Perera V. Henry

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[PRIVY COUNCIL]

1965 Present: Lord Reid, Lord Morris of Borth-y-Gest, Lord Guest, Lord Pearce, and Lord Pearson

M. G. PERERA, Appellant, and DARIA M. HENRY, Respondent

PRIVY COUNCIL APPEAL No. 34 OF 1964

S. C. 461/60—D. C. Colombo, 8434/L

Servitude—Right of way—Allegation of encroachment—Quantum of evidence.

The trial Judge upheld the plaintiff-respondent's claim that the erection by the defendant-appellant of two pillars upon a plot of land referred to in the proceedings as Lot D was an encroachment on the plaintiff's right of way over Lot D. The plan produced in evidence described Lot D as " Reservation for a road 20-ft. wide ". The title deed of the defendant relating to an adjacent land showed that the defendant also was entitled to a similar right of way over Lot D " to pass and re pass over and along the private road twenty feet wide ". No issue was framed at the trial as to the demarcation of the right of way. The only contention of the defendant was that the plaintiff had lost her right of way by non-user and by abandonment. The defendant indeed claimed that the roadway (Lot D) was owned by him.

Held, that it was not open to the defendant to take the point, for the first time in appeal, that, before there could be any finding of encroachment, it was the duty of the trial Judge to have decided the question as to what was the nature and extent of the right of way to which the plaintiff was entitled.

Held further, that, even if the point had been open it could not have succeeded, because the right of way claimed by the plaintiff was in fact specific and was precisely defined.

APPEAL from a judgment of the Supreme Court.

Walter Jayawardena, for the defendant-appellant.

M. P. Solomon, with *Sir Learie Constantine* and *M. I. Hamavi Haniffa*, for the plaintiff-respondent.

Cur. adv. vult.

November 16, 1965. **[Delivered by LORD MORRIS OF BORTH-Y-GEST]**—

This is an appeal from a decree of the Supreme Court of Ceylon dated the 4th December 1962 dismissing the appellant's appeal from a judgment and decree of the District Court of Colombo (A. L. S. Sirimane A. D. J.) dated the 14th September 1960 whereby judgment was entered for the respondent (the plaintiff in the action) declaring that the erection by the appellant (the defendant in the action) of two pillars upon a plot of land referred to in the proceedings as Lot D were an encroachment on the respondent's right of way over Lot D. The judgment also awarded the respondent damages and ordered the appellant to demolish the pillars within a period of two months.

The plot of land referred to as Lot D was shown on a plan which was filed with and pleaded as part of the plaint in the action. On that plan Lot D was described by the words " Road Reservation ". Land of which the respondent became the owner under and by virtue of a deed dated the 20th July 1955 was marked Lot N on that plan. Lot D is a strip of land which runs on the east side of Lot N and which gives access to Lauries Road. Lot N, the respondent's plot of land, was formerly a part of a larger plot of land owned by her father. He purchased in 1924. He acquired the land by deed (No. 1645) dated the 28th June 1924. The land comprised two Lots (then known as Lots B and C) which were shown on a plan which was referred to in

the deed (Plan No. 345 dated 29th March 1924). That plan was produced in evidence in the action. It showed Lot D and described it by the words—" Reservation for a road 20-ft. wide ". In extent it was 15-67 perches. The conveyance of each Lot (Lots B and C) to the respondent's father was a conveyance " together with the right of way over the said reservation marked ' D ' ".

The respondent is one of four children and after her father's death his land was divided between them. His land (formerly known as Lots B and C) was divided into 5 lots known as Lots L. M. N. O. and P. By the deed of the 20th July 1955 (Deed of Exchange No. 139 of 1955) the respondent became the owner of Lot N. Lot N. was described in a schedule of the deed and was (as were the other divided Lots) shown on a Survey Plan (Plan No. 2126 dated 25th February 1954). The plan which was annexed to the plaint in this action was the same as that Survey Plan. Lot N (being a divided portion of the contiguous Lots previously known as Lots B and C) was 19-9 perches in extent and was by the deed conveyed to the respondent together with " the rights ways easements and appurtenances thereto in anywise belonging or used or enjoyed therewith or reputed or known as part and parcel thereof ".

The appellant became the owner of a plot of land in 1954. That plot was described as Lot A on the plan made in 1924 (Plan No. 345 dated the 29th March 1924). The plot lay to the north of the Lots then known as Lots B and C. The plan (No. 345 of 1924) was the same as that referred to in the deed (No. 1645 dated 28th June 1924) by which the respondent's father became the owner of Lots B and C. The appellant became the owner of Lot A by deed (No. 2010) dated the 14th May 1954 and he was granted a right of way over Lot D as that Lot was shown in Plan 345 dated the 29th March 1924. It was a right (" with other person or persons who hold a similar right ") to " pass and repass over and along the private road twenty feet wide leading from Lauries Road ". Lot D was (in the schedule to the deed) also referred to as a reservation for a road twenty feet wide.

