

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

In the matter of an appeal made in terms of  
Article 127 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.

**SC / APPEAL / 48 / 2014**

**SC / HCCA / LA / 195 / 2014**

**WP / HCCA / COL / 65 / 2011 (LA)**

**DC Colombo: DLM / 174 / 2008**

**Demuni Cuthbert Kingsley Silva,**

No.23, 17<sup>th</sup> Lane,

(Off College Street),

Kotahena,

Colombo 13.

**PLAINTIFF**

**-Vs-**

**Shanthalingam Shanthakumar,**

No.25/1, 17<sup>th</sup> Lane,

(Off College Street),

Kotahena,

Colombo 13.

**DEFENDANT**

**AND THEN BETWEEN**

**Shanthalingam Shanthakumar,**

No.25/1, 17<sup>th</sup> Lane,

(Off College Street),

Kotahena,

Colombo 13.

**DEFENDANT – APPELLANT**

**-Vs-**

**Demuni Cuthbert Kingsley Silva,**

No.23, 17<sup>th</sup> Lane,

(Off College Street),

Kotahena,

Colombo 13.

**PLAINTIFF – RESPONDENT**

**AND NOW BETWEEN**

**Demuni Cuthbert Kingsley Silva,**

No.23, 17<sup>th</sup> Lane,

(Off College Street),

Kotahena,  
Colombo 13.

**PLAINTIFF – RESPONDENT – APPELLANT**  
**(Deceased)**

**Nalini Krishnajina Silva nee Ruwanpura,**  
23, 17<sup>th</sup> Lane,  
(Off College Street),  
Kotahena,  
Colombo 13.

**SUBSTITUTED PLAINTIFF –**  
**RESPONDENT – APPELLANT**

-Vs-

**Shanthalingam Shanthakumar,**  
25/1, 17<sup>th</sup> Lane,  
(Off College Street),  
Kotahena,  
Colombo 13.

**DEFENDANT – APPELLANT –**  
**RESPONDENT**

**Before:** S. Thurairaja, PC, J  
A.H.M.D. Nawaz, J &  
Mahinda Samayawardhena, J

**Counsel:** Romesh De Silva, PC with Saumya Amarasekara, PC for the Substituted –  
Plaintiff – Respondent – Appellant.

V. Thevasenathipathy with F. Nissa Faiz for the Defendant –Appellant –  
Respondent.

**Argued on:** 07.11.2024

**Decided on:** 19.03.2026

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

1. The core issues in this case revolve around the question whether the Learned District Judge of Colombo rightly allowed an issue based on title, which had been raised only in the replication, and whether the Learned High Court Judges correctly overturned that decision. The District Judge permitted the issue on title to proceed despite it being set out in replication rather than in the original plaint. However, the Civil Appellate High Court Judges took a different stance, disallowing the issue based on procedural grounds to which I will advert later.
2. This Court granted leave to appeal on 18 March 2014, in order to evaluate the aforesaid quintessential questions, formulating the following questions of law as substantial having regard to the petition of appeal;

1. *When there is no dispute with regard to the dominant land, is it necessary to plead title in detail to the dominant land in an action where the dispute is over the servient land?*
  2. *Is it necessary to pray for a declaration of title to the dominant land when the dispute only relates in respect of the servient land?*
  3. *Is the Plaintiff entitled to plead title in detail in a replication where his title to a dominant land is challenged for the first time in the answer filed by the Defendant?*
  4. *Where a title is pleaded in a replication in order to clarify rights to an incidental matter to the dispute set out in the plaint, is the Plaintiff entitled to raise issues on the said pleadings.*
3. This is an action filed by the Plaintiff – Respondent – Appellant (the Plaintiff) for a declaration of right of way in favour of his land. The plaint recited the entitlement as follows;
- (a) *He is legally in possession of the land described in the 1<sup>st</sup> Schedule to the plaint;*
  - (b) *The Defendant has not disputed the Plaintiff's possession to the land described in the 1<sup>st</sup> Schedule to the plaint or the title of the Plaintiff's to the premises described in the 1<sup>st</sup> Schedule to the plaint;*

*(c) The Plaintiff has acquired prescriptive rights to the land described in the 1<sup>st</sup> Schedule and the roadway described in the 2<sup>nd</sup> Schedule to the plaint;*

*(d) The Plaintiff has a right of way over the land described in the 2<sup>nd</sup> Schedule to the plaint in order to access his land described in the 1<sup>st</sup> Schedule to the plaint;*

*(e) The Defendant has raised the height of the roadway described in the 2<sup>nd</sup> Schedule to the plaint by 52” inches;*

*(f) By the said action of the Defendant, he has prevented the Plaintiff's access to his land over the roadway described in the 2<sup>nd</sup> Schedule to the plaint;*

4. When one looks at this plaint, it is crystal clear that the Plaintiff asserts to be the holder of a servitude or right of way over a road way which is described in the 2<sup>nd</sup> Schedule to the plaint. It has to be noted that the plaint did not set out a title in the plaint but the Plaintiff was emphatic that he had prescribed to the roadway and in addition, he was being obstructed in his use and enjoyment of the roadway by Defendant.

5. The prayer of the Plaintiff was formulated in the following tenor;

*(a) For a declaration that the Plaintiff has a right of way over the roadway described in the 2<sup>nd</sup> Schedule to the plaint;*

*(b) For a declaration that the land described in the 2<sup>nd</sup> Schedule is a right of way to the land described in the 1<sup>st</sup> Schedule to the plaint;*

*(c) For order preventing the Defendant from obstructing the road described in the 2<sup>nd</sup> Schedule to the plaint;*

*(d) For a mandatory order directing the Defendant to restore the roadway described in the 2<sup>nd</sup> Schedule to the plaint to its original condition.*

6. Thus, it is quite clear that the basis of the plaint for a right of way over the servient tenement was prescriptive user and obstruction thereof by the Defendant. He also asserted possession over the dominant tenement but had not recited his title thereto.

7. The amended answer of the Defendant took up the following positions;

*1. That the Defendant was unaware of the Plaintiff's possession or the title to the land described in the 1<sup>st</sup> schedule to the plaint. In those circumstances the Defendant rejected paragraphs 2 and 3 of the plaint which is related to the land which is described in the 1<sup>st</sup> schedule hereto.*

*2. The Defendant also denied that the Plaintiff had prescriptive rights to the land described in the 1<sup>st</sup> Schedule.*

8. In his amended answer, the Defendant raised a claim in reconvention based on an alleged encroachment by the Plaintiff onto the roadway and thereby sought an order to combine the encroached portion to the road way in dispute.

9. The Defendant thus challenged the Plaintiff's title to the roadway in dispute and prayed for a declaration that he was entitled to use the roadway set out in

the 2<sup>nd</sup> Schedule to the plaint and for a further declaration that the Plaintiff had no right over the said roadway.

10. From the foregoing it is clear as daylight that even though the Plaintiff claimed a right of way over the roadway described in the 2<sup>nd</sup> Schedule based on his prescriptive user, the Defendant sought a declaration that the Plaintiff had no right whatsoever over the roadway. The rival pleadings thus exhibited elements of *actio confessoria* and *actio negatoria* on the part of the Plaintiff and the Defendant respectively.
11. It is a salient fact that there is no contest raised or an adverse title pleaded against the Plaintiff in respect of his dominant tenement. The gravamen of the complaint of the Defendant is that the Plaintiff had not pleaded his title to the dominant tenement in the plaint.
12. The claim in reconvention comprised two distinct components. First, the Defendant alleged encroachment by the Plaintiff upon his land; secondly, he sought damages consequent upon such alleged encroachment. In addition, the Defendant prayed for a declaration that he was entitled to the portion said to have been encroached upon.
13. In answer to the claim in reconvention, as embodied in the amended answer, the Plaintiff filed a replication. In that replication, the Plaintiff set out more fully his title to the dominant tenement and, correspondingly, the basis upon which he asserted rights over the servient tenement.
14. It is significant that the Defendant raised no objection to the replication setting out the Plaintiff's title to the lands described in the 1<sup>st</sup> and 2<sup>nd</sup> Schedules. When the matter proceeded to trial, the Plaintiff invited the Court to frame issue No. 28 as follows:

*Is the Plaintiff the title holder or the owner of the land depicted in the 1<sup>st</sup> Schedule as described in the replication. The Defendant objected to the aforesaid issue raised by the Plaintiff and the learned District Judge by his order dated 13 October 2011 overruled the objections and proceeded to permit issue No.28 and have the trial continued.*

