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

Withanarachchige Vyting Perera

No.184,

Kirillawala,Kadawatha.

Plaintiff-Appellant-Deceased

1A.Warusapperuma Aratchige Indra Gunawardana,

181/5,

Kirillawala,Kadawatha.

Case No. CA 777/99(F)

D.C. Gampaha Case No. 28250/L

1B. Warusapperuma Aratchige Shamitha Lakshan Gunawardana,

94/2, Uthuwanbogahawaththa,

Weyangoda.

1C. Warusapperuma Aratchige Shelton Gunawardana,

184/1,

Kirillawala.

1D. Warusapperuma Aratchige Nimal Gunawardana,

No. 242/2,

Robert Gunawardana Mawatha,

Battaramulla.

Substituted Plaintiffs-Appellants

Vs.

01. W.A.Jayasena,

No.183,

Kirillawala,Kadawatha.

02. Wasantha Perera

No.183,

Kirillawala,Kadawatha.

Defendants - Respondents

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Widura Ranawake with Chinthaka Kohomban for Substituted Plaintiff Appellants

Rohan Sahabandu P.C. with Hasitha Amerasinghe for Defendants-Respondents

Written Submissions tendered on:

Substituted Plaintiff-Appellants on 5th February 2015 and 25th January 2018

Defendants-Respondents on 5th March 2018

Argued on: 29th November 2017

Decided on: 2nd April 2018

Janak De Silva J.

The Plaintiff-Appellant-Deceased (Plaintiff) claimed to be the owner of house bearing assessment no. 184 situated on the land more fully described in the 1st schedule to the plaint of which he claimed to be a co-owner. He averred that there was a right of way from the Kandy-Colombo road to the said house and land which right of way is more fully described in the 2nd schedule to the plaint. It was claimed that the said right of way was used by the Plaintiff and his predecessors uninterruptedly for over 100 years. According to the Plaintiff this right of way only adjoins the

land more fully described in the 3rd schedule to the plaint which is owned by the Defendants. However, the Plaintiff claimed that the Defendants had obstructed this right of way.

Accordingly, the Plaintiff prayed, inter alia, for a declaration that he is entitled to a widening of the said right of way to a 12 foot wide right of way due to prescription or necessity, prohibiting the Defendants from obstructing this right of way and damages of Rs. 100/= per day until he is allowed to use the said right of way.

The Defendants denied the claim of the Plaintiff and submitted that there was another road access to the Plaintiff's land which is more fully described in the 3rd schedule to the answer. They further stated that the Plaintiff had failed to make all the owners of the lands over which the Plaintiff claimed a right of way parties to the action. The Defendants prayed for a dismissal of the Plaintiff's action, a permanent injunction restraining the Plaintiff from using any other access way over the lands of the Defendants other than the access road depicted in the 3rd schedule to the answer. The learned Additional District Judge of Gampaha dismissed the action of the Plaintiff and granted the permanent injunction prayed for by the Defendants. Hence this appeal by the Plaintiff.

By the time this matter was argued the Plaintiff was dead and the Substituted Plaintiff-Appellants (Appellants) were substituted.

One matter that arose for consideration is whether the Plaintiff had made all the owners of the servient tenements parties to the action. In answering issue no. 27 in the negative and issue no. 28 in the affirmative, the learned Additional District Judge concluded that the Plaintiff's action must be dismissed due to the failure on the part of the Plaintiff to make all the owners of the servient tenements parties to the action. The learned Counsel for the Appellants submitted that this is an erroneous conclusion as there is no need to include as parties' owners of the servient tenements who did not obstruct or dispute the right of way of the Plaintiff.

Ownership of an object consists of a bundle of rights. Some of these rights can be granted to one person while another continues to be the owner. Such rights are known as *iura in re aliena*. Servitudes are examples of *iura in re aliena*. The essential characteristic of a servitude is that it limits a person's ownership or dominion. In the case of a right of way the owner of the servient tenement must allow the owner of the dominant tenement the use of the right of way without any obstruction.

