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

In the matter of an Application for Leave to Appeal in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006.

1. Markandu Linganathan,
   No.9/4, Station Road,
   Colombo 4.

2. Abdul Cader Mahmud,
   Council Lane,
   Dehiwala.

S.C. Appeal No: 200/2012

SC HCCA LA No: 90/2012

HCCA Colombo Case No: 66/2011/LA

DC Colombo Case No: DLM 00198/2010

PLAINTIFFS

Vs.

1. Yousoof Ibrahim Jafferjee,
   No.3, Conston Place,
   Colombo 7.

2. Mansoor Ibrahim Jafferjee,
   No.6B, Adams Avenue,
   Colombo 4.

3. Mohomadally Ibrahim Jafferjee,
   No.25, Alfred Place,
   Colombo 3.

4. Gulzar Hussein Ibrahim Jafferjee,
   No.6A, Adams Avenue,
   Colombo 4.

5. Mrs. Rehana Abbas Ibrahim Jafferjee,
   No.36, Horton Place,
   Colombo 7.

6. Mrs. Zahra Thair Ibrahim Jafferjee,
   No.10, Adams Avenue,
   Colombo 4.

   Carrying Partnership in Business under the name, style and firm of Jafferjee Brothers of No.150, St. Joseph Street, Colombo 14.

DEFENDANTS

AND

1. Markandu Linganathan,
   No.9/4, Station Road,
   Colombo 4.

2. Abdul Cader Mahmud,
   Council Lane,
   Dehiwala.

PLAINTIFF-PETITIONERS

Vs.

Gulzar Hussein Ibrahim Jafferjee,
No.6A, Adams Avenue,
Colombo 4.

4TH DEFENDANT-RESPONDENT

Mrs. Zahra Thair Ibrahim Jafferjee,
No.10, Adams Avenue,
Colombo 4.

6TH DEFENDANT-RESPONDENT

Both carrying on business under the name, style and firm of Jafferjee Brothers of No.150, St. Joseph Street, Colombo 14.

AND NOW BETWEEN

1. Markandu Linganathan,
   No.9/4, Station Road,
   Colombo 4.

2. Abdul Cader Mahmud,
   Council Lane,
   Dehiwala.

PLAINTIFF-PETITIONER-APPELLANTS

Vs.

Gulzar Hussein Ibrahim Jafferjee,
No.6A, Adams Avenue,
Colombo 4.

4TH DEFENDANT-RESPONDENT-RESPONDENT

Mrs. Zahra Thair Ibrahim Jafferjee,
No.10, Adams Avenue,
Colombo 4.

6TH DEFENDANT-RESPONDENT-RESPONDENT

Both carrying on business under the name, style and firm of Jafferjee Brothers of No.150, St. Joseph Street, Colombo 14.

Before:	**Hon. P. Padman Surasena, C.J.,**
	Hon. Kumudini Wickremesinghe, J.
	Hon. Janak De Silva, J.
Counsel:	Dr. Romesh de Silva, P.C. with Geethaka Goonawardene, PC and Kushlan Senevirathne for the Plaintiff-Petitioner-Appellants
	Navin Marapana, P.C. with Uchitha Wickremesinghe and Saumya Hettiarachchi for the 4th and 6th Defendant-Respondent-Respondents
Written Submissions:	06.12.2012 and 27.11.2025 by the Plaintiff-Petitioner-Appellants
	06.02.2017 and 03.12.2025 by the 4th and 6th Defendant-Respondent-Respondents
Argued On:	31.10.2025
Decided On:	31.03.2026

Janak De Silva, J.

This is an appeal preferred by the Plaintiff-Petitioner-Appellants (Plaintiffs) against the decision of the High Court of Civil Appeal of the Western Province (holden in Colombo) (High Court) affirming the judgment of the District Court of Colombo which held that the Plaintiffs cannot maintain the action filed against the Defendant-Respondent-Respondents (Defendants).

In this action, the Plaintiffs claimed that:

(i) They and their predecessors in title have been using the roadway more fully described in Schedule 3 to the plaint,

(ii) They were entitled to use the said roadway by virtue of title deeds, a final decree in a partition action and by way of necessity,

(iii) On or about 08.01.2001 the Defendants had obstructed the use of this roadway,

(iv) Accordingly, the Plaintiffs instituted action in the District Court of Colombo bearing No. 19174/L and obtained inter parties an interim injunction preventing the Defendants from obstructing their right of way,

(v) The Defendants appealed against the grant of the interim injunction. In ***Jafferjee v. Linganathan*** **[C.A.L.A. 143/2001, C.A.M. 04.06.2002]** the Court of Appeal dismissed the appeal,

(vi) However, that action was dismissed on 11.09.2002 for want of appearance by the Plaintiffs,

(vii) The appeal preferred by the Plaintiffs against this judgment had to be withdrawn as it was filed out of time,

(viii) After that appeal was dismissed, the Defendants had again obstructed the Plaintiffs from using the said right of way on 19.10.2010 which gave rise to the Defendants instituting the present action,

(ix) The Plaintiffs in this action *inter alia* sought

a. A declaration that they are entitled to the roadway more fully described in Schedule 3 to the plaint by way of necessity,

b. An interim injunction preventing the Defendnats and their servants and agents from obstructing the Plaintiffs and their servants and agents from using the roadway described in Schedule 3 to the plaint.

The learned judge of the District Court refused to grant this interim injunction as the previous action of the Plaintiffs was dismissed under Section 87(1) of the Civil Procedure Code (CPC) and due to the Plaintiffs' failure to establish a prima facie case in order to obtain interim relief.

The Plaintiffs preferred an appeal to the High Court which refused to grant them leave to appeal and affirmed the judgment of the learned judge of the District Court.

Aggrieved, the Plaintiffs sought and obtained leave to appeal on the following questions of law:

i. *Whether the High Court of Civil Appeal has wrongly applied the principle of res judicata?*
ii. *Whether the High Court of Civil Appeal failed to give its mind to the principles applicable to the granting of an interim injunction?*
iii. *Whether the High Court of Civil Appeal failed to give its mind to the case of the Plaintiffs?*
iv. *Whether the High Court of Civil Appeal did not apply and/or fail to consider the law relating to the right of way by necessity?*

The High Court further held that the Plaintiffs were precluded from maintaining the present action in view of Section 34 of the CPC which mandates that every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action claimed in the action. Where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. The High Court held that the Plaintiffs cannot maintain the present action as they have omitted to plead the remedy of right of way by necessity in the earlier action.

Finally, the High Court held that the Plaintiffs had lost the right of way they had earlier from the northern boundary due to their actions and hence cannot seek to obtain a right of way by necessity over the land of the neighbours.

Question of Law No. 1

Coomaraswamy (*Law of Evidence*, Vol. I, 2nd ed., page 528) states that the following elements must be established in order to succeed in a plea of *res judicata*:

(a) The former action must have been a regular action.

(b) The two actions must be between the same parties or their representatives in interest (privies).

(c) The previous judgment must be a final judgment.

(d) The same question or identical causes of action must have been involved in both actions.

(e) The judicial tribunal pronouncing the decision must have had competent jurisdiction in that behalf.

(f) The previous decision must be what in law is deemed such.

(g) The particular judicial decision must have been in fact pronounced as alleged.

(h) The judgment should not have been obtained by fraud or collusion.

(i) If it is a foreign judgment, it should have been passed in accordance with the principles of natural justice.

(j) The correctness of the decision is not a relevant consideration.

Section 87(2) of the CPC states that where an action has been dismissed under this section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.

The High Court held that the prohibition in Section 87(2) acts independently of the principles applicable to *res judicata* and there is no necessity to consider the ingredients of *res judicata* in determining the issue before court. The only question to be considered is whether the cause of action in both actions is the same which was answered in the affirmative by the High Court.

Let me examine the precision of the approach of the High Court.

The present Section 87 of the CPC was introduced by Civil Procedure Code (Amendment) Law, No. 20 of 1977.

