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

In the matter of an Appeal under and in terms of section 5(c) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

S.C. Appeal No:
153/2016

SC (HC) CALA No:
169/2014

WP/HCCA/GPH No:
57/08(F)

District Court of Gampaha
Case No: 35508/L

Bogoda Arachchige Manoratne,
No.45, Amugodella Road,
Biyagama.
PLAINTIFF
Vs.

1. Collure Appuhamilage
Somasiri Collure,
Thakshila', No. 42, Biyagama.

2. Dayananda Collure,
No. 43, Malwana, Biyagama.
DEFENDANTS

AND

1. Collure Appuhamilage
Somasiri Collure,
'Thakshila', No. 42, Biyagama.

2. Dayananda Collure,
No. 43, Malwana, Biyagama.
DEFENDANT-APPELLANTS
Vs.

Bogoda Arachchige Manortne,
No. 45, Amugodella Road,
Biyagama.
PLAINTIFF-RESPONDENT

AND BETWEEN
Bogoda Arachchige Manortne,
No. 45, Amugodella Road,
Biyagama.
PLAINTIFF-RESPONDENT-APPELLANT

Vs.
1. Collure Appuhamilage
Somasiri Collure,
'Thakshila', No. 42, Biyagama.

2. Dayananda Collure,
No. 43, Malwana, Biyagama.
DEFENDANT-APPELLANT-RESPONDENTS

Before : S. Thurairaja, P.C., J.

: A.H.M.D. Nawaz, J.

: Sampath B. Abayakoon, J.

Counsel : Manohara De Silva, P.C. with Hirosha Munasinghe instructed by L.K.I. Perera for the Plaintiff-Respondent-Appellant.

: Dr. Sunil Coorey instructed by Diana Stephanie Rodrigo for the Defendant-Appellant-Respondents.

Argued on : 04-08-2025

Written Submissions : 19-09-2025 and 15-03-2021 (By the Defendant-Appellant-Respondents)

: 09-09-2025 and 23-09-2019 (By the Plaintiff-Respondent-Appellant)

Decided on : 19-11-2025

Sampath B. Abayakoon, J.

This is an appeal preferred by the plaintiff-respondent-appellant (hereinafter referred to as the plaintiff) on being aggrieved of the judgment pronounced by the Provincial High Court of the Western Province holden in Gampaha while exercising its civil appellate jurisdiction.

The said judgment has been pronounced on 06-03-2014, whereby the judgment pronounced by the learned District Judge of Gampaha on 06-06-2008, which was a judgment pronounced in favour of the plaintiff, was set aside.

Having set aside the District Court judgment, the learned Judges of the High Court have allowed reliefs as prayed for in prayer ඉ), ඊ) in the answer of the defendants before the District Court.

When this matter was supported for leave to appeal on 03-08-2016, this Court granted leave on the questions of law as set out in paragraph 13(B) to (H) of the petition dated 04-04-2014.

However, when the matter was taken up before the Court for argument on 04-08-2025, both the learned Counsel who represented the parties agreed that it would be sufficient to confine their arguments to the questions of law covered under paragraph 13(B) and (C) of the petition of appeal.

The said questions of law read as follows,

1. Did the learned Judges of the Provincial High Court err in law in allowing the appeal of the defendant-appellant-respondent at a time when there was no prayer to set aside or vary the judgment of the trial Court and if the said judgment has no force or avail in law.
2. Did the learned Judges of the Provincial High Court have erred on the fundamental principles of the law in relation to a case of this nature in granting the relief prayed for in the absence of any evidence to establish a right of way by prescriptive user.

At the hearing of this appeal, this Court heard the submissions of the learned President's Counsel who represented the plaintiff, and also the submissions of the learned Counsel who represented the defendant-appellant-respondents (hereinafter referred to as the defendants). This Court also had the benefit of considering the pre-argument written submissions and the post-argument written submissions tendered by the parties.

Although the 1st question of law revolves around a legal question as to the maintainability of the appeal before the High Court, I find it appropriate to consider the facts related to this matter before I would venture into considering the questions of law under which this appeal is considered.

The plaintiff has instituted an action before the District Court of Gampaha stating that he is the owner of the land morefully described in the 3rd schedule of the plaint.

He has averred that the defendants are brothers, and the owners of the lands situated adjacent to the Western boundary of his land where he and his predecessor in title allowed the defendants to use a temporary footpath along the South-Western boundary of his land when their father passed away in 1985 and also when their mother passed away in 1990 for the purposes of their respective funerals.

The plaintiff has admitted that the defendants used the said footpath from time to time, but with the permission of the plaintiff's predecessor in title.

It has been the position of the plaintiff that the defendants forcibly erected a gate on 06-07-1991 and started using the footpath forcibly when they had no right of servitude to use a footpath through the land belonging to the plaintiff.

On the above-mentioned basis, the plaintiff had prayed for a declaration of title that the land morefully described in the 3rd schedule of the plaint is owned by him without any incumbrances amounting to a servitude, and other incidental reliefs.

In their answer filed before the District Court, the defendants, while denying the title pleaded by the plaintiff, had admitted that the two lands owned by them are situated towards the Western boundary of the land belonging to the plaintiff. Denying that they forcibly erected gates, it has been their position that they enjoyed a 6-foot-wide road access from Amunugodella main road to their lands through the land belonging to the plaintiff for over 40 years. They have claimed prescriptive rights to the said road access and has stated that based on that prescriptive right, they erected a gate at the entrance of the said access road from the main road.

They have relied on a final partition plan in another case to claim that a 6-foot-wide footpath was in existence for over 40 years and had claimed that it was the most convenient and shortest route and the only access road for the defendants to reach the main road.

They have claimed that they have a right to the said access road as a 12-foot-wide road out of necessity.

In their prayer, they have sought the dismissal of the plaintiff's action and for a declaration that they are entitled to the said road access through prescription. They have also prayed for the earlier mentioned widening of the road out of necessity, and for an order for the removal of obstructions caused to their road access, allegedly by the plaintiff.

However, it appears that the defendants have given up their claim for the widening of the road access out of necessity at the trial stage.

The learned District Judge of Gampaha, having considered both the oral and documentary evidence placed before the Court and issues raised by the parties, has pronounced her judgment determining that the plaintiff has established his ownership to the land morefully described in the 3rd schedule of the plaint and the defendants have failed to establish that they have prescriptive rights to a 6-foot-wide road access through the land belonging to the plaintiff.

It has also been determined that the 1st and 2nd defendants have a clear separate road access to reach their lands and the road access claimed by them is not the only road access they have, as claimed. It has also been found that the road access claimed by the defendants is an access that can be used to reach the 1st defendant's land from the land belonging to the 2nd defendant, which is an access of convenience rather than a necessity. Accordingly, the learned District Judge has answered the issues in favour of the plaintiff while granting the reliefs as prayed for in the prayer of his plaint, except for the relief ඉ.

When this judgment was appealed against by the defendants to the High Court, the learned Judges of the High Court, after having considered the submissions made before the Court, have decided that the main issue that needs determination would be whether the defendants have acquired a prescriptive right of the footpath by using it as a servitude right for a period of over 40 years.

It appears that the learned Judges of the High Court has mainly relied on the final partition plan No. 1137 dated 28-07-1974 filed in the District Court of Gampaha Partition Action No. 14665 (1V3) to determine that the defendants have established that they have used the said footpath as a servitude right even during 1974, and had continued to use it until it was obstructed. It has also been determined that the said footpath has been used as a 6-foot-wide access and the defendants have established using an access road with such width. It has been further determined that although the defendants may have an alternate road access, the disputed path has been used by them at the times of flooding of the area and there is no impediment for them to use the

said access as a matter of convenience as they have acquired prescriptive rights over the said access. It has been determined that the learned District Judge was not correct when answering the issues of the plaintiff. Accordingly, the learned Judges of the High Court have set aside the judgment of the learned District Judge, while allowing reliefs prayed for by the defendants as stated earlier.

At the hearing of this appeal, the position taken up by the learned President's Counsel in relation to the 1st question of law was that, in the petition of appeal filed before the High Court, other than narrating the facts of the matter and stating in paragraph 23 of the petition that the defendants are aggrieved on the basis set out in the said paragraph, there was no prayer for seeking any relief from the High Court.

It was his position that there was no proper appeal before the High Court under which any relief should have been granted and the learned Judges of the High Court were misdirected in granting reliefs when there was no prayer before the Court other than a mere statement of facts presented in the form of an appeal.

Making submissions as to the determination of the High Court where the judgment of the learned District Judge was set aside, it was his position that the learned Judges of the High Court should not have relied on a final partition plan prepared in an unrelated case to conclude that the defendants have proved prescription to a 6-foot-wide road access through the plaintiff's land of 20 perches. It was his position that the defendants never used a 6-foot-wide access road through the plaintiff's land as of a right, although they were allowed to use a footpath due to exigencies as stated in the plaint from time to time which does not prove prescribing to a 6-foot-wide road access.

Pointing out that both the lands belonging to the two defendants have clear road access and they have been using those roads as their main entrances, it was his contention that the claimed road access was only for the defendants to enter each other's lands and not out of any necessity. It was further argued that the prescriptive claim has been based on the premise that it is the only

means of access available for them, which was not the truth. It was his submission that the plaintiff has proved his case, whereas the defendants have failed to establish the prescriptive claim made by them and the judgment of the District Judge should have been allowed to stand.

The position taken up by the learned Counsel for the defendants with regard to the legal question of law was that this was a question raised for the 1st time before this Court. Although it was admitted that the petition of appeal before the High Court does not include a prayer seeking relief, it was his contention that the notice of appeal contains the relief sought for from the appellate Court. It was his position that no miscarriage of justice has occasioned as a result of the said oversight, and in anyway, no prejudice has been caused to either party and hence, in accordance with the proviso of section 5A(2) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006, such an objection cannot be maintained.

Submitting as to the facts of the matter, it was his position that although there are alternate access roads, such roads get flooded during the rainy season and the questioned road access is the only access available to the defendants in such situations. It was his position that the learned Judges of the High Court were correct in setting aside the trial Court judgment and allowing the appeal.

With the above factual matrix in mind and having considered the submissions of the learned Counsel, I will now move on to consider whether there is merit in the questions of law under which leave to appeal was granted in this matter.

The 1st question of law: -

A person who is aggrieved of a judgment pronounced by a learned Judge of a District Court can prefer a notice of appeal in terms of section 755 of the Civil Procedure Code within the stipulated time, giving the particulars of case as required in the section so that the opposing party and the other relevant stakeholders is put on notice about his intention to appeal against the judgment.

Thereafter, he shall file the petition of appeal within the time frame specified and in terms of section 758 of the Civil Procedure Code.

The said section 758 read as follows-

> **758. (1) The petition of appeal shall be distinctly written upon good and suitable paper, and shall contain the following particulars: —**
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> **(a) the name of the Court in which the case is pending;**
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> **(b) the names of the parties to the action;**
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> **(c) the names of the appellant and of the respondent;**
>
> **(d) the address to the Court of Appeal;**
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> **(e) a plain and concise statement of the grounds of objection to the judgment, decree, or order appealed against—such statement to be set forth in duly numbered paragraphs;**
>
> **(f) a demand of the form of relief claimed.**
>
> **(2) The Court in deciding any appeal shall not be confined to the grounds set forth by the appellant, but it shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of being heard on that ground.**

The position taken up by the plaintiff is that when the defendants presented their petition of appeal to the Provincial High Court, they have not prayed for any specific reliefs from the Court, and hence, there was no basis before the High Court to grant any relief to them, and the learned Judges of the High Court was misdirected when relief was granted on the basis that there was a prayer seeking relief.

It is clear from the petition of appeal filed before the High Court, which can be found in the Supreme Court appeal brief, that it bears no prayer for any relief claimed. It had been paragraphed and numbered from 1 to 23.

Paragraphs 1 to 22 refer to the facts of the case, while in paragraph 23, the appellants have stated the grounds upon which their Counsel would be arguing the appeal before the High Court.

It is manifestly clear that the defendants being the appellants before the High Court, had failed to pray for any relief from the Court which is a mandatory requirement in terms of section 758(1)(f) of the Civil Procedure Code.

The learned Counsel for the defendants contended that this was not a matter taken up before the High Court when the appeal was considered and there is no basis for the plaintiff to take up that as a question of law before this Court. I am of the view, since this Court decided to formulate the questions of law that needs to be determined with the consent of both parties when this matter was taken up for argument, this was a specific question of law raised. Hence, I find that it is a matter that requires a determination from this Court.

It needs to be observed that the learned Judges of the High Court had been misdirected when it was determined that the defendants had come before the Court praying for reliefs as sought by them in their answer before the District Court.

The 1st paragraph of the appellate judgment pronounced by the High Court reads as follows-

> 1, 2 විත්තිකාර අභියාචකයන් විසින් මෙම අභියාචනය ඉදිරිපත් කොට ඇත්තේ ගම්පහ උගත් අතිරේක දිසා විනිසුරුවරිය 2008/06/06 දින ප්‍රකාශයට පත් කරන ලද තීන්දුව ඉවත් කරන ලෙසට ඉල්ලා සිටිමින් ය. විත්තිකාර පාර්ශවය විසින් ස්වකීය උත්තරයේ ආයාචනයේ ඉල්ලා ඇති සහන ලබා දෙන ලෙසටත්, අධිකරණයට මැනවයි හැඟෙන අනෙකුත් සහන ලබා දෙන ලෙසටත් අභියාචන පෙත්සමෙන් ඇයද සිටියි.

The above opening passage of the judgment clearly shows that the learned Judges of the High Court have failed to appreciate the fact that there had been no prayer seeking relief in the petition preferred to the High Court, but has gone on a misdirected premise that there was a prayer seeking relief in terms of the answer filed by the defendant before the District Court. It appears that it was on such basis the High Court has decided to allow the defendants to

use the 6-foot-wide road way apparently showed in a plan dated 12-07-1993 on the basis of long standing, uninterrupted, and unchallenged usage.

The plan mentioned in the High Court judgment is the plan marked 1V1, namely the plan No.5239 dated 12-07-1993 by surveyor K. G. Hubert Perera. Although the Court has decided that the said plan depicts a 6-foot-wide road access, what it actually depicts is a footpath as shown by the defendants to the surveyor.

I am unable to comprehend the fact under what circumstances the High Court allowed such relief which was not sought for from the High Court. It is my considered view that there should be a prayer to set aside the judgment of the District Court for the High Court to determine the matter differently from the trial Court judgment. I am of the view that although the learned Judges of the High Court have stated that they are allowing the appeal by granting the above-mentioned relief, in fact there had been no proper appeal before the Court to allow such relief.

Under the circumstances, it is my considered view that there is merit in the 1st question of law under which this appeal was considered.

The 2nd question of law: -

It is clear that the plaintiff has come before the Court seeking for a declaration of title without any encumbrances in favour of the defendants in the form of a servitude through his land.

It is manifestly clear from the evidence that the plaintiff has proved his title to the land mentioned in the 3rd schedule of the plaint, which is a land of 20 perches in extent. It has been his position that although the defendants were allowed to use a footpath along the South-Eastern and Western boundary of his land from time to time as a gesture of goodwill, it was never allowed as a right of servitude. It was on the basis that the defendants are attempting to use such a road access as an access of convenience, the plaintiff has pleaded reliefs as prayed for in his plaint.

The position of the defendants had been that they have acquired prescriptive rights to a 6-foot-wide road access by using that road for over a period of 40 years.

As correctly observed by the learned District Judge in her judgment, a 6-foot-wide road access is not something equivalent to using a footpath, as a footpath cannot be of such a width as claimed by them. Since it has been the position of the defendants that they have prescribed to such a path of 6 feet in width, the law requires them to establish that fact before the trial Court. In other words, it is they who should establish their rights as claimed.

Had they claimed that they had a right of servitude of using the claimed road access through the land belonging to the plaintiff through usage or out of necessity, it was up to them to show the said road access by identifying it in a proper manner and also identifying the dominant tenement and the servient tenement.

Since their claim was based on a right of a servitude through prescription, they were required to establish that by performing an overt act or acts adverse to the rights of the plaintiff to his land, they used the road for more than 10 years and thereby, acquired prescriptive rights as claimed.

In the evidence led before the District Court, there is nothing to suggest that such evidence has been adduced. The only evidence placed before the Court by the defendants had been to the effect that they used the road access as an easy access to the road, which does not mean an adverse usage of the said access in view of the plaintiff's position that he and his predecessors in title allowed the defendants to use a footpath in times of their need.

It has to be mentioned at this juncture, the defendants themselves had admitted that they have separate road access to reach their lands through the roads that run adjacent to their respective lands. The plans prepared for the purposes of this action clearly show that they have been using such road access as the main access to their lands and houses. The evidence also clearly shows that the real purpose of using the footpath have been to obtain access to each other's land through the land belonging to the plaintiff.

I find no basis to consider the evidence that during the times of flooding of the area, the defendants' only means of access to the road is through the plaintiff's land.

The evidence placed before the District Court has also clearly established the fact that the defendants' claim in the answer, that this was their only access to the main road, is false.

Very much similar facts were considered in the judgment of **Wanigasooriya Vs. Danawathie and Others (2009) 1 SLR 85.**

> The plaintiff appellant filed action alleging that her father permitted the defendant's predecessor to have access to his land over and along the land of the plaintiff, and sought a declaration to close down the road, and further alleged that the defendant has an alternate way.
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> The defendant-respondent contended that the roadway in question had been used by him over a period of 50 years and moved for a dismissal of the action. The trial Court held with the defendant-respondent.
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> Held:
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> 1. The judgment does not support even by a stretch of imagination that the defendants used the right of way for a long period of time exceeding 50 years adverse to the rights of the plaintiff, but merely states that they had used their path.
>
>   The judgment does not identify the use being adverse to the rights of the plaintiff's title 10 years immediately preceding the institution of the action. The consequence of this finding would be that according to the trial Judge the defendant had not acquired any prescriptive rights to the road way.
> 2. It is quite clear that the trial Judge had erred in not appreciating that there was lack of evidence regarding the acquisition of right of way of necessity.

Per Adul Salam, J.

> *"The impugned judgment of the learned District Judge in answer to issue 5 does not support even by a stretch of imagination that the defendants use the right of way depicted as X1B in plan X for a long period of time exceeding 50 years,* ***adverse to the rights of the plaintiff*** *but merely states that they had used the path. In other words the finding of the learned District Judge inter alia was that the 1st, 2nd and the 3rd defendants and their predecessors has used the right of way depicted as X1B in plan X for a long period of time exceeding 50 years, but does not identify the use as being adverse to the right of the plaintiff on a title independent and whether they enjoyed the same without any interruptions for a period of 10 years immediately preceding the institution of the action. The consequences of this finding would be that according to the learned Judge the defendants had not acquired any prescription rights to use the road way."*

His Lordship also considered the legal principle set out by His Lordship Basnayake, C.J. in **Soyza Vs. Fonseka 58 NLR 501** as to the nature of the evidence required to prove the acquisition of a right of way by prescription, where it was held that there should be clear and unmistakable evidence of the commencement of an adverse user for a prescriptive period that is necessary to claim a servitude by way of prescription.

In view of the above findings, I am of the view that the learned District Judge was correct in determining that the defendants had failed to prove that they have acquired prescriptive rights to a road access 6 feet in width. I find that the learned Judges of the High Court had failed to consider this important factor in relation to a claim based on prescription.

For the reasons as considered above, I answer both the questions of law in the affirmative.

Accordingly, I set aside the judgment dated 06-03-2014 by the learned Judges of the High Court of the Western Province holden in Gampaha as it cannot be allowed to stand.

I affirm the judgment dated 06-06-2008 pronounced by the learned Additional District Judge of Gampaha.

The appeal is allowed.

Having considered the relevant facts and the circumstances, I order no costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.

I agree.

Judge of the Supreme Court