1930

Present : **Dalton J.**

FERNANDO *et al. v.* DONA MARIA *et al.*

175—*C. R. Kalutara*, 11,796.

Servitude—Right of way over several contiguous lands—Owners of all servient tenements—Necessary parties.

Where an action is brought to vindicate a right of way over several contiguous lands it is necessary to join the owners of all the servient tenements over which the right of way is claimed.

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

Ameresekere, for defendants, appellant.

Hayley, K.C. (with him *F. C. Perera*), for plaintiffs, respondent.

[1] (1927) 28 *N. L. R.* 430.

December 11, 1930. DALTON J.—

The plaintiffs, husband and wife, brought this action for a declaration of a right of cart way from the Galle-Colombo high road, across four pieces of land marked lots 1 to 4, to their premises as shown on the plan P1 produced in the case. In addition they claimed an injunction and damages.

The defendants are owners of lot 3, the plaintiffs themselves owning lot 2, the owners of lots 1 and 4 are not parties to the action, but some of them have been called as witnesses for the defence and they deny any right of way to plaintiff for carts across their land.

Plaintiffs plead that they and their predecessors in title have had the uninterrupted and undisturbed use and enjoyment of this cart way for a period of over ten years, and they say that on March 22, 1929, the defendants obstructed the cart way by planting coconuts and putting up a fence on the road at the entrance to and exit from their land lot 3.

The defendants admit that the plaintiffs are entitled to a right of way by a footpath, and it is clear from the plan that there are stiles in the fence complained of.

No plea was raised in the answer that the plaintiffs could not maintain the action without joining the owners of lots 1 and 4, although the defendants pleaded that the claim was vague and embarrassing, but this question seems to be raised in the issues which were as follows :—

(1) Are the plaintiffs entitled by prescription to the rights of cart way demarcated in plan P1 of January 20, 1930 ?

(2) What damages, if any, are plaintiffs entitled to ?

(3) Are the plaintiffs entitled to the right of way over the intervening lands marked 1 and 4 ?

(4) If not, would this in any way debar the plaintiffs from maintaining the present action ?

The trial Judge has answered all the issues in favour of the plaintiffs and has amongst other things specifically decreed that plaintiffs are entitled to the right of way over lots marked 1 and 4.

The defendants appeal from the judgment both on the facts and on the law.

With regard to the alleged user as a cart road, there is a considerable amount of evidence led on both sides. After reading it I must admit the evidence for the plaintiffs, so far as it purports to show a continuous and uninterrupted use for a period of ten years, is somewhat meagre. It is not necessary however for me to say that I differ from the trial Judge's conclusion on the first issue, for I have come to the conclusion that, on the case as brought here, the plaintiffs must fail on other grounds.

The plaintiffs are not bringing an action against the defendants merely for an obstruction raised on lot 3. The principal claim set out in their plaints is that they are entitled to a declaration of a right of way across lots, 1 2, 3, and 4 to the main road. The existence of the right of way across lot 3 depends upon the existence of the right across 1 and 4. I leave out lot 2 as it is plaintiff's property. As pointed out in *Gunasekere v. Rodrigo*[1] in such a case the right is one and indivisible. It is now admitted in the argument before me that in any event the declaration in the decree of a right of way as claimed across lots 1 and 4 could not bind the owners of those properties.

It is not necessary that the servient tenement should adjoin the dominant tenements. An owner may have several properties between him and the main road to which he wants access as here just as in the case of water rights a riparian owner may have a servitude over

[1] 30 *N. L. R.* 468.

several properties higher up the stream. But it is one and the same servitude which is constituted over the several properties in favour of the dominant tenement (*Voet VIII.*, 4, 19). Whether there be one or more servitudes is reckoned according to the number of the dominant tenements, and not according to the number of the servient tenements.

Mr. Hayley urged that plaintiffs were entitled to bring the action against the person who put up the obstruction and need join no other parties. That depends, as I have stated, on the nature of the action. This is not an action for damages for obstruction against the defendants, but for declaration of a right of way over four contiguous pieces of land which is one and indivisible.

It was held in *Saunders v. Executrix of Hunt* [1] that a question as to a disputed right or servitude may indirectly be tried by a personal action for damages, but it would seem that the proper remedy is by a real action. If there be any obstruction or interference with a disputed right a personal action lies for damages, and if necessary for an injunction against the obstructor. If however the action be in the nature of a vindicatory action claiming a right of way, then inasmuch as the right is one and indivisible, it would appear necessary to join the owners of all the intervening servient tenements over which the right of way is claimed in order to have the servitude declared in favour of the dominant tenement. It has been suggested further that this might be a misjoinder, but it would appear to be in conformity with the provisions of section 18 of the Civil Procedure Code, otherwise it would not appear possible for the Court effectually and completely to adjudicate upon the question involved in such an action. Damages cannot be recovered in one action against separate tort feasors, but in *Sadler v. The Great Western Railway Co.* [2] where there was held to be misjoinder, Lord Herschell expressed no opinion as to whether that would be the case if the claim had been limited to a claim for a declaration of right or a claim to an injunction. Lord Shand expressed the opinion that so far as Scotch procedure was concerned even in a case of damages where only two defendants were concerned it might be convenient to have cases of damages tried together, but that the English rules prevented this being done. The question for decision is not an easy one, and unfortunately counsel have not been able to help me with any local decision on the point, and I have not had the benefit of any detailed argument on the point.

On the action, as brought under the issues framed, it seems to me that the trial Judge could only answer issue 3 in the negative. If plaintiffs wish to establish that they are entitled to the declaration of right they claim, they must establish their contention that all four lots are subject to the right of way (see *Fernando v. Fernando* [1]). For that purpose it seems to me the owners of the intervening properties must necessarily be heard and plaintiffs must bring them before the Court. So far as some of them have been heard here as witnesses, they rebut plaintiff's claim. The plaintiffs have not shown they are entitled to a right of way over the intervening lots 1 and 4 and I have come to the conclusion that they cannot maintian the action as brought.

The third issue being answered adversely to the plaintiffs, it follows upon the circumstances here that the fourth issue must be answered adversely to them also. The decree entered in the lower Court must therefore be set aside and the plaintiff's action must be dismissed with costs.

The appeal is allowed with costs.

Appeal allowed.

[1] 2 *Men.* 295. [2] (1896) *A. C.* 450.