**DAVID**

**v.**

**GNANAWATHIE**

COURT OF APPEAL
JAYASURIYA, J.
KULATILEKA, J.
CA. No. 661/96 (F)
D. C. EMBILIPITIYA No. 3471/L
19TH MARCH, 1998
29TH MAY, 1998
10TH SEPTEMBER, 1998
05TH NOVEMBER, 1998
15TH MARCH, 1999

*Praedial servitude - Personal servitude - Nature and character - Right of way by Prescriptive user and by way of necessity - Dominant tenement and servient tenement - Merger - Roman Dutch Law - Civil Procedure Code S 41 - Servient tenement not described with certainity and precision - Is it fatal?*

The Plaintiff Respondent claimed a servitude of right of way by prescriptive user and alternatively a servitude of a way of necessity. It was conceded that the dominant tenement and servient tenement lands are owned by the Mahaweli Authority.

The court after holding that the dominant tenement and the servient tenement are lands owned by the State, granted the reliefs prayed for by the Plaintiff Respondent.

*On appeal,*

**Held :**

(a) A praedial servitude is one which accrues to an individual merely because he is the owner of the *praedium dominans*. He could claim and exercise it only in his capacity as the owner of the dominant tenement. A personal servitude is one which vests in an individual as such and not by reason of the fact that he is the owner of a tenement.

(b) For the exercise of a praedial servitude there ought to be a dominant tenement owned by one individual and a servient tenement owned by another individual.

The Mahaweli Authority is the owner of both tenements. Therefore the Plaintiff Respondent not being the owner of the dominant tenement cannot legally claim or exercise this servitude of right of way; Further, the Plaintiff cannot assert that she is claiming a servitude for the Mahaweli Authority. The Defendant too cannot, as he is not the owner of the tenement, legally grant or create this particular servitude.

(c) Merger (confusio) of the dominant and servient tenement in one ownership terminates and extinguishes the servitude.

(d) A way of necessity could only be generally claimed when there is no other alternative route available.

A person is not entitled to claim the best and nearest outlet on the ground of necessity, if he has another but a less convenient route.

(e) When the Plaintiff claimed that he has exercised by prescriptive user a right of way over a defined route, the obligation of the Plaintiff to comply with S.41, Civil Procedure Code is paramount and imperative. Strict compliance with S.41 Civil Procedure Code is necessary as the Fiscal would be impeded in the execution of the decree/Judgment if the servient tenement is not described with precision and definiteness.

Appeal from the Judgment of the District Court of Embilipitiya.

**Cases referred to :**

1. *G. L. A. Perera vs. Municipal Council of Negombo* - 75 CLW 28.
2. *John Singho vs. Pedris Appuhamy* - 48 NLR 345.
3. *Louw vs. De Villers* - 10 SC 324 at 325.
4. *Exparte Geldenhuys* - 1926 OPD 155.
5. *Baehwisch vs. Estate Odendaal* - 1909 18 SC 152.
6. *Vander Vlugt vs. Salvation Army Property Co* - 1932 CPD 56.
7. *Dreyer vs. Letterstedts Trustees and Executors* - 5 - S - 99.

8. *Du toit vs. Visser and Another* - 1950 2 SALR 93 (C).
9. *Groot - Chwaing Saltworks Ltd., vs. VonTonder* - 1920 AD 492.
10. *Myers vs. Van Heerden and Another* - 1996 2 SALR 649.
11. *Salmon vs. Lambs Executors* - 1906 20 EDC 351.
12. *Velupillai vs. Subasinghe* - 58 NLR 385.
13. *City Deep vs. Ma Calagan* - 1924 WLD 276.
14. *Jansen and Thorn vs. Ysel* - 1 SALR 6.
15. *Wilhelm vs. Norton* - 1935 - EDL 143 at 152, 169.
16. *Illing vs. Woodhouse* - 1923 Natal Law Reports 168.
17. *Ellmann vs. Werth* - 16 SC 173.
18. *Gray vs. Gray* - 28 Natal Law Reports 154.
19. *Van Schalk vs. Du Plessis* - 17 SC 454.
20. *Lentsz vs. Mullin* - 1921 EDL 268.
21. *Matthews vs. Road Board for the District of Richmond and others* - 1967 3 SALR 244.
22. *Mohotti Appu vs. Wijewardena* - 60 NLR 46 at 47.
23. *Abdulla vs. Junaid* - 44 CLW 84.

*Ms. Anandi Cooray* for Defendant Appellant

*P. D. Wimalanaga* for Plaintiff Respondent

*Cur. adv. vult.*

February 02, 2000.
**JAYASURIYA, J.**

The adjudicating process upon this appeal has spotlighted the nature and character of a praedial servitude in that it is created for the benefit of the *Praedium Dominans* (dominant tenement) to be claimed and exercised by an individual in his capacity of being the owner of the dominant tenement and this appeal manifests the marked distinction between a praedial servitude and a personal servitude.

The plaintiff in her plaint claimed from the defendant a servitude of right of way by prescriptive user (vide paragraphs 2 and 6 of the plaint) and alternatively a servitude of a way of necessity (vide paragraphs 4 and 5 of the plaint). In the schedule to her plaint she has described with reference to metes and bounds the dominant tenement (lot 23 which is alleged to be owned by her). But there is no description of the servient tenement with reference to metes and bounds or a reference to a sketch or plan depicting the servient tenement. In fact having described the dominant tenement in the schedule, there is only a description of the servient tenement (lot 22) in the following terms: "To gain access to the dominant tenement from the main Hambantota Ratnapura Road, a right of way which runs to the north of the dominant tenement 125 feet in length and 4 feet in breath which has been lotted as lot No. 22." In her prayer to her plaint she has specifically claimed a declaration for a right of way as described in the schedule to her plaint and she has prayed for an order on the defendant restraining and prohibiting the defendant from impeding and hindering her in the use of the said right of way.

The defendant in his answer *inter alia* pleaded that the plaintiff never exercised a servitude of right of way over the defendant's land, that the plaintiff had no legal right to claim and assert a right of way as prayed for in her plaint and that the plaint disclosed no cause of action against the defendant.

The case proceeded to trial on issues which were numbered one to twenty. Vide pages 67 to 74. The relevant issues for the consideration of this appeal are issues one, two, three, six, seven, eight, ten, fifteen and nineteen. In issues one and three the plaintiff has raised the question whether the plaintiff by using the aforesaid right of way from the year 1960 uninterruptedly, without any hindrance or impediment, adversely and independently for over ten years, has acquired a right of way by prescription.

In issue two, the plaintiff has raised the question whether she is entitled to a way of necessity over the servient tenement. In issue seven the defendant has raised the question whether the plaintiff could have and maintain the presently constituted action, as she has failed to describe the servient tenement by reference to metes and bounds or with reference to sketch or plan as required by section 41 of the Civil Procedure Code. In issue eight, the defendant has raised the question whether the plaintiff is legally entitled to claim a way of necessity over the servient tenement. In issue ten, the plaintiff has raised the question whether the defendant is the owner of the servient tenement either by reason of the execution of the transfer deed No. 606 dated 1.5.1978 attested by Buddadasa Vitanage Notary Public (marked D11) or by reason of prescriptive right. In issue fifteen, the plaintiff has raised the consequential issue whether the aforesaid transfer deed (marked D11) has been executed in contravention of the provisions of the Land Development Ordinance and in respect of a land which is owned by the State. The defendant has framed issue nineteen as a consequential issue raising the question, if the servient tenement and the dominant tenement are lands owned by the State is the plaintiff entitled to have and maintain the presently constituted action claiming a servitude of a right of way by prescription or a way of necessity?

The plaintiff in her plaint alleged that she was the owner of lot No. 23 which is fully described in the schedule to the plaint and she claimed a servitude of a right of way over lot 22, which is imperfectly described in the schedule to her plaint to gain ingress from the aforesaid main road to lot No. 23 and to gain eggress from lot 23 to the aforesaid main road.

During the course of the trial it was agreed and conceded by both parties that the dominant tenement (lot 23) and the servient tenement (lot 22) were both lands owned by the State and lands which had been vested in the Mahaweli Authority; Vide sections 24 and 25 of the Mahaweli Authority Act. In

terms of the Mahaweli Authority Act certain statutes are specifically referred to in schedule B to the Act and the tenth statute which is referred to is the Land Development Ordinance. The evidence recorded at the trial discloses that both the plaintiff and the defendant were unauthorised and unlawful encroachers of lands which were vested in the Mahaweli Authority. No grants or permits had been issued under the provisions of the Mahaweli Authority Act or under the provisions of the Land Development Ordinance to render legal their unauthorised occupation of lands which were vested in the State.

Although a photocopy of a plan (F. V. P. 779) without strict formal proof was marked in evidence as P1 (being a photocopy of the F. V. P. 779) which depicted the relevant allotments, yet the evidence of the official witness called on behalf of the plaintiff was to the effect that before the Mahaweli Authority decided to issue any grants or permits to encroachers of State land certain vital steps in procedure had to be taken. The Authority had to decide whether the encroached land was required for purposes of the State. If it was not so required, then plans have to be prepared depicting the encroachments, boundary stones have to be affixed to the soil and thereafter the plans prepared by the survey officers had to be approved by Surveyor General, before the issue of grants or permits to encroachers could be contemplated. It is in evidence that none of these steps had been taken and the division recorded in the sketch plan P1 was not final at all. Thus it is manifest that both the plaintiff and the defendant had no investitive right to occupy their relevant lands and neither did they have a statutory right under the provisions of the Mahaweli Authority Act and the Land Development Ordinance although it was so incorrectly contended at the argument of this appeal.

Learned counsel for the respondent relied on a nebulous statutory right conferred on the plaintiff by the Mahaweli Authority which had no existence in law. Learned counsel for

the respondent relied heavily on the judgment in *G. L. A. Perera* vs. *Municipal Council of Negombo*[1] particularly at page 30. But this decision is certainly not helpful to support the alleged statutory right relied upon by counsel. In that decision, Justice Siva Supramaniam, was dealing with an entirely different set of circumstances and His Lordship proceeded to state that where an obligation does not arise under the common law but it is created by statute that one must look to the statute to see if there is a specific remedy contained in it for breach of that obligation and if a specific remedy has been provided, no other remedy is available at law. The *ratio decidendi* of that judgment has no application to the present appeal as no right and obligation has ever been created by statute as contended, for the plaintiff and the defendant to lawfully occupy State land. Equally no issue relating to what precise recourse to a remedy arises upon this appeal.

This issue relating to a statutory right raised for the first time upon this appeal by learned counsel for the respondent, ought not to be considered by this Court at all. There has been no issue framed in regard to the vesting of a statutory right as contended for in the issues which have been raised before the trial Judge. It is trite law that a Court cannot in the course of its judgment in appeal decide on matters not covered and caught up by the issues. No such issue has even been framed at the trial and no responsible counsel could prefer submissions in appeal on matters outside the area covered by the issues dealt with by the trial Judge. These principles were laid down by Justice Wijewardena when he was delivering the judgment in a partition case, but the principles laid down by him are equally applicable to all other civil actions. Vide *John Singho* vs. *Pedris Appuhamy*[2].

A consideration of the principles of the Roman Dutch Law are necessitated having regard to the issues arising upon this appeal. Praedial servitudes are constituted in law in favour of a particular *praedium dominans* (dominant tenement) and can only pass with the dominant tenement. An individual who

is the owner of the dominant tenement *in his capacity as the owner of the praedium dominans* claims and exercises the servitude over the servient tenement. The owner of the dominant tenement cannot lawfully purport to transfer the dominant tenement to someone else and purport to exercise the servitude for himself or lend the use of the servitude to third parties apart from the land Domat 1.1.12.1.14; Voet B.1.1; *Louw* vs. *De Villers*[3] at 328. Praedial servitudes are part and parcel of the dominant land and they themselves are immovable - Van Leeuwen Roman Dutch Law 2.19.2 It is relevant to distinguish between personal and praedial servitudes in relation to the legal issue arising upon this appeal. A praedial servitude is one which accrues to an individual *merely because* he is the owner of the *praedium dominans*. He could claim and exercise it *only* in his capacity as the owner of the dominant tenement. However, a personal servitude is one which vests in an individual as such and not by reason of the fact that he is the owner of a tenement. *(praedium dominans)* Vide the opinion of Grotius 59 page 420; Van Leeuwen Roman Dutch Law 2.22.6; *Ex parte Geldenhuys*[4].

For the constitution and the exercise of a praedial servitude there ought to be a dominant tenement owned by one individual and a servient tenement which is owned by another individual - Voet 8.4.19; Huber 2.43.17; *Baehwisch* vs. *Estate Odendaal*[5] 1909. Do SC 152; *Vander Vlugt* vs. *Salvation Army Property Co.*,[6]. The owner of the dominant tenement (lot 23) and of the servient tenement (lot 22) in this action is the Mahaweli Authority. Thus the Mahaweli Authority cannot in law claim and exercise this particular servitude of right of way claimed in the plaint. For the trite principle of law is that no one could have a servitude over his own land - *Nulli Res Sua Sevit-Dreyer* vs. *Letterstedt's Trustees and Executors*[7]. The Roman Dutch Law principle being that merger (confusio) of the Dominant and Servient tenement in one ownership teminates and extinguishes the servitude - *Du Toit* vs. *Visser and another*[8] *Groot-Chwaing Salt Works Ltd.*, vs. *Von Tonder*[9] *Myers* vs. *Van Heerden and another*[10]. For an analyatical examination of this

rule - vide Justice Kotze's judgment in *Salmon* vs. *Lambs Executors*[11] Thus the Mahaweli Authority who admittedly is the owner of both the dominant and servient tenement cannot claim or exercise the servitude or right of way as prayed for in the plaint. The plaintiff not being the owner of the dominant tenement cannot legally claim or exercise this servitude of right of way. Likewise the plaintiff cannot assert that she is claiming a servitude for the Mahaweli Authority. The defendant who is not the owner of the servient tenement cannot legally grant or create this particular servitude. Thus the answers to issue eight and nineteen have necessarily to be in the negative. The learned trial Judge has *wrongly* answered issue eight in the affirmative, but *correctly* answered issue nineteen in the negative. Although he has correctly answered issue nineteen in the negative he has *wrongly* entered judgment in favour of the plaintiff in terms of prayer one and two of the plaint. If the answer to issue nineteen is in the negative, the learned District Judge ought to have refused the claims in prayer one and two of the plaint.

The issue which arises upon this appeal also arose for consideration before the Supreme Court in *Velupillai* vs. *Subasinghe*[12]. Learned counsel for the defendant-appellant relied upon this decision in support of her contentions before us. Chief Justice Basnayake delivering the judgment in Velupillai's case succintly remarked thus:

"The servitude claimed in the instant case is a real or praedial servitude. Such a servitude cannot exist without a dominant tenement to which rights are owed and a servient tenement which owes them. A servitude cannot be granted by any other than *the owner of the servient tenement*, nor acquired by any other than by him who *owns* the adjacent tenement - the dominant tenement. Here the plaintiff who is the lessee and *not the owner* of the land claims a servitude from the defendant who is *not the owner* but a lessee of the land. However the owners of both tenements are one and the same group of persons. A praedial servitude is a right for all times

attaching to the dominant tenement and cannot be acquired except for the benefit of the lessor by the lessee whose rights are limited by the terms of the lease..... It is sufficient to refer to the case of *City Deep* vs. *Ma Calagan*[13] where the very question arose for decision and it was held that a lessee in Longum Tempus cannot acquire a praedial servitude by prescription over the property of the lessor. That case refers to the decision of *Jansen & Thorn* vs. *Yese*[14] in which Kotze, J held that a lessee cannot acquire a real servitude for himself. The person entitled to a way of necessity is only the person who is the owner of the dominant land - Voet 8.3.4".

Thus the South African Courts have held that even a lessee in Longum Tempus, who certainly has a right in rem and an interest in the land, cannot claim and acquire a servitude as he is not the owner of the dominant tenement. Even if we hold that the plaintiff is entitled to a statutory right in respect of lot 23, he cannot legally acquire and purport to exercise a servitude of a right of way as he is not the owner of the dominant tenement.

The learned District Judge's judgment contains a series of misdirections, inconsistencies and discrepancies. Having regard to issues one, three and six and paragraphs two and six of the plaint it is crystal clear that the plaintiff is seeking a declaration of a servitude of a right of way by prescription. However the Judge at page 111 incorrectly states and arrives at the finding.

"පැමිණිල්ලේ අඩංගු කරුණු පලකා බලන කල්හි අධිකරණයට පෙනී යන්නේ පැමිණිල්ලේ නඩුව පදනම් කර ඇත්තේ **කාලා විරෝධී** අයිතිය මත **නොවන** බවයි."

Again at page 271 of his judgment the learned Judge states as follows:

"පැමිණිලිකරු ඉල්ලා සිටින්නේ **කාලා විරෝධී** අයිතියක් **නොව** මාර්ග අයිතියක්ය."

