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

In the matter of an Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C of the Act No.54 of 2006 of the High Court of the Provinces (Special Provisions) Act as amended .

Mahabadalge Rita Malkanthi,
No.169,
Sapugahawatta,
Wiharakumbura,
Kirindiwela.

Plaintiff

S.C. Appeal No.127/2017
SC (HCA) LA No. 307/2015
WP/HCCA/AV/Appeal No. 1313/2012(F)
D.C. Pugoda No.691/L

Vs.

1. Ilandari Pedige Kamalawathi,
   No.168,
   "Thilaka Wila", Sapugahawatta,
   Kirindiwela.
2. Ilandari Pedige Premasiri,
   No.168/D, Sapugahawatta,
   Wiharakumbura,
   Kirindiwela.
3. Warushamana Pedige Weerasingha,
   Sapugahawatta,
   Wiharakumbura,
   Kirindiwela.

Defendants

AND BETWEEN

Mahabadalge Rita Malkanthi,
No.169,
Sapugahawatta,
Wiharakumbura,
Kirindiwela.

Plaintiff-Appellant

Vs.

1. Ilandari Pedige Kamalawathi,
No.168,
"Thilaka Wila", Sapugahawatta,
Kirindiwela.
2. Ilandari Pedige Premasiri,
No.168/D, Sapugahawatta,
Wiharakumbura,
Kirindiwela.
3. Warushamana Pedige Weerasingha,
Sapugahawatta,
Wiharakumbura,
Kirindiwela.

Defendant-Respondents

AND NOW BETWEEN

Mahabadalge Rita Malkanthi,
No.169,
Sapugahawatta,
Wiharakumbura,
Kirindiwela.

Plaintiff-Appellant-Appellant

Vs.

1. Ilandari Pedige Kamalawathi,
No.168,
"Thilaka Wila", Sapugahawatta,
Kirindiwela.

2. Ilandari Pedige Premasiri,
No.168/D, Sapugahawatta,
Wiharakumbura,
Kirindiwela.
3. Warushamana Pedige Weerasingha,
Sapugahawatta,
Wiharakumbura,
Kirindiwela.
Defendant-Respondent-Respondents

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BEFORE : **KUMUDINI WICKREMASINGHE J.**
ACHALA WENGAPPULI, J.
MENAKA WIJESUNDERA, J.

COUNSEL : Harindra Rajapaksha for the Plaintiff-Appellant-Appellant.
Kamal Perera for the Defendant-Respondent - Respondents.

ARGUED ON : 03rd June, 2025

DECIDED ON : 27th March, 2026

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ACHALA WENGAPPULI, J.

The Plaintiff instituted the instant action to seek a declaration of Court, recognising her right of servitude, to have access to the property described in the 1st schedule to the Plaint, to which she holds title, along

the Northern boundary of the 1st Defendant's land, through an 8-foot-wide roadway, now narrowed down to mere 2-foot footpath. She also sought a declaration of Court recognising her entitlement to have that 8-foot roadway widened to a 15-foot roadway on the basis of necessity and to have that widened roadway extending over the land of 2nd and 3rd Defendants as well.

In their joint answer, the 1st to 3rd Defendants have denied that the Plaintiff ever had any access to her land over their respective lands with an 08-foot-wide roadway. They further claim that when the Plaintiff attempted to draw electricity lines over their lands, they successfully resisted. They totally denied that the Plaintiff had access to her land over the land held by the 2nd Defendant. The Defendants have accordingly prayed for the dismissal of the Plaint, by which a right of way is sought over lands that are owned by several other co-owners, without naming them as parties.

Parties proceeded to trial after settling for a total of 24 issues between them. At the conclusion of the trial, the District Court dismissed the Plaintiff's action on the premise that the Plaintiff has failed to establish her title to the land described in the first schedule to her Plaint as she did not tender the title deed No. 378 of 22.05.2000. It also decided to dismiss the action for the reason that there was no evidence presented, indicating there was an 8-foot-wide roadway used by the Plaintiff over the 1st Defendant's land, except for the existence of a footpath, only three feet wide.

