GODAMUNE
vs
MAGILIN NONA

COURT OF APPEAL
SALAM. J
CA 396/2006 (F)
DC COLOMBO 17237/L
MAY 26, 2008

Right of way of necessity - Purchase of a landlocked subdivided portion of a larger land - Is he entitled in law to seek a way of necessity over the adjacent land? - Can a splitting of a land impose a servitude upon the neighbours?

The plaintiff-respondent claimed a servitude consisting of a right of way based on prescription, and also access by way of necessity over a land owned by the defendant.

The trial Judge rejected the claim based on prescription but came to the conclusion that the plaintiff is entitled to use the strip of land as a way of necessity.

The defendant-appellant contended that, a person who had purchased a landlocked sub divided portion of a larger land which had a road frontage to a public road is not entitled in law to seek a way of necessity over the adjacent land, without making a claim for such a way against his vendor or the owners of the other subdivided lots of the larger land.

Held:

(1) An owner of a land, who by his own act deprives himself of access to a road is not entitled to claim a right of way of necessity over the land of another.

(2) When a piece of land is split into two or more parts, the back portion must retain its outlet over the front portion ever though nothing was said about it, because the splitting of the land cannot impose servitude upon the neighbours.

AN APPEAL from a judgment of the District Court of Colombo.

Cases referred to:-

1. *Wilhelm vs. Norton* - 1935 FDL 143 at 169
2. *Peacock vs. Hodges* - 6 Buch at 69 (Buchanam, James & EJ Reports)
3. *Suppa Navasivayam vs. Janapathipillai* 33 NLR 44
4. *Nagalingam vs. Kathirasa Pillai* - 58 NLR 371
5. *Costa vs. Rowell* - 1992 - 1 - Sri LR 5 at 9

Gamini Marapona PC with *Navin Marapona* for defendant-appellants
Nihal Jayamanne PC with Dilhan de Silva for plaintiff-respondent

April 28, 2009

ABDUL SALAM, J.

The plaintiff-respondent (plaintiff) sued the defendant-appellant (defendant) for a declaration that she is the owner of the allotment of land marked as 4 C depicted in plan No 3021 made by M. Sathyapalan, Licensed Surveyor. There was no contest as regards the ownership of the allotment of land marked as 4C and the learned district Judge quite rightly declared the plaintiff as being the owner of the said allotment.

The main dispute that arose in the case was whether the plaintiff is entitled to use lot 5 depicted in the said No 3021 as a right of way to have access to the said lot No 4. Admittedly the defendant is the owner of lot 5.

At the trial, as has been correctly observed by the learned district Judge, the plaintiff has failed to establish her claim for a servitude constituting a right of way over lot 5 and therefore rejected the plaintiff's claim based on prescription.

However, the learned district Judge came to the conclusion that the plaintiff is entitled to use the strip of land depicted

as lot 5, belonging to the defendant as a way of necessity to have access to her allotment of land marked as lot. 4. The present appeal has been preferred against the judgment of the learned district Judge dated 7th July 2000, declaring the plaintiff to be entitled to use lot 5, as the means of access to her allotments of land as a right of way of necessity.

The learned president's counsel of the plaintiff has submitted that a way of necessity *(via necessitates or noodweg)* is a right of way granted in favour of a property over an adjoining one, constituting the only means of ingress to and egress from the former property to some place with which it must of necessity have a communicating link. In this respect the learned President's Counsel has cited *Grotius 2.35.8 and 11,* where it is stated that such a right of way, may be a permanent way to enable access to public road. He has also referred me to the judgment in *Wilhem vs.Norton*[1] at 169, where it is stated that the land that do not adjoin a high way or neighbours road are entitled to the necessary access to a high way.

The learned President's Counsel has further submitted that the grant of a right of way of necessity originated in Roman law and that it can be claimed from the neighbouring owner, as of right when the circumstances warrant it *(Voet 8.3.4)* and in terms of the judgment in *Peacock Vs Hodges*[2] at 69, such claim for a way of necessity should be restricted to the actual necessity of the case. In other words the contention made on behalf of the plaintiff is that she has been rendered Landlocked and the use of the defendants land is sheer necessity to enter upon and depart from the land in question.

On the other hand, on behalf of the defendant the learned president's counsel has persistently argued that a person who had purchased a landlocked sub divided portion of a larger

land is not entitled in law to seek a way of necessity over the adjacent land, to wit; over lot 5 belonging to the defendant.

The facts as revealed in the evidence and relevant to the background of the dispute need to be elaborated. Lot 4C belonging to the plaintiff was part of a larger land known as lot 4 which in turn was a part of several amalgamation of lands known as Kebellagahawatta, Migahawatta, Siyambalagahawatta, Galtotawatta, Jambolagahawatta and Galtotewatta Kebella Gahawatta in extent 6 Acres 1 Rood and 5 perches. It was owned in common by several people including Seelawathie Perera, the immediate predecessor in title of the plaintiff. By indenture bearing No 895 dated 3rd July 1980, Atapattu Corenelis Perera, Hewagama Seelawathie Perera co-owners amicably partitioned the said land among them by mutually allotting to each party divided and defined allotments of land in lieu of their undivided rights, as per plan of partition bearing No 37638 dated 22nd May 1980 made by N. S. Sirisena, Licensed Surveyor.

As far as the present dispute is concerned, Hewagamage Seelawathie Perera was allotted lot plan No 3763 in extent 2 Roods and 35.5 perches with considerable road frontage and lot 5 being an elongated strip of land presumably serve as a means of access in extent 21.61 perches and lot 2 in extent 3 Roods and 6.33 perches to Hewagama Albert Perera. Admittedly Hewagama Albert Perera by deed No 24490 dated 3rd September 1984 attested by D.W. Ratnayaka N.P has transferred all his rights from and out of the said lots 2 and 5 to the defendant in this case.

Hewagamage Seelawathie Perera having seized and possessed of the said lot No 4 in plan No 3763 had subdivided the same into four allotments of land identified as 4A,4B,4C and 4D thus rendering lot 4A to continue to remain as the only subdivided block with total road frontage on the west and

without any right of way or road frontage or other means of access to 4B, 4C and 4D, sold and conveyed lot 4D to the plaintiff by deed No 304 dated 24th August 1986 attested by Y. G. S. Perera, N.P.

Even though by deed No 304, Seelawathie Perera had purportedly transferred the right to use lot 5 in favour of the plaintiff, admittedly she has no rights whatsoever to assign or transfer or otherwise alienate the right to use lot 5 as she had purportedly done. In the circumstances, the only question the learned district Judge considered was whether, the plaintiff is entitled to a right of way of necessity over and along lot 5 to have ingress and egress from her lot No 4 D to the nearest public way.

As has been quite correctly contended by the learned President's Counsel for the defendant the legal issue that arises in this appeal is whether a person who has bought a landlocked subdivided portion of a larger land, which had road frontage to public road, could seek a way of necessity over his neighbour's land, without making a claim for such a way against his vendor or the owners of the other subdivided lots of the larger land.

The undisputed evidence led at the trial in this case, unequivocally points to the facts that Seelawathie Perera who originally owned the entirety of lot 4 with full road frontage on the west of the said lot had by her own act in subdividing the same into four subdivided allotments has deprived herself of the right of access to lot 4B to 4D and thus made it to be surrounded entirely a landlocked block. The learned district Judge has either ignored or failed to take this matter into consideration or apply the principle of law relevant to the dispute, as has been clearly laid down in the reported judgments, although they have been submitted in the written submissions tendered by the defendant.

The simple question the trial judge ought to have consided was whether Seelawathie Perera who subdivided lot 4 into four allotments of land without providing any means of access to lots 4B to 4D could have sought a right of way of necessity over the land of her neighbour, had she not disposed of her interest in 4D. According to the fundamental principle of law, she is undoubtedly not entitled to make such a claim against her neighbour and as such her successor in title could not have acquired a greater right than what her predecessor enjoyed. As a matter of fact the plaintiff has acquired the rights what Seelawathie Perera had in respect of lot 4D and therefore the obstacle that stood in the way of the plaintiff in relation to the claim of the right of way of necessity over the defendants land would be the same as what Seelawathie Perera would have been confronted with.

In this respect it is suitable to consider the judgment in *Suppu Navasivayam vs Kanapathipillai*[3] where His Lordship Maartensz expressed the view that an owner of a land, who by his own act deprives himself of access to a road, is not entitled to claim a right of way of necessity over the land of another.

Let me also refer to the relevant passage of the judgment in the case of *Nagalingam vs Kathirasa Pillai*[4] at 371 where it was observed by Gratiaen J as follows:

"The plaintiff's claim clearly cannot be sustained as lot 4 originally formed part of a larger land which was admittedly served by the Northern lane. Upon the subdivision of the larger land, each person who received an allotment which would otherwise be landlocked-automatically became entitled under the Roman Dutch law to a right of way over the allotment or allotments adjoining the public lane. (Massdorp-Edition 7th II pp 182-183).

According to *Wilhelm Vs Norton (Supra)* when a piece of land is split into two or more portions, the back portion must retain its outlet over the front portion, even though nothing

was said about it, because the splitting of the land cannot impose servitude upon the neighbours.

In the light of the principles of law discussed above, suffice it would be to conclude with the authoritative pronouncement made by His Lordship Wijetunga, J in the case of *Costa Vs Rowell*[5] at 9 to the following effect:

> "By reason of the said subdivision, the servitude could not be imposed upon the defendant who was only a neighbour. Even if the access to the UC Road would be less convenient from the point of view of the plaintiff, she would not be entitled to claim a right of way on the ground of necessity over the neighbour's land when she has a legal right of access to the public highway over the intervening subdivisions of the larger land".

For the foregoing reasons, it is quite apparent that the learned district Judge could never have granted the plaintiff a right of way of necessity over and along lot 5 belonging to the defendant and he had absolutely no discretion or other option than to dismiss the plaintiff's action, when he was not satisfied that the plaintiff had failed to establish the claim for the right on prescription. As such, it goes without saying that the conclusion reached by the learned district Judge has in fact ended up in a miscarriage of justice and occasioned a travesty of law. Since no purpose would be served by ordering a fresh trial, I feel obliged to set aside the impugned judgment of the learned district Judge and substitute the same with the dismissal of the plaintiff's action.

It is my view that the plaintiff ought to have vindicated her right against the owner of the intervening subdivisions of lot 4 including her immediate predecessor, if she wanted to emerge as victorious.

Accordingly, I allow the appeal with costs payable by the plaintiff to the defendant fixed at Rs 5250/-

Appeal allowed