

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

In the matter of an Appeal
from the Provincial High Court
of Kandy.

Nawala Rathnayake Mudiyansele
Chandra Ranasinghe, No. 41 and
41/1/1, Anagarika Dharmapala
Mawatha, Kandy.

Plaintiff

SC Appeal No. 64/2014
SC/HC/CA/LA Application No. 58/2013
CP/HCCA/KN/53/2010 (F)
D.C. Kandy No. X/12451

Vs

1. Palitha Munasinghe
2. S.M. Munasinghe
Both of Official Residence, Bank of
Ceylon, Peradeniya.

Presently at No. 43, Anagarika
Dharmapala Mawatha, Kandy.

Defendants

AND

1. Palitha Munasinghe
2. S.M.Munasinghe
Both of Official Residence, Bank
of Ceylon, Peradeniya.
Presently at No. 43, Anagarika
Dharmapala Mawatha, Kandy.

Defendants Appellants

Vs

Nawala Rathnayake Mudiyanseelage
Chandra Ranasinghe, No. 41 and
41/1/1, Anagarika Dharmapala
Mawatha, Kandy.

Plaintiff Respondent

AND NOW

Nawala Rathnayake Mudiyanseelage
Chandra Ranasinghe, No. 41 and
41/1/1, Anagarika Dharmapala
Mawatha, Kandy.

Plaintiff Respondent Appellant

Vs

1. Palitha Munasinghe
- 2.S.M.Munasinghe

Both of the Official Residence, Bank
of Ceylon,Peradeniya.
Presently at No. 43, Anagarika
Dharmapala Mawatha, Kandy.

Defendants Appellants Respondents

**BEFORE : S.EVA WANASUNDERA PCJ.
K. T. CHITRASIRI J. &
NALIN PERERA J.**

COUNSEL: Samantha Ratwatte for the Plaintiff Respondent Appellant.
S.C.B. Walgampaya PC. for the Defendants Appellants Respondents

ARGUED ON: 11.07.2016.

DECIDED ON: 14.09.2016.

S. EVA WANASUNDERA PCJ.

This Court granted leave to appeal on 12. 05. 2014 on the questions of law enumerated in paragraph 15 (a) to (f) of the Petition dated 20.02.2013 from the

judgment of the High Court of Civil Appeal of the Central Province holden in Kandy.

They are as follows:-

1. Is the said judgment contrary to law and against the evidence available in the record?
2. Did the High Court of Civil Appeal err in holding that there has been a merger (conficio) of the dominant and the servient tenement in one and the same person by disregarding the specific authority cited namely that of Perera Vs Samarakoon 23 NLR 502, the judgment of Bertram CJ which was agreed upon by Schneider J ? (whereby it was held that it was only the acquisition of the same right in the dominant land and the servient land that one could apply the concept of merger)
3. In any event did the High Court of Civil Appeal misdirect itself in fact and in law when deciding that the concept of merger was applicable without such an issue being framed in the original Court and being directly in conflict with the admissions recorded in the original Court?
4. Did the High Court of Civil Appeal err by failing to consider the admissions recorded in the original court and accepting the arguments which were contrary to the admissions of fact recorded in the original court?
5. Did the High Court of Civil Appeal err by misconstruing the meaning of "open passage" and by holding that a further requirement of establishing of a servitude known as servitude of a passage had to be proved when in fact the simple English meaning of passage which was accepted through out in the original court was in fact the ability of Lot 3 to be used as an access?
6. Did the High Court of Civil Appeal err in holding that the deed marked P2 in the original court transferred the entirety of Lot 3 when clearly as can be seen from pages 530 particularly 532 of the document marked X what was transferred was lot numbers 4 and 5 together with a servitude over Lot 3?

By all these questions of law, the Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) is challenging the judgment of the High Court mainly on the basis that the High Court was wrong in holding that there had been a merger of the rights thereby extinguishing the servitude that was created by the deeds.

According to the Plaintiff, the Plaintiff had prayed for *firstly* a declaration of title to Lot 4 in Plan 1592 which is the accepted plan by all parties, and *secondly* for an order to keep Lot 3 in Plan 1592 as an open passage so that the Plaintiff's right to receive light and air as a servitude would not be disturbed.

The Plaintiff further prayed for an enjoining order and a permanent injunction to stop the Defendants Appellants Respondents (hereinafter referred to as the Defendants) from building on Lot 3. The Plaintiff also contended that she should be granted access to maintain and repair her water pipes which were facing the said Lot 3.

The Plaintiff got **title** to the land by **Deed No. 14321** dated 05.02.1991. By this deed, she had bought Lot 4, which is of an extent of 3 Perches and Lot 5 which is of an extent of 8.75 Perches, together, for a purchase price of Rs. 100,000/- from W.A. Saranaguptha Jayasinghe. This deed is done on a printed deed form and has two Schedules, describing Lot 4 and Lot 5 , with the boundaries. There is **no mention of any other Lot, over which there is any right of 'open passage' in this particular deed.**

The background facts are as follows. Mrs. S.A.P.Seelawathie Jayasinghe who was the owner of a block of land of an extent of 23.25 Perches had got a surveyor to divide the same into five Lots. The Plan No. 1592 was done on 21st June, 1972 by the licensed surveyor and leveler, L.W. Ariyasena. On 31.07.1972, she executed **Deed No. 7440** and gifted Lot 1 of 5.25 Perches, to her daughter Kusum Kanthi Kularatne nee Jayasinghe. In that Deed there is **no mention of Lot 3 as an' open passage.'** On 27.08.1979 she transferred Lot 2 by **Deed No. 29** to H.N.Amara Herath and P.S. Jayasinghe for a consideration of Rs. 6000/-. Even in this deed, there is **no mention of Lot 3 being left as an open passage.**

By **Deed No. 9461** dated 18.02.1978, Seelawathie Jayasinghe transferred Lots 3, 4 and 5 to W.A.Saranaguptha Jayasinghe for a consideration of Rs. 4000/-. This deed **has one schedule** which is referred to in the body of the deed. This schedule contains **three lands** which are specifically identified under specifically described three Lots of land namely **Lots 4, 5 and 3** in the same order and Lots 4 and 5 are further described as portions of land surveyed in 1954. **Lot 3 stands alone** in the schedule to **the Deed No. 9461** as the last block of land which was transferred to the purchaser, W.A.Saranaguptha Jayasinghe.

As pointed out by the Plaintiff's counsel at the hearing of this Appeal, at the end of the description of Lots 4 and 5, there is a mention of **“ a right of way over and along the portion marked Lot 3 “ in the said plan.**

I observe that this right of way over Lot 3 was recognized as a right of way to reach the Lots 4 and 5 , **only up to this day, i.e. 18.02.1978 , on which date that block of land , i.e. Lot 3, was transferred to the same person who would be owning Lots 4 and 5 of the same land from the said date.** In other words, Lot 3 had been a right of way as a servitude to Lots 4 and 5 from 31.07.1972 to 18.02.1978. On 18.02.1978, Seelawathie Jayasinghe transferred Lots 4 and 5 along with the soil rights of Lot 3 to Saranaguptha Jayasinghe. Then, the right of way became a soil right by a proper deed of title **when Lot 3 was bought over by one and the same person who became the owner by purchase of Lots 4 and 5.**

In other words, Lot 3 was recognized as a right of way or open passage from 31.07.1972 as a means of access to Lots 4 and 5 until 18.02.1978. When Seelawathie Jayasinghe sold Lots 4 and 5 to Saranaguptha Jayasinghe on 18.02.1978, she sold Lot 3 also to Saranaguptha Jayasinghe.

It is at this point that the judgment of ***Perera Vs. Samarakoon 23 NLR 502*** can be applied where it was held that, “ it is only upon the acquisition of the same right in the dominant land and the servient land, that one could apply the concept of merger.” I hold that on 18.02.1978, Saranaguptha Jayasinghe **got the merged rights and became the owner of soil rights of Lots 4 and 5 and 3. The servitudal rights over Lot 3 had come to an end on 18.02.1978.**

The Court of Appeal had followed the same principle in ***David Vs. Gnanawathie 2000, 2 SLR 352*** and similarly held that merger of the dominant and servient tenement in one ownership **terminates and extinguishes the servitude.**

As an owner thereafter, Saranaguptha Jayasinghe was entitled to sell each block of land separately as separate blocks of land to any person who was willing to buy them at whatever price he wants to, after the date on which the dominant and servient tenement got merged on 18.02.1978.

According to Plan No.1592, Lot 5 is facing the main road, Sanghamitta Mawatha, Lot 4 is facing the other main road, Anagarika Dharmapala Mawatha. Lot 4 is a long strip of land which is adjoining Lot 5. The block of land Lot 5 is in extent more than twice the size of Lot 4. Lots 4 and 5 together have two main roads facing each block on either side. Lots 1 and 2 have only one side facing Anagarika Dharmapala Mawatha and they are 5.25 Perches and 3.25 Perches. They are comparatively small when compared with Lots 4 and 5 taken together. Lot 3 is an 'L' shaped block of land of 3 Perches situated between Lot 4 and Lot 2.

The position of the owner of Lots 5,4 and 3, being Saranaguptha Jayasinghe, after 18.02.1978, was that he could legally mortgage, transfer, lease or gift or dispose of any of the lots at his will.

It is at this juncture that Saranaguptha Jayasinghe had **sold Lots 4 and 5** to the **Plaintiff**, Chandra Ranasinghe in 1991 **by Deed No. 14321**. He had kept Lot 3 for himself. **He had not mentioned anything about Lot 3 in that Deed. There is no right of way to be given or any reason for Lot 3 to be kept as an 'open passage'.**

Saranaguptha Jayasinghe had not given any right of way to the Plaintiff in the Deed of Transfer No. 14321. I fail to see how the Plaintiff could pray as a relief in the Plaint for a right of way or a servitude over Lot 3 or to leave it as an open passage **when it is not specifically mentioned in the deed by which she got title to Lots 4 and 5**. The mere wording in the printed form to the effect that 'all rights privileges, easements, servitudes and appurtenances whatsoever' is not sufficient enough to convey a right or servitude over another specific portion of land even though the counsel for the Plaintiff Respondent Appellant contended that it should be so, at the hearing of this case.

I agree with the High Court Judges when they held that, **if it was the intention of the vendor to convey any right or servitude it should be specifically mentioned** in the Deed and such mere wording in the printed form to such effect is not sufficient to convey any right or servitude to be in existence.

Lot 3 is adjoining Lots 1 and 2. Even though the owners of Lots 1 and 2 did not have any mention of Lot 3 as an open passage or a right of way in their title

deeds, they themselves being siblings of one family might have used Lot 3 for convenience in going about doing their daily affairs, even after 18.02.1978.

In 1994, the owner of Lot 1, W.A.Kusum Kanthi Kularatne nee Jayasinghe and the owner of Lot 3, Saranaguptha Jayasinghe decided to sell the said Lots 1 and 3. When selling the same, together, for one million rupees to Seelawathie Minnette Munasinghe, they got their other sibling, P.Somachandra Jayasinghe and his wife to join as Vendors in the sale, thus granting all the rights they have been enjoying up to that date, if any, to be transferred to the Vendee. **The Vendee in that Deed No. 9277 dated 10.06.1994 is the 2nd Defendant in the present case.** The two blocks of land, Lots 1 and 3 when joined together takes the shape of the English letter ' U ' and that is the reason why the Plaintiff in her Plaint complains that the house the Defendants are building is in the shape of U and obstructing the right to light and air to her house which is already built. At the inception of the case, the Plaintiff had got an enjoining order to stop the 1st and 2nd Defendants, building on their land but later on it was desolved after the inquiry held by the District Court in that regard.

It is to be noted that even though the Plaintiff sought a decree to the effect that she is entitled to a **servitude of light and air over Lot 3**, the District Judge concluded that the Plaintiff was **not entitled to such a right as prayed for**. Yet, the Plaintiff **did not file an Appeal** against the judgment challenging the said decision. The Plaintiff was happy with the District Judge's decision granting the relief that Lot 3 be left open as an open passage.

The learned Judges of the High **Court has not dealt with** the pleading whether the Plaintiff has **a right to light and air over Lot 3** because the Plaintiff did not file an Appeal from the District Court Judgment in that regard. I quite agree with the High Court Judges' decision not to look into that aspect.

The Plaintiff's land is a much larger land than the Defendants' land and a house has been built on it some time ago, according to a **plan approved by the Municipal Council**. As such, the owner of the said house, the Plaintiff, cannot, in a broader sense, reasonably have any complaints about light and air. Anyway the Plaintiff had not pursued such a right in the Civil Appellate High Court by way of an Appeal when the District Judge had not granted that right to her.

For the aforementioned reasons, I hold that the learned High Court Judges have held quite correctly that the Plaintiff is not entitled to any other relief other than a declaration of title to Lots 4 and 5. I affirm the judgement of the Civil Appellate High Courtt.

I answer all the questions of law enumerated above in the negative, in favour of the Defendants Appellants Respondents and against the Plaintiff Respondent Appellant.

Appeal is dismissed. However I order no costs.

Judge of the Supreme Court.

Justice K. T. Chitrasiri
I agree.

Judge of the Supreme Court.

Justice Nalin Perera
I agree.

Judge of the Supreme Court.