The appeal preferred by the Plaintiff against the said judgment too was dismissed by the High Court of Civil Appeal. The Plaintiff sought to challenge the judgment of the District Court before that Court on the grounds of appeal that the trial Court was wrong in holding that she did not acquire a right of way of servitude over the 8-foot roadway and that she had no alternate access to a public road. The appellate Court was not convinced of the merits of these two grounds of appeal. The Plaintiff, thereupon sought Leave to Appeal against that judgment from this Court.

On 20.06.2017, having considered the submissions of the parties, this Court thought it fit to grant Leave to Appeal to the Plaintiff on the questions of law that are set out in paragraphs 14(b), (c) and (d) of her petition dated 25.09.2015. The said three questions of law are as follows;

i. Did the Learned Judges of the Civil Appellate High Court holden in *Avissawella* err in law by concluding that the Plaintiff failed to establish that she used a right of way 8 feet width over the 1st Defendant's land for a period of time exceeding 10 years disregarding the oral and documentary evidence produced at the trial?

ii. Did the Learned Judges of the Civil Appellate High Court holden in *Avissawella* err in law by holding that the Plaintiff has failed to prove that she is entitled to a right of way of necessity over the 1st to 3rd Defendant's land disregarding the settled law pertaining to a way of necessity in the given circumstances and in the present-day context?

iii. Did the Learned Judges of the Civil Appellate High Court holden in *Avissawella* and the learned District Judge err in law by disregarding the evidence presented by the Plaintiff to prove the way of necessity and by failing to appreciate the evidence placed by the Respondents which has a corroborative value?

In support of her appeal before this Court, learned Counsel for the Plaintiff contended that the appellate Court has fallen into grave error when it failed to consider the evidence presented by the Plaintiff and her witnesses, particularly the surveyor, who surveyed the lands on a commission issued by Court, on the request of the Plaintiff. It was stressed upon before us by the learned Counsel that there was in fact a roadway with a width of 8 feet, over which a tractor was used to transport metal that had been quarried from the Plaintiff's land and, admittedly the Defendants' have obstructed that roadway, which action led to the complaint made to police on 02.09.2003. Learned Counsel thereupon invited attention of this Court to the fact that the 1st Defendant conceded that the Plaintiff has no other access to a public road and is willing to grant her some relief.

In that factual backdrop, learned Counsel submitted that the appellate Court has failed to apply the relevant principles of law that had been laid down in the judgments of ***Roaslin Fernando v Alwis and Others***

(1957) 61 NLR 302 and ***De Vass v Mendis*** (1948) 49 NLR 525 and SC Appeal No. 83/2012 – decided on 17.10.2014.

Learned Counsel for the Defendants contended that the Plaintiff instituted an action before the trial Court claiming her entitlement to 8-foot-wide roadway, which she claimed to have acquired on prescription. The declaration of her entitlement to 8-foot roadway was not sought out of necessity. She pleaded necessity only in respect of her other relief to have that roadway widened to 15 feet. The applicability of the principles in relation to right of way of necessity is therefore confined to her claim to have that 8-foot roadway, widened to be a 15-foot roadway, in order to facilitate vehicular movement to her land. He further referred to the evidence of the surveyor, who confirmed that there was no 8-foot-wide roadway in existence but only a 2-foot-wide footpath was noted. Therefore, learned Counsel invited attention of this Court to the principles of law enunciated in the judgment of ***Kandiah v Seenttamby*** (1913) 17 NLR 29 by *De Sampayo* J, where his Lordship has held that the evidence to prove the acquisition of a prescriptive right to a servitude of way over lands belonging to others should be of "*precise and definite*" in nature and the evidence presented by the Plaintiff fails to satisfy this standard.

It was also brought to the notice of Court that the evidence clearly indicated that the Plaintiff has built a two storied house with frontage to a public road in the same locality and therefore the necessity to have the 15-foot-wide road to have access to her ancestral home cannot be accepted in view of the judgment of ***Amarasuriya v Perera*** (1944) 45 NLR 348.

