WANIGASOORIYA
vs
DANAWATHIE AND OTHERS

COURT OF APPEAL
ABDUL SALAM. J
CA 658/04 (F)
DC KULIYAPITIYA 12417/99
NOVEMBER 12, 2007

Permissive access given - Plaintiff unable to protect cultivation - Alternate access available - Prescriptive title? - Roadway used for over 50 years - Rights adverted to the plaintiff? - Right of servitude - Proof - Way of necessity.

The plaintiff-appellant filed action alleging that her father had permitted the defendants predecessor to have access to his land, over and along the land of the plaintiff, and sought a declaration to close down the road, and further alleged that the defendant has alternate way.

The defendant-respondent contended that, the roadway in question had been used by him over a period of 50 years and moved for a dismissal of the action. The trial Court held with the defendant-respondent.

Held:

(1) The judgment does not support even by a stretch of imagination that the defendants used the right of way for a long period of time exceeding 50 years adverse to the rights of the plaintiff, but merely states that they had used their path.

The judgment does not identify the use being adverse to the rights of the plaintiff on a title ten years immediately preceding the institution of the action.

The consequence of this finding would be that according to the trial Judge the defendant had not acquired any prescriptive rights to the roadway.

(2) It is quite clear that the trial Judge has erred in not appreciating that there was lack of evidence regarding the acquisition of a right of way of necessity.

APPEAL from the judgment of the District Court of Kuliyapitiya.

Cases referred to:-

1. *Brampy Appuhamy vs. Gunasekara* 50 NLR 253 at 255
2. *De Soysa vs. Fonseka* - 58 NLR 501

Collin Amarasinghe with *Roland Munasinghe* for plaintiff-appellant
N. R. M. Daluwatte PC with *Gaithri de Silva* for defendant respondent

May 11, 2009

ABDUL SALAM, J.

This is an appeal from the judgment of the learned additional district Judge of Kuliyapitiya, dismissing the action of the plaintiff-appellant (hereinafter referred to as the "plaintiff").

The background to the appeal briefly is that the plaintiff filed action against the defendant-respondents (hereinafter referred to as the "defendants") alleging that the father of the plaintiff permitted the defendant's predecessor in title to have access to his land, over and along the land of the plaintiff. The plaintiff's position is that the said permissive access given to the defendants and their predecessors has resulted in a division of her land and therefore she is unable to protect or improve her cultivation. The plaintiff further averred in her plaint that alternative access is available to the defendants to avoid such a division of the land and defendants by not using the alternative way have caused damages to her in a sum of rupees 3500/- per month.

The defendants whilst admitting the ownership of the plaintiff to the land in question claimed that the roadway had been used by them over a period of 50 years and moved for a dismissal of the plaintiff's action.

At the commencement of the trial paragraphs 1, 2 and 3 were admitted by the defendants, Paragraph 1 of the plaint

deals with the situation of the land and as to the places where the defendants resided. Paragraph 2 of the plaint deals with the ownership of the plaintiff to the subject matter along which the defendants were using the roadway. Paragraph 3 of the plaint deals with the manner in which the plaintiff became the owner of the subject matter over which the defendants are using the alleged permissive roadway.

The material facts and the law on which the parties were at variance included as to whether defendants were permissive users of the road in question and whether the plaintiff is entitled to close down the road, since the defendants have an alternative roadway to gain access to their land. As has been referred to above, the title of the plaintiff to the land in question was never an issue before the learned district Judge. However in his judgment the learned district Judge whilst arriving at the finding that the defendants had failed to prove a right of servitude on prescription and by way of necessity avoided holding the plaintiff as being the owner of the subject matter. The learned counsel of the plaintiff has submitted that the learned judge was patently in error when he failed to find on the plaintiff's ownership and thereafter proceeded to enter a decree for the dismissal of the plaintiff's action.

For purpose of lucidity and comprehension of the actual dispute and to ascertain the exact approach adopted by the learned judge towards the resolution of the dispute, it is appropriate to produce a translation of the issues and the manner in which they were answered in the judgment. When translated into English they appear to me as follows...

1. Did the husband of the 1st defendant who is also the father of the 2nd defendant serve the father of the plaintiff as a watcher? Yes

2. During that period with the leave and licence of the father of the plaintiff and subsequently with the leave and

licence of the plaintiff, (after the plaintiff became the owner of the subject matter) did the defendants use the roadway referred to in the plaint and depicted in plan No 129 A/71? Not established.

