

LUCIYA

v.

SOMARATNE

COURT OF APPEAL

RATWATTE, J. (PRESIDENT) & VICTOR PERERA, J.

CA (SC) 357/73 (F). D. C. CHILAW 18471

MARCH 3, 1981.

Servitude - Right of Cartway by prescription - deviation - abandonment

Where a person has acquired a right of way over a definite track over another's land by prescription and thereafter a deviation is effected by mutual agreement.

Held:

The servitude attached to the new deviated route on the basis of prescription. The right is an incorporeal right and the particular route affects only the manner of its exercise. The right is not lost by the deviation on the basis of abandonment unless the abandonment is intentional and deliberate.

Cases referred to:

- (1) *Nagamani v. Vinayagamoorthy* (1923) 24 NLR 438.
- (2) *Fernando v. Mendis* (1911) 14 NLR 101.
- (3) *Dias v. Fernando* (1935) 37 NLR 304.

Appeal from the Judgment of the District Court of Chilaw.

H. W. Jayewardene, Q.C. with S. C. B. Walgampaya and
Lakshman Perera for the appellants.

K. Shanmugalingam for the respondent.

Cur. adv. vult.

March 30, 1981

VICTOR PERERA, J.

The plaintiff-respondent filed this action on the 14th February 1969 against the 1st and 2nd defendants-appellants for a declaration that he was entitled to a cartway P.Q. or R.S.T. in the sketch "X" annexed to the plaint or any other road "ex necessitate" over the land called Kadjugahawatta belonging to the 2nd defendant and over the land called Kadjugahawatta which belonged to R. P. Dingiriya whose estate was being administered by the 1st defendant in Testamentary suit No. 2395/T. The land of the plaintiff-respondent was marked "A" in the sketch and the land of the 2nd defendant was marked "D" and the land of Dingiriya

was marked "E." The plaintiff respondent alleged that to gain access to the Village Committee Road adjoining the land of Dingiriya he used the cartroad P.Q. over the land of the 1st and 2nd defendants-appellants from his land for well over 30-years and had acquired a prescriptive title thereto. The plaintiff-respondent alleged that on or about 1960 the 2nd defendant appellant who was the owner of the lot marked "D" and an heir of Dingiriya the owner of lot "E" requested the plaintiff-respondent to use the roadway depicted as lot R.S.T. in the sketch as he wanted to close down the road P.Q. for the purpose of planting. The plaintiff-respondent alleged that he thereafter used the road marked R.S.T. on the sketch till the 22nd May 1968 when the 2nd defendant-appellant obstructed that part of the deviated roadway R.S.T. He named the 2nd to 6th defendants as parties as they were the owners of the land lying directly East of the plaintiff-respondent's land and adjoining the lands of the 1st and the 2nd defendants-appellants.

The 1st and the 2nd defendants-appellants filed answers on the 8th August 1969 denying the claim of the plaintiff-respondent but pleading that the 3rd, 4th and 5th defendants have been using a roadway over the land of the 6th defendant and that the plaintiff-respondent has always been using a roadway over the land of the 3rd, 4th and 5th defendants, that after the institution of the action the 3rd, 4th, 5th and 6th defendants with the connivance of and in collusion with the plaintiff-respondent obliterated traces of the said roadway and that in any event the shortest and most convenient route to the land of the plaintiff-respondent from the Village Committee road was over the lands of the 3rd to 6th defendants.

On a Commission issued by Court, Plan No. 341 dated 3rd November 1969 (1D1) and the Report dated 4th November 1969 (1D2) were submitted to Court. The plaintiff-respondent had pointed out the roadway ABC as the road which he used, and D.E.B.C. as the deviated road which he used. These roadways correspond with the roadways indicated in the sketch "X."

On a Commission issued by Court at the instance of the 1st and the 2nd defendants-appellants, Plan No. 389 dated 21st March 1970 (1D2) and the Report dated 23rd March 1970 (1D2A) were submitted to Court. According to this Plan and Report a road G.H.I. was shown over the land of the 3rd, 4th and 5th defendants and over the land of the 6th defendant. According to the Report (1D2A) there were no signs of a roadway over this portion depicted as G.H.I. There were barbed wire fences at G and between G. and H. In this Plan apart from the roadways depicted in

Plan 341 (1D1) as A.B.C. and D.E., another road is shown as a continuation of D.E. over the 1st and 2nd defendants-appellants' lands as E.F.J.K.L.M.N. leading to the plaintiff-respondent's land. The defendants-appellants had also on a Commission issued by Court submitted Plan No.3782 (1D3) showing a further alternative route A.B.C.D.E. along the Southern boundaries of the 1st and 2nd defendants-appellants' lands leading to the plaintiff-respondent's land.

When the matter came up for trial on the 25th October 1972, the following issues were framed :—

- (1) Has the plaintiff by use for over 10 years acquired a right to the roadway depicted as PQ in the sketch annexed to the plaint ?
- (2) Did the 2nd defendant allow the plaintiff to use the roadway shown as RST as a deviation of the roadway PQ ?
- (3) Did the 2nd defendant on or about the 22nd May 1968 obstruct the plaintiff's use of the track RST ?
- (4) What damages has the plaintiff suffered by reason of the said obstruction ?
- (5) If so, what is the amount of the damages ?
- (6) In any event is the plaintiff entitled to a right of cartway by necessity over the land of the 1st and 2nd defendants ?
- (7) Is the road over the land of the 3rd, 4th, 5th and 6th defendants the shortest and most convenient road to the plaintiff's land?
- (8) Are the lands of the plaintiff, the 3rd to 6th defendants one and the same land?
- (9) If so, can the plaintiff claim a right of way of necessity over the land of the 1st and 2nd defendants?
- (10) Can the plaintiff have and maintain this action without the addition of all necessary parties ?

After the issues were framed, Counsel for the plaintiff-respondent stated to court that the 3rd to 6th defendants were made parties as the owners of the adjoining lands and as there was a claim for any other roadway of necessity. This action was against

the 1st and 2nd defendants-appellants only. Accordingly the Court made order that the 3rd to 6th defendants were not necessary parties to this action as the plaintiff is not now claiming any other right of way of necessity and discharged the 3rd to 6th defendants.

The trial thereafter proceeded between the plaintiff-respondent and the 1st and 2nd defendants-appellants only. At this stage the 1st and 2nd defendants-appellants do not appear to have objected to the 3rd to 6th defendants being discharged.

The plaintiff-respondent gave evidence to the effect that Dingiriya referred to in the plaint was the owner of the land called Ambagahawatta alias Kadjugahawatta. He by Deed No. 25895 dated 1.8.47 (P1) gifted this land to the plaintiff-respondent, his illegitimate son. He stated that Dingiriya died prior to 1956 about 20 or 22 years prior to the date he gave evidence, that after Dingiriya's death he entered into possession of this land and used the roadway shown as P.Q. in the sketch (P2). He testified that this road was used by Dingiriya himself over the land which was now possessed by the 2nd defendant. According to the evidence of the plaintiff-respondent he had used the roadway P.Q. for well over 10 years till the 2nd defendant deviated the road.

The Surveyor Mr. Bertram de Silva was next called to speak to his Plan and Report. He identified the roadway marked as P.Q. as the roadway marked A.B.C. in his Plan No. 341.

The defendants-appellants called Surveyor Vernon Perera who made the Plan No. 378 (1D3) at their instance but his evidence was not helpful in any way.

The 2nd defendant-appellant gave evidence and stated that the 1st defendant-appellant was her mother. She stated that she knew the roadway claimed by the plaintiff-respondent, that she was present when Mr. Bertram Silva surveyed the same and that Mr. Bertram Silva had depicted the road as A.B.C. in the Plan 1D2. She denied that the plaintiff-respondent ever used the roadways A.B.C. or D.E.B.C. She stated that the plaintiff used a road over the 6th defendant's land, but under cross examination she admitted that during Dingiriya's life time Dingiriya went over the road A.B.C. to pluck coconuts from his land. She stated that she thought her father Dingiriya used a road over the 6th defendant's land.

Thus it is clear that the defendants-appellants were unable to establish that there was any other roadway which was used, with any positive evidence.

The learned District Judge has examined the evidence carefully and come to the conclusion that the plaintiff-respondent had used the roadway A.B.C. and that he had acquired a title thereto by prescription, and that on a suggestion and at the request of the 2nd defendant-appellant the roadway was deviated as D.E.B.C. in Plan 341 in or about 1960.

Mr. H. W. Jayewardene, Q.C. Counsel for the defendants-appellants contended that even if the plaintiff-respondent had acquired a title to the right of way A.B.C. by prescription, there was an abandonment of the servitude. He relied on the case of *Nagamani v. Vinayagamoorthy*⁽¹⁾. In that case it was held that a servitude could be lost by abandonment but the abandonment must be deliberate and intentional. He also relied on the case of *Fernando v. Mendis*⁽²⁾ which was considered in that case. But in the instant case there was no evidence of any intentional abandonment. At the request of the 2nd defendant-appellant, the plaintiff-respondent had agreed to a deviation of the roadway over the same land of the defendants-appellants and leading up to the portion B. C. of the roadway which had been used earlier.

Mr. Shanmugalingam, Counsel for the plaintiff-respondent, cited the case of *Dias v. Fernando*⁽³⁾ where it was held that where a person acquired a right of way over another's land and a deviation of the route is effected by mutual agreement, the servitude attached to the new route. In that case the District Judge had found that the plaintiff had used a cartway over the defendants' land for a considerable number of years. About 7 or 8 years prior to 1934 when the trial took place the roadway was deviated. In that case the plaintiff claimed the old cartway with the deviation.

The Court considered the identical question that has arisen in this case, namely, where a right of way had clearly been acquired along a defined path and was in force up to about 7 or 8 years, was that right lost by the deviation? The answer to that question depended on the nature of the plaintiff's right to the servitude and whether there had been an abandonment of that right at the time of deviation.

The Court held on an examination of all the authorities that it was an incorporeal right over the tenement and the particular route affects only the manner of its exercise.

The plaintiff-respondent in this case claimed the road A.B.C. or the road as deviated. The learned District Judge answered issues 1, 2 and 3 in the affirmative but clarified the matter by reference

to the demarcation in Plans filed of record. He held that the plaintiff-respondent had prescribed to the roadway marked A.B.C. although the road was deviated in the manner shown in the said Plan as D.E.B.C. and that the said roadway was obstructed. The District Judge accordingly declared the plaintiff-respondent entitled to the cartway depicted as A.B.C. in Plan 341 dated 30.9.1969 made by Bertram de Silva, Licensed Surveyor, being the road which the plaintiff-respondent had used before the deviation and awarded damages.

We do not see any reason to vary the said judgment. We therefore affirm the judgment and decree and dismiss the appeal with cost payable to the plaintiff-respondent.

Ratwatte, J. I agree.

Appeal dismissed.