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

In the matter of an application for Appeal under and in terms of Article 128 (1) of the Constitution read with Section 5C (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC APPEAL No. 221/2016

SC Application No.
SC/HCCA/LA/312/2015

HCCA Kurunegala Case No.
NWP/HCCA/Kur 63/2010 (F)

D.C. Chilaw Case No. 25165/L

Samarappuli Mudiyanselage
Somadasa,
6/67, William Gardens,
Kurunagala Road,
Chilaw.

PLAINTIFF

-Vs-

1. Warnakulasuriya Gertrute Tressila
2. Mihidukulasuriya Shenali Muthusilili Fernando

Both of 1/16, Colombo Road, Chilaw.

DEFENDANTS

AND BETWEEN

1. Warnakulasuriya Gertrute Tressila

2. Mihidukulasuriya Shenali Muthusilili Fernando, Both of 1/16, Colombo Road, Chilaw.

DEFENDANT - APPELLANTS

-Vs-

Samarappuli Mudiyanselage Somadasa, OF No. 6/67, William Gardens, Kurunagala Road, Chilaw.

PLAINTIFF – RESPONDENT

AND NOW BETWEEN

1. Warnakulasuriya Gertrute Tressila
2. Mihidukulasuriya Shenali Muthusilili Fernando, Both of 1/16, Colombo Road, Chilaw.

DEFENDANT-APPELLANT-APPELLANTS

-VS-

Ruwani Dilhara Rukmali Hathrusinghe, of No. 66/35, Waduragala Watta, Kurunegala Road, Chilaw.

1B Substituted PLAINTIFF-RESPONDET-RESPONDENT

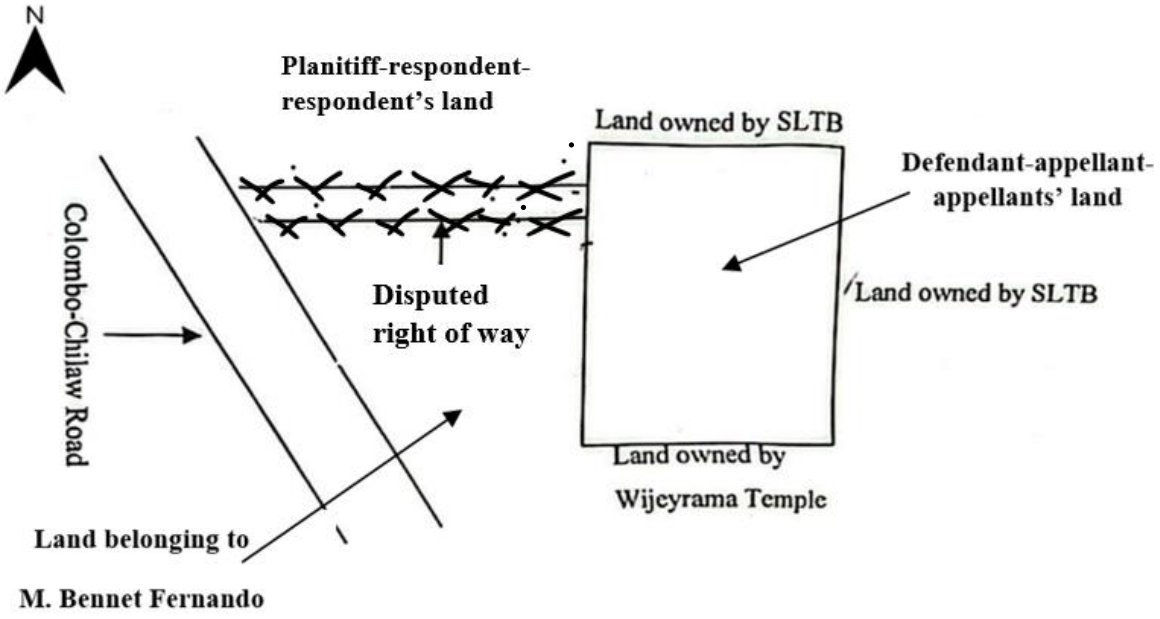
BEFORE	**:**	Vijith K. Malalgoda, PC, J. Yasantha Kodagoda, PC, J. A.H.M.D. Nawaz, J.
COUNSEL	**:**	Erusha Kalidasa with Wishmi Malaveera for the Defendant-Appellant-Appellant. Sudarshani Coorey for the Substituted Plaintiff-Respondent-Respondent.
ARGUED ON	**:**	24.05.2023
DECIDED ON	**:**	22.08.2024

A.H.M.D. Nawaz, J.

