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

SC/APL/50/2015
SC/HCCA/LA 473/2014
WP/HCCA/AV No. 686/2008
D.C. Pugoda No. 300/L

Dassanayaka Arachchige Jayasekera

**PLAINTIFF**

Vs.

1. Alawathura Raalalage Dhanusekera
2. Hapan Thanthrige Pabilis

**DEFENDENTS**

Alawathura Raalalage Dhanusekera

**1ST DEFENDANT-APPELLANT**

Vs

Dassanayaka Arachchige Jayasekera

**PLAINTIFF-RESPONDENT**

Hapan Thanthrige Pabilis

**2ND DEFENDANT-RESPONDENT**

……..

In the matter of an Application for Leave to Appeal made in terms of Section 5C(1) of Act No. 54 of 2006

Alawathura Raalalage Dhanusekera
Adjoining Kahatadeniya Boutique
Dangalla, Pepiliyawala

**1ST DEFENDANT-APPELLANT-PETITIONER**

Vs.

Dassanayaka Arachchige Jayasekera
Punchi Horagolla Watta,
Ranwala, Meethirigala

**PLAINTIFF-RESPONDENT-RESPONDENT**

Hapan Thanthrige Pabilis (**Deceased)**

**2ND DEFENDANT-RESPONDENNT**

2a. Aluthge Kankanamalage Alpi Nona
2b. Hapan Thanthrige Dayangani
2c. Hapan Thanthrige Deepani

All of No. 97, Vihara Mawatha,
Kothalawala, Kaduwela.

2d. Hapn Thanthirige Dayaratna
Punchi Horagolla Watta.
Ranwala, Devindugama, Meethirigala .

**SUBSTITUTED 2ND DEFENDANT-RESPONDENT-RESPONDENT**

**BEFORE:** S. E. Wanasundera P.C., J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

**COUNSEL:** Padmasiri Nanayakkara with Thilakasiri Alahakoon
and Ms. Anudi Nanayakkara for the 1st Defendant-Appellant-Appellant

Damitha Karunarathne instructed by Mrs. Churari of the Legal Aid Commission for the Plaintiff-Respondent-Respondent

**ARGUED ON:** 25.09.2015

**DECIDED ON:** 18.02.2016

**GOONERATNE J.**

This was an action filed in the District Court of Pugoda for a declaration that the Plaintiff-Respondent is entitled to a servitude of a right of way over the 1st & 2nd Defendant's land described in the 2nd schedule to the plaint. Plaintiff-Respondent also sought removal of all obstructions placed by the 1st Defendant-Appellant on the right of way. District Court entered judgment in favour of the Plaintiff-Respondent and same was affirmed by the Provincial Civil Appellate High Court, Avissawella. This court on or about 12.03.2015 granted Leave to Appeal from the above judgment, on the following questions of law as in paragraph 28 (a) to (d) of the petition of the 1st Defendant-Appellant.

(a) Was it correct for the learned District Judge and for the Honourable Judges of the High Court of Civil Appeals to hold that the Plaintiff-Respondent is entitled to a right of way when the servient tenement is not described in the plaint?

(b) Did the learned District Judge and the Honourable Judges of the High Court of Civil Appeals err in law in allowing a right of way along the strip of land depicted in සැ-4 where it appears that several intervenient lands exists, and owners of those lands were not made parties?

(c) Do the impugned Judgment of the District Court marked A-12 and the High Court of Civil Appeals marked 'F' offend the rule of indivisibility of servitudes?

(d) Did the Honourable Judges of the High Court of Civil Appeals err in determining the appeal without hearing the Counsel for the 1st Defendant-Appellant without following the provisions of Section 769(1) of the Civil Procedure Code?

Parties to this suit proceeded to trial on 17 issues. Plaintiff's issues in a gist suggest that he is the owner of land described in schedule 1 of the plaint and that in order to get to Plaintiff's land from Tharala Welgama road (should read as Wedagama) the road described in schedule 2 of the plaint was used and thereby Plaintiffs and his predecessor have prescribed to same. (Issue Nos. 2 & 3) The said road is morefully described in plan No. 1041/LRC ඇඩා/2876 of 05.07.1985 (Issue No.4). Obstruction placed on the said road are shown in Commission plan No. W. 1871 dated 16.01.1998 (Issue No. 5). The only means of access to the Plaintiff's land and shortest access is the road shown in schedule 2 of the plaint (Issue No. 6). Defendants are the servient tenement to the said road. (Issue No.7) and the Defendant-Appellants obstructed the said road way on 15.10.1996 (Issue No. 8). Issues once raised and accepted by court would be the material relevant to the case and the pleadings would recede to the background.

Defendants suggest in their issues, alternate roads that could be made available and to be used to get to Plaintiff's land. On the question of prescription 1st Defendant-Appellant raise a question whether the Plaintiffs have prescribed to the land in schedule 1 of the plaint as described in paragraph 4 of

plaint (Issue No. 11). Issue No.12 raised by the 1st Defendant state by reference to LRC plan 3296 in the manner described in the said issue a road is correctly depicted which goes across 1st Defendant's land. Issue No. 13 suggest that under the supervisions of Assistant Superintendent of Surveys a Survey was done by one Senanayake and by plan ගම/2278 of 1988 it shows that an 18 foot road had been reserved. Further issue No. 14 states plan No. 1871 of Surveyor Wijekoon dated 16.01.1998 shows a private road used by the 1st Defendant. The 1st Defendant-Appellant's position as suggested and raised in his issues is that there are alternate routes available to get to Plaintiff's lands and that Plaintiff-Respondent has no right to a road way as pleaded in his plaint (Issue Nos 15 & 16).

In a land case of this nature plaint should necessarily refer to the metes and bounds of the land in dispute by reference to a map or survey plan in compliance with Section 41 of the Civil Procedure Code. Schedule 1 of the plaint gives details of the land owned by the Plaintiff-Respondent described as lot 1 in plan 1041 (P2) and the title deed relied upon by him was marked as P1, The 2nd schedule to the plaint describes a roadway 12 feet wide which gives an extent of 20 perches. Issue No. 2 suggests that to get to Plaintiff-Respondent's land from Tharala-Wedagama road the road described in schedule 2 of the plaint had been used. In Plaintiff's evidence he states the shortest road to his land is from

the Wedagama Ranwala road. This position had been verified at folio 73 of the brief by the lower court as Tharala to Wedagama. Plaintiff's evidence suggest it is a cart way 12 feet wide. I would state the evidence at folio 73 describes and gives more clarity to the point as follows: මගේ ගේ ලග ඉදලා අඩි 12 ක පාරෙ ගියාම වෙදගම තාර පාරට වැටෙනවා අනිත් පැත්තට තරාල වෙදගම සිට තරාල පාරට වැටෙනවා. The 12 feet cart way goes over the lands of the 1st & 2nd Defendants, as testified by Plaintiff-Respondent. In the plaint it is pleaded that Plaintiff is entitled to a road way by reference to plan P2 and P2a connecting such a position, paragraphs 5, 6 & 7 of the plaint need to be considered? Does the plaint inclusive of above and gathered from the plaint describe the servient tenement with precision and definiteness?

I will at this point of my judgment consider the views expressed by the learned High Court Judge in his Judgment dated 06.08.2014, on the point of identification of the servient tenement, and compliance with Section 41 of the Civil Procedure Code. The learned High Court Judge no doubt has given his mind to the question of identity but what is crucial to a case of this nature is a definite and precise description of the servient tenement being described in the plaint. The High Court Judgment refer to the disputed portion of the road is shown as L-L in plan bearing No. 1041 (P2). Learned High Court Judge further states that Commissioner D.A. Wijesinghe prepared his plan 1871 (Commissioner's Plan) and produced at the trial marked P4 & P4A. What has been considered is stated

by the learned High Court Judge in his judgment as “the disputed road way is clearly shown in P4 and this road is connected to Plan P2”, which was prepared in 1985.

I observe that nowhere in Plan P2 does it show the servient tenement of the 1st Defendant-Appellant. In P2 the disputed area is shown as L to L in P2 which shows it is adjoining to lot (1) of P2 claimed by the Plaintiff-Respondent. Lot (2) is described as a road the boundaries are shown in the schedule to said plan and to the east is the land of K.S Ratnapala. South is Kelani river, west again is lot (1). No reference at all to the servient tenement in plan P2, other than P2ඉ as described as the disputed road, extent of road 18 perches. However in schedule 2 of plaint, road is described in extent of 20 perches and 12 feet in width  boundaries given as north and south balance portion of road. East and west the land of Dhanusekera (1st Defendant-Appellant). Paragraph 6 of plaint avers that 1st and 2nd Defendants are servient tenements of adjoining road.

The extent in plan relied upon by Plaintiff and paragraph 6 of the plaint differ. Plan gives no indication of a servient tenement but paragraph 6 of the plaint states Defendants are owners of the servient tenement. Plan does not refer to the disputed portion of the road. Paragraph 8 avers the disputed point and obstruction at the point connecting Tharala – Wedagama Road. On this

aspect. David Vs. Gnanawathie throws more light to the legal requirement (CA 661/96 F reported in 2000 (2) Sri L.L.R 353). Though the judgment is a Court of Appeal Judgment same has a persuasive value, and need to be applied and followed.

*Per Jayasooriya J.*

Pg. 353.

> When the Plaintiff claimed that he has exercised by prescriptive user a right of way over a defined route, the obligation of the Plaintiff to comply with S. 41. Civil Procedure Code is paramount and imperative. Strict compliance with S. 41 Civil Procedure Code is necessary as the Fiscal would be impeded in the execution of the decree/Judgment if the servient tenement is not described with precision and definiteness.

Is it also possible to take the view that the judgments in both courts has permitted a right of way over the road depicted in plan P4? Plaint was not amended. Does plan P4 depict the right of way claimed in the 2nd schedule to the plaint shown as L-L in plan P2 & P2අ? Plaintiff in his evidence testified that the 12 feet wide road goes over the lands of the 1st & 2nd Defendants. In cross examination (folio 87) Plaintiff-Respondents admits lot 2 in the plan was the land adjacent to the village and state that it is not the strip of land. To a specific question as to whether the schedule in plaint is wrong, there was no answer by Plaintiff (Page 91).

A commission was issued to a Surveyor. It is necessary to examine the evidence of the Surveyor Wijesinghe at folios 117 to 120 of the brief. He testified that in order to facilitate the Survey he made use of plan P2 (1041). Commission plan is marked P4, and he measured the road way shown by the Plaintiff's party. There were certain obstructions (යම් යම් අවහිරතා) in certain places on the road. There was a gate at the point of commencement of the road. He also states there were no other obstructions. I find that this witness does not specifically state he superimposed plan P2 on the commission plan. This witness' last answer in his evidence was that it is not necessary to superimpose, as there was a road.

Perusal of plan P4, the road/right of way is shown and to the north of the road are the lands of the 2nd Defendant, 1st Defendant-Appellant, and one Ariyasinghe. At a point shown as falling on to Ranwala Wedagama a gate is shown, which is near and adjacent to Ariyasinghe's land. (that is in an extreme corner of the road). The other opposite extreme corner of the road is the Plaintiff-Respondent's land. To the south of that portion is a path leading to Kelani river. I observe on perusing the point where a gate is placed, it is difficult to conclude whether in fact it is an obstruction to the road, but certainly the gate as depicted in P4 is near and bordering Ariyasinghe's property. On the other extreme corner of the alleged road way some dotted lines are depicted.

According to P4 the dotted lines are on Plaintiff's land and that of the 2nd Defendant's land. All this had been marked in the way same as shown by Plaintiff. The portion of land up to 2nd Defendant's land consists of two portions and one is that of the 2nd Defendant and the other is that of Ariyasinghe (not a party). It would be necessary to focus on that part of the evidence of the Surveyor. It reads thus:

මම නිරීක්ෂණය කලා මෙම පැමිණිල්ලේ ඉදිරිපත් කල පාරේ යම් යම් තැන්වල අවහිරතා ඇති බවට. පාර පටන් ගන්න තැන තියෙනවා ගේට්ටුවක් දාල. වෙනත් අවහිරතා නැහැ. මගේ පිඹුරේ බටහිර මායිමේ කඩ ඉරකින් ලකුණු කර තියෙනවා. කම්බි වැටක්. ඒ පාරේ කම්බි ගහලා අවහිර කළ කොටස මම කඩ ඉරකින් පෙන්වා තියෙනවා. බටහිර මායිමේ අවහිරයට අමතරව පාර ආරම්භ වන ස්ථානයේ ගේට්ටුවෙන් අවහිර කර තියෙනවා. ඒ සම්බන්ධයෙන් මගේ වාර්තාවේ සඳහන් කලා.

What concerns this court is whether plan P4, which is the commission plan correspond to schedule 2 of the plaint? It disturbs me to conclude in the manner suggested by the Plaintiff-Respondent. The question is whether the road described in the schedule to the plaint which is marked L-L in P2, and described in the 2nd schedule to the plaint, is outside the right of way depicted in P4? Accuracy, precision and definiteness is always paramount in a case where party seeks to enforce a servitude of a right of way. Has the Plaintiff-Respondent pleaded correctly the land over which he is claiming a right of way? No doubt the servient tenement is not properly described. Pleadings do not with

certainty support the evidence. Care must be taken to understand that a servitude is a restriction upon the enjoyment of the right of ownership of the owner of a servient tenement. It need to be interpreted restrictively. As stated above (as in P4) obstruction with a gate is bordering on Ariyasinhge's land. Ariyasinghe is not a party. The dotted line to indicate another encroachment in P4 which commence from 2nd Defendant's land and goes over to Plaintiff's land. The two obstructions do not connect 1st Defendant's property which has to be a servient tenement, according to the plaint, and proved to the satisfaction of court, as regards a servient tenement. The gate alleged to be an obstruction borders Ariyasinhge's land, who is not a party to the suit. The dotted lines indicative of a barbed wire fence borders the 2nd Defendant's land, though a party, has wilfully not taken part in court proceedings. In this regard I note the evidence of Plaintiff in his cross examination at folio 108 (typed figure 42) of the proceedings as follows:

ප්‍ර : තවදුරටත් යෝජනා කරනව ගේට්ටුව දාල පාර වහල තිබෙන්නේ ධනුසේකර කියන 1 වෙනි විත්තිකාරයගේ ඉඩම හරහා නොවෙයි මේ ඉඩම විත්තිකාරයෙක් නොවන අයකුට?

උ : මේ විත්තිකාරය නොවෙයි ගේට්ටුව සවි කලේ.

ප්‍ර : පබ්ලිස් කියන මෙම නඩුවේ 2 වෙනි විත්තිකාරයගේ ඉඩම මතින් කියන පාර තමාට ලේසියෙන් හා කෙට්යෙන් යන්න පුලුවන් පාරක්?

උ : මට යන්න තහනමක් නෑ.

It is necessary for completeness of this judgment to examine the issue relating to prescription. Issue No. (2) indicates that road described in schedule 2 of the plaint was used by Plaintiff and issue No. (3) states Plaintiff and his predecessors have possessed and used the road for over 10 years and prescribed to same. The learned High Court Judge emphasised the aspect of identity, and on prescription support the position that Plaintiff has used the road for 20 years and his wife corroborated that position which was not disputed. Can the High Court arrive at a conclusion in this manner? If prescription has to be considered, can it be based on mere bare assertions? Are the requirements in Section 3 of the Prescription Ordinance fulfilled to the satisfaction of court?