Learned Counsel for the Defendant also raises the point that the Plaintiff, having failed to establish her title to the land in respect of which the servitude claimed, is not entitled to that relief as she also failed to name the necessary parties to the case, as the lands described in the 2nd to 4th schedules are held in common by several others, in addition to the three Defendants, who are named as parties to the instant matter.

It appears that the Plaintiff's case was presented before the trial Court with a view to achieve two distinct objectives. First, the Plaintiff wants to have the servitude of 8-foot-wide roadway recognised by Court and then to have that 8-foot roadway widened to a 15 foot roadway, out of necessity.

In respect of the 1st objective, the Plaintiff has raised issues Nos. 5(i) to (iii), which are to the effect; whether there is a 8-foot-wide road providing access to her land, along the Northern boundary of the 1st Defendant's land, whether she and her predecessors in title have enjoyed that roadway over the past 10 years and whether she acquired a right of servitude of having access to a public road.

In relation to the second objective, the Plaintiff raised issue No. 8 to the effect whether the Plaintiff is entitled to have that 8 feet road widened to a 15-foot-roadway out of necessity.

The trial Court, having considered the evidence presented before that Court, answered all these issues in the negative, before proceeding to dismiss the Plaint. In appeal, the High Court of Civil Appeal too has affirmed those factual findings made by the trial Court.

In view of the questions of law and the submissions made by learned Counsel for the Plaintiff as well as for the Defendants, it is incumbent upon this Court to consider the evidence presented by the parties, particularly the Plaintiff, in respect of these issues, and review the validity of those findings, when considered along with the applicable principles of law.

The Plaintiff's first objective of obtaining a declaration that she had access to her property through 8-foot-wide roadway over the 1st Defendant's land must be examined before proceeding to consider any other contention.

It is undisputed that the nearest public road to all these lands is *Katupitiya* Road. All the parties have accessed that public road through another roadway known as *Sapugahawatta* or *Vihara Kumbura* Road. This part of the road is owned by the local authority. The surveyor, in conducting his survey, in terms of the commission issued by Court, proceeded to the land held by the Plaintiff, by walking through *Vihara Kumbura* Road and thereafter continued through the front portion of the land (මිදුල) held by the 1st Defendant. He then demarcated the 8-foot-wide roadway, claimed to have existed by the Plaintiff, (but nothing to support it existed) and also demarcated the boundaries, if that access road is widened to 15 feet, in his Plan No. 2814 (Y) the Northern boundary of that widened road would extend into the lands held by the 2nd and 3rd Defendants. Plan Y, depicts these two specific demarcations.

There is no dispute that in the past, the means of access to the land claims to be held by the Plaintiff, was gained through a 2-foot-wide

footpath that ran along the Northern boundary which also forms a portion of the front garden of the 1st Defendant. The Plaintiff, in order to substantiate her claim of acquiring the servitude on the basis that there was 8-foot-wide road used by her for over ten years, relied on the fact that a tractor was used to transport metal that was quarried from her land, over the 1st Defendant's land. The Plaintiff's position is that 8-foot-wide road was used by her until the 1st Defendant put up obstacles across that road sometime in June 2003, which resulted in making complaints to the police.

The factual claim of transporting metal through the disputed roadway has different variations. The Plaintiff maintains that it was her predecessors in title who used the tractors to transport metal from her land as it did happen sometime back, which she estimates to be around 10 to 12 years ago. The Defendants, during cross-examination, suggested that the dispute over transporting of metal using tractors has erupted between the 1st Defendant and one *Premasiri*. The Plaintiff admitted that position and also admitted it was the 1st Defendant's brother, *Wimaladasa,* who transported metal by his tractor.

Samaradiwakara, who served as the *Grama Niladhari* of the area, whilst giving evidence on behalf of the Plaintiff, admitted that he intervened in his official capacity to bring about a settlement of a dispute that erupted over the use of land belonged to others to transport metal.

