KAROLIS
v
AMARADASA AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 245/95
DC KEGALLE 1515/L
JULY 12, 2007

Servitudes – Rustic servitudes – Unsafe to act on mere assertions? Acquisition by prescription or by transfer of land and right to use the land – Footpath only?

Held:

(1) There is an absence of proof that the unallotted path had been acquired by the plaintiff by prescription or grant or by transfer of land and right to use

the land. Unless and until the plaintiff's legal entitlement with proof as the unallotted path is established there cannot be and one cannot urge any obstruction to that path or claim a right of way.

(2) A person who has a right of way for using a footpath over the intervening land cannot claim to have a right for lands over the adjoining field.

(3) In the absence of cogent evidence and evidence uncorroborated to establish a servitude the defendant should not be made to suffer and enable the plaintiff to use a right of way for his convenience. It would be unsafe to act on mere assertions to especially when servitude is claimed.

APPEAL from the judgment of the District Court of Kegalle.

Cases referred to:

1. *Coranelis Singho* v *Perera* 63 NLR 48.
2. *Karunaratne* v *Gabrial Appuhamy* 15 NLR 257.
3. *Hendrick* v *Sarnelis* 41 NLR 519.
4. *Thambapillai* v *Nagammapillai* 52 NLR 225.
5. *Rajentheram* v *Sivarajah* 66 NLR 324.
6. *Muthaliph* v *Mansoor* 39 NLR 316.
7. *Samarasekera* v *Ramanathan Chetty* 10 CLW 169.
8. *Thamboo* v *Annammah* 36 NLR 330.

Champaka Ladduwahetty for 1A defendant-appellant.
L.K.I. Perera for plaintiff-respondent.

October 15, 2007
GOONERATNE, J.

This was an action filed in the District Court of Kegalle to obtain a declaration of title to the encroached portion of land as in prayer (a) and (b) to the amended plaint and for recovery of possession-removal of obstruction (as in prayer 'c' & 'd') and damages. The proceedings in the District Court indicate that parties had raised 16 issues which were accepted, by court. At the hearing of this appeal the learned Counsel for the defendant-appellant conceded that he has no dispute regarding issue No. 1, and invited this Court to consider issue No. 8 as being the crucial issue in this case. Perusal of same would indicate that the entire case in the Trial Court and in this appeal would relate to the matters connected to the said issue along with issue Nos. 6, 7, and 12, which would also decide this appeal. The learned Counsel for the defendant-appellant also contended that only a final *decree* (P4) would create rights and not a final plan and that he would rely to a

great extent on P4 (final *decree*).

Learned Counsel for the respondent conceded that based on the final decree he cannot claim a right of way and that his position was that his claim is based on prescription beginning from the year 1960.

Counsel for the defendant-appellant also submitted to this Court that the question of prescription was not put in issue at the trial court.

However it is important to ascertain as to how title devolved on each party, by reference to the earlier final decree. (P4-Case No. 2444) dated 7.6.1946. According to the said decree the extent of land is 3 Roods 31 Perches as shown in plan 560 B of 1945. Schedule to P4 refer to lot 1, 1A, 2 and 2A. Lot 1 and 1A had been allotted to one Sanchiya plaintiff in that case, and lot 2 to 3rd defendant (present defendant) plaintiff in his evidence goes further and admit that lot 1 and 1A had been allotted to Sanchiya and lot 2 and 2A allotted to the defendant in terms of the earlier partition case. The dispute seems to be the obstruction caused to plaintiff by the defendant as shown as 'X' in plan P1, Issue No. 8 had been raised, I believe to invite Court to decide on same. In P4, (*decree*) plaintiff in the earlier case had been given a right of foot path 3 feet width by the edge of the southern boundary of lot 2 and 2A for the High Road.

In the petition of appeal filed in this case the appellant *inter alia* pleads that:

(a) The previous partition case 2444 the appellant was allotted lots 2 and 2A in plan 5606/1964 and had entered into possession after final decree of 1946 and is in possession of the said lots for over 40 years. Any encroachment would have taken place 40 years ago and had acquired prescriptive title to same.

(b) Date of encroachment as suggested by plaintiff-respondent was 10th November 1970. In cross-examination of plaintiff the date admitted was a date in 1971. Surveyor Kurukulasooriya who surveyed the land on 4.1.1968 refer to encroachment. If any encroachment took place as indicated, in 1968 by the Surveyor, defendant-appellant had possessed the alleged encroachment for over 18 years. In any event it had to be a date prior to 10th November 1970.

(c) Learned District Judge had been misdirected on the right of

foot path allowed by partition decree No. 2444 of 1946, on the southern boundary of lots 2 and 2A which was allotted to the plaintiff-respondent. The alleged obstruction pointed out by plaintiff is far away from the foot path as shown in the plan. Evidence on obstruction not corroborated other than by the evidence of plaintiff.

It would be prudent to identify and ascertain plaintiff's and defendant's soil rights which needs to be traced from the earlier partition *decree* 2444. The defendant was allotted lots 2 and 2A in plan No. 560/B according to partition *decree* 2444. The plaintiff in that case (2444) Sanchiya had been allotted lots 1 and 1A in the said plan. There is no dispute on this division. It is also decreed that the plaintiff sanchiya be given a right of foot path – 3 feet width by the edge of the southern boundary of lots 2 and 2A. P3 and P4 are plan 560B and *decree* in Case No. 2444 respectively. On perusing P3 1 find that lots 1 and 2 are both adjacent to the main road. (Udugoda to Kegalle) Lots 1A and 2A are situated close to the Ela shown in that plan. It would not be incorrect to observe that both Sanchiya and the defendant in the present case who was the 3rd defendant in case 2444 have access to the main road according to P3. Sanchiya had a right of foot path not across lot 2 and 2A but at the edge of those lots to the south.

Sanchiya named above had transferred the property as in the amended plaint paragraphs 2 - 5 to the persons named therein and finally to the plaintiff. Therefore the plaintiff could only own and possess what was decreed to sanchiya in case No. 2444. As such plaintiff would be entitled to lots 1 and 1A, and to the right of foot path as decreed above. Plaintiff had purchased the land in question on or about 1967. (paragraph 5 of the Amended plaint). By the time the plaintiff purchased the property the defendant was already in possession of lots 2 and 2A in terms of the decree in case No. 2444. (about 23 years).

Issue Nos. 6 and 7 refer to a right of way shown in plan No. 560/1943 filed in Case No. 2444 and the obstruction caused by Defendant shown as 'x' in plan No. 801. decree in case No. 2444, only a right of foot path was given to the Plaintiff's predecessors in title and not a right of way (road). The point 'x' in plan 801 seems to be the middle of the land in dispute, where as the decree permitted

a foot path at the edge of lots 2 and 2a. A foot path would be a small path to enable people to walk by foot and not big enough for a vehicle or cart to be driven on same. If issue Nos. 6 and 7 are to be answered in favour of the plaintiff the point of time plaintiff acquired a right of way and the basis of his claim to that would have to be established in order to negate what was decreed in Case No. 2444. It would be necessary to examine the evidence led at the trial before any view could be expressed on the judgment of the District Court.

I would at this point refer to the following authority on servitudes as it would be necessary to understand it's nature, right and ownership before proceeding to examine the evidence led in this case.

The laws of Ceylon Cecil Walter Perera 2nd Edition pg. 487 Chapter III.

SERVITUDES

THE right of servitude according to Van de Linden is a sort of real right whereby an inheritance, whether it be a house or land, is bound or subject to the use or convenience of a neighbouring house or land. The servitude or use may, he says, be also of the thing to a person (m). Van Leeuwen defines it as a species of imperfect property and a right less extensive than usufruct. He says it is the right of prohibiting something or doing something to or in the house of another or upon his land for our own benefit and above our ordinary legal right (n). Grotius thus explains the nature of the right-Ownership is either full or qualified. Qualified ownership is that property in a thing to which there is something wanting which prevents the owner from doing with it whatever he pleases although not forbidden by the common law. Where there is qualified ownership, whatever is wanting to one belongs to another, who consequently has also a qualified ownership; for instance, a person who has a right of footpath over land has no full ownership. for he may not sell the land or claim the fruits thereof, both of which are included in full ownership, while the person who has to allow the footpath has not the full ownership either, for he may not prohibit the other from coming on to his land, a right which is a part of ownership.

For the sake of distinction the term "ownership' is confined to the rights of the person who has the larger share in the ownership he being the one who may sell and let the land, and the lesser share is called a

privilege, such as the right of footpath for instance.

It was the evidence of Surveyor Kurukulasooriya that he visited the land in question and has in his plan No. 801 show the extent possessed by the plaintiff. Plan 801 is marked as P1 and the report as P2. Plaintiff occupies lots 1 and 4 in plan P1. P1 has superimposed plan 560 B/1945 relating to case No. 2444. Superimposition is shown in red in plan P1. Plan P1 shows lot 1A of plan 560 B/1945 as lots 1 & 3 and lot 1 of 560 B/1945 as lots 5 and 4. Obstruction shown as XI which obstruction is placed before entering plaintiff's land. In cross-examination Surveyor states that superimposition is not correct but is acceptable to be reliable. (Pg. 108 of the brief). Surveyor admits the following in cross-examination.

(a) Difference in extent of the 2 plans (p1 and 560B) is about .25 perches.
(b) lot 2A in earlier case had been allotted to the defendant without any encumbrances.
(c) Road shown in lot 2A in earlier plan is a part of the said lot 2A.
(d) Lot 2A not fully superimposed on plan P1, only half had been superimposed.
(e) Cannot see any changes in plaintiff's lots and defendant's lots.
(f) Plaintiff's lot would not be a paddy field.
(g) Unable to state whether lot 2A in the present day situation had increased or decreased in extent with reference to P3.
(h) In terms of the decree the road shown in the plan is unallotted. (It seems to be the road way shown in the middle and going across lot 2A).

In the report of the Surveyor (P2) lot 3 and 5 of P1 is shown as an encroachment.

On the above evidence of the Surveyor, the District Judge expressed her views on the evidence led at the trial and narrates the evidence of Surveyor Kurukulasooriya, and states that plaintiff confirms the evidence of Surveyor as regards the obstruction shown as 'x' and the encroachment depicted as lots 3 and 5 in P1. Further the difference in extent shown in both earlier plan and P1 is only .25 perches which is negligible and as such P1 is reliable. (The extent

should read as .25 perches and not 2.5 perches as District Judge narrates the evidence of Surveyor Kurukulasooriya).

The Grama Sevaka has also given evidence. This evidence seems to be supporting the defendant's more than the plaintiff though he was called by the plaintiff one cannot rely on his evidence to be cogent evidence to establish a right of way and demonstrate any obstruction across such right of way. This Court cannot give any benefit to the plaintiff for relying on the evidence of the Grama Sevaka as it is apparent that the witness had not been able to support the plaintiff's version.

It is the position of the defendant that since 1945, defendant possessed lots 2 and 2A in plan P3 and that if there was any encroachment as suggested by the plaintiff, possession by the defendant of the land in dispute had been since 1945. Other than the evidence of the defendant, on this aspect I cannot find any evidence to negate the position of the defendant. Decree in Case No. 2444 would only give the plaintiff a right of footpath on the southern boundary of lots 2 and 2A and not across lots 2 A in plan P3. Therefore the plaintiff should establish by clear evidence that he and his predecessors in title used the right of way shown in plan P3. (across lot 2A). By P4 plaintiff's predecessors in title was never given a right of way across lots 2A, although P3 indicates a path (shown in dotted red colour lines). The evidence on this point as stated by the Surveyor is that the path remains unallotted. Nor does P4 refer to this path other than the foot path allotted to plaintiff's predecessors in title.

It is plaintiff's evidence that he purchased lots 1 and 1A the land in question by deed P7 (No. 163 of 13.11.1967) and thereafter came into possession. (There is no mention of a specific date). He also testify that the defendant had fenced the southern side of lot A and caused an obstruction to the foot path. He also testify about the encroachment shown as lots 3 and 5 in P1. Encroachment was in 1970. He stated that the right of way had been in use for generation, and that he had been using this road. It is 3 1/2 feet in width. In cross examination plaintiff admits the following:

(1) His grand-father was a party in the earlier partition Case No. 2444 but had not been allotted any share/right.

(2) He has been litigating with the defendant since purchase of the

land and also filed action against one Bodiratne for fencing the Northern Province of the land in dispute.

(3) Thereafter in 1971 defendant obstructed and fenced.

(4) Amended plaint dated 10.12.1987.

(5) Bodhiratne's case terminated on 16.3.1971 (D5).

(6) Up to 1970 undisturbed possession of land.

(7) Lot 3 in plan P1 encroached in 1973.

(8) Disputed Lot 1 and 1A 1970 and 1973.

Though the *decree* in case No. 2444 had been entered over 60 years ago the rights of both plaintiff and defendant needs to be traced to the said *decree*, and the right of footpath recognised at that point of time cannot be ignored. Plaintiff came into possession of the land in dispute only after 1967. Defendant had been in possession since 1946. A period of about 22 years between date of *decree* and transfer of lots 1 and 1A to plaintiff is a period where only defendant's version is available to Court. In the absence of the plaintiff during this period and lack of material to establish another right of way in the manner pleaded by plaintiff from a witness who could testify about the past situation to support plaintiff or his predecessors in title makes the plaintiff's case a weak case especially when one seeks to enforce a right of way. Legally only the footpath recognised in *decree* 2444 could be enforced, unless the right of way suggested by plaintiff was acquired by prescription or grant or by reservation when owner transfers land.

At this juncture I would refer to another authority to ascertain the nature of Rustic Servitudes to include footpath. *Principles of Ceylon Law - H.W. Tambiah Q.C. - pg. 292/293.*

Where a footpath goes through several lands, it is very common in the rural areas of Ceylon to have stiles along the footpath in places where such paths cross the lands. The presence of such stiles do not in any way nullify the right of a dominant owner to have a servitude of footpath over another man's land (*Cornelis Singho* v *Perera*)[1].

In Ceylon a right of way is mainly acquired by grant or by a reservation when an owner transfers his land to another or by prescription. In any event it has to be a defined tract (Karunaratne

v Gabriel Appuhamy(2). Where a right of way is given in general terms without assigning a defined path the selection of the path rests with the owner of the dominant land. But he may change its location if it can be done without damage to the owner of the servient tenement (Hahlo and Kahn, p604).

A right of way is also acquired by prescription (Section 5 Prescription Ordinance). in order that a person may acquire a servitude by prescription, there should be adverse user for a period of more than ten years over a defined path. Mere straying over parts of land which was allowed for the purpose of convenience is not sufficient to acquire a servitude by prescription (*Karunaratne* v *Gabrial Appuhamy) (supra)*. Under the law of Ceylon where a right has been acquired for a path by prescription, it could only be exchanged by a national grant. A servitude over a new path may also be acquired by using another defined path and by abandoning the old one (*Hendrick* v *Sarnelis*)(3). *Thambapillai* v *Nagamanipillai*(4).

Very often when a piece of land is divided among co-owners by cross-conveyances, a narrow portion is left to be used as a path. In such a case the narrow strip is co-owned land which is intended to be used as a path, and a co-owner who uses it as a path does not possess the right of a servitude but of a common ownership (see *dictum* of Tambiah, J. in *Rajentheram* v *Sivarajan*(5); *Muthaliph* v *Mansoor*(6). Servitudes acquired by prescription must be continous and must be of the same nature. Thus, a person who has a right of way for using a footpath over an intervening land cannot claim to have a right for carts over the adjoining fields (*Samarasekera* v *Ramanathan Chetty*(7). When a person has the right of way, not only he but his servants, guest, visitors and labourers can also use it. Since servitudes are onerous in nature, one co-owner cannot grant one without the concurrence and consent of all the co-owners (*Thamboo* v *Annammah*)(8).

The original plaint in this case had been filed in 1977. Amended plaint filed in 1987 (10 years later) and parties proceeded to trial on the amended pleadings. The District Judge has failed to consider the long possession of the defendant. Since 1946, which had not been contradicted by the plaintiff, and proceeded to give judgment in favour of the plaintiff stating that the action was filed in 1977 and as such defendant had not prescribed to the land for the reason that the

10 year requirement of undisturbed and independent possession had not been proved. It is my view that the Trial Court Judge has not properly examined the evidence on prescription of the land to the portion possessed by the defendant. The documents relied by plaintiff marked P8 and P9 relate to disputes concerning paddy fields and not obstruction as urged by plaintiff, to a right of way. Although the Surveyor had in evidence suggested an encroachment the District Judge had not considered the question of long possession of the defendant to the area shown as lots 3 and 5 in plan P1, which the defendant possessed since 1946. The District Judge had been misdirected on the question of right of way and failed to consider the previous partition decree in case No. 2444, which permitted a right of foot path on a defined tract. Instead, the trial Court Judge had thought it fit to answer issue Nos 6 - 8 in favour of the plaintiff which related to an unallotted path. There is an absence of proof that the unallotted path had been acquired by the plaintiff by prescription or grant or by transfer of land and right to use the land. Unless and until plaintiff's legal entitlement with proof as above to the unallotted path is established there cannot be and one cannot urge any obstruction to that path or claim a right of way. Further the unallotted path seems to be going across lot 2A (allotted to the defendant). In the absence of cogent evidence and evidence uncorroborated to establish a servitude the defendant should not be made to suffer and enable plaintiff to use a right of way for his convenience. It would be unsafe to act on mere assertions especially when servitude is claimed.

In the above circumstances I set aside the judgment of the District Court and hold that issue Nos. 4 to 8 and 9 to 13 should be answered in favour of the defendant and that the plaintiff's action should be dismissed. This appeal is allowed with costs fixed at Rs. 10,000/-.

EKANAYAKE J. - I agree.

Appeal allowed.