

LOWE
vs.
DAHANAYAKE AND ANOTHER

COURT OF APPEAL,
WIMALACHANDRA, J.
CALA 37/2005
DC NEGOMBO 6385/L
22ND AUGUST, 2005

Interim injunction - Preventing access being obstructed - A person, having no soil rights, can he obstruct another using the road ? - How does a right of way come into existence ? Interim relief-Ingredients-Can the District Court invalidate an order made by the Primary Court - Primary Courts Procedure Act, Sections 66, 67, 68 and 69.

The plaintiff-responents instituted action and prayed *inter-alia*, for a declaration that they are entitled to a right of way over the roadway depicted in the plan and further sought an enjoining order/interim injunction restraining the defendant from obstructing the plaintiffs from using the roadway. The Court granted interim relief sought. The defendant petitioner sought leave to appeal from the Court of Appeal.

Held:

- (1) A right of way can come into existence, by an agreement duly registered, by Crown Grant, by prescriptive possession, by dedication to the public or by a declaration by a competent statutory authority that a right of way of necessity has been granted.
- (2) The defendant is not the owner of the roadway - She is not the owner of the servient tenement - she is a mere user of that road, and as she has no soil rights in respect of the right of way, she has no right to obstruct the plaintiffs from using the roadway.
- (3) It is only the owner of the servient tenement who can oppose the plaintiff using the road way.
- (4) The plaintiffs have a *prima facie* case, the balance of convenience favours them, and the equitable considerations favour the grant of an injunction.

Per Wimalachandra J.

"The District Court cannot issue an interim injunction which will nullify or invalidate an order made by a Primary Court - if the Primary Court had already made an interim / final order for possession of land, in the instant case the effect of the interim injunction granted by the District Court is not contrary to the order made by the Primary Court Judge."

APPLICATION for leave to appeal from an order of the District Court, Negombo

Cases referred to :

1. *Jinadasa Vs. Werasinghe* 31 NLR 33
2. *Perera Vs. Gunatilleke*, 4 NLR 181 at 182
3. *Kanagasabai Vs. Mylvaganam*, 78 NLR 288 (*distinguished*)

D. H. Siriwardane for defendant petitioner

Ranjan Suwardaratne with Ranjith Perera for plaintiff-respondents

Cur.adv.vult.

2nd November, 2005

WIMALACHANDRA, J.

The defendant-petitioner (hereinafter referred to as the defendant) filed this application for leave to appeal from the order of the learned District Judge of Negombo dated 20.01.2005. By that order the learned judge granted the interim injunction prayed for by the plaintiff-respondents (hereinafter referred to as the plaintiffs) in their plaint. Briefly, the facts as set out in the petition are as follows :

The plaintiffs instituted this action bearing No. 6385/L in the District Court of Negombo against the defendant and prayed *inter-alia* for a declaration that the 1st plaintiff is, subject to the life interest of the 2nd plaintiff, the owner of the land described in the 2nd Schedule to the plaint, which is a divided portion of the land described in the 1st Schedule to the plaint (depicted in Plan No. 7815/2000) and for a declaration that the plaintiffs are entitled to a right of way over the roadway depicted in the plan No. 7815/2000 shown as the southern boundary. The plaintiffs also sought an enjoining order and an interim injunction restraining the defendant from obstructing the plaintiffs from using the said roadway. When the application for the interim injunction was taken up, both parties agreed to file written submissions and invited the Court to make the order on the written submissions and the documents filed by the parties. Accordingly, the Court made the order on 20.01.2005 granting the interim injunction sought by the plaintiff. It is against this order that the defendant has filed this application for leave to appeal.

The plaintiffs' title to the land described in the 2nd Schedule to the plaint, which is in extent of 17.2 perches, is not disputed. The land described in the 1st schedule to the plaint is bordering on the north by a 30 ft. wide

road and the south by the roadway described as Devata. The plaintiffs' father Don Cyril Samarasekera became the owner of the land described in the 1st schedule by deed of purchase No. 403 dated 15.01.1955 marked "P1". The said Don Cyril Samarasekera gifted the said land to the 1st plaintiff subject to the life interest of the said Don Cyril Samarasekera by deed No. 65689 dated 14.05.1988 marked "P3". The said Don Cyril Samarasekera constructed a house on the land described in the 2nd Schedule to the plaint, which is on the southern part of the land described in the 1st Schedule. This is shown in Plan No. 7815/2000 made by Hugh L. C. Dabrera, Licensed Surveyor marked "P4". It is the plaintiffs' case that the said Don Cyril Samarasekera built the said house and garage close to the southern end of the land facing the roadway described as the "Devata" in deeds marked "P1" and "P3". It is not in dispute that the said road "Devata" is now named Jayaratne Road, which is 20 ft. in width. The plaintiffs' position is that if Don Cyril Samarasekera had not used the said roadway in the south as a means of access, he would not have built the said house and the garage facing the said roadway. The architectural plan of the said house was produced marked "P5" and the plan showing the house built close to Jayaratne Road (previously called Devata Road) marked "P4".

The counsel for the defendant submitted that the plaintiffs have access to the land from the roadway shown to be 30 ft. in width as the northern boundary. The learned counsel further submitted that the learned Judge has not examined whether the plaintiffs have made out a *prima facie* case, in that, they were in fact entitled to a servitude over the said roadway and therefore the order of the learned Judge granting the interim injunction cannot stand. The learned counsel contended that only the defendant is entitled to the right of way over the said roadway by deed No. P13.

In order to entitle the plaintiffs to an interlocutory injunction, the plaintiffs must establish that there is a *prima facie* case in their favour. Once they clear that hurdle the next requirement is that the balance of convenience should favor the plaintiffs. The Court must also consider whether the equitable considerations favour the grant of an injunction. As regards

the above-mentioned first requirement, the Court must be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a possibility of success if the facts alleged by the plaintiffs are proved. (Dalton J. in *Jinadasa Vs. Weerasinghe*⁽¹⁾)

A right of way can come into existence by an agreement duly registered, by Crown Grant, by prescriptive acquisition, by dedication to the public, or by a declaration by a competent statutory authority that a way of necessity has been granted (Servitudes by Hall & Kellaway, page 70).

Before I proceed to consider the requirements of prescriptive acquisition, it must be noted that the defendant is not the owner of the said roadway, in that the defendant is not the servient tenement, and she is a mere user of the said road. Title to a servitude may be acquired by prescription if the occupation or use of something over which a right is asserted has been exercised *nec vi, nec clam, nec precario*. (Servitudes by Hall and Kellaway, page 29). It must be openly exercised and the person asserting must have suffered no interference from the true owner. Further, the use of the roadway must take place without the consent of the true owner. These are essential elements to a prescriptive claim against the owner of the roadway. As I mentioned above, the defendant is not the true owner and she is one of the users of the roadway among several others. It is only the owner of the servient tenement who can oppose the plaintiff using the said roadway. In this case the defendant is not the owner but merely another user of the said roadway. It is to be noted that an adverse user for the purpose of prescriptive rights has to only show that he has been a user of the definite roadway. According to the evidence placed before the Court, the plaintiffs' father who bought this land on 15.01.1955 has this roadway as the southern boundary of his land. Thereafter the plaintiffs had build a house bordering the southern boundary of the said land facing the said roadway, which is the subject matter of this action. The certificate of confirmity was obtained for the said house on 30.11.1998 (*vide* "P6") All these are *prima facie* proof that they have been using the said roadway for well over ten years. Any sporadic interruption coming from another user of the said road, namely, the defendant is immaterial since she is not the owner of the said roadway.

It seems to me that the plaintiffs have used the said roadway, which is the southern boundary of their land as of right for a long period of time. This is borne out by the construction of the house and garage by the plaintiffs in close proximity to the southern boundary of their land facing the said roadway.

In the case of *Perera Vs. Gunatilleke*⁽²⁾ at 182, Bonsor C. J. observed:

"It seems to me that, where a person establishes that he has used a way as of right openly and continuously for a long period and is forcibly prevented from using it, he is entitled to an injunction to restore him to the quasi possession of the way, irrespective of whether he can establish the existence of a servitude. We will treat this action as a possessory action and grant an injunction which will restore the *status quo ante*"

It is also to be noted that the defendant who has no soil rights in respect of the said right of way, has no right to obstruct the plaintiffs from using the said roadway.

The balance of convenience too favours the plaintiffs. Even if the injunction sought by the plaintiff is granted, it will not prevent the defendant from using the said roadway. It will only prevent the defendant from obstructing the plaintiffs from using the roadway. However, if the injunction is not granted there is nothing to prevent the defendant from obstructing the plaintiffs from using the roadway. Accordingly, the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted.

Finally, I will consider the objection raised by the learned counsel for the defendant that in view of the order made by the Primary Court, Negombo in Case No. P/3660, dated 20.11.1998, the District Court will not have jurisdiction to grant an interim injunction according to the judgment in the case of *Kanagasabai Vs. Mylvaganam*.⁽³⁾

The facts which led to the filing of an information by the Police under Section 66 of the Primary Courts Procedure Act, No. 44 of 1979 was due to a dispute between the 1st party respondent, Yasasiri Ruwan Balasuriya, the 2nd party respondent W. Shereen Malcon Lovi and the 3rd party respondent Don Cyril Samarasekera over the said roadway, namely, Deveta alias Jayarathe road. The plaintiffs were not parties to the primary Court proceedings but the plaintiffs' predecessor in title to land was the 3rd party respondent.

After an inquiry the learned Primary Court Judge made order under Section 69(2) directing the 3rd party-respondent not to cause any obstruction to the 2nd party-respondent in using the said roadway.

The learned Magistrate observed that the 3rd party respondent had not used the said roadway as of right.

The order reads as follows :

"ඉහත ෂී කරුණු අනුව මෙම නඩුවේ අරාධිලට අදාල දෙවට පාර. ප්‍රවේශ මාර්ගයක් වශයෙන් අයිතිවාසිකමක් ලෙස මෙම නඩුවේ පළමුවන හා තුන්වන වඳුන්තරකරුවන් විසින් පාවිච්චි නොකරන ලද බවට නිගමනය කරමි.

තවද, එහි බලය ඇති අධිකරණයක නියෝගයක් හෝ ආඥාවක් යටතේ හැර අනන්‍යකාරයකින් ඉහත ෂී ප්‍රවේශ මාර්ගය පාවිච්චි කිරීමට දෙවන පාර්ශ්වයට කරනු ලබන සියලුම බාධාවන් පළමුවන හා තුන්වන වඳුන්තරකරුවන්ට මෙයින් තහනම් කරමි."

The operative part of the order is the 2nd paragraph where the learned Judge ordered the 1st and 3rd respondents not to obstruct the 2nd respondent when she uses the road. It is to be noted that nowhere in the order is it stated that the 1st and 3rd respondents are prohibited from using the said road.

In the case of *Kanagasabai vs Mylvaganam* (*Supra*) it was held that where a Primary Court had already made an interim or final order for possession of land, the District Court will not have jurisdiction to grant an

interim injunction which have the effect of nullifying such order. That is, the District Court cannot issue an interim injunction which will nullify or invalidate the order made by the Primary Court Judge in terms of sections 66, 67, 68, 69 of the Primary Courts Procedure Act.

In the circumstances it is my considered view that in the instant case the effect of the interim injunction granted by the learned District Judge is not contrary to the order made by the Primary Court Judge. Accordingly, I cannot agree with the submission made by the learned counsel for the defendant that the interim injunction granted by the learned District Judge will prejudice the rights of the defendant.

For these reasons I see no grounds to set aside the order of the learned District Judge dated 20.01.2005. Accordingly, the application for leave to appeal is dismissed with costs fixed at Rs. 5,000.

Application Dismissed
