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

Vellage Sumanasiri De Silva
Maitreepala Senanayake Mawatha,
Anangoda, Galle.

DEFENDANT-APPELLANT

C.A 1264/1998 (F)
D.C. Galle 11946/L

Vs.

M. Gamage Indranee Paranagama
No. 30A,
Maitreepala Senanayake Mawatha,
Anangoda, Galle.

SUBSTITUTED-PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Chathura Galhena with Manoja Gunawardena
for the Defendant-Appellant
A. A. de Silva P.C., for the Plaintiff-Respondent

ARGUED ON: 26.9.2012

DECIDED ON: 06.02.2013

GOONERANTE J.

This was an action filed in the District Court of Galle for a declaration of title to lot 3 (paragraph 2 of plaint) in plan marked P1 (No. 533 of 11.6.1982) and eviction of the Defendant-Appellant from the said lot. Plaintiff gets title from deed marked P2, No. 3462 of 28.11.1985. Perusal of plan P1 gives an indication of the dispute and lot 3 is the access road to lot 1 which Plaintiff became entitled to by deed P2. Deed P2, is a partition deed by which Plaintiff and her sister was given land by her mother who was the previous owner of the entire land comprising of lots 1 – 3 in plan P1. Lot 2 in plan P1 was given to Emalin Seetha (predecessor in title of Defendant). According to the matters submitted by Plaintiff-Respondent Lot 3 in plan P1 belongs to Plaintiff by virtue of deed P2. Emalin Seetha has no rights to lot 3. Defendant-Appellant's position seems to be that lot 3 above is an access common to both Plaintiff and Defendant (the owner of lot 2).

The main question that need to be resolved in the court below and in this court is whether the Defendant-Appellant has no right to use the right of way over lot 3. Plaintiff Respondent's position is that it was by deed P2, exclusively given to Plaintiff. At the trial as many as 23 issues were raised with one admission, being recorded. Issue No. 2 indicates that the

Defendant had attempted to obstruct, in the way the issue is recorded (refer to paragraph8 of plaint) the access to lot 3. The above named Emalin Seetha (Plaintiff's sister) carried out several transactions regarding the above lot 2 (issue Nos. 7 – 10). Defendant relies on plan V1 No. 615 which depicts lots 2A, 2B, 2C & 3.

Issue Nos. 18 – 20 raised by the Defendant-Appellant relates to one important aspect of the case regarding access roads and whether there is an alternative to the access road and the way of necessity.

I will deal with several grounds of appeal urged by the Defendant-Appellant. It was the position of the Appellant, in the appeal, that the trial judge who heard the case did not pronounce judgment and was not involved in writing the judgment. Due to some reason not disclosed the trial judge who heard the case could not write and pronounce the judgment. The succeeding trial judge had written and pronounced the judgment, who never had the opportunity to hear evidence and test the demeanor of the witnesses. No doubt under those circumstances and if an application was made to the trial court for trial de nova, such an application should be allowed. In the case in hand it is different. Nowhere in the record it is suggested that the parties to the case made an application for trial de nova.

This ground is urged for the first time in appeal. In Dharmaratne Vs. Dassenaike 2006 (3) SLR 130. The head note of the said decided case reads thus:

"The judgment was fixed for 02.09.2003. Before the judgment could be delivered the trial judge was elevated as a judge of the High Court and proceeded abroad on leave. On 12.03.2004 the successor in office as District Judge transferred the case to the Additional District Judge for the purpose of delivering the order. When the case was called the 1st and 2nd defendants made an application to Court that the case be heard de novo. The plaintiff objected. The Additional District Judge refused the application for a trial de novo and fixed the case for judgment.

Held:

(1) In view of the provisions of section 48 of the Judicature Act – as amended a party to an action has no right to demand a trial de novo but where an application is made for a trial de novo there is a discretion vested in the judge to decide whether a trial de novo should be ordered or not.

(2) The 1st defendant – respondent has set up a claim on the basis of prescriptive title and the 2nd defendant – petitioner claimed on a title deed coming from the 1st defendant. The claim of prescription depends to very great extent upon oral testimony which in turn makes the impression created by the witness an important factor in determining the question of fact.

The case in hand is different. After so many years, an application being made for trial de novo is not in order. If an application for trial de novo was made in the trial court that application should be allowed in the best interest of justice. Parties never made an application for a fresh

trial, and instead maintained complete silence in that regard. Even the Petition of Appeal does not refer to such a ground of appeal except in paragraph 11 of the Petition of Appeal, which merely state that the trial judge who heard the evidence was not in service when the judgment was to be delivered. There is no indication that an application for trial de novo was made in the District Court, if so was refused. The case of Dharmaratne Vs. Dassenaike is very much a persuasive judgment, and gives the rationale to allow an application for trial de novo. However it is strictly not on point with the case in hand. If any prejudice is caused the party concerned he could have moved the District Court prior to judgment being pronounced.

On plan V1 the trial judge seems to have erred, when he answered points of contest No 11 & 12. When V1 was produced, party concerned objected to V1. However at the close of the Defendant's case there was no objection recorded for reading of the documents in evidence. I do agree with learned counsel for Appellant that trial judge was in error, based on the dicta in Sri Lanka Ports Authority and others Vs. Jugolinija Boal East case.

However proof of plan V1 would not conclude the case of Defendant-Appellant in his favour. The trial judge in fact has considered V1 and in the body of the judgment express his views as follows:

"වි.01" දරණ පිඹුර ද, විත්තිකරුගේ පුර්වාගාමියා විසින් පෞද්ගලිකව කරවන ලද මැණුමකි. එම පිඹුරෙහි ලොට්: 03 දරණ කොටස ද ඇතුලත් කර එහි ප්‍රමාණයක් දක්වා විස්තර කර ඇති බව පෙනේ. එහෙත් විත්තිකරුගේ පුර්වාගාමියාට එසේ කිරීමට කිසිදු බලයක් හෝ අයිතියක් නොමැත. ඇය විසින් බෙදා වෙන් කරන ලද ඉබම් කොටස් වලට ඇයගේ එකි ලොට්: 02 දරණ ඉඩමේ බිමෙන් ම කොටසක් ප්‍රයෝජනයට ගෙන මාර්ග ප්‍රවේශයක් යොදා ගත යුතුව තිබුණි. වෙනත් අයට අයිති පෞද්ගලික මාර්ග ප්‍රවේශ ඇයට අවශ්‍ය ලෙස පාවිච්චිය සඳහා ඇතුලත් කර පෙන්වීමට හෝ කිසිවෙකුට පැවරීමට හෝ ඇයට අයිතියක් නැත. ඊට හේතුව ඇයට එකි අංක 03 දරණ මාර්ගය පිළිබඳව කිසිදු ආකාරයේ අයිතියක් නො තිබීමයි. එ බැවින්, විත්තිකරුට එකි ඔප්පුව මගින් කිසිදු ආකාරයේ අයිතියක් එකි අංක 03 දරණ බිම් තිරුව පිළිබඳව හිමි නොවේ.

Based on deed V1 alone no court can arrive at any conclusion. As done by the learned District Judge he has considered all facts and circumstances supported by oral and documentary evidence and entered judgment in favour of Plaintiff-Respondent with good reasoning.

The Defendant party or their predecessors in title had several transactions and ultimately subdivided by plan 615 of 10.12.1987. Lot 2 was subdivided as lots 2A, 2B & 2C. Thereafter Lot 2B & 2C by deed 4630 of 2.12.1987 transferred to the Defendant. Plaintiff's evidence supported the position that lot 2 was given to Plaintiff's sister Emalin Seetha, who

together with her daughter sold 2B & 2C to the Defendant. Lot 2 has a road frontage to the main road. I have noted Defendant's failure to answer the questions:

ප්‍ර: තමා පිලිගන්නවා අංක 3 කැබැල්ල එමලි සිතාට අයිති කැබැල්ලක් නොවේ.
ඒක මුළුමනින් පැමිණිලිකාරියට පැ 2 ඔප්පුවෙන් අයිතිවුන දේපලක්?

