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

In the matter of an application for Special Leave to Appeal in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Kerewgoda Dona Shiromi,
No. 56, St. Sebastian Mawatha,
Kandana.

Plaintiff

SC/ Appeal No. 88/2017
SC/ HCCA/ LA No. 196/2015
WP/ HCCA/ GPH
No. 145/2008 (F)
DC Negombo Case No. 5586/L

Vs,

1. Hanwellage Don Francis,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

2. Hettige Don Newton Donatus,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

Defendants

1. Hanwellage Don Francis,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

2. Hettige Don Newton Donatus,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

Defendant-Appellants

Vs,

Kerewgoda Dona Shiromi,
No. 56, St. Sebastian Mawatha,
Kandana.

Plaintiff-Respondent

-And Now Between-

Kerewgoda Dona Shiromi,
No. 56, St. Sebastian Mawatha,
Kandana.

Plaintiff-Respondent-Appellant

Vs,

1. Hanwellage Don Francis,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

2. Hettige Don Newton Donatus,
   No. 1/56,
   St. Sebastian Mawatha,
   Kandana.

Defendant-Appellant-Respondents

Before: **Justice S. Thurairaja, PC**
Justice A.L. Shiran Gooneratne
Justice Mahinda Samayawardhena

Counsel: Sanjeewa Dasanayake with Nilum Devapura **for the Plaintiff-Respondent-Appellant.**

Dr. Sunil Cooray with Sudarshani Cooray **for the Defendant-Appellant-Respondents.**

Argued on: 27/10/2021

Decided on: **15/09/2022**

A.L. Shiran Gooneratne J.

The Plaintiff-Respondent-Appellant (hereinafter sometimes referred to as "the Plaintiff"), by Plaint dated 22/01/1999, filed action in the District Court of Negombo, Case No. 5586/L, seeking *inter alia*:

a) a declaration of title to the land morefully described in the first schedule to the Plaint.
b) that the said land is held and possessed by the Plaintiff without any encumbrance of a servitude of right of way attached.
c) damages in a sum of Rs. 50,000/- together with continuing damages at the rate of Rs. 5,000/- per month.

The Plaintiff's claim in brief is that she is the direct and only successor in title to the land in the first schedule to the Plaint which was held and possessed by her on reaching the age of 18 years in October 1990. The Defendant-Appellant-Respondent's (hereinafter sometimes referred to as the "defendants") were using a footpath across the said land, having obtained leave and license from the Plaintiff. Later in 1998 the Defendants had unlawfully demolished a toilet constructed by the Plaintiff, widened the foot path to an 8-foot-wide roadway and had forcibly tried to take a vehicle on the disputed road claiming the existence of a 10 feet wide roadway. The Plaintiffs ownership to the land was also disputed.

The Defendants in their answer dated 24/08/2001, *inter alia*, sought;

A declaration that the Defendants are entitled to a servitude of right of way and/ or a right of necessity of a 10 feet wide roadway over the Plaintiff's land to access the Defendants land morefully described in the second schedule to the Plaint.

In their answer, the Defendants pleaded, *inter alia*, that they have been using the 10 feet wide roadway over the Plaintiff's land for more than 10 years and therefore, they have prescribed to the said roadway and also contended the use of the said road by way of necessity.

After the conclusion of the trial, the learned District Judge, by Judgment dated 28/11/2008, granted relief to the Plaintiff as prayed for in the said Plaint. In the said Judgment the learned District Judge dismissed the claim seeking a right of way over the subject matter and also on the entitlement claimed by way of necessity. The learned District Judge granted the said relief on the basis that the case was filed in 1998, the Plaintiff has attained the age of maturity in the year 1990 and therefore, there is no continuous and uninterrupted possession of a minimum of 10 years required from that date, to claim a servitude of right of way by the Defendants.

