SUPREME COURT

Vincent and Others
V.
James and Others

S.C. 63/80 — CA 440/72 (F) — D.C. Colombo 11266/2

Right of Way — Personal or praedial — No presumption of Personal Servitudes. Intention of Parties.

One D.D. William Appuhamy owned a land called Beliwetiya Kumbura. By Deed No. 996 he conveyed a portion 17.89 perches in extent to one Mona Violet Barnes Mack D.A's predecessor in title "subject to the right of way over the cart road along the Eastern boundary of the said premises in favour of the said vendor".

It was argued that the Deed No. 996 created only a personal servitude because the reservation of the cartway was in favour of the vendor and there was no mention of his heirs executors, administrators or assigns.

Held (1) that where a deed provides a right of way meant to serve as access for an owner of the neighbouring land the ingredients of a praedial servitude are there. Hence in this case the servitude was meant to benefit the owner of the neighbouring land and pass to his successors in title.

(2) that the omission to mention successors in title was no pointer to the intention of parties

APPEAL from judgment of the Court of appeal

Before: Samarakoon Q.C., C.J., Ratwatte J. and Soza J.

Counsel: H.L. de Silva, Senior Attorney with N.S.A. Goonetilake and N. Mahendra for Appellants.

H. Samaranayake for substituted Plaintiff-Respondents.

Argued On: 8.3.82

Cur. adv. vult.

Decided On: 8.4.1982

SOZA J.

The only question which arises in this appeal is whether the Deed No. 996 dated 18th November 1932 (P6) creates a personal servitude or a praedial servitude over the portion of land called Beliwetiya Kumbura alias Higgaha Kumbara described in Schedule B of the plaint filed in this case.

One D.D. William Appuhamy at one time owned the land called the divided Eastern half part of Beliwetiya Kumbura alias Higgaha Kumbura of an extent of about 6 1/2 Kurunies paddy sowing area with owita land.

William Appuhamy by the deed No. 996 of 1932 marked P6 conveyed a divided portion of this land in extent 17.89 perches as depicted in plan No. 940 dated 12th June 1932 made by G.L. Schokman Licensed Surveyor to Mona Violet Barnes Mack "subject to the right of way over the cart road along the Eastern boundary of the said premises in favour of the said vendor". The cartroad gives access to the Wijayamangalarama Road through a connecting footpath. Several plans were prepared for the case. For the purpose of the trial plan No. 996 dated 21.3.1966 made by D.A. Mendis Licensed Surveyor marked X and showing the disputed road as Lot D in Plan No. 1010 X dated 9th October 1970 made by S. Lokanathan

Licensed Surveyor marked X1 showing the road claimed as it leads to Wijayamangalarama Road were adopted in the issues.

It is argued that the deed P6 created only a now extinct personal servitude over the 1st defendants land because;

1. the conveyance is free from all encumbrances,
2. the reservation of the cartway is in favour of the vendor and there is no mention of his heirs, executors, administrators, or assigns.

De Sampayo J in the case of *Misso v Hadjear* (1) defined the expression "incumbrance" as follows:-

> "In the largest sense it means any kind of burden on or diminution of the title, and in a narrower sense it is generally employed to indicate a mortgage or charge upon the property."

In the case cited the land was sold "free from all and any encumbrance whatsoever". It was held that "when a property is sold in such a way as to vest full and absolute dominium in the purchaser, freedom from such burdens as servitudes is also necessarily warranted" (p. 280). In the instant case however the expression "free from all encumbrances" must be read subject to the express grant of a right of cartway in the same deed. Therefore the expression "encumbrances" as used in P6 must be understood in the narrow sense as meaning "mortgage or charge". The statement in the deed that the conveyance is free from all encumbrances means no more than that there are no burdens other than those mentioned in the deed. Even if we regard the right reserved in the deed P6 as a right to a personal servitude it is a personal right to the enjoyment of what necessarily is a praedial servitude. In any event a personal servitude involving land is an encumbrance on that land – see *Hall and Kellaway* (1942): *Servitudes* p. 147 and *Ex parte Geldenhuys*[2]. Hence the declaration in the deed P6 that the conveyance is free of all encumbrances is of no relevance to the question before us.

The second point that is being made is that the reservation of the servitude is only for the benefit of the vendor. The fact that there is no mention of "heirs executors, administrators and assigns" of the vendor is relied on as supporting the inference that the servitutal right referred to in the deed was not transmissible and this is one

of the indicia of personal servitudes. Innes J in the case of *Willoughby's Consolidated Co. Ltd. v Copthall Stores Ltd*[3] said:

> "From the very nature of a personal servitude the right which it confers is inseparably attached to the beneficiary. Res servit personae. He cannot transmit it to his heirs, nor can he alienate it; when he dies it perishes with him."

It may be added for the purpose of completeness that if there is an agreement or custom permitting alienation as is usually the case with mining servitudes there can be an alienation of a personal servitude. Inalienability is generally speaking a trait of personal servitudes.

A praedial servitude is one which vests in an individual because he is owner of a praedium. On the other hand a personal servitude is one in which res non servit rei but res servit personae. Usufructus, usus and habitatio are personal servitudes par excellence because from their very nature, they must always be personal. The categories of personal servitudes are however not limited to usufructus, usus and habitatio. There can be other personal servitudes too. For example servitudes normally praedial if constituted in favour of a person as such and not as owner of property are treated as personal servitudes *(Lee. Honore & Price: The South African Law of Property. Family Relations and Succession* (1954) p. 40; *Willoughby's Consolidated Co. Ltd v Copthall Stores Ltd (supra) p. 281;* and *Hall and Kellaway: Servitudes* (1942) pp. 6, 7). *Willoughby's* case (supra) was sent back by the Privy Council for further investigation and was once again up before a bench of five Judges in the Appellate Division. Innes C.J. who presided had occasion to make the following observations on the question of real and personal servitudes created by agreement[4]:

> "Whether a contractual right amounts in any given case to a servitude-whether it is real or only personal - depends upon the intention of the parties to be gathered from the terms of the contract construed in the light of the relevant circumstances. In case of doubt the presumption will always be against a servitude; the onus is upon the person affirming the existence of one to prove it."

