FERNANDO
v.
WICKREMASINGHE

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.,
C.A. NO. 55/96
D.C. MT. LAVINIA/493/95 L
AUGUST 31ST, 1998

Right of access – Injunction – Prima facie case – balance of convenience – Civil Procedure Code – S. 18 addition of party – Non-joinder – Praedial Servitudes.

The plaintiff-respondent acquired ownership of lot 789 with the right of way over lots 769 and 779. The defendant-petitioner obtained by way of gift from the original owner the rights to use the roadway over lot 779.

On an application of the plaintiff-respondent, the District Court restrained the defendant-petitioner from using the same right of way over lots 769 and 779.

Held:

1. The defendant-petitioner relied on a purported gift of a right of way of servitude of user of a roadway granted by the original owner M. It appears that M. having amalgamated his land with that of J. subdivided it into 16 lots inclusive of two road reservations and transferred the right of access over such lots to J. in common with the owners of other lots other and disposed all his right, title and interest to several persons. M. has covenanted and agreed that right of way over lots 769 and 779 should be used by the owners of lots 780-785 only in common with owners of lots 764-778. J too disposed all his rights together with the right of way over lots 769, 779, 780 to several persons.

   Thus there existed a serious matter to be tried in relation to the legal rights of the plaintiff-respondent and that he had a reasonable prospect of success even in the light of defences, the defendant had pleaded.

2. The sequential test of considering where the balance of convenience lies is fulfilled by weighing the injury which the defendant will suffer if the injunction is granted and where he would ultimately turn out to be the victor, against the injury which the plaintiff will suffer if the injunction were refused and where he would ultimately turn out to be the victor.

3. A person who had no soil rights in respect of a road reservation could not maintain an action for a declaration that defendant was not entitled

to a servitude of right of way over such road reservation. Praedial servitudes can only pass with the Land.

Application in Revision from the order of the District Court of Mt. Lavinia.

Cases referred to:

1. *M. D. B. Saparamadu v. Violet Catherine Melder* CA 688/42F CAM 22.3.96.
2. *K. K. Gunadasa v. J. Subasinghe* CA 92/95 CAM 27.3.95.
3. *Felix Bandaranaiyake v. The State Film Corporation* 1981 (2) SLR 287.
4. *Amarasekera v. Mitsui & Company Ltd.,* 1993 (1) SLR 22.

S. Mahenthiran for defendant-petitioner

Nihal Jayamanna PC with *Noorani Amerasinghe* for plaintiff-respondent

Cur. adv. vult.

October 30, 1998

WEERASURIYA, J.

By this application defendant-petitioner is seeking to set aside the order of the District Judge dated 22.02.1996, restraining him from using a right of way over lots 769 and 779 morefully described in the 6th and 7th schedules to the plaint, marked P1.

The plaintiff-respondent by plaint dated 03.09.1995 instituted action against the defendant-petitioner seeking *inter alia* the following reliefs.

1. A declaration that deed No. 11685 dated 28.05.1993 attested by A. B. W. Jayasekara NP is *void ab initio* and conveys no title and a direction to the Registrar of Lands, Colombo, to cancel the registration of the said deed.

2. A declaration that the defendant-petitioner, his servants, agents and all those holding under him have no right of access to the two reservations for road described in the 6th and 7th schedules to the plaint.

3. A permanent injunction restraining the defendant, his servants, agents and all those holding under him from entering the aforementioned two reservations for road described in the 6th and 7th schedules of the plaint.

4. An interim injunction restraining the defendant, his servants, agents and all those holding under him from entering the said two reservations described in the 6th and 7th schedules of the plaint.

5. An enjoining order in the like manner.

The facts as set out in the plaint are briefly as follows:

Mohamad Sultan Marikkar and Gregory Edward Anthony Perera Jayawardena were owners of adjoining lots 147A4 and 147A5, respectively as shown in plan No. 2105 made by K. M. Samarasinghe, licensed Surveyor. The said Marikkar and Jayawardena by mutual consent amalgamated the said lots 147A4 and 147A5 and subdivided it into 22 lots shown as lots 764-785 in plan No. 2415 prepared by Sameer, licensed Surveyor. Lots 769, 779, and 780 were marked as common road reservations as access for the aforesaid lots. Thereafter Marikkar by deed marked 'C' conveyed unto Jayawardena the right of access in common with the owners of other lots and thereafter he disposed all his right, title and interest in the said lots together with the right of way over 769 and 779 to several persons. Similarly, Jayawardena had disposed all his right, title and interest in the allotments of land together with the right of way over lots 769, 779 and 780 to several persons. The plaintiff-respondent by deed marked 'D' acquired ownership of the lot 784 with building standing thereon together with the right of way over lots 769 and 779.

The Commissioner of National Housing by deed of transfer No. 8010 dated 04.01.1983 conveyed the ownership of premises No. 3/2, Waidya Place, Dehiwala, to Grace Fernando (mother of defendant) who by deed of gift No.139 dated 03.09.1984 gifted an undivided 1/3 share of the said premises to her daughter Nilmini Fernando. Thereafter, the aforesaid Grace Fernando by deed Nos. 11587 and 11588 dated 10.09.1993 gifted an undivided 1/3 share each to her two sons namely, Chrysanthus Fernando and Eulogious Fernando (the defendant-petitioner). The defendant-petitioner, Nilmini Fernando and Chrysanthus Fernando had caused the said premises subdivided into 3 lots marked 2765, 2766 and 2767 in plan No. 41 made by W. D. D. Gunadasa licensed Surveyor and executed deed of partition No. 11762 dated 10.08.1993. By the said deed of partition Nilmini Fernando, Chrysanthus Fernando and the defendant-petitioner had been declared owners of lots 2767, 2766, respectively.

The defendant-petitioner by deed No. 11685 dated 28.05.1993 obtained by way of gift from original owner Marikkar, the right to use the roadway over lot 779 shown in plan No. 2415.

At the hearing of this application, learned counsel for the defendant-petitioner submitted the following matters:

(*a*) that the District Judge had misdirected himself by holding that the plaintiff-respondent had made out a *prima facie* case;

(*b*) that the District Judge had erred by holding that balance of convenience lie with the plaintiff–respondent.

The contention of learned counsel for the defendant-petitioner that no *prima facie* case had been made out by the plaintiff-respondent was based on the following grounds:

(*a*) that plaintiff-respondent was entitled to the servitude of a right of way over lots 769 and 779 and that he had not acquired soil rights;

(*b*) that original owner Marikkar had not divested his soil rights over lots 769 and 779 and that he had gifted the right to use the access over lots 769 and 779 to the defendant-petitioner;

(*c*) that the plaintiff-respondent could not have maintained the action as he had failed to name the grantor of the deed as a party to the action.

Learned counsel for the defendant-petitioner cited two unreported cases namely, *M. D. B. Saparamadu v. Violet Catherine Melder*[1] and *K. K. Gunadasa v. J. Subasinghe*[2] wherein the principle was accepted that a person who enjoyed only a servitude of a right of way, will be debarred from seeking a declaration that another person has no claim for a servitude of a right of way.

Hall and Kellaway in *'The Law of Servitudes'* at page 2 states that:

"Praedial servitudes are constituted in favour of a particular praedium and can only pass with the land. The dominant owner

cannot transfer the land to someone else and keep the servitude for himself or vice versa, nor can he let the servitude, or lend the use of it to strangers apart from the land."

It was observed in *M. D. B. Saparamadu v. Violet Catherine Melder* (supra) that where a person who enjoyed a servitude was obstructed, he could bring an action against the person who obstructed him from interfering with the enjoyment of the servitude. However, it was laid down that a person who had no soil rights in respect of a road reservation could not maintain an action for a declaration that defendant was not entitled to a servitude of right of way over such road reservation.

In the instant case, the defendant-petitioner relied on a purported gift of a right of servitude of user of a roadway granted by the original owner Marikkar. It would appear that the said Marikkar having amalgamated his land with that of Jayawardena, subdivided it into 16 lots, inclusive of two road reservations and transferred the right of access over such lots to Jayawardena and disposed all his right, title and interest to several persons. It is to be observed that Marikkar by deed marked 'C' had covenanted and agreed that right of way over lots 769 and 779 should be used by the owners of lots 780 to 785 only in common with the owners of lots 764 to 778. Thus there appears to be a serious question, in the sense of a matter to be tried that was not frivolous or vexatious. The learned District Judge was expected to consider all the material before him and decide whether the plaintiff's prospect of success was real and not fanciful and that he has more than an arguable case.

It is to be observed that what the plaintiff-respondent had to place before the District Judge was the existence of a *prima facie* case. It has been held in *Felix Bandaranaiyake v. The State Film Corporation*[3], that making out of a *prima facie* case would mean that a serious question must exist to be tried in relation to a person's legal rights and that probabilities were that he would win. Similarly, in *Amarasekera v. Mitsui & Company Ltd.*[4] it was held that where there was a *prima facie* case and a reasonable prospect of success and the plaintiff had actual and legally recognizable rights and the balance of convenience was in his favour, an interim injunction should be granted.

Upon an examination of all the material placed before the District Judge, one is justified in forming a *prima facie* impression that a serious matter existed to be tried in relation to the legal rights of the plaintif-respondent and that he had a reasonable prospect of success even in the light of defences, the defendant had pleaded.

The sequential test of considering where the balance of convenience lies is fulfilled by weighing the injury which the defendant will suffer if the injunction is granted and where he would ultimately turn out to be the victor, against the injury which the plaintiff will suffer if the injunction were refused and where he should ultimately turn out to be the victor. The main factor that has to be considered is the extent of the uncompensatable disadvantage or irreparable damage to either party. Having considered all the material placed before the District Judge, the conclusion is inescapable that the District Judge had rightly formed a *prima facie* impression, that the balance of convenience lay with the plaintiff-respondent and equitable consideration would favour the grant of an interim injunction. The object of issuing an interim injunction is to preserve the property in dispute is *status quo* until the the conclusion of the trial.

The contention of learned counsel that the plaintiff-respondent cannot have and maintain the action without naming the grantor as a defendant is dependant on the basis of a non-joinder of a party. It is to be noted that a person who is no more than a witness need not be named as a party defendant. The plaintiff-respondent has sought a declaration that the deed in question was *void ab initio* and since the grantee of the deed was the defendant the question may arise whether or not there is a legal requirement to name him as a party–defendant. It is to be noted that section 18 of the Civil Procedure Code makes provision for the addition of parties to enable court effectually and completely to adjudicate upon all the questions involved in the action.

For the foregoing reasons, I am of the view that there is no basis to interfere with the findings of the District Judge. In the circumstances, I dismiss this application with costs.

DE SILVA, J. – I agree.

Application dismissed.