

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

1. H. M. Podihamy Siriwardena
2. K. S. Asoka Ranmali
3. H. A. Seneviratne

all of No.81/1, Nalandarama  
Road, Pathiragoda,  
Maharagama.

**PLAINTIFFS**

C.A 397/1998 (F)  
D.C. Mount Lavinia 1845/L

Vs.

1. N. Yahennis Perera  
(Deceased)
2. N. Upali Pathmasiri Perera

Both of No. 45, Nalandarama  
Road, Pathiragoda,  
Maharagama.

**DEFENDANTS**

**AND BETWEEN**

N. Upali Pathmasiri Perera of  
No. 45, Nalandarama Road,  
Pathiragoda,  
Maharagama.

**2<sup>ND</sup> DEFENDANT-APPELLANT**

Vs.

4. K. S. Asoka Ranmali
5. H. A. Seneviratne

Both of No.81/1, Nalandarama  
Road, Pathiragoda,  
Maharagama.

**2<sup>ND</sup> & 3<sup>RD</sup> PLAINTIFF-  
RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** Lasitha Chaminda with P. Mahanama Thillekeratne  
for the 2<sup>nd</sup> Defendant-Appellant

Wijedasa Rajapakse P.C., with Rajitha Haturusinghe  
for 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiff-Respondents

**ARGUED ON:** 27.9.2012

**DECIDED ON:** 05.02.2012

**GOONERATNE J.**

This was an action filed in the District Court of Mt. Lavinia for a declaration to a road access as shown in plan marked p1 (No. 1153 of 13.11.1961) more particularly described as lot 'B' in the said plan which is shown as an access path or road to lot 'A' from the main road (Nalandarama Road). Judgment was

entered in favour of Plaintiff-Respondent and the 2<sup>nd</sup> Defendant-Appellant has preferred this appeal from the said judgment. Parties proceeded to trial on 3 admissions, the admission of jurisdiction of court and 13 issues. Plaintiff-Respondent has produced documents P1 to P16a without any objection. Defendant-Appellant has produced plan D1 only.

The 2<sup>nd</sup> Plaintiff's evidence clearly establish that the lots 'A' & 'B' of plan P1 was originally owned by one Mango Perera. The said Perera had by deed P2 transferred same to one Karunaratne. The 2<sup>nd</sup> Plaintiff's evidence refer to a series of transactions by deeds and statements P2 –P16a which were produced in evidence without any objection. (inclusive of police statement and other statement to Grama Sevaka). This evidence according to the witness suggests long user as the access road shown as 'B' in the above plan. There is also evidence of obstruction to the user of the road access in Plaintiff witnesses. (P9 – P14) evidence. Plaintiff evidence suggests that until the time of objecting or placing obstruction by the Defendant party the Plaintiffs were using the access road. In view of the obstructions Plaintiff party had to use another access on the western boundary for which Plaintiff had no right of access.

The judgment of the trial judge also refer to the version of the Defendant-Appellant as expressed by the trial judge.

මෙම පාරේ ගස් කොළන් වැටී ඇති බවට විත්තියෙන් ඉදිරිපත් කරන ලද සාක්ෂි පිලිගත නොහැක. 1988 වර්ෂයේ සිට පාවිච්චි නොකිරීමෙන් ගස් වැවෙන්න හැකියාව ඇත. එසේ වුවත්, ඔප්පු වලින් පැමිණිලිකරුවන් ලබාගෙන ඇති අයිතිය විත්තිකරුවන් විසින් නැවතත් අත්පත් කරගත් බවත් දක්නට නොතිබුණි. විත්තියෙන් සඳහන් කර තිබුණේ පැමිණිලිකරුවන් කිසි දිනෙක මෙම පාර පාවිච්චි නොකල බවයි. නමුත්, 1961 වර්ෂයේදී පැමිණිලිකරුවන් පදිංචි ඉඩම ආරවුල් කරන පාර ප්‍රවේශයද සහිතව පැමිණිලිකරුවන්ගේ පුරවගාමි අයිතිකරුට විකුණා තිබුණේ 2 වන විත්තිකරුවන්ගේ පියා වන 1 වන විත්තිකරුවන්ගේ මව වන මංගොනෝනා බව පෙනුණි. එක් කලෙක මෙම ඉඩමේ අයිතිකාරිය මංගොනෝනා බව විත්තියට සාක්ෂි දුන් 2 විත්තිකරු පිලිගෙන ඇත. ඒ අනුව පැහැදිලිවම පැමිණිලිකරුවන් මෙම පාර ප්‍රවේශයට අයිතිය ලබාගෙන ඇත.

