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

W. V. Pemawathie Wickramasinghe
of No. 220, Warapalana,
Wathurugama.

PLAINTIFF

C.A 646/1998 (F)
D.C. Gampaha 28097/L

Vs.

1. P.K. Senapala
No. 210, Warapalana,
Uduthuththiripitiya,
Waturugama.

2. A. W. G. Senevirante
"Sandagiripaya",
Attanagalla,
Urapola.

3. Mangalasili Karunaratne
No. 141, Kandy Road,
Yakkala.

DEFENDANTS

AND NOW BETWEEN

1. P.K. Senapala
No. 210, Warapalana,
Uduthuththiripitiya,
Waturugama.

1ST DEFENDANT-APPELLANT

Vs.

W. V. Pemawathie Wickramasinghe
of No. 220, Warapalana,
Wathurugama.

PLAINTIFF-RESPONDENT

1. A. W. G. Senevirante
"Sandagiripaya",
Attanagalla,
Urapola.

2. Mangalasili Karunaratne
No. 141, Kandy Road,
Yakkala.

2ND & 3RD DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: W. Dayaratne P.C. with W.G.C. Dhanushka for
The Defendant-Appellant

L. Chaminda for the Plaintiff-Respondent

ARGUED ON: 28.03.2012

DECIDED ON: 06.08.2012

GOONERATNE J.

On or about August 1985 the Plaintiff-Respondent filed action in the District Court of Gampaha against three Defendants claiming a servitude right of way to a 8 feet cart road as in paragraph 10 of the plaint. Apart from that servitude right for a right of way as aforesaid, Plaintiff-Respondent also prayed for removal of obstruction caused by the 1st Defendant-Appellant and the prayer to the plaint is against both 1st 2nd Defendants, and for peaceful possession/damages (as in paragraph 13 of the plaint). The learned District Judge granted all the relief other than damages by judgment of 24.8.1998. The 1st Defendant-Appellant appealed against the judgment and learned President's Counsel argued inter alia, mainly on the question of the servient land not shown and identified properly in the plaint and also demonstrated to court that all persons were not made parties to the suit, with reference to several items of evidence, and the user of an other alternate route by Plaintiff. Learned President's Counsel also demonstrated to Court that Plaintiff was not able to establish a defined track, to claim a cart road.

The plaint consists of two schedules. The 1st schedule to the plaint describes the land as lot 2 at "Kosgahapillewa" in extent 1 Rood, 4/10

Perches. 2nd schedule described as lot 1 of "Kosgahapillewa" in extent of 1 Rood- 20.6 perches. According to the plaint 3rd Defendant was the dominant owner of land contained in the 2nd schedule to the plaint (paragraph 9) and in the plaint aver that no relief is claimed from the 3rd Defendant as the 3rd Defendant has not objected to the action. It seems to be the position of the Plaintiff-Respondent that a 8 feet wide cart road went over the land in the 2nd schedule and also over the land adjacent to it called "Liyagahakurunduwatta". The cart road reached a public road namely 4th Post Warapalana. Plaintiff's position as averred in the pleadings and in the oral submission to court was that Plaintiff and her predecessors have prescribed to the servitudal right to use the cart road. Plaintiff pleads 2nd defendant was the dominant owner of "Liyagahakurunduwatta" and 1st Defendant-Appellant was residing on it. However the 1st & 3rd Defendants have filed a joint answer dated 13.2.1989 denying Plaintiff's position. Parties proceeded to trial on 13 issues. 2nd & 3rd Defendant-Respondents were absent and unrepresented. Issue Nos. 9 – 12 raised before the learned District Judge seems to be the grounds of contest urged by the 1st Defendant-Appellant. These grounds would revolve round Section 41 of the Civil Procedure Code, failure to name parties, alternate route etc.

Learned President's Counsel argued in relation to Section 41 of the Civil Procedure Code, which require a description of metes and bounds of the land subject to litigation and as far as possible by reference to plans, maps, sketches etc. It was the learned President's Counsel's position that the trial Judge was in grave error, where in the judgment it is stated that plaint does not refer to plan P12 but the deed P2 refer to plan P12 and as such identity is not in question (folio 165 of brief). This court observes that in land cases there should be strict compliance with Section 41 of the Code.

