1938 *Present :* **Maartensz and Moseley JJ.**

WIJEYGOONEWARDENE *v.* DE SILVA.

40—D. C. Kandy, 48,132.

Public stand for omnibus—No right of way or user to public—Not a road or street—Motor Car Ordinance, No. 20 of 1927.

The public are not entitled to a right of way or user over a public stand provided for omnibuses under the regulations issued under the Motor Car Ordinance.

APPEAL from a judgment of the District Judge of Kandy. The facts are fully stated in the judgment.

N. Nadarajah (with him *S. W. Jayasuriya* and *U. A. Jayasundere*), for defendant, appellant.

N. E. Weerasooria (with him *E. B. Wikramanayake*), for plaintiff, respondent.

Cur. adv. vult.

May 10, 1938. MAARTENSZ J.—

The defendant appeals from a decree of the District Court of Kandy (1) declaring the plaintiffs entitled to the right of approach and access to their premises from the Railway Approach road and from their premises to the Railway Approach road ; (2) ordering the defendant to demolish the house marked No. 2 depicted in the plan X filed of record in the case ; (3) ordering the defendant to pay the plaintiffs damages at the rate of Rs. 50 per mensem " till the abatement of the nuisance by the removal of the house No. 2 " and costs.

The following is a short narrative of the events which led to the action :—

The first plaintiff was and still is the owner of premises bearing assessment Nos. 113-121, Peradeniya road, Kandy. By a notice dated December 21, 1934, he informed the Municipal Council of Kandy (hereafter referred to as the Council) that he intended to erect certain buildings on the premises Nos 113-121. These buildings were not erected.

A second notice dated March 13, 1935, was given by the first plaintiff to the Council of his intention to build a workshop and showroom in premises Nos. 113-121, Peradeniya road. The words "Peradeniya road" have been struck off and "Railway Approach road" substituted. He was granted leave to erect the workshop and showroom in premises Nos. 113-121 by the order dated June 5, 1935 (P 4) subject to the conditions stated in the order. One of the conditions was as follows: "(4) The proposed access from Peradeniya road must be cleared by dismantling the unauthorized roof of cattle gala".

The Council had inquired on March 29, 1935, "What means of access do you intend providing from Peradeniya road?" (P 7).

The first plaintiff in reply wrote letter D 6 annexing "a plan of the access road I intend providing from Peradeniya road".

At this time the land marked "Bus Park" in plan X was land owned by the Council which the first plaintiff had no right to enter. The letter P 7, the letter D 6 and condition 4, on which sanction was granted to the first plaintiff to put up a showroom, indicate to my mind that the first plaintiff intended that access to the building should be from Peradeniya road and I do not think I can accept Mrs. Wijegoonewardene's evidence that she and the first plaintiff had the idea of erecting the building in anticipation of the piece of land belonging to the Council being declared a stand for hiring cars. This evidence is also inconsistent with her evidence that originally it was intended to construct the building ten feet from the boundary between the first plaintiff's premises and the land belonging to the Council.

The building which was completed in August, 1936, is so close to the boundary that it encroaches slightly on the land belonging to the bus park. See P 12.

Mrs. Wijeygoonewardene stated that the site was altered owing to a landslip and that the Assistant Municipal Engineer had advised her and the first plaintiff as to what should be done after the landslip.

If the first plaintiff had constructed his building ten feet from the boundary he would have had less reason for complaint in this action.

By a notification in the *Government Gazette* No. 8,160 of October 25, 1935 (P 27), the Municipal land marked bus park was declared "a stand for hiring cars within the Municipality of Kandy". The north-western boundary is described as "premises Nos. 113, 113A, 114 to 121, Peradeniya road, and drain". There is a pavement round the park. Between the pavement on the north-west and the first plaintiff's premises there was a triangular bit of land which, with the sanction of the Governor granted in terms of section 153 (1) of the Municipal Councils Ordinance, 1910 (P 29) was leased to the defendant. The defendant by a notice dated July 17, 1936 (P 33) informed the Council of his intention to erect a boutique on that bit of land.

The Chairman's minute on the application included the words "I was rather troubled as to the proximity of the existing boutique to those which it is proposed to erect in the above stand" (see D 12). Permission was however granted and the defendant commenced building, and

completed the building in December, 1936, in spite of the plaintiff's written protest dated November 13, 1936, and the filing of this action on November 14, 1936.

The cause of action in the original plaint was that the erection of the defendant's building will deprive the plaintiffs of free light and air and free prospect and will deny to plaintiffs the common law right of not having their house darkened, the view affected and the approach obstructed. The plaintiffs prayed "that they be declared entitled to *servitus altius non tollendi* and the *servitus luminibus officiendi aut prospectus*, for a notice on the defendant to show cause why he should not be restrained from continuing the said building, for the demolition of the same so far as such building or parts of it that affect the plaintiffs' said rights; for continuing damages at Rs. 10 per diem".

The defendant in his answer pleaded the lease from the Council and denied the plaintiff's right to the servitudes claimed.

The plaintiffs then filed an amended plaint in which they alleged that the parcel of land on which the defendant had built "forms the bus park and is a street or road as defined under Ordinance No. 6 of 1910, and Ordinance No. 10 of 1861, with a right of access to the plaintiffs from their land and house".

The prayer was amended by the addition of a prayer for a declaration that the plaintiffs are entitled to the rights of approach and access. The claim to the servitudes prayed for was abandoned at the trial; and the only questions we have to decide in appeal are (1) whether the plaintiffs are entitled in law to free access to and from the bus park—the answer to this question depends on whether the bus park is a public street or road; (2) if the plaintiff have the right of access claimed, have they suffered any damages by reason of the building erected by the defendant. The issues relevant to the questions which fall for decision are:—

"(1) Is the piece of land, on which the defendant has built a house, a *street* or *road*, within the meaning of Ordinance No. 6 of 1910, and No. 10 of 1861?"

"(2) If so, had the plaintiffs a right of access over this piece of land to the plaintiffs' house and premises?"

"(5) What damages has the plaintiff sustained?"

"(10) (Instead of 2) Have the plaintiffs a right of access from their land and house to the said piece of land (on which the defendant has built a house) and from the bare piece of land to their house as alleged by them?"

"(11) Has the erection of the building by the defendant prevented the plaintiffs from having access to and from their building to the bare piece of land, and from it to the road?"

"(12) Have the plaintiffs a right of free light, air and free prospect for their building over the premises occupied by the defendant?"

Issues 10, 11 and 12 were suggested by defendant's Counsel instead of issue 2 suggested by the plaintiffs' Counsel, but the District Judge framed them all. There were a number of other issues which really did not arise regarding the defendant's right to construct the building by virtue of his lease from the Council.

The District Judge observes in his judgment that " the dispute between the parties to this action resolves itself into two matters. (1) Nuisance caused by an *obstructive* building; and (2) right of access from a highway ".

The District Judge held that the defendant's house was a nuisance as it impeded the free flow of light and air into the plaintiffs' house and was, owing to its situation, a source of annoyance. But those reasons would not constitute the house an actionable nuisance unless it violated the plaintiffs' legal rights. The right of servitude having been abandoned, the only right left is the right of access to and from the bus stand.

The plaintiffs could only have such a right if the bus stand was a public street or road or place.

The District Judge has held that the essential elements in all the definitions of a highway, street or road is the right of the public or part of the public to have access to some space and use it as a thoroughfare and that a bus stand therefore came within the category of a highway or street.

The phrase—the right of the public or part of the public to have access to some space—is contained in the definition of a " highway " in the Motor Car Ordinance of 1927, which is as follows :—" ' Highway ' includes every place over which the public have a right of way, or to which the public or any part of the public are granted access, and every place where the motor traffic thereon is regulated by a Police Officer ".

The respondent's Counsel relied very strongly on this definition in support of his contention that the bus stand was a highway. In my judgment a highway has been given an extended meaning for the purpose of making the Ordinance in certain circumstances applicable to places which are not highways over which the public have a right of way.

The definitions of the terms " Road " in the Road Ordinance, No. 10 of 1861, and " Street " in the Municipal Councils Ordinance, No. 6 of 1910, include places other than a road or street in the ordinary meanings of those terms. The fact that the piece of land declared as a bus stand answers to the description of those places—I do not think it does—does not constitute it a road or a street unless the public have a right of way over it or a right to use it.

Public roads in Ceylon, the term road being used in its ordinary meaning, are those which have existed from time immemorial or which have from time to time been constructed on land belonging to the Crown or acquired for the purpose and thereafter used by the public as a means of communication, *Fernando v Senerat*[1]. The bus stand is certainly not a public road in this sense as it has not existed as a road from time immemorial or constructed for a means of communication.

To constitute a parcel of land, a road or street in any other sense it must, I take it, have been used as such from time immemorial or constructed for that purpose under section 9 of the Road Ordinance, No. 10 of 1861, which enacts that it shall be lawful for " the Governor and (Executive) Council

[1] *(1932) 33 N. L. R. 346.*

to order any new road to be opened" or under section 149 (1) of the Municipal Councils Ordinance which enacts that "subject to the provisions of this Ordinance, the Council, with the sanction of the Governor in Executive Council, may lay out, construct and make new streets . . . . ".

The piece of land in question was clearly not used as a road or street in any other sense from time immemorial, nor was it opened, laid out or constructed under section 9 of the Road Ordinance or under section 149 of the Municipal Councils Ordinance. The public have therefore no right of way over it or a right to use it.

It was contended however that it became available to the public because it was declared a public stand by a notification in the *Government Gazette* of October 25, 1935 (P 27). I do not think this contention is sound. It seems to me to confuse a public stand which is part of a highway and a public stand which is not part of a highway.

Rule 2 of Part 1 of the Fourth Schedule of the Motor Car Ordinance, No. 20 of 1927, provides that "no omnibus shall be allowed to stand on any highway, except—

(*a*) On a public stand or stopping place indicated as such by a notice exhibited by the licensing authority . . . .".

This rule contemplated a part of the highway being used as a public stand or stopping place ; but the fact that a place which is not part of the highway is declared a public stand will not make it part of a road or street. Hence the notification in the *Gazette* of October 25, 1935, did not make the area of land within the boundaries set out a part of the Railway Approach road.

Moreover, the rules D 25, D 26, and D 34 regulating the establishment and use of public stands clearly negative the plaintiffs' contention that the piece of land became available to the public.

Rule 3 limits the use of public stands to hiring cars holding written permits to use them. A fee is payable for the permits.

Rule 4 makes a breach of rule 3 an offence.

The rule in exhibit D 26 excludes cars other than hiring cars from stands provided for hiring cars.

Rule 8—exhibit D 34—excludes from a public stand all persons except—

(*a*) the driver, conductor or owner of an omnibus or motor cab parked at the stand,

(*b*) a person engaged in repairing an omnibus or cab,

(*c*) a *bona fide* passenger travelling or intending to travel by any omnibus or motor cab in the stand.

The plaintiffs have, while these rules are in force, no rights in the stand unless they can come under rule 8.

The plaintiffs do not claim that their right to enter the stand under rule 8 has been affected by the defendant's house. Their action therefore

fails on the ground that the plaintiffs have not established that they have a right of way over or the right to use the piece of land described as a bus park in plan X.

I think the plaintiffs' action would have failed in any event on the ground that they have not proved their damages. The first plaintiff, by an indenture P 11, dated July 16, 1936, leased the house built by him to the second plaintiff for a term of three years from September 1, 1936, at a rental of Rs. 50 a month. The second plaintiff stopped paying rent after the defendant's house was built, and I think the District Judge assessed the damages at Rs. 50 a month on this basis.

The first plaintiff, so far as I can see, is still entitled to his rent from the second plaintiff, at least, it has not been proved that he is not, and he cannot claim that he has suffered any damage. The second plaintiff has not proved that he has suffered any damage.

The first plaintiff has not given evidence of any damage suffered by him. His wife said : (*a*) " The defendant's building cuts off the view of our building up to about three fourths of its height "; (*b*) that the building was to serve for the sale of motor accessories and a motor repair shop and the defendant's building shut out from view the showroom ; (c) " my serious complaint is that access to the Railway Approach road and the bus park has been cut off ".

The plaintiff has not proved that he has suffered any damages as the result of the obstruction of the view of the park and the showroom.

No doubt the plaintiff could not in the circumstances prove any actual loss, but the loss beyond the evidence that the second plaintiff refused to pay his rent is not estimated.

The complaint that access to the park has been cut off is not well founded. If the plaintiff had built his house 10 feet from the boundary, there would have been no necessity to walk along a drain on emerging from the front as stated by the Surveyor, Mr. Schokman. As the buildings stands at present, " to the west of house (2) for the space of about one chain it is possible to step out from the plaintiff's land on to the white space shown as pavement " (plan X)—I quote from the evidence of Mr. Schokman.

The plaintiff is certainly unfortunate. By the declaration that the Municipal land was to be a stand for hiring cars, he had reason to hope that he would find customers for his motor repair shop and motor accessories among the drivers, conductors and owners of buses using the stand. I do not suppose he would have complained so much if the defendant had constructed his building for some other purpose than that of selling motor accessories. He is certainly better situated to attract customers, but the customers can reach plaintiff's shop quite easily if they wish to do so. The loss plaintiff is likely to sustain results not from the obstruction to the road or street but from the presence of a rival trader in a better situation. The damage therefore does not flow from the obstruction if any to the road street—if the bus stand or park is a road or street. As regards plaintiff's access to the bus stand, there is no estimate of the

damage resulting from the inconvenience mentioned by the surveyor. As far as I can see, it is so slight as to be incapable of estimation in terms of money.

The appeal must be allowed and plaintiff's action dismissed with costs in both Courts.

MOSELEY J.— I agree.

Appeal allowed.