The evidence reveal that the lands in question and lands in the vicinity were vested in the Land Reform Commission. There is no clear acceptable proof as to when it was vested in the Land Reform Commission, but vesting of the property is not ruled out. Original court should have examined, vesting of the land in the L.R.C with much care in view of Section 6 and 9 of the said law where lands vested in the commission vest with absolute title free from encumbrances. On the other hand Section 9 enacts that a servitude should not be affected. Was there in fact a servitude  right of way where people in the area had used the disputed road way prior to Plaintiff-Respondent filing action? However Plaintiff's rights to the property, whatever it may be, may have to be

declared on execution of deed marked P1. These are all areas that should have been checked and verified in the original court.

Plaintiff's evidence in his examination-in-chief (73) and re-examination was that people used this road and used for 20 years. Plaintiff's wife also states the same without explaining such use in detail. Possession must be explained and exemplified. In *Juliana Hamine Vs. Don Thomas 59 NLR 546.*

Held:

> That when a witness giving evidence of prescriptive possession states "I possessed" or "We possessed", the Court should insist on those words being explained and exemplified.

At page 548..

> On this aspect, it is sufficient to recall the observations of Bertram C.J. in the Full Bench Case of *Alwis v Perera:*
>
> "I wish very much that District Judges – I speak not particularly but generally – when a witness says 'I possessed' or 'we possessed' or 'We took the produce', would not confine themselves merely to recording the words, but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts as the witnesses have in their minds are stated in full and appear in the record."

I have to observe that issue No. (3) has not been established by the Plaintiff. This is an important aspect that should have been explained and exemplified by Plaintiff's witnesses. There is no requirement to call such number

of witnesses to prove a point. However other than Plaintiff's own wife an independent witnesses' evidence from the village would have fortified Plaintiff's case , and may have even satisfied the requirements contained in Section 3 of the Prescription Ordinance.

I am unable to accept the position that the road shown in P4 and P4a is connected to the short road depicted in plan P2. Plaint does not describe same in precise terms. I state that a road way is shown in P4 plan but considering the servient tenement that should be depicted on the plan and established in the case in hand, there is no proper identification of same for the reasons stated above. Nor was the plaint amended to provide material to establish precise identity of the land in dispute. There could not have been a bar to amend the plaint to bring it in line with Plaintiff's case.

Plaintiff-Respondent has failed to describe the servient tenement over which the roadway is depicted in P4. The obstruction as described in plan P4 is on two points of the road way shown in P4, i.e barbed wire fence and the gate. It may be possible to state that the alleged obstruction of the barbed wire fence obstructs or is within the lands of the 2nd Defendant. Plaintiff-Respondent seeks access from that obstruction also to the right of way from Kelani river to Ranwala-Wedagama road. The gate which is alleged to be causing obstruction is at the far end or the eastern end of that right of way and certainly not within

the land of the 1st Defendant-Appellant. It is on or within the land of A.R.D. Ariyasinghe (not a party) This is the other lapse apparent on perusal of plan P4. In this regard I would refer to the case of *De Silva Vs. Nonahamy* which assist court to realise the aspect of continuity of servitude.

*Macdonell C.J. in Nonahamy Case 34 NLR 113at page 115 held:*

> The servitude, here a right of way, is one and indivisible in the sense that it must be shown legally to exist at each and every point on the strip of land over which it is claimed and if the claimant fails to prove its existence at any one of such points, the servitude disappears not at that point only but at every other point;

Plaintiff claims a road way in P4, he should have made the owners of other lands parties more particularly where the gate stood. In the context of this case it should be done. Ariyasinghe in the context of this case is a necessary party. As such the action itself is bad in law. It is so as it was the complaint of the Plaintiff about a gate obstructing his path that encouraged him to file action. The owner of a dominant tenement should establish his right of servitude of the particular servient tenement and in this case is the point where the gate was installed. It may <u>not be necessary</u> to bring all the adjacent owners to the road way into the case even if the law contemplate of each of the contiguous lands is a servient tenement and the law lays that the owner or owners of each such tenement is under a duty to permit the free exercise by the owner or owners of the dominant tenement of his right of way. In the context of the case in hand I

observe that the owners of a servient tenement where the gate and barbed wire fence could be identified, as shown in Plan P4, no doubt, would be necessary parties. Only the 2nd Defendant had been made a party. In the case of a servitude right of way which need to be proved in court by way of a well defined track and the servient tenement, are two matters that need to be established with precision by the owner of the dominant tenement. The obstruction to the road way necessarily has to be considered with the above in mind.

