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

M. L. Maglian Abeyratne
Polkorutuwawatta,
Welipitimodera, Gintota.

PLAINTIFF

C.A 1250/1998 (F)
D.C. Galle 11752/L

Vs.

1. A. Sunil Amarasiri de Silva
Polkorutuwawatta,
Welipitimodera, Gintota.

2. M. P. M. Abeyratne
'Sripali', Station Road, Gintota.

DEFENDANTS

AND

M. L. Maglian Abeyratne
Polkorutuwawatta,
Welipitimodera, Gintota.

PLAINTIFF-APPELLANT

Vs.

1. A. Sunil Amarasiri de Silva
Polkorutuwawatta,
Welipitimodera, Gintota.

3. M. P. M. Abeyratne
'Sripali', Station Road, Gintota.

DEFENDANTS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Lasitha Chaminda with P. M. Thillekeratne
for Plaintiff-Appellant

N.R.M. Daluwatte P.C., for Defendant-Respondent

ARGUED ON; 18.05.2012

DECIDED ON; 28.09.2012

GOONERATNE J.

This was an action filed in the District Court of Galle by the Plaintiff-Appellant claiming a servitudal right of way over the land of the 1st Defendant-Respondent. Having filed plaint and after the survey, amended plaint was filed since at the survey the 2nd Defendant claimed that part of the right of way falls within the 2nd Defendant's land as depicted by the Commissioner on plan No. 521 of 6.5.1991 (P1). By the amended plaint the 2nd Defendant was made a party but no relief claimed, but only to give notice of the suit. In plan No. 521 (P1) the road way is depicted as lots 'B' & ' C'. It is claimed by the Plaintiff by prescriptive user and in the alternative it is

claimed as a way of necessity. The District Judge dismissed the Plaintiff's action and the appeal is from the dismissal of the action.

It is evident that the Commissioner has shown the road way as two lots (B & C) since it runs through 2 lands owned by the 1st & 2nd Defendants (Surveyor's evidence at folios 88 & 102). I will refer to the position of the Plaintiff-Appellant. The following points to be noted.

(a) on or about May 1990 blocked access to the main road from the dominant tenant (Polkoratuwewatte) by erecting a fence. As such Appellant complained to the police

(b) Interim injunction issued by Galle District Judge to remove the fence.

(c) Servient tenement surveyed. Respondent admitted the contents and report of Surveyor. In the report lot 'B' & 'C" identified as road way available to Plaintiff to have access to the main road.

(d) In surveyor's evidence he testified that the boundary of the dominant tenant was an 'Ela' and the western and the eastern boundaries were also a stream. It is an isle as stated by Plaintiff and the only access is from the northern boundary. Grama Sevaka corroborates this evidence of Surveyor.

(e) Lots 'B' & 'C' in plan P1 is the only available access to the main road.

(f) Appellant also claim a way of necessity.

(g) In an action claiming either a cart-way or foot-path of necessity, it is sufficient for the claimant to indicate the way claimed and claimed is not obliged to describe the way of necessity by physical metes or bounds or by reference to a map or plan.

Relies in the case of Abdulla and another Vs. Junaid and others 44 CLW 84.

(h) Trial Judge has erred by dismissing Plaintiff's action holding that Plaintiff failed to describe the servient tenement in the amended plaint.

I will deal with the above position in my judgment as it appears to this court that several other decisions had been delivered by the Appellate Court in recent times.

(i) Answers to issue Nos. 6 & 7 contrary or inconsistent.

(j) Trial Judge erred/misdirected in law holding in the judgment that Plaintiff's action should fail as he failed to add all co-owners of the servient tenant in the amended plaint. By the amended plaint 2nd Defendant was added.

(k) Appellant pleads that prescriptive rights are proved and established over lot 'C' & 'D' in plan P1. Argument advanced by deed produced P2 to P4, P5 and P6 and the oldest deed among them is dated 3.6.1936. These deeds ..... to title dominant tenement. The dominant Tenement is surrounded three boundaries consisting of water streams and the only available access to the main road is from the western boundary. The above deeds however makes no reference to the right of way. Appellant plead that the right of way has been enjoyed by predecessors in title for over a period of 10 years.