3. Thereafter during the time the defendants were using the said roadway has the plaintiff suffered damages as referred to in paragraph 9 of the plaint? **Not established**

4. As the defendants enjoy an alternate right of way to their land, has the plaintiff got the right to close down the road used by the defendant with the leave and licence of the plaintiff? **No**

5. Have the 1st, 2nd and the 3rd defendants and before them their predecessors used the right of way depicted as X1B in plan X for a long period of time exceeding 50 years? **The defendants have enjoyed it for a long period of time.**

6. Are the defendants entitled to the said right by way of necessity? **According to the facts proved the defendants are not entitled to a right of way of necessity.**

7. Are the defendants entitled to the reliefs prayed for in their answer in the event of 5,6 being answered in favour of them? **Certain reliefs can be obtained.**

8. If the defendants are in need of a right of way of necessity are they entitled to obtain the same as referred to in their answer? **No**

The learned counsel of the plaintiff has adverted to the failure on the part of the defendants to make a specific claim of a right of way over the plaintiff's land by prescription and the failure to state even an issue relating to such a claim. Paragraph 5 of the answer merely confines to the defendants and their predecessors having enjoyed a right of way for a

period of 50 years. At this stage it may be useful to refer to the judgment in the case of *Brampy Appuhamy Vs Gunasekara*[1] at 255 where Basnayaka J (as he then was) held in relation to the limitation of actions under the statute (Prescription Ordinance) – section 5, 6, 7, 8, 9, 10, and 11 unless it is specially pleaded by way of defence. The crux of the decision in the said case, when applied to the facts of the present matter would reveal that the learned district Judge has in fact erred with regard to the proper application of the law.

The impugned judgment of the learned district Judge in answer to issue 5 does not support even by a stretch of imagination that the defendants used the right of way depicted as X1B in plan X for a long period of time exceeding 50 years, **adverse to the right of the plaintiff** but merely states that they had used the path. In other words the finding of the learned district Judge inter alia was that the 1st, 2nd and the 3rd defendants and their predecessors have used the right of way depicted as X1B in plan X for a long period of time exceeding 50 years, but does not identify the use as being adverse to the right of the plaintiff on a title independent and whether they enjoyed the same without any interruptions for a period of 10 years immediately preceding the institution of the action. The consequence of this finding would be that according to the learned judge the defendants had not acquired any prescription rights to use the roadway.

The learned counsel of the plaintiff has suggested that the failure to find in favour of the defendants on adverse possession was on account of the admission of the two defendants who testified in court and the answer to issue No 1 to the effect that the husband of the 1st defendant who is also father of the 2nd defendant had served the father of the plaintiff as a watcher. The unambiguous nature of the finding of the learned district Judge was that defendants have failed

to establish a right of servitude by long and prescriptive user attached to the land.

It is pertinent at this stage to reiterate the legal principle set out by his Lordship Basnayaka CJ in *De Soysa Vs Fonseka*[2] as to the nature of the evidence required to prove the acquisition of a right of way by prescription. His Lordship stated that clear and unmistakable evidence of the commencement of an adverse user for a prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises.

The learned district judge has also found that the defendants are not entitled to a right of way of necessity either. In the circumstances, it is quite clear that the learned district Judge has erred basically in answering some of the issues, when there was clear admission as to the ownership of the plaintiff and lack of evidence regarding the acquisition of a right of way of necessity or a right of way of prescription by the defendants. The error thus committed by the learned district Judge has ended up in a serious miscarriage of justice. As the plaintiff who is legitimately entitled to a declaration that she is the owner of the property in question without any burden of servitudes has been unduly denied of a declaration to that effect and this in my opinion is perverse and needs to be corrected.

For the foregoing reasons it is my considered view that the learned district Judge should have answered the issues in the following manner:

1. Did the husband of the 1st defendant who is also the father of the 2nd defendant serve the father of the plaintiff as a watcher? **Yes**

2. During that period with the leave and licence of the father of the plaintiff and subsequent to the plaintiff having

become the owner with the leave and licence of the plaintiff, did the defendants use the roadway referred to in the plaint and depicted in plan 129A/71? **Yes**

3. Thereafter during the time the defendants were using the said roadway, has the plaintiff suffered damages as referred to in paragraph 9 of the plaint? **Not established**

4. As the defendants enjoy an alternate right of way to their land, has the plaintiff got the right to close down the road used by the defendant with the leave and licence of the plaintiff? **Yes**

5. Have the 1st, 2nd and the 3rd defendants and before them their predecessors used the right of way depicted as X1B in plan X for a long period of time exceeding 50 Years? **The defendants have enjoyed it for a long period of time.**

6. Are the defendants entitled to the said right by way of necessity? According to the facts proved the defendants are not entitled to a right of way of necessity.

7. Are the defendants entitled to the reliefs prayed for in their answer in the event of 5, 6 being answered in favour of them? **Not entitled to any reliefs.**

8. If the defendants are in need of a right of way of necessity are they entitled to obtain the same as referred to in their answer? **No**

Subject to the above variations made in relation to the answers given to the issues by the learned district Judge, it is my view that this case should be decided in favour of the plaintiff as prayed for in the plaint but without damages. The learned district Judge is directed to enter decree afresh accordingly.

Appeal allowed