15. The learned District Judge came to the finding that the dispute between the parties is not an action for a declaration of title to the land but in respect of a right of way and the question before court was not whether the Plaintiff had title to the dominant tenement but whether the Plaintiff was entitled to a right of way over the Defendant's land.
16. Aggrieved by the order, the Defendant appealed to the Civil Appellate High Court but the High Court took the view that the learned District Judge had erred in law when he allowed issue No.28. It is against this judgement of the High Court of Colombo pronounced on 5 April 2013, the Plaintiff appealed to the Supreme Court.
17. In his submissions before this court the learned counsel for the Defendant Mr. V. Thevasenathipathy contended that the aforesaid issue could not be raised by the Plaintiff as it was a fact which should have been pleaded in the plaint. He argued that the title of the Plaintiff to the dominant tenement would have to be set out clearly in the plaint by way of a clear chain of title with numbers of relevant deeds and the Plaintiff grievously failed as he presented a plaint which was devoid of the material particulars.
18. Mr. Romesh De Silva the learned President's Counsel argued that issues would not be confined to the pleadings and it is axiomatic that it could arise even outside the pleadings – see the judgement of the Privy Council in *Bank of*

*Ceylon v. Chelliahpillai*<sup>1</sup>. In fact, it is apposite to recall the principle laid down by the Privy Council in this case to the effect that “a case must be tried upon the issues on which the right decision of the case appears to the court to depend” – See comparable dicta to this effect in *Franklin Fernando v. Analectus Fernando and Others*<sup>2</sup>.

19. As I said before, the Plaintiff’s action is classified as *actio confessoria*, whilst the Defendant sued for its counterpart *actio negatoria*.

20. In a nutshell, “the great type of real action was the *vindicatio* for the recovery of specific property, as the *condictio* was the type of personal action. For servitudes the appropriate actions were the *actio confessoria*, claiming a servitude; the *actio negatoria*, denying a servitude”.<sup>3</sup>

21. Hall and Kellaway on “**Servitudes**” delineate “*actio confessoria*” and “*actio negatoria*” thus;

“The actions recognized 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.”<sup>4</sup>

22. Wille alluded to *actio confessoria* in the following tenor:

“The holder of a servitude may approach a court for a declaration of rights if his or her rights under the servitude are threatened or have been infringed.”

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<sup>1</sup> 64 N.L.R. 25 at p 27.

<sup>2</sup> (2015) 1 Sri.L.R. at p 9.

<sup>3</sup> See R.W Leage “*Roman Private Law Founded on the Institutes of Gaius and Justinian (1906) – Kissinger Legacy Reprints* at p 383.

<sup>4</sup> C.G.Hall & E.A.Kellaway *Servitudes* p.139.

23. The learned authors described *actio negatoria* thus;

*“The actio negatoria, an action in rem, is available to the owner of property to restrict any physical disturbance of land”.*

24. So much for the common law. Turning to Judicial precedents they are galore – see J.A.N. de Silva, J (as he then was) in *Saparamadu v Melder*<sup>5</sup>; *Karunadasa v. Jinadasa Subasinghe*<sup>6</sup>; *Fernando v Wickremasinghe*<sup>7</sup>; for a discussion on the distinction between the two *actiones* and the previous precedents – see *Gertrude Tressila and Another v Rukmali Hathurusinghe*.<sup>8</sup>

25. The forgoing discussion while bringing out the distinction between the two actions also brings into sharp focus the following.

26. Where the *actio negatoria* is the bulwark of ownership, enabling the dominus to repel unwarranted claims and vindicate the plenitude of his title, the *actio confessoria* stands as the proper remedy of the **servitude-holder**. It enables the claimant to affirm and enforce the existence of the servitude, not by disputing the ownership of the servient tenement, but by asserting a limited real right carved out of that ownership.

27. Thus, when the exercise of a servitude is obstructed, the holder may institute the *actio confessoria* to secure recognition of the right and to prevent interference with its lawful enjoyment. Unlike the *actio negatoria*, which proclaims freedom from encumbrance, the *actio confessoria* affirms entitlement to a defined use — whether it be a right of way, a right to draw

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<sup>5</sup> (2004) 3 Sri.L.R.148.

<sup>6</sup> CA 1172 / 98 (F) Decided on 16.06.2014.

<sup>7</sup> (1998) 3 Sri.L.R. 37.

<sup>8</sup> SC Appeal 221 / 2016 Decided on 22.08.2024.

water, or some other specified utility — and thereby preserves the integrity of the limited real right.

28. The *actio confessoria* presupposes that the claimant is the holder of a servitude, whereas the *actio negatoria* is the appropriate remedy of an owner asserting the plenitude of his proprietary rights. In the present case, the Plaintiff invokes the former remedy. It therefore becomes incumbent upon him to establish, as a fact in issue, the manner in which he became vested with the servitude which he asserts in his plaint.

29. As earlier adverted to, the Plaintiff traces his entitlement to the servitude to the deed by which he acquired title to the dominant tenement. It is true that this particular articulation emerged more fully in the replication than in the original plaint. However, the amended answer filed by the Defendant alleges encroachment upon his land. In that context, it cannot be said to offend the rules of pleadings for the Plaintiff to respond that his acts were confined within the limits of his own land. For that purpose, the pleading of his title in the replication becomes both relevant and material.

30. In the replication, the Plaintiff sets out the provenance of the servitude and the manner of its acquisition. While the plaint originally relied upon prescription as a mode of acquisition, the replication clarifies that the servitude was also created by notarial grant appurtenant to the dominant tenement. The learned District Judge, in my view, cannot be faulted for framing an issue with reference to the Plaintiff's title to the dominant tenement, for it is by virtue of that title that the servitude—if proved—would arise. The ownership of the dominant tenement is not asserted as an independent cause of action, but as the juridical foundation upon which the servitude rests.

31. Ultimately, what is before this Court is the Plaintiff's claim to a servitude and the Defendant's denial thereof. It is this assertion of a limited real right, coupled with its repudiation, that furnishes the cause of action.

**A servitude may be acquired either by express grant or by prescription.**

32. In the first instance, a servitude over land may be created by deed. Section 2 of the Prevention of Frauds Ordinance mandates notarial execution in respect of the creation of any "*interest or encumbrance affecting land,*" and a servitude—being a limited real right burdening the servient tenement—plainly falls within that statutory requirement. Accordingly, where a servitude is constituted by agreement, its validity depends upon compliance with the formalities prescribed by the Ordinance.

33. Apart from express grant, a servitude may also be acquired by prescription. The Prescription Ordinance governs this mode of acquisition. A claimant must establish uninterrupted and undisturbed enjoyment of the servitude, as of right, for a period of ten years or more. Mere temporary inability to exercise the right, occasioned by natural causes such as floods or other *vis major*, does not amount to legal interruption. This principle was recognised in *Perera v. Gunatilleke*<sup>9</sup>, where the Court held that such involuntary suspensions do not defeat the continuity required for prescriptive acquisition.

34. Thus, whether by formal notarial grant or by long and uninterrupted user maturing into a legal right, the law recognizes distinct juridical pathways through which a servitude may come into existence.

35. The Plaintiff has presented this case before Court and it has to be resolved on the rival claims.

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<sup>9</sup> 4 N.L.R. 181

36. In any event, the issue sought to be raised does not suffer from any legal impediment for another striking reason. The deeds that bestow ownership of the dominant tenement on the Plaintiff have been listed in the list of witnesses and documents. These deeds appear to invest the Plaintiff with the grant of a servitude, and as such, the Plaintiff could raise his issue having due regard to the documents listed in the list of witnesses and documents. Section 146 of the Civil Procedure Code (the operative provision when the issue on ownership of the land was sought to be raised) permitted issues to be framed on documents. Therefore, issue No.28 must be permitted to be raised and thus, the learned District Judge was quite right in allowing that issue to be raised. It is the Civil Appellant High Court that fell into an error. In the circumstances, I set aside the judgment of the Civil Appellate High Court dated 05.04.2013 and affirm the order of the District Court dated 13.10.2011.

37. All questions of law touching upon the raising of the issue are answered in favor of the Plaintiff.

38. The appeal of the Plaintiff – Respondent – Appellant is allowed and the case is remanded to the District Court of Colombo to permit issue No.28 to be raised and the trial to be proceeded with ensuring an expeditious conclusion of the trial.

**Judge of the Supreme Court**

**S. Thurairaja, PC, J.**

I agree

**Judge of the Supreme Court**

**Mahinda Samayawardhena, J.**

I agree

**Judge of the Supreme Court**