

SAPARAMADU
v
MELDER

COURT OF APPEAL
DR. A. De Z. GUNAWARDANE, J.
J.A.N de SILVA, J.
CA 688/93 (F).
DC MT. LAVINIA 308/SPL.
JANUARY 24, 1996 AND
FEBRUARY 8, 1996.

Servitudes – Actio Confessario – Actio Negatoria – Difference – Declaration that land is free from servitude – Who could institute such an action? – Could it be by a person who himself enjoys only a servitude?

The plaintiff-respondent instituted action for a declaration that the defendant-appellant is not entitled to use the road reservation – the plaintiff was not the owner of the land over which the roadway exists.

The trial court gave judgment in favour of the plaintiff-respondent.

Held:

- (1) Actions relating to servitudes are categorized under Roman Dutch Law as Actio Confessario – An action to enforce a servitude and Actio Negatoria – Action to declare a property free from servitude.
- (2) Actio Negatoria could only be brought by an owner against any one claiming a right to exercise a servitude over his property for the purpose of ascertaining whether a servitude existed.
- (3) The plaintiff prayed for a declaration that the defendant is not entitled to use the road reservation. This action falls into the category of Actio Negatoria.

- (4) The plaintiff not being the owner of the land over which the roadway exists cannot maintain the action.

J.A.N. de SILVA, J.

"It is to be noted that the action has been filed on the basis that the defendant-appellant has no right to use the road: we are of the view that such an action can be filed only by a person who has soil rights and not by a person who himself enjoys only a servitude".

Appeal from the judgment of the District Court of Mt. Lavinia.

P.A.D. Samarasekera PC with *R.Y.D. Jayasekara* for defendant-appellant.

Ikram Mohamed with *Shyama Fernando* for plaintiff-respondent.

March 22, 1996.

J.A.N. de SILVA, J.

This is an appeal from the Judgment of the learned District 01 Judge of Mount Lavinia in case No. 308/Spl.

The plaintiff-respondent instituted this action in the District Court of Mount Lavinia on the 20th of April 1983 for a declaration that the defendant-appellant is not entitled to use the road reservation depicted as lot 7 shown in Plan No. 24 (marked P2) morefully described in the schedule to the plaint in any manner whatsoever and for a permanent injunction restraining the defendant-appellant, his servants and agents from using the said roadway.

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The defendant-appellant sought to claim a prescriptive right to use the said roadway.

The plaintiff claimed title to the said roadway upon a series of deeds commencing from 1922.

At the trial the following admissions were recorded:

1. that Earnest Jubilee Melder became the owner of Lot A in Plan No. 66A dated 03.10.1922.
2. that the said Earnest Jubilee Melder died on 03.07.1936 leaving a last will, which was admitted to probate in case No. 81117/T of the District Court Colombo and that 20 probate was issued to Ela Jane Melder.

3. In terms of the last will Ela Jane Melder became the owner of that Lot A1 in Plan No. 66A.
4. According to Plan No. 24 of 02.04.1956 lot 'A' of Plan No. 66A was divided into seven lots and lot No.7 was marked as a road reservation.
5. Ela Jane mentioned above, by deed of gift No. 3659 of 25.03.1967 gifted lot A3 and A4 in Plan No.24 with rights over the roadway over lot 7 to her son Earnest Oscar James Melder. 30
6. Earnest Oscar James Melder died intestate leaving Violet Catherine Melder, the plaintiff in this case and 4 children.
7. Earnest Melder's estate was administered in case No. 25047/T of the District Court of Colombo and plaintiff-respondent became entitled to an undivided half share of lots No. 3A and 4A in Plan No. 24 along with rights over the roadway viz. lot 7. It was also admitted that the land belonging to the defendant abuts the aforesaid roadway depicted as lot 7 in Plan No. 24. 40

The following five issues were raised at the trial viz:

1. In terms of the above admissions has the defendant got a right to use the roadway marked in Plan No. 24 marked as P2.?
2. If so, is the plaintiff entitled to the relief prayed for.?
3. Has the defendant used this roadway undisturbed and uninterrupted without any obstruction continuously for more than 30 years to go on foot and vehicles and to draw electric mains and to lay water mains?
4. Can the plaintiff have and maintain this action without making all other co-owners of Lot A7 parties to this action? 50
5. If issues 3 and 4 are answered in the affirmative should the plaintiff's action be dismissed with costs?

In view of the admissions referred to earlier the defendant-appellant began the case. He had based his case on long and uninterrupted user. In support of this he himself gave evidence and led the evidence of his father and another witness. It is to be observed that the defendant had called the plaintiff too to give evidence on his behalf. 60

The learned District Judge has given judgment in favour of the plaintiff as prayed for in the plaint.

The learned counsel for the defendant-appellant submitted that plaintiff-respondent cannot have and maintain this action.

He pointed out that actions relating to servitudes are categorised under Roman Dutch Law as "Actio Confessorio" and "Actio Negatoria" or Contraria, the former being an action to enforce a servitude and the latter to declare a property free from a servitude.

"Actio Negatoria" could be brought only by an owner against anyone claiming a right to exercise a servitude over his property for the purpose of ascertaining whether a servitude existed. The learned counsel cited Wille on principles of South African Law, page 224 to substantiate this proposition, which states as follows: 70

"If a person unlawfully claims a servitude over land or claims greater rights under a servitude than it actually comprises, the owner of the land may bring an action against him, known as the actio negatoria, for a declaration that his land is free from the servitude claimed, or free from the excessive burdens as the case may be. This action can be instituted by none but the owner of the land in question." 80

The learned counsel for the defendant-appellant drew the attention of this court to paragraph (a) of the prayer to the plaint, which read thus, "for a declaration that the defendant is not entitled to use the road reservation shown in Plan No. 24 and morefully described in the second schedule hereto in any manner whatsoever." The counsel submitted that, this action falls, into the category of Actio Negatoria. Therefore, the plaintiff not being the owner of the land over which the said roadway exists, the plaintiff-respondent cannot maintain this action. It is clear from the 90

admissions recorded and the deeds produced in this case, that the plaintiff-respondent is a co-owner of lot No. 3A and 4A of Plan No. 24 dated 02.04.1956 and she has only a right of way over lot 7 of the said plan.

It is to be noted that the action has been filed on the basis that the defendant-appellant has no right to use this road. We are of the view that such an action can be filed only by a person who has soil rights and not by a person who himself enjoys only a servitude. The plaintiff-respondent has not even claimed that she has prescriptive title to the land on which the said roadway exists. 100

The learned counsel for the plaintiff-respondent submitted that the plaintiff's action is an action which comes within the meaning of "Actio Confessorio". He further submitted that if the exercise or enjoyment of a servitude is obstructed or infringed in any way the holder of a servitude may by means of actio confessorio enforce his rights.

It is to be observed that when a person who enjoys a servitude is obstructed, he could bring an action against the person who obstructs to restrain him from interfering with the enjoyment of the servitude. The counsel for the plaintiff-respondent too cited from Principles of South African Law - by Wille 5h edition the following passage at page 222: 110

"If the exercise or enjoyment of the servitude be obstructed or infringed in any respect, the holder of the servitude may by means of confessoria enforce his legal rights."

However, in the instant case the plaintiff-respondent has prayed for a declaration that the defendant-appellant has no right to use the right of way in question. We are of the view that she cannot have and maintain this action in the present form against the defendant-appellant as she has no soil rights in respect of the said road reservation marked, Lot 7 in Plan No. 24. This aspect of the matter has neither been raised nor looked into by the learned District Judge. We therefore set aside the judgment of the learned District Judge and dismiss the plaintiff's action. 120

In the circumstances, the appeal is allowed with costs fixed at Rs. 750/-.