

Present: Schneider J.

1922.

SINGHO APPU v. HENDRICK APPU *et al.*

25—C. R. Balapitiya, 13,893.

Right of co-owner to take carts over common land.

A part-owner of a land is entitled to use it for taking carts to his house which is on the land, provided, by doing so, he does not interfere with the enjoyment of the land by his co-owners.

THE plaintiff claimed in this case a cart way over the land called Timbirigahawatta, of which he was admittedly a co-owner. He stated that he enjoyed the use of the cart way for over a prescriptive period, and also claimed it as a way of necessity. The plaintiff also alleged that the defendants obstructed him in the use of the cart way, and claimed damages occasioned by the defendant's act.

The defendants denied plaintiff's right to have a cart way and their liability to pay any damage.

At the trial the following issues were framed:—

- (1) Did the alleged right of cart way exist over a prescriptive period from D to A ?
- (2) If so, did the second and third defendants obstruct the way ?
- (3) Damages ?
- (4) Is plaintiff entitled to a necessary cart way, and on what terms ?

These issues were subsequently altered by the Court to—

- (1) Is the road alleged by plaintiff an existing cart way over the common land ?
- (2) Did the second and third defendants obstruct it ?
- (3) Damages ?

The learned Commissioner dismissed the plaintiff's action, with costs.

Plaintiff appealed.

Zoysa, for plaintiff, appellant.

E. G. P. Jayatileke (with him Fonseka), for defendants, respondents.

April 12, 1922. SCHNEIDER J.—

In this action the plaintiff claimed a right of cart way alleging that he was entitled to it by user. It is an admitted fact that a good portion of the cart way claimed by the plaintiff runs through a land which is owned in common by the plaintiff and the defendants. The cause of action is alleged to have been an obstruction in this part of the way, or, in other words, that the defendants interfered

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with the plaintiff's use of the cart way on the land owned by the plaintiff and the defendants in common. It seems to me that the plaintiff has misconceived his action, and that the issues tried did not cover the actual facts of the case. It seems to me an elementary principle that the part-owner of a land is entitled to use it for taking carts to his house which is on the land, provided, by doing so, he does not interfere with the enjoyment of the land by his co-owners. There is nothing in this case as disclosed by the evidence to show that the use of this cart way on the common land by the plaintiff causes injury or damage to the defendants, or that the plaintiff has put the land to use to which he, as an owner, is not entitled to put it to. There is evidence that the plaintiff has a dwelling house on the land. He is entitled to a right of way to the house by foot, as well as by vehicles, provided such use does not interfere with the legitimate enjoyment of the land by the other co-owners. There is evidence that the defendants have a dwelling house on the common land, and that they, in fact, use a part of this cart way in order to reach their house. It seems to me, therefore, upon the facts, that the plaintiff was putting the land to a legitimate use in taking carts across it to his house. In my opinion the defendants were not justified in obstructing the plaintiff's use of this cart way. I would, therefore, direct that the defendants be ordered to remove the obstruction complained of, and that they be restrained from obstructing the plaintiff from the use of the said cart way, unless and until by a properly constituted action they establish that the use of such a cart way by the plaintiff is inconsistent with their rights as co-owners. The plaintiff will have the costs of the action and of this appeal. I make no order as to the claim for damages.

Appeal allowed.