

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

H. D. Peiris Thilakapala  
201, Pamunugama,  
Alubomulla.

**PLAINTIFF**

C.A 607/1998 (F)  
D.C. Panadura 171/L

Vs.

1. G. Malini
2. G. Sarath Dharmasiri

Both of  
201, Pamunugama,  
Alubomulla.

**DEFENDANTS**

**AND**

1. G. Malini
2. G. Sarath Dharmasiri

Both of  
201, Pamunugama,  
Alubomulla.

**DEFENDANTS-  
APPELLANTS**

Vs.

H. D. Peiris Thilakapala  
201, Pamunugama,  
Alubomulla.

**PLAINTIFF-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** P. Yakgahawita for Defendant-Appellants

S. Delgoda with T. K. Hirimuthugoda  
for Plaintiff-Respondents

**ARGUED ON:** 13.02.2012

**DECIDED ON:** 31.05.2012

**GOONERATNE J.**

This was an action filed in the District Court of Panadura for a declaration of a servitude for a 10 foot wide roadway over Defendant's land to access Plaintiff's residence . The prayer to the plaint in the alternative seeks the said roadway on grounds of necessity. There is also a prayer to grant compensation to Defendant if the roadway is permitted by court. Damages are also claimed for obstructions caused by Defendant from 1986

at Rs. 50/- per mensem. Parties proceeded to trial on 11 issues and one admission. It was admitted that the land described in the 2<sup>nd</sup> schedule to the plaint is owned by the Defendants. Issue No. 2 is regarding Plaintiff's entitlement to the land described in 1<sup>st</sup> schedule to the plaint. Issue No. 3 is to the effect that there was in fact a servitude in favour of the Plaintiff's for a 10 foot roadway over the land comprised in schedule 2 of the plaint. The roadway referred to in issue No. 2 is shown in plan 583 as lot 1 (issue No 3). Issue No. 4 is regarding the resistance or objections of Defendants on 12.8.1988 caused to Plaintiff. Judgment was entered in favour of Plaintiff on 1.6.1996, except in answer to issue No. 8 the learned District Judge has not allowed any payment as compensation to the Defendant-Appellants.

It was the position of the Appellant that there was no existing roadway and Plaintiff-Respondent in law is not entitled to such roadway of necessity. Appellant's further contended that there is a shorter or an alternate roadway over the land of Edwin Perera as depicted as 'E' & 'D' in plan 2406. The Appellant's attempted to show that Plaintiff had a footpath over the land of Hewage Aslin Perera, shown in dotted lines leading to the cemetery road over premises marked 'G' in plan 2406 (V1) (Plan of surveyor Costa). However the report of Surveyor Costa itself indicate (Folio

232, in paragraph 5) that the foot path was not found on the ground or did not exist. Having perused the above plan and submission of Plaintiff-Respondent it is evident that due to several structures on lot 'G' it is not viable to have a roadway demarcated over the said land in the manner suggested by the Appellant. It appears that there is justification to consider the roadway suggested by Plaintiff-Respondent as maintained by Plaintiff, in both courts.

The entirety of the evidence placed in the Original Courts suggest and support the Plaintiff-Respondent's view on road way. Surveyor K.G. Fernando states there was no foot path as alleged by Defendant-Appellant. It is clearly demarcated in plan P1, No. 583 the roadway suggested by Plaintiff (lot 1). The Police Officer who conducted investigations on roadway has in his evidence in the District Court (pg. 104) confirmed the roadway over Defendant's land, as only means of access to Plaintiff. In evidence Plaintiff states it is not possible to ride even a bicycle over the suggested foot path by Defendant-Appellant (93 & 99 Folios). On the question of user of the roadway the following points and evidence to be noted.

- (a) The Plaintiff has given clear and cogent evidence that the roadway claimed by him was used from the time of his predecessor as far back as 1967 when the

rubber trees on his land were removed and transported using lorries and tractors along the said roadway.

- (b) He goes on to state that subsequently a house was built on the said land in 1971 and that the building materials for this purpose were also transported using vehicles along the said roadway.
- (c) The evidence of Peter Jayasuriya, the Chairman of the Death Donation Society of the area, also lends credence to the Plaintiff's testimony since he states that items belonging to the said Death Donation Society were stored in the Plaintiff's house and transported using the roadway in question.

The 1<sup>st</sup> Defendant according to the evidence led at the trial came to live in the house claimed by her in 1985 (2 years prior to filing action) and cannot have any knowledge of usage of the road in question. Defendants also having called witnesses to support their case, and supported by the following authorities cited by Respondent, are useful to arrive at a final decision in this appeal.

A case on actual necessity. Rosalin Fernando Vs. P.L.P. Alwis

61 NLR 302 ...

Survitude – Way of necessity – Burden of Proof.

In a claim made by the plaintiff for a right of footway of necessity to enable her to obtain access from her land to the nearest public road –

**Held**, that when a Court is called upon to decide a question of the grant of a right of way of necessity a proper test to be applied is whether the actual necessity of the case demands the grant of the right of way. In such a case it is not necessary that the plaintiff should establish that the way claimed is the only means of access from his land to the

public road. If an alternative route is too difficult and inconvenient, the actual necessity of the case is the determining factor.

*Mercin V. Edwin & Others* 1984 (1) SLR 224....

Right of way – Prescriptive user-Does the mere enjoyment of the right amount to adverse user?

The plaintiff filed action claiming a right of way from his land over two lands belonging the defendants, by virtue of prescriptive user and also as a way of necessity. I defendants denied the existence of the alleged right of way and averred that plaintiff's land was bounded on the South by the V.C road from which he could obtain access to his land.

The Magistrate dismissed the plaintiff's action on the ground that he had failed to establish that he had prescribed to the right claimed and that even if he had used right of way claimed by him he had done so with the leave and licence of the defendant and further that he had access to the V.C road.

**Held –**

In the circumstances of this case once the plaintiff establish physical user of the way for the prescriptive period, he was entitled to succeed on the issue of prescriptive user. The mere enjoyment of the right is proof of adverse user. On the evidence the plaintiff has proved adverse user of the right of way claimed by him over the prescriptive period, and is therefore entitled to the right of way claimed and to be restored to the possession thereof.

In Ceylon a right of way can only be acquired by user under the Prescription Ordinance and the course or track over which the right is acquired is necessarily strictly defined 15 NLR at 259; 31 NLR 126. The

material placed before the Original Court no doubt indicates that the track over which (the road) the right is acquired is strictly and correctly defined by Plaintiff in evidence.

In all the facts and circumstance of this case it is apparent that the actual necessity of the case demands that Plaintiff need to get relief in the manner pleaded in his plaint which are supported by evidence lead on his behalf. The Plaintiff is not claiming this right on mere convenience but for a real necessity. It is no doubt a question of fact and all the facts and circumstances support the case of the Plaintiff. As such I affirm the learned District Judge's judgment and dismiss his appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL