

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

Rajapaksha Arachchige Sanjeewa Subash  
Rajapaksha, No. 867/1, Peradeniya Road,  
Kandy.

Presently at

C 12A, University of Peradeniya,  
Peradeniya.

PLAINTIFF

-Vs.-

C.A. Appeal No: 149/ 2000F

D.C. Kandy: 17330/ L

1. H.D.M.L Dharmawardhene
  2. H.D.R.T. Dharmawardhene
  3. H.D.R. Dharmawardhene
  4. H.D.A. Dharmawardhene
  5. H.D.P. Dharmawardhene
- No. 867/B, Peradeniya Road, Kandy

DEFENDANTS

AND NOW BETWEEN

- 1A.H.D.R.T Dharmawardhene
  - 2.H.D.R.T. Dharmawardhene
  - 3.H.D.R. Dharmawardhene
  - 4A.H.D.R.T Dharmawardhene
  - 5.H.D.P. Dharmawardhene
- No. 867/B, Peradeniya Road, Kandy.

DEFENDANTS-APPELLANTS

-Vs.-

Rajapaksha Arachchige Sanjeewa Subash  
Rajapaksha, No 867/1, Peradeniya Road,  
Kandy.

Presently at

C 12A, University of Peradeniya,  
Peradeniya.

PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J
COUNSEL	:	Manohara Desilva PC with Pubuduni Wickramaratne for the Defendants Appellants
		Harsha Soza PC with Upendra Walgampaya for the Plaintiff Respondent

Decided on	:	10.12.2018
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The Plaintiff-Respondent in this case was given at the end of the trial an 8 feet right of way over the land of the Defendant-Appellant, in order to access his land. The Defendant-Appellant impugns this grant of 8 feet on the basis that a previous partition action (DC Kandy P/7050) had resulted in the grant of only a 3 feet right of way and this previous decree operates as a *res judicata* and the widening of the right of way to a 8 feet cart way could not have been granted in the 2<sup>nd</sup> action, which is the current action.

In the previous Partition Action bearing No. P/7050 of the District Court of Kandy, the plaintiff's predecessor in title Pathirana Wanigasekara had purchased the dominant tenant as the 2<sup>nd</sup> added Defendant in the aforesaid partition suit. The said dominant tenant which is depicted as Lot No. 7 in the preliminary Plan bearing No.1049 was excluded, when the trial had come up on 18.03.1970, upon an agreement that the Plaintiff confined the corpus to be partitioned to Lots 1 to 6. It was recorded by way of a settlement that a right of way to Lot 7, in favour of the 1<sup>st</sup> and 2<sup>nd</sup> added Defendant-Appellants (predecessors in title of the Plaintiff in this case) was reserved and thereafter the 1<sup>st</sup> and 2<sup>nd</sup> added Defendants had been discharged from the case and they had also been awarded costs.

The interlocutory decree dated 30.07.1970 ordered that Lot 7 were excluded but the added Defendants who owned Lot 7 were given a right of way from the main road. The right of way straddled the lands of the Plaintiffs in that case (who become Defendants in the 2<sup>nd</sup> case). The interlocutory decree also discharged the added Defendants and they were ordered to be paid costs.

It was further ordered and decreed that the land and premises should be sold by auction among the co-owners and the proceed divided.

### **Roadway reduced to 3 feet**

The interlocutory decree only described a roadway. It did not mention a width. It is only in the order dated 26.11.1976 that the learned District Judge had decided that the added Defendant would be entitled to a roadway of 3 feet width-see V8 at p.434 of the brief.

Moving away from the introductory matrix, let me start from the beginning.

The Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") by a plaint dated 07.01.1993 filed this current action against the 1<sup>st</sup> to 5<sup>th</sup> Defendant-Appellants (hereinafter sometimes referred to as "the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants") praying, *inter alia*,:-

- (a) for a declaration that the Plaintiff is entitled to the 10 foot wide road way described in the 2<sup>nd</sup> schedule to the plaint and entitled to drive vehicles over the said roadway to access the land and premises described in the 1<sup>st</sup> schedule to the plaint;
- (b) as the Plaintiff has no other means of access to the land described in the 1<sup>st</sup> schedule to the plaint, a permanent injunction preventing the Defendants from obstructing the said road way and for an interim injunction and an enjoining order in like manner until the said permanent injunction is issued;
- (c) as the said right of way over the said roadway described in the 2<sup>nd</sup> schedule to the plaint is a right of way of necessity for an interim injunction directing the removal of the obstructions placed by the Defendant on the said road way.

The Defendants filed answer dated 17.03.1993 (at page 72) and prayed, *inter alia*, for a dismissal of the Plaintiff's action, for a declaration that the Plaintiff is entitled to the user of a right of way of 3 feet as declared in Case No. P/7050, and for damages in a sum of Rs.50,000/-.

The Plaintiff by replication dated 16.09.1993 (page 75) demined the counter claim of the Defendants and sought a dismissal of the said counter claim.

The trial commenced on 29.04.1994 (page 81) and the parties framed their respective issues. However, when the case came up on 22.03.1995 both parties moved to record admissions and issues afresh and the learned trial Judge allowed the said joint application. The parties recorded 2 admissions and the Plaintiff framed issues 1 to 8 while the Defendants framed issues 9 to 31 (page 87). After the said issues were framed the Plaintiff's Counsel moved to amend the plaint and the learned trial Judge allowed the said application.

The Plaintiff thereafter tendered his amended plaint dated 05.04.1995 (page 25) and pleaded, *inter alia*, that:-

- (i) The land which the Plaintiff is seized and possessed of is depicted in Plan No.441 dated 07.04.1959 and morefully described in the 1<sup>st</sup> schedule o the plaint is also depicted as Lot No.7 in plan No.1049 dated 08.04.1969 which was prepared in D.C. Kandy Case No. 7050/P-vide page 419;
- (ii) Lots Nos.2, 3 and 5 in the said Plan No.1049 prepared in Case No.7050/P depicts a 10 foot wide road way along which a vehicle could travel and the said road way is described in the 2<sup>nd</sup> schedule to the amended plaint and;
- (iii) The Plaintiff's predecessors have for over 50 years used the said 10 foot wide road way described in the 2<sup>nd</sup> schedule to the plaint to access the land described in the 1<sup>st</sup> schedule to the amended plaint;
- (iv) The original owners of the land described in the 1<sup>st</sup> schedule to the paint were one H.H.J.S. Perera, one H.I.E.J. Perera, one H.I.F. Perera and one H. Florence;
- (v) The said H.I.F. Perera is the mother of the Defendants in the present action;
- (vi) The right of way over the said road way described in the 2<sup>nd</sup> schedule to the plaint was transferred by the vendors who sold the land described in the 1<sup>st</sup> schedule to the plaint on Deed Nos.2569 dated 12.04.1959 and 2571 dated 27.04.1959 to the vendee, one M.S. Nanayakkara;
- (vii) Thereafter the said M.S. Nanayakkara on Deed No.833 dated 15.08.1962 transferred the aid land and right of way to one P. Kodikara who in turn transferred it on Deed No.876 sated 08.10.1964 transferred it to M.S. Nanayakkara who then transferred it on Deed No.831 dated 27.10.1964 to one E.P.P. Wanigasekera;

- (viii) The said Wanigasekera together with her husband =, one W.A.P. Fernando by Deed No.4040 dated 22.06.1989 transferred the said land and right of way to one Reginton Rajapaksa and one Srimathie Rajapaksa and they gifted the same to their son, the Plaintiff, on Deed No.14092 dated 18.06.1990 who became entitled to the said land described in the 1<sup>st</sup> schedule to the plaint and the right of way described in the 2<sup>nd</sup> schedule to the plaint to access the said land;
- (ix) The Plaintiff and his predecessors in title have by user of the said road way for over 10 years acquired prescriptive rights to use the said road way;
- (x) Case No.7050/P was instituted seeking to partition the land described in the 3<sup>rd</sup> schedule which is adjoining the Plaintiff's land describe in the 1<sup>st</sup> schedule and the Plaintiff in the said action had wrongfully included the Plaintiff's land as part of the corpus in the said partition action;
- (xi) The Plaintiff's predecessor in title, the said E.P.P. Wanigasekera, intervened in the said partition action nay by order dated 30.07.1970 obtained an exclusion of the land described in the 1<sup>st</sup> schedule to the plaint from the corpus in the said action;
- (xii) In the said partition action the corpus consisted of Lots Nos.1 to 6 in the said Plan No.1049 )vide page 419) and Lots Nos. 2, 3 and 5 therein consisted of the 10 foot road way in question (described in the 2<sup>nd</sup> schedule to the amended plaint) along which the Plaintiff in the present action accessed the land described in the 1<sup>st</sup> schedule to the amended plaint;
- (xiii) The Plaintiff in the said partition action sought to reduce the width of the said 10 foot road way and the mother of the Defendants in the present action objected thereto. However, at the inquiry the application to reduce the width of the road way was allowed in the said partition action

and the corpus in the said action was auctioned and at the auction was purchased by the mother of the Defendants in the present action;

