

In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka

CA 968/96 F
DC Batticaloa 3243/Misc.

M I Avvaumma,
Division No 3,
Kattankudy

Plaintiff-Appellant

Vs

M I Ahamed Lebbe,
Division No 6,
Kattankudy

Defendant-Respondent

Before: A W A Salam J

COUNSEL: Nizam Kariapper

for the Plaintiff-Appellant.

Defendant-Respondent absent and unrepresented.

Argued on: 24.01.2011

Written Submissions filed on: 21.02.2011.

Decided on: 02.06.2011.

A W A Salam,J

The facts that led to this appeal briefly are that the plaintiff by her plaint dated 7th March 1989 claimed the right to draw water from a common well based on acquisition of such right by virtue of deed No 18468 dated 7th September 1967 produced at the trial marked P1. Both the plaintiff and the defendant are owners of two adjoining premises bearing assessment No's 116 and 120 respectively. The plaintiff alleged that the defendant broke the door on the wall of the plaintiff's property leading to the common well and blocked it by constructing a kitchen on the path thereby depriving her of the right to use the well. Admittedly, both of them are siblings and they became the owners of said premises by right of gift made by their father.

The pivotal question that arose for consideration at the trial was whether the plaintiff had abandoned the right to draw water from the common well. At the trial the plaintiff gave evidence and stated that she had given the premises in question on rent from the time it was gifted to her by the father and that she never exercised the right to draw

water from the common well. The learned district judge held *inter alia* that the burden being on the plaintiff to establish her right to the alleged servitude, failed to discharge the same and hence not entitled to any relief. This decision of the lower court is based on the admitted fact that the plaintiff had in fact abandoned the right to draw water from the common well. The plaintiff has never possessed the property in question by herself. From the time it was gifted to her, it had been possessed for and on her behalf by her tenants. As conceded by the plaintiff none of the tenants had ever exercised the right to draw water over or across or through the path from the common well.

As has been clearly observed by the learned district judge, the servitude of *aquae haustus* involves the right to draw water from a well situated on the property of another. By contrast, the servitude of *aquae ductus* entails the right of leading or conveying water across or through the servient tenement to the dominant tenement and both these rights have received recognition in the law of Sri Lanka.

To reiterate the remarkably weak version of the plaintiff, she had never possessed the property in question by herself except through her tenants who too had elected not to avail of the servitude right granted under P1. In the case of Fernando Vs Mendis 14 NLR 101, it was held that the abandonment of a right of servitude to draw water from a well standing on another's land destroys it, not only when such abandonment is express, but also when it is tacit.

The principle enunciated in the judgment relied upon by the district judge reported in 40 NLR 495 (Don Simon Peter *et al. v. James Fernando*) is also worthy of being repeated. The question that arose for decision in that case was whether the right of way as accessory to wit, *aquae haustus* should be regarded as being abandoned, when the principal servitude itself is abandoned. Based on what was stated by Voet to the effect that “Servitudes are indivisible in their nature and where there are two servitudes-the one principal and the other accessory, which are due at the same time-and the principal is abandoned, the accessory also is regarded as abandoned” (Voet in part VIII. 6, 5) the court dismissed the plaintiff's action based on the footing

that the principal servitude had gone into disuse. In other word the established principle of law is that where there are two servitudes consisting of a principal and an accessory, the accessory must also be regarded as having been abandoned if the principal is abandoned.

The learned counsel of the appellant contended that the admission made by the defendant under cross-examination that there is a common well used to draw water by all, as per P1 the plaintiff is entitled to draw water from the common well. However, the counsel has failed to appreciate the principle regarding the burden of proof in a case of this nature when making his submissions. In this type of action the initial burden of proof lies always with the plaintiff. As has been rightly pointed out in the impugned judgment, the plaintiff has failed to discharge this burden. It is elementary rule that the plaintiff cannot legally assert the right she had asked for relying on an admission of the defendant made under cross examination as to the existence of a common well. Noticeably, there is no specific admission by the defendant that the plaintiff had been using the servitudes in question.

In the circumstances, the finding of the learned district judge as to the failure of the plaintiff to establish her claim for servitude does not appear to me as faulty or inconsistent with the evidence led at the trial. As such, I am compelled to dismiss this appeal. Appeal dismissed with costs.

Judge of the Court of Appeal

Kwk/-