Aggrieved by the said Judgment, the Defendants appealed to the Gampaha High Court of Civil Appeal seeking, *inter alia*, to set aside the said Judgment dated 28/11/2008. The learned Judges of the High Court of Civil Appeal by their Judgment dated 07/05/2015 held, *inter alia*, that the Plaintiff has failed to prove that she is the sole owner of the land in question. The Appeal Court while acknowledging that the Defendant's entitlement to access their land through the Plaintiff's land was not granted by their predecessors in title, held that due to necessity, the footpath which was in existence since 1976 had gradually widened to a 10 feet wide road which the Defendants have lawfully possessed and prescribed. The Plaintiffs Appeal to this Court arises out of the said Judgment.

This Court by its Order dated 30/03/2017, granted Leave to Appeal on the questions of law stated in paragraph 17 (a), (b) and (d) and a consequential question of law which

was raised on the ground of necessity, on that date. However, when this case was taken up for argument on 27/10/2021, the said consequential issue raised by the Defendants was abandoned and the question of law pleaded in paragraph 17 (d) was amended to read as stated below. Parties consented to the said questions of law, which are reiterated in their written submissions tendered after the hearing -

1. that their Lordships erred in law and in fact in coming to the conclusion that the Defendant-Appellant-Respondents have acquired a prescriptive title to the right of way in question.
2. that their Lordships erred in law in not finding out the date of commencement of the prescriptive user of the said right of way by the Defendant-Appellant-Respondents for the purpose of calculating the prescriptive user.
3. whether the Plaintiff-Respondent-Appellant is qualified under Section 13 of the Prescriptive Ordinance when calculating the prescriptive period.

In deciding whether the Defendants had acquired a right of way by prescriptive possession, the Civil Appeals High Court observed that the disputed roadway was used as a footpath in 1976 and over time, owing to necessity, has expanded to a 10 feet wide roadway. The Court also observed that the Plaintiff reached the age of 18 in 1990, however, was of the view that the Defendants were using the disputed roadway adverse to the interest of the Plaintiff and also her predecessors in title long before 1990.

The Plaintiff states that she observed a footpath across her land prior to building her house in 1991. The position of the Plaintiff is that the said footpath was used by the Defendants with her permission. Documents marked ‘P2’ and ‘P6’ were tendered in the proceedings instituted in terms of Section 66 of the Primary Court Procedure Act in the Magistrates Court of Wattala in April 1998. Therein, the Defendants have sought

permission of the Plaintiff to use the said right of way and also agreed to purchase the subject matter. In Plan No. 3645 dated 05/04/1976, marked ‘P5’, there is reference to a foot path towards the southern boundary of the Plaintiff’s land. The predecessor in title of the Defendant’s land in his affidavit tendered to the Magistrates Court, marked ‘P2a’, also states that he used the said road to reach the main road.

The Plaintiff in her evidence in the trial court stated that in October 1997, she cut down a coconut tree towards the southern boundary which was within the disputed right of way. The tree trunk had been trimmed down to the ground level by the Defendants prior to the institution of the case in the Magistrates Court. The Plaintiff answering a question posed by the District Court stated that the roadway was expanded by the Defendants a few days prior to the institution of the Magistrates Court action in 1998.

At the instance of the Plaintiff, the Court issued a commission on W.S. Senaka Perera, Licensed Surveyor to survey the disputed land and accordingly, Plan No. 4403 dated 27/04/2000 was tendered by the Plaintiff marked ‘P1’, and the surveyor report marked ‘P1a’. The disputed roadway across the Plaintiff’s land is marked as Lot 2 in the said plan. According to the evidence given by the surveyor it was revealed that in October 1997, a coconut tree within the said roadway had been cut down by the Plaintiff. The root of the said tree is depicted in the said plan. When the surveyor had inquired from the Defendants regarding the position taken by the Plaintiff of cutting down the coconut tree, the Defendants had remained silent. According to the surveyor the northern boundary had not been clearly demarcated and the 10 feet wide roadway had been identified from the parapet wall towards the southern boundary. And as stated below the Defendants admitted that there was no indication on the land that a 10 feet wide roadway was used prior to the demarcation by the surveyor.

ප්‍ර: අඩි 10ක පාරක් පාවිච්චි කළා කියා කුඤ්ඤු ගැසුවාට අමතරව, පාරක් පාවිච්චි කළා කියා පෙන්නුම් කරන්න ලකුණු පේනවාද?

උ: නැහැ.

The Defendant relies on the existence of a roadway in Plan No. 4896 dated 02/05/2001 made by W.D. Nandana Seneviratne, Licensed Surveyor, tendered to Court marked 'V1' and the surveyor report marked 'V1a'. The said report states that a 3 feet wide roadway is depicted in Lot 3 in Plan No. 8814 dated 21/02/1986, made by Licensed surveyor, M.D.J.V. Perera. According to the Surveyor report marked 'V1a', the roadway depicted as Lot 3 was the earlier roadway and as at the date of Plan No. 4896, the disputed roadway towards the southern boundary is depicted in Lot 3 and 4 as shown to the surveyor by the Defendants. The present road across the Plaintiff's land depicted in Lots 3 and 4 together, is an open space except for the boundary wall on the southern boundary. In his evidence before the trial court the said Surveyor could not specifically state whether Lot 3 and Lot 4 consisted of a 10 feet wide roadway.

The 2nd Defendant in his evidence before the District Court stated that long before he purchased the land in 1980, he was personally aware of the existence of a roadway across the land belonging to the Plaintiff. He further stated that having purchased the said land in 1980, he transported raw material for construction of their house through the disputed roadway. In their written submissions, the Defendants state that they had been using a three-wheeler and a van by that time meaning before 1998. However, under cross examination before the trial court it was very specifically stated that prior to the institution of the Magistrates Court case in 1998, a vehicle was not taken on the disputed roadway and the Defendants had no right to do so, as envisaged in the evidence cited below.

ප්‍ර: ආරවුලක් ඇති වුනා නම්, ප්‍රවේශ මාර්ගය පිළිබඳව ඒ ඇති වුනේ මහත්තයා වාහනය අරගෙන යන්න එන්න පටන් ගත්තාම?

උ: එහෙමයි.

ප්‍ර: ඒ මත තමයි මහේස්ත්‍රාත් අධිකරණයේ 66 වෙනි වගන්තිය යටතේ නඩු පැවරුවේ?

උ: එතකොට ඒ පාරේ වාහන ගෙන යාමට කිසිම අයිතියක් තිබුණේ නැහැ?

උ: එහෙමයි.

In ***Priyangika Perera vs. Gunasiri Perera (SC Appeal No. 59/2012),*** Prasanna Jayawardena PC, J. observed that;

"a plaintiff who claims a right of way by prescription must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in section 3, the Plaintiff has to prove that: he has had undisturbed and uninterrupted possession and the use of the right of way for a minimum of ten years and that such possession and use 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".

It is in evidence that the dispute arose when the Defendants tried to widen the road to take a vehicle contrary to and defeating the right given to them to use a foot path. Further, as disclosed in evidence, it is unlikely that the Defendants used a vehicle prior to cutting down the coconut tree, as it stood in the disputed roadway. In the complaint made to the Police dated 23/04/1998, marked 'P2a', the Plaintiff admits to the existence of a 3 feet wide roadway since coming to reside in the land in 1991. The first Defendant's wife in her police complaint dated 18/04/1998, in proceedings before the Magistrates Court states that, the Plaintiff had promised to sell the disputed roadway

for lawful consideration. The Plaintiff in her pleadings before the trial court has also clearly stated that the Defendant sought to use a footpath across her land and continued to use the said foot path with her permission.

In ***De Soysa vs. Fernando 58 NLR 501***, it was held that,

"When a user of immovable property commences with leave and license the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises.

As observed earlier, the existence of a roadway which widened over time at least to 8 to 10 feet is questionable due to the coconut tree which stood towards the southern boundary within the disputed right of way until 1997, the existence of which is admitted by the Defendants. At the time the survey was carried out, the coconut tree root stood three feet three inches from the southern boundary. Therefore, it is unlikely that the Defendants had used a 10 feet wide road prior to 1997. Accordingly, the evidence before Court does not establish the use of a 10 feet wide road across the Plaintiff's land as claimed prior to 1997. However, when the evidence is examined, the existence of a foot path across the Plaintiff's land cannot be denied.

Therefore, in the facts and circumstances of this case, it is right to inquire as to whether the Defendants prescribed to a right of way over the Plaintiff's land. Accordingly, it is important to establish the date of commencement of the right of the prescriptive user.

Section 13 of the Prescription Ordinance states as follows;

"Provided nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say-

(a) Infancy,

(b) Idiocy,

(c) Unsoundness of mind,

(d) Lunacy, or

(e) Absence beyond the seas

Then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by section 3 of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen; but no further time shall be allowed in respect of the disabilities of any other person;

Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwithstanding the disability of any adverse claimant."

The Plaintiff in her evidence before the trial court has admitted that the Defendant was resident in their land since 1980, the year the Defendants claim to have prescribed to the disputed right of way and further states that she was resident in the premises until

her father's death in May 1986. When she turned 14 years of age and since then, she had not lived in the said premises. After her marriage in 1991, the Plaintiff returned to her property, at the age of 19. The instant case was instituted in 1999. According to the birth certificate of the Plaintiff marked 'P3', the Plaintiff was born on 31/10/1972.

On the available evidence, the learned District Judge came to a definite finding that the Plaintiff born in 31/10/1972, reached the age of maturity on 31/10/1990, and since the instant action was instituted on 22/01/1999, the Defendant could not have prescribed to the disputed right of way. On this issue the Judges of the Civil Appeal High Court were of the view that eventhough the Plaintiff came into the land at the completion of 18 years on 31/10/1990, the Defendants were using the disputed roadway long before 1990 and therefore has prescribed to a right of way not only against the Plaintiff but also against her predecessors in title. When deciding on the prescriptive title to the right of way in question, the learned Judges did not make any reference to Section 13 of the Prescription Ordinance but made a broad statement that such was decided on evidence led in the case. However, it is observed that the Civil Appeal High Court failed to examine the relevant evidence led before the trial court before coming to the said finding.

In this Court the Defendants takes up the position that the Plaintiff born in 1972 is claiming rights to the land through her father and not claiming independent of her father and therefore, prescription will run since her claim is through her father. The Defendant is not disputing the fact that the Plaintiff reached the age of maturity in 1990 and the applicability of Section 3 of the Prescription Ordinance in such an instance. Gratiaen J. in ***Chelliah vs. Wijenathan 54 NLR 337***, held that;

"*Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights".* Same was cited in ***Ganemulla Gamage Suraji vs. P.K. Sunil Samarasekara, SC Appeal 33/2010 decided on 05/07/2018.***

The Defendant's position is that,

Firstly: at the time of demise of the Plaintiff's father in 1986, the roadway which was a footpath had been widened to at least to a 8 to 10 feet roadway and by now has been prescribed by the Defendants.

Secondly: since the Plaintiff inherited a land with a right of way prescribed by the Defendants, the said time would run against the Plaintiff through her father.

It is in evidence that the Defendant with the permission of the Plaintiff had used a footpath over the Plaintiff's land. It is also in evidence that prior to 1998, the Defendants negotiated with the Plaintiff to acquire title to the said property on valuable consideration. When cross examined on document marked 'P5', the Plaintiff admitted that there had been a footpath across the Plaintiff's land since 1976. However, there is no cogent evidence to establish that the said footpath was widened over time to an 8 to10 foot roadway or that the Defendant's predecessors in title used the disputed right over the said land, since the demise of the Plaintiff's father in 1986.