The servient tenant consist of lot 1 "Kosgahapillewa" and the land called "Liyagahakurunduwatta". According to the plaint and Plaintiff, the 8 foot cart road runs from Plaintiff's land lot 2 of "Kosgahapillewa" and lot 1 of "Kosgahapillewa" which are described in the schedule to plaint but there is no reference in the schedule to the plaint to the other adjacent land namely "Liyagahakurunduwatta" on which part of the cart road runs and join the public road at 4th post, Warapalana. The partition plan in case No. 4951/P which was marked as P12 only refer to land called "Kosgahapillewa". P12 shows 3 lots. Lot 3 is the cart road. As in P12 the cart road does not go or stretch beyond lot 1. But in order to get to the public road there is another adjacent land, which is called "Liyagahakurunduwatta". P12 does not make any reference to the said

"Liyagahakurunduwatta". In fact the corpus in partition case 4951 consists of lots 1 – 3 only. Paragraphs 10 & 11 refer to "Liyagahakurunduwatta". A mere reference to that land would not suffice without reference to it's metes and bounds, or to a sketch or plan annexed to the plaint. The trial Judge relies on the identity on plan P12. I would agree with the learned President's Counsel on this point since it is mandatory in a land case of this nature to identify the land in question or dispute by reference to metes and bounds in the plaint. By a right to servitude would mean one party would have to either give up or give in to another to enable the other to walk or move on to another point, and thus give him free access, very often over the land of another. As such court should be extra cautious to grant that right, and in case of an alternate route however inconvenient it may be court would be reluctant to grant that right.

As regards cart way dominant and servient tenants must be adjacent. 40 NLR 85; 10 CLW 169.

In David Vs. Gnanawathie 2000(2) SLR 352 at pg. 366

Per Jayasuriya, J.

Strict compliance with the provisions of section 41of 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 spent out in section 41 of the Civil Procedure Code..."

Another important point is the question of dominant owner and servient owner. 3rd Defendant-Respondent and 2nd Defendant-Respondents are described as dominant owners as in paragraphs 9 & 11 of plaint. The 2nd Defendant-Respondent is the dominant owner of land called "Liyagahakurunduwatta" and 1st Defendant-Appellant had no title to the 2nd schedule to the property in plaint. The 8 feet cart road runs over the said two lands. Therefore 2nd & 3rd Defendant might have to be called servient owners. The 3rd Defendant being a servient owner would be the only person who could grant a servitude over his land.

In the said David Vs. Gnanawathie 2000(2) SLR 352 at pg. 360...

"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 owned 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."

The 1st Defendant-Appellant in his evidence before court reject any right of way or servitude to Plaintiff and her predecessors over that land and state never was there in existence any road above their land. In his

evidence names of 6 co-owners had been mentioned. However no document had been produced to prove that fact, but the witness had maintained that position in his evidence.

In Thamboo Vs. Annammah 36 NLR 330...

Where a land held in common was partitioned by deed among the co-owners, a strip of land being reserved for their common use as a lane giving access to the several lots; and where one of the co-owners sold a portion of his lot together with "the right accruing thereto in the lane reserved for common use as a thoroughfare".

Held, that the conveyance did not give title to any portion of the soil of the lane or to a right of way over it.

A co-owner cannot grant a servitude over the common property without the concurrence of the other co-owners.

This witness also explain the position very precisely in relation to the partition case. That would give a clear indication about the ground situation. That portion of the evidence is as follows:

උ: නඩු තින්දුවෙන් වෙන් වුනු ඉඩමට මෙහායින් තමා අපෙ ඉඩම තියෙන්නේ. ඒත් පාරක් තිබුනේ නැහැ.

ප්‍ර: එතන තිබෙන්නේ සෙනෙවිරත්නට අයිති ඉඩම?

උ: නැහැ. ඔක්කොම එකට තියෙන්නේ.

ප්‍ර: නඩු තින්දුවේ ප්ලැනයේ තියෙන්නේ සෙනෙවිරත්නගේ ඉඩම කියල නේද? කවුද ඒ සෙනෙවිරත්න?

උ: ඒ, මේ නඩුවේ පාර්ශවකරුවෙක්.

ප්‍ර: ඒ නඩු තින්දුවේ මෙම පාර කරත්ත පාරක් ලෙස පෙන්නලා තියෙනව?

උ: එතන අපේ ඉඩමෙන් පාරක් නැහැ කියල මේ ප්ලැනේ සටහන් කරල තියෙනව.

ප්‍ර: ඒ කාලයේ අඩි 8 ක පාරක් තිබුන මොහොට්ටිගේ ඉඩමට යන්න?

උ: ඒ පාර වෙන් වෙලා තිබුනේ පැමිණිලිකාරියගේ ඉඩමටත්, නිස්සංකගේ ඉඩමටත් පමණයි.

ප්‍ර: මම කියන්නේ 2 වැනි විත්තිකරුගේ ඉඩම උඩින් පැමිණිලිකාරියගේ ඉඩමට පාරක් තිබුන නේද?

උ: බෙදුම් නඩුව දාලා තියෙන්නේ පැමිණිලිකාරියගේ ඉඩමටයි, මංගලසිරිගේ ඉඩමටයි විතරයි. අපේ ඉඩමට නඩුවක් දාලා නැහැ. මංගලසිරිගේ ඉඩමට විතරයි පාර තියෙන්නේ. එතනින් එහාට පාරක් නැහැ.

The partition case would not decide on a road way and one of the boundaries of the corpus in the partition case is a land belonging to A.W.G. Seneviratne (2nd Defendant-Respondent). Road reservation does not go beyond the corpus. On examining the material and plan the above location and the terminal point of the road way could be clearly identified as to does not go beyond a point. The partition case as stressed by the Appellant does not go beyond it's corpus "Kosgahapillewa". No court could give a right of way in a partition case outside it's corpus. (No jurisdiction to grant such relief).

Then I would turn to the evidence of Surveyor Hubert Perera. This evidence should under normal circumstances establish Plaintiff's case, but it was not so. I would refer to the evidence as pointed out by learned President's Counsel.

In cross examination,

ප්‍ර: මෙහි රතු ඉරි වලින් පැමිණිලිකාරිය ඉල්ලන පාර පෙන්නුම් කර තියෙනවා.

උ: ඔව්

ප්‍ර: පොලවේ ඒ රතු ඉරි වලින් පෙන්නුව ආකාරයට පාරක් තිබ්බේ නැහැ. පැමිණිලිකාරිය කිව්ව ආකාරයට කුඤ්ඤඳ ගහලා පෙන්නුව කර දුන්න ආකාරයට පාර ලකුණු කලා.

උ: ඔව්

ප්‍ර: තමාගේ වාර්ථාවේ තියෙනවා සමහර තැන්වල පාරක් පේන්ඩ නැහැ කියා?

උ: ඔව්

ප්‍ර: මේක හිස් බිම. ගස් නැහැ. ඔනෑ කෙනෙකුට ඇවිදින්න හෝ වාහනයක් ගෙනියන්ඩ පුලුවන්. පැතලි බිම?

උ: ඔව්

ප්‍ර: එම නිසා තමාට ඔනෑ ආකාරයට පාරක් ඇඳල පෙන්වන්ඩ පුලුවන්?

උ: ඔව්

ප්‍ර: වත්තිකාරයෝ මුල සිට කියා සිටියා පාරක් කවදාවත් පාවිච්චි කලේ නැහැ කියා?

උ: ඔව්

ප්‍ර: ගම්බද පලාත්වල පාරවල් තියෙන්ඩ ඔන නැහැ. එම නිසි පාරක් නැති ඉඩමේ හරහා වාහන ගෙනිටන්ඩ පුලුවන්.

උ: ඔව්

I had the advantage of reading with much interest the case law on "defined track", in this type of case and as regards alternate route. The facts and evidence points in that way and based on the evidence of Surveyor Kottegoda there seem to be an alternate road or path shown by the said Surveyor in his plan V1. That path or road way may not be so convenient to get about, but it is not an impossibility for people to get about. In a village people very often use this type of path to get to a point. Evidence of Surveyor Kottegoda had not been challenged on material aspects.

In Marasinghe Vs. Samarasinghe 73 NLR 433 at 442. "In the case already discussed above David Vs. Gnanawathie at pgs. 363/364..

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 form 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.

Sumangala Vs. Appuhamy 46 NLR 137..

A servitude such as that of right to a footpath must be established by cogent evidence, as it affects the right of the owner of a land to the free and unfettered use of his land. The fact that the person who claims the servitude has other means of access to the road is a matter that must be considered in weighing the evidence of user.

Chandrasiri Vs. Wickramasinghe 70 NLR 15..

A right of way of necessity cannot be granted if there is another though less convenient path along which access can be had to the public road.

The evidence led at the trial should be considered in it's entirety. In a village as observed by learned President's Counsel, on land persons could walk or even take a vehicle when the need arises. That would

not mean that a defined track has been established. Going all over a land is not a right of way that could be established unless defined, in a particular way. Villages may not object to persons just walking over a land irrespective of ownership. But if parties seek to establish a right of way then it normally leads to litigation and court has to observe and apply time tested legal principles, some of which are discussed in this judgment. Trial Judge seems to have been influenced on certain items of evidence to arrive at a decision. In a case of this nature all relevant aspects of evidence on either side need to be considered very carefully. Mere user of land and walking all over the land would not prove a defined track. Nor can inconvenience be the deciding factor. Convenience of user to one, may result in inconvenience to another who has to directly or indirectly suffer or give up his soil rights, even to an extent. The law could not envisage such a situation but must at all time be considered on acceptable legal principles as discussed above. As such I am reluctantly compelled to reject the judgment of the trial Judge. I set aside the judgment of the District Court and dismiss Plaintiff's action. Appeal allowed. Each party will bear their own costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL