

1277/99(F)

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

Mohamed Aliyar Abdul Gaffoor
NO.12, Mapanawatura Passage,
Kandy.

Plaintiff

C.A. Case No:-1277/99(F)

D.C. Kandy Case No:-16468/L

V.

Soma Attanayake
No.10, Circular Road,
Mapanawatura, Kandy.

Defendant

Between

Srimathi Malkanthi Karunanayake,
32-1/1, Sri Saranankara Road,
Dehiwala.

Substituted-Defendant-Appellant

V.

Mohamed Aliyar Abdul Gaffoor
No.12, Mapanawatura Passage,
Kandy.

Plaintiff-Respondent

Before:- H.N.J.Perera, J.

Counsel:-Mano Devasagayam with Sujeewa Dahanayake for the
Substituted- Defendant-Appellant
Plaintiff-Respondent absent and unrepresented.

Argued On:-13.05.2014

Written Submissions:-16.07.2014

Decided On:-20.01.2016

H.N.J.Perera, J.

The plaintiff instituted this action against the defendant for a declaration of a servitude right of way access over a 12 foot wide road leading from the main road purportedly depicted in Plan No.1118 dated 28th November 1977 made by P.W Wijewardene Licensed Surveyor for the purpose of going to his house by foot and vehicular transport.

The defendant filed answer denying the plaintiff's claim and stated that by virtue of deed No.4282 dated 05.12.1936 attested by Frank Seneviratne, Notary Public, she became the owner of the said roadway by way of purchase as depicted in Plan No.55/36 dated 24.11.1930 made by Mr. Creltzheim, Licensed Surveyor. It was also the position of the defendant that in or about 1990 the plaintiff had wrongfully and unlawfully removed the fence posts separating the roadway from the plaintiff's premises and encroached on the roadway and began using the same. The defendant prayed for a declaration that she is the owner of the said roadway and also made a claim in reconvention claiming damages in a sum of Rs 50,000/- and further damages at Rs, 2,500/- per month from the date of answer till the defendant is restored to exclusive use and possession of the said roadway.

At the commencement of the trial the plaintiff withdrew his action and it was accordingly dismissed but on the application of the defendant the court proceeded with the claim in reconvention.

After trial the court delivered judgment on 27.10.1999 dismissing the defendant's claim in reconvention. Aggrieved by the said decision of the learned trial Judge the defendant had preferred this appeal to this court.

At the trial Srimathi Karunanayake gave evidence on behalf of the defendant-appellant and stated that soon after the purchase of the strip of land on deed No.4282 marked D2, her mother, the defendant had this land converted into a roadway in 1940 and from that time onwards up to the time that one Sarojini Tennakoon broke the fence in 1980 and none of the occupants of the plaintiff's premises ever used the said roadway. In this case the defendant has not given evidence. The defendant's daughter gave evidence and stated that from 1940 the road in dispute had been fenced off by the defendant and used exclusively by her. It was only in 1980 that Sarojini Tennakoon encroached on the said roadway. The said Sarojini Tennakoon too filed a case in the District Court , No 12661/L stating that the defendant had obstructed her use of the said roadway and claiming a declaration that she is entitled to use the said roadway but had later withdrawn the said case. The witness for the defendant claimed that the said Sarojini Tennakoon did not use the said roadway after the said case was withdrawn and dismissed. The witness has also stated that running parallel to the said roadway on the western side is a foot path which extends from the premises of Francis Henricus and passed the plaintiff's house to the main road. It was her evidence that access to the plaintiff's house from the main road and the successors in title to Sarojini Tennakoon, including the plaintiff, used that foot path which ran parallel to the said roadway on the western side.

It is not in dispute that one Purnam Cynthia Wasagam was the original owner of the said land and that she by deed 4282 transferred the said portion of the land to the defendant. By the said deed Purnam Cynthia Wasagam had reserved certain rights over that portion as stated in the said deed. The nature of the rights reserved in the said deed 4282 was considered in case No.10971/L . The said case was filed by the defendant against Bobby Henricus and Anton Henricus claiming, inter alia exclusive rights to the said portion (to the said portion of land converted to a roadway) and claimed that the said Bobby Henricus and Anton Henricus have no right to use the said roadway. The court after trial dismissed the defendant's action holding that the assigns etc of Purnam Cynthiya Wasagam are entitled to use the road. (P1,P2and P3.) The defendant has not appealed from that judgment.(P3)After considering the said clause in deed 4282 the court has held that all those who claim rights from Purnam Cynthia Wasagam are entitled to use the said road. The plaintiff too gets title from the said Purnam Cynthia Wasagam and therefore is entitled to use the Said road.,

In 1936 by deed No 4282 marked D2 Puraman Cynthia Wasagam sold and transferred that strip of land in extent 13.93 perches which was subsequently converted into a roadway which is the subject matter in dispute. The deed states that the transfer to the defendant is subject to the condition that "if the said land is converted into a roadway leading to the defendant's house, then the vendor or her heirs and assigns shall have the right to use the said roadway as approach to their house for vehicular traffic or otherwise the same shall be fenced off by the vendee at her own expense within a reasonable time of the execution of these presents."

In 1942 by deed No 10219 the said Purnam Cynthia Wasagam also sold land and premises to Francis Henricus situated on the West of the defendant's premises. The said deed excludes the strip of land depicted

in Plan 55/36 marked D2A sold to the defendant upon the deed of transfer No 4282 marked D2.

The learned trial Judge has clearly held that as the defendant has converted the said strip of land into a roadway the plaintiff and her predecessors in title became entitled to use the said right of way under the said clause in deed marked D2.

The learned trial Judge has also come to a clear conclusion that the defendant did not have exclusive use of the roadway. The plaintiff has raised no dispute as to the ownership of the strip of land. The only dispute centered around the question whether the plaintiff is entitled to use the same as a roadway or not or whether the defendant had exclusive rights to use the said roadway. The daughter of the defendant who gave evidence on behalf of the defendant has very clearly admitted the fact that Francis Henricus (the vendee in deed 10219) did use the said road way. She has in fact admitted that the said Henricus did use the said roadway even after the judgment had been delivered in case No 10971/L. Later she has tried to say that the Henricus did so with the permission of the defendant in this case. The learned trial Judge has very clearly considered the said evidence given by the said witness for the defendant and has come to a very clear conclusion that she has lied when she later said that the said roadway was used by the said Henricus with the permission of the defendant. Further the learned trial Judge has held that the evidence given by the said witness to the effect that no one used the said roadway after the case 12661/L was withdrawn by the said Sarojini Tennakoon cannot be true. The learned trial Judge has clearly held that the defendant is not entitled to a declaration that he is entitled to the exclusive use of the said roadway and for as declaration that the same is a private road.

It is true that the defendant-appellant has become the owner of the said lot described in the 2nd schedule to the plaint when she purchased the said land by deed No 4282 in 1936. But when she converted the said strip of land to a roadway according to the condition stated in the said deed, the plaintiff too became entitled to use the said road way and there is evidence to show that Henricus (vendee in deed No.10219) too exercised the said right to use the road way as a right of way. This fact had been admitted by the defendant's witness whilst giving evidence in court. But there is no evidence to show that the defendant-appellant exclusively possessed the said roadway as a part of her land without any interruption or obstruction of anyone and acquired prescriptive title. The learned trial Judge has after careful consideration of the evidence before him has come to a clear conclusion that although the defendant-appellant used and possessed the said roadway, the defendant-appellant has failed to lead evidence and prove prescriptive title to the said road reservation.

The learned trial Judge has further held in his judgment that the evidence given by the daughter of the defendant is very weak and unsatisfactory.

The trial Judge has further held that no proper evidence had been led to assess the damages caused to the defendant. The trial Judge has in fact held that the defendant has no exclusive right to use of the said roadway. Therefore he has held that the mere fact that the plaintiff had used the said roadway does not entitle the defendant to claim damages from the plaintiff in this case.

The learned District Judge has arrived at his decision on certain factual matters or has decided on primary facts. I have considered the entire judgment and see no reason to interfere with primary facts of this case. The trial Judge has arrived at a correct conclusion. An Appellate Court should not without cogent reasons interfere with primary facts.

In *Munasinghe V. C.P.Vidanage* 69 N.L.R 98 it was held that the jurisdiction of an appellate court to review the record of the evidence in order to determine the conclusion reached by the trial Judge upon evidence should stand has to be exercised with caution.

Further in *Gunawarene V. Cabral and others* (1980) 2 Sri.L.R 220, it was held that the appellate court will set aside inferences drawn by the trial Judge only if they amount to findings of fact based on :-

- (1) Inadmissible evidence; or
- (2) After rejecting admissible and relevant evidence; or
- (3) If the inferences are unsupported by evidence; or
- (4) If the inferences or conclusions are not rationally possible or perverse.

In the case before me I do not see that the findings of the learned District Judge and the inferences drawn by him are vitiated by any of these considerations. In my view there is no justification for interfering with the conclusions reached by the learned District Judge which I perceive are warranted by the evidence that was before him.

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the substituted – defendant-appellant is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL