CARLO PERERA
v.
LAKSHMAN PERERA

COURT OF APPEAL,
S.N. SILVA, J.,
C.A. APPLICATION No. 125/85,
D.C. NEGOMBO No. 2388/L,
JUNE 13 AND 22, 1990.

Servitude of Right of Way – Settlement – Inspection by Court – Order by Court after inspection – Delay in seeking revision.

A five month delay in seeking revision of an order made by Court after inspection will not be treated as undue delay.

As it was agreed that the dispute as to the right of way was to be disposed of by an order of Court made after inspection, the District Judge had full power to decide on the matter upon his observations and on a consideration of the matters that were urged by the parties

at the time of the inspection. There was no necessity, as the District Judge did in this case, to afford the parties an opportunity to make submissions five months thereafter and to make his order after almost six months of the date of inspection.

The District Judge's order is imprecise and is lacking in clarity. However, it is clear that the District Judge had rejected the defence contention of the existence of an alternative road and ordered that the plaintiffs were entitled on payment of compensation, to a right of way 4 feet in width, over the land of the defendant-petitioners. The order is conflicting as to the location of the road. This portion is severable from the other findings and is set aside in revision. The correct course is for the present District Judge, as the Judge who made the order has ceased to be a judicial officer, to inspect the land afresh and determine the matter if necessary by issuing a Commission to the Surveyor.

APPLICATION for revision of the order of the District Judge of Negombo.

N. R. M. Daluwatta, P.C. for defendant-petitioner.

Mahanama de Silva for plaintiff-respondents.

Cur. adv vult.

July 27, 1990

S. N. SILVA, J.

The 1st and 2nd Defendant-Petitioners have filed this application in Revision against the order of the learned District Judge of Negombo made on 29.08.1984 in the above action. The said order was made upon the consent of parties pursuant to an inspection made by the learned District Judge.

The Plaintiff-Respondents instituted this action in the District Court claiming a right of way over the lands of the Defendant-Petitioners. The right of way that is claimed is depicted in Plan No. 510 dated 28.10.1979 made by G. O. R. Silva, Licenced Surveyor and marked 'P5' in this application. It consists of two parts, the first part is coloured in gray and the second is coloured in yellow. It appears that the 3rd to 6th Defendants owned lands over which the first part of the right of way is located. It is not disputed that there is in fact a road which is used by all parties over these lands. These Defendants did not appear at the trial and contest the claim of the Plaintiff-Respondents. The dispute really is with the two Defendant-Petitioners over whose land the second part of the right of way (marked in yellow) is claimed.

The Plaintiff-Respondents claimed that they were entitled to this right of way by prescriptive user, over a period of 45 years or, in the alternative, as of necessity. The Defendant-Petitioners in their answer denied that the Plaintiff-Respondents ever used a right of way over their land. They further stated that the gate leading to their land as indicated in Plan marked 'P 5' is kept closed.

That the Plaintiff-Respondents did not have access to their land situated to the East of the land of the Defendant-Petitioners over the land of the Defendant-Petitioners.

When the case came up for trial on 3.2.1984 a settlement was entered into by the Plaintiff-Respondents and the Defendant-Petitioners. In terms of the settlement the learned District Judge was empowered to inspect the land in question and to decide whether the Plaintiff-Respondents have an alternative road to their land and if not to decide on a suitable road to which the Plaintiff-Respondents will be entitled in the action. Pursuant to this settlement the learned Trial Judge inspected the land on the same day in the presence of the parties. The order was made thereafter, upon such inspection. By the said order the learned Trial Judge held that there is no alternative road to the Plaintiff-Respondents to reach their land from the public road and that the alternative road shown by the Defendant-Petitioners goes partly over some other lands the owners of which are not parties to the action. The learned Trial Judge also observed that the land of the Plaintiff-Respondents is uncultivated and overgrown with jungle. In these circumstances he held that a strip of land 4 feet in width over the Defendant-Petitioners' land would be adequate for the Plaintiff-Respondents. In the order learned District Judge sought to identify this strip of land with reference to the Plan marked 'P 5'. He further ordered that the Plaintiff-Respondents should pay the assessed value of this strip of land to the Defendant-Petitioners.

On 18.9.1984 the Defendant-Petitioners made an application to vary the said order. Thereafter on 31.1.1985 they made this application to have the said order set aside.

At the hearing of this application learned Counsel for the Plaintiff-Respondents raised the following preliminary objections :

The first objections is that there has been undue delay on the part of the Defendant-Petitioners in invoking the jurisdiction of this Court. It was

submitted that the application should be dismissed in limine on this ground. As noted above, the order against which this application has been filed was made on 29.8.1984. The Defendant-Petitioners sought to explain the delay partly on the basis that they had to obtain a certified copy of the proceedings from the District Court. It is noted that the certified copy was obtained on 17.12.1984. This application was thereafter filed on 31.1.1985. Thus it is seen that the application has been filed within a period of five months of the order that is challenged. It had been filed within six weeks of the certified copy being obtained. Counsel for the Defendant-Petitioners has not cited any precedent in which an application has been dismissed because it was filed within a period of five months of the impugned order. To my mind there has been no undue delay in filing this application. The Rules require that a certified copy of the proceedings be filed together with an application in revision. It is seen from the record that there has been some delay in obtaining the certified copy. The Defendant-Petitioners cannot be faulted for this matter. I accordingly see no merit in this ground of objection.

The second preliminary objection is that the Defendant-Petitioners have failed to disclose material particulars in their pleadings filed in this Court and that they are lacking in *uberrima fides*.. According to the submission of Counsel, the Defendant-Petitioners should have averred in their pleadings that the learned District Judge inspected the land on 3.2.1984 and thereafter afforded the parties an opportunity to make submissions on 10.7.1984. The proceedings of 10.7.1984 reveal that there was no appearance for the Defendant-Petitioners on that day. The submission is that the Defendant-Petitioners should have drawn the attention of Court to this lapse on their part. Learned President's Counsel for the Defendant-Petitioners submitted that an entire copy of the proceedings in the District Court together with the proceedings of 10.7.1984 have been filed by the Defendant-Petitioners. It was submitted that in these circumstances it was not incumbent on the Defendant-Petitioners to specifically refer to the proceedings of 10.7.1984 in their petition filed in this Court. Learned President's Counsel submitted that there has been no attempt to mislead this Court as regards the proceedings had in the District Court.

It is seen that according to the settlement that was entered into on 3.2.1984 the learned District Judge was empowered by the parties to make an order after an inspection of the land. Hence there was really no occasion to call for further submissions. The learned District Judge has

the full power to decide on this matter upon his observations and on a cosideration of the matters that were urged by the parties at the time of the inspection. These matters had in fact been recorded. For some reason, without making an order immediately after the inspection, the learned District Judge afforded the parties an opportunity to make submissions five months thereafter and made the order itself almost six months after the inspection. Having considered the proceedings in this case and the submissions of Counsel I am of the view that the proceedings had on 10.7.1984 at which the Defendant-Petitioners were unrepresented are not material so as to warrant a specific mention of it in the petition. The Defendant-Petitioners have filed a copy of these proceedings in the document marked 'P 2'. In these circumstances there has been no attempt on the part of the Defendant-Petitioners to suppress this aspect of the matter from this Court. Therefore, I see no merit in this ground of objection raised by the Plaintiff-Respondents.

The last preliminary objection raised by learned Counsel for the Plaintiff-Respondents is that the petition does not disclose any ground for the exercise of revisionary jurisdiction. This is in fact a matter to be decided finally in considering the merits of the application. Suffice it to state, that the Defendant-Petitioners have in their petition dated 31.1.1985 filed in this Court, in paragraph 11, set out the grounds of challenge in sub-paragraphs (*a*) to (*g*). These grounds contain several matters against the order of the learned District Judge.

It would not be necessary for me to consider this objection any further at this stage since for the reason stated hereafter I am of the view that there is adequate ground for the exercise of revisionary jurisdiction in respect of a part of the order of the learned District Judge.

For the reasons stated above I overule the preliminary objections raised by the Plaintiff-Respondents.

Learned President's Counsel for the Defendant-Petitioners restricted his challenge to the order, to two grounds. They are :

(1) that the order requires the Defendant-Petitioners to set apart a strip of land to be used as a roadway for the Defendant-Petitioners. It was submitted that the action being for a servitude the learned District Judge could not have directed that a strip of land be set apart for the Plaintiff-Respondents.That, at best, the Plaintiff-Respondents would have only the use of the land as a right of way and no more ;

(2) that in the portion of the order in which the learned District Judge seeks to identify the strip of land that should constitute the road he had given a conflicting description. In this respect, it was submitted that the order lacks in clarity and is imprecise. It was also submitted that the order could not be executed in its present form.

As regards the first matters learned Counsel for the Plaintiff-Respondents conceded that the Plaintiff-Respondents would be entitled only to a right of way and that they would not be entitled to fence off that strip of land or to deprive the Defendant-Petitioners also from using that land.

I have considered the particular portion of the order dealing with this matter. Although the learned District Judge has used words to the effect that the strip of land should be separated for the use of the Plaintiff-Respondents, it is clear that the land was intended to be used only as a road. Therefore in my view the order only entitled the Plaintiff-Respondents to a right of way over the land of the Defendant-Petitioners and no more.

The second matter urged by learned President's Counsel requires a consideration of a particular portion of the order in which, *ex facie*, there is a conflict. When submissions were made with regard to this matter initially, learned Counsel for the Plaintiff-Respondents stated that there may be an error in the certified copy filed in this Court. Therefore, the original record was sent for and the hearing was postponed. It is now seen that the words in the original record and of the certified copy are identical. The particular portion of the order comes after the learned District Judge arrives at a finding that a 4 foot roadway is sufficient for the Plaintiff-Respondents and it reads as follows :

"මෙම කරුණු යටතේ, පැමිණිලිකරුට අඩි 4ක පළල් පාරක් ප්‍රමාණවත්ය කියා මම තීරණය කරමි. ඒ අනුව, ඉහත සඳහන් 510 පිඹුරේ පෙන්නුම් කරන අන්දමට ලා කහ පාටින් දක්වා ඇති පාරේ උතුරෙන් අඩි 2ක් ද, දකුණෙන් අඩි 2ක් ද, උතුරෙන් අඩි 4ක් හැර මක්නිසාදයන් එය 1, 2 විත්තිකරුවන්ගේ නිවසට ආසන්න වන හෙයින්, එම පාරේ දකුණු මායිමේ අඩි 4ක පළල් පාරක් පැමිණිලිකරුවන්ගේ පාවිච්චියට වෙන් කරන ලෙසට මම තීරණය කරමි."

It is seen from this portion that the learned District Judge has sought to identify the strip of land in relation to the road claimed by the Plaintiff-Respondents and depicted in Plan No. 510. The road depicted in this plan is 8 feet in width. In the first part the learned District Judge states that the 4-foot road should be made up after taking away 2 feet from the

North and 2 feet from the South of the road as depicted in Plan No. 510. Thus a strip of 4 feet in the centre appears to have been allowed as a road. However, immediately thereafter it is stated that 4 feet should be taken off from the North and 4 feet should be given only from the South. Therefore, as noted by me, *ex facie,* there is a conflict. Learned Counsel for the Plaintiff-Respondents submitted that the latter portion qualifies what has been stated earlier and should apply in relation to the area near the house of the 1st Defendant-Petitioner. Although, there is some merit in this submission, I have to note that the learned District Judge has not so stated in the order. In any event a dispute will arise as to the point from which the deviation should take place. As it is, there are two paths of the road that is ordered, one is in conflict with the other.

This order was made by the learned District Judge pursuant to an inspection of the land based on his visual observations. In these circumstances it would not be open to this Court to interpret the order or to modify it as suggested by learned Counsel for the Plaintiff-Respondents. This Court could engage in such an exercise if the order was based on evidence. In which event the order could have been modified on the basis of the evidence that had been accepted by the learned District Judge. Therefore, I am inclined to agree with the submission of learned President's Counsel that the order is imprecise and that it lacks in clarity. Certainly, it could not be executed in the present form since a dispute would arise as to the precise location of the road. This would lead to further protracted litigation between the parties.

On the other hand I am not inclined to agree with the submission of learned President's Counsel that the entire order should be set aside in view of the impugned portion referred above. Learned District Judge has in his order clearly rejected the contention of the Defendant-Petitioners that the Plaintiff-Respondents have an alternative road to their land. He has also clearly come to a finding that the Defendant-Petitioners are entitled to a 4-foot roadway over the land of the Defendant-Petitioners for which the Plaintiff-Respondents should pay compensation as assessed by the Surveyor. These findings are in my view severable from the impugned portion referred above in which the learned District Judge sought to identify the particular location of the road. I therefore uphold the finding of the learned District Judge as contained in the said order which entitles the Plaintiff-Respondents to a right of way, 4 feet in width, over the land of the Defendant-Petitioners.

The Plaintiff-Respondents would be liable to pay compensation for this right of way as ordered by the learned District Judge. For the reasons stated above, I would act in revision and set aside only the portion of the order referred above, in which the learned District Judge sought to identify the particular location of the right of way that the Plaintiff-Respondents would be entitled to.

The order dated 29.8.1984 of the learned District Judge does not appear to be a final determination of the entire matter. It is titled "order" and not a judgment or a decree. It appears to be an order which comes within the description in Section 204 of the Civil Procedure Code where certain matters have been left undetermined for further consideration. It appears that the learned District Judge intended there to be another commission in which the Surveyor would demarcate the particular strip of land that would constitute the right of way based upon the guidelines given in the order and also assess the amount of the compensation that is payable. It is only on the basis of such material that a final determination would have been made by the learned District Judge on this matter. Therefore, I am of the view that the learned District Judge should now decide upon the location of the 4-foot right of way on the Defendant-Petitioners' land and the question of compensation payable by the Plaintiff-Respondents. Thereafter, these decisions and the findings in the order dated 29.8.1984 that have been upheld in the preceding sections of this judgment should be set down in the form of a decree that will be binding on the parties.

According to the terms of settlement entered into on 3.2.1984 the parties have agreed to abide by the order made by the learned District Judge upon an inspection of the land. This settlement remains valid and binding on both parties. Therefore the learned District Judge would now have jurisdiction to decide upon the two matters referred in the preceding paragraph. Since the learned District Judge who originally inspected the land has ceased to be a judicial officer, the present District Judge is directed to finally determine these matters upon an another inspection of the land and if necessary by issuing a commission to the Surveyor.

I make no order as to costs.

Order varied.