ළ : උත්තරයක් නැත.

Defendant also does not deny that Plaintiff made several complaints to the police.

I have no hesitation in endorsing the following submissions of Plaintiff.

The learned trial judge in his judgment discussed at great length the question of way of necessity and states at pages 146 -147 of the judgment that the Defendant had not taken any steps to produce a plan by obtaining a commission on a Surveyor to prepare a plan to be produced in court for the purposes giving all the details relevant to the consideration of way of necessity so as to enable the court to consider whether on the facts there are justifiable reasons to give a way of necessity over lot 3 which belongs only to the Plaintiff and no one else and which access road lot 3 had been improved after great expenditure to enable a motor vehicle to be brought to the Plaintiff's house.

It is admitted by the Defendant in his evidence that before he purchased lot 2B and 2C he fully examined all the documents and checked up the title and also searched at the Land Registry.

(vide pages 111, 112, but in the cross examination the Defendant at page 124 states as follows;

ප්‍ර: තමා මේ දේපල මිළදි ගන්නාවිට දැනගෙන සිටි කරුණක් තමා අංක 3 කැබැල්ල පැමිණිලිකරුට අයිති බම් කට්ටිය?

තමා දැන ගෙන සිටියා නම් ගන්නේ නැද්ද?

ළ : ගන්නේ නැහැ.

Defendant cannot ignore the fact that lot 3 is exclusively owned by Plaintiff. Having done a proper search on suitability of land, should have not purchased the land in dispute. Plaintiff is not to be blamed for any lapse or fault of Defendant, i.e having been aware of title to lot 3 and purchased same. I have also considered the following authorities.

In Namasivayam Vs. Kanapathipillai 32 NLR 44..

An owner of land, who by his own act deprives himself of access to a road is not entitled to claim a way of necessity to the road over the land of another.

An Introduction to Roman Dutch Law R.W – Lee 5th Ed. 176

In case of doubt the presumption is against a servitude; the onus is upon the person affirming the existence of one to prove it.

Servitudes Hall & Kellaway

Pg.69...

A dominant owner can always claim a means of access to and egress from his property when necessity demands it, i.e he may bring proceedings for constituting a servitude of way (de servitude constituenda), but he can only claim rights to a specific way of necessity after it has been duly constituted as such by any of the recognized methods (Wilhelm v. Norton, 1935 E.D.L., p. 152; Rampersad v. Goberdun, 1929 N.L.R 33). In a claim for a via necessitates the onus of proving the necessity is upon the person alleging it. He must prove, for example, that he has no reasonable and sufficient access to the public road for himself and his servants, and if he be a farmer no such approach as will enable him to carry out his farming activities (Lentz v. Mullin, 1921 E.D.L., p 270). If a person through his own fault, design, or negligence makes access to his own property impossible he cannot claim a via necessitates over a neighbour's property. If, for instance, the owner of land bordering on a main street builds on the whole of his street frontage he is not entitled to claim ex necessitate a right of way over his neighbour's land as a means of access to the back of his premises (Ross Executors v. Ritchie, 19 N.L.R 103)

An owner of land cannot by his own conduct deprive access, and thereafter complain. A way of necessity cannot be claimed in that way. I cannot find a proper communicating link to consider the necessity of the Defendant-Appellant. Further a claim need to be restricted to an actual necessity. Not an artificial creation. The word 'necessity' in the context of the case need to be interpreted strictly.

In all the circumstances of this case I do not wish to disturb the judgment of the District Judge. I affirm the District Court Judgment. Appeal dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL