1957 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

ROSALIN FERNANDO, Appellant, *and* P. L. P. ALWIS and others, Respondents

*S. C. 120—D. C. Panadure, 2375*

*Servitude—Way of necessity—Burden of proof.*

In a claim made by the plaintiff for a right of footway of necessity to enable her to obtain access from her land to the nearest public road—

*Held*, that when a Court is called upon to decide a question of the grant of a right of way of necessity a proper test to be applied is whether the *actual necessity* of the case demands the grant of the right of way. In such a case it is not necessary that the plaintiff should establish that the way claimed is the only means of access from his land to the public road. If an alternative route is too difficult and inconvenient, the actual necessity of the case is the determining factor.

APPEAL from a judgment of the District Court, Panadure.

*H. W. Jayewardene, Q.C.*, with *P. Ranasinghe* and *P. K. Liyanage*, for the plaintiff-appellant.

*E. R. S. R. Coomaraswamy*, with *E. B. Vannitamby*, for the defendants-respondents.

*Cur. adv. vult.*

July 25, 1957. T. S. FERNANDO, J.—

The plaintiff instituted this action claiming a right of cartway of necessity, 8ft. in width, over lots marked " X " and " Y " of the defendants' land depicted in plan P.1 to enable her to obtain access from her land to the nearest public road, Gunananda Place. As an alternative, she claimed a right of footway of necessity, 4ft. in width, over lot " Y " referred to above. The learned District Judge dismissed the plaintiff's action, and it may be stated at once that we do not consider that she has established any case entitling her to judgment in respect of the right of cartway claimed by her. The only question that merits consideration on this appeal is whether she has satisfactorily established her claim to a footway of necessity.

The principle of our law governing the decreeing of a right of way of necessity is quoted in the judgment of this Court in *De Vaas v. Mendis*[1] as follows :—

" All lands which do not abut upon a high road or a neighbour's road are entitled to a road of necessity . . . If a man's land does not abut on a high road or a neighbour's road, the Court wil[1] grant him a necessary road whereby to reach the high road by the shortest way and with the least damage."

[1] *(1948) 49 N. L. R. at 527.*

The lands intervening between the plaintiff's land and the nearest public road (Gunananda Place) belong to the defendants, the 1st defendant's father-in-law G. S. Fernando, Rev. Stembo and Mrs. Goonewardene respectively. The lands of G. S. Fernando and Rev. Stembo are so built upon already that it is not possible to carve out a footpath over either of these lands to enable the plaintiff to enjoy a means of access to Gunananda Place. Rev. Stembo has, moreover, already successfully asserted in a court of law that the plaintiff in not entitled to a right of way over his land. Access over Mrs. Goonewardene's land which adjoins the western half of the southern boundary of the plaintiff's land, even if it had been claimed, would have involved a much longer stretch of land and a more circuitous route than over the strip marked "Y" in plan P.1. The only side of the plaintiff's land which is not land-locked is the western which, unfortunately, has the sea-shore for its boundary. While the learned trial judge has not been unappreciative of the difficulties experienced by the plaintiff at present, he has decided the case against her on account of the view he formed that it is not impossible for the occupants of the houses standing on the plaintiff's land to obtain access to a public road via the sea-shore. The plaintiff sought to shew that during the dry weather the heat of the sun makes it impossible, particularly for the children living on her land, to walk to and from school on the heated sea-sand ; and during the periods of the monsoons, she complained, the sea is so rough and heavy as to make the waves reach the boundary of her land. It would also appear that an attempt by the Urban Council to construct a road along the sea-shore has proved abortive as a result of the lack of co-operation or enthusiasm on the part of owners of land (among whom, be it said, the plaintiff was not one) abutting the road so proposed.

