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

Indra Kumari Ratnayaka of

Ban/ Ellagama Maha Vidyalaya

Diyathalawa

C.A. No:1103/99(F)

D.C. Bandarawela
Case No:1088/L

Plaintiff-Appellant

Vs.

G.K. Dharmadasa of

'Pasalkanda'

Ellagama

Diyathalawa

Defendant-Respondent

BEFORE : M.M.A. GAFFOOR J AND
S. DEVIKA DE L. TENNEKOON J

COUNSEL : Sanjeewa Dasanayake for the Plaintiff-Appellant

Chanaka Kulatunga for the Substituted Defendant-Respondent

ARGUED ON : 21.03.2017

WRITTEN SUBMISSIONS
TENDERED ON : 15.06.2017 (Substituted Defendant-Respondent)

22.06.2017 (Plaintiff-Appellant)

DECIDED ON : 08.08.2017

M.M.A. GAFFOOR J

The plaintiff-appellant (hereinafter called and referred to as the appellant) preferred the present appeal against the judgment of the learned District Judge of Bandarawela in case bearing No: L/1088 dated 30.11.1999. When the matter was taken up for argument on 21.03.2017, having concluded the arguments the Court has directed to both parties to tender their respective written submissions. The appellant instituted action against the defendant-respondent (hereinafter called and referred to as the respondent) pleading that she is the owner of the land described in the schedule to the plaint and that the respondent had commenced using a foot path through the said land in dispute in spite of there being an alternative road leading to the respondent's land as depicted in Plan marked 'අක්ෂ".

The respondent filed answer denying the averments contained in the plaint and pleaded that the said portion of land which is purportedly used by the defendant as a roadway had been in existence for a period of more than 10 years and hence the respondent has acquired a prescriptive title to the said roadway and further pleaded that the said roadway is required by her as an access to her block of land as a way of necessity and prayed for dismissal of appellant's action.

When the trial commenced, 1 admission was recorded between the parties whereas issues bearing No. 1-10 (vide proceedings dated 15.02.1996 at page 54-57 of the brief) were raised by the petitioner and issues bearing No.11-19 were raised by the respondent. At the trial, evidence was led on behalf of both contesting parties in support of their respective claims. On behalf of the Appellant, she herself, a retired principle and the licensed surveyor gave evidence and closed her case marking documents අ1 to අ6. On behalf of the respondent the respondent herself and the licensed surveyor gave evidence marking documents 1 to 14. Thereafter, both parties tendered written submissions and the learned District Judge delivered his judgment on 30.11.1999 in favour of the respondent. Being aggrieved by the said judgment, the appellant preferred the present appeal to the Court of Appeal seeking reliefs as prayed for in the prayer to the petition. The appellant claimed ownership to the parcel of the land called 'Pasal Kanda Watta' by virtue of state grant bearing No.ඉඩ/ඉ 13250 dated 03.07.1991. It is the complaint of the appellant that the respondent on or about July 1988 forcefully demarcated a foot path over the appellant's land to the direction of east to south despite the right of way demarcated by the Survey General along the eastern and southern boundaries of the appellant's land. However, it was revealed during the course of the trial that the respondent who claimed servitude right to a servient tenement had claimed without having title to a dominant tenement. In view of the

pleadings, issues and evidence led and documents the following could be considered as main issues pertaining to the present dispute.

a. Can the respondent on the materials placed before Court claim right of way by prescription and/or by way of necessity for mere convenience?
b. Can a person who has used indefinite ways of access to road subsequently claim a right of way for a defined track over the property of another?
c. When there is an alternative right of way can the respondent claim way of necessity?
d. In the absence of title to the dominant tenement as at the date of institution of action can the respondent claim a right of way over a servient tenement?

Respondent claimed that they are using the said roadway from the year of 1981 and therefore they have prescribed to the said right of way. (According to their evidence at page 10 of the proceedings dated 02.06.1988 – reverse page 90 of the brief)

"මම නිශ්චිත වශයෙන් අධිකරණයට කියන්නේ ආරවුල් පාර පාවිච්චි කරන්නේ 81 ඉඳලා. අවුරුදු 10කට වැඩි කාලයක් එම පාර පාවිච්චි කල නිසාත් එම ඉඩමට විකල්පව වෙන කිසිම මාර්ගයක් නැති නිසාත් මෙම මාර්ගයම ලබාදෙන ලෙස ඉල්ලා සිටිනවා."

According to the decided cases in order to obtain the prescriptive right to another person's land and/or claim right of way the following ingredients have to be proved by the person claiming the same.

i. undisturbed and uninterrupted possession by a title adverse to or independent of that of the claimant or plaintiff,

ii. must be possessed by a person unaccompanied by payment of rent or produce,

iii. a certain length of continuous possession (minimum of 10 years)

iv. Bona fide possession

v. Possession ut dominus

In the case of ***Mitrapala and Another vs. Tikonis Singho*** (2005) 1 SLR 206:

> (7) Mere possession is not prescriptive title. He must prove that he had possessed the property in the manner and for the period set out in section 3 of the Prescription Ordinance.
>
> (8) Where a party invokes the provisions of section 3 in order to defeat the ownership of the adverse claimant to immovable property the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights.

In the case of ***De Silva vs. Commissioner General of Inland Revenue*** 80 NLR 292 Sharvananda J held;

> "where a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed"

In the case of ***Seeman vs. David*** (2000) 3 SLR 23 Weerasooriya J held;

> "Person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an over tact. The proof of adverse possession is a condition precedent to the claim for prescriptive rights."

In the case of ***Kandiah vs. Seenitamby*** 17 NLR 29 it was held:

> "A person who merely strays across an open land wherever it is most convenient at any given point of time cannot thereby acquire prescriptive right"

In the case of ***Cornelis vs. Fernando*** 65 NLR 93 it was held:

> "in the absence of a finding that the plaintiff established a right of way by prescription over the intervening land, the court could not grant the plaintiff a right of way through the defendant's land."

A careful perusal of defendant's evidence clearly shows that they have been using indefinite footpaths over a long time of access the main road. Vide page 87 of the brief.

"..... තාවකාලිකව එම ඇල්ගම විදුහලේ විදුහල්පතිනියගෙන් අවසරය ඉල්ලාගෙන විදුහල් භූමියෙන් ආවා ගියා ... පාර ගැන බලලා දෙගොල්ලන්ගේම කැමැත්තෙන් පාරක් දුන්නා පැමිණිලිකාරියගේ ඉඩමට පහලින් ...."

(Defendant giving evidence – Vide page 87 of the brief)

"..... ඊට පසුව යන්න එන්න පාරක් නැති නිසා පාසලේ විදුහල්පතිතුමාගෙන් ඉල්ලගෙන පාරක් පාවිච්චි කළා.....ඊට පසු බදුල්ල ඉඩම් කොමසාරිස්තුමාගේ නියෝගය මත දැනට පාවිච්චි කරන පාර තුන්ගොල්ලගේ කැමැත්ත අනුව ලබා දුන්නා ....."

(Defendant giving evidence – Vide page 103 of the brief)

H.W. Tambiah Q.C. in Principles of Ceylon Law at page 292, 293 has held as follows:

> "Where a footpath goes through several lands, it is very common in the rural areas of Ceylon to have stiles along the footpath, in places where such paths cross the lands. The presence of the stiles do not in any way nullify the right of a dominant owner to have a servitude of footpath over another man's land."

Further, in the case of ***Karunaratne vs. Gabriel Appuhamy 15 NLR 257*** it was held:

> "Mere straying over parts of land which was allowed for the purpose of convenience is not sufficient to acquire a servitude by prescription."

It is manifest from decided cases that in regard to the prescription of incorporeal rights, the claimant must establish a requirement not specified in the provisions of the Prescription Ordinance namely, that the adverse user of the rights must be exercised in relation to a particular defined area of the corpus.

This view was first expressed in an unreported case in 1909 CR Mallacam 16080 SC minutes of 26.01.1909 in ***Karunaratne vs. Gabriel Appuhamy*** (1912) 15 NLR page 257 Lascelles CJ observed;

> "In the system of law which prevails in Ceylon right of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly defined."

In ***Kandiah vs. Seenitambi*** (1913) 17 NLR at page 29 the plaintiff, who was the owner of a land, could only prove that he had generally walked across the land of the defendant more than 10 years. However, he could not establish user of a definite path. De Sampayo A.J., dismissing the plaintiff's claim, held that the adverse user, for the purposes of prescription, must be in respect of a definite track. De Sampayo A.J. endorsed the proposition laid down by Wendt J. in a previous case that "The evidence to establish a prescriptive servitude of way must be precise and definite. It must relate to a defined track, and must not consist of proof of mere straying across an open land at any point which is at the moment most convenient".

G.L. Peiris on The Law of Property in Sri Lanka Volume III Servitudes and Partition, page 74.

The principle was reiterated in ***Fernando vs. Fernando*** (1929) 31 NLR page 126 Fisher C.J. (with Drieberg J. agreeing) said "User of a definite track is the only way in which a right of way over the land of

another can be acquired by prescription." Similar views were expressed by Wendt J in ***Andris vs. Manuel*** 2 S.C.D. 69 and by Howard C.J. in ***Hendrick vs. Saranelis*** (1940) 17 C.L.W. 87, in ***Marasinghe vs. Samarasinghe*** (1970) 73 N.L.R. 433 Alles J cited at page 449 the cases of ***Kandiah vs. Seenitamby and Moragappa vs. Casie Chetty*** as supporting the proposition that, in order to establish a servitude by prescription, there should be a well defined track in existence.

It is the position of the appellant that the defendant has an alternative route of access for her land granted by the state.

ප : 1269 ප්‍රවේශ මාර්ගය පවතිද්දීම මෙම විත්තිකරුගේ ඉඩමටත් ප්‍රවේශ විය හැකි වන පරිදි රජයෙන් පාරක් වශයෙන් කොටසක් වෙනම වෙන් කර තිබෙනවාද?

උ : ඔව්.

(Licensed Surveyor giving evidence. Vide page 80 of the brief)

Also in the case of ***Suppu Namasiwayam vs. Kanapathipillai et al*** 32 NLR 44 held:

> "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."

In the case of ***Chandrasiri vs. Wickramasinghe*** 70 NLR 15 at page 17 held:

> "The onus lies on a person who claims a right of way of necessity to show that it is necessary for him to claim this right and when there is an alternative convenient route he cannot make this claim."

However, it is an admitted fact that at the time of disputing the appellant's right and even at the time of institution of these proceedings the respondent had no title to the parcel of land claimed to have been the dominant tenement. The respondent for the first time answering a question posed by the appellant's Counsel divulged the fact that her mother got title to the dominant land after 5 years of instituting the action namely in the year 1998.

ප්‍ර : තමන්ගේ මවගේ නම තියෙන ඉඩමත් රජයේ ඉඩමක්?

උ : රජයේ ඉඩමක්. ජයභූමි ඔප්පු තිබෙනවා.

ප්‍ර : උසාවියට ඉදිරිපත් කරලා නැහැ?

උ : මාර්තු මාසේ 03 ලැබුනේ

ප්‍ර : ඒක උසාවියට ඉදිරිපත් කරන්නේ නැද්ද?

උ : එහෙමයි.

ප්‍ර : පැමිණිලිකාරියට ලැබිලා තියෙන්නේ රජයේ ඉඩමක්?

උ : එහෙමයි.

ප්‍ර : පැමිණිලිකාරියගේ ඉඩමට ස්වර්ණභූමි ඔප්පුවක් තිබෙනවා?

උ : එහෙමයි.

ප්‍ර : කොයි අවුරුද්දේ මාර්තු මාසේ 03 ඔය ජය භූමි ඔප්පුව ලැබුනේ?

උ : 98 මාර්තු.

(Defendant giving evidence at page 95 of the brief)

The learned District Judge analysed the situation in the following manner.

විත්තියට ඔවුන් හුක්ති විඳින ඉඩමට අයිතියක් නැති බවට පැමිණිල්ල සාක්ෂි විභාගයේදී අභියෝග කර ඇතත්, වර්තමානයේ විත්තිය අදාළ ඉඩමේ ජයභූමි ඔප්පු

දරන්නන් බව වී. 5 ලකුණු කරමින් තහවුරු කර ඇත. එයද පැ 1 අ පිඹුරේම පිටපත් සහිතව ඒ මත දී ඇති පමණින් එහි ඇති මාර්ග වෙන් කිරීම ඔවුන් භාවිතා කළ යුතු යැයි නියෝග කිරීම සුදුසු නැත....

(Page 15 of the judgment. Vide page 136 of the brief)

By coming to such conclusion the learned trial judge has deliberately over sighted the fact that rights of the parities to be determined as at the date of the institution of action.

In ***Velupillai vs. Subasinghe*** (1956) 58 NLR 385 Basnayake C.J. said:

> "It would appear from this passage that a person who is entitled to claim a way of necessity is the person who is the owner alone." The competence to assert this claim is inextricably tied up with ownership of a land or *praedium.*
>
> The principle admits of no doubt that a servitude cannot be granted by any other than the owner of a servient tenement, nor acquired by any other than by the person who owns the dominant tenement.
>
> The attitude has been adopted by our courts that 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."

In ***Suppa Namasivayam vs. Kanapathipillai*** (1930) 32 N.L.R. page 44 Maartensz A.J. declared:

> "As regards the right of way of necessity, I am clearly of opinion that the plaintiffs are not entitled to claim it. The plaintiffs purchased the land to the south in 1917 and had access to the

road over this land to the south. They donated the land to the south to their son just a year before the action was filed, and I cannot avoid coming to the conclusion that the deed of gift was executed with a view to claiming a way of necessity over the defendants' land."

In a case of ***Talagune v. De Livera*** (1997) 1 SLR page 253 it was held:

"There is no provision which permits a defendant to plead by way of defence, matters arising subsequent to the institution of action, the judgment must determine the rights of the parties as on the date of the institution of action."

The position was affirmed in the recent case of ***Podi Nileme vs. Shriyakanthi*** SC App 22/2013 decided on 17.01.2014.

A careful perusal of the judgment of the learned District Judge indicates that he has failed to consider the totality of evidence in reaching the judgment. The Judge has heavily relied on some comments/remarks of evidence and thus has failed to analyse the impact of the entire evidence. The learned District Judge's finding to the effect that the respondent has possessed the right of way over 10 years was erroneous. In deciding so the trial Judge has failed to address his judicial mind to the balance of probabilities.

".... මෙම කරුණු සැලකිල්ලට ගැනීමේදී අධිකරණයට පෙනී යන්නේ 1980 - 81 කාලයට පෙර සිට විත්තිය පැමිණිලිකාරියගේ ඉඩමකින් ප්‍රවේශ අයිතියක් භාවිතා කළ බව වේ. පසුව එය ඉඩම මැදින් වෙන්කළ පාරක් වී ඇත. මෙම නඩුව පවරා ඇත්තේ ඉන් වසර 13කට පමණ පසු 1993 දී වේ. ඒ අනුව වසර 10කට අධික කාලයක් විත්තිය විවාදිත ඉඩම මතින් මාර්ග අයිතියක් භාවිතා කළ බව පෙනේ..."
(Page 09 of the judgment vide page 130 of the brief)

"මේ විදියට විත්තිකරුවන් බලෙන් මගේ ඉඩම මැදින් යන්න පටන් ගත්තේ 1988 ඉඩම මැන ගල් දැම්මාට පස්සේ. එයාලාට ස්ථිර පාරක් වෙන්කර දුන්නාට පස්සේ"

(Evidence of plaintiff vide page 61 of the brief)

" .. විත්තිකාරිය බලහත්කාරයෙන් පාර කැපුවේ 1988. ඒ වෙලාවේ මම ස්වාමී පුරුෂයාට කීවා. ඊට පස්සේ මගේ ස්වාමිපුරුෂයා දියතලාව උපදිසාපතිතුමාට පැමිණිලි කළා... මට මේ ප්‍රධාන පත්‍රය ලැබෙන්න කලින් ඉඩම මනින්න ආව වෙලාවේ විත්තිකරුවන් බලහත්කාරයෙන් කැපූ පාර තිබුනේ නැහැ.. "

(Plaintiff giving evidence during cross examination vide page 64 of the brief)

Further, the learned District Judge has decided in his judgment that the appellant has not called any witness to prove that the right of way given to the respondent by the Plan has difficulties of usage.

"රජයේ මිනින්දෝරු විසින් පැ 1 අ පිඹුරේ දැක්වෙන පරිදි පාරක් විත්තිකාරියගේ ඉඩම 1988 දී සලකුණු කර ඇති බව සත්‍යකි. නමුත් මානක නන්දසේනගේ මෙන්ම විත්තියේ වන්දා පද්මිණි නම් සාක්ෂිකාරියගේ සාක්ෂිය අනුවද මෙම වෙන් කර ඇති පාර ප්‍රායෝගික දුෂ්කරතා නිසා භාවිතා කල නොහැක. මෙකී ප්‍රයෝගික දුෂ්කරතා නොමැති බව පෙන්වීමට පැමිණිල්ල කිසිදු සාක්ෂියක් කැඳවා නැත."

(Page 11 of Judgment vide page 132 of the brief)

However, by the evidence of the Surveyor testified on behalf of the respondent himself has stated to Court that though it was not so convenient the right of way given and demarcated by the AGA was in usable condition.

"පී.කේ. ධර්මදාස මිය

අධිකරණයට :

ප්‍ර : රජයෙන් වෙන්කර තිබෙන මාර්ගය භාවිතා කිරීමට අපහසුද?

සාක්ෂිකරු : පාවිච්චි කිරීම ටිකක් අපහසුයි. දැනට පාවිච්චි කරන

පාරේ යන්න පුළුවන්. කලින් කිවූ ආකාරයට පල්ලමට ගොස් නැවත නැග්මක් තිබෙනවා.

ප : රජයේ වෙන්කළ කොටසේ පාරේ පළල කොපමණද?

උ : මීටර් 4ක් පමණ පළල ඇත. විකල්ප පාර අඩි 6ක් පමණ පළල ඇත."

(Vide page 113 of the brief)

According to the judgment the learned District Judge in his judgment page 9 has stated-

"... එම ආරවුල ඉඩම මැදින් විත්තිකරුගේ පාර වෙන් කර දෙන ලෙස ඉල්ලා සිටීම බවද හැගේ. එසේ ඉල්ලන්නට ඇත්තේ ඒ වන විටද එලෙස පාර භාවිතා කල නිසා විය යුතුය. මෙම කරුණු සැලකිල්ලට ගැනීමේදී අධිකරණයට පෙනී යන්නේ 1980 - 81 කාලයට පෙර සිට විත්තිය පැමිණිලිකාරියගේ ඉඩමකින් ප්‍රවේශ අයිතියක් භාවිතා කළ බව වේ. පසුව එය ඉඩම මැදින් වෙන් කළ පාරක් වී ඇත. මෙම නඩුව පවරා ඇත්තේ ඉන් වසර 13කට පමණ පසු 1993 දී වේ. ඒ අනුව වසර 10කට අධික කාලයක් විත්තිය විවාදිත ඉඩම මතින් මාර්ග අයිතියක් භාවිතා කල බව පෙනේ ..."

(Page 09 of the Judgment – Vide page 130 of the brief)

Also the learned District Judge has failed to give due consideration to the fact that the defendants have been using indefinite ways access from lands.

"... තාවකාලිකව එම ඇල්ගම විදුහලේ විදුහල්පතිගෙන් අවසරය ඉල්ලගෙන විදුහල් භූමියෙන් ආවා ගියා ...."

(Vide page 87 of the brief)

In view of the aforesaid submissions it is clear that the learned District Judge has failed to consider totality of evidence in deciding whether or not to grant servitude right over the appellant's land.

The learned District Judge has misdirected himself in deciding the law and facts on above servitude and come to a wrong finding that the respondent has having a servitude right over the appellant's land. Therefore, I am of the opinion that the issues should have been answered in the following manner.

a. No.
b. No.
c. No.
d. No.

Therefore I set aside the judgment of the learned District Judge and according to the relief as prayed for in the petition, the appeal is allowed.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

S. DEVIKA DE L. TENNEKOON J

I agree.

JUDGE OF THE COURT OF APPEAL