CEYLON PETROLEUM CORPORATION
v
MASHOOD

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A. 84/89 (F)
D.C. HAMBANTOTA 755/L
MAY 30, 2003
AUGUST 7, 2003

Right of way of necessity – Servient property vested free from all encumbrances in Corporation – Ceylon Petroleum Corporation Act, No. 28 of 1961 sections 5B, 35 and 35(3) – Specific statutory purpose sought to be achieved – Interests of a public body – Acquisition of a right of way after vesting.

The plaintiff-respondent instituted action seeking a cartway as a right of way of necessity to have access to his land in Schedule C, over the land in schedule B which had been vested on the defendant-appellant. The defendant-appellant whilst denying the averments, prayed for the dismissal of the action. The plaintiff-respondent was running a petrol shed on the land in Schedule B as a dealer of the appellant Corporation and the dealership had been cancelled this land was vested free from all encumbrances in the Corporation under section 35. It was contended that the plaintiff cannot maintain his action in view of section 35.

Held:

i) While a land is vested under section 35 of the Ceylon Petroleum Corporation Act no past or future encumbrances can affect the land that is vested absolutely in the Petroleum Corporation.

ii) A servitude will not be created by judicial decree for the mere asking; the person seeking such a decree must discharge the onus that rests on him.

iii) If one were to accept the argument that a right of way of necessity can accrue after such a vesting order, it is essential for the plaintiff to establish the necessity of the cartway he is seeking, and it becomes necessary to examine the facts and whether those facts would give rise to a requisition of a right of way of necessity; this the plaintiff had failed to establish.

APPEAL from the judgment of the District Court of Hambantota.

Cases referred to:

1. *Wijesena* v *Fernando* – 78 NLR 193
2. *Fernando* v *Fernando* – 31 NLR 107
3. *Gunasekera* v *Rodrigo* et el — 30 NLR 468
4. *Vass* v *Mendis* — 40 NLR 525 at 528.

Sanjeeva Jayawardena for defendant-appellant
S.F.A. Cooray with *L. Liyanage* and *M.T.R.H. Silva* for plaintiff-respondent.

Cur.adv.vult

October 31, 2003

DISSANAYAKE, J.

The plaintiff-respondent instituted this action seeking *inter alia* a cartway as a right of way of necessity to have access to his land morefully described in schedule 'C' of the plaint, over the land morefully described in schedule B of the plaint which had been vested on the defendant-appellant.

The defendant-appellant by his answer whilst denying the averments in the plaint prayed for dismissal of the action.

The case proceeded to trail on 15 issues. At the conclusion of the trial the learned District Judge entered judgment in favour of the plaintiff-respondent and granted a right of cartway.

The defendant-appellant appealed from the aforesaid judgment.

At the arguments of the appeal before this Court, learned counsel appearing for the defendant-appellant and the plaintiff-respondent restricted their arguments to the following issue of law, namely: whether the plaintiff-respondent could have validly maintained this action in the District Court of Hambantota in view of the provisions of section 35 of the Ceylon Petroleum Corporation Act, No. 28 of 1961 as amended.

Counsel for both parties agreed to do away with oral arguments and tender their respective written submissions to resolve this issue.

The facts relevant to deal with this legal issue are as follows:-

The plaintiff-respondent was running a petrol shed on land described in schedule 'B' to the plaint, as a dealer of the defendant-appellant Corporation. The then Minister of Industries and Scientific Affairs acting in terms of section 35 of the Ceylon Petroleum Corporation Act, No. 28 of 1961 as amended vested the said land in the defendant-appellant's corporation.

This had prompted the plaintiff-respondent to institute this action seeking a right of way of necessity, which was resisted by the defendant-appellant on the ground that section 35 of the Petroleum Corporation Act, No. 28 of 1961, has the effect of vesting the land on the defendant-appellant free of all encumbrances.

At the District Court issue No. 11 which was based on this legal issue arising out of section 35 of Act, No. 28 of 1961 was raised by the defendant-appellants which reads as follows:-

Issue No. (11):-

Can the plaintiff have and maintain his action in view of the provisions of section 35 of the Ceylon Petroleum Corporation Act?

Thus it is necessary to examine the section 35 of the Petroleum Corporation Act, No. 28 of 1961 as amended.

Section 35:

1) The Minister may, by order (hereinafter in this and referred to as a "Vesting Order") published in the Gazette, vest in the Corporation with effect from such date as shall be specified in the order, any such notified property as has not been disclaimed by a notice of a disclaimer or way, right, interest or benefit in such notified property derived under the terms of any arrangement, agreement (formal or informal) lease, or notarially executed instrument subsisting on the date of a publication of the notice of claim."

Section 35(3) provides thus:-

A vesting order shall have the effect of giving the corporation absolute title to any property specified in the order with effect from the

date specified therein and free from all encumbrances provided however where any right, interest or benefit in any notified property is vested in the corporation, a vesting order shall have the effect of giving the corporation such right, interest or benefit with effect from the date specified in the order.

Thus it is clear that, what can be vested is either the property as a whole or a right or interest in that property. It is to be seen that whatever it may be that has been vested, upon vesting all rights that hitherto existed are extinguished and the land vests absolutely and without encumbrance, in the Ceylon Petroleum Corporation.

The learned counsel who appeared for the plaintiff-respondent by way of his written submissions conceded that the land described in schedule 'B' to the plaint has been vested on the defendant-appellant on 21.08.1974, without any encumbrances.

However he had taken up the position that a right of way of necessity has been created after the said vesting of the said land. Learned counsel has drawn a parallel on the provision of section 48(1) of the Partition Law.

He had contended that a servitude which is not reserved in the final decree of partition is wiped out by such final decree of partition and the property vested by it on the parties free of all encumbrances. However it is possible to acquire a servitude thereafter by prescriptive user or by judicial decree on the ground of necessity.

He cited *Wijesena* v *Fernando* (1) where it was held – that although the partition decree extinguished in law that portion of the cartway A-B, yet once a praedial servitude has been acquired it is not lost or extinguished by the impact of a partition decree over a portion of it; the servitude over the balance portion is not destroyed or lost but lies dormant and is revived by the recreation of the servitude over the lost portion. Once a way of necessity is granted over A-B (in the circumstances of this case the plaintiff should be granted a cartway of necessity over A-B the servitude over B, C, D, E, F, G, H is revived and operative.

At page 198, Sharvananda, J. (as his Lordship then was) stated:

"It is to be noted that in *Fernando* v *Fernando* (2) 31 NLR 107 case, Dalton, J. re-cognized the possibility of recreation of the entire servitude after the after the extinction as a result of the Partition decree...."

He also cited *Gunasekera* v *Rodrigo* (3) where it has been held that where the plaintiff-appellant had inspite of the final decree for partition, without reserving the right of way, continued to use the same right of way for over ten years from (1909) the date of the partition decree was held entitled to the right of way.

To examine the aforesaid contention of learned counsel who appeared for the plaintiff-respondent it has become necessary to examine the provisions of the Ceylon Petroleum Act, No. 28 of 1961, carefully...

It is interesting to note that by examination of section 5B of the Ceylon Petroleum Corporation Act, that the Ceylon Petroleum Corporation has been statutorilly vested with the exclusive right to import, export, sell, supply or distribute petroleum products.

The long title of the Ceylon Petroleum Corporation states *inter alia* as follows:-

"An Act to provide for the establishment of the corporation to carry on business as an importer, exporter, seller, supplier or distributor of petroleum as well as the business of.....to enable the compulsory acquisition or requisition for such corporation of any immovable or movable property required for the purpose of such corporation and to provide....."

It is to be seen that the legislature considered it a primary purpose of the Act, to not only establish a corporation to regulate the petroleum market but also to vest land in that corporation for the purpose of facilitating the attainment of the objectives set out as the Act in the larger public and rational interest.

It is of significance to observe that if the interpretation advanced by learned Counsel for the plaintiff-respondent is accepted, it will have the effect of supervening the intention of and the objectives of the legislation by permitting land which was vested free of all encumbrances to be nevertheless immediately encumbered consequent to vesting.

This would also lead to an absurd situation where the land vested in the Ceylon Petroleum Corporation would always be under threat of some private individual claiming a right or interest over that land.

Thus the arguments of learned counsel appearing for the plaintiff-respondent wherein he purported to draw parallels between a partition decree and a vesting order under section 35 of the Ceylon Petroleum Corporation Act, is untenable in a situation where a specific statutory purpose is sought to be achieved in the interests of a public body like the Ceylon Petroleum Corporation as opposed to a land of a private individual.

In "Crisis on Statute Law" 7th edition at page 338, by S.G.G. Edgar it is stated *inter alia*:-

"Where there is conflict case law (being common law) must of course Yield to Statute Law. Many enactments are aimed at particular judicial decisions either declaring them to have been erroneous or altering the law as laid down in them. And it is a matter of everyday occurrence for the Courts to consider whether the wording of an enactment shows an intent to get rid of some rule of case of law."

Therefore I am of the view that where a land is vested under section 35 of the Ceylon Petroleum Corporation Act, no past or future encumbrances can affect the land that is vested absolutely in the Petroleum Corporation.

Even if one were to accept the argument that a right of way of necessity can accrue after such a vesting order, it is necessary to examine the facts of the case that is presently before me, whether those facts would give rise to an acquisition of a right of way of necessity.

The vesting of the land described in schedule B took effect by the publication of the notice of acquisition in the Gazette which is dated 26.8.1984 (Vide V4).

The confirmation of the scheme of partition and allotting of shares in partition action bearing No. P/143 of the District Court of Hambantota in which the land that was vested also formed part of the the corpus had taken place on 10.11.1985 (VI) which had been about more than 14 months after the vesting of the land.

Therefore the plaintiff-respondent had continued to be a co-owner of the larger land for more than 14 months after the vesting. And as such co-owner he had a right to occupy any portion of the larger land and to gain access to any part thereof across any other part which was adjacent to either the Tangalle-Hambantota main road or the V.C. road.

There is another aspect to this matter. The plaintiff-respondent was aware that his dealership with the Petroleum Corporation has been cancelled by letter dated 07.3.1975 (V3). By the nature of acquisition published in Gazette (V4) dated 26.8.1984 he had been made aware that portion of the land where his petrol shed was situated was vested in the defendant-appellant corporation.

The plaintiff-respondent in his evidence had admitted that he was present in Court at the hearing of the partition action and that he was represented by counsel. However the plaintiff-respondent who had known that he had been deprived of the access to the Hambantota-Tangalle road as a result of the vesting, had failed to bring these matters to the notice of the District Judge who heard the partition action in order to see that he is allotted a land with a road frontage to Hambantota, Tangalle road, avoiding the land where the petrol shed is situated which had been already vested in the defendant-appellant corporation.

However it appears that the plaintiff-respondent had suppressed that fact apparently hoping to get a right of way from the acquired land. This, shows the lack of *bona fides* in the claim of the plaintiff-respondent.

This conduct of his also leads to the conclusion that he is land-locked not due to the conduct of the defendant-appellant but by the conduct of himself.

The land allotted to Somapala Jayawardena, the plaintiff in partition action P/143 is situated towards the west of the land in suit. According to plan bearing No. 39 of Licensed Surveyor G. Warnakulasuriya (P1) all four boundaries of the land allotted to Somapala Jayawardena are undefined. Further the plaintiff-respondent admitted in his evidence that he could gain entrance to the land in suit through that land. He had further conceded that there were neither buildings nor plantations in that land. Weerakkody officer of the defendant-appellant Corporation in his evidence stated that the land did neither have a barbed wire fence nor a plantation. It was overgrown with shrub jungle. There were several foot paths across the land. Therefore it is apparent that the plaintiff-respondent is not land locked. He has access to his land through the land situated on his Western side.

In deciding whether or not to grant a roadway of necessity, our Courts have always considered the need of the plaintiff as against the hardship that would be caused to the defendant. Weerakkody who was the Manager, Marketing and Distribution of the defendant-appellant corporation in setting out the reasons why the defendant-appellant was opposed to granting a right of way has stated that for a petrol shed the ideal road frontage would be 125 feet and the minimum is considered to be 100 feet. The petrol shed in suit has only a frontage of 80 feet. He had stated a further reduction of 10 feet will make it impractical for large vehicles such as bowsers to use the premises. Further he testified to the plan of the defendant-appellant corporation to expand the fuel station with further facilities. Further it is revealed in the evidence that if a right of way of 10 feet is given across the fuel station, the risk of causing a fire by a careless act of a person using the road, like for e.g. throwing away a lighted cigarette butt or match stick onto an area that is full of inflammable material like petrol is very likely.

As against the inconvenience and risk to property, life and limbs of employees of the defendant-appellant the need of the plaintiff-respondent is to have a right of cart way solely for the purpose of commencing a paddy milling business in the future.

In *Vass* v *Mendis*(4), Basnayake, J. (as his Lordship then was) observed, "A servitude will not be created by judicial decree for the mere asking. The person seeking such a decree must discharge the onus that rests on him."

Therefore it is essential for the plaintiff to establish the necessity of the cartway he is seeking. The only fact relied on by the plaintiff to show necessity are that he had laid a foundation to construct a building on the land and that he intended to commence a business of a paddy mill after completion of the building. Even at the date of action no building has been constructed on the foundation.

It was revealed in the evidence that the land as soon as it was fenced off soon after it's acquisition in 1974. The plaintiff-respondent instituted this action on 13.09.1982, after a period of 8 years after fencing. If he had a real necessity to have access to the land in suit, institution of the present action after a period of over 08 years is not comprehensible.

Thus it can be reasonably be concluded that the plaintiff-respondent had failed to establish that he had a right of way of necessity over the defendant-appellant's land.

It is significant to observe that the learned District Judge had failed to embark on a proper evaluation and analysis of the evidence led in this case. The learned District Judge further had failed to analyse the evidence and consider the law relating to vesting under section 35 of the Ceylon Petroleum Corporation Act.

Therefore the judgment of the learned District Judge cannot be 240
allowed to stand.

I set aside the Judgment of the learned District Judge and direct him to dismiss the action.

The appeal of the defendant-appellant is allowed with costs fixed at Rs. 5000/-

SOMAWANSA, J. – I agree

Appeal allowed.