In **D.R. Kiriamma vs. J.A. Podibanda 2005 (BLR) 9,** Udalagama, J. made reference to the following passage in Walter Perera's "Laws of Ceylon", 2nd Edn. 396, which reads as follows,

"A*s regards to the mode of proof of prescriptive possession, mere general statements of witnesses that the Plaintiff ---- have possessed the land for a number of years exceeding the prescriptive period are not evidence of uninterrupted and adverse possession to support a title of prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided by court".*

The Defendants placed reliance on Plan No. 3645 dated 05/04/1976, marked 'P5', in support of their contention of the existence of a footpath as far back as 1976. In the absence of legal title, it is an absolute necessity that witnesses speak in proof of possession, adverse and independent against that of the claimant, at least ten years prior to bringing of such action. The mere use of a footpath for over 10 years does not give the Defendant a prescriptive title as set out in Section 3 of the Prescription Ordinance. It was observed that,

*"Person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. The proof of adverse possession is a condition precedent to the claim for prescriptive rights", [**Seeman vs. David (2000) 3 SLR 23].***

In **Naguda Marikar vs. Mohammadu 7 NLR 91,** the Judicial Committee of the Privy Council held that;

"where a person enters on another's land as his agent he cannot claim a title by prescription, unless he can show that he has changed his character from agent to owner, and that he had possession as such owner for a period of ten years".

Justice Grenier A.J. cited with approval the above finding in **Lebbe Marikar vs. Sainu 10 NLR 339** and opined; *"I must confess that my sympathies are with the plaintiff, but the law is clearly against him."*

This principle was followed in several other judgments delivered by this Court, *Orloff vs. Grebe 10 NLR 183, Lebbe Marikar vs. Sainu 10 NLR 339, Thilakaratne vs. Bastian 21 NLR 12, Navarathne vs. Jayathunge 44 NLR 517, De Soysa vs. Fonseka 58 NLR 501, Corenelis vs. Fernando 65 NLR 93, De Silva vs. Commissioner General of Inland*

Revenue 80 NLR 292 and more recently in *Ganemulla Gamage Suraji vs. P.K. Sunil Samarasekara,* SC Appeal 33/2010 (SC minutes dated 05/07/2018).

Even though the Civil Appeal High Court came to a finding that the Defendants used the disputed roadway since 1976, a change in character of the Defendants using a footpath from that of not being adverse to that of being adverse, with an intent to possess the land in detriment to the interest of the true owner's rights, has not been established in evidence. Therefore, in the absence of evidence of an overt act, adverse and independent to that of the Plaintiff's predecessor in title, the Defendants cannot claim a right by prescription over the said land, prior to 1986.

Accordingly, the 1st and 2nd questions of law are answered in the affirmative.

In the absence of a right of way conveyed in Deed No. 16358 dated 08/11/1980 (V6), the Defendants did not call their predecessors in title to establish that their predecessors had used the disputed right of way adversely to the interest of the land owner. Therefore, it can be safely concluded that when the Plaintiff became an heir to her father's land in 1986, the Plaintiff did not inherit a land with a right of way prescribed to by the Defendants or their predecessors in title, thus defeating the claim of the Defendant's in justifying possession by prescription. Therefore, finding out whether the plaintiff was qualified under Section 13 of the Ordinance for the purpose of calculating the prescriptive period would be redundant, in the facts and circumstances of this case.

Accordingly, answering the 3rd (as amended), question of law can be dispensed with.

In the circumstances issue No. 5, 6, 7a, 7b and 8 raised in the District Court should be answered in the affirmative.

Therefore, in all the above circumstances, the Judgment of the Civil Appeal High Court dated 07/05/2015 is set aside and the appeal is allowed.

Subject to the above variation, the Judgment dated 28/11/2008, made by the learned District Judge is affirmed.

Appeal allowed. No costs ordered.

Judge of the Supreme Court

S. Thurairaja, PC, J.

I agree

Judge of the Supreme Court

Mahinda Samayawardhena J.

I agree

Judge of the Supreme Court