

RANASINGHE
v
SOMAWATHIE AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A. NO. 520/93(F)
D.C. COLOMBO 15093/L
JUNE 12, 2003
JULY 17, 2003

Right of way of necessity – Raising of unpleaded issue on prescription half way through case – Is it permitted?– Law relating to right of way by prescriptive user – Prescription Ordinance sections 5, 6, 7, 8, 9, 10 and 11.

The plaintiff-appellant instituted action praying that he was entitled to a right of way of necessity. The defendant-respondent prayed for a dismissal of the action. The plaintiff-appellant moved to frame an additional issue which was based on prescription half way through the trial.

This was objected to by the defendant-respondent and court rejected the said issue.

At the conclusion of the trial the District Judge dismissed the action.

Held :

- (i) Though issues are not restricted to the pleadings, it is equally settled law that no party can be allowed to make at the trial a case materially different from that which he has placed on record.
- (ii) A right of way by prescription has to be established by proof of the existence of the following ingredients, *inter alia*, –
 - a) adverse possession;
 - b) uninterrupted and independent user for at least 10 years to the exclusion of all others;

These are matters of fact, and unless such matters are pleaded by the plaintiff, there would be no way how the opposing party could counter the claim of the plaintiff-appellant based on acquiring a right of way by prescriptive user.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Bank of Ceylon v Chellappapillai* – 64 NLR 25
2. *Hildon v Munaweera* – (1997) 3 Sri LR 220
3. *G.P. Nandias Silva v T.R. Unamboowe* – 76 CLW 25
4. *Brampy Appuhamy v Gunasekera* – 50 NLR 253
5. *Liyanage and others v Seneviratne* – (1986) 1 CALR 308
6. *Nadarajah v David* – (1999) 1 Sri LR 240

Nihal Somasiri for plaintiff appellant.

Hemasiri Withanachchi for substituted defendant-respondents.

Cur.adv.vult

October 23, 2003

DISSANAYAKE, J.

The plaintiff-appellant instituted this action praying *inter alia*, that he was entitled to a right of way of necessity over the area coloured in blue, in plan No. 3052 dated 20.2.1965 (P4) drawn by licensed surveyor S.Rajendra, which area allegedly is situated between lots No. 210 and 208/2 belonging to the original defendant.

The original defendant in his answer filed, whilst denying the averments in the plaint prayed for dismissal of the action.

The case proceeded to trial on 19 issues and at the conclusion of the trial, the learned District Judge dismissed the action.

It is from the aforesaid judgment that this appeal has been preferred.

Learned counsel who appeared for the plaintiff-appellant contended that the learned District Judge was in error when he dismissed the action. The aforesaid contention of learned counsel appearing for the plaintiff-appellant appears to be based on the grounds that the learned District Judge has failed:-

- a) to embark on a proper analysis and evaluation of evidence, in relation to right of way of necessity.
- b) to allow the application of the plaintiff-appellant during the

course of the trial to raise an issue on prescriptive user on the 20 ground of acquisition of a right of way on the basis that it was not pleaded, and thereby he had failed to appreciate the principle that raising of issues is not confined to the pleadings.

The plaintiff-appellant's case was that he was resident at No. 208/1, and he had a business adjoining his house, which bore assessment No. 214. He claimed a right of way by necessity over land bearing assessment No.210 which was in possession of the original 1st and the 2nd defendant-respondents. During the course of evidence, the plaintiff-appellant conceded that the premises occupied by him consisted of two assessments numbers bearing 30 numbers 208/1 and 214 which adjoins each other with a common door. He stated that while he lived at No. 208/1, his business was carried on in premises No. 214. On the plaintiff-appellant conceding that he had ample access from his premises to Mutwal Road as they are situated abutting Mutwal Road, it is apparent that his claim of right of way of necessity fails.

After his disclosure in his evidence that he had ample access to Mutwal Road from his property and as such his claim of a right of way by necessity cannot be maintained, he had moved to frame the following additional issue which was based on prescription half way 40 through the trial.

Issue No. 20:

Has the plaintiff acquired a right of way over the area marked in blue in plan X to have access to his property by prescriptive user?

The 2nd defendant-respondent objected to the aforesaid issue on the basis that raising an unpleaded issue of prescription half way through the case will cause prejudice to the defendant. The learned District Judge agreed with the contention of the defendant-respondent and had rejected the additional issue.

It is to be observed that the principle that issues are not restricted 50 to the pleadings is well recognized one under our law of civil procedure (*Vide Bank of Ceylon v Chellappapillai*)⁽¹⁾.

It is also equally settled law, that no party can be allowed to make at the trial a case, materially different from that which he has placed on record. *Per* Gunawardane, J. in *Hildon v Munaweera* ⁽²⁾.

It is interesting to note that the plaintiff-appellant instituted this action pleading in his plaint, a right of way of necessity. The original 1st defendant and the 2nd defendant-respondent had filed their joint answer and refuted the claim of the plaintiff-appellant based on the law relating to the right of way of necessity. 60

The law relating to right of way by prescriptive user is different. The material that are necessary to be established by the plaintiff and the defences that are available to a defendant are substantially different. Raising of issues on the Prescription Ordinance which are not pleaded have been frowned upon by our courts. Vide the decisions of *G.P. Nandias Silva v T.P. Unamboowe* (3) and *Brampy Appuhamy v Gunasekera* (4).

In *Brampy Appuhamy v Gunasekera* (*Supra*) Basnayake, J. (as His Lordship then was) at page 255 stated:-

"An attempt was made to argue that the defendant's claim was 70
barred by Prescription Ordinance (Cap. 55). That plea is not taken in the plaintiff's replication. There is no issue on the point nor is there any evidence touching it. The plaintiff was represented by counsel throughout the trial. In these circumstances the plaintiff is not entitled to raise the question at this stage. It is settled law that when, as in the case of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance the effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right, the court will not take the statute into account unless it is specially pleaded by way of defence." 80

In *G.P. Nandias Silva v T.P. Unamboowe* (*Supra*) it was held, *inter alia* where the plea of estoppel has not been taken in the pleadings, no issue may be raised therein.

Learned counsel who appeared for the plaintiff-appellant cited *Liyanage and others v Seneviratne* (5) and *Nadarajah v David* (6) and contended that the aforesaid decisions apply to the facts of the case that is presently before me.

It is to be observed that the decisions of the aforesaid two appeals were in respect of pure questions of law, that arose on pleadings. To be precise those decisions relate to raising of issues 90
on matters that were not dependent on any facts, they deal with pure questions of law arising out of the pleadings.

On the contrary the question presently before me is in respect of a plea of prescription as means of acquiring a right of way. This is dependent on evidence of establishing a right of way by prescriptive user. A right of way by prescription has to be established by proof of the existence of the following necessary ingredients *inter alia* that are necessary to conclude the existence of such a right:-

- a) adverse possession.
- b) uninterrupted and independent user for at least 10 years to the exclusion of all others.

(section 3 of the Prescription Ordinance) (cap.81)

The above matters are all questions of fact and they have to be established by cogent evidence.

Therefore, unless such matters are pleaded by the plaintiff, there would be no way how the opposing party could counter the claim of the plaintiff-appellant based on acquiring a right of way by prescriptive user.

I am of the view that the acquisition of a right of way by prescriptive user is not a pure question of law, and is dependent on facts too, hence the decisions of *Liyanage and others Seneviratne (Supra)* and *Nadarajah v Daniel (Supra)* do not apply to the facts of the action presently before me.

Thus it appears that the learned District Judge has rightly rejected issue number 20 suggested by the plaintiff-appellant.

It is to be observed further that the learned District Judge had rightly rejected the claim of right of way by necessity since the plaintiff-appellant already had access to Mutwal Road.

I see no basis to interfere with the aforesaid judgment of the learned District Judge. Appeal of the plaintiff-appellant stands dismissed with costs fixed at Rs. 5000/-.

SOMAWANSA, J. – I agree.

Appeal dismissed.