

1944

*Present: Wijewardene J.*

AMARASURIYA, Appellant, and S. I. PERERA, Respondent.

212—C.R. Negombo, 45,482.

*Servitude—Cartway of necessity—Basis of claims—Actual necessity of the case.*

A right of cartway by necessity can be claimed no further than the actual necessity of the case demands.

**A** PPEAL from a judgment of the Commissioner of Requests, Negombo:

*E. B. Wikremanayake*, for defendant, appellant.

*L. A. Rajapakse*, for plaintiff, respondent.

*Cur. adv. vult.*

May 30, 1944. WIJEYWARDENE J.—

The plaintiff instituted this action claiming a right of cart-way of necessity over the land of the defendants. The cart-way claimed is 10 feet wide and nearly 75 yards long. The defendants disputed the plaintiffs right to the relief claimed.

<sup>1</sup> 16 N. L. R. 53.

<sup>2</sup> 3 *Lorensz* 76.

The Commissioner of Requests held that the plaintiff was entitled to a right of cart-way on payment of Rs. 50 as compensation. After citing a passage from *Maasdorp's Institutes of Cape Law* to the effect that "the right to a way of necessity is indefinite in its character and not limited to any particular route," the Commissioner omitted to give any directions in his judgment for marking the track along which the right is to be enjoyed. The decree itself declared merely that the plaintiff "is entitled to a right of cart-way of necessity over the lands of the defendants." This is not a proper decree to be entered in an action of this nature. The learned Commissioner appears to have misunderstood the passage from *Maasdorp* cited by him. That passage has reference to the rights of the parties before they come to Court. But when the matter is brought before the Court, this indefinite right of way must be converted into an express and definite right of way by the decree of Court.

It is admitted that the plaintiff has a right of footpath over the defendant's land. The existence of such a right does not, of course, bar the plaintiff from claiming a cart-way of necessity. *Boteju v. Abilinu Singho*<sup>1</sup>. The plaintiff could make such a claim successfully if there are special circumstances which call for the exercise of the Court's discretion in his favour and the granting of the relief claimed. I would refer in this connection to the following passage in the judgment of de Villiers C.J. in *Peacock v. Hodges*<sup>2</sup>:—

"The authorities in the Roman-Dutch Law clearly shew that a right of road by necessity can be claimed no further than the actual necessity of the case demands . . . . Moreover I think, in the present case, that if the plaintiff's case rests on a right of way by necessity, that a three feet passage would be quite sufficient to allow to the owner of the hire houses as a means of access. A right of way by necessity does not give a right to the enjoyment of a greater servitude than the absolute necessity of the case requires; and the necessity in this case would not require more than that the tenants of the small hire houses should have the means of ingress and egress."

The plaintiff bases his claim on two grounds:—(1) that he lives in a house on the land and that he owns a car purchased in 1930 and (2) that it is necessary to employ carts to take the produce of the land.

Now the plaintiff bought this land less than 4 years before the institution of this action. It was a bare land at the time. He put up a house about 3 years after his purchase and lived there with his wife for about 4 months and then the wife went to live at Moratuwa. The plaintiff does not say in his evidence that he continued to live in the house after his wife went to Moratuwa. The evidence for the defence is that the plaintiff is not living now on the land. In any event the plaintiff is a Government Servant and it is not unlikely that he will be transferred within a few years from this station to another station. The plaintiff did not construct a garage for his car on this land. He built a garage on an adjoining land of which his mother is said to own an undivided share. The plaintiff himself admits that there was no cart road to the land before his purchase. The evidence does not show any good reason

<sup>1</sup> (1919) 7 C. W. R. 36.

<sup>2</sup> (1876) *Buchanan's Repts.* 65.

why the plaintiff should not walk to the garage on the adjoining land and drive the car from there. I would adopt respectfully the observations made by Drieberg J. in *Fernando v. de Silva* <sup>1</sup>:

“ These lands lie a short distance from the Negombo-Mirigama road. The land in that part of the country, as indeed is the case in most rural areas, consist of numerous small holdings and necessarily comparatively few of them can have direct access by carts to the main road. Under these conditions the respondents whose lands cannot be described as *bloklands*, because they have free access to a road by the path, cannot say that a cart-way is a necessity. Far from this being the case it would be a distinct luxury not enjoyed by the majority of owners of similar lands.”

As for the second ground, I think that a judge would be taking an unreal view of the conditions obtaining in this country if he held that the owner of a compound of half an acre requires a cart-way for transporting his coconuts.

The granting of the cart-way claimed will impose a very heavy burden on the defendant whose land appears to be not even an acre in extent.

I set aside the judgment of the Commissioner and direct decree to be entered dismissing the plaintiff's action with costs here and in the lower Court.

*Appeal allowed.*