- (xiv) The Defendants are estopped from denying that the Plaintiff is entitled to a 10 foot right of way as the Defendants' predecessor (mother) has objected to the reduction of the width of the road way-*vide* pages 425 to 446;
- (xv) The Plaintiff has leased out the land and premises described in the 1<sup>st</sup> schedule to the plaint and until 20.01.1992 the lessee of the Plaintiff has enjoyed the said 10 foot wide right of way but on or about 20.01.1992 the defendants have erected a fence and along the said road way and reduced the width of the said road way resulting in the Plaintiff and his lessee being unable to access the land described in the 1<sup>st</sup> schedule to the plaint by vehicle-*vide* page 28;
- (xvi) Therefore grave and irremediable loss and damage I being caused to the Plaintiff.

The Plaintiff in the said amended plaint, *inter alia*, prayed for declaration that the Plaintiff is entitled to a 10 foot wide right of way of necessity and a permanent injunction preventing the Defendants from obstructing the said 10 foot wide right of way leading to the Plaintiff's land described in the 1<sup>st</sup> schedule to the plaint.

The Defendants by Statement of Objections dated 17.05.1995 (page 77) objected to the said amended plaint stating that the Plaintiff is guilty of laches and moved for the said amended plaint to be rejected.

The learned trial Judge by his order dated 14.07.1995 (page 93) allowed the amended plaint subject to costs.

The Defendants thereafter filed amended answer dated 15.08.1995 (page 68) once again praying for a dismissal of the Plaintiff's action, for a declaration that the

Plaintiff is entitled to the user of a right of way of 3 feet as declared in Case No. P/7050 and for damages in a sum of Rs.50,000/-. It was pleaded in the said amended answer, inter alia, that by Order in Case No.7050/P dated 20.11.1976 the learned District Judge had restricted the right of way in question to a width of 3 feet and the writ of possession in Case No.7050/P had been executed on or about 27.10.1992 demarcating the right of way as been 3 feet in width.

The plaintiff filed Replication dated 12.09.1995 (page 79) seeking a dismissal of the claim in reconvention prayed for by the Defendants in the said amended answer.

The trial commenced afresh on 25.03.1997 (page 96) with the Plaintiff framing issues 1 to 15. The Defendants objected to issues 3, 4, 5, 9 and 10 framed on behalf of the Plaintiff and the learned trial Judge overruled the said objection by order dated 08.07.1997 (page 101). The defendant framed his issues on 08.09.1997 (page 103) as Issues Nos. 16 to 30.

Therefore, the trial proceeded on Issues Nos. 1 to 15 framed by the Plaintiff on 25.03.1997 (page 96) and Issues Nos. 16 to 30 framed by the Defendants on 08.07.1997 (page 103).

One Kalukotuwegedera Gunasena (pages 106 to 110) (Administrative Officer from the Kandy Municipal Council), one Srimathie Rajapaksa (pages 119 to 207) (the mother and power of attorney holder of the Plaintiff), one Hector Navaratne (pages 208 and 214) (Licensed Surveyor and court Commissioner), one Alfrious Ian Jayatilake (pages 214 to 229) and M.R.M. Gunaratne Banda (pages 229 to 235) (Grama Niladhari of Velata Division) testified on behalf of the Plaintiff marking in evidence document 21 to 217.

The 4<sup>th</sup> Defendant (pages 235 to 281), one Chithrasome Adihettie (pages 282 to 285) (Licensed Surveyor and Court Commissioner), one Satyavel Balakrishnan (pages 286 to 291) and one Anula Disnayake (pages 291 to 294) (nominee of the



registrar of the District Court of Kandy) gave evidence in support of the Defendants' case and marked in evidence documents ௨1 to ௨11.