In view of this limitation on ownership or dominion by a servitude, the logical question is whether the owner of the servient tenement must be made a party to an action by the owner of the dominant tenement when a right of way is claimed. This is a live question as the survey plans presented in evidence indicate that the right of way claimed by the Plaintiff traverses at least two portions of land owned by other parties who are not parties to this action. This question attains greater importance as under Roman Dutch law a person obstructed in the enjoyment of a servitude was entitled to seek his remedy by the *actio confessoria* which according to *Voet*[1] in most cases lies against the owner of the servient tenement and if there be more than one, against each one of them in solidum, because the action is not divisible in this case.

This issue is not devoid of difference of opinion. In *Fernando et al v. Dona Maria*[2] Dalton J. was of the opinion that where an action is brought to vindicate a right of way over several contiguous lands, it is necessary to join the owners of all the servient tenements over which the right of way is claimed. Dalton J. took a similar view in *Fernando et al v. Angela Fernando*[3]. A different view was taken by Drieberg J. in *Maralalingam v. Kumarapillai et al*[4] where he opined that it was not necessary that all the intervening landowners must necessarily be made parties if they have not obstructed the right of way. In *Fernando et al v. Arnolis*[5] it was held by Drieberg J. and Lyall Grant J. that in an action for declaration of a right of way all the co-owners of the servient tenement are necessary parties as such a judgement is against the land and it is therefore necessary that

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[1] Voet VIII.,5,2
[2] 32 N.L.R. 166
[3] S.C. Minutes, December 10, 1938; No. 175 C.R. Kalutara, 11,796
[4] 32 N.L.R. 225
[5] 32 N.L.R. 328

all the owners of it should be parties to the action. In *De Silva v. Nonohamy et al*[6] Macdonnel C.J., Garvin S.P.J. and Jayawardene A.J. (Daltons J. dissenting)held that where a person who claims to be entitled to a right of way which traverses a number of contiguous lands is obstructed and disturbed in the enjoyment of his rights by the owner of one of these lands, an action brought by him against the wrong doer for a declaration of his right and damages, is not badly constituted because the owners of all the intervening servient tenements are not joined as parties.

The Indian courts appear to have adopted a similar position. *Madan Mohan Chakravarthy v. Sashi Bhusan Mukherji*[7]was an action for declaration of a right of way and injunction to remove an obstruction where the appellants argued that the action should fail since all the owners of the servient tenements over which the right of way passed had not been made parties to the action. It was held that only the servient owners who had raised objection to the plaintiff's right of way need be made parties to the action. In *Lal Mohammad Biswas v. Emajuddin Biswas and Ors*[8] it was held that it would be sufficient to name as defendants the parties that are alleged to be obstructing the right of way.

Based on the above authorities the position on the need to make owners of servient tenements parties to an action pertaining to a right of way in Sri Lanka can be stated as follows:

(a) The owner or owners of the servient tenements **over which a right of way is claimed in the pleadings must always be made a party to an action seeking a declaration of a right of way over that servient tenement**

(b) The owner or owners of a servient tenement **over which a right of way merely passes need to be made a party to an action seeking a declaration of a right of way only where that party has specifically denied or objected to the existence of the plaintiff's right of way or obstructed it**

[6] 34 N.L.R. 113
[7] AIR 1915 Cal 403
[8] AIR 1964 Cal 548

The learned Counsel for the Appellant submitted that there was no need to make the owners of the servient tenements in this case a party to the action as those owners did not obstruct the right of way of the Plaintiff. I am unable to accede to this argument. The survey plans presented in evidence indicate that the right of way claimed by the Plaintiff traverses at least two portions of land owned by other parties who are not parties to this action. The appeal brief contains two applications made by way of petition and affidavit, one jointly by Mary Jayakody and V.A. Nishantha Perera and the other by Margaret Perera, to have them added as parties to the action (Appeal brief pages 310-322). The basis of these applications appears to be that they are the owners of the land situated to the western boundary of the right of way claimed by the Plaintiff and that a major portion of the said right of way goes over the land belonging to them. The record shows that the Plaintiff objected to them being added as parties and therefore the application was withdrawn later. The point is that the owners of the servient tenement in fact wanted to be added as parties to the action while claiming that the Plaintiff had fraudulently omitted to make them parties to the action. Having objected to the said application the Appellant cannot now be heard to state that they are not necessary parties as they did not cause any obstruction to the Plaintiff's right of way.

Furthermore, the evidence is that when the land on which the Plaintiff resides was partitioned in 1970, a 4-foot roadway from the Kandy-Colombo road was reserved for the occupants. This roadway adjoins the land of the Defendants and it is this roadway that the Plaintiff sought to be extended by way of a declaration to a 12-foot roadway due to prescription or necessity. Greater portion of such an extended roadway traverses over the two lots situated to the western boundary of the 4-foot roadway. Yet the owners of the said two lots were not made parties to this action.

In the aforesaid circumstances, I am of the view that they were necessary parties and that the learned Additional District Judge has correctly answered issue nos. 27 and 28.

The learned Counsel for the Appellant may have appreciated the above position when he informed Court that the Appellant was not pursuing the declaratory relief claimed in prayer (ඇ) of the amended plaint but limiting his relief to prayer (ඈ) in the amended plaint.

The learned Counsel for the Appellant relied on the decision in *Gordon Frazer Co. Ltd. v. Jean Marie Losio*[9] where the Court of Appeal held that a plaintiff can in the plaint itself as was done in that case, seek an injunction to restrain the defendants from committing an act, the commission or continuance of which would produce injury to the plaintiff, as a substantive relief and that a decree granting such a substantive relief is permissible in terms of section 217(f) of the Civil Procedure Code without a prayer for declaratory relief. While I reserve my opinion on the correctness of this statement, the facts of the two cases are different.

In this case the Plaintiff sought a declaration as to his entitlement to a right of way and thereafter sought a decree prohibiting the Defendants from obstructing the said right of way. Thus, the action of the Plaintiff is a combination of a real action, the action for declaration of the right of way, with a personal action, action preventing the Defendants from obstructing that right of way and damages. The Appellants cannot then change the character of the action in appeal by abandoning the real action.

In any event, the evidence in this case does not support even a decree prohibiting the Defendants from obstructing the said right of way claimed by the Appellants. That is because the Appellants are seeking to prohibit the Defendants obstructing the right of way depicted in plan nos. 84/1986 and 257/1985 prepared by Ratna Hettiarachchi, licensed surveyor. The evidence shows that the land depicted in the said plans includes 0.375 perches from the land of the 1st Defendant when the case of the Plaintiff is that the right of way claimed only adjoins the lands of the Defendants and does not traverse them. When a plaintiff claims that he has exercised by prescriptive user a right of way over a defined route, the obligation on the plaintiff to comply with section 41 of the Civil Procedure Code is paramount and imperative. Strict compliance with section 41 of the Civil Procedure Code is necessary as the Fiscal would be impeded in the execution of the decree/judgment if the servient tenement is not described with precision and definiteness.[10] Servitudes are onerous and the law does not favour them and it is incumbent on a person who claims a servitude to establish his claim by clear and satisfactory evidence of the strongest kind.[11]

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[9] (1984) 2 Sri.L.R. 85

[10] *David v. Gnanawathie* (2000) 2 Sri.L.R. 352

[11] Basnayake C.J. in *De Soyza v. Fonseka* (58 N.L.R. 501 at 502)

Furthermore, the principle is that a right of way of necessity cannot be granted if there is another although less convenient path along which access can be had to the public road. In answering issue nos. 8 and 25 in the negative the learned Additional District judge has concluded that there is another roadway from the land of the Plaintiff. I see no reason to disagree with this finding of fact made by the trial judge. The evidence shows that there exists a 12-foot-wide roadway to the western boundary of the Plaintiff's land which in fact had been used by the Plaintiff. In *David v. Gnanawathie*[12] Jayasuriya J. held that a way of necessity could only generally be claimed when there is no other alternative route available. A person is not entitled to claim the best and nearest outlet on the ground of necessity, if he has another, but less convenient route.

For the foregoing reasons, I see no reason to interfere with the judgement of the learned Additional District Judge of Gampaha dated 28th May 1999.

The appeal is dismissed with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal

[12] (2000) 2 Sri.L.R. 352