The plaintiff's action claiming a right of footway was dismissed by the learned trial judge on the sole ground that the plaintiff had failed to discharge the rather heavy onus that lay upon her to satisfy the Court that the " absolute necessities " of the case demanded the grant of the right of way claimed. A reference to " absolute necessity " appears in certain judgments in South African cases in respect of claims for rights of way, but " absolute necessity " does not appear to my mind to involve in these cases a requirement that the plaintiff should establish that the way claimed is the only means of access from his land to a public road or a neighbour's road (via vicinalis). De Villers C. J. in *London and S. A. Exploration Co. v. Bultfontein Mining Co.*[1] stated that the Court has more than once decided that a servitude of necessity cannot be claimed beyond what *absolute necessity* requires. The same learned judge, ten years later, in the case of *Van Schalkwijk v. Du Plessis and others*[2] said that the Court has never laid down any definite rule as to what circumstances would constitute a necessity nor was it advisable that such a rule should be laid down. He did not go so far as to hold that there can be no road of necessity over a neighbour's land unless the only possible approach to a public road is over such land. In his own words, " there may perhaps be cases in which the alternative route would be so difficult and inconvenient as to be practically impossible, and in such cases the

[1] *(1890) 8 S. C. at 60.* [2] *(1900) 17 S. C. at 464.*

Court might be justified in affording relief subject to compensation and the other restrictions mentioned by Voet (8 : 3 : 4) ". Another and to my mind, a simpler expression was used by the same learned judge in an earlier case *Peacock v. Hedges* [1] where he stated that " the authorities in the Roman-Dutch law clearly shew that a right of road of necessity can be claimed no further than the *actual necessity* of the case demands ". If I may say so, with great respect, this simpler and more readily understood expression appears to afford an easier test to be adopted when a Court is called upon to decide a question of the grant of a right of way of necessity.

Learned counsel appearing for the appellant has urged upon us that the alternative route via the sea-shore is so difficult and inconvenient that, having regard to the facts in this case, we shall be justified in taking the somewhat unusual course of interfering with the conclusion of fact reached by the learned trial judge. I have, therefore, to enter upon an examination of (*a*) the circumstances relied on by the plaintiff to establish the burden that undoubtedly lay upon her to show that the actual necessity of the case demanded the grant to her of the right of footway claimed and (*b*) the circumstances pointed to by the defendants as negativing such a right.

On the plaintiff's land, which is about half an acre in extent and is situated in the heart of Panadure, stand two houses in one of which live her parents and her sister with three children. In the other lives another sister with her seven children. At the time of trial seven of these ten children were attending schools in Panadure, and for these children access to and egress from the houses are possible only by going along the sea-shore from the western corner of the plaintiff's land for a distance of about 143 yards until they reach the place where a public lane in front of the Magistrate's bungalow meets the sea-shore. From this place they can get on to the public lane and thereafter to other public roads. It was urged on behalf of the plaintiff that the sea sand gets so heated in midday that the soles of the children's feet get burnt. It was further urged that (i) during monsoon weather access to and from the houses was not possible on account of the fact that waves reached the plaintiff's western boundary, and (ii) the plaintiff desired to erect other buildings on her land and that the present mode of access to the land makes it impossible for materials to be transported thereto. It is incontestable that carts and other vehicles cannot be brought to the land along the sea-shore. I leave out of account other reasons urged on behalf of the plaintiff such as the necessity of access to her house for the patients of her husband who is an Ayurvedic physician. The plaintiff and her husband do not reside on this land at present, and the learned District Judge quite rightly points out that, if her husband's practice is as large as has been stated, there is no reason why he cannot continue to practise his profession living at Horakelle, Moratuwa, as he is now doing.

The claim of the plaintiff to this right of way was resisted by the defendants on grounds which have been examined by the trial judge and rejected as being specious, and it is not necessary upon this appeal to

[1] *(1876) 6 Buchanan's Cape S.C.R. at 69.*

consider these grounds as we are in agreement with the conclusion reached by the learned trial judge on this aspect of the case.

