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

K. K. Karunadasa
No.21, New Lane
Maitipe, Galle
Defendant-Appellant

Vs

Jinadasa Subasinghe
No.21/8, New Lane
Maitipe, Galle
Deceased Plaintiff-Respondent

C.A.NO.1172/98 (F)
D.C.GALLE CASE NO.12773/L

Dhanwathie Subasinghe
(Also known as M.A. Dayawathie)
No.21/8, New Lane
Maitipe, Galle
And others
Substituted-Plaintiff-Respondents

BEFORE	:	**K.T.CHITRASIRI, J.**
COUNSEL	:	Priyantha Alagiyawanna for the Defendant-Appellant Chandana Prematthilake for the 1st to 3rd Substituted Plaintiff- Respondents
ARGUED ON	:	25.07.2013, 14.11. 2013 and 05.05.2014
WRITTEN SUBMISSIONS FILED ON	:	06.12.2013 by the Defendant-Appellant 02.12.2013 by the 1st to 3rd Substituted-Plaintiff-Respondents
DECIDED ON	:	16TH JUNE 2014

CHITRASIRI, J.

This is an appeal preferred by the defendant-appellant seeking *inter alia* to set aside the judgment dated 9th January 1998 of the learned Additional District Judge of Galle. In the petition of appeal, the appellant also has sought to have the action of the plaintiff dismissed. The said action of the deceased plaintiff is basically to have a decision securing his right of way or in other words his access to the premises where he is in occupation.

Learned Counsel for the appellant contented that the plaintiff-respondent has no right to file this action to have the respondent prevented from using the roadway referred to as Lot 5 in Plan 424 marked P1, as he has no soil rights over the said strip of land referred to as lot 5. Though, it was not raised as an issue in the Court below, the appellant has every right to take up such an issue at this appeal stage since it involves a pure question of law. **[Talagala Vs. Gangodawila Co-operative Store Society, (48 N. L. R. 472) Jayawickrema Vs. David Silva, (76 N.L.R. at 427) Dassanayake Vs. Eastern Produce and Estates Co. Ltd. 1986 (1) S.L.R. at 258]** Admittedly, the appellant has no soil rights over the aforesaid Lot 5 which is being used as a roadway. Lot 5 is a sub division of Lot 8 of a larger land depicted in Plan 934A marked V10. (at page 242 in the appeal brief)

Lot 8 in the larger land shown in the Plan 934A had been owned by one Kumarasinghe and he has sold it to various parties having sub divided the same, as shown in plan marked P1. However, the said Kumarasinghe has retained with him the soil rights of the said roadway referred to as lot 5 in Plan P1 when he

disposed of some other lots depicted in that plan P1. Hence, the respondent has only the right to use lot 5 in plan P1 as the access road to lot 4 where he is in occupation.

Then the question arises whether the respondent has the right to file and maintain this action to secure his right of way exercising his servitude and to prevent others using the roadway referred to as lot 5 in plan marked P1 to which he has no soil rights. Law as to the actions available to secure servitudes could be found in the authorities referred to herein below.

Hall and Kellaway on Servitudes 02nd Edition at p.135 & 136, states that -

> *"The actions recognized by Roman Dutch Law were the actio confessoria and the actio negatoria or contraria, the former being an action to enforce a servitude, and the latter to declare a property free from a servitude. The actio confessoria embraced (a) the removal of all obstructions or replacement of anything destroyed, through which the servitude is rendered useless (b) .... (c) .... (Voet, 8.5.3). The actio negatoria could be brought by an owner against anyone claiming the right to exercise servitude over his property for the purpose of ascertaining whether the servitude existed."*

Massdorp's Institutes of South African Law Volume II page 177, states that –

> *"The old actions were called the actio confessoria and actio negatoria or contraria and the principles which governed them are still applied*

to some extent, although the procedure has altered and at p.178 states that the general rule is that only a person in whose favour a servitude has been created can enforce it, because servitudes are indivisible in their nature."

Wille citing Voet 8.5.5. has stated as follows:

"If a person unlawfully claims a servitude over land or claims greater rights under a servitude than it actually comprises, the owner of the land may bring an action against him, known as the action negatoria for a declaration that his land is free from the servitude claimed, or free from the excessive burdens as the case may be. This action can be instituted by none but the owner of the land in question."

[Wille's Principles of South African Law – 8th Edition at page 326]

In the case of **Saparamadu v. Melder, [2004 (3) S.L.R. at page 148]** having applied the law referred to above has held that an action for a declaration that the defendant is not entitled to use the road reservation can be filed only by a person who has soil rights and not by a person who himself enjoys only a servitude." (at pg.151). Even in this same action, when the Court of Appeal was invited to make a decision in respect of an interlocutory order issued by the learned District Judge, Sarath.N.Silva, J (as he then was) held thus:

"We have considered the submissions of learned counsel. We are inclined to agree with the submissions of learned counsel for the petitioner that the plaintiff being a person who is entitled only to the use of the right of way

(servitude) cannot injunct another person from the use of that right of way. ***He can only injunct another person from obstructing or preventing his use of that right of way."***

In the circumstances, it is clear that the actions to secure servitudes are of two fold. They are *actio negatoria* and *actio confessoria. Actio negatoria* is available to an owner of a land who has soil rights while *actio confessoria* is available to a person holding a servitude without soil rights. *Actio confessoria* is an action to enforce a servitude that can be instituted by a person in whose favour a servitude has been created. *Actio negatoria or contraria* is an action to declare a property free from a servitude which could only be filed by the owner of a person who has soil rights.

In this instance, the respondent among other things also has sought to have a declaration to secure his servitude, namely to use the roadway and to have it free from obstructions. [items ඇ and ඈ in the prayer to the plaint] At the same time he also has sought to prevent the respondent using the roadway. [items ඈ, ඉ සහ ඊ in the prayer to the plaint]. Hence it is partly, an action known as *"actio confessoria"* when it comes to the second and the third items in the prayer to the plaint. As mentioned above, the respondent in this case is entitled to maintain this action to secure his servitude so long as he is not seeking to prevent others using the same. Therefore, he need not establish soil rights to the land over which he claims a servitude to obtain the reliefs other than the reliefs ඈ, ඉ සහ ඊ. Accordingly, I am not inclined to accept the contention of the

learned Counsel for the appellant as far as the second and the third reliefs of the plaintiff is concerned.

Having discussed the issue as to the right of the respondent to file this action, I will now turn to consider whether the learned Additional District Judge is correct when he concluded the case against the appellant. Final outcome of the findings of the learned trial judge is seen in the answer given to the issue No.4.

The answer given to the said issue No.4 reads thus:

"Answer

4. පැමිනිල්ලේ ආයාවනයේ ' අ, ආ, ඇ, ඈ, සහ ඉ' වේදවල ඉල්ලා ඇති සහන ලබා ගැනීමට පැමිනිලිකරුට හිමිකමක් ඇත."

[Vide proceedings at page 151 in the appeal brief]

Accordingly, it is clear that the decision that is being challenged in this appeal depends on the manner in which the aforesaid answer given to issue No.4. Hence, it is necessary to look at the reliefs prayed for in the plaint of the respondent. Reliefs so prayed for, in the plaint read thus:

"(අ) මෙහි පහත පලමු උපලේඛණයේ සඳහන් දේපල පැමිණිලිකරු සතු බවට ප්‍රකාශ කරන ලෙසද,

(ආ) මෙහි පහත දෙවන උපලේඛණයේ සඳහන් මාර්ග ප්‍රවේශය එකී දේපලට ප්‍රසිද්ධ මාර්ගයේ සිට හෙවත් මාබරිපේ දෙවන පටුමග හෙවත් මාඉරිපේ අලුත් පටුමග සිට ප්‍රවේශවීමට ඇති එකම විශේෂිත හා පුද්ගලික මාර්ග ප්‍රවේශය (Exclusive Private Access) **බවට ප්‍රකාශයක් ලබා දෙන ලෙසද,**

(ඇ) එකී මාර්ග ප්‍රවේශය පැමිණිලිකරුට නිර්බාධිතව හා නිරවුල්ව කිසිදු ආකාරයක අවහරියකින් තොරව පරිහරනය කිරීමට අයිතියක් ඇති බවට ප්‍රකාශයක් කරන ලෙසද,

(ඈ) විත්තිකරු විසින් පැමිණිලිකරුගේ අයිතියට බාධා පමුණුවන අයුරින් එකී අංක දරන කැබැල්ලේ බස්නාහිර මායිමේ කිසිදු ආකාරයක විවරයක් තැනීම හෝ වෙනත් ඒ ආකාර පියවරක් තැනීම වලක්වාලන ආඥාවක් කරන ලෙසද,

(ඉ) විත්තිකරු ඇතුලු ඔහු යටතේ හිමිකම් පාන සෑම සියලු දෙනාම එකී දෙවන උපලේඛණයේ සඳහන් දේපලින් නෙරපා එහි නිරවුල් භුක්තිය පැමිණිලිකරුට ලබාදෙන ලෙසද,

(ඊ) ඉහත 17 වන ඡේදයේ සඳහන් පරිදි 1994 මැයි මස 09 වන දින සිට මසකට රුපියල් 500/- බැගින් අලාභ විත්තිකරුගෙන් අයකර දෙන ලෙසද,

(උ) පහත දෙවන උපලේඛණයේ විස්තර කර ඇති මාර්ග ප්‍රවේශය උපයෝගි කරගෙන විත්තිකරුගේ ඉඩමට රථවාහන ඇතුලු කිරීම හෝ එකී මාර්ග ප්‍රවේශය උපයෝගී කරගෙන විත්තිකරුගේ ප්‍රධාන මාර්ගයට රථවාහන ගැනීමද, එකී මාර්ග ප්‍රවේශයේ රථවාහන නවතා ගැනීමද, වලක්වාලන මේ නඩුව පවතිනතෙක් බලපවත්වන අතුරු තහනම් නියෝගයක් හෝ වාරන නියෝගයක් හා අතුරු තහනම් නියෝග දැන්වීමක් විත්තිකරු වෙත නිකුත් කරන ලෙසද,

(ඌ) මේ අධිකරණයට සුදුසුයැයි තීරණය කරන වෙනත් සහ වැඩිමනක් සහන වේ නම් එයද ලබාදෙන ලෙසය."

[Vide proceedings at pages 44 & 45 in the appeal brief].

Only the reliefs prayed for in the first five items in the prayer to the plaint have been granted by the learned District Judge in favour of the respondent.

First relief mentioned therein is to have a judgment declaring that the respondent is the owner of the land morefully described in the first schedule to the plaint. It is the lot 4 in Plan marked P1. Ownership of which is not being disputed by the appellant. Appellant has no right or title to the said land occupied by the respondent. Indeed, the parties at the commencement of the trial have admitted that the aforesaid land referred to in the first schedule to the plaint which is lot 4 in plan 424 (P1) is owned by the respondent (admission No.2). *[Vide proceedings at page 73 in the appeal brief].*

Second relief prayed for is to have a declaration declaring that the roadway referred to in the second schedule to the plaint is a roadway commencing from the main road leading to the property occupied by the respondent and it is his exclusive and private access to reach lot 4 in Plan P1. Appellant does not dispute the said right of way claimed by the respondent. Neither has he challenged the entitlement of the respondent using lot 5 as the access road to the respondent's land referred to in the first schedule to the plaint which commences from the main road.

Next relief is to have a declaration allowing the respondent to use the aforesaid roadway without any obstruction being made. It is connected to the second relief as well. The appellant has no objection for the use of the said right of way by the respondent. Evidence also reveals that the respondent has the right to use the said roadway without any obstruction being made by the appellant. Therefore, it is clear that the appellant cannot obstruct the said roadway being used by the respondent.

Therefore, I do not see any wrong in granting the reliefs prayed for in the first three items in the prayer to the plaint, namely prayers ඇ, ඈ and ඇ්, in favour of the respondent. Indeed, the appellant is not affected by granting those reliefs referred to in the first three items in the prayer to the plaint. In the circumstances, I do not see any error in the decision of the learned Additional District Judge, granting relief in favour of the respondent as prayed for in the first three items found in the prayer to the plaint.

Remaining two reliefs that have been granted in favour of the respondent are the reliefs "ඇ්" and "ඉ". Relief "ඇ්" in the prayer to the plaint is to prevent the appellant having an opening on the western boundary of Lot No.5 whilst the relief "ඉ" mentioned therein is to have the appellant evicted from lot 5 in Plan marked P1. Clearly, those two reliefs are to obtain a declaration securing the property rights of the respondent preventing others enjoying servitudes over the roadway referred to as lot 5 mentioned above.

As mentioned hereinbefore in this judgment, reliefs referred to in the preceding paragraph could only be obtained by filing an action known as *Actio negatoria or contraria.* Such an action is available to a person who has soil rights over the land he holds a servitude. Admittedly, the respondent has no soil rights to the land over which he has a servitude which is the road way referred to as lot 5 in Plan marked P1. Soil rights of the said lot 5 is with Kumarasinghe at the time the action was instituted. Therefore, the plaintiff-respondent has no legal

right to file action seeking to prevent the defendant-appellant performing any act on the land over which the respondent claims that he enjoys a servitude. Hence, the respondent is not entitled to file action to obtain the reliefs prayed for in the items "ඇ" and "ඉ" referred to in the prayer to the plaint.

In the circumstances, it is my opinion that the learned District Judge misdirected himself as to the law when he granted the reliefs prayed for in the prayers "ඇ" and "ඉ" to the plaint. For the aforesaid reasons, the judgment dated 9th January 1998 is varied to read it as; the plaintiff is entitled only to the reliefs prayed for in paragraphs "ඇ", "ඈ", and "ඇ" in the prayer to the plaint and is not entitled to the rest of the reliefs prayed for in the plaint.

Subject to the above variations, this appeal is dismissed. Parties are to bear their own costs of this appeal. Having considered the circumstances of the case, the order made by the learned District Judge as to the costs of the action is set aside. Accordingly, the plaintiff-respondent is not entitled to the costs of the action filed in the District Court.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL