MERCIN
v.
EDWIN AND OTHERS

COURT OF APPEAL

ATUKORALE, J. (PRESIDENT) AND G. P. S. DE SILVA, J.

C.A. (S.C.) No. 974/75 (F)–D.C. GALLE 8174/ L.

FEBRUARY 9 AND 10, 1984.

Right of way– Prescriptive user– Does the mere enjoyment of the right amount to an adverse user ?

The plaintiff filed action claiming a right of way from his land over two lands belonging to the defendants, by virtue of prescriptive user and also as a way of necessity. The defendants denied the existence of the alleged right of way and averred that the plaintiff's land was bounded on the South by the V. C. road from which he could obtain access to his land.

The Magistrate dismissed the plaintiff's action on the ground that he had failed to establish that he had prescribed to the right claimed and that even if he had used the right of way claimed by him he had done so with the leave and licence of the 1st defendant and further that he had access to the V. C. road.

Held–

In the circumstances of this case once the plaintiff established physical user of the right of way for the prescriptive period, he was entitled to succeed on the issue of prescriptive user. The mere enjoyment of the right is proof of adverse user. On the evidence the plaintiff has proved adverse user of the right of way claimed by him for over the prescriptive period, and is therefore entitled to the right of way claimed and to be restored to the possession thereof.

Case referred to

(1) *Head v. Toit S.A.L.R. 1932 C.P.D. 287.*

APPEAL from the District Court, Galle.

P. A. D. Samarasekera with *Nihal Jayawardena* and *G. L. Geethananda* for the plaintiff–appellant.

N. Devendra for the 1st and 2nd defendants-respondents.

Cur. adv. vult.

March 22, 1984.

ATUKORALE, J. (President)

The plaintiff is the elder brother of the 1st defendant. The 2nd defendant is the son of the 1st defendant. The plaintiff and the 3rd defendant are the owners in equal shares of the land called Egodawatte *alias* Godaudawatta depicted as lot C in Final Plan marked 1D1. The plaintiff filed this action against the 1st and 2nd defendants claiming a right of way from his land over two lands belonging to the 1st and 2nd defendants (hereinafter referred to as the defendants) called Mahahenawatta and Kurunduhena to the Polpagoda-Hiyare V.C. road forming the northern boundary of the defendants' lands. This right of way claimed by the plaintiff is depicted as lots 1, 2 and 3 in surveyor Guruge's Plan marked P1 prepared for the purpose of this action. According to P1 the right of way, as one proceeds southwards from the V.C. road, runs firstly through Mahahenawatta and then through Kurunduhena (both belonging to the defendants) and then enters the plaintiff's land. It is then shown to proceed through the plaintiff's land towards the south-west. The evidence seems to be that after leaving the plaintiff's land the path goes over an 'edanda' and rejoins the same V.C. road on the south-west about 1/4th of a mile away from the plaintiff's land. The distance from the V.C. road on the north to the plaintiff's land along lots 1, 2 and 3 is about 1/8th of a mile. According to the plaintiff this right of way was about 6 feet in width. He claimed it both by virtue of prescriptive user and also as a way of necessity.

The defendants denied the existence of the alleged right of way over their lands. They also averred that the plaintiff's land was bounded on the south by the V.C. road from which he could obtain access to his land. They further maintained that the plaintiff had always used the path leading from the V.C. road on the south-west to gain access to his land and that he never used the right of way depicted as lots 1,2, and 3 in Plan P1

After hearing the evidence the learned Magistrate dismissed the plaintiff's action. He held that the plaintiff had failed to establish that he had prescribed to the right of way claimed by him. He also held that the plaintiff had access to the V.C. road along the path to the

south-west of his land, that he had used that path and that even if the plaintiff had used the right of way claimed by him he had done so with the leave and licence of his younger brother, the 1st defendant. The learned Magistrate further held that although the plaintiff's land was bounded on the south by the V.C. road yet owing to the steep embankment on that side no access was possible therefrom to enter his land. This latter finding of the learned Magistrate was not challenged before us and must be accepted as correct. In the result the learned Magistrate held against the plaintiff both on the question of prescriptive user as well as a way of necessity. The present appeal is from this judgment.

Learned counsel for the plaintiff has before us strenuously challenged the finding of the learned Magistrate on the issue of prescriptive user. He submitted that the learned Magistrate had misdirected himself on several important items of evidence in the case and thereby drawn certain conclusions adverse to the plaintiff which are irrational and untenable. These misdirections arose, according to learned counsel, as a result of the failure of the learned Magistrate to make a careful and impartial evaluation of the evidence as a whole. He contended that a proper analysis of the evidence establishes that the plaintiff has prescribed to the right of way claimed by him. Learned counsel for the plaintiff made no submissions to us on the alternative claim for a way of necessity.

A perusal of the judgment and a close scrutiny of the evidence, both oral and documentary, show that this submission of learned counsel for the plaintiff is entitled to succeed. The judgment is founded on certain inferences adverse to the plaintiff's case. These inferences do not appear to be borne out by the evidence in the case. For instance the learned Megistrate finds on the evidence of surveyor Guruge and his report to court that the path leading from the plaintiff's land over lot B to the V.C. road on the south-west is one that is available to the plaintiff to gain access to the V.C. road without any hindrance and as such it was not necessary for Guruge to have surveyed the same. Guruge's evidence, however, was that when he attempted to survey that path and did so close to the 'edanda' the owners of that land protested denying the existence of a right of way in that direction. It is no doubt true, as pointed out by learned counsel for the defendants, that Guruge in his report to court makes no reference to this protest. But from this fact one cannot reasonably infer that there was no

objection to the user of that path and that it was freely available to the plaintiff. It is clear that the commission issued to Guruge authorised him to survey only the right of way which the plaintiff claimed was obstructed by the defendants, namely lots 1, 2 and 3 in his Plan P1 and no other. There was thus at the stage of his survey no necessity for Guruge to have referred to the objection of the landowners in his report. Accepting the evidence of Guruge as the learned Magistrate did, it becomes clear that the Magistrate erred in reaching the conclusion that the plaintiff had the free and unobstructed user of the path to the south-west of his land. Similarly upon an examination of the Final Partition Plan 1D1 of 1941 upon which the entire land Egodawatte was partitioned and the plaintiff was alloted lot C, the learned Magistrate states that there is no indication whatsoever of the existence of the right of way leading to the plaintiff's house from the V.C. road on the north. He then proceeds to hold that the absence of any such indication in 1D1 establishes that there was at that time no definite right of way from that direction as claimed by the plaintiff. The learned Magistrate seems to have placed much reliance on this fact to discredit the plaintiff's version. In my opinion, however, he is wrong in drawing such an inference against the plaintiff. For Plan 1D1 makes it equally clear that the path to the south-west of lot C which the defendants asserted was the one used by the plaintiff at the time is itself not depicted therein, even though its entire length ran through the corpus partitioned in that case. Moreover, as pointed out by learned counsel for the defendants, there was no legal requirement under the old Partition Ordinance to depict any existing paths or roadways in partition plans. In any event by far the greater length of the right of way claimed by the plaintiff would have fallen outside the corpus in Plan 1D1 and as such could not possibly have been depicted therein. Hence the learned Magistrate was not justified in drawing an inference adverse to the plaintiff from the absence of the right of way claimed by him in Plan 1D1. Another factor which has weighed heavily in the mind of the learned Magistrate in rejecting the plaintiff's claim is the alleged failure of the plaintiff to make a prompt complaint to any person or authority when his right of way was obstructed by the defendants. The learned Magistrate takes the view that the obstruction was, according to the plaintiff, in 1970 but the plaintiff took no action till the present action was filed in 1973. There is little doubt that according to the plaintiff the dispute arose in July 1970

when the defendants cut drains across the right of way and started planting tea. He stated that he complained to the Police who inquired into his complaint and that later he complained to the Conciliation Board. The 1st defendant in the course of his evidence admitted that a police officer (Ratnayake) came to the land in 1970 several times and that he told him that he could not give the right of way claimed by the plaintiff. He also accepted the fact that a member of the Conciliation Board came to inspect the land upon the plaintiff's complaint. Learned counsel for the defendants submitted that this evidence of the 1st defendant was in reference to what transpired after the complaint 1D3 was made by his son Ratnapala(the 2nd defendant) against the plaintiff and not upon the alleged complaint of the plaintiff. But I am unable to accept the submission of learned counsel for the defendants. 1D3 is a complaint dated 14.6.1971 and not in 1970 when the police officer admittedly came to the land for inquiry. Further it was never suggested to the plaintiff during cross-examination that the Police inquiry was in consequence of the complaint 1D3 in 1971 and not as a result of the plaintiff's complaint in 1970. I am of the opinion that the learned Magistrate has misdirected himself on this point.

During the course of his judgment the learned Magistrate states that even if the plaintiff did use a right of way over the defendants' lands he did so with the leave and licence of the 1st defendant, his younger brother and as such he has not proved prescriptive user. In this respect it is necessary to note that it was not the defendants' case that the plaintiff used the right of way with the permission of the 1st defendant. Their position was that no right of way was ever used by the plaintiff over their lands. The pleadings and issues make this position very clear. As the defendants totally denied any user by the plaintiff, no question of permissive user arose for determination by the learned Magistrate. The learned Magistrate seems to have entertained doubts about the veracity of the defendants' complete denial of any user by the plaintiff. But for the fact that the learned Magistrate misdirected himself on the matters set out by me above, there was in my view ample evidence to substantiate a finding in the plaintiff's favour on the issue of prescription. I am also in agreement with the submission of learned counsel for the plaintiff that in the circumstances of this case once the plaintiff established physical user of the right of way for the prescriptive period he was entitled to succeed on the issue of prescriptive user. In *Head v. Toit (1)* it was

urged that the plaintiff in a claim for a servitude based on prescription must prove not only user for the prescriptive period but must also establish that the user was adverse for which purpose the plaintiff must show positively that the user was not with the permission of the owner of the servient tenement. This contention was rejected by Sutton, J. who adopted the following statement of the law laid down by Maasdorp in Institutes of Cape Law (Vol: 1, p. 226) :

"In the case of an affirmative servitude . . . . .the mere enjoyment of the right in question is in itself an adverse act."

I hold that on the facts in the instant case the plaintiff has proved adverse user of the right of way claimed by him for over the prescriptive period.

The only other matter that remains for my consideration is the finding of the learned Magistrate that the right of way runs over a part of Crown land and hence the plaintiff has no right to claim this right without making the Crown a party to the action. Suffice it to say that the learned Magistrate's finding on this matter is not one that arose for his decision. The defendants admitted and in fact claimed that they were the owners of the two lands constituting the servient tenements. The learned Magistrate therefore clearly erred in holding that the Crown was the owner of the second land over which the right of way passed.

For the above reasons I allow the appeal. The judgment of the learned Magistrate is set aside. The plaintiff as a co-owner of lot C in Plan 1D1 is declared entitled to a right of way four feet in width over the two lands of the defendants along the track depicted as lots 1, 2 and 3 in surveyor Guruge's Plan P1 by virtue of prescriptive user. He is also entitled to be restored to possession thereof. The 1st and 2nd defendants are directed to remove the obstruction to the said right of way. The plaintiff will be entitled to nominal damages fixed at Rs. 25.00 per annum from July, 1970 until he is restored to possession. He will be entitled to costs of the lower court and a sum of Rs. 525.00 as costs of this appeal. The damages and costs are payable by the 1st and 2nd defendants.

G. P. S. DE SILVA, J.–I agree.

Appeal allowed.