

1950

Present: Gratiaen J.

THAMBAPILLAI, Appellant, and NAGAMANIPILLAI *et al.*,
Respondents

S. C. 141—C. R. Kalmunai, 364/L

Servitude—Right of way—Acquisition by prescription—Elements necessary—Substitution of one track for another—User for full prescriptive period necessary.

It is a pre-requisite to the acquisition of a right of way by prescription that a well-defined and identifiable course or track should have been adversely used by the owner of the dominant tenement for over ten years. Where, therefore, a defined track has been used for an insufficient period of time to establish rights by prescription, it would not be legitimate to take into account, for purposes of prescription, an earlier period when passage over the servient tenement was enjoyed in a general way without reference to any particular course or track.

Although the substitution of one track for another may be permissible where a right of way in general terms has come into existence by grant or by disposition, this principle has no application in cases where a servitude is claimed by virtue of prescriptive user. If a new track is substituted for another, it must, in the absence of a notarial grant, be used for the full prescriptive period before any servitude in respect of it can be established.

APPEAL from a judgment of the Court of Requests, Kalmunai.

C. Renganathan, for the defendant appellant.

P. Navaratnarajah, with *V. Arulambalam*, for the plaintiffs respondents.

Cur. adv. vult.

May 22, 1950. GRATIAEN J.—

In this action the plaintiffs, as co-owners of the land described in paragraph 2 of the plaint, claimed a right of way over the property of the defendant, who is an adjoining land-owner, along a defined track leading to a public road. This servitude was claimed by right of prescriptive user and, in the alternative, as a right of way of necessity.

The evidence of witnesses called by the plaintiffs establishes that the defined track over which a right of way was claimed had come into existence only two or three years before the present action was instituted; until then, the plaintiffs had not used this track but had for well over ten years exercised, in a general way and not along any particular track, rights of access over the defendant's land to the public road. On this evidence the learned Commissioner held that the plaintiffs were entitled to judgment by virtue of prescriptive user. He therefore considered it unnecessary to record his finding on the plaintiffs' alternative claim to a right of necessity.

In my opinion the defendant's appeal is entitled to succeed. The judgment is based on the assumption that a right of way over the defined track of recent origin had been acquired by prescription. It is a prerequisite to the acquisition of a right of way by prescription that a well-defined and identifiable course or track should have been adversely used by the owner of the dominant tenement for over ten years—*Karunaratne v. Gabriel*¹. A person who merely strays across an open land wherever it is most convenient at any given point of time cannot thereby acquire prescriptive right—*Kandiah v. Seenitamby*². In the present case, as I have said, the track in question has been used by the plaintiffs for an insufficient period of time to establish rights by prescription, and it would not be legitimate to take into account, for purposes of prescription, an earlier period when passage over the servient tenement was enjoyed in a general way without reference to any particular course or track.

Learned Counsel for the plaintiffs asked me to hold that the new track over which a right of way is now claimed had been substituted, by agreement between the owners of the dominant and the servient tenements, for the rights which the former had previously exercised and enjoyed. In the first place, there was no averment or proof of any such agreement. In any event, an agreement of this kind, if established, would have been of no avail. The substitution of one track for another may be permissible in certain circumstances, where a right of way in general terms has come into existence by grant or by disposition (*Voet 8-3-8*), but this principle has no application in cases where a servitude is claimed by virtue of prescriptive user—*Kandiah v. Seenitamby*²; *Morgappah v. Casie Chetty*³; *Madanayake v. Timotheus*⁴. If a new track is substituted for another, it must, in the absence of a notarial grant, be used for the full prescriptive period before any servitude in respect of it can be established. The judgment of Sampayo J. in *Costa v. Livera*⁵

¹ (1912) 15 N. L. R. 257.

² (1913) 17 N. L. R. 29.

³ (1913) 16 N. L. R. 31.

⁴ (1921) 3 Cey. L. Rec. 82.

⁵ (1912) 16 N. L. R. 26.

does not seem to me to take a contrary view. It dealt with a special case where the existence of a right of way, subject to an agreed deviation, was admitted by the owner of the dominant tenement. It has no application, as Ennis J. points out in *Morgappah v. Casie Chetty* ¹, where the acquisition of a servitude by prescription is denied. With great respect, I share the doubts expressed by Soertsz, J. in *Dias v. Fernando* ² as to whether Koch J. was justified in holding that *Costa v. Livera* ³ departs in any way from the general principle which the earlier decisions of this Court have laid down. Sampayo J.'s later ruling in *Kandiah v. Seenitamby* ⁴ shows that this distinguished Judge very clearly recognised the limited operation of the doctrine laid down in *Voet 8-3-8*.

In the present case a defined track has been used for a short period of time in substitution for a vague and general user of the servient tenement in a manner which the law does not recognise as a mode of establishing servitudes by prescription. In the result, the plaintiffs have failed to prove that they have acquired a right of way over this particular defined track or, for that matter, over any other part of the land. The position might have been different if there had been only some slight *deviation* (for the convenience and with the concurrence of all the parties) of a *defined* track over which prescriptive rights had been acquired (vide *Rubidge v. McCabe* ⁵).

I set aside the judgment appealed from, but order that the case should be sent back for a re-trial before another Judge on the issue relating to the plaintiffs' claim to a right of way of *necessity* over the defendant's land. This issue has unfortunately not been adjudicated upon by the learned Commissioner. The defendant is entitled to his costs of appeal. The costs of the abortive trial will be costs in the cause.

Case sent back for re-trial.