Factual Matrix:

1. The Plaintiff (hereinafter sometimes referred to as the 'Respondent') pleaded a cause of action seeking a declaration that the Defendants (hereinafter sometimes referred to as the 'Appellants') are not entitled to a right of way across the Plaintiff's land. The Plaintiff's property, as depicted in the accompanying diagram, abuts the Colombo-Chilaw Road. The central issue for determination is whether the Defendants have a

legitimate right of way over the Plaintiff's land, as claimed by the Defendants and contested by the Plaintiff.



2. The Defendants claimed a 10-foot-wide right of way across the Plaintiff-Respondent-Respondent's land to access their property located to the East. The Plaintiff sought a declaration that the Defendants had no entitlement to any such servitude over his land, while the Defendants, in their counterclaim, asserted they had acquired a prescriptive right of servitude. They based their claim on what they argued was their own long-standing use of the land, as well as that of their predecessors in title. It must be stated that the immediate predecessor in title of the

Defendants was one Hilarian Fernando who was the husband of the 1st Defendant and the father of the 2nnd Defendant.

3. After an extensive trial in which substantial evidence was adduced by both parties, the trial judge, in a judgment dated May 19, 2010, ruled in favour of the Plaintiff. The judge granted the reliefs sought in prayers (a) and (d) of the plaint, while dismissing the Plaintiff's claim for damages against the Defendants.

4. Dissatisfied with the judgment of the District Judge, the Defendant appealed to the Civil Appellate High Court of Kurunegala. In a judgment dated August 24, 2015, the High Court Judges of the Civil Appellate Court affirmed the District Judge's judgment of May 19, 2010.

5. Aggrieved by the judgment of the Civil Appellate Court dated August 24, 2015, the Defendant filed this instant appeal to this Court.

Appeal of the Defendant-Appellant-Petitioner

6. This Court granted leave to appeal on the following questions raised by the Defendant-Appellant.

i. Whether the learned High Court Judges erred in law by answering issue No. 07 in the affirmative, specifically

   a) Are the Defendants using the said path across the plaintiff's land to gain access to their property?

   b) Is there an alternative right of way to access the Defendants' land?

ii. Whether the learned High Court Judge erred in law by finding that the Appellants have an alternative road access.

iii. Whether the findings made by the learned High Court Judges are bad in law and in fact and unsupported by evidence led at the trial.

iv. Whether the learned High Court Judges erred in law in their finding that the Petitioners have an alternative road access.

v. Whether the findings of the learned High Court Judges are wrong.

vi. Whether the judgment of the learned High Court Judges is wrong and/or erroneous.

Determination of Ownership of the Plaintiff and its implications for Actio Negatoria

7. The primary argument advanced by the Defendant-Appellants before the High Court concerned the Plaintiff's ownership of the disputed land.

Although this specific issue was not raised before this Court, it is essential to first establish in *actio negatoria* that the Plaintiff-Respondent is indeed the legitimate owner of the land. This is crucial as the action, known as *actio negatoria*, must be instituted by an owner of a land over which a Defendant claims a servitude.

8. Before the High Court, the Defendant-Appellants contended that the Plaintiff could not institute an *actio negatoria*, asserting that he had not established his title to the land.

9. The Plaintiff's claim was based on Deed No. 2876 dated August 5, 1996, which traced the title through a series of deeds, including a partition deed dating back to 1917. The land had undergone multiple transactions, with various portions being transferred over the years. The Defendant-Appellants, the widow and daughter of Hilarian Fernando, contended that certain transfers, particularly Deed No. 823 of 1984 in favour of Hilarian Fernando, initiated the prescriptive period for the right of way over the Plaintiff's land. Consequently, they argued that the Plaintiff's claim that the Defendants cannot enjoy a right of way is unsustainable.

10. However, the learned High Court Judges correctly determined that Deed No. 823, dated July 22, 1984, in favour of Hilarian Fernando, did not

include a right of way in any of its schedules over any land. The mere fact that one of the boundaries mentioned in the deed's schedules is described as a roadway does not imply that the grantors of Deed No. 823 conferred a right of way to the grantee, Hilarian Fernando, the predecessor in title of the 1st and 2nd Defendants.

11. Consequently, the learned judges of the Civil Appellate Court concluded that the Plaintiff's predecessors had not fully relinquished their rights to the land, thereby affirming that the Plaintiff's title, derived from Deed No. 2876, remains valid.

12. Furthermore, the Defendant-Appellants argued that the land was co-owned, which they claimed granted them a right of way. However, this assertion was rightly rejected by the High Court Judges, who determined that all relevant co-owners had consented to the Plaintiff's deed, thereby affirming the Plaintiff's exclusive ownership of the land.

13. Several factors further confirm the Plaintiff's ownership of the purported servient tenement. Notably, when the Defendants pleaded in prayer (a) to the answer that the Plaintiff's action should be dismissed because they had established a right of way by prescription **over the Plaintiff's land**, they effectively admitted that the Plaintiff is the owner of the land in

question. This prayer to the answer serves as an explicit acknowledgment and admission of the Plaintiff's ownership of the land over which the Defendants claim the right of way.

14. Furthermore, it is well established that assertions or averments in pleadings do not need to be expressly recorded as admissions to qualify as admissions of a disputed fact. As I articulated in ***Mohamed Mahful Abdul Wakeel and 2 others v Hewage Sirisena and Gunawathie and Others***[1]**,** such assertions can suffice for proof without explicit admission.

"……. We come across "admissions" for the first time only in Section 17 of the Evidence Ordinance because the first exception to the hearsay rule in the Evidence Ordinance begins from Section 17. Section 17(1) of the Evidence Ordnance defines an admission as a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact. Section 17(1) of the Evidence Ordinance deals with informal admissions, whereas Section 58 deals with formal admissions……. Section 58 of the Evidence Ordinance makes it quite clear that an out of

[1] CA 1218/1996 (F) DC Galle L/12950 (CA minutes of 27.09. 2016; (2017) Hulftsdorp Law Journal 161; Junior Bar Law Journal Volume III (2017) at p 132.

court statement such as an admission in an answer but filed before Court is probative of its truth against the Defendant….".

15. It is further noteworthy that the Plaintiff's title deed, marked as P1 during the trial, was admitted without any objections. This should be considered as an acknowledgment of the deed's contents, which conferred title upon the Plaintiff.

16. I conclude that the learned High Court Judges correctly determined that the Plaintiff-Respondent is the rightful owner of the land, thereby refuting the Defendants' claims and affirming the Plaintiff's entitlement to bring the *actio negatoria*. Consequently, the arguments that the Plaintiff lacks standing to bring this action, or that the land is co-owned, thereby granting the Defendants a right of way, are without merit. This is evidenced by the fact that the Defendants did not seriously challenge the correctness of this finding before the Supreme Court.

17. Having resolved the issue of title, which is a fundamental element of actio negatoria, I now turn to the remaining questions: (a) the nature and scope of actio negatoria, (b) whether the Defendants have established a servitudinal right over the Plaintiff's land, and (c) whether the Defendants can claim a right of way by necessity over the Plaintiff's land.

The nature and scope of Actio Negatoria

18. In ***Saparamadu v. Melder***[2] the plaintiff who had only a servitude (not soil rights) over the disputed land had prayed *"for* a *declaration that the defendant is not entitled to use the road reservation .... in any manner whatsoever".*[3] In other words, the Plaintiff sought a declaration that the land in question is free from any servitude. The court held that "*such an action can only be filed by someone who has soil rights and not by someone who himself enjoys only a servitude"*[4] (see paragraph at p.152).

