1975 *Present* **:Rajaratnam, J. Weeraratne, J., and Sharvananda, J.**

M. H. WIJESENA and another, Appellants, *and*
D. C. FERNANDO, Respondent

S. C. 242/69 (F)—D. C. Kuliyapitiya, 964/L

Servitude—Right of cartway by prescriptive user—Alternatively, right of cartway of necessity—Effect of Partition Decree on portion of right of cartway—Principle of indivisibility of servitude.

The plaintiff instituted in 1963 an action for a declaration that she has prescribed to a right of cartway depicted as A, B, C, D, E, F, G, H, in Plan 'X'. She claimed in the alternative to the right of cartway as a way of necessity. The trial judge rightly held that there was evidence of prescriptive user by the plaintiff from 1942 onwards. There was also evidence that there is no road other than the one shown in Plan 'X' to get to the V. C. road from the Plaintiff's land.

That portion of the cartway A—B was the subject matter of a partition action in which final partition decree was entered in 1957 allotting that strip of land to the defendant-appellants and some others. It was contended for the appellants that on the entering of the partition decree in 1957 the plaintiff not only lost the right of cartway A—B acquired by prescriptive user, but also the right of cartway over the balance portion B, C, D, E, F, G, H as the servitude is indivisible by nature and cannot be acquired or lost in part only.

Held.—Although the partition decree extinguished in law that portion of the cartway A—B, yet once a praedial servitude has been acquired it is not lost or extinguished by the impact of a partition decree over a portion of it; the servitude over the balance portion is not destroyed or lost but lies dormant and is revived by the re-creation of the servitude over the lost portion. Once a way of necessity is granted over A—B (in the circumstances of this case the plaintiff should be granted a cartway of necessity over A—B) the servitude over B, C, D, E, F, G, H is revived and is operative

Per Rajaratnam, J.— " ..... it is contrary to the principles of the Roman Dutch Law to say that the plaintiffs lost their servitude in part only. A servitude of a right of way is a single servitude..... "

APPEAL from a judgment of the District Court, Kuliyapitiya.

H. W. Jayawardena, with *P. A. D. Samerasekera* and *I. Mohamed* for the 1st and 2nd defendants-appellants.

E. A. G. de Silva for the plaintiff-respondent.

Cur. adv. vult.

September 9, 1975. RAJARATNAM, J.—

I have read the reasons given by my brother for the dismissal of this appeal with costs in both Courts payable to the 1st plaintiff-respondent with which I agree.

The simple question in this case is whether a cartway A-B-C-D E F G H as shown in Plan X and which on the findings of the trial Judge has been usedwithout interruption from 1942 and was a prescribed servitude enjoyed by the plaintiffs, was lost after a Partition Decree 2D2 in 1957 whereby the defendants obtained title to the land covering A-B by reason of s.48 (1) of the Partition Act freeing the title from " all encumbrances whatsoever ".

To answer this question, the principle enunciated in Voet that " praedial servitudes are indivisible by nature and therefore cannot be acquired or lost inpart only " is of great importance. On the findings, the cartway continued to be used even after 1957, although the portion A-B was used only for 6 years after the Partition Decree. It is not necessary for me to consider whether the factual continued user of the portion A-B before the Partition Decree could be ignored when the user of the portion A-B continued in fact from 1942 without interruption till it was disputed in 1963. The continuation of the factual user, when it was open to the defendants to assert their unencumbered title may be relevant as the whole doctrine of prescription, as Voet says, is based on negligence.

Under these circumstances it is contrary to the principles of the Roman Dutch Law to say that the plaintiffs lost their servitude " in part only ". A servitude of a right of way is a single servitude and as Voet in Book VIII Title 6-12 puts it

> " Idemque est, si per plures fundos sibi contiguos quis habuerit eundi jus, et tempore statute per unum tantum ierit, nam et per reliquos eundi ius ei servatur "

that is to say as we find in Maasdorp " Thus a servitude of right of way is a single servitude, if it is in favour of one dominant tenement, though it may run across several servient properties, so much so that if the right of way has been used over one of the servient tenements but not over the others the servitude will be preserved even with respect to those over which for the period of prescription it has not been used "—Maasdorp 8th Edt. II, p. 175 (Juta).

The appeal must therefore be dismissed with costs in both Courts payable to the 1st plaintiff-respondent.

SHARVANANDA, J.—

The 1st plaintiff-respondent instituted this action for a declaration that she has prescribed to a right of cartway depicted as A to H in Plan No. 2001 dated 20.6.64 and made by Vernon Perera, Licensed Surveyor, and marked X. She claimed, in the

alternative, that she be declared entitled to the right of cart-way and passage 12 feet wide as a way of necessity over the defendants' land to the V.C. road on the west.

After trial, the District Judge accepted the evidence of the 1st plaintiff and her witnesses on the question of user of the said cartway shown as A to H in the aforesaid Plan X and held that the plaintiff had prescribed to the said cartroad 12 feet wide. According to the plaintiff, she had purchased the land called Narangahahena by deed No. 2621 of 1942 (P1), and to get to that land from the Ennoruwa-Kithalawa Road, she had to go across Waduwakumburawatta, Kokkanduwawawatta and Badalgewatta, the lands of the defendants. She has been residing in that land from the time of the purchase. She and her husband had put up a house and a carpentry shed where her husband had been carrying on his trade of cart-making. According to her, carts had been brought to her house along this road A to H for repairs and new carts were taken along this road. Her husband had been plying this trade from 1942. From the plaintiff's land to get to the V.C. road, there is no other road other than the one shown in Plan X. The evidence of prescriptive user by plaintiff is over-whelming and I see no reason to reverse the finding of the Court below on this issue whether the plaintiff has been using the cartway A to H in Plan X from 1942 onwards. The District Judge has answered that issue in the plaintiff's favour.

The defendants-appellants admit that there is a cartroad going through the land shown as BCDEFG, but state that it has been provided for their private use and they deny the plaintiff's user of the said cartway. Mr. Jayawardena submitted that this cartway BCDEFG cuts through the 1st and 2nd defendants' land of Waduwakumburawatta and Kokkanduwawawatta and is gravely burdensome to the servient tenement. But the fact is that whoever has been using that cartway, it is a well-established cartway which, according to the plaintiff and her witnesses, has been in existence for several years and had been serving her house.

Mr. Jayawardena raised an interesting argument in relation to that portion of the cartroad AB in Plan X. He pointed out that the cartway AB was part of the land Agampitiyahena which was the subject matter of partition action No. 6170 of the District Court of Kurunegala, and that in the final partition decree (2D2) entered on 23.7.57, Lot C in the final partition plan No. 2752 (2D3), which is a narrow strip of land over which the cartway AB in Plan X runs, was allotted to his clients and other plaintiffs in that case. He relevantly submitted

that on the entering of the partition decree 2D2 in 1957, the right of cartway which the present plaintiff is alleged to have acquired over Lot C by prescriptive user had got wiped out and fresh adverse user from 1957, the date of entering of the partition decree was necessary for the plaintiff to establish a right of cartway not only over AB, but also over BCDEFGH in Plan X. In my view, there is substance in his argument as far as the cartway AB is concerned; for the partition decree 2D2 extinguished, in law, all rights and servitudes not specifically provided for in such decree; therefore, though the plaintiff continued to use the cartway AB undisturbed through the period of the partition proceedings and thereafter, in law she lost that servitude on the entering of the partition decree 2D2 and hence there was in law, though not in fact, a break in the nature of her user of the cartway AB. She had to re-acquire her right afresh after 1957. Since this action was filed in 1963, technically, she cannot base her right to the use of AB on prescriptive possession. Mr. Jayawardena further submitted that as the plaintiff had, by operation of the partition decree, lost her right of cartway over the portion AB, she lost, the right of cartway over the balance portion BCDEFGH, as the servitude was one and indivisible. He relied on *Fernando v. Fernando* (31 N.L.R. 107) in support of his proposition. In that case the plaintiff claimed by prescription a right of way from his land across three lands owned severally by the defendants. That claim was resisted on the ground that a partition decree entered in respect of one of the servient tenements did not conserve the right of way over that tenement. It was held in appeal that the partition decree extinguished the servitude over that particular tenement, and that since one of the lands over which the servitude was claimed, namely, the land adjoining the road, was separated from the alleged dominant tenement by a piece of land which did not own the same servitude, the plaintiff had therefore failed to establish the servitude he claimed, namely, the right of way, from his land to the road. It was said that the right of way as claimed therefore had a missing link, his alleged right over that section having gone. It is to be noted that the plaintiff's claim in that case to a way of necessity was refused as he, unlike the plaintiff in the present case, had other means of approach. A legalistic but unrealistic view had been taken of the facts in that case. Dalton J. could not appreciate as to why the plaintiff did not put forward any claim for a right of way in the partition action. He queried: "If the evidence led for the plaintiff is to be believed, his right of way over this property and the others had been in continuance and uninterrupted use for over ten years prior to that, but no claim was then put forward..... but if the way was being used by him as a cart-road regularly

at that time, it is difficult to think that he was not fully aware of the action". A Judge more familiar with local conditions and the ways of our peasantry will not share that difficulty of appreciation.

According to the evidence that has been accepted by the trial Court, the plaintiff has been using this right of cartway ABCDEFGH from 1942 adversely to all owners of the intervening servient tenements of the defendants from 1942 up to 16th June, 1963, when, for the first time, the 1st and 2nd defendants-appellants obstructed the plaintiff. This evidence warranted the Distrct Judge holding that the plaintiff had prescribed to the said cartway and was unaware of the partition proceedings in D.C. Kurunegala 6170. According to the submission of Counsel for the 1st and 2nd defendants-appellants, the partition decree supervened to existinguish in law a part of that servitude. Maasdorp, on the Law of Things, Vol. II (5th Ed.) at page 191, states that "praedial servitudes are indivisible in their nature and can therefore not be acquired or exercised or lost in part only". This statement is based on Voet. Voet had not considered the situation created by our Partition Act or Ordinance whereby a part of the praedial servitude of a cartway can get extinguished by operation of law. Such an extinguishment is an artificial imposition. But, both propositions can be reconciled. Though, as a result of the partition decree, that portion of the cartway AB might have, in law, got extinguished, yet, once a praedial servitude has been acquired, it is not lost or extinguished by the impact of a partition decree over a portion of it; the servitude over the balance portion is not destroyed or lost but lies dormant and is revived by the re-creation of the servitude over the lost portion. Once a way of necessity is granted over AB, the servitude over BCDEFGH is revived and is operative. It is to be noted that in the 31 N.L.R. 107 case, Dalton J. recognized the possibility of re-creation of the entire servitude after the extinction as a result of the partition decree, had there been a notarial grant of servitude over that section covered by the partition decree. Once the missing link is re-provided, the entire servitude is revived. The partition decree 2D3 has not supervened to destroy the servitude over the remaining cartway BCDEFGH. In my view, the servitude of cartway over BCDEFGH in Plan X, which had been acquired by the plaintiff by prescriptive user, survived the entering of the partition decree. This decree had the limited effect of extinguishing the servitude over the portion AB only. The plaintiff remains entitled to that part BCDEFGH which was a substantial portion of the cartway which had been acquired by prescriptive user from 1942.

It is to be noted that though the partition decree was entered in 1957, the plaintiff continued her adverse use of the entire cartway ABCDEFGH until June, 1963, peacefully and without any obstruction from the defendants-appellants. This action was instituted in July, 1963.

In the circumstances, in my view, the plaintiff should be granted a cartway of necessity over AB in Plan X which was extinguished by the partition decree 2D3 of 1957. If not for the statutory consequence of the partition decree 2D3, the plaintiff would not have lost her right of cartway over AB. (It is is to be noted that the defendants-appellants were plaintiffs in the partition action No. 6170 and they failed to disclose the present plaintiff's right of cartway over AB.) In the circumstances, the defendants-appellants are not entitled to any compensation for the grant of way of necessity over AB in Plan X. The grant of cartway of necessity over AB recreates the servitude over AB and revives the servitude over BCDEFGH. The plaintiff is thus declared entitled to the use of cartway over ABCDEFGH in Plan X. Counsel for the appellants stated that the cartway over BCDEF affects them prejudically as the route divides the lands over which it runs into two halves. The fact that such a route had existed from 1942 militates against such complaint. But, if they feel justified in their complaint, it is open to them to offer to the 1st plaintiff-respondent a deviation of the route, provided that the proposed alternative route is equally convenient and serviceable to the 1st plaintiff-respondent as owner of the dominant tenement Narangahahena described in the schedule to the plaint—*Marasinghe v. Samarasinghe* (73 *N.L.R.* 433). But so far they have failed to do so so.

For the reasons set out above, the appeal is dismissed with costs in both Courts payable to the 1st plaintiff-respondent.

WEERARATNE, J.—I agree.

Appeal dismissed.