Likewise at page 259 of the Judgment the learned Judge states as follows:

"විත්තියේ නීතිඥ මහතා දක්වන පරිදි **කාලා විරෝධී හිමිකමක්**පැමිණිලිකාරිය ඇයද සිටින්නේ **නැත**."

Further the learned trial Judge has answered issues one, three and six in the affirmative to the effect that the plaintiff is entitled to claim by prescription a right of way as prayed for in the plaint. In his judgment at page 275 he has answered issues one and three in the affirmative and in favour of the plaintiff.

At the trial a claim to a way of necessity was also pressed. The defendant in refutation of that claim pleaded that the plaintiff had an alternative route. However the learned trial Judge very *irresponsibly* held that the issue of an alternative route does not arise for consideration and is not relevant. Though he has reached this finding he has answered issues two and eight which relate to the claim of a way of necessity in favour of the plaintiff. Thus there is manifest inconsistency in his finding that the existence of an alternative route is irrelevant in view of his answer to issues two and eight. At page 264 of his judgment, the learned Judge holds as follows:

"එහෙත් ඇත්ත වශයෙන් මෙහිදී අධිකරණයේ අවධානය යොමුවිය යුත්තේ **වෙනත් මාර්ගයක් පැවතීම** සම්බන්ධයෙන් **නොව** විෂයගත මාර්ගය පැමිණිලිකාරිය භාවිතා කර ඇතිද යන්නය."

Again at page 265 in his judgment the learned trial Judge erroneously holds thus:

"විත්තියේ තර්කය වී ඇත්තේ වෙනත් මාර්ගයක් පැමිණිලිකාරියට යාම් ඊම් කිරීමට ඇති බවයි. එහෙත් වෙනත් මාර්ගයක් **පවතීද නැතිද**? යන මෙහිදී විමසිය යුතු නො වේ. විමසිය යුත්තේ පැමිණිලිකාරිය මෙම මාර්ගය භාවිතා කොට ඇතිද යන්නය."

The learned trial Judge has misdirected himself on the competing claims and pleas put forward by the respective parties before him and arrived at these two wrong findings and

failed and omitted to examine and evaluate the evidence led by the defendant in support of the existence of an alternative route. In fact the plaintiff under cross examination when she was confronted with the photocopy of the plain FVP bearing No. 779 (which was marked in evidence as P1) admitted that there is a strip of vacant land along Shashikala Gems to get to her father's land which was lotted in the plan as lot 33/9. She also accepted the firm fact that one boundary to her land (lot No. 23) is her father's land; Vide pages 128 and 129 of the record. In the circumstances the learned trial Judge was duty bound, in view of the fact that issues two and eight were raised, to give his anxious consideration to this plea and the evidence led in support of an alternative route available to the plaintiff.

A way of necessity could only be *generally* claimed when there is no other alternative route available to a plaintiff. For the history of the origin of the right of way of necessity - see the decision in *Wilhelm* vs. *Norton*[15] at 152 Voet 8.3.4 *Via Necessitatis* is a right of way granted in favour of property over an adjoining one, constituting the only means of ingress to and egress from the former property. Thus if there is an alternative reasonable and sufficient route, the claim fails. On this issue the criterion is necessity and not convenience but it is not necessary to establish absolute necessity. Vide *Illing* vs. *Woodhouse*[16] at 168. A person is entitled to a *reasonable and sufficient* means of access to a public road from his property. Hence he is not entitled to claim the best and nearest outlet on the ground of necessity, if he has another but a less convenient route. *Ellmann* vs. *Werth*[17] at 173; *Gray* vs. *Gray*[18] *Van Schalk* vs. *Du Plessis*[19] *Wilhem* vs. *Norton (Supra)* at 169.

If a person claiming a way of necessity "has an alternative route to the one claimed, although such route may be less convenient and involve a longer and a more arduous journey, so long as the existing road gives him reasonable access to a public road, he must be content and cannot insist upon a more direct road over his neighbour's property" - *Lentz* vs. *Mullin*[20]. Also see *Matthews* vs. *Road Board for the District of Richmond*

& *Others*[21]. Justice Weerasuriya in *Mohoti Appu* vs. *Wijewardena*[22] at 47 quoted extensively from the decision in Lentz's case and held that a person can claim a way of necessity for the purpose of going from one land owned by him to another but remarked that the right of way will not be granted if there is an alternative route to the one claimed, although such a route may be less convenient and involve a longer and a more hazardous journey.