19. This legal proposition was based on the scope of the action, as described in Wille's *Principles of South African Law,* 8th Edition, p. 326, which was cited by the Court of Appeal at p. 151 of the referenced judgment.

"If a person unlawfully claims a servitude over land or claims greater rights under a servitude than it actually comprises, the owner of the land may bring an action against him, known as the actio negatoria, for a declaration that his land is free from the servitude claimed, or

[2] (2004) 3 Sri.LR 148.
[3] Ibid., last paragraph p. 151.
[4] Ibid at p. 152.

free from the excessive burdens as the case may be. <u>This action can</u> <u>be instituted by none but the owner of the land in question</u>."[5]

20. Thus, the Court of Appeal in ***Saparamadu v. Melder*** concluded that "*... in the instant case the plaintiff-respondent has prayed for a declaration that the defendant-appellant has no right to use the right of way in question. We are of the view that she (plaintiff) cannot have and maintain this action in the present form against the defendant-appellant as she has no soil rights in respect of the said road reservation...".*

21. However, His Lordship J.A.N.de Silva (as His Lordship then was) stated at p.152 that when a person who enjoys a servitude is obstructed, he could bring an action against the person who obstructs to restrain him from interfering with the enjoyment of the servitude and invoked the following passage from Wille's Principles of South African Law (8th Edition) p.325.

"If the exercise or enjoyment of the servitude be obstructed or infringed in any respect, the holder of the servitude may by means of

[5] See Wille's citation of Voet 8.5.5 for judgments to support the proposition in the passage.

actio confessorio, enforce his right or obtain other appropriate legal redress against the offender".[6]

22. The holder of the servitude may in addition, claim damages for any loss caused to him.[7] Therefore, it is evident that the plaintiff in *Saparamadu v. Melder* should have filed her action in the form of actio confessoria rather than actio negatoria. The mistake lies in the fact that actio negatoria is available to a landowner (or someone with soil rights), while actio confessoria is available to a person who holds only a servitude without soil rights.

23. **Hall and Kellaway on Servitudes**[8] states that,

"The actions recognised by Roman Dutch law were the actio confessoria and the actio negatoria or contraria, the former being an action to enforce a 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 a

[6] Wille cites Voet 8.5.1, 8.5.2 and 8.5.3.
[7] Ibid p 325.
[8] See 2nd Edition at pp 315-136.

servitude over his property for the purpose of ascertaining whether the servitude existed".

24. **Maasdorp's *Institutes of South African Law***[9] explains that the traditional actions, known as actio confessoria and actio negatoria or contraria, still influence modern principles, even though the procedures have evolved. The tome further states that the general rule is that only the person in whose favour a servitude has been created can enforce it, as servitudes are indivisible by nature.[10]

25. The questions of law raised before this Court does not call in question the form of action that *actio negatoria* should take and this Court summarizes position as follows:

> *Actio negatoria* or *contraria* is an action to declare a property free from servitude, which can only be brought by the owner or someone with soil rights. In contrast, *actio confessoria* is an action to enforce a servitude, which can only be filed by the person in whose favour the servitude has been established.

26. I now turn to the two remaining matters that are central to the

[9] Volume II at p 177
[10] See page 178.

questions of law before this Court: whether the Defendants have established a servitudinal right over the Plaintiff's land, and whether the Defendants can claim a right of way by necessity over the Plaintiff's land.

Does a servitudinal right by virtue of prescription inhere in the Defendants?

27. In the course of the judgment, I noted that Deed No. 823, dated July 22, 1984, conferred no explicit right of way on Hilarian Fernando, the Defendants' predecessor in title, to traverse a servient tenement. When the Plaintiff acquired title through Deed No. 2876 on August 5, 1996, Hilarian Fernando signed as a vendor on the deed.

28. This clearly indicates that the Defendants' predecessor in title relinquished any rights or entitlements over the land in question. Furthermore, there is no conclusive evidence to establish that they had been using the servient tenement for over 10 years, aside from the plan No. 250/84, marked as Vi during the trial. The learned District Judge explicitly stated in her judgment that the court could not rely on this plan, as the surveyor who prepared it testified that it was drawn based on instructions from Hilarian Fernando, the Defendants' predecessor in

title. Consequently, the learned High Court Judge concluded that the Defendants failed to provide definite evidence that they had been using the purported right of way as shown in plan 250/84.

29. The relinquishment or renunciation of any right of way by Hilarian Fernando in the deed of transfer in favour of the Plaintiff binds his successors, namely the Defendants. If the owner of a dominant tenement is a party to a deed which confers no right of way over the servient tenement, he must be treated to have abandoned the right of way. Such an abandonment is deliberate and intentional. Under Section 115 of the Evidence Ordinance, an estoppel will operate against the Defendants just as it would have against Hilarian Fernando. For termination of servitudes by abandonment see ***Nagamani v Vinayagamoorthy***[11]***; Fernando v Mendis***.[12]

30. In the circumstances, the conclusions reached by both the District Court as well as the High Court that the defendants enjoy the right of way as of right cannot be faulted.

[11] 24 N.L.R 438

[12] 14 N.L.R 101.

Way of Necessity

31. A way of necessity can generally only be claimed when no alternative route is available to the claimant. Historically, a way of necessity is a right of way granted in favour of a property over an adjoining one, serving as the only means of ingress to and egress from the former property. Therefore, if an alternative, reasonable, and sufficient route exists, the claim fails. The key criterion for this issue is necessity, not convenience; however, it is not required to prove absolute necessity.

32. If a person is entitled to a reasonable and sufficient means of access to a public road from their property, they cannot claim the best and nearest route on the grounds of necessity if another, albeit less convenient, route is available. In ***Fernando v. Fernando*** [13] it was held that the plaintiff was not without other means of access to and from his land. It appeared that his residence was to the south of the land he claimed as the dominant tenement. Daiton J. noted:

"His complaint seems to be, in his own words, that he has no easier means of access or no closer road leading to the high road other than the roadway he now claims. The gamsabhawa road joins the main road

[13] 31 N.L.R 107.

a little to the south of the right of way claimed. This is, therefore, a further means of access open to him. Upon the evidence led, it would in my opinion be impossible to hold that the plaintiff has shown conclusively that he is entitled to the road claimed as a way of necessity".

33. A right of way of necessity cannot be granted if there is another though less convenient path along which access can be had to the public road.

34. In light of the principles established by precedents, determining whether an existing alternative route is difficult or practically impossible to use is a question of fact that must be assessed based on the specific circumstances of each case.[14]

35. Evidence was placed before court indicating that the Defendants have a definite right of way to their land through the premises of the bus stand as shown in the diagram above. There is no indication that this route is prohibited by regulations, nor is there any evidence of significant difficulties preventing the Defendants from using this alternative route.

36. Accordingly, both the learned District Judge and the High Court Judges correctly ruled in favour of the Plaintiff on the issues of prescriptive use

[14] See *Marasinghe v Samarasinghe* 73 N.L.R 433; *Mohoti Appu v Wijewardema* 60 N.L.R 46; *Sumangala v Appuhamy* 46 N.L.R 137; *Chandrasiri v Wickremasinghe* 70 N.L.R. 15

of the right of way and the way of necessity. This Court finds no reason to interfere with those findings.

37. In the circumstances, we proceed to affirm the judgments of both the District Court and the High Court of Civil Appeals and dismiss the appeal of the Defendant-Respondent-Respondents. We answer the questions of law raised before this Court in favour of the Plaintiff-Appellant. The learned District Judge is directed to enter judgment and decree as prayed for by the Plaintiff.

Judge of the Supreme Court

V. K. Malalgoda, PC. J

I agree, Judge of the Supreme Court

Yasantha Kodagoda, PC. J

I agree, Judge of the Supreme Court