KULATUNGA VS RANAWEERA

COURT OF APPEAL
EKANAYAKE. J.,
RANJITH SILVA, J.
C. A. 893/94(F)
D. C. HORANA 4000/L
JUNE 14, 2005

Declaration of a right of way - Partition Decree - Blocking of right/access - waiver and abandonment of right of user ? - Right of way granted by Deed - Could it be lost by non - user ? Issues framed - Pleadings recede to background ? - Perverse Judgment – When could the Appellate Court interfere ? - Raising no Issues in the appellate Court ? - Evidence Ordinance S 114

The plaintiff - Appellant sought a declaration of a right of way over Lot 5, which was provided as a right of access to Lots 2, 3 and 4 in a Partition Decree, the Respondent who was the owner of lots 3 and 4 blocked the said right of access to Lot 2 over lot 5 by erecting a fence across the road (Lot 5). The Defendant - Respondent filed Answer denying the allegations and pleaded that, the strip of land covered by Lot 5(a) was not used as a road - way by any one as there was access to lot 2 from the public road, and the Appellant had waived or abandoned his right to use Lot 5 as his right of access. The Trial Court dismissed the Plaintiffs action.

On appeal -

Held

(i) The Appellant was not claiming any right or title derived or on the strength of the Partition Decree, therefore in the absence of any specific issue as to whether the Appellant was entitled to a rght of way over Lot 5 by virtue of or based on the partition decree, the trial Judge cannot be faulted for not holding in favour of the Appellant.

'Once issues are framed the case which the Court has to hear and determine become crystallised in the issues and the pleadings recede to the background.'

Per de Silva J

"Servitude to be lost by abandonment, the abandonment must be deliberate and intentional, the abandonment of a servitude destroys the right not only when the abandonment is express but also when it is tacit. Further where something is conceded to the owner of the servient tenement which naturally and of necessity obstruct the use of

the servitude there is tacit abandonment of the servitude provided the abandonment is deliberate and intentional and certainly not behind the back of the person entitled to the servitude."

(ii) A right of way granted by a Deed is not lost by mere non user.

(iii) The appellant had not raised appropriate relevant and pertinent issues, it is not fair at this stage for the Appellate Court to frame an issue and answer that issue on its own as the parties have not addressed their minds specifically to that issue.

(iv) Appellate Court can and should interfere even on questions of fact although those findings cannot be branded as "perverse" unless the issue is one of credibility of witnesses. When the issue is mainly on the credibility of witness an appellate Court should not interfere unless the findings are perverse and not in regard to findings on other issues from the facts which are either proved or admitted.

Appeal from the Judgment of the District Court of Horana.

Cases referred to :

1. Hanafi vs Nallammah - 1998 1 Sri LR 73
2. Fernando vs Mendis - 14 NLR at 101
3. Inagamani vs Vinayagamoorthy - 24 NLR 438
4. Paramount Investments Ltd., vs Cader - 1986 Sri L. R. Vol. 2 at 309
5. Fradd vs Brown & Co. Ltd 20 NLR 282
6. Wickramasuriya vs Dedoleena - 1996 2 Sri LR 95

Appellant absent and unrepresented.

Rohan Sahabandu for respondent

Cur. Adv. vult.

July 12, 2005

W. L. RANJITH SILVA, J.

On 12.07.2004 when this matter came up for argument before another division of this court the plaintiff Appellant (hereinafter referred to as the appellant) was absent and unrepresented. Mr. Sahabandu had appeared and concluded his oral submissions on behalf of the Defendant-Respondent and a date was granted for written submissions. The journal entry of that date is to the effect that as the Appellant failed to appear in court despite repeated notice on the appellant, the court decided to dispose of the appeal after a consideration of the petition of appeal. On 30.09.2004 this matter came up before another division of this Court and that Court referred this matter to this division of the Court of Appeal. On a perusal : of the docket

it appears that notice on the appellant and his Registered Attorney at Law were dispatched on several occasions on the orders of this court and that none of the notices so issued returned undelivered. Therefore this court can safely presume under Sec. 114 of the Evidence Ordinance that the relevant notices were not only dispatched but also were duly served on the appellant and his Registered Attorney.

On 18.02.2005 this matter was fixed for argument for the 14.06.2005 when it came up for argument Mr. Sahabandu, counsel for the Respondent informed court that he was prepared to abide by the written submission already filed on behalf of the respondent and that the matter could be resolved on the written submissions. But on a request made by this court Mr. Sahabandu made a brief outline of the case for the benefit ot this court since this case shuttled from one court to another in the past.

The facts

The Appellant instituted action bearing No. 400/L in the District Court of Horana seeking - *inter alia* for a declaration of a right of way over lot 5 morefully described in the second schedule to the plaint, for an order for the removal of all obstructions thereon and for damages.

The plaintiff's position was that one Richard Kulatunga became the owner of the land morefully described in schedule 1 to the plaint (lot 2 in plan No. 178) by virtue of the partition decree in P/5116 and that the said Kulatunga transferred the land to one Victor Alvis Kulatunga and the two Kulatunges aforesaid transferred the same to one Gunaratne Alvis Kulatunge by deed No. 13664 of 24.05.78 and that Alvis Kulatunga transferred 13 perches of the said land to the appellant by deed No. 14529 of 13.09.1982.

It is common ground that by the final decree in P/5116 lot 5 was provided as a right of access to lot 2 aforesaid and to lots 3 and 4 of the said plan No. 178. The Appellant in his plaint alleged that the Respondent who was the owner of Lots 3 & 4 blocked the right of access to lot 2 over lot 5 by erecting a fence across the said road (lot 5) on or about 28.02.1986.

The Respondent filed answer denying the allegations levelled against him in the plaint and pleaded that from about 1953 the strip of land covered by lot 5(a) was not used as a road way by any one as there was access to lot 2 from the public road. (Thannanwilla road). The Respondent further averred that neither the appellant nor his predecessors in title ever used the road after the public road called "Thannanawilla" road aforesaid came into existence and that the Appellant waived or abandoned his right to use lot 5 as his right of access, and pleaded that he had prescribed to lot 5.

When the matter was taken up for trial in the District Court four issues were framed on behalf of the Appellant. They are as follows :

(1) Did the plaintiff use lot 5(A) and lot 5(B) as access road to reach lot 2(A) ?
(2) Did the defendant on or about 9 obstruct the road shown as lots 5(A) & 5(B) ?
(3) Did the defendant on or about 22.01.1989 obstruct the road shown as lots 5(A) & 5(B) ?
(4) Is the plaintiff entitled to obtain an order against the defendant to remove all the obstruction in lots 5(A) & 5(B) ?
(5) Is the Plaintiff entitled to claim damages from the defendant ?

After trial the Learned District Judge by its judgement dated 21.04.1994 dismissed the Appellant's action and the appellant being aggrieved by the said judgement preferred this appeal to this Court.

At a glance one could see that the appellant by his issues framed was not seeking to establish a servitude of right of way acquired by prescription or on a deed. He was not even seeking to establish the right of way shown as lot 5 in plan 178 granted by the partition decree in P/5116. Whatever the admissions or the pleadings are a case is ultimately decided on the issues framed by the parties or by the court itself irrespective of the pleadings. It was held in *Hanafi Vs. Nallamma* by G. P. S. De Silva, C. J. that once issues are framed the case which the court has to hear and determine becomes crystallised in the issues and the pleadings recede to the background. In the case in hand the first issue is whether the Appellant used lot 5(A) ; and lot 5(b) as a road access to reach lot 2(A). It is clear that the Appellant was certainly not claiming any right or title derived or, on the strength, of the partition decree in case No. 5116/P. Therefore in the absence of any specific issue as to whether the appellant was entitled to a right of way over lot 5(a) or lot 5(b) or both by virtue of, or based on the partition decree in case No. 5116/P the Learned District Judge cannot be faulted for not holding in favour of the appellant on that issue as there was not sufficient evidence on that issue to prove that the Appellant used the particular road for any length of time. On the other hand issue No. 1 does not speak of a date as to when the appellant commenced using the said road, or for how long he used that road. Since the Appellant was not relying on title or a right she derived based on the partitioned decree referred to above the appellant could not in any event have succeeded in this action. On the other hand the Appellant failed to frame an issue on

prescription either. Even if he did he failed to prove that he had prescribed to lots 5(A) and 5(B) as he was silent as to the date she started using the road or when the disputes arose as to the said right of way.

THE LAW

I shall now deal with some of the cases cited by the Respondent in order to show that a right of way is lost by non user or abandonment. The statement of law made by the counsel for the respondent is good in regard to normal servitudes but not for servitudes granted by deeds. In *Fernando Vs. Mendis*[2] at 101 the well which was the subject matter in that action was filled up with the consent of both parties, and the court held that there was an express abandonment. *Inagamani Vs. Vinayagamurthy*[3] it was laid down that for servitde to be lost by abandonment the abandonment must be deliberate and intentional. According to **Voet** the abandonment of a servitude destroys that right not only when the abandonment is express but also when it is tacit. On the other hand there is also the proposition that servitudes are lost by permitting or allowing the servient tenement owner anything to be done which is repugnant to or inconsistent with the servitude of right of way to be built upon, or a wall to be constructed across the road or a drain to be cut across the road. In other words where something is conceded to the owner of the servient tenement which naturally and of necessity obstruct the use of the servitude, there is tacit abandonment for the servitude provided the abandonment is deliberate and intentional and certainly not behind the back of the person entitled to the servitude. In any case all the authorities cited by the counsel will not be relevant to a situation where the servitude is created by way of a Deed of Conveyance as in the present case in view of the decision in Paramount *Investments Ltd. Vs. Cader*[1] at 309. Althought this case was not cited before me, the judgement in this case lays down the principle very clearly. It was held in that case that a right of way granted by a deed is not lost by mere non-user. In this case too, the servitude was first recognised by the partition decree and was later conveyed to the Appellant by a Deed of Transfer. There is no evidence in this case to prove that the appellant or his predecessors in title ever conceded their rights in respect of the said servitude intentionally or deliberately.

Therefore I respectfully disagree with the submissions made by the Respondent that there had been a tacit or express abandonment by the appellant or her predecessor in title of the servitude of a right of way in

respect of lots 5(A) and 5(b) (lot 5 in plan 178). But unfortunately for the Appellant there was no appropriate, relevant or pertinent. Issue framed on his behalf. The only issue that has some relevance to this topic is issue No. 5 based on prescription, raised by the Respondent and that too was answered in the negative.

It was also the contention of the counsel for the Respondent that in any event this court should not intervene in this matter as the judgement of the learned District Judge, is not perverse. He has cited among other authorities *Fradd Vs. Brown & Co. Ltd.*[5] What was held in that case was that when the issue is mainly on the credibility of witnesses an Appellate Court should not interfere unless the findings of the judge are perverse and not in regard to findings on other issues from the facts which are either proved or admitted ? And in the last place what witnesses are to be believed ? It is only in the last question any special sanctity attaches to the decision of a court of first instance. On the first two questions no special sanctity attaches. By any special sanctity is meant the disinclination on the part of an appellate body to correct a judgment as being erroneous. (*Vide*, *Wickramssooriya Vs. Dedoleena*[6].

Therefore it is seen that an Appellate Court can and should interfere even on question of facts although those findings cannot be branded as "perverse." unless the issue is one of credibility of witnesses. Even though I disagree with the learned counsel appearing for the respondent on certain views expressed by him, which I have enumerated above I agree with him that the Appellant failed to raise the appropriate issue at the trial. I also find that it would not be fair at this stage for this court to frame an issue and answer that issue on its own as I find that the parties have not addressed their minds specifically to that issue.

For the aforesaid reasons I find that there is no merit in this appeal and the same is hereby dismissed with costs fixed at Rs. 5,000 to be paid by the Appellant to the respondent. The Registrar is directed to send the record to the appropriate court for necessary action.

EKANAYAKE, J. - I agree.

Appeal Dismissed.