MUNIDASA SILVA
v
LASANTHA FERNANDO

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA ,J.
C.A. 691/91 (F)
D.C. KALUTARA 3264/L
FEBRUARY 17, 2002
MAY 5, 2003

Prescription – Right of way – Servitude – Created by partition decree – Non user of the servitude – Is the servitude lost? Modes of extinction – Burden of Proof – Right attached to land –

The plaintiff – respondent instituted action for a declaration of title to lot "O" in plan P1, and a right of way to proceed to lot "O". The defendant-appellant contended that the alleged right of way had not been in existence for over 10 years, and that he and his predecessor in title have possessed the area alleged as a right of way for over 10 years – claiming prescriptive rights.

The trial court held with the plaintiff.

On Appeal.

Held:

(i) The fact that right of way existed and that the same has been demarcated on a plan would necessarily mean that the right of way did exist and the fact of non user alone will not be sufficient to lose a right of way. The right of way was left in common by a partition decree.

(ii) Where the servitude was created by the decree in a partition action demarcated in the final partition plan, and though there is no specific mention of the servitude in the Deed of Transfer by which title to lot "O" devolved on the plaintiff - respondent, yet the right of servitude passed to the transferee for it is a right attached to the land.

(iii) Under our law a person does not lose the right to any ownership of immovable property e.g. a land, servitude by mere non possession (non user).

(iv) Once devolution of title in respect of Lot "O" is admitted it follows that, the plaintiff – respondent became entitled to the servitude – right of way

attached to lot "O" granted in a Partition Action. In the premises there is no burden on the plaintiff – respondent to prove that he and his predecessors in title did in fact use the roadway, the burden is on the defendant – appellant to prove that he had acquired prescriptive rights to the strip of land containing the right of way.

APPEAL from the Judgment of the District Court of Kalutara

Cases referred to:

1. *K. Rajentheram* v *K. Sivarajah* – 66 NLR 324
2. *Nagamani* v *Vinayagamoorthy* - 24 NLR 438 at 439
3. *Paramount Investments Ltd.,* v *Cader* – 1986 2 SRI LR 309
4. *Chellappah Ariyaratnam and Another* v *Chelliah Subramaniam and four others* – 79 NLR 121

R.K.S. Sureshchandra for defendant-appellant

Rohan Sahabandu for plaintiff-respondent.

Cur.adv.vult

October 3, 2003

SOMAWANSA, J.

The plaintiff-respondent instituted the instant action in the District Court of Kalutara seeking a declaration of title to lot 'O' in plan No. 4005 dated 12.09.1902 prepared by B.M. Flamer Caldera, Licensed Surveyor marked P1 and morefully described in the schedule to the plaint, a right of way as depicted in the said plan to proceed to the said lot 'O' from Alutgama-Welipanna Road, and to have the obstructions on the said roadway removed. 01

The plaintiff-respondent's position was that he was the owner of lot 'O' in the said plan marked P1, that there was a roadway from lot 'O' to the Alutgama–Welipanna Road as depicted in the said plan, that the defendant-appellant is the owner of lot 'J' in the said plan marked P1 which abut the roadway claimed by the plaintiff - respondent, that the defendant-appellant obstructed the said right of way. The plaintiff-respondent sought an enjoining order preventing the defendant-appellant from obstructing his right of way and was granted the same. 10

The position taken by the defendant-appellant was that the plaintiff-respondent and his predecessor in title had access from Alutgama – Welipanne Road to lot 'O' through lot 'H' in the said plan marked P1, that the alleged roadway claimed by the plaintiff-respondent had not been in existence for over 10 years, that he and his predecessors in title have been possessing the area alleged as a right of way for over 10 years and claimed prescriptive rights to the said strip of land. In the premises he prayed for a dismissal of the plaintiff-respondent's action and he be declared as having acquired prescriptive rights over the alleged roadway.

At the commencement of the trial, it was admitted by the parties that the plaintiff-respondent is the owner of lot 'O' and defendant-appellant is the owner of lots 'J' and 'P' depicted in plan No. 4005. The parties went to trial on 7 issues. The plaintiff-respondent's issues were based on the question whether lots 1, 2 and 3 depicted in plan No. 1877 prepared by B.C.D. Fernando, Licensed Surveyor constitute the road reservation claimed by the plaintiff-respondent while the defendant-appellant's issues were based on the question whether he has prescribed to the area shown as a roadway on the said plan.

At the conclusion of the trial the learned District Judge by his judgment dated 15.10.91 held with the plaintiff-respondent. It is from the said judgment that the defendant-appellant has lodged this appeal.

At the hearing of this appeal, it was submitted by the counsel for the defendant-appellant that the evidence placed before Court clearly showed that the roadway shown in plan No. 4004 marked P1 prepared in 1902 was no longer in existence at the time the plaintiff-respondent claimed the said roadway in 1984. He contended that the fact that a right of way existed and the same has been demarcated on a plan does not necessarily mean that it can be claimed if it has been lost by non-user that in the present case the right of way over the portion of the land claimed as the roadway had been lost by non-user for well over a period of 10 years. The learned District Judge has failed to consider this aspect of non-user and has thereby erred in law. However I am unable to agree with this submission. The fact that a right of way existed and that the same has been demarcated on a plan would necessarily mean that

the right of way did exist and the fact of non user alone will not be sufficient to lose a right of way. In the instant action it is admitted that the right of way claimed by the plaintiff-respondent has been demarcated and left in common as reservation for roads in final partition plan No. 4005. Hence, it is also admitted by parties that the reservation for roads as demarcated in that plan is a common right of way for the plaintiff-respondent and the defendant-appellant as well as the other parties who were allotted shares by the final decree in partition action 2030. In the case of *K. Rajentheram* v *K. Sivarajah*(1) the head note reads as follows:

> "Where the co-owners of a land execute a deed of partition allotting to themselves separate portions reserving, in common ownership, an allotment which one of them is given the right to use as a path to proceed from the separate portion to the public road, the others are not entitled to obstruct the free use of the right of way by erecting a gate at the entrance to the pathway. In such a case, the interest of the person who has the right to use the reserved allotment as a pathway is one of co-ownership and not a servitude. He is entitled to use it in accordance with the object for which it is intended to be used."

In the case of *Nagamani* v *Vinayagamoorthy*(2) *Per* de Sampayo, J.

> "There is no doubt about the right created by the deed, and it can only be lost by some means known to the law, such as an adverse right created in favour of a servient tenant against the dominant tenant, by means, for instance, the prescriptive possession".

It appears to me the same principle would apply to the instant action where the servitude was created by the decree in a partition action demarcated in the final partition plan marked P1 and though there is no specific mention of the servitude in the deed of transfer by which title to lot 'O' devolved on the plaintiff-respondent marked P1 yet the right of servitude passed to the transferee for it is a right attached to the land. Proposition to this line of reasoning is to be found in the case of *Paramount Investment Ltd.* v Cader(3) the head note in the case reads as follows:

"A servitude of right of way can be lost by abandonment express or tacit. A servitude is lost by express abandonment when the dominant owner clearly and intentionally abandons it. Tacit abandonment takes place where the servient owner is permitted to do something which necessarily obstructs the exercise of the servitude and makes the servitude inoperative. Where, as in the instant case, express abandonment based on non-user owing to a wall built by the dominant owner's predecessor-in-title is what is relied on, the position is that under our law a servitude of right of way created by notarial grant cannot be lost by mere non-user."

In that case too the servitude of right of way was created by notarial agreement and in the instant action it was by a scheme of final partition confirmed by Court as shown in partition plan No. 4005 in case No. 2030/P. In the case of *Paramount Investments Ltd.*. v *Cader*(3) (*supra*) Seneviratne, J., considered most of the authorities on Roman Dutch Law and the decisions dealing with this point. Justice Seneviratne in his judgment at page 321 made the observations:

"I will consider whether the concept of non-user is applicable in our law. According to the Roman-Dutch Law Jurists "Praedial servitudes are classed as immovable property". Nathan Common Law of South Africa - (Vol.I 2nd Ed. Page 343, Para 432). "A real servitude is a fragment of the ownership of an immovable .....". Introduction to Roman-Dutch Law – R.W. Lee (5th Ed. Chap. 6 Page 164). Our Statute Law – Prescription Ordinance (C.L.E. Vol. III Chap. 68) section 2 defines – "immovable property" as follows:

"....shall be taken to include all shares and interests in such property, and all rights, easements and servitudes thereunto belonging or appertaining".

In the authoritative text Introduction to Roman Dutch Law – R.W. Lee (5th Ed. Chap 3 Page 130) – Lee deals with the acquisition and extinction on ownership in corporeal things. At page 144, Lee has summed up how ownership is lost in corporeal things as follows:

"The modes of extinction of ownership are:-

1. Dereliction or abandonment of possession.
2. Accession (when it effects a transfer of ownership).
3. Tradition.
4. Prescription.
5. Expropriation by competent authority e.g. when land is taken for some public purpose.
6. Forfeiture for crime."

Thus, it will be seen that non-user is not set out as a mode of extinction of ownership of any corporeal thing – immovable property. It was submitted by the learned Queen's Counsel for the plaintiff-appellant-petitioner that any loss of a right to a praedial servitude must be in accordance with the law by which one loses one's rights to immovable property. Under our Law title to immovable property cannot be lost by non-user (non possession). It is clear that one way of acquiring title to property is by prescription in terms of Section 3 of the Prescription Ordinance.".

It was held in that case that under our Law a person does not lose the right to any ownership of immovable property eg. a land, a servitude by mere non possession (non-user).

In the light of the above authorities, cited by me, it appears that the plaintiff-respondent who became the owner of lot 'O' would be entitled to lot 'O' as well as the right to use the roadway which was in common for his predecessor's in title as per the final scheme of partition confirmed by Court in case No. 2030/P. In such circumstances in considering whether there has been an abandonment or non-user of the servitude - right of way by plaintiff -respondent and his predecessors in title different consideration has to apply as distinct from servitude created by prescription or by verbal agreement. Once devolution of title in respect of lot 'O' is admitted it follows that the plaintiff-respondent became entitled to the servitude - right of way attached to lot 'O' granted in partition action in case No. 2030/P. In the premises there is no burden on the plaintiff-respon-

dent to prove that he and his predecessors in title did in fact use the roadway.

At this point, it would be pertinent to refer to the submissions made by counsel for the defendant-appellant as to the burden of proof. It is his submission that when a right of way is denied to a person claiming same on the basis of non-user the burden is on the claimant to the right of way over the servient land to establish that it had been used prior to his acquiring rights over the dominant land. He goes on to say that in the instant case the plaintiff-respondent had become the owner of the dominant land – lot 'O' only in 1984 and has complained that he had been obstructed from using the right of way through the servient land from November 1984 and apart from the evidence of the plaintiff-respondent no other evidence was placed by him to establish that the right still existed at the time he purchased lot "O'. Therefore he submits that the plaintiff-respondent has failed to discharge the burden on him to establish the right of way. I would say this argument cannot hold water for the simple reason that at the time the plaintiff-respondent became the owner of lot 'O' in 1984 right of a servitude was in existence as per the final partition scheme in case No. 2030/P. The plaintiff-respondent became entitled to the same by virtue of devolution of title. In the case of *Chellappah Ariyaratnam and Another* v *Chelliah Subramaniam and Four Others* (4) the facts were:

> " The plaintiffs-appellants instituted an action for a declaration that they were entitled to certain servitudes. The defendants - respondents contended that since 1942 when the plaintiffs' predecessor in title who was also the owner of the adjacent land had bought this land he abandoned his rights in the land in suit as these rights were also available in the adjacent land. The learned District Judge while holding that the appellants were entitled to the said servitudes on the title they pleaded, dismissed the action on the basis that the plaintiffs-appellants and their predecessor in title had since 1942 tacitly abandoned the exercise of these rights or had lost them by non-user."

In that case it was the position of the defendant that although deed P1 had made provision for the rights claimed by the plaintiffs such rights had not been demarcated on the ground nor were those rights exercised by the parties or their successors in title.

It was held:

> "That the learned District Judge had erred when he came to the conclusion that these rights were lost by the plaintiffs - appellants and their immediate predecessor in title by reason of waiver. This was not a case of express waiver nor did the conduct of the respondents during the relevant time show that they themselves had inferred a waiver or surrender of those rights on the part of the appellants."

In that case Wanasundera, J., expressed the view that in this instance those parties were co-owners of the pathway and the rights of the parties should have been considered on that basis, that is as to whether there had been adverse and prescriptive possession of the pathway by the respondents and referred to the decision in *K.A. Rajentheran* v *Sivarajah*(1) (*supra*). In the light of the above reasoning, I am unable to agree with the submission made by counsel for the defendant-appellant that the burden of proof of user of the servitude is with the plaintiff-respondent. I would hold that as the plaintiff-respondent has established that he was entitled to the servitude, the right of way which devolved on him with the devolution of title to lot 'O' the burden is on the defendant-appellant to prove that he had acquired prescriptive rights to the strip of land containing the right of way.

Another matter raised by the counsel for the defendant-appellant is that in order to establish a servitude, it is also necessary to show that a clear defined path has been used by the person claiming the servitude. That a Sureveyor's contention that it was possible to go on foot through shrubs and trees on a land does not establish that there was a roadway. That in the instant case there was clear evidence that at the entrance to the roadway claimed there was an embankment about 2 1/2 feet high through which a wheel barrow or a cycle could not be taken and further there was evidence of a coconut tree 75 years old some shrubs and a few steps leading to a well on the road claimed, that these clearly indicate that there was no clearly defined path as claimed by the plaintiff-respondent. As for the pathway, it is clearly shown in the partition plan No. 4005. In order to ascertain the correctness of the submission it becomes necessary to examine the evidence led in this case.

For the plaintiff-respondent he himself and B.C.D. Fernando, Licensed Surveyor gave evidence leading in evidence P1 to P4. While for the defendant-appellant he and Senarath, Licensed Surveyor gave evidence leading in evidence V1 to V14. It transpired in the evidence of the plaintiff-respondent that he purchased lot "O" in plan marked P1 to construct a house and had been using this road access when in November 1984 the defendant-appellant obstructed his access by planting trees and dumping stones, that as the Town Council acquired a small portion to widen the drain that ran along the roadway, access was now reduced to about 6 feet, that the coconut tree did not obstruct the use of the roadway and was on the boundary near the well, that he was working in a hardware shop and used to take his goods in a wheel barrow along this road to his house and that after the obstruction he was unable to do so. It was suggested to him that he used lot 'H' which adjoins lot 'J' to get to the public road this was denied by the plaintiff-respondent and went on to say that only access he had was through the roadway shown in plan marked P1.

It is to be noted that though the defendant-appellant tried to make out that the plaintiff-respondent used to get to the main road through lot 'H' the defendant-appellant failed to adduce evidence to establish this fact other than *ipse dixit* of the defendant-appellant. It was also suggested to the plaintiff-respondent that as there was a concrete slab at the entrance to the road from the main road which blocked the entrance the roadway claimed cannot be used. This was also denied by the plaintiff-respondent who stated that one can just step over the slab and use the roadway and even a wheel barrow or a bicycle could be taken over it. He was also questioned as to why he did not claim compensation from State for acquisition of portion of the roadway for road widening to which his answer was that at that time he was not the owner. As regards non user by his predecessor in title the plaintiff-respondent's position was that they were abroad. Surveyor Fernando who was called by the plaintiff-respondent specifically stated that the plaintiff-respondent has no other means of access to his land other than through the roadway shown in plan marked P1. Plan No. 4005 marked P1 was produced through him where all the allotted lots including the road reservations are shown.

On a perusal of this plan it is apparent that the road reservations is the only means of access from lot 'O' to Aluthgama-Welipanna Road. He went on to say that due to the road widening 0.15 Perches has been taken from the north of the road access and also a further 0.16 Perches has been taken over to construct a concrete drain and that the balance area now in existence has been shown as lot 03. He also went on to say that he found certain trees planted on the roadway ages varying between 8-10 months and a year old coconut tree. It is to be noted that obstruction came in November 1984 and the survey was done in June 1985 about 8 months thereafter. Surveyor also says that there were evident tell tale marks that the road had been used. Plan No. 1877 dated 06.10.1985 prepared by him was marked P2 while his report was marked P3.

Surveyor Seneviratne who was called by the defendant-appellant had gone to the corpus 4 years after the alleged obstruction and prepared his plan No. 5200 marked V3. His report is marked V4. According to him there were trees aged 8-10 years on the roadway claimed. His evidence was that the road as it is cannot be used, however he accepted the position that one can stride or hop over the slab at the entrance to the main road. The position taken by the defendant-appellant in his answer was that he is the owner of lots 'J' and 'P' that he had acquired prescriptive title to the road reservation to the east of 'J'. However in his evidence he disclaimed any rights to the said road reservation. At pages 134 and 135 of the brief under cross examination he states:

ප්‍ර: තමා ඒ පාරට වෙන් කළ කොටසින්, තමා අයිතිවාසිකම් ඉල්ලනවාද?

උ: මම ඉල්ලන්නේ නැත.

ප්‍ර: තමා 'ජේ' හා 'පි' කැබලි දෙකේ අයිතිය පමණයි ඉල්ලන්නේ?

උ: ඔව්.

ප්‍ර: ඒ අයිතිය තමා ඉල්ලා සිටින්නේ නැත.

උ: නැත.

ප්‍ර: අධිපාරට තමා අයිතිවාසිකම් කියන්නේ නැත.

උ: ඔව්. මගේ ඉඩමේ තමයි මම ගල්බාලා තියන්නේ.

These answers as submitted by the counsel for the plaintiff-respondent clearly cuts across the defendant-appellant's case. It is also to be noted that all the deeds marked by the defendant-appellant deal with amalgamated lots 'J' and 'P' describing the eastern boundary as Totagewatta alias Water Course which in effect would include the road reservation. However these deeds will not convey title to the strip of land reserved in common as reservation for roads.

It is also submitted by counsel for the defendant-appellant that the learned District Judge failed to consider the fact that as the result of the widening of the main road a portion of the roadway shown in plan No. 4005 marked P1 had been acquired and that compensation has been paid only to the defendant-appellant which is borne out by the gazette notification marked V1. In fact the plaintiff-respondent was questioned on this point by the counsel for the defendant-appellant and I find that the plaintiff-respondent has given a reasonable explanation in that he says that at that time he was not the owner and that his predecessors in title were abroad.

It appears to me that the learned District Judge has evaluated and analysed the evidence placed before him and has come to a correct finding on facts. In the circumstances, I see no reason to interfere with his judgment. Accordingly the appeal of the defendant -appellant will stand dismissed with costs fixed at Rs. 5000/.

DISSANAYAKE, J. – I agree

Appeal dismissed.