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

2. Liyana Pathiranahalage Podimanike
   Ganangamuwa, Nakkawatta.
4. Liyana Pathiranahalage Podinona
   Koulwewa, Horombawa.
4A. H. A. K. Kusuma Gunawardena
   Koulwewa, Horombawa.
9. U. W. Wimaladasa
   Ganangamuwa, Nakkawatta.
9A. Uduwa Vidanelage George Kingsley Kumara
   Ganangamuwa, Nakkawatta Post.

2, 4A and 9A Defendants-Appellants

Case No. CA 555/1994(F)
D. C. Kuliyapitiya Case No. 6218/L

Vs.

Punchirala Arachchige Dingiri Appuhami
Ganangamuwa, Nakkawatta.

(Deceased)

Plaintiff

Punchirala Arachchige Amarathunga
Ganangamuwa, Nakkawatta.

Substituted Plaintiff-Respondent

1. Edirisinghe Mudiyanselage Kiribanda
   Nakkawatta.
3. Liyana Pathiranahalage Milinona
   Udagorake, Anukkane.
5. Liyana Pathiranahalage Jayasena
   Ranwala, Beligala.
6. Edirisinghe Mudiyanselage Podimahathtaya
   Ganangamuwa, Nakkawatta.
7. Liyana Pathiranahalage Thomas Singho
   Ganangamuwa, Nakkawatta.

(Deceased)

7A. Liyana Pathiranahalage Premadasa
   Ganangamuwa, Nakkawatta.
8. Liyana Pathiranahalage Premadasa
   Ganangamuwa, Nakkawatta.

Defendant-Respondents

Before: Janak De Silva J.

K. Priyantha Fernando J.

Counsel:

Rohan Sahabandu P.C. with Hasitha Amerasinghe for 2nd, 4A and 9A Defendants-Appellants

Irusha Kalidasa with Chanaka Neeranga for Plaintiff-Respondent

Argued On: 01.04.2019

Written Submissions tendered on:

2nd, 4A and 9A Defendants-Appellants 06.04.2019

Plaintiff-Respondent on 24.06.2019

Decided on: 20.05.2020

Janak De Silva J.

This is an appeal against the judgment of the learned District Judge of Kuliyapitiya dated 01.07.1994.

The plaintiff instituted the above styled action in the District Court of Kuliyapitiya by filing the amended plaint dated 19.03.1981 [page 117 of the Appeal Brief] claiming *inter alia* a right of way from the main road to an allotment of land belonging to him over two allotment of lands belonging to the defendants.

The plaintiff averred in his plaint that –

1. He became the owner of the allotment of land more fully described in the schedule 'ක' to the said amended plaint by virtue of the final decree of District Court of Kuliyapitiya case bearing no. 2985/P;
2. There has been a cart road (10 feet wide) to the said allotment of land over two allotment of lands belonging to the defendants more fully described in the schedules 'ග' and 'ජ' to the said amended plaint for over a period of 35 – 40 years;
3. He is entitled to the said right of way by prescription and by way of necessity;
4. The 2nd and 7th – 9th defendants are obstructing the said cart road unlawfully and causing damages amounting to Rs. 100/- per month.

A commission was issued to identify the right of way claimed by the plaintiff. Accordingly, plan no. 233/84 dated 08.10.1984 made by S. B. Abeykone, Licensed Surveyor [page 260 of the Appeal Brief] and the surveyor's report [page 256 of the Appeal Brief] were produced and the cart road (10 feet wide) claimed by the plaintiff is depicted as Lots 1, 2 and 3 in the said plan no. 233/84. Alternatively, a proposed road convenient to all the parties to the action was shown as Lots 4, 5, 6 and 7 in the same plan.

Another commission was issued at the request of the 8th defendant and plan no. 932/කුලී dated 27.01.1986 made by A. B. M. Weber, Licensed Surveyor was prepared which depicted (as Lots 1 and 2) an existing road that leads to the allotment of land belonging to the plaintiff.

The 7th – 9th defendants filed their answer on 16.02.1987 [page 137 of the Appeal Brief] and stated:

1. The plaintiff had ample opportunity to obtain a right of way by the final decree of District Court of Kuliyapitiya case bearing no. 2985/P;
2. However, without doing so, he reserved his right to obtain a right of way if the necessity ever arises;
3. It is evident by the said conduct of the plaintiff that he already had an alternative road leading to his allotment of land;
4. The said alternative road is depicted in plan no. 932/කුලී dated 27.01.1986 made by A. B. M. Weber, Licensed Surveyor.
5. The right of way sought by the plaintiff runs through two allotments of land belong to the defendants splitting the said two allotments of land into several allotments of land;
6. If the right of way sought by the original plaintiff is given to him, the defendants will not be able to possess the said two allotments of land belonging to them peacefully or without any disturbance.

After trial, the learned District Judge held that the plaintiff is entitled to the right of way claimed by him over the two allotments of land belonging to the defendants.

The contention of the plaintiff is that he has been using the claimed right of way as a cart road for over a period of 35 – 40 years and hence he has acquired the prescriptive title to the said cart road [pages 183, 191 – 193 and 195 of the Appeal Brief]. The defendants did not dispute the fact that the plaintiff used the said cart road which runs through their allotments of land. Their position is that the plaintiff used the said cart road with their express consent [pages 168, 171, 200 – 202, 213 – 216 and 221 of the Appeal Brief]. No evidence was led to show that there was a dispute over the said cart road prior to the alleged obstruction by the defendants.

Section 3 of the Prescription Ordinance reads –

> *"**Proof of the undisturbed and uninterrupted possession** by a defendant in any action, or by those under whom he claims, of lands or immovable property, **by a title adverse to or independent of** that of the claimant or plaintiff in such action (that is to say, **a possession unaccompanied by** payment of rent or produce, or performance of service or duty, or by **any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred**) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs."* [Emphasis added]

It is trite law that in order to acquire prescriptive title to an immovable property, there should be an exclusive and adverse possession against all the other persons/owners.

A plaintiff who claims a right of way by prescription must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in section 3, the plaintiff had to prove that he has had undisturbed and uninterrupted possession and use of the right of way for a minimum of ten years and that such possession and user of the right of way has been adverse to or independent of the owner of the land and without acknowledging any right of the owner of the land over the use of that right of way [*Maddumage Sulochana Priyangika Perera v. Maddumage Nimal Gunasiri Perera and Others* (S. C. Appeal No. 59/2010 S. C. M. 18.01.2019)].

In *Ranasinghe v. Somawathie and Others* [(2004) 2 Sri. L. R. 154 at 158] Dissanayake, J. observed:

> *"A right of way by prescription has to be established by proof of the existence of the following necessary ingredients inter alia that are necessary to conclude the existence of such a right –*
>
> *a) adverse possession; and*
>
> *b) uninterrupted and independent user for at least 10 years to the exclusion of all others.*
>
> *The above matters are all questions of fact and they have to establish by cogent evidence."*

The defendants took up the position that they allowed the plaintiff to use the said cart road at his request until the determination of District Court of Kuliyapitiya case bearing no. 2985/P. Without disputing the position taken up by the defendants, the plaintiff led evidence to show that he has been using the said cart road peacefully for over a period of 35 – 40 years. There is no evidence to show that the plaintiff commenced to use the said cart road adversely to the defendants.

When a user of immovable property commences with leave and license, the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises [*De Soysa v. Fonseka* (58 N.L.R. 501)].

In view of the above, I hold that the plaintiff has failed to establish that he is entitled to the said right of way by prescription.

The question to be considered then is whether the plaintiff has established his claim for a right of way of necessity.

In the case of *Maddumage Sulochana Priyangika Perera v. Maddumage Nimal Gunasiri Perera and Others* (supra), Prasanna Jayawardena, P. C., J. observed –

> *"However, with regard to a claim of a right of way of necessity, the claimant is not required to prove possession or user of the right of way. Instead, a claimant who seeks a declaration from court that he is entitled to a right of way of necessity over the land of another, must satisfy the court that the situation of the claimant's land is such that, the only route which can be used from the claimant's land [without having to undergo unreasonable inconvenience or difficulty] to access a public road or other roadway from which a public road can be accessed, is by traversing over the land of another person and that, therefore, by reason of necessity, he is entitled to a declaration from court that he is entitled to a right of way of necessity over that person's land to access the public road or roadway, subject, usually, to the payment of appropriate compensation to the owner of the servient land."*

However, if there is an alternative route available, the claimant, usually, will not be entitled to a right of way of necessity over the land of another unless the court is satisfied that the alternative route is so inconvenient or difficult to use that it is unreasonable to expect the claimant to use that alternative route. Where the plaintiff has an alternative route, the fact that this alternative route is longer or inconvenient or even arduous will not entitle the plaintiff to obtain a shorter and more convenient right of way over the land of another unless, as mentioned earlier, the court is satisfied that, the alternative route is unreasonably inconvenient or difficult to use [*Mohotti Appu v. Wijewardene* (60 N.L.R. 46), *Chandrasiri v. Wickremasinghe* (70 N.L.R. 15), *Somaratne v. Munasinghe* (74 N.L.R. 14)].

To establish that the plaintiff has an alternative road to his allotment of land, the defendants have produced the plan no. 932/කුලී dated 27.01.1986 made by A. B. M. Weber, Licensed Surveyor [page 255 of the Appeal Brief] in which the said alternative road is depicted as Lots 1 and 2.

In the surveyor's report, the licensed surveyor who prepared the said plan no. 932/කුලී has described the said Lot 2 as follows [page 252 of the Appeal Brief] –

> *"... මෙම කැබැල්ල පැමිණිලිකරු විසින් පාවිච්චි කරනු ලැබූ අඩිපාරකි. සිට වශයෙන් පෙන්වා ඇති මෙම කැබැල්ල 2985/බෙදුම් දරණ නඩුව යටතේ මැන සාදා ඇති අංක. 5076 දරණ පිඹුරෙ හි ලොට් 2 සහ 3 හරවා දැක්වෙන අඩිපාර වේ."*

The evidence led by both parties reveal that the plaintiff used to use carts to transport his merchandises and his son uses a car [pages 158, 164, 167, 184, 200 – 202 and 208 of the Appeal Brief]. Even if there is an alternative road leading to the allotment of land belonging to the plaintiff, it is quite clear that the said alternative road provides no means of accessing the allotment of land belonging to the plaintiff by a vehicle.

A right of way must not be understood solely based upon the times during which Roman Law and the Roman-Dutch Law was developed. In the contemporary context, I am of the view that it is unreasonable to expect the plaintiff not to use a vehicle for transportation purposes and the extent of any right of way by necessity must be considered by Court having due regard to the modern requirements of any person. Thus, I hold that the plaintiff is entitled to a right of way of necessity over the allotment of lands belonging to the defendants so as to enable him to use a vehicle.

It is trite law that when granting a right of way of necessity, the court would grant a necessary road to reach the main road by the shortest way and with the least damage and that to the smallest possible detriment to the owner allowing it [*De Vaas v. Mendis* (49 N.L.R. 525), *Rosalin Fernando v. Alwis and Others* (61 N.L.R. 302)].

In *Arnolis Appu v. Heenhamy* (40 C.L.W. 90 at 92) Gratiaen J. held:

> "The underlying principle seems to be that laid down in the opinion of Grotius which is followed in *De Vaas vs. Mendis* (1948) 49 N.L.R. 525, namely that where a party proves that he has "*no reasonably sufficient access* to the public road" the Court will grant him "a necessary road whereby to reach the high road *by the shortest way and with the least damage*". If this test be applied in the present case, I think that the plaintiff's claim is entitled to succeed. The servitude asked for is "by the shortest way" and it has been proved that the defendant would suffer no material damage or inconvenience by the proposed widening of the dewata but would rather derive financial benefit from an award of compensation in her favour. The term "reasonably sufficient access" is at best a comparative term, and in deciding a case which falls somewhere near the indefinable border-line between "necessity" and obvious "convenience", it is relevant to consider, among other factors, to what extent the defendant would suffer by a grant of the servitude asked for".

The right of way claimed by the plaintiff (i.e. Lots 1, 2 and 3 in the said plan no. 233/84) runs through the two allotments of land belonging to the defendant splitting it to several allotments. Also, it can be observed that the dwelling houses of the defendants are situated very closely to the claimed right of way. Therefore, in my view the learned District Judge erred in granting the right of way set out in the judgment.

Therefore, I am inclined to grant the plaintiff the proposed right of way depicted as Lots 4, 5, 6 and 7 in the said plan no. 233/84 and it seems to be a more convenient option for all the parties and the defendants. It must also be noted that the plaintiff has indicated his willingness to accept the same [paragraph 9 of the surveyor's report at page 257 of the Appeal Brief]. Also, the plaintiff has accepted that the proposed right of way gives access to his allotment of land [page 180 of the appeal brief]. It is also the observation of S. B. Abeykone, Licensed Surveyor who prepared the plan no. 233/84 dated 08.10.1984 that this is the more suitable right of way.

In granting this right of way of necessity, the 3rd, 4th, 5th and 6th defendants must be compensated by the award of compensation as required by law.

If the neighbour is ordered to submit his property to a full and permanent right of way which is sought *ex necessitate*, the owner of the landlocked property must pay a just price for this right. [Hall and Kellaway, *Servitudes*, 2nd Ed., p. 69]

The total extent of this right of way of necessity is 9.9 perches. I assess a perch of this land at Rs. 2,00,000/= per perch. Accordingly, the Substituted Plaintiff-Respondent will pay the following amounts to the 3rd, 4th, 5th and 6th defendants:

3rd defendant - Rs. 2,00,000/=

4th defendant - Rs. 3,75,000/=

5th defendant - Rs. 3,50,000/=

6th defendant - Rs. 11,00,000/=

For all the foregoing reasons, I vary the judgment of the learned District Judge of Kuliyapitiya dated 01.07.1994. I allow the appeal to that extent and answer the issues as follows –

1. කුරුණෑගල-මාදම්පේ ප්‍රසිද්ධ මාර්ගයේ සිට සුමනතිස්ස බී. අබේකෝන් මානක නිලධාරී තැන විසින් 1984 ජූලි 13 වැනි දින අංක. 233/84 දරණ පිඹුරේ කැබලි අංක. 1, 2 සහ 3 වශයෙන් නිරූපණය කර ඇති කරත්ත පාර විත්තිකරුවන් සතු පැමිණිල්ලේ උපලේඛනයේ 'ක', 'ග' සහ 'ඡ' අක්ෂර ඉඩම් උඩින් පැමිණිලිකරු සතු පැමිණිල්ලේ උපලේඛනයේ 'ක' අක්ෂරය යටතේ විස්තර කර ඇති ඉඩමට යාම්-ඒම් කිරීම සඳහා පැමිණිලිකරු සහ ඔහුගේ පරවශ අයිතිකරුවන් විසින් පාවිච්චි කරන ලද්දේ ද? පැමිණිලිකරු විසින් විත්තිකරුවන්ගේ අවසරය මත භාවිතා කර ඇත.
2. ඉහත කී පාර පැමිණිලිකරු සහ ඔහුගේ පූර්ව අයිතිකරුවන් විසින් පැමිණිල්ල ඉදිරිපත් කිරීමට පෙර වසර 10 කට අධික කාලයක් භුක්ති විඳ ඇත් ද? පැමිණිලිකරු විසින් විත්තිකරුවන්ගේ අවසරය මත භුක්ති විඳ ඇත.
3. එසේ නම් දීර්ඝ කාලීන භුක්තියෙන් එකී කරත්ත පාරෙ හි පරවශතාව පැමිණිලිකරුට හිමි වී ඇත් ද? නැත.
4. 1981.01.16 වැනි දින සිට 1981.03.11 වැනි දින දක්වා අතරතුර කාලයේ දී 2, 7, 8 සහ 9 විත්තිකරුවන් විසින් නීතිවිරෝධී ලෙස එකී පාර හරහා කම්බි ගැසීමෙන් සහ අගල් කැපීමෙන් එකී ඉඩමෙහි පරවශතාව පැමිණිලිකරුට භුක්ති විඳීමට අවහිර කරමින් ක්‍රියා කරන ලද්දේ ද? පැන නොනගී.
5. එසේ නම්, එකී ක්‍රියාකලාපය හේතුකොටගෙන පැමිණිලිකරුට අලාභයක් සිදු වී ඇත් ද? පැන නොනගී.
6. එසේ නම්, එකී අලාභය කොපමණ ද? පැන නොනගී.
7. අත්‍යවශ්‍යතාව හේතුකොටගෙන එකී පාරෙ හි පරවශතාව ලබා ගැනීමට පැමිණිලිකරුට අයිතියක් ඇත් ද? අත්‍යවශ්‍යතාව හේතුකොටගෙන සිට සුමනතිස්ස බී. අබේකෝන්, මිනිනිදෝරු තැනගේ 1984.10.08 දිනැති අංක. 233/84 දරණ පිඹුරේ කැබලි අංක. 4, 5, 6 සහ 7 වශයෙන් නිරූපණය කර ඇති මාර්ගයේ අයිතිය පැමිණිලිකරුට හිමි වේ.

8. පැමිණිලිකරුට පැමිණිල්ලේ ආයාචනයෙ හි ඉල්ලා ඇති සහනයන් ලබා ගැනීමට අයිතියක් ඇත් ද? ඉහත 7 හි පිළිතුර බලන්න.
9. කුලියාපිටිය දිසා අධිකරණයේ අංක. 2985/බෙදුම් නඩුව මගින් බෙදා වෙන් කරන ලද ඉඩම් කොටස්වලින් මෙම නඩුවට අදාළ පරවශ ඉඩම් සමන්විත වී ඇත් ද? අදාළ නොවේ.
10. කුලියාපිටිය දිසා අධිකරණයේ අංක. 2985/බෙදුම් දරණ නඩුවේ දී පාරක අයිතියක් ඉල්ලා ඇත් ද? අදාළ නොවේ.
11. එකී ප්‍රශ්නයට 'නැත' යන පිළිතුරක් ලැබෙන්නේ නම් පැමිණිලිකරුට මෙම නඩුව මේ ආකාරයට පවත්වාගෙන යා හැකි ද? අදාළ නොවේ.
12. මෙම නඩුවෙන් ඉල්ලා ඇති පාරට අමතර ව පැමිණිලිකරුවන්ට යාම්-ඊම් සඳහා ඒ. බී. එම්. බෙවර් මානක නිලධාරී තැනගේ අංක. 932/කුලී දරණ පිඹුරේ පෙන්නා ඇති පාරක් ඇත් ද? අඩිපාරක් ඇත.
13. එසේ නම්, අත්‍යවශ්‍යතාවයේ හේතුව මත මෙම නඩුවෙන් පැමිණිලිකරුට පාරක් ඉල්ලා සිටිය හැකි ද? ඔව්.
14. කුලියාපිටිය දිසා අධිකරණයේ අංක. 2985/පී දරණ බෙදුම් නඩුවට විෂය වස්තුව බෙදා වෙන් කරන ලද ඉඩමෙ හි පරවශතාව සම්බන්ධ ව පැමිණිලිකාරයා මෙම නඩුවෙන් තම අයිතිවාසිකම් රැක නබාගෙන නොමැති ද? අදාළ නොවේ.
15. එසේ නම්, ඔහුගේ එම අයිතිවාසිකම් එම නඩුවෙ හි අවසාන තීන්දු ප්‍රකාශයෙන් අහෝසි වී ඇත් ද? අදාළ නොවේ.
16. එසේ නම් පැමිණිලිකරුට මෙම නඩුව පවත්වාගෙන යා හැකි ද? අදාළ නොවේ.

The learned District Judge of Kuliyapitiya is directed to enter decree accordingly.

Appeal partly allowed. The parties shall bear their costs.

Judge of the Court of Appeal

K. Priyantha Fernando J.

I agree.

Judge of the Court of Appeal