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

CA 1034/98
D.C. Kegalle Case No. 3340

01. Garnini Jayalath Wijewardena
No. 104, Badalladeniya,
Ambanpitiya,
Galigamuwa Town.

02. Morayalage Namdawathie Wijewardena of do (Dead)

02A. Sooriya Kumara Wijewardena of do

02B. Chandra Kumara Wijewardena of do

(Minor) 2A and 2B Plaintiffs are substituted in the room of the 2nd Plaintiff dead. 1st Plaintiff appointed as Guardianad-litem over 2B minor Plaintiff)

Plaintiff

Vs.

Viyannalage Saranelis
Dambullewatta,
Ambanpitiya,
Galigamuwa Town.

Defendant

Viyannalage Saranelis
Dambullewatta,
Ambanpitiya,
Galigamuwa Town.

Defendant/Appellant

Vs.

01. Gamini Jayalath Wijewardena
No. 104,
Badulladeniya,
Ambanpitiya,
Galigamuwa Town.

02. Morayalage Nandawathie Wijewardena of do (Dead)

02A. Sooriya Kumara Wijewardena of do

02B. Chandra Kumara Wijewardena of do

(Minor) 2A and 2B Plaintiffs are substituted in the room of the 2nd Plaintiff dead. 1st Plaintiff appointed as Guardianad-litem over 2B minor Plaintiff)

Plaintiff/Respondent

C.A 1034/98 (F) **D.C.Kegalle Case No: 3340/L**

Before : K.T.Chitrasiri, J.

Counsel : Udaya Bandara for the Defendant-Appellant.

Nagitha Wijesekara for the Plaintiff –Respondents.

Argued &
Decided on : 07.03.2013.

K.T.Chitrasiri, J.

This is an appeal seeking to set aside the judgment dated 17.09.1998 of the learned District Judge of Kegalle. In that judgment, learned District Judge decided the case in favour of the Plaintiff. Accordingly, the Plaintiff –Respondents (hereinafter referred to as the Plaintiffs) became entitled to have the benefit of the reliefs prayed for in the prayer to the amended plaint dated 09.11.1987 except for the relief prayed for in paragraph (ඇ) therein.

Learned Counsel for the Appellant in support of his case made submissions for more than one hour. Learned Counsel for the

Respondent also took nearly ½ an hour to conclude his submissions.

Basically, it is the contention of the learned Counsel for the Appellant that the learned District Judge did not properly consider the evidence of the surveyor who drew the Plan bearing No:574 marked 'P1'. Learned Counsel further submitted that the evidence of the Plaintiff as to the usage of the road way claimed by the Plaintiffs had not been corroborated by an independent evidence . In the petition of appeal, it is contended that the learned District Judge has given undue weightage to the evidence of the Plaintiff and had failed to comment on the contradictory nature of the Plaintiff's evidence.

The learned District Judge in his judgment dated 17.09.1998 had decided that the Plaintiffs are entitled to have a road way as claimed by them on the basis of prescription. Accordingly, he has answered the first six issues in accordance with his said decision. Therefore, it is clear that the findings of the learned District Judge is on the basis of prescription claimed by the Plaintiffs to the strip of land alleged to have been used by them as a road way.

The 1st Plaintiff in his evidence has stated that he, along with his wife who is the 2nd Plaintiff, having constructed a house within their land commenced using the disputed road way since the year 1971. (Vide evidence in pages 84 and 85). Since then they have been using this strip of land as a right of way. The way in which they used this land as a right of way is clearly explained in his evidence found at pages 84 and 85 of the brief.

The manner in which the Defendant obstructed their right of way also has been described by the Plaintiff in his evidence. Having said so, he went on to say that he made a complaint to the police in the month of March 1983, of the obstruction. Even though he has referred to the month as the month of May in cross- examination, he has clearly said that it was in the month of March 1983. Thereafter, the police seems to have settled the dispute and the Plaintiffs were allowed to use the road way. After sometime, the Defendant again had obstructed the right of way of the Plaintiff completely on the 23.05.1984. Immediately, thereafter too, he has made a complaint to the Grama Sevaka of the obstruction. Grama Sevaka has confirmed this position in his evidence.

At this stage, it must be noted that the learned Counsel for the Appellant failed to show any question put to the Plaintiff in cross examination suggesting that there had been no right of way, used by the Plaintiff. Moreover the Defendant even in examination- in- chief had not denied that the Plaintiffs were using it as a road way. Therefore, it is implied that the Defendant-Appellant had accepted the position that the Plaintiffs, in fact had been using this road way. In the light of the above, circumstances and the analysis of the evidence referred to above it shows that there had been a road way used by the Plaintiffs as claimed by them and it was obstructed by the Defendant.

Learned Counsel for the Defendant referred to the evidence of Surveyor Perera at length. He highlighted the fact that the area claimed as the road way is only 8 inches in width as shown in the plan marked P1. However, the surveyor in his evidence has explained this position and has said that it had only 8 inches in width, particularly at the time of the survey. He has clearly said in answer to Court that there had been a gate at the northern point of the road way. He also had explained the manner in which the pole was found at the gate and how it had been used as a gate. (Vide evidence at pages 71 and 74 of the brief). In the circumstances, I am unable to agree with the contention of the learned Counsel for

the Appellant as to the evidentiary value of the existence of road way referred to in the plan marked P1.

Witness Siril Perera Gunawardena who had been the Grama Seva Niladhari of the area in the year 1984, had clearly said that there had been a road way as claimed by the plaintiffs and it was used by them for a period of about 20 years (Vide page at 124 of the brief). This evidence had not been contraverted at all. The witness Punchi Banda who seems to have no connection to the either party also has given evidence in support of the Plaintiffs' contention. His evidence too has not been contraverted.

Having considered the evidence, it is clear that the Plaintiffs have established that there had been a road way, used by them since the year 1971 over the land claimed by the Defendant and it was obstructed by him. Accordingly, I do not see any error on the part of the learned District Judge when he came to his conclusions.

At this stage, it must be noted that the grounds of appeal urged by the learned Counsel for the Defendant-Appellant as well as in his petition of appeal are restricted to the facts of this case. No questions involving law has been raised in this appeal. Generally, the Appellate Courts are slow to interfere with the findings of a

trial Judge as to the facts of the case. This position in law is clearly stated in Alwis Vs. Piyasena Fernando (1993) 1 SLR at page 119 where His Lordship G.P.S de Silva, C.J. held thus:

"It is well established that findings of primary facts by a trial judge who hears and sees the witnesses are not to be lightly disturbed on appeal. "

As mentioned before, the appeal in this case was argued challenging the manner in which the trial Judge looked at the evidence as to the facts of the case. I am of the opinion that the trial Judge, having observed the demeanour of the witnesses, is the best person to decide as to the facts of the case.

Considering this position in law and for the reasons set out hereinbefore, I am not inclined to interfere with the findings of the learned District Judge.

Accordingly, this appeal is dismissed with costs fixed at Rs.50,000/- payable to the Plaintiff –Respondents.

Appeal dismissed with costs.

JUDGE OF THE COURT OF APPEAL

Vkg/-