

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

Ranaweera Kankanamge Premananda
Kadegedara,
Murungasyaya, Middeniya.

Plaintiff

SC APPEAL NO: SC/APPEAL/144/2017

SC LA NO: SC/HCCA/LA/470/2016

HCCA TANGALLE NO: SP/HCCA/TA/08/2015 (F)

DC WALASMULLA NO: L/735

Vs.

1. Hendrick Abeysiriwardane,
Hendrick Stores, Hungama Road,
Middeniya.
2. Ranaweera Kankanamge Indrani,
Murungasyaya, Middeniya.

Defendants

AND BETWEEN

Ranaweera Kankanamge Premananda
Kadegedara,
Murungasyaya,
Middeniya.

Plaintiff-Appellant

Vs.

1. Hendrick Abeysiriwardane,
Hendrick Stores, Hungama Road,
Middeniya.
2. Ranaweera Kankanamge Indrani,
Murungasyaya,
Middeniya.
Defendant-Respondents

AND NOW BETWEEN

Hendrick Abeysiriwardane,
Hendrick Stores,
Hungama Road,
Middeniya.

1st Defendant-Respondent-Appellant

Vs.

Ranaweera Kankanamge Premananda
Kadegedara,
Murungasyaya,
Middeniya.

Plaintiff-Appellant-Respondent

Ranaweera Kankanamge Indrani,
Murungasyaya,
Middeniya.

2nd Defendant-Respondent-Respondent

Before: P. Padman Surasena, J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J

Counsel: Indunil Bandara for the 1st Defendant-Respondent-Appellant.
Kanaga Sivapathasundaram for the Plaintiff-Appellant-Respondent.

Argued on: 06.06.2022

Written submissions:

by the 1st Defendant-Respondent-Appellant on 30.08.2017.

by the Plaintiff-Appellant-Respondent on 17.10.2017.

Decided on: 19.07.2023

Samayawardhena, J.

The Plaintiff instituted this action in the District Court of Walasmulla in 2005 against the 1st Defendant seeking a declaration that he is entitled to have a six-foot wide right of way from Thalawa-Middeniya road to his land (dominant tenement) and for an order to remove the wall erected by the 1st Defendant obstructing the said right of way and damages. The 2nd Defendant who is a co-owner of the dominant tenement was made a party only for notice and no relief was sought against her. She is the sister of the Plaintiff. The 1st Defendant filed answer seeking dismissal of the Plaintiff's action and compensation for harassment. After trial, the District Court dismissed the Plaintiff's action on the basis that the right of way the Plaintiff seeks to establish is not based on (a) any previous Judgment (b) any deed or (c) prescription. The cross-claim of the 1st Defendant for damages was also refused. On appeal, the High Court of Civil Appeal set aside the Judgment of the District Court and granted the reliefs sought by the Plaintiff except for damages. This appeal by the 1st Defendant is against the Judgment of the High Court.

The High Court Judgment is comprehensive. The High Court analyzed the evidence led at the trial in the correct perspective, which the District Court failed to do. There is no necessity to repeat them here. As the High Court has stated in the Judgment, there was clear documentary evidence before the District Court to decide the matter in favour of the Plaintiff although the District Court erroneously dismissed the Plaintiff's action on the ground that there is no basis to grant relief to the Plaintiff.

If I may state the facts briefly, this right of way starts from Middeniya-Talawa road and runs between the 1st defendant's building (a business premises on the left side) and Abeysinghe Stores on the right side. The owner of Abeysinghe Stores is not a party to the case.

There was a previous partition case No. P/52 in the District Court of Walasmulla to partition the dominant tenement. The Preliminary Plan of that case was marked P4 without any objection and without subject to proof. P4 had been prepared in 1986. In P4 this road is shown as the access road to the land to be partitioned. The road was bounded by the two walls of the said two buildings. There were no obstructions on the road at that time. The Final Partition Plan prepared in 1999 was marked P1A without any objections and without subject to proof although the surveyor was called as a witness by the plaintiff. According to the Final Partition Plan and the Report, Lot 1C of the Final Partition Plan, which is six-foot wide, serves as the access road to the land; and this road had been obstructed by the 1st Defendant of the instant case by constructing a wall in the middle of the road (*vide* pages 157 and 160 of the brief). This is the disputed road which is the subject matter of this action. The surveyor has further stated in the Report that unless the said obstruction is removed, there will be no access to Lots 1A and 1B of the Final Partition Plan. The Final Decree of the partition case was marked P1 without objection and without subject to proof. It *inter alia* states that Lot 1C is

declared as the access road: “තවද එකී බෙදුම් පිඹුර අනුව බෙදා වෙන් කර දෙන්නට යෙදුන ආකාරයට, මෙහි පහත උපලේඛණයේ සඳහන් අංක 1 ඒ දරණ කැබැල්ල මෙම නඩුවේ පැමිණිලිකරුටද, අංක 1 බී දරණ කැබැල්ල 1 වන වින්තියටද, අංක 1 සී දරණ කැබැල්ල අඩි 6 ක් පළල පාරක් ලෙසද, අයිතිකර පවරා හිමිකර තීන්දු කරමි.” The plaintiff has purchased Lot 1A from the Plaintiff in the partition case by Deed marked P3 and Lot 1B from the heirs of the 1st defendant in the partition case by Deed marked P2.

How can then the District Judge says that there is no basis for the Plaintiff’s action? The 1st Defendant has not challenged this portion of the partition decree in these proceedings or in the partition action itself or in any other proceedings. In any event, the Final Decree of the partition action cannot be interfered with in these proceedings.

According to the 1st Defendant’s evidence, he came to Lot A of his Plan marked Y as a lessee in 1984. According to the Lease Agreement marked V1, the northern boundary is the public road and the western boundary is also a road. The 1st defendant says he purchased the leased property in 1987. He further says that he constructed this wall in the middle of the road in 1988. On what basis did he do so? The Plaintiff does not admit that the wall was constructed in 1988. According to the Plaintiff, the wall was constructed in 1999. The person who constructed the wall says that prior to the construction of the wall, the width of the road was 6 feet (page 115 of the brief). The Defendant has no right to construct such a wall obstructing the road which had been there even before the preliminary survey was done in the partition action in 1986. No Plan has been approved to construct this wall. It is an unauthorized construction.

I answer the following questions of law upon which leave to appeal was granted in the negative.

Did the High Court err in law (a) in failing to evaluate the case presented before it; (b) in law in holding that the Plaintiff has acquired the right of way by prescription; (c) in failing to appreciate that the Plaintiff has failed to discharge his burden of proof; (d) in failing to appreciate that there should be cogent evidence to establish a claim for right of way; and (e) in substituting its opinion in place of that of the District Court?

The appeal is dismissed with costs. The 1st defendant shall pay the costs in all three Courts and remove the wall constructed by him in the middle of the right of way on his own expense and clear the road within one month of the reading out of the Judgment in the District Court.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

Judge of the Supreme Court