IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

C.A. 1247/96 F
D.C. Kandy 16466/L

P.U.Kumarapperuma,
107, Ampitiya Road,
Kandy
Plaintiff-Appellant

Vs.

1. K A Mary Grace,
   113/6, Ampitiya Road,
   Kandy
2. Municipal Commissioner,
   Kandy

Defendant-Respondents

BEFORE : A W A SALAM, J

COUNSEL : A A De Silva PC with Bernard De Soyza for the plaintiff-appellant and Mōnori Herath for the 2nd defendant-respondent. Substituted 1st defendant-respondent absent and unrepresented.

WRITTEN SUBMISSIONS FILED ON : 26. 04.2012

ARGUED ON : 22.11.2011

DECIDED ON : 30.07.2012.

A W Abdus Saām, J

The plaintiff-appellant (plaintiff) filed action against the 1st and 2nd defendant-respondents (1st defendant/2nd defendant) *inter alia* for the following reliefs.

1. A declaration of title to the land described in the schedule to the plaint.

2. A declaration that the 1st defendant is not entitled to a road over the said land.

3. A declaration that the defendants have no right to have water pipes laid out or have electrical wires across the said land.

4. A direction issued on the defendants, to remove the pipes and electrical wires placed across the said land.

5. For recovery of damages and

6. For a permanent injunction restraining the 1st defendant from using the road across the land belonging to the plaintiff.

The defendants filed answer denying the various averments in the plaint and sought a dismissal of the plaintiffs' action. The 1st defendant in addition prayed for a counter declaration that

she is entitled to the use of the footpath by virtue of having acquired prescriptive rights.

At the trial the plaintiff gave evidence and called certain officers from the Electricity Board and Water Board. The plaintiff's case was closed, reading in evidence 16 documents. The 1st defendant did not call any witnesses but gave evidence and closed her case without marking any documents. The learned district judge delivered his judgement on 11 October 1996 dismissing the plaintiffs' action. He granted a declaration to the 1st defendant that she is entitled to use the footpath depicted as EFGH and I, in plan marked X. This appeal has been preferred by the plaintiff, challenging the propriety of the said judgement *inter alia* on the following grounds....

(i) The judgement is contrary to law and the evidence adduced at the trial.

(ii) only an owner of a land can claim a right of way over the land of another.

(iii) The 1st defendant is not entitled to a right of way in as much as she has failed to establish her title to her land.

(iv) The learned district judge had erred in law when he granted relief to the 1st defendant without considering the fact that the land over which the footpath is claimed, abuts a public road and

(v) The failure to consider the admission that the plan

marked P 11 was made by the 1st defendant's predecessor in title and that the said plan made in 1978, does not show the right of way claimed by the respondent.

Admittedly, the plaintiff is the owner of the land in respect of which he sought a negative declaration to the effect that the subject matter is unencumbered with a footpath in the nature of a servitude. The land in question is depicted in three separate plans made at various times, bearing numbers (1) 64 dated 27.6.1967 made by R.A.W.A.N Jayathunga L.S, produced at the trial marked P10 (2) 1154 dated 15.01.1978 made by P M Wijewardena, L.S produced marked as P11 and (3) 4527 dated 14.03.1992 made by P W Wijewardena marked at the trial as X.

The oldest plan produced was one bearing No 64 (P10), an amicable plan of partition made in the year 1967. In this plan the footpath in question has not been shown at the identical location as in plan X. The 1st defendant has admitted this position in her evidence. Further, she has admitted that in P 11 (No 1154 made in 1978) too the right of way in question has not been depicted. Significantly P11 had been prepared at the instance of one Ranaweera, a predecessor in title of the 1st defendant. Plan No 4527 (X) has been prepared for the purpose of the present case on a commission issued by the lower court. There are two footpaths shown in this plan. The

plaintiff's position is that the 1st defendant started using the footpath shown as EFGH in the recent past. The plaintiff contended that the footpath EFGH and I was used by the 1st defendant without proper authority after abandoning her right of way shown in plan X as ABC and D.

A brief reference to all three plans needs to be made at this stage. The northern boundary of the plaintiff's land in P10, P 11 and X is the ELA or the "watercourse". In P10 the house belonging to the 1st defendant is shown to be immediately next to the watercourse. Accordingly, the southern boundary of the watercourse is the servient tenement and its northern boundary is the land and premises belonging to the 1st defendant or the dominant tenement.

According to the plaintiff, the 1st defendant is not entitled to use the footpath shown in P10. She is not entitled to use the footpath depicted as EFGH and I depicted in plan X either. The plaintiff maintained that the 1st defendant is entitled to use the footpath depicted as A,B,C and D in plan X which she used for some time, then abandoned it and commenced using footpath EFGH and I in plan X. The core issue therefore is whether the 1st defendant is entitled to the right of way EFG and H shown in plan X or she should content with the footpath ABC and D.

