1965 *Present:* **T. S. Fernando, J., and Tambiah, J.**

CHANDRASIRI and another, Appellants, *and* WICKRAMASINGHE, Respondent

S. C.15/1962—D. C. Kandy, 4862/L

Servitudes—Right of way of necessity—Alternative route—Effect.

A right of way of necessity cannot be granted if there is another though less convenient path along which access can be had to the public road.

APPEAL from a judgment of the District Court, Kandy.

A. C. Gooneratne, Q.C., with *R. Gooneratne*, for Defendant-Appellant.

C. Ranganathan, Q.C., with *K. Nadarajah*, for Plaintiff-Respondent.

Cur. adv. vult.

December 15, 1965. TAMBIAH, J.—

The plaintiff, who is the owner of the northern three pelas of a land called Diddeniya Kumbure, depicted in plan No. 1903 of 12.1.1961 and marked X in the course of the proceedings, claimed a right of way over the defendant's land along the path ABCD on two causes of action, namely by right of prescriptive user and by way of necessity. After trial the

learned District Judge held that the plaintiff respondent had not prescribed to this path but granted a servitude by way of necessity. The defendant has appealed from this order.

It transpired in the course of the evidence that there is another path EF along which the plaintiff could have access to the public road. Mr. De La Motte, the surveyor who prepared the plan X, testified that the road marked EF in plan X appeared to be a well used path and that it is possible to go along this path to the abandoned brick kiln marked 2 and the well No. 3 which are situated in the plaintiff's land. The plaintiff who gave evidence stated that he had only used AB and not the path EF but he admitted under cross-examination that about 50 or 60 people use the road EF to get on to this land for the purpose of going to another well in his land which is marked No. 4 in the plan referred to earlier. He stated that seven to eight house holders come along the Village Committee path to this well using the path marked EFGH. He also admitted that this path had been in existence for at least 20 years.

The second defendant stated that about 60 to 70 people use the path EF to go to the plaintiff's land from the public road and that this was an old path. He also added that there are other paths, apart from this path claimed, to go to the plaintiff's land from the public road to the West. The plaintiff was forced to admit that there are other paths to have access to his land from the public road but he said that they were not convenient. The road EF runs through Kiri Ukku's land. The plaintiff-respondent has led no satisfactory evidence to show that he cannot use this path. When he was asked why he could not use this road he stated that the road EFGH is only limited to seven or eight houses and that he has not used it. He has led no evidence to show that he would be prevented if he attempts to use the path EF along which sixty to seventy people pass daily to go to the well of the plaintiff.

Mr. A. C. Gooneratne, Q.C., who appeared for the appellant, submitted that a right of way of necessity cannot be granted when there is another equally convenient path. It is my view that the path EF can be used by the plaintiff if he chooses to do so, to have access to the public road.

Mr. C. Ranganathan, Q.C., submitted that every person who owns a land-locked land has got the right to obtain a right of way of necessity if he proves that he has no other path which he has acquired either by grant or prescription. In support of this contention he relied on a passage from Maasdorp, which is as follows: (vide The Institutes of South African Law, Vol. II 6th Edition p. 218).

> " In addition to the above rights of passage, which have their origin, like all other servitudes, in express or implied grant, we have to consider another kind of right of way which falls under the class of servitudes of necessity, to which allusion has already been made above, namely, necessary way or way of necessity. It is based on the right which every

owner of land has to communication with the world at large outside his ground, and, with this object in view (whenever no definite path or road has been allotted to him, by way of grant or acquired for his land by prescription), to claim some means of access to the public roads of the country, without which his land would be useless to him. "

The authorities cited in support of this proposition by Maasdorp are *Kimberly Mining Board v. Stamford* [1], and a passage from Grotius (G. 2.35.7). I have examined these authorities and they do not support the contention of Mr. Ranganathan. Hall and Kellaway, in their well-known work on Servitudes, state as follows : (vide Servitudes by Hall and Kellaway p. 68) :

" Nor may a person claim a road *ex necessitate* over his neighbour's land on the ground that this property alone intervenes between his land and a public road, whereas he has the use of a road giving access to another public road, but one which passes over a number of intervening properties whose owners may in the future object to his using it. (*Lentz v. Mullin*) [2] ".

It is clear law that such an owner is not entitled to claim a right of way on the grounds of necessity, if there is another though less convenient road.

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. In *Lentz v. Mullin* [3] Graham J. P. said :

" The onus of proving a claim of this character is upon the person alleging it, and the claimant alleging it, to succeed, must show that he has no reasonable or sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry out his farming operations. If he had an alternative route to the one claimed, although such a route may be less convenient and involve a longer and more arduous journey, so long as the existing route gives reasonable access to the public road, he must be content and cannot insist upon a more direct approach over his neighbour's property. "

The plaintiff has not discharged this onus.

In this case although a feeble attempt was made by the plaintiff to show that this path EF in plan X was not allowed to be used, he has not led satisfactory evidence to show that the owner of the land over which the path passes had any serious objection if the plaintiff wanted to use it. Kiri Ukku, the owner of the land through which EF passes, has not objected to 60 to 70 people using this path. No reason has been given as to why he should object if the plaintiff also uses this path.

[1] *Buch. App. C. 129.* [2] *(1921) E. D. L. 268.*

[3] *1921 E. D. L. 268 at 270.*

The plaintiff stated that he made a complaint to the police when he was refused this path. But he has not called any police officer to prove that he made such a complaint. Further he stated that he only used the path AB. For these reasons I set aside the order of the learned District Judge granting a right of way of necessity over the path ABCD in plan X and dismiss the plaintiff's action with costs in both courts.

T. S. FERNANDO, J.—I agree.

Appeal allowed.