He states that the dispute was between the Plaintiff and one *Pranshawathie.* The witness has settled the dispute by adding 3 feet to the existing roadway along the boundaries enabling a tractor to be taken to the land. According the recollection of the witness, this dispute has erupted

somewhere around 1993 or 1994. However, although this witness claims to have added 3 feet to the existing roadway facilitating the transport of metal, did not specifically state the width of the access road before the widened area was added. Obviously, this indicates that the roadway before the dispute was not 8 feet wide and that is why it needed to be widened to accommodate the movement of a tractor. During cross-examination, *Samaradiwakara,* also admitted that the tractor must have made about only 7 or 8 trips in total, transporting metal.

The evidence of *Grama Niladhari,* relied on by the Plaintiff, over the dispute that erupted between her and one *Pranshawathie* presented another challenge. The Plaintiff required the proof of the use of 8-foot-wide roadway over a period of ten years to have that servitude recognised by Court. She became the owner of the property only in May 2000, and the instant action was instituted in December 2003. The time duration is less than the number of years required to acquire prescriptive title if the Plaintiff restricts the period of prescription to that period. She therefore needed to tack her claim of prescription to time period during which her predecessors in title were the owners of the property. The transportation of metal has taken place during this time. This seems to be the only item of evidence the Plaintiff had to substantiate her claim of having an 8-foot-wide roadway.

This evidence also indicates that the claim of transporting metal using tractors was confined to a one-off incident. That act of transporting metal by tractor over these adjoining lands was done with the intervention of the *Grama Niladhari,* in order to facilitate the act of transportation and that too only for a limited number of trips. The Plaintiff or any of her

predecessors in title never owned vehicles and would not have used that 'widened' roadway, in that form, after the necessity of transporting of metal from that land was over. This seemed a more probable proposition to act on, as it is also undisputed among the parties that the section of the roadway from the 1st Defendant, connecting same to *Vihara Kumbura* Road, is about only 6 feet wide. Those 6-foot-wide roadway ends with the 1st Defendant's land. This stretch of roadway connecting the 1st Defendant's land to *Vihara Kumbura* Road is used by almost all the parties, and if that is only of 6 feet in width, there cannot be any valid reason to have an 8-foot-wide road between the Plaintiff's land and the 1st Defendant's, merely to serve only the Plaintiff, who walked along the foot path to gain access to that property.

This proposition is further confirmed by the observations of the surveyor. He did not notice any signs to indicate there existed an 8-foot-wide roadway along the access route pointed out by the Plaintiff. Nor did he note any obstructions that had been erected across the roadway narrowing it down only to a 2-foot-wide footpath, which is the only observable roadway that was in existence on that land.

Siriyawathie, in her evidence claimed that there was a 9-foot-wide road, improving on her own sister's claim, who asserted that the roadway was only of 8 feet wide. After few tractors loads of metal were transported in 1993 (ignoring the *Grama Niladhari's* evidence), up until the action was instituted in 2003, there is absolutely no evidence to indicate there was any regular vehicular movement along the disputed roadway between the Plaintiff's land and *Vihara Kumbura* Road for the past ten years. Thus, the inference that the Plaintiff used only a 2-foot-wide footpath all along,

except the few instances of the tractor was transporting metal, and that too with the intervention of the *Grama Niladhari* in order to diffuse a dispute that has erupted between neighbours seemed a more probable proposition to act on. However, that fact alone cannot provide clear and definitive evidence in support of her claim of acquisition of a servitude for an 8-foot-wide roadway.

In view of this evidence, the trial Court had no other option to answer the issue No. 5 in the negative. Therefore, the affirmation of the said finding of fact reached by the trial Court in determining the instant appeal by the appellate Court could not be faulted at all. In view of the reasoning in the preceding paragraphs, I concur with the decisions of the Court below on this particular point.

It was for the Plaintiff to establish on a balance of probability, that she used a roadway with a width of 8 feet from 1993 for ten years over the 1st Defendant's land. *Basnayake* J (as he then was) in ***De Vaas v Mendis*** (*supra,* at p. 527), highlighted the principle that in " … *a claim for a via necessitatis, the onus of proving necessity is upon the person alleging it*".