The learned district judge has taken into consideration the

existence of a footbridge over the watercourse connecting the right of way EFG and H to the house of the 1st defendant. If the road shown by the plaintiff is not used by the 1st defendant, the question may arise as to what purpose the footbridge had been constructed over the watercourse connecting the footpath across the plaintiff's land to the land and premises of the 1st defendant. The fact that no footbridge was found connecting the footpath ABC and D in plan X to the 1st defendant's land was considered by the learned district judge as evidence sufficient enough to come to the conclusion that the 1st defendant had never used the footpath ABC and D in plan X. Taking into consideration the evidence led at the trial on this question the finding of the district judge against the plaintiff cannot totally be justified, unless the evidence for and against the plaintiff is carefully scrutinized.

The learned president's Counsel has submitted that the 1st defendant having abandoned the right of way marked as ABC and D is now using the access EFG and H shown in plan X resulting in the value of the plaintiff's land being diminished, since the access road EFG and H cut across the plaintiff's land into two at the point GH in plan marked X. On a perusal of the judgement, it is quite clear that the trial judge has arrived at the conclusion that the 1st defendant has never used the right of way ABC and D marked in plan X. In that exercise he has taken into consideration the distance along the right of way to the defendants house and absence of a footbridge along

ABC and D. However, the trial judge has failed to consider the legal obligation on the part of the 1st defendant to prove her title to the dominant tenement. Further, the mere absence of a footbridge alone cannot strictly give rise to an irresistible conclusion that the 1st defendant had acquired a prescriptive right of user to the right of way in question. The finding of the trial judge therefore appears to have been influenced by extraneous consideration.

It is to be observed that in so far as the plaintiffs action is concerned, the burden is on him to establish that the 1st defendant had been using the right of way marked as ABC and D in plan X and that she abandoned the same and then started using the right of way EFGH and I in plan X. Applying the same rule, it is for the 1st defendant to establish her right to the servitude in question, if she desired to obtain a judgement in her favour. The trial judge does not appear to have properly addressed his mind to burden of proof and the evidential burden attached to the case of both parties. The question of the abandonment of servitude as alleged by the plaintiff has not been adequately discussed in the impugned judgment. Further, in the light of the evidence led by both parties, it is nothing but appropriate that the learned district judge ought to have adverted to the principle that in the event of a doubt as to the existence of a servitude, it should have been ruled in favour of the plaintiff who had sought a negative declaration. It is trite law that in case of doubt as to the existence of a

servitude whether personal or praedial the presumption is against a servitude and as stated earlier the obligation is upon the person affirming the existence or non-existence of the servitude to prove all what he/she alleges to exist.

Be that as it may, as regards the existence of a servitude the Roman Dutch law in no ambiguous language demands that clear and cogent evidence should be placed before court prior to the servient tenement is burdened with a servitude. In the circumstances, I am of the view that the finding of fact by the learned district judge on this matter call for the timely intervention of this court.

On the question as to whether the 1st defendant is entitled to use the right of way marked in plan X as EFGH and I, the trial judge answered the issue in the affirmative. As far as the relief prayed for by the 1st defendant is concerned, it is her burden to establish that she had (had) acquired a prescriptive right to use the right of way marked as EFGH and I. The learned President's counsel for the plaintiff has submitted that the roadway in question namely EFGH and I, has not been shown in plan 1154 dated 15 January 1978, made by PW Wijeyawardena licensed surveyor. In the said plan both rights of ways have not been shown. Further, the (the) learned president's counsel has pointed out that the roadway marked as EFGH and I in plan X and P 10 and the roadway marked as "footpath 3 feet wide" are not identical to each other.

Apparently, the learned district judge has not paid attention to these infirmities in his judgement before he came to the conclusion that 1st defendant has acquired a valid prescriptive right to use the roadway. The impugned judgement in favour of the 1st defendant is based on the erroneous footing that the surveyor who prepared plan X has testified that the right of way EFGH and I was the only access available to the 1st defendant. As pointed out by the learned President's counsel the surveyor has not stated in his evidence that it was the only access to the 1st defendant's house. This incorrect assumption has influenced the learned district judge to a great extent to come to his erroneous finding.

Taking all these matters into consideration, that I am of the view that the impugned judgment has ended up in a miscarriage of justice as a result of the misapplication of the legal principles to the facts of this case. As such, the judgment appealed against is set aside and the case sent back for re-trial.

There shall be no costs.

Judge of the Court of Appeal