The first important matter is the question of servient tenement not being described by the Plaintiff in the amended plaint. I had the benefit of perusing the written submissions of the Defendant-Respondent. Having perused the amended plaint, paragraph 7 of the amended plaint describes the land through which the road way runs. Plan P1 only shows the road way and not the entirety of the servient land. Further as pointed out by the Respondent which is apparent on perusal of P1, the Surveyor has depicted two lots to describe the road way as lots 'B' & 'C'. These lots 'B' & 'C' runs through two lands. On Surveyor's evidence it is said that lot 'B' runs through the land Paragahawatte. Lot B runs across the 2nd Defendant's land

(Surveyor's evidence Pgs. 90 & 102). The boundary of lot 'B' & 'C' shown by two lines and a dot in plan P1. It is not correctly and clearly shown. As such trial court would not be able to evaluate the claim for a servitude unless proper complete details are given in the plaint and plan. The plan does not give the extent and details of the servient lands, along with it's boundaries, in a manner for a court of law to arrive at a conclusion on servitude. Plaintiff was adamant and in evidence took the position that servient tenement solely belongs to the 1st Defendant. The amended plain refer to the 2nd Defendant and is made a party only for the purpose of notice. As such I have no reason to fault the trial Judge's findings that the servient tenement is not property identified. This is a very fundamental error. Deed 2V1 & 2V2 shows 2nd Defendant's rights to a portion of the land claimed as the servient land by Plaintiff.

I have also examined the case law cited by Plaintiff-Appellant.

In Abdulla and another Vs. Junaid and another 44 CLW 84. The learned counsel for Appellant argued that it was not obliged to describe the way of necessity by physical metes or bounds or by reference to a sketch plan or map (relying on the dicta of the case). In the above case the District Judge had rejected the plaint on the ground that the plaint did not describe the land in the way depicted in the plan. Basnayake J. in the judgment states

the learned District Judge appears to have misread Section 41. It reads as in the Civil Procedure Code "the right of way of necessity or interest in a specific portion of land .... etc.

Then compared the above Section with the revised edition and Section 41 reads as:

> "When the claim made in the action is for some specific portion of land, or for some share or interest in a "specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds, or by reference to a sufficient sketch, map or plan to be appended to the plaint, and not by name only."

It is clear that the words 'the right of way of necessity are omitted in the revised edition and in the present Civil Procedure Code. Basnayake J. emphasis at pg. 84 of the judgment that the section does not require that when a right of way of necessity is claimed over a servient tenement the path or way claimed should be described by physical metes and bounds or by reference to a map or sketch. I do not think the above case cited would have a bearing on the case in hand since in Abdulla's case Plaintiff claimed a way of necessity - cart-way or foot-path in lieu of the right of way which they allege they have acquired and lost in consequence of it not being conserved in the decree for the partition of the servient tenement.

The case in hand is different and one cannot haphazardly apply the case cited above. It has no direct application to the case in hand. Having made my observations as above, I am bound and inclined to follow and adopt the dicta in the following recently decided cases.

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 the appeal it was held that, 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 section 41, of the Civil Procedure Code is paramount and imperative. Strict compliance with section 41 of the 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.

David Vs. Gnanawathie (2000(2) S.L.R. 352)

A party who claims prescriptive title to a particular allotment of land is obliged to clearly describe it either by boundaries or extent of the land that he claims to have prescribed. Section 41 of the Civil Procedure Code requires to define such land with reference to physical metes and bounds or by ma or sketch.

Dayawathie Vs. Baby Nona Panditharatne

(C.A No. 728/93 (F), D.C. Kalutara

Case No. 3597/L, C.A. Minute dated 10.5.2001)

Plaint was filed seeking a declaration of title to an undivided share of a land. It was pleaded that the defendant-appellant had encroached upon a portion. The encroached portion was not described with reference to physical metes and bounds or by reference to any map or sketch. The matter was fixed for ex-parte trial; after ex-parte trial

application was made to issue a commission to survey the land and identify same. The ex-parte trial did not end up in a judgment. After the return of the commissioner, the plaint was amended, a fresh ex-parte trial was thereafter held. After the decree was served, the defendant-appellant sought to purge default, which was refused.

Held that,

(1) the Court was obliged initially to have rejected the original plaint since it did not describe the portion encroached upon section 46 (2) (a) read together with section 41 of the Civil Procedure Code.

Gunasekera Vs. Punchimenike (2002(2) S.L.R 43)

It is the view of this court that strict compliance with Section 41 is necessary.

To get on to the other matter - failure to add all owners of the servient tenement as parties to the action. No doubt the 2nd Defendant is added to the suit on the amended plaint. The only reference to the 2nd Defendant is only in paragraph 17 of the amended plaint. No relief is sought against the 2nd Defendant? However issue Nos. 21 & 22 bring the 2nd Defendant into the lime light. Plaintiff has not rejected or objected to deeds 2V1 & 2VD. Lot 'B' of the right of way is owned by the 2nd Defendant. The trial Judge has clearly analysed the position on this point and advert to the fact that Plaintiff cannot maintain the action as pleaded and the evidence of Plaintiff that right of way is claimed only against the 1st Defendant. Lot 'B' seems to have been omitted by Plaintiff. The Trial Judge's views on this appeal really clarify the position. An extract is reproduced in this judgment.

2 විත්තිකාරිය නඩුවට පාර්ශවයක් කිරීමෙන් අනතුරුව පැමිණිලිකාරිය සිය සංශෝධිත පැමිණිල්ල මගින් ද 2 විත්තිකාරියට විරුද්ධව කිසිදු සහනයක් ඉල්ලා නැත. ඒ අනුව පැමිණිලිකාරිය දෙවන විත්තිකාරියගේ ඉඩම මගින් මාර්ග ප්‍රවේශයන් ඉල්ලා නොසිටින බව පෙනේ. එසේ මාර්ග ප්‍රවේශයට යටත් වන සියලු ඉඩම් වල අයිත්කරුවන් නඩුවට පාර්ශවයන් නොකර එසේ ඔවුන් ගේ ඉඩම් මගින් මාර්ග ප්‍රවේශයන් නොඉල්ලා එම මාර්ගයේ කොටසක පමණක් අයිතිකරුවෙක් ප්‍රවේශයක් කර එසේ කොටසක් පමණක් හසු වන ඉඩමෙන් පමණක් එකී මාර්ග අයිතිය ඉල්ලා මෙවන් නඩුවක් පවත්වා ගෙන යා නොහැක. මාර්ග අයිතිය කොටස් වශයෙන් ඉල්ලා නඩු පවරා සහන ලබා ගත නොහැක. එමෙන්ම මාර්ග අයිතිය යනු කොටස් කළ හැකි අයිතියක් නොවේ. ඊට ආදාල සියලුම පරවශ ඉඩම් විස්තර කර ඒවායේ හිමිකරුවන් නඩුවට පාර්ශවයන් කිරීම එම පරවශ ඉඩම් වල ස්වභාවය අධිකරනයට පැහැදිලි කිරීම පැමිණිලිකාරිය විසින් කළ යුතු අනිවාර්ය කරුණකි. මෙම නඩුවේ පැමිණිලිකාරිය මාර්ග ප්‍රවේශයට අදාල බී දරණ කොටසට අයත් ඉඩම් කොටසක අතහැර ඇති බව පෙනේ.

Plaintiff has also claimed the right of way by prescriptive rights. The Plaintiff purchased the land from the so called dominant servient owner on 4.5.1980. Prior to that she had no right to the road-way. Plaintiff had not been able to prove prescriptive user of the road way in dispute by strong evidence of Plaintiff's predecessors in title. In fact no evidence had been placed in the original court of prescriptive user or right. Therefore I do

not wish to disturb the Trial Judge's findings/ruling on the question of prescription. There is an absence of evidence of user of the road way for a long period of time.

Claiming alternatively by Plaintiff the right of way of necessity. Unfortunately Plaintiff has not been able to demonstrate and show the entire land of the 1st Defendant to enable court to consider such a plea. There is no material to the effect to determine a way which will cause the least harm or inconvenience to the servient owners. Therefore court cannot grant such a right. However attention of this court was drawn to the evidence at Pg. 110 of the Surveyor's evidence. A portion of a road way depicted in plan P1. Not very conspicuous in plan P1. It is to the north of lot 'C' at the turning point or bend in the road to houses from Thuparama Mawatha. I have noted in this regard the evidence of Surveyor at Pgs. 111 and 112 of the original record. Unfortunately facts need to be proved in a very convincing way. It has not been properly demonstrated with much emphasis. Therefore this court cannot come to any conclusion and the learned District Judge's views need to prevail.

In all the above circumstances it appears that Plaintiff has not proved her case. No relief is claimed from the 2nd Defendant. As such Plaintiff has abandoned her servitude rights in respect of lot 'B'. Therefore

the right of way does not extend up to the main road and does not proceed beyond a certain point. There are no cogent reasons adduced to fault the judgment of the learned District Judge. The Plaintiff's action is misconceived and there is no merit in this appeal. Certain basic rules in law relating to servitudes and right of way seems to have been left out or ignored. A right of way of necessity can be granted only to the extent of the actual necessity of the case demands. 6 times 44. The owner of a land who by his own act deprives himself of access to a road is not entitled to claim a way of necessity 33 NLR 44. In the instant case proper legal norms are not adopted. It is no doubt a question of fact, which need to be expressed with certainty and handled on a proper basis. It is very unfortunate that relief cannot be granted to the Plaintiff. Therefore I affirm the judgment of the learned District Judge.

Appeal dismissed without costs.

Dismissed.

JUDGE OF THE COURT OF APPEAL