1943

Present : **Hearne J.**

ABEYTUNGE, Appellant, *and* SIYADORIS *et al.*, Respondent.

113—C. R. Galle, 21,811.

Cartway of necessity—Claim in one action against contiguous lands owned by several defendants—No misjoinder of causes of action.

Where the plaintiff in one action claimed a right of cartway of necessity over several contiguous lands which were owned by different sets of owners,—

Held, that there was no misjoinder of causes of action and parties.

The denial of a right of cartway based upon necessity by each set of co-owners is a denial of the entire right and gives rise to one and the same cause of action.

APPEAL from a judgment of the Commissioner of Requests, Galle.

C. V. Ranawake, for plaintiff, appellant.

E. F. N. Gratiaen (with him *Ivor Misso*), for fourth, fifth, and sixteenth defendants, respondents.

Cur. adv. vult.

March 12, 1943. HEARNE J.—

The plaintiff claimed a right of cartway of necessity to a road through a parcel of land of which the sixteenth defendant-respondent is amongst others a co-owner, then through a parcel of land of which the fourth and

fifth defendants-respondents are amongst others co-owners and finally through a third parcel of land of which the first, second and third defendants-respondents are amongst others co-owners. The Commissioner acceded to the argument that there was misjoinder of causes of action and of parties and dismissed the suit.

In *de Silva v. Nonohamy et el.*[1], the plaintiff claimed to be entitled to a right of way which traversed a number of contiguous lands and, on being disturbed in his enjoyment of the right of way by the owner of one of the lands, he brought an action against the owner for a declaration of his right and damages.

It was held that in these circumstances it was not necessary for him to join as parties the owners of intermediate lands, that the action was properly constituted without their being joined, and that the plaintiff was entitled to proceed against the particular owner referred to alone, even if it appeared in the course of the proceedings that another owner of an intervening land also denied the right of way which the plaintiff claimed.

In this event the Court could exercise its powers under section 18 of the Civil Procedure Code.

In *Fernando v. Arnolis*[2] Drieberg J. said he was not sure if relief is sought against a defendant by declaration of a right of way over his land, the owner of an intervening land must also be joined as a party. But he indicated that in his opinion if the intervening owner also denied the right of way, the Court in the hope of reaching finality in the matter should order that he be joined as a party. His actual words were "I am not sure that the owner of an intervening land must in all cases be made a party to the action; but where the right of way over an intervening land is denied by the owner of it his presence before the Court becomes necessary in order to enable the Court effectually and completely to adjudicate and settle all questions involved in the action and to avoid further litigation".

(In the order that was made the Court (Lyall Grant and Drieberg JJ.) gave the respondents permission to bring a fresh action "making parties to it all the co-owners of Delgahawatta (over which the right of way was claimed) and the owner or owners of Ambalanduwakurundewatta (the intervening land)".

In *Perera v. Fernando*[3] Wood Renton C.J. was of the opinion that, where a right of way is claimed over two distinct lands, the one belonging to the first defendant and the other to the second and third defendants, the causes of action are distinct, and the owners should not have been sued in the same action.

In *de Silva v. Nonohamy* (*supra*) Macdonell C.J. cited *Perera v. Fernando* (*supra*) with approval but the purpose for which he cited it must be noted.

The question before him was whether the owner of an intervening land *need* be joined and he cited *Perera v. Fernando* in order to show that such owner need not be joined. But in adopting *Perera v. Fernando* for the purpose of deciding the matter he was considering, it must not be taken for granted that he adopted all the implications of that decision. Garvin S.P.J. did not cite it. Jayawardene A.J. did, but only for the limited purpose I have mentioned.

[1] *34 N. L. R. 113.* [2] *32 N. L. R. 328.* [3] *4 C. W. R. 148.*

I think that *Perera v. Fernando* must be read with reference to the particular facts of that case. It was only the first defendant who interfered by an overt act with the right of way the plaintiff claimed and the case is little more than direct authority for saying that the second and third defendants who had up to the time of action not challenged the plaintiff's right of way, should not, in those circumstances, have been made parties.

An examination of the authorities seems to lead to this result. If a plaintiff claims that he is entitled to an existing right of way in his favour, and one of the owners of several lands traversed by the right of way disturbs his enjoyment of it, he may file an action against such owner alone. It is unnecessary to make the owners of intervening parcels of land who do not or have not challenged the plaintiff's right of way parties. If, however, any owner of an intervening land also disputes the plaintiff's right of way he may and indeed should be made a party. In this event no misjoinder arises.

All these authorities deal with a right of way which the plaintiff asserted had previously existed. What is the position when he seeks to have a right of way (of necessity) which had not previously existed decreed in his favour ? It is argued by Counsel for the respondents to this appeal that there is a separate and distinct cause of action in regard to each parcel of land over which the plaintiff seeks to exercise a right of way, and that these separate causes of action against different parties cannot be joined in one suit.

There is only one case that seems to have any bearing on the subject, and it is claimed by the respondents to be in their favour. In that case, *Dias v. Amarasinghe*[1], de Sampayo J. said : " It is no doubt true that the owner of land cannot establish a servitude of way over a land not adjoining his own unless he has a right over the intervening lands. But this case has a peculiarity of its own. The plaintiff does not claim a present right of way but he asks the Court to grant him one of necessity. In that state of things I do not think it against principle for the Court to give it by taking the lands separately. The plaintiff in this action may yet bring an action similar to this against the owners of the intervening lands and ask the Court for a similar decree ". I do not think the claim of the respondents is justified. The case decides that the plaintiff may proceed against owners of contiguous lands over all of which he claims a right of way of necessity one at a time. It does not decide that he cannot proceed against all together. Where, therefore, the right of way is one of necessity, the particular problem that has to be decided in this case appears to be free of local authority. It must be decided on first principles.

Now, on what principle did the Judges in *Fernando v. Arnolis*[2] permit the plaintiff to join as parties the co-owners of Dalgahawatta (over which the right of way was claimed) and the owner or owners of Ambalanduwa-kurundewatta (the intervening land) who also disputed the right of way ? On the principle, I take it, that the servitude is indivisible and that a cause of action being *inter alia*, the denial of a right, each of the two sets of co-owners in denying to the plaintiff the right to proceed over a parcel of land owned in common, *ipso facto* denied to the plaintiff

[1] *4 C. W. R. 269.* [2] *32 N. L. R. 328*

the exercise of an indivisible right and was thus liable to be sued in respect of the same cause of action. It is, I think, clear that this follows from the fact that if the right is interrupted at one point, it effectually brings the whole servitude to an end. No doubt a part is less than the whole. But in the case of a servitude the denial of a part *is* the denial of the whole.

I see no reason why the same principle should not apply when a right of way is claimed of necessity. It may be that the claim of the plaintiff is fantastic. But if necessity can be established, the denial of a "right" based upon necessity by each set of co-owners is the denial of one entire right and gives rise to one and the same cause of action. Each set may have a different defence. The denial of necessity may be based on varying considerations. But this does not, in my opinion, mean that the causes of action are distinct. There is one denial possibly based on different grounds.

I allow the appeal with costs. The case will go back for trial in the ordinary way. All costs in the trial Court will be in the discretion of that Court.

Appeal allowed.