

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

Dr. Ms. Aruni Molagoda,

No. 23,

Macklyod Road,

Colombo 4.

C.A. No.307 / 1999 (F)

D.C. Kegalle No.4900 / L

Plaintiff

-Vs-

Disanayake Mudiyanseelage Gunawardena,

No. 106,

Colombo – Kandy Road,

Kegalle.

Presently at: No. 01,

Winston Wickramasinghe Mawatha,

Kegalle.

Defendant

AND

Disanayake Mudiyanseelage Gunawardena,

No. 106,
Colombo – Kandy Road,
Kegalle.

Presently at: No. 01,
Winston Wickramasinghe Mawatha,
Kegalle.

Defendant-Appellant

-Vs-

Dr. Ms. Aruni Molagoda,
No. 23,
Macklyod Road,
Colombo 4.

Plaintiff-Respondent

BEFORE : **A.H.M.D. Nawaz, J, and**
H.C.J. Madawala. J.

COUNSEL : **Palitha Ranatunga for the Defendant-Appellant**
instructed by T. Wickramasinghe (AAL).

Rohan Sahabandu P.C. with Hasitha
Amarasinghe for the Plaintiff-Respondent.

Argued on : **01.12.2015**

Decided on : **22.06.2016**

A.H.M.D. NAWAZ, J,

The Plaintiff-Respondent (hereinafter known as ‘the Plaintiff’) filed this action on 23rd March 1992 against the Defendant-Appellant (hereinafter known as ‘the Defendant’) in the District Court of Kegalle seeking a declaration of title to lot B of ***Welegoda Hena alias Nugagahapitiya Walawwa*** depicted in Plan No.2049 of surveyor Panditharathne, ejectment of the Defendant therefrom and for damages.

The Defendant in his answer denying the averments of the Plaintiff stated that lot B does not belong to this Plaintiff but as a part of a right of way used by the Defendant as access to his premises, which access road is marked as ‘road’ and the Plan is marked as V1.

The matter went to trial on 23 issues and on 4th January 1999, the learned District Judge entered judgment in favour of the Plaintiff. Aggrieved by the judgment, the Defendant has preferred this appeal to this Court.

At the trial, surveyor Sisira Panditharathne gave evidence on 30th April 1993 on behalf of the Plaintiff. This witness states that it is he who made Plan No.2049 in which he depicted the land called ***Welegoda Hena*** which is now known as ***Nugagahapitiya Walawwe*** by 4 lots i.e. – lots 1, 2, 3 and 4. At the time of the survey in 1973, there was no dispute over lot 2. At that time, there was no access road through lot 2 to go to the land situated on the eastern side of lot 2. He states further that he once again surveyed this land and the plan was produced as marked ‘P2’ in which lot 2 is shown as 2A, 2B and 2C. 2B is shown as an access road to go to the

house on the eastern side. But in 1973 this road was not there. Only in April 1990 it was created for the first time. The road shown by him was a private road which goes only to the land of Panabokke. It was Panabokke who made this road. This witness clearly states that when he made this Plan No.2049 in 1973, this road was not there. Even a foot path was not there.

He further stated that this foot path was later made into a big road by the Town Council but this road was not used to provide access to the Defendant's land. The Defendant had put rolled gate posts but there was no gate. This witness denies the road shown by surveyor Tennakoon in broken lines in the Plan marked as V1. If a surveyor is not certain about a road, he may show it in broken lines. That is how the surveyor Tennakoon has shown it. When the witness Panditharathne went to the place on 2nd April 1991, there was a road.

According to this witness, when he surveyed the land in 1973 (Please see the Plan marked as P1), there was no road as claimed by the Defendant. This road came into existence only subsequently in 1991. It has to be stated that the evidence by this witness was not contradicted by the Defendant.

After this witness, the Plaintiff's father Molagoda has testified on behalf of the Plaintiff. He has traced the title of the Plaintiff, and said that in April 1989, when he went to this land he saw only a foot path which is shown as 2B in Plan P2. Again in 1990 when he went to this land he saw the foot path. But the land was fenced with barbed wire. This foot path was later made into a road as shown as 2B. He said that they never allowed the Defendant to use it as a road. There is another road to go from the Defendant's land to the main road. In other words the Defendant had another access to the main road.

This witness categorically states that in 1973, there was no road but it came into existence only in 1989 or 1990. The Defendant had to go through 'Royal garage' to go to his house.

The evidence of the Defendant establishes that there was no road by the name of *Wickramasighe Road* which is in dispute now. The Defendant admitted that when he bought this land in 1975, there was no road way provided in the transfer deed. (See pages 100, 101 of the Brief).

The Defendant's evidence is not satisfactory as to the existence of the road in dispute. He admitted that when he bought this land, no road was provided for. He has not answered the question that he has no right whatsoever to claim any right to the road in dispute – see page 109 of the Brief.

The Defendant's witness Edirisinghe, who worked in the Town Council admitted that the road in dispute was a private road leading to *Meedeniya Walawwa* and *Nugagahapitiya Walawwa* and it came into being only in 1992. This road is shown as a private road in P2.

An important witness for the Defendant was surveyor Tennakoon. He admitted that in Plan No.2049 of Panditharathne, no road was shown. This Plan bearing No.2049 was drawn by Panditharathne in 1973. Surveyor Tennakoon also admitted that this road in dispute was a foot path and it existed with a flight of steps at the same place. It was not a road that could be used for vehicles - see pages 188/189 of the Brief. This witness has made the Plan No.191/A which was marked as V1. This was a private plan prepared at this request of the Vendor of the Defendant.

Considering the evidence led in this case, it is clearly established by the Plaintiff that this road in dispute was never in existence. There was no road in existence to go to

Walawwawatte from the road on its western boundary. It is clear that the Defendant has encroached on to the Plaintiff's land and made a road way to take his car to his house. The Defendant in his evidence admitted that he bought a car in 1990 and he had no car prior to 1990. It is settled law that even if there existed a right of using a foot-path (*iter*), it does not include the right to take a vehicle over that path. It is nothing more than the right of being able to come and go on foot - **Corenelis Singho v. Perera.**¹

It is also clear that when the Defendant bought his land by Deed No.1295 (V2), no access road was provided for in the said deed. The Defendant was using the access road through the Royal garage as referred to above. This access contained a flight of steps and since 1975, this access has been in existence. This was the access shown as a road by the vendor. This is admitted by the wife of the Defendant in her evidence.

It appears that the learned District Judge has analyzed this evidence carefully and has come to a conclusion that there was no road in existence through lot 2B shown in Plan P2 and that lot 4, which belongs to the Defendant has a road way or access to the main road by or through the back portion of 'Royal garage'.

According to the totality of the evidence led in this case, I am of the view that the Defendant has unlawfully encroached upon a portion of the land which is shown as lot 2B in Plan No.2049 dated 20th January 1991 made by K.S. Panditharathne, and that the Defendant has no right of way through the land of the Plaintiff as stated above.

¹ 68 N.L.R 46

I therefore affirm the judgment of the Learned District Judge and dismiss this appeal with costs.

JUDGE OF THE COURT OF APPEAL

H.C.J. Madawala, J.
I agree

JUDGE OF THE COURT OF APPEAL