Plan P2 annexed to the plaint was prepared in 1985 (12 years prior to filing action) and the short road shown therein does not correspond to the road depicted in P4. Nor does the road described in the 2nd schedule to the plaint correspond with road described in Plan 4. The survey plan P4 and the evidence led at the trial does not support the plaint. The requirement of Section 41 of the Civil Procedure Code has not been fulfilled. As stated above dominant tenement and the servient tenement need to be described and identified correctly. The servient tenement has not been properly described in the plaint. Servient tenement over which the alleged road runs, had not been described in the plaint. It is fatal.

I agree with the submissions of learned 1st Defendant-Appellant's counsel that the dominant tenement, the servient tenement or tenements and the right of way claimed should be pleaded with necessary meats and bounds.

Commissioner's report and evidence does not reveal with certainty that the commission plan shows a superimposition of plan P2 on plan P4.

The importance of ascertaining and describing a servient tenement has been considered in *Maasdorp's Institutes of South African Law. Vol II – 8th Ed. Pg. 1256.*

> "A servitude may be defined as a detachment of some of the rights of ownership from The ownership of some particular property and either conferring them upon a person other than the owner, or attaching then to the ownership of another property. 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. It is the right to make property servient to someone other than the real owner, and from this the term, servitude is derived".

The Judgment of the District Court and the High Court offends the rule of indivisibility of servitude. The servitude right of way shown in plan P4 (subject to the material discussed above) is one and indivisible. It must exist at each and every points, of the road way. Plaintiff has not proved the servient tenement at the point where the gate is shown in plan P4. As such the servitude will disappear at every point of the roadway shown in plan P4.

The 4th question of law reflected in paragraph 28(d) of the petition indicates that the learned counsel for the 1st Defendant-Appellant was not heard, in appeal before the Civil Appellate High Court. The proceedings of

23.06.2014 records the day's events in the High Court. Learned counsel for the Appellant who was to appear was on his way to in Avissawella High Court. It appears that he had not reached court on time. At 10.35 a.m court had fixed the matter for judgment and permitted parties to file written submissions. Both parties have filed written submissions. I cannot fault the learned High Court Judge for doing so, since it was the only case to be taken up for argument. Court cannot be faulted for counsel's lapse. Proceeding of the day give no indication of an application for a postponement.

The question of law arising from paragraph 28 of the petition are answered as follows:

28(a) It is incorrect for the Judges in both courts to hold that the Petitioner-Respondent is entitled to a right of way. In the absence of material to identify the right of way in the plaint and non-compliance with Section 41 of the Civil Procedure Code, is fatal to a case of this nature.

28(b) As observed in this Judgment, servient tenement which is adjacent/over which the roadway proceeds are relevant and material to the case in hand. Failure to make the relevant owner of that servient tenement a party is an error. Judges in both courts erred in this regard and the action is not properly constituted.

28(c ) Both Judgments of the District Court and the High Court offend the rule of Indivisibility of servitude, as stated above in this Judgment.

28(d) An opportunity was made available by the High Court to tender written submissions and both parties have tendered submissions. It was the counsel for the Appellant who failed to appear in court at the correct time. No court could be faulted in the absence of a proper application for an adjournment.

In all the above facts and circumstance the Judgments of the District Court and the Civil Appellate High Courts are set aside. Appeal allowed without costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

S. E. Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C., J.

I agree.

JUDGE OF THE SUPREME COURT