

1948

*Present: Wijeyewardene J.*

SUMANGALA, Appellant, and APPUHAMY,  
Respondent.

290—*C. R. Gampola, 6,317.*

*Servitude—Right to footpath—Cogent evidence of right necessary.*

A servitude such as that of right to a footpath must be established by cogent evidence, as it affects the right of the owner of a land to the free and unfettered use of his land. The fact that the person who claims the servitude has other means of access to the road is a matter that must be considered in weighing the evidence of user.

**A** PPEAL from a judgment of the Commissioner of Requests, Gampola.

*L. A. Rajapakse, K.C.* (with him *S. R. Wijayatilake and T. B. Dissanayake*), for the plaintiff, appellant.

*S. W. Jayasuriya* for the defendant, respondent.

*Cur. adv. vult.*

March 7, 1945. WJEWARDENE J.—

The plaintiff brings this action as the controlling Viharadhipathi of the Pothgul Vihara, Elpitiya, to have it declared that a land of the Vihara, lot 2 in plan D 2, is free from the servitude of a footpath claimed by the defendant as the owner of lots 5 and 6.

The Vihara stands on the land called Viharawatte, lot 1 in place D 2, and the Vihara owns lots 2, 3 and 4.

Lot 1 is separated from lot 2 by the Gansabahawa road. The lots 2, 3 and 4 are contiguous lots. In going from lot 1 to 3 the plaintiff crosses the Gansabahawa road at the point A, shown in plan D 2, and goes along the footpath, shown in detail in plan P1—the footpath being Y F Z. The tea plantation in lot 2 appears to be fenced with barbed wire except along the common boundary between the lots 2 and 3.

The defendant states that he went along the footpath, G F in plan P 1 and then proceeded along the footpath F Y used by the priest, and thus got on to the Gansabhawa road. He says he used this path for the last 32 years as he had no other access to the Gansabhawa road.

It is no doubt true, as pointed out by the learned Commissioner, that the defendant claims this right of way by prescription, but the fact that the defendant has direct access to the Gansabhawa road as admitted by the retired Korala—one of the defence witnesses—is a matter which cannot be ignored in weighing the evidence of user.

The defendant's case is that he has been using the footpath in question for nearly 32 years but he is unable to explain satisfactorily why the plaintiff should have suddenly objected to his using the footpath about 1942. He makes a somewhat vague statement that there were "some differences" between him and the plaintiff about 1942 and that he then ceased to help the Siamese Sect to which the plaintiff belongs. He says that the plaintiff obstructed the use of the footpath only after he withdrew his support from the Siamese Sect. The defendant's evidence with regard to the nature of the "differences" between him and the plaintiff that resulted in plaintiff obstructing the footpath is very unsatisfactory and unconvincing. The plaintiff appears to me to give a more reasonable account of the origin of the differences between him and the defendant. He says that the defendant who was a dayakaya of the temple wanted to use the footpath in 1940 and he told the defendant that he could not allow footpaths over Vihara lands. The defendant then got displeased with the plaintiff and ceased to support the plaintiff's temple.

The plaintiff fenced lot 2 nearly twenty years ago as there was a tea plantation on it. As he had to go from lot 1 to lot 3 over lot 2 he lowered the barbed wire at the point A near the Gansabhawa road so as to give him access to lot 2 without at the same time leaving a gap through which trespassing cattle could enter lot 2. If the defendant was allowed by the plaintiff until two years ago to use that footpath there would have been a similar arrangement of the strands of wire at the point G. But the position now is that the wire had been cut at G. Defendant says that he did not make the gap at G. He says that the gap at G is today what it was for the last twenty years. It is difficult to believe that the plaintiff who took so much trouble to prevent cattle trespassing at A would have left the opening at point B through which cattle could have entered lot 2 and damaged his plantation. This supports the version of the plaintiff that there was a continuous fence between lot 2 and lot 5 and the defendant created the gap about 1942 by cutting the strands.

The evidence of the Surveyor de la Motte is not of much assistance to the defendant. He went to the lands some months after the dispute arose and saw what he thought was a path near the point G. It would not be difficult for the defendant to have taken steps to see that there were signs of such a path during the months that elapsed between the commencement of his dispute with the plaintiff and the visit of de la Motte.

Kiri Banda, the retired Korala, made a general statement that he knew the defendant using the road for the last 25 years, but under cross-examination he admitted that he had been to the defendant's land about 15 years ago for an inquiry and in connection with vaccination duties. He also added that he had been to these lands 2 or 3 years ago along the footpath "as a short cut" and that nobody objected to his doing so. The fact that the Korala of the village going on official duty was not prevented from going over the plaintiff's land cannot be relied upon as evidence of user of the footpath by the defendant as owner of a dominant tenement. Moreover, the evidence of this witness that the Gansabhawa road "touches the defendant's land" contradicts the defendant's evidence that his "land has no Gansabhawa road on the southern end".

I have no doubt that the defendant denied that he had direct access to the Gansabhawa road in order to lend colour to his story that he crossed the plaintiff's land to go to the Gansabhawa road. The remaining witness Samarakoon could only speak of the use of the footpath by the defendant after 1940.

As against this evidence there is the evidence of the plaintiff who is a Nayaka Thero. I see no reason for rejecting the evidence of this witness. He is corroborated by the evidence of Mr. Kalenberg, a licensed Surveyor, who says that the path from F to G appeared to him to be of much more recent date than the rest of the path. On a careful examination of the evidence in the case I am definitely of opinion that the defendant has failed to prove the servitude claimed by him. Servitudes such as these must be established by cogent evidence as they affect the right of the owner of a land to the free and unfettered use of his land.

I set aside the judgment of the learned Commissioner and direct decree to be entered in terms of clause 1 in the prayer of the plaint and for damages at Rs. 6 a year from date of action. The plaintiff would be entitled to costs here and the Court below.

*Appeal allowed.*

