posing a question of reliability on this story. Burden is on the Plaintiffs to prove the necessity of a permanent cart road through evidence placed before Court. I cannot see such reliable evidence had been led. In **Fernando V de Silva 30 N L R 56**, it was held that the owner of a land which had access to the High Road by a path, could not claim a cartway unless the actual necessity of the case demanded it. In **Amarasuriya V Perera 45 N L R 348** at **350** Wijewardene J held as follows;

"*I think that a judge would be taking an unreal view of the conditions obtaining in this country if he held that owner of a compound of half an acre requires a cartway for transporting his coconuts. The granting of the cartway claimed will impose a very heavy burden on the defendant whose land appears to be not even an acre in extent*."

Thus, it appears that when a foot path is available the Plaintiffs can claim a cart way on necessity only when there are special circumstances which calls for the exercise of the court's discretion in Plaintiffs' favour. No such special circumstances seem to have been adduced in evidence before the Learned District Judge. As stated in **Chandrasiri V Wickramasinghe 70 N L R 15**, the onus lies on the person/s who claims the right of way of necessity to show that it is necessary. In the present action, the Plaintiffs failed in proving the need of a cart road and the Defendants have proved to the satisfaction of the Court the existence of an alternative foot path.

In the aforementioned circumstances this court cannot state that the learned District Judge or the Learned High Court Judges were in error when they came to the conclusion that the Plaintiffs had not proved the necessity of a road that can take vehicles to the Plaintiffs' land.

Further, the learned District Judge had observed that even if there was a cart road over the Defendants' land, the Plaintiffs had abandoned it since the Plaintiffs had not taken any step to stop the building made by the Defendants on the purported roadway claimed by the Plaintiffs. As per the evidence of the 3rd Plaintiff, this building was completed in 1970s. The plaint in this case was filed only in 1993 December. In this regard learned District Judge had cited **Paramount Investment**

Limited V Cader (1986) 2 S L R 309 to indicate that tacit abandonment takes place where the servient owner is permitted to do something that necessarily obstructs or make inoperative the exercise of servitutal right. However, in the case at hand, purported servitude claimed by the plaintiffs is not one created by a deed, as such the proposition of law stated in the said case that, under our law, a servitude of right of way created by a notarial grant cannot be lost by non-user has no relevance. Furthermore, the Plaintiffs marked P1 plan to show the purported roadway they claim but the trees grown on the said roadway which are 10 to 15 years old as per the Plaintiffs' own witness itself is indicative of an abandonment that had taken place much before the purported obstruction alleged in the plaint. Anyhow, according to Roman Dutch Law, in order for the right to be abandoned, non-user or the abandonment of the right should be for a third of hundred years, i.e. 33 and 1/3 years- vide **Dayawathie V Dias and others, The Bar Association Law Journal 2013 Vol. XX page 20**. As per P3, lot A and lot B appears to be portions of one land named Siyambalagahawatte. There is no evidence to indicate that the path on the western boundary was part of the main land reserved as a road access to these two lots. No roadway is shown over the Lot B as an access road to Lot A. The Plaintiffs deed, as said before, does not indicate any right of way was reserved for Lot A, neither over Lot B nor over the said path on the west to the land. No evidence had been led to show when the original owner transferred Lot B to the predecessors of the Defendants, he reserved a right of way over Lot B for Lot A. Thus, if there was any right of way over Lot B, the abandonment would have taken place when those Lots were given to the predecessors of the parties. If one abandons his right of way, he cannot be allowed to claim it as a way of necessity again. However, even to consider abandonment, first there must be proof for that, at a given time in the past, there was a servitude of right of way over the Defendants' land which is lot B of P3. As said before, the path shown in P3 was not over the said lot B as such there was no proof to indicate that there was servitude of right of way over aforesaid lot B which has to be considered as the servient tenement.

Due to the aforementioned circumstances, this court cannot find fault with the Learned High Court judges' decision that affirmed the judgment of the Learned District Judge which dismissed the Plaintiffs' action.

Hence, this court answers the issues of laws mentioned above in the negative.

Accordingly, the appeal is dismissed with costs.

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Judge of the Supreme Court.

Vijith K Malalgoda P C, J.

I agree.

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Judge of the Supreme Court.

Murdu N. B. Fernando P C, J.

I agree.

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Judge of the Supreme Court.