Moving on to consideration of the issue No. 8, which has been framed by the Plaintiff to the effect whether she is entitled to have that 8 feet road widened to a 15-foot roadway out of necessity, perhaps require no consideration as it does not arise in view of the answer to issue No. 5. If the Plaintiff has failed to establish of her servitude of an 8-foot roadway over the Defendant's lands, whether it should be widened to 15-foot roadway does not arise. Nonetheless, it shall be considered on the basis that the rights of way of necessity of a 15-foot-wide roadway as a sole

ground pleaded in the Plaint, although it is not. One of the authorities relied on by the Plaintiff herself is relevant in this regard.

In the case of ***Rosalin Fernado v Alwis and Others*** (1957) 61 NLR 302, *T.S. Fernando* J, after having quoted a section from the text of a South African judgment ***Peacock v Hedges*** (1876) 6 Buchana's Cape S.C.R. at 69, which read, " *… the authorities in the Roman Dutch law clearly show that a right of road of necessity can be claimed no further than the actual necessity of the case demands"* and stated (at p. 304) " *[I]f I may say so, with great respect, this simpler and more readily understood expression appears to afford an easier test to be adopted when a Court is called upon to decide a question of the grant of a right of way of necessity."*

In my view, the test indicated in the words "*actual necessity of the case demands"* encapsulates the very essence of the test that should be applied by a Court, in determining a claim made by a party to a right of necessity to have access to a public road over someone else's land.

The question before me for consideration is did the Plaintiff establish her "*actual necessity*" of a 15-foot-wide roadway, as her case demands in this particular instance. In this regard, it is relevant to note that the land to which the said right of access sought by the Plaintiff, on the basis of necessity, is her own ancestral home where she and her siblings grew up under parental care. The evidence is clear that the Plaintiff has already put up a two storeyed residential house in *Sapugaswatte* area. Moreover, even if in respect of that ancestral house, the Plaintiff had no vehicle to be brought into her land through that widened roadway. Her claim is purely based on a future eventuality of her elderly mother falling sick and if she is required

to be taken to a hospital for medical treatment in a vehicle. She, being an employee of a government hospital, is very well justified in showing concern for the welfare of her mother in case of a medical emergency. But throughout her childhood and until she got married, there would have been many similar instances which they have apparently successfully managed with those 2-foot-wide footpath, used to gain access to a public road.

In this regard, I respectfully adopt the principle recognised in the judgment of ***Fernando et al v De Silva*** (1928) 30 NLR 56, which the Defendants have relied on. In that instance, *Drieberg* J relied on the judgment of ***Peacock v Hedges*** (*supra*) in holding (at p. 59) that when there is free access to a road by *"a path"* leading to the public road is available to a party, he "*… cannot say that a cartway is a necessity*".

The contention of the learned Counsel, which was advanced before this Court on behalf of the Plaintiff, is that she has no other means of access to her house and the Defendants in their evidence have conceded that they refused to grant the way of necessity because of personal enmity is not supported by the proceedings. It is also the contention of the Plaintiff that some of the Defendants have admitted her entitlement to have road access. But these factors cannot provide additional support to her evidence, simply because they conceded in their respective evidence only of her right to have access to the public road through the foot path and not the 8 feet wide or 15-foot-wide roadway.

The conclusion reached by the trial Court that the Plaintiff failed to establish her title to the property was not argued before us. That finding

was affirmed by the appellate Court. Then, even if the questions of law are answered in the affirmative, the Plaint should be dismissed.

In view of the reasons that are set out in the preceding paragraphs of this judgment, I am of the considered view that all three questions of law on which the instant appeal was heard should be answered in the negative.

Therefore, I proceed to answer the three questions in the negative.

Accordingly, the judgments of the District Court as well as the High Court of Civil Appeal are hereby affirmed.

The appeal of the Plaintiff is dismissed with costs.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE J.

I agree.

JUDGE OF THE SUPREME COURT

MENAKA WIJESUNDERA, J.

I agree.

JUDGE OF THE SUPREME COURT