1931

Present : **Drieberg J.**

MARALALINGAM *v.* KUMARAPILLAI *et al.*

230—*C. R. Matale,* 20,223.

Right of way—Owners of intervening lands—Are they necessary parties ?—Objection for non-joinder.

Quære, Whether, in an action for a right of way, it is necessary to join as parties the owners of intervening lands over which the right of way lies, whether they deny the right or not.

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

Navaratnam, for the plaintiffs, appellant.

N. E. Weerasooria, for the defendants, respondent.

February 20, 1931. DRIEBERG J.—

The appellants sued the respondents for declaration of a right of way and for damages for having obstructed it. In their amended plaint they described the right of way as a footpath extending "from the Gansabhawa road to the field called Meladunpathakumbura and from thereto the land called Viharehena along the ridge of the irrigation channel which runs through defendants' land ".

From the plan, No. 374, it appears that the path runs from the Gansabhawa road first over a land marked E, then over the appellants' field Meladunpathakumbura ; it continues from there over the field J and then over the respondents' land to the appellants' land Viharehena, where they have a house. The appellants say that the respondents obstructed the path at the stile by putting up a barbed wire fence.

The owners of E and J are not parties to this action.

The Ratemahatmaya was first examined and when the first appellant was under cross-examination the respondents' proctor took the objection that the appellants' action must fail as he had not made the owners of the intervening lands, E and J, parties. He cited in support of this two cases, *Singhappuhamy v. Somasunderam* [1] and *Samsan v. Amarasingha* [2].

The learned Commissioner held on these authorities that the first issue should be answered in the negative, and dismissed the action with costs. The first issue was a general one whether the appellants were entitled to the right of way ; it does not state in what manner, but it is clear from the pleadings that the issue refers to a right by prescriptive possession.

Even if the respondents' contention was right the learned Commissioner should not have dismissed the action. The objection came too late; section 22 of the Civil Procedure Code requires that such an objection should be taken at the earliest possible opportunity and in all cases before the hearing ; and even when the obejction is taken in time this is not of itself a ground for dismissing an action, for section 17 of the Code provides that no action shall be defeated by reason of non-joinder of parties.

If the learned Commissioner was of opinion that the action was not properly constituted without the owners of E and J being parties he should have ordered the appellants to make them parties and only dismissed the action if they failed to comply with the order.

If the action was properly constituted, but the Court was of opinion that the presence before the Court of the owners of E and J was necessary in order to enable it to effectively and completely adjudicate upon and settle all the questions involved

[1] (1915) 1 *C. W. R.* 44. [2] (1917) 4 *C. W. R.* 269.

in the action, the Court could, of its own motion, have added them as parties—section 18 of the Code. In the circumstances the appellants were entitled to proceed with their case.

As I have held that the objection of non-joinder comes too late it is not necessary for me to decide the question whether the action must fail for want of joinder of these parties.

Of the two cases cited, *Singhappuhamy v. Somasunderam (supra)* has no application to the question; in *Samsan v. Amarasingha (supra)* which was a case of a claim to a way of necessity, De Sampayo J. observed that an owner of land could not establish a right of way over a land not adjoining his own unless he has a right over the intervening lands.

In *Gunasekera v. Rodrigo* [1] it was held that where a land which intervened between the plaintiff's and the defendant's was the subject of a partition decree in which the right of way was not reserved, the right of way over the defendant's land as well was lost.

In *Fernando v. Fernando* [2] the plaintiff claimed a right of way by prescriptive user over three lands, X, Y, and Z, between his land and the high road. A partition decree had previously been entered for the land Y, which was between X and Z, without reservation of a right of way and it was held that the right of way over X and Z was thereby lost.

As a matter of defence where another land lies between his and the plaintiff's a defendant can say that the plaintiff cannot have a right of way over his land if he has no right of approach to it.

But except in the case to which I shall presently refer, it has not been held that a plaintiff whose right of way is denied by the owner of the land over which it passes cannot sue him to vindicate the right of way without joining as parties the owners of the other lands over which the right of way lies, whether they deny the right or not.

[1] (1929) 30 *N. L. R.* 468.
[2] (1929) 31 *N. L. R.* 107.

Mr. Weerasooria relied on the case of *Fernando et al. v. Angela Fernando* [1]. There Dalton J. held that the intervening owners were necessary parties and dismissed the action as they had not been joined. The objection of non-joinder was not taken in the answer but issues were framed whether the plaintiffs were entitled to a right of way over the intervening lands, and if not, were the plaintiffs for that reason debarred from maintaining the action; Dalton J. regards these issues as intending to raise the objection of non-joinder.

The trial Judge held that the plaintiffs had enjoyed a right of way over the defendants' land as well as the intervening lands. In appeal the action was dismissed on the ground that the owners of the intervening lands were necessary parties.

I am unable to agree that the intervening landowners must necessarily be made parties. If they have not obstructed the plaintiff and admit the existence of the right they might successfully plead that there was no cause of action against them and claim that the action against them be dismissed with costs.

It is not necessary for me to deal more fully with this point. In my opinion the objection came too late and should not have been upheld. The appellants are entitled to continue the action as it is now constituted. They will of course have to prove the existence of this right, but it is not necessary that the others should be joined. It is possible that they might admit the appellants' claim or the position might be affected by the special circumstances referred to in paragraph 2 (*e*) of the petition of appeal.

I set aside the decree of dismissal and direct that the trial of the case be continued.

The respondents will pay the appellants the costs of this appeal.

Appeal allowed.

[1] *S. C. Miuntes, December* 10, 1938; *No.* 175 *C. R. Kalutara,* 11,796.