### The evidence in the case

When the house on Lot 7 in Plan No.1049 (*vide* page 392 and 419) was constructed, the said 10 feet roadway has been shown to the Kandy Municipal Council as the access road-*vide* pages 107-110. Srimathie Rajapaksa is the Plaintiff's mother. In the course of her evidence she produced Plan No.441 of 07.04.1959-௨4 (page 369) which shows the said access road off the Colombo-Kandy road from the point shown as Peradeniya Road to the Plaintiff's property-*vide* ௨2 at page 363.

Srimathie Rajapaksa in the course of her evidence produced the relevant title deeds, viz., Deeds Nos.2569 (௨3) (page 365), 2571 (௨5) (page 370), 833 (௨6) (page 374), 876, (௨7) (page 378), 831 (௨8) (page 382), 4040 (௨9) (page 386), and 14092 (௨10) (page 388)-*vide* also Deed No.4041 (௨1) at page 414. All these title deeds confirm the said right of way which is claimed by the Plaintiff. In Plan No.1049 (௨11) and (௨3) (pages 392, 419) the said roadways is shown as Lots 2, 3 and 5.

Srimathie Rajapaksa produced the aforesaid title documents to establish the Plaintiff's entitlement to the dominant tenement which is the said Lot 7, and the servient tenement over which the servitude of way exists which the Plaintiff is seeking to broaden out of sheer necessity.

Srimathie Rajapaksa testified that when they purchased the property in suit in 1989 the said roadway existed just as it has previously existed as shown in Plan No.441 of 07.04.1959 (௨4) (page 369)-*vide* page 124. The same roadway is shown in Plan No.1040 of 03.04.1969 (௨11 and ௨3) (pages 392 and 419)-*vide* also Plan No.1462 (௨2) at page 418.

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Srimathie Rajapaksa's husband Dr. Reginton Rajapaksa's was a professor in the Peradeniya University, and Srimathie Rajapaksa was a lecturer, and they occupied their official residence in the campus. By Deed No.14092 (ex10) of 18.07.1990 (page 388) Srimathie Rajapaksa and her husband Dr. Reginton Rajapaksa gifted the said property to their son the Plaintiff together with the said right of way to the said house.

According to Srimathie Rajapaksa's evidence after she and her husband Dr. Reginton Rajapaksa purchased the said property in 1989 by Deed No.4040 of 22.06.1989 (ex9) (page 386) her husband Dr. Reginton had used his car over the said roadway to access the said house. There had been an old house on the said property at the time it was purchased by Dr. Reginton and Srimathie Rajapaksa-*vide* pages 139-140. When they used the said roadway to access the house by car there had been no protest from any quarter.

Dr. Reginton and Srimathie Rajapaksa had prior to purchase of the said property gone by car over the said roadway to see the said property. It has transpired in evidence that the said house had been let to one Mr. Dissanayake and one Mr. Wijeratne-*vide* page 125. They too had used their vehicle over the said roadway to access the said house. After these two tenants left, the house had been let to the Timber Corporation, and it was then that the 4<sup>th</sup> Defendant-Ananda Dharmawardena had fixed a concrete post to obstruct vehicular passage along the said roadway. Srimathie Rajapaksa has complained to the Kandy Police-*vide* ex12 at page 393. Thereafter, there was a Primary Court Case, and the Defendants were ordered to remove the concrete post-*vide* Primary Court Case ex13 dated 21.05.1992, ex14 and ex15 (pages 394 to 401). The result of this dispute was that the tenant reduced the rent to Rs.1,000/-, and eventually left. As at the date of ex12, namely, 20.01.1992 the house was unoccupied. If there is no right of vehicular passage, the said premises are of no use to the Plaintiff-*vide* page 128. The

Plaintiff would face numerous difficulties if no vehicular passage could be had to the said house.

Not long after the said order of the Primary Court, however, it would appear that the final decree in D.C. Kandy Case No.7050/P had been executed, and the width of the disputed roadway had been restricted to 3 feet *vide* pages 139, 140, 147, 148 and 149 and final decree 26 in D.C. Kandy Case No.7050/P at pages 425, 426 and 427; *vide also* pages 431, 432, 433 and 434 to 437. It would seem that by order of the District Court of Kandy dated 26.11.1976 (28 pages 434 to 437) in D.C. Kandy Case No.7050/P the disputed roadway has been restricted to a 3 feet wide roadway by consent apparently given by some oversight.