The learned trial Judge has completely failed to give his consideration and attention to the aforesaid principles relating to a way of necessity and to the plea of alternative route and he has completely failed to consider and evaluate the valuable material and evidence placed before him by both parties. Besides having misdirected himself he has erroneously held that the issue of the availability of an alternative route does not arise for consideration upon the trial held before him.

The learned trial Judge's answer to issue fifteen is in the affirmative. If so, the plaintiff is not entitled to have and maintain the presently constituted action but inconsistently the learned trial Judge has granted the plaintiff the reliefs prayed for by the plaintiff in prayer one and three of her plaint. Likewise, the learned trial Judge has answered issue nineteen in the negative and in favour of the defendant. But inconsistently and erroneously he has entered judgment for the plaintiff as prayed for in terms of prayer one and three of the plaint.

Issue seven has been raised at the trial agitating the question whether the plaintiff is entitled to have and maintain the present action in its constituted state, as the plaintiff has failed to describe with certainty and precision the servient tenement over which the servitude of right of way is sought to be claimed by prescription. The point was pressed at the trial that there was a failure to comply with the provisions of Section 41 of the Civil Procedure Code in that though the plaintiff made a claim in this action for some interest (a right in *rem*) in a specific portion of land that she had failed to

describe in the plaint, so far as possible, the portion of the land by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan to be appended to her plaint. I have already adverted to the imperfect manner in which the servient tenement has been described in the schedule to the plaintiff's plaint.

Learned counsel for the plaintiff-respondent sought to overcome this culpable failure to describe the servient tenement by reference to physical metes and bounds or by reference to a sketch, map or plan, by relying on the judgment pronounced by Chief Justice Basnayake in *Adbulla* vs. *Junaid*[23]. The decision in *Abdulla* vs. *Junaid* is clearly distinguishable from the present action. In *Abdulla* vs. *Junaid* (supra) the only claim of the plaintiff was for a declaration of *a way of necessity*. In the present action there is a prayer for a declaration of a right of way by prescription and alternatively for a declaration of a way of necessity. Where the claim is one to a way of necessity only, the plaintiff does not assert that he has exercised the servitude over a defined path but claims from the Court through its order a reasonable and sufficient way of necessity to be decreed by the Court. Where the plaintiff as in this action claims that he has exercised by prescriptive user a right of way over a defined route, the obligation of the plaintiff to comply with the provisions of Section 41 of the Civil Procedure Code is paramount and imperative.

In *Abdulla* vs. *Junaid (supra)* the plaintiff filed with the plaint in that action a sketch where the claim to proceed along a defined path had been indicated. (vide the judgment of Chief Justice Basnayake at 84 and the judgment of Justice Pulle at 85). Besides in that particular action *before* the trial commenced, a commission was issued to a Surveyor and the plan and report of the Commissioner was filed of record without objection and *before* the trial commenced the Court had ample material to frame the issues, although the plaintiff in that action had not amended his plaint to describe in the schedule the metes and bounds of the servient tenement and

to refer to the plan certified by the Commissioner. Those were significant features which distinguished that action from the present action at a point of time long before issues were framed in that action.

In the course of this trial the photocopy sketch of FVP 779 was sought to be produced. Then objection was taken by the defendant and this document P1 was marked subject to proof. But that condition was not satisfied to the very end of the case. Strict compliance with the provisions of section 41 of the Civil Procedure Code is necessary for the Judge to enter a clear and definite judgment declaring the servitude of a right of way and such definiteness is crucially important when the question of execution of the judgment and decree entered arises for consideration. The fiscal would be impeded in the execution of the decree and judgment if the servient tenement is not described with precision and definiteness as spelt out in section 41 of the Civil Procedure Code. In the circumstances issue number seven should have been answered in the negative and not in the affirmative.

In the circumstances the learned trial Judge was correct in rejecting the claim in reconvention filed by the defendant as the defendant could not claim any damages as the servient tenement was not owned by him and he had no legal right to effect any erections on it. However, the learned trial Judge for the reasons enumerated by me in this judgment has misdirected himself grievously and has erroneously entered judgment for the plaintiff. In the result, we allow the appeal of the defendant-appellant with costs fixed at Rs. 5,000/- payable by the plaintiff-respondent and we set aside the judgment entered by the learned trial Judge in favour of the plaintiff-respondent and proceed to dismiss the plaintiff's action. The appeal is allowed with costs.

**KULATILAKA, J.** - I agree.

*Appeal allowed.*