

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

1. Wasala Kulatunga Wijekoon Mudiyansele
Bharatha Padmasiri Wijekoon.
2. Wasala Kulatunga Wijekoon Mudiyansele
Tikiri Bandara Wijekoon.

2nd and 3rd Respondent-
Petitioner-Appellants

Court of Appeal Case No:
CA (PHC) 58/2010
HC Kandy Revision
Application No: **84/2006**
Kandy Primary Court
Case No: **59100**

-Vs-

Perumbada Gedara Senevirathne,
No. 203, Dambagoda,
Danture.

1st Respondent-Respondent-
Respondent

Before : **A.L. Shiran Gooneratne J.**

&

Mahinda Samayawardhena J.

Counsel : Upul Ranjan Hewage with Buddhika Wethewa for the Appellants.

W.D. Weeraratne for the 1st Respondent-Respondent-Respondent.

Written Submissions: By the 2nd and 3rd Respondent-Petitioner-Appellants on 19/09/2018

By the 1st Respondent-Respondent-Respondent on 05/08/2019

Argued on : 01/10/2019

Judgment on : **06/11/2019**

A.L. Shiran Gooneratne J.

The officer in charge of the Kadugannawa Police filed an information in terms of the provisions contained in Section 66(1)(a) of the Primary Courts Procedure Act No. 44 of 1979, in the Magistrates Court of Kandy over a disputed right of footway between the 2nd and 3rd Respondent-Petitioner-Appellants (hereinafter referred to as the Appellants) and the 1st Respondent-Respondent-Respondent (hereinafter referred to as the Respondent). The learned Magistrate by

order dated 13/07/2006, held that the Respondent is entitled to acquire a right of way as prescriptive user. A revision application to set aside the said order filed by the aggrieved Appellants were refused by order dated 03/12/2014, by the Provincial High Court of the Central Province holden in Kandy. It is the said order that the Petitioner is before this Court seeking to canvass, in this application.

A right of way to be acquired on Prescription was discussed in ***Thambapillai Vs. Nagamanipillai 52 NLR 225***, where it was held that;

“it is a pre-requisite to the acquisition of a right of way by prescription that a well-defined and identifiable course or track should have been adversely used by the owner of the dominant tenement for over ten years.”

The Respondent claims that he together with other villagers have used the disputed 3 feet wide roadway referred to as Gamsabha road for over a period of 25 years. According to the statements recorded by the police, the Appellants have placed branches of trees to obstruct the said roadway.

To acquire a right of way by a prescriptive user there must be a land for the beneficial enjoyment and another land over which servitude is exercisable. The right of way claimed by the Respondent is to access his property that has been allotted and acquired through a Partition action bearing No. P 9601.

In ***Kandaiah Vs. Seenitamby 17 NLR 29***, it was held that;

"the evidence to establish a prescriptive right of way must be precise and definite. It must relate to a define track and must not consist of proof of mere straying across open land at any point which is at the moment most convenient."

The police observations marked 1 @ 11 confirms the existence of a 3 feet wide road by the side of the threshing floor, 'Kamatha', and the paddy field. Obstructions placed on the road has also been observed. The police observations also noted a 3 feet long concrete bridge on the foot path constructed by the Pradeshiya Sabha.

The learned Magistrate in his order has clearly stated that the 3 feet wide footpath claimed by the Respondent is by the side of the threshing floor which should be cleared of any obstructions. The learned Magistrate has arrived at his conclusions based on the fact that the Respondent was an actual user. The evidence taken into consideration in arriving at the said conclusion supports the fact that the foot path claimed by the Respondent was not randomly used or a foot path which runs over the property of the Appellants. There is no evidence to suggest that the Respondent has claimed a right of way by prescription over the intervening high lands or paddy lands. (Cornelis Vs. Fernando 65 NLR 93)

The learned Magistrate having taken into consideration the information, affidavits and documents filed by the respective parties arrived at a just decision that the Respondent has the right to use the foot path as claimed. In dismissing the revision application, the learned High Court Judge has correctly concluded that the

Appellant has failed to establish exceptional circumstances to overturn the said order.

In all the above circumstances, I see no reason to interfere with the judgment of the learned High Court Judge of Kandy.

Application dismissed. I make no order as to costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL