

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

Vadivelu Ambikabalan  
35, Devala Road, Nugegoda,  
Presently at  
21/1A, Samudradevi Vidyalaya Mw  
Nugegoda.

**PLAINTIFF**

**Case No: CA/649/97/F**

**D.C. Mt. Lavinia No. 2186/L.**

**Vs**

Thusitha Sujatha de Lanarole  
21/1, Samudradevi Balika Mw  
Nugegoda.

**DEFENDANT**

**AND NOW BETWEEN**

Vadivelu Ambikabalan  
35, Devala Road, Nugegoda,  
Presently at  
21/1A, Samudradevi Vidyalaya Mw  
Nugegoda.

**PLAINTIFF – APPELLANT**

**Vs**

Thusitha Sujatha de Lanarole  
21/1, Samudradevi Balika Mw  
Nugegoda.

**DEFENDANT - RESPONDENT**

**BEFORE**

: Deepali Wijesundera J.

M.M.A. Gaffoor J.

**COUNSEL**

: Thishya Weragoda for the  
Plaintiff - Appellant.

D.H. Siriwardhena for the  
Defendant – Respondent.

**ARGUED ON**

: 20<sup>th</sup> February, 2015

**DECIDED ON**

: 11<sup>th</sup> December, 2015

**Deepali Wijesundera J.**

The defendant respondent was the owner of the land described in the first schedule to the plaint filed in the District Court Mt. Lavinia in case no. 2186/L. By plan no. 2281 marked as **P2** the land was divided into two Lots as **D2A** and **D2B**. By deed no. 1269 dated 01/10/1989 marked as **P4** the respondent had transferred Lot **D2A** to the appellant

for a consideration of Rs. 3,22,000/= but only Rs. 250,000/= has been paid. A sum of Rs. 72,000/= was kept back by Mortgage Bond P5. On the same day both parties have entered into an agreement (P3) in respect of an access road to Lot D2A, the land purchased by the appellant. It was agreed that at the time of execution of the agreement that the respondent should give a temporary right of way to the appellant until a permanent right of way was provided, within six months. If the respondent failed to do so he had to cut down trees and give access from Samudradevi Vidyalaya Mawatha to Lot D2A.

The appellant on the 21<sup>st</sup> of August 1990 has installed an action against the respondent in the District Court of Mt. Lavinia seeking specific performance of clause D of the said agreement granting the appellant right of way over the respondent's land, and for a permanent injunction to prevent the respondent from obstructing the said right of way and for damage. Upon conclusion of the trial the learned District Judge has dismissed the appellant's application holding that a public road exists on the western boundary of the appellant's land, and in the circumstances he is not entitled to a roadway from the respondent's land. The appellant has filed the instant application against the said judgment.

The learned counsel for the appellant submitted that the District Judge failed to appreciate that the rights of the parties and cause of action has to be determine as at the date of institution of action and the said judgment is erroneous in law. He further stated that it is contradictory to answer issue 1 and 2 in favour of the appellant and issue 7 in favour of the respondent. The appellant submitted the learned District Judge has stated the respondent breached the agreement but refused to grant specific performance of the said agreement which makes the judgment erroneous in fact and in law.

The appellant citing the judgment in ***Eastern Hardware Stores Vs Fernando (1958) 58 NLR at 570*** said the cardinal rule of law is that in an action rights of parties must be determined as at the date of action. The respondent has stated in evidence that the public roadway was created in 1991 after the institution of action in the District Court in 1990.

The argument of the appellant was that the learned District Judge by first stating that the respondent has breached the contractual agreement and later stating that since there is a public roadway to the appellant's land therefore he was not entitle to specific performance as prayed for in the plaint has erred in law.

The learned counsel for the appellant stated that a party had a right to compel a person to give something which he has promised to give and it has been recognized and given effect in our courts and cited the judgments in *Holms Vs Alia Marikkar (1896) 1 NLR 282 and Noorul Asin Vs Podi Nona de Soyza (1989) 1 SLR 63*.

The respondent stated that by agreement *no. 1208 (P3)* the parties only agreed that the appellant be given a temporary roadway to Lot **D2A** until a permanent roadway is provided as access to Lot **D2A** on its western boundary after which the appellant is duty bound to pay the balance Rs. 72,000/= to the respondent. He further stated the permanent roadway referred to in the agreement always referred to Samudradevi Vidyala Mawatha to the west of Lot **D2A**. He further stated that at the time the appellant purchased the land there was a gate opening onto the road on the west of **D2A** which the appellant had blocked by building a wall across the gate. Referring to the original deed by which the appellant bought the land the respondent stated that there is no mention of a roadway therefore the appellant is not entitled to a right of way over the defendant's land by deed *no. 1209* marked **P4**.

The learned District Judge in his finding has observed that the appellant while having an access road from the western boundary of his

land is seeking an access road across the respondent's land. He has also observed that in the event of the respondent failing to provide a right of way along the western boundary of his land within six months there is no clause in the agreement to say that the appellant is entitled to a permanent right of way over the respondent's land.

**The agreement No. 1208 has the following clauses;**

- (a) The vendor shall sell and the purchaser shall purchase the land in the second schedule hereto fully described at or for the sum of Rupees Three Hundred and Twenty Two Thousand of which a sum of Rupees Two Hundred and Fifty Thousand has been paid by the purchaser to the vendor.***
  
- (b) The vendor shall on execution of this Agreement give the purchaser a temporary right of way to drive heavy vehicles to and from Samudradevi Vidyalaya Mawatha (formerly Wickremasinghe Place) until a permanent right of way is provided.***
  
- (c) Within a period of six (6) months from this date the vendor shall give the purchaser permanent right of way to and from Lot D2A aforesaid to Samudradevi Vidyalaya Mawatha (formerly Wickremasinghe Place) that is Samudradevi Vidyalaya Mawatha on the western boundary of Mawatha (formerly Wickremasinghe Place).***

***(d) In the event of the failure on the part of the vendor to obtain such right of way referred to in clause (c) above then the vendor shall cut down such trees as are necessary and give a right of way which should be a straight road from Samudradevi Vidyala Mawatha (formerly Wickremasinghe Place) to Lot D2A aforesaid, the said right of way being of the same width as that of the existing roadway leading from Samudradevi Vidyala Mawatha (formerly Wickremasinghe Place) to Lot D2 described in the first schedule hereto and depicted on a Survey Plan.***

***(e) If however the vendor obtains the right of way referred to in clause (c) above then the vendor has the absolute right to close the aforesaid temporary right of way given in clause (b) above and the purchaser shall close the entrance from Lot D2A to Lot D2B aforesaid and undertakes not to use the temporary roadway thereafter.***

***(f) On the vendor giving a permanent right of way to the purchaser then the purchaser shall pay to the vendor the balance purchase price of Rupees Seventy Two Thousand (Rs. 72,000/=).***

***(g) The vendor and the purchaser shall be firmly bound by these presents notwithstanding anything to the contrary herein contained and shall be entitled to ask for specific performance of this Agreement.***

Clause (e) clearly states that once the permanent right of way is obtained the appellant has under taken not to use the temporary roadway and the respondent had the right to close the said temporary roadway.

The District Court case had been filed on 06/05/1991 and not in 1990 as mentioned by the counsel for the appellant. The respondent has marked a document as **D1** in the District Court which is dated 08/08/1990, this is a letter written by *The Chairman, Sri Jayawardenapura Kotte Urban Council* to the respondent stating that the Samudradevi Road is being repaired and once it is done the said road could be used as a public road. This letter clearly shows that the appellant had road access to his land from the western boundary at the time he filed action in the District Court to get a roadway across the respondent's land. The deed of sale makes no reference to a roadway since there was access to the said land which was blocked by the appellant to get access from the respondent's land.

The learned District Judge in his judgment has taken into cognizance all aspects of the case touching evidence and facts and legal aspects exhaustively and come to a correct finding. This court can



not see a single lawful reason to set aside the learned District Judge's findings.

For the afore stated reasons the appeal of the appellant is dismissed with costs fixed at Rs. 25,000/=. The judgment of the District Court is affirmed.

**JUDGE OF THE COURT OF APPEAL**

**M.M.A. Gaffoor J.**

I agree

**JUDGE OF THE COURT OF APPEAL**