In the instant case it is not disputed that the deed P6 created a servitude. The only question is whether the servitude is personal or

praedial. On this question Herbstein J had the following comments to make in the case of *Ex parte Minister of Irrigation*[5]:

> "I have been unable to find any authority laying down that in case of doubt a servitude must be presumed to be personal rather than real. But I would point out that Voet (8.1.1. and 8.4.15) suggests that when the term servitude is used without qualification, it is usually a real servitude which is meant."

No firm view however was expressed by Herbstein J that any ambiguity on whether a servitude is personal or praedial should be resolved by holding the servitude to be praedial.

The principle of Roman-Dutch Law is that clear and cogent evidence is required before a servitude will be held to exist. There is no principle of law however that in case of ambiguity the Court would lean towards the construction that the servitude created is a personal servitude rather than a praedial servitude on the basis that the former is less onerous. A decision as to whether a servitude is personal or praedial must in case of doubt always depend on the facts and circumstances of the particular case. As *Hall and Kellaway* (ibid) p. 7: say.

> "The essential difference depends upon whether the servitude is constituted in favour of a particular piece of land or not ....., and in case of doubt the intention of the parties gathered from the terms of the contract which is to be construed in the light of the circumstances of the case will be the deciding factor."

No presumption can be brought into play. There is no case law support for invoking any presumption either way.

On the question of personal servitudes involving a right of way it will be of interest to refer to two cases which are usually cited. The first is the case of *Fernando v Jayasuriya*[6]. The servitude there revolved round the personal skills of the occupant of the adjoining land. Hence the servitude was regarded as a personal servitude. The second is the case of *Wijeyesekere v Vaithianathan*[7]. In this case the grantor had mortgaged a parcel of land and thereafter gifted it adding a right of way. It was held that the right of way did not become accessory to the mortgage. The circumstances of the gift showed that

only a personal servitude for the benefit of the donee was intended. In neither case did the Court apply any presumption.

Where a deed provides a right of way meant to serve as access for an owner of a neighbouring land the ingredients of a praedial servitude including the requirement of a servient tenement and a dominant tenement are there. In the instant case the servitutal right created is meaningless if it is not meant to benefit the adjoining land of the vendor. The failure to mention the successors in title of the vendor is no pointer to the intention of the parties. It is in fact inconceivable that the vendor on P6 would have been content with a personal servitude. He was the owner of the adjoining land and without access along the eastern boundary of the corpus sold he would have been virtually landlocked. The alternative access shown runs through three fenced lots and is obviously legally insecure and vulnerable owing to the intervening lots to be crossed before the public road is reached — See application of tracing of Dehiwela-Mount Lavinia Town Survey Street No. 29 prepared by S. Jokanathan Licensed Surveyor on 15.10.1970 marked X3. If William Appuhamy decided to sell the land he was left with after he executed P6 he would have had no stable access to offer his purchaser. In the event of such a sale he would be left with a personal right of cartway over the corpus sold which would be of no use to him. Therefore the conclusion is justified that the deed P6 created a praedial servitude in favour of William Appuhamy as owner of the adjoining land.

Reliance was also placed on the absence of any mention of the servitude in the deeds set out in the devolution of title of the 1st defendant-appellant after P6. But from this it cannot be inferred that the servitude created by P6 was not transmissible. The benefit and the burden of a servitude are inseparable from the land to which they are attached. They pass with the land to every succeeding owner - see *Lee. Honore and Price* (ibid) p. 24, *Hall and Kellaway* (ibid) p. 2, *Suppiah v Ponnampalam* 8 and *Maheswary v Ponnudurai* [9] As Voet (8.1.2) has said:

"The possessor of a farm burdened with a servitude,cannot sell the same unburdened."

And again Voet said (8.1.6):

> "The imposition of real servitudes moreover burdens every successor, whether universal or particular, to the servient tenement, and contrariwise benefits those who succeed to the dominant tenement, the tenements, that is to say, passing along with their burden."

The 1st defendant-appellant cannot have a better title than what Mrs. Mack his predecessor had on P6. On the other hand the servitutal rights of William Appuhamy held by him as owner of the dominant tenement have by deed passed to the original plaintiff and on his death now to the respondents substituted in his room.

There were some other matters of contention between the parties but these have been sufficiently dealt with by the learned trial Judge and Court of Appeal and do not require discussion by us.

The Judgment of the Court of Appeal is affirmed. As the respondents did not file written submissions their Counsel was not heard by us and therefore they are not entitled to costs.

The appeal is accordingly dismissed without costs.

SAMARAKOON, C.J. — I agree.
RATWATTE, J. —I agree.

Appeal dismissed

References:

1. (1916) 19 NLR 277, 278
2. (1926) 0.P.D. 155
3. (1913) A.D. 267, 282
4. *Willoughby's Consolidated Co. Ltd v Copthall Stores Ltd* (1918) A.D. 1, 16.
5. (1948) 2 SALR 779, 785.
6. (1949) 50 NLR 564
7. (1938) 40 NLR 318
8. (1911) 14 NLR 229
9. (1957) 59 NLR 498