Has the plaintiff shown that the actual necessity of the case demands the grant to her of the right of footway claimed over lot " Y "? The only alternative way disclosed was to walk along the stretch of sea-shore until one reached the lane in front of the Magistrate's bungalow. The learned District Judge has found that ingress or egress by foot over 143 yards of sea-shore is not so difficult or inconvenient as to be practically impossible. The question, undoubtedly, is one of fact, but in the particular circumstances of this case we have, after examination of the relevant facts, reached a conclusion different to that reached by the learned District Judge. In doing so we are fortified by the fact that no question arises here of the credibility of witnesses but that the real question is the proper inference to be drawn from the undisputed facts spoken to by certain disinterested witnesses called on behalf of the plaintiff. As Viscount Simonds said in *Benmax v. Austin Motor Co. Ltd.*[1], where the sole question is one of evaluation of facts the appellate court is in as good a position as the trial judge and should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge.

We are not inclined to disagree with the learned District Judge that (1) the circumstance that the children's feet get burnt by going over the heated sand was an exaggerated hardship and one capable of easy remedy such as by the use of sandals or cheap rubber shoes and (2) the question of the transport of building materials etc. by cart or other conveyance loses any importance if the plaintiff is otherwise not entitled to a cartway. We are, however, unable to brush aside the proper inference to be drawn from the evidence of several reliable witnesses like Messrs. W. N. Goonewardene, D. W. J. Perera and Henry Peiris who spoke of the hardship caused to occupants of the houses on the plaintiff's land during the periods of the monsoons, notably the south-west monsoon. It is not denied that during the south-west monsoon the waves from the sea reach the plaintiff's land. The fact that children and sick persons can get into or out of this land only by wading through or being carried across 143 yards of water or beach at a season when the sea is notoriously turbulent is to my mind a compelling circumstance and, in this case, a decisive one. Viewed in the light of this real hardship of access over the sea-shore in monsoon weather, and indeed at other seasons as well, I find no difficulty in deciding that this alternative route is one which is " so difficult and inconvenient as to be practically impossible". It is a relevant circumstance that some 21 persons, including 10 children, live in the two houses on this land. In case of sickness no vehicle can be brought up to the house and the patient, even if he is capable of walking, will have to be carried by others over a not inconsiderable length of sea-shore. In the case of a wedding or funeral, the difficulties and inconvenience will be manifest. In the case of an urban area like this part of Panadure where so many buildings exist and so much building activity appears imminent, the denial of the right of way claimed would amount to a deprivation of a necessary amenity of modern living. I am of opinion that the alternative route does not

[1] *(1955) 1 A. E. R. 326.*

constitute reasonable access to a public road, having regard particularly to modern conditions of living and that the plaintiff should be granted the more direct approach to a public road over the defendants' land as claimed by her.

The only question that remains is the quantum of the compensation that should be ordered to be paid to the defendants in consideration of their being compelled to allow the creation of this servitude over their land. "If the neighbour is ordered to submit his property to a full and permanent right of way which is sought *ex necessitate*, the owner of the landlocked property must pay a just price for this right".—Hall and Kellaway on Servitudes, (2nd. ed.), page 69. In my opinion, reasonable compensation or the just price the plaintiff must pay would be the market value of the strip of land. According to plan P. 1, lot "Y" has been surveyed as an area covering 2·86 perches. The learned District Judge has stated in the course of his judgment that in the event of this Court disagreeing with his view that the route over the sea-shore constitutes reasonable access to the plaintiff's land, compensation should be calculated at Rs. 15,000 an acre which, according to the 1st defendant himself, is the price of land in this locality. On this basis, the value of lot "Y" works out to Rs. 268, and I would order that a sum of Rs. 300 be paid to the defendants by the plaintiff as compensation for the grant which I decree to her of a right of footway from her land over "Y" in plan P. 1 to Gunananda Place.

The plaintiff will have the costs of this appeal and half her costs in the court below.

H. N. G. FERNANDO, J.—I agree.

*Appeal allowed.*