Prior to this amendment, the provision for default of the plaintiff was set out in Section 84(1) of the CPC which, according to the Legislative Enactments 1956 Revised Edition, read as follows:

> *"(1) If the plaintiff fails appear on the day fixed for the appearance and answer of the defendant. or on the day appointed for the filling of the answer, or for the filling of the replication, or for the hearing of the action, and if the defendant on the occasion of such default of the plaintiff to appear is present in person or by proctor, and does not admit the plaintiff's claim and does not consent to postponement of the day for the hearing of the action the court shall pass a decree nisi in the form no. 21 in the first schedule or to the like decree shall at the expiration of fourteen days from the date thereof become absolute unless the plaintiff shall have notice shown to the court good cause by affidavit or otherwise for his non appearance."*

There was no provision similar to the present Section 87(2) of the CPC which explicitly states that where an action has been dismissed under this section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.

Learned President's Counsel for the Respondents submitted that notwithstanding such absence, there is a long line of cases which held that where the plaintiff defaults in appearing within the meaning of Section 84 of the CPC (as at then) and the action is dismissed, it was a bar to a fresh action on the same cause of action.

In ***Fernando v. Uduman*** **[5 N.L.R. 81]**, A's action was dismissed on the ground of his absence on the trial day. On plaintiff's motion an order *nisi* was allowed on defendant to show cause why the judgment should not be re-opened. However, the plaintiff, without availing himself of this order, moved the Court for permission to institute a fresh action. It was held that the decree of dismissal entered in the old action was a bar to the new action, but that as the District Judge should have opened up the decree, his error should not stand in the way of the issues between the parties being tried. Accordingly, the Supreme Court entered a decree of dismissal in the old case and

allowed the new one to go on. Lawrie, J. held (at page 82) that so long as the decree of dismissal stood, no other action could be brought.

In ***Palaniappa v. Gomes*** **[11 N.L.R. 285]** the plaintiff brought an action in the District Court of Colombo against the defendant, who was resident in Kalutara, on a promissory note, and having been ordered to give security for costs under section 417 of the CPC, he failed to do so. His action was dismissed under section 418 of the CPC. Subsequently the plaintiff brought an action on the same note in the District Court of Kalutara, and the defendant pleaded the dismissal of the previous action as *res judicata*. It was held that the dismissal of the first action operated as *res judicata* and barred the second action.

In ***Dharmadasa v. Piyadasa Perera*** **[64 N.L.R. 249]** the question revolved around a default decree entered against the defendant. It was held that a decree absolute for default that has been passed against a defendant by a District Court is one to which section 207 of the CPC applies and can, therefore, operate as *res judicata* in a subsequent action between the same parties in respect of the same subject-matter.

Nevertheless, in ***Herath v. The Attorney General*** **[60 N.L.R. 193 at 221]** Basnayake, C.J., having examined the provisions regulating the plea of *res judicata*, went on to hold as follows:

> *"The first question that needs consideration is whether the expression "all decrees" includes decrees entered under section 84. Now section 207 occurs in a chapter which has a heading "Judgment and Decree" and makes elaborate provision regarding the pronouncing of judgment, the drawing up of decrees. Section 184 provides that upon the evidence which has been duly taken or upon the facts admitted in the pleading or otherwise and after the parties have been heard either in person or by their pleaders judgment shall be pronounced in open court after notice to the parties. Section 188 provides that as soon as the judgment is pronounced a formal decree bearing the same date as the judgment shall be drawn up by the Court in the form No. 41 in the First Schedule or to the*

like effect specifying in precise words the order which is made by the judgment in regard to the relief granted or other determination of the action. The succeeding sections make elaborate provisions regarding decrees in respect of immovable property, movable property, interest, specific performance, payment by instalments, set off, mesne profits, accounts etc.

Section 206 provides that the decree or certified copy thereof shall constitute the sole primary evidence of the decision or order passed by the Court. The preceding provisions of the Chapter in which section 207 occurs to my mind show that the decrees spoken of in that section are decrees drawn up by the Court under section 188 after judgment has been pronounced in the manner contemplated in sections 184, 185, 186 and 187. Such decrees are final between the parties subject to appeal. ***Section 207 will therefore apply only to decrees pronounced after there has been an adjudication on the merits of a suit and not to decrees entered under section 84****."* (emphasis added)

However, Pulle, J. (at page 226) in his separate opinion did not agree with this portion of the judgment and held:

"…that the dismissal of the action was a bar to a fresh action against one or other of the parties on the same cause of action, assuming that the District Judge had jurisdiction to try case No. 3632 on its substantive merits, is plain enough."

In fact, Gunasekera, J. in ***Dharmadasa*** **[supra. at pages 251-252]** stated as follows:

"The present case is distinguishable from that of Herath v. The Attorney-General (supra), being a case of a decree entered after there had been an adjudication on the merits of the suit in that there was an exparte trial under section 85 of the Code. In any event I respectfully disagree with the view that the term "decree" as used in Chapter 20 of the Code must be given the meaning that is given to it in the passage quoted from the learned Chief Justice's judgment.

Some of the consequences of that interpretation would be that a Court would have no power to correct a clerical or arithmetical mistake in a decree entered under section 84 or 85 ; the requirements laid down in sections 190 and 191 as to the contents of decrees relating respectively to immovable property and to the delivery of movable property would not apply to a decree entered under section 85 ; and the provisions of section 192, empowering a court to include in a money decree an order for the payment of interest, would not apply to such a decree if it was entered after an exparte trial. I do not think that there is anything in the context to suggest that the legislature intended that the word " decree " should be given a meaning that would lead to such consequences."

The learned President's Counsel for the Defendants submitted that the amendment to Section 87(2) of the CPC was specifically introduced to put to rest the controversy surrounding what he described to be the *obiter dictum* of Basnayake, C.J. in ***Herath*** **[supra.].**

There is merit in the position taken by the learned President's Counsel for the Defendants. I have no doubt that the amendment made in 1977 to Section 87 of the CPC, cleared any lingering doubts on whether a default order made against a plaintiff suffices to prevent a fresh action being instituted on the same cause of action.

The amendment introduced by Section 87(2) of the CPC operates as a statutory bar and is distinct and independent from the concept of *res judicata* enshrined in Sections 34 and 207 of the CPC. It does not require adjudication on the merits of the case. Section 87(2) is a stand-alone section and the only requirements for its application is that there was a default on the part of the plaintiff and the the cause of action in both actions is the same.

The Plaintiffs sought to impugn the judgment of the High Court on a twofold basis. They contend firstly, that they have a new cause of action based on the *right of necessity*, and therefore Section 87(2) of the CPC has no bearing on this action; and

secondly that the actionable wrong springs from a different date to the violation in the first action and is of a continuing nature.

It was further submitted that Section 40(d) of the CPC requires a plain and concise statement of the circumstances constituting each cause of action and where and when it arose. Thus the Plaintiffs claimed that a cause of action has to relate to a date on which it arose. Although the obstruction may be the same, each date of the obstruction constitutes a separate and different cause of action. The cause of action in this case is the obstruction that took place on 19.10.2010. Moreover, this action relates to a new cause of action, namely the cause of action of a road way by necessity.

Let me first examine the meaning of *cause of action*. Plaintiffs relied heavily on the definition of cause of action in Section 5 of the CPC which reads:

> *"cause of action" is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury*.

As correctly pointed out by Lascelles, A.C.J., in ***Pless Pol v. Lady de Soyza and Others*** **[9 N.L.R. 316 at 319-320]**:

> *"The term "action" is defined as "a proceeding for the prevention or redress of a wrong." It is clear to me that the words "the wrong for the prevention or redress of which an action may be brought" states generally what is connoted by the term "cause of action" the remainder of the sentence enumerates some - not necessarily all (for the word used is "includes") - of the acts of defendants which constitute causes of action."*

Hence a *cause of action* is the wrong for the prevention or redress of which an action may be brought. The wrong *includes but is not limited to* the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury.

What is the wrong the Plaintiffs sought to prevent or redress in the earlier District Court of Colombo case No. 19174/L? They pleaded that they have acquired a right of way by prescription and sought a declaration that they are entitled to a right of way over the land more fully described in Schedule 3 in the plaint filed in that action. The wrong they described is the act of the Defendants obstructing and/or preventing the Plaintiffs from using the said roadway (right of way).

No doubt that right was obtained by prescription. However, the fact that the Plaintiffs claimed a right of way by prescription does not mean that the wrong was the violation of the right of way acquired by prescription. The right violated is the right of way claimed by the Plaintiffs.

Let me further expound this delinking of the right of way and the mode by which such right is created or acquired by examining the servitudes recognised in Roman-Dutch law and the way in which they are created.

According to Voet (7.1.1) a servitude is a real right enjoyed by one person over or in respect of the property of another, whereby the latter is required to suffer the former to do, or himself to abstain from doing, something upon such property for the former's advantage.

Servitudes are either real or praedial servitude or personal servitude (Voet 7.1.1). Real or Praedial Servitudes are where the person for whose benefit such right is constituted and enjoy it as incidental to and inseparable from immovable property of which he is the owner. Real servitudes can be further divided into rustic and urban servitudes although this distinction does not have any practical consequences.

Personal servitudes on the other hand allows the person for whose benefit such right is granted to enjoy it personally without reference to any property of which he is owner.

Right of way is a Real Servitude. Lee (An Introduction to Roman-Dutch Law, 1915 Clarendon Press, page 150) explains that a way of necessity, giving necessary access to a public road, is in fact a right of way.

Real Servitudes can be acquired by agreement, prescription, last will, judicial decree and by operation of law.

The contention of the Plaintiffs is based upon a focus on the mode by which the right of way was acquired. However, in ***Samichi v. Pieris*** **[16 N.L.R. 257 at 261]** Lascelles C.J., opined that *"The true "cause of action"… is the right in virtue of which this claim is made, the foundation of the claim"*.

Where identical rights are claimed in subsequent proceedings, they would be considered the same cause of action. This is illustrated in ***Dingiri Menika v. Punchi Mahatmaya*** **[13 N.L.R. 59]** where subsequent to the plaintiff's right to inherit from her father being decided against her in an action, she instituted a second action in respect of a different land forming a part of the same inheritance. It was held that the decision in the first case was *res judicata* of the present action. It was further held that for the purpose of determining whether or not two causes of action are the same, Court have to look not to the mere form in which the action is brought, but to the grounds of the plaint, and to the media on which the plaintiff asks for judgment.

In the present case, the Plaintiffs' averments in the two plaints of the District Court suits are nearly identical, and the claims are based on the same right of way. The only differences in the present case are the Plaintiffs claiming a right of way by necessity and asserting a violation springing from a different date of obstruction.

As the learned President's Counsel for the Defendants submitted, accepting the argument of the Plaintiffs that each separate obstruction gives right to a new cause of action, leads to absurdity. Plaintiffs will then be entitled to file a new action each day even if each action is dismissed for want of appearance.

Question of law No. 1 is answered in the negative.

Question of Law No. 2

I will first delve into whether the Plaintiffs have established a *prima facie* case in order to be entitled to an interim injunction. For this, the Court needs to be prima facie satisfied that the Plaintiffs have a legitimate legal right to seek the relief they have prayed for.

However, as correctly identified by the learned judges of the High Court, the property to which the Plaintiffs claim title (Lot 4) has an alternate roadway to the North through Lot 5 of Plan No. 101. In fact, it was through a subsequent subdivision of Lot 4 by the Plaintiffs that some of the subdivided lots lost access to this roadway.

Where a party with access to a roadway has caused such a subdivision effectively landlocking the subdivided lots, they are not then entitled to claim a right of way over their neighbour's land **[*G.R.Godamune v. Magilin Nona* (C.A. 396/2000(F), C.A.M. 28.4.2009), *Suppu Namasivayam v. Kanapathipillai* (32 N.L.R. 44), *K.Nagalingam v. Kathirasipillai* (58 N.L.R. 371), *Costa v. Rowell* (1992) 1 Sri.L.R. 5]**.

The Plaintiff has claimed that the test for the right of way of necessity is assessing the actual necessities of the case, and has cited several authorities to the effect that where an alternative route does not constitute reasonable access to a public road the plaintiff should be granted a more direct approach to the road. However, none of these authorities relate to instances in which the Plaintiffs have landlocked their property through their own action.

Thus, the Plaintiffs have failed to establish a *prima facie* case in order to be entitled to an interim injunction in their favour, as rightly recognized by the learned judges of the High Court.

Question of law No. 2 is answered in the negative.

The reasons expounded above requires that questions of law Nos. 3 and 4 should also be answered in the negative.

For all the foregoing reasons, I affirm the judgment of the High Court of Civil Appeal dated 02.02.2012.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, C.J.

I agree.

CHIEF JUSTICE

Kumudini Wickremesinghe, J.

I agree.

JUDGE OF THE SUPREME COURT