විත්තිකරු මෙම පාර අවහිර කර ඇති බවට 2 සහ 3 පැමිණිලිකරුවන් සාක්ෂි දී ඇත. පොලිසියට පැමිණිලි කර ඇත. විත්තිකරු වැට ප්‍රතිසංස්කරණය කල බව කියා ඇත. එහෙත් විත්තිකරු කර තිබුණේ මෙම පාරද ඇතුළුවන සේ වැටත් ඉදිකිරීමයි. මෙම වැට 3 වන පැමිණිලිකරු විසින් කඩා ඇත. එසේ කඩා තිබුණේ පාර ප්‍රවේශය අවහිර කිරීමෙන් බව පෙනුණි.

This court is of the view that the trial judge has correctly analysed all the evidence pertaining to very basic primary facts, which should not be disturbed. The trial judge had the opportunity to gage the several witnesses in their evidence in open court and examine carefully the actions/reactions and demeanor of the witnesses. The two plans produced in the course of leading evidence clearly identify the access road with the situation of the land in dispute. Though the Appellant attempt to demonstrate long user as in issue No. 11, there was no acceptable evidence placed before the trial court, to conclude in that way and

accept the Defendant-Appellant's contention of a very confused state of prescribing to the land in dispute. One should not be called upon to surmise a plea on prescription. Such a plea should be proved as in Section 3 of the Prescription Ordinance. Mere allegation as in the Petition of Appeal of the misdirection of the trial judge are not supported and established by good reasons and law by the Appellant.

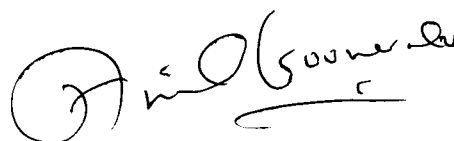
There is some reference in the Petition of Appeal (paragraph 8) about a visit to the site or inspection of court the site of the land dispute and courts failure to consider such a suggestion of a site inspection by the Appellant. The Appellant has failed to establish this point based on consent of parties. There has to be consent of parties for a site inspection, according to the provisions of the Civil Procedure Code and not otherwise. If there was agreement for a site inspection, no appeal would lie – K.D.P. Wickremasinghe – Civil Procedure Code in Ceylon Chapter 27 – pg. 453/454.

I cannot find any acceptable grounds urged in the Petition of Appeal. There is no merit in this appeal. Plaintiff-Respondent's version is more probable in the context of this case. The particular lot in plan P1 and P16 which is an access road or path belongs to the Plaintiff by virtue of deeds. The Defendant cannot have any right to same.

The law is generally hostile to grant a servitude, whether by way of presumption or by way of necessity. In case of doubt the presumption is against a servitude. The onus of proving necessity is on the person who allege same – Roman Dutch Law – R.W. Lee – 5<sup>th</sup> Ed. pg. 176. See also Servitudes – Hall & Kellaway pgs. 6 & 9; 49 NLR 350.

In all the above facts and circumstances I am not inclined to disturb the findings of the leaned District Judge. I affirm the judgment of the District Court. Appeal dismissed without costs.

Appeal dismissed.

A handwritten signature in black ink, appearing to read "A. M. Gouwerou". The signature is written in a cursive style with a large initial "A" and a long horizontal stroke at the end.

JUDGE OF THE COURT OF APPEAL