At some date thereafter the appellant erected two pillars on Lot D. They were 12 feet apart and were at the entrance to Lauries Road. As a result the width of free passage was narrowed and obstructed. At some date the appellant appears also to have expended money in making up the roadway (Lot D) but he did not do so with the concurrence or at the request of the respondent. After the appellant had erected the two pillars the respondent's lawyers sent a letter of protest. The appellant's lawyers sent a letter in reply dated the 17th January 1957. In it they wrote :—" Our client instructs us to deny that your client has any right along and over the road leading from Lauries Road, to our client's property at New Buller's Road, referred to by you as " the common roadway ". This road was constructed by our client at his own expense and our client is most surprised to find your client now making a claim to the use of our client's roadway. "

The respondent brought her action by plaint dated the 31st January 1958. She alleged that the appellant had wrongfully erected the two pillars : she sought an order for their removal and damages. At the trial damages were agreed at Re. 1 per month subject to liability. In addition to denials the appellant by his amended answer alleged that the owners of Lots B and C had lost any right of use of the roadway " by non-user and abandonment of same for well over the prescriptive period ". The claim was also made that the appellant and his predecessors had " prescribed to the said right of. way by user for well over the prescriptive period ". It was also pleaded that the respondent had acquiesced in what the appellant had done. There was a counter-claim which for present purposes does not call for full mention.

After hearing evidence at the trial the learned Additional District Judge gave judgment (on the 14th September 1960) in favour of the respondent. He held that her title to Lot N and her right of way over Lot D were established and he further held that the right of way of the respondent (and of her predecessors in title) over Lot D had not been lost by non-user or by abandonment and that no prescriptive rights barring the respondent's right of way could be shown by the appellant. Holding that the erection of the pillars was a restraint on

the free exercise and user of the right of way he ordered their removal and awarded damages.

By petition of appeal dated the 19th September 1960 the appellant appealed to the Supreme Court of Ceylon which court by decree dated the 4th December 1962 dismissed the appeal without giving any reasons. Thereafter final leave to appeal to Her Majesty in Council was granted by the Supreme Court on the 13th May 1963.

In the prepared case of the appellant three reasons were formulated in support of the appeal viz. (1) Because the respondent failed to establish her right of way. (2) Because the learned trial judge failed to consider whether or not the respondent had established her right of way and (3) Because there was no legal evidence of the respondent's title to the said right of way. Upon a consideration of the facts as their Lordships have recorded them and of the judgment in the District Court it would seem difficult to advance contentions which could support these reasons. As the argument for the appellant was developed before their Lordships it became apparent that it was being presented by way of a wholly different approach. No attempt was made to submit that the respondent's predecessors in title had not possessed some right of way in relation to Lot D. No attempt was made to submit that the respondent did not possess some right of way in relation to Lot D. It was not contended that there had been any " abandonment " either by the respondent or by her predecessors in title. What was urged was that the respondent had not shown that she had a right of way over the whole width of Lot D. It was said that even assuming that the appellant (who himself only had a right of way) had had no right to erect the pillars it had not been shown that there had been interference with such rights as the respondent possessed. As the basis of this contention it was submitted that the respondent's predecessors in title had merely had a right to choose a route of appropriate width along and within but not extending to the whole width of Lot D and that at some time they had made their choice with the result that thereafter they and their successors had no right of way which could be asserted over the whole width of 20 feet. It was contended that where a servitude such as a right of way is

granted in general terms and without precise definition the owner of the dominant tenement has a right to choose where to lay the line of the route of the right of way and that once he has made such choice (which he must do in such manner as to burden the servient property as little as possible) he cannot vary it. The learned District Judge, so it was contended, had failed to apply himself to the question and had failed to decide the question as to what was the nature and extent of the right of way to which the respondent was entitled. It was said that as a result it had not been shown that by the erection of the pillars there had been any obstruction of such right of way as could properly be asserted by the respondent.

The line of argument which their Lordships have summarised is one of which no trace is to be seen in the record of the proceedings. No indication of it is to be found in the pleadings. There is no hint of it in the issues framed as suggested on behalf of the appellant. There is no sign that it was advanced at the hearing. The suggestions then made and the contentions advanced would seem to have been quite inconsistent with it. The appellant was then contending that the respondent or her predecessors had lost their right of way by non-user and by abandonment. The appellant indeed claimed that the roadway (Lot D) was owned by him. He so claimed in his petition of appeal to the Supreme Court. It is clear that the argument which was submitted to their Lordships was one that was making its maiden appearance in the litigation. In short it was an entirely new point. It was not raised in the Courts below. It was not taken in the appellant's case. Had the point been originally taken it could if necessary have been met by the respondent both by evidence and by argument. In all these circumstances their Lordships are satisfied that the point was not open to the appellant and it follows that the appeal must fail. Their Lordships must add however that as a result of allowing a considerable latitude in order that the nature of the argument should be fully appreciated it was in fact amply and completely developed. This enables their Lordships to express their conclusion that had the point been open it could not have succeeded. Their Lordships are satisfied that the right of way which was granted to the respondent's father in 1924 was specific

and was precisely defined: no necessity arose at any time for any choice or election of any particular or limited route.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.