The said 3 feet wide roadway is shown in the final partition Plan No.595 in D.C. Kandy Case No.7050/P (25 at page 424). The final partition decree is dated 27.08.1989 (page 427), and it has been implemented on 27.10.1992 *vide* page 431. It will be observed that these events have taken place after Dr. Reginton and Srimathie Rajapaksa purchased the said property by Deed No.4040 on 22.06.1989 (29 at page 386). In fact the evidence of Srimathie Rajapaksa at pages 148, 149, 177, 180 is that she came to know of the said final decree in D.C. Kandy Case No.7050/P only during the course of the proceeding in the said Primary Court Case.

The Timber Corporation official who was occupying the house had not objected to the execution of the ~~wait~~ *vide* page 245. The 4<sup>th</sup> Defendant had not accepted the Plaintiff's position that they used a 10 feet wide roadway *vide* page 247. The 4<sup>th</sup> Defendant states in evidence that if there is a 10 feet wide roadway they will not be able to open out their windows *vide* page 250.

Ian Jayatilake, a close relative of the Plaintiff's predecessor-in-title, testified that as far as he knows vehicles have gone over the roadway in question *vide* page 126. Grama Niladhari Gunaratne Banda who has worked in the said area around 1993 said he has personal knowledge of the dispute in this case. He said in evidence

that vehicles could have gone over the roadway in question-*vide* page 231. Even the 4<sup>th</sup> Defendant admitted that a small car could go over a 10 feet wide roadway but not over a 3 feet wide roadway-*vide* page 272. He conceded that in certain occasions the use of vehicles is necessary-*vide* page 273.

After the conclusion of the trial the parties tendered their respective written submissions. Thereafter the learned Additional District Judge of Kandy delivered judgment dated 14.01.2009 (page 295) granting the Plaintiff a right of way of necessity which is 8 feet in width.

In a nutshell the learned Additional District Judge held as follows:-

- (i) When comparing the right of way depicted as Lot No.2 in plan marked as 05 (Plan No.595 page 424) with the right of way depicted as Lots Nos.2 and 3 in plan marked 011 (Plan No.1049 pages 392 and 410) there is no doubt that the right of way depicted in plan marked 011 is much wider than the 3 feet roadway depicted in plan marked 05.
- (ii) The interlocutory decree (016 page 402) in Case No.7050/P does not set out the width of the said right of way leading up to the Plaintiff's land.
- (iii) After an inquiry held into the width of the said right of way in Case No.7050/P the said right of way has been reduced to a width of 3 feet by order dated 26.11.1976 (08 page 434). The width of the said roadway has not been restricted to 3 feet in a proper assessment of the evidentiary material in the said order dated 26.11.1976 marked 08 (pages 434, 436, 437).
- (iv) Conditions may change later, and a wider roadway would become a necessity.
- (v) The doctrine of *res judicata* has no application in this case.

- (vi) The fact that there is an order of Court restricting the right of way to a width of 3 feet is not bar on the Plaintiff to institute an action at a later stage for the said right of way of necessity to be widened depending on the necessity at the time- *Boteju v. Abilinu Singho* 7 CWR 36-*vide* page 335.
- (vii) Evidence proves that prior to the obstruction by the Defendants the right of way was wide enough to access the Plaintiff's land by car-*vide* Plan No.441-~~324~~ and Plan No.1040-~~3211~~; that by Deeds ~~325~~ to ~~3210~~ it is the wider roadway shown in Plan No.441-~~324~~ which has been conveyed-*vide* pages 304, 308, 310, 311.
- (viii) That even after the restriction of the said roadway to a 3 feet wide roadway the wider roadway has been used without opposition-*vide* pages 312-314; even the Defendants' witness Balakrishnan confirmed this fact in evidence-*vide* pages 286, 315.
- (ix) That the dispute arose because a concrete post was fixed to prevent user of the wider roadway-*vide* page 314.
- (x) Court was satisfied that prior to D.C. Kandy Case No.7050/P the wider roadway existed-*vide* page 315; that even after the final decree in the said Case No.7050/P the wider roadway has been used.
- (xi) Considering that a two-storied house has been constructed on the said premises, a right of vehicular passage thereto is a necessity.
- (xii) Court in the circumstances considered that an 8 feet wide roadway should be given to the Plaintiff, and accordingly entered a decree giving the Plaintiff an 8 feet wide roadway on the ground of necessity.

Being aggrieved by the said judgment of the District Court of Kandy the Defendant-Appellants has preferred this appeal seeking, *inter alia*, to have the said judgment set aside.

In my view the learned Additional District Judge brought to bear on his assessment of evidence the facts and circumstances of this case and concluded that there was necessity that made the grant of an 8 feet wide roadway imperative.

In fact it has to be recalled that until the said roadway was restricted to a 3 feet wide roadway by the final decree in the said D.C. Kandy Case No.7050/P, the roadway in question was a much wider roadway than a 3 feet wide roadway. The Plan Nos.441 of 07.04.1959 (ප්‍ර4 page 369) and 1040 (ප්‍ර11 and ප්‍ර3 pages 392 and 419) together with the title ප්‍ර5 to ප්‍ර10 all point to this fact and it must be observed that the learned Additional District Judge has taken into account this fact. Even the roadway shown in Plan No.1049 (ප්‍ර11) and (ප්‍ර5) which is the preliminary plan in D.C. Kandy Case No.7050/P shows a much wider roadway than a 3 feet wider roadway. So there was ample evidence before the learned Additional District Judge that when the property was purchased by Dr Reginton and Srimathie Rajapaksa in 1989, the said roadway both physically, and in terms of the documents of title was a much wider roadway than a 3 feet wide roadway, and that vehicles passed and repassed down that roadway without let or hindrance.

It cannot be gainsaid that even after the final partition decree in the said Case No.7050/P wherein the said roadway was restricted to a 3 feet wide roadway, the said roadway in dispute continued to be used as a much wider roadway until January, 1992 when the 4<sup>th</sup> Defendant fixed a concrete post to prevent the passage of vehicles on the said roadway.

Even though the preliminary Plan No.1049 (ප්‍ර11 and ප්‍ර3) in the said Case No.7050/P did not show the 3 feet wide road, but rather showed a much wider

road, and there was no issue, or evidence or adjudication regarding the matter in the said partition case, it would appear that the matter was raised at a later stage upon a motion after entry of the interlocutory decree, and the order dated 26.11.1976 (28 page 434) had been made apparently on the basis of consent given for the restriction of the said roadway to a 3 feet wide roadway-*vide* pages 303, 308. The learned Additional District Judge has considered these matters, and taken the view that there is nothing, however, to preclude the Plaintiff from now claiming a wider roadway to take vehicles to the dominant tenement. This conclusion reached by the learned trial Judge is unassailable and as was held in the case of *Boteju v. Abilinu Singho* (1979) 7 CWR 36, the previous case cannot be *res judicata* as was submitted on behalf of the Defendant-Appellant in this case.

The learned District Judge arrives at the conclusion that if the road existed as a 3 feet wide road, it would have been unnecessary to suddenly fix a concrete post on the said roadway-*vide* page 315. The learned Judge has also considered the fact that there is a two-storey building on the dominant tenement, and that access thereto by vehicle could be considered to be a necessity. The wider road after all physically existed at the time the property was purchased by Dr. Reginton and Srimathi Rajapaksa. I quite agree with the submissions made that the wider roadway was a servitude which appertained to the property. I

The condition of the dominant tenement, the original physical state of the roadway, the manner in which the roadway has been used are all relevant considerations when an action is filed for broadening of an existing right of way on the ground of necessity-*vide* the cases of *Boteju v. Abilinu Singho* (1979) 7 CWR 36; *Alwis v. Silva* 8 N.L.R 76; *Amarasuriya v. S.I. Perera* 45 N.L.R 348 at 349. In the instant case what is of crucial importance is the fact that a wider roadway has existed over a long period of time, and has been used as such for a long period of time, and that it was restricted to a 3 feet wide roadway in D.C. Kandy Case No.7050/P in usual circumstances without any notice to the Plaintiff

as was pointed out by the submissions made on behalf of the Plaintiff-Respondent.

In the circumstances I take the view that the learned Additional District Judge of Kandy arrived at the right decision to declare an entitlement for the Plaintiff entitled to an 8 feet wide roadway on the basis of necessity and entered decree accordingly.

Accordingly I proceed to affirm the judgment dated 14.01.2000 of the learned Additional District Judge of Kandy and dismiss this appeal.

JUDGE OF THE COURT OF APPEAL