IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C. A. Appeal No. 628/97 (F)
D.C. Matale Case No. 3458/L

Bulanwatte Dharmasirige
Seelawathie

No. 134, Hulangamuwa Road,
Watagoda

Plaintiff-Appellant

VS.

Bulanwatte Dharmasirige
Piyasena,

No. 135, Hulangamuwa Road,
Watagoda

Defendant-Respondent

B. D. Nishantha Dharmakeerthi,

No. 135, Hulangamuwa Road,
Watagoda

Substituted Defendant-Respondent

Before : M. M. A. Gaffoor, J.

Counsel : S. N. Wijithsingh with Chithrananda G. Liyanage for the Plaintiff-Appellant

The Defendant-Respondent absent and unrepresented

Written Submission tendered on : 28.08.2018 (by the Plaintiff-Appellant)

Decided on : **29.03.2019**

M. M. A. GAFFOOR, J.

This an appeal stemming from the judgment of the learned District Judge of Matale in respect of a land action bearing Case No. 3458/L.

The Plaintiff-Appellant (hereinafter referred to as the Appellant) instituted the above action praying *inter alia* for a declaration that the Defendant-Respondent (Respondent) does not have any right to use the right of way in the compound or near the compound (as described in the schedule to the plaint) to have access to his house and a direction on the Respondent that he should use the roadway on the Northern side which was used by the Respondent previously and for costs.

The Appellant in his plaint stated that he became entitled to 1/2 share of the corpus by deed bearing No. 1022 dated 01.01.1982 and he possessed the corpus. He further stated that The Respondent after giving up the road access, he continued to use the road way in the compound of the Appellant (vide page 35 and 42 of the appeal brief). Being strained with the above action of the Respondent, the Appellant compelled to file the above action in the District Court.

In contrast, the Respondent in his answer stated *inter alia* that the right of way was used by him for more than 50 years (vide: page 46 of the appeal brief).

After conclusion of trail, the learned District Judge dismissed the action of the Plaintiff and answered the issue raised by the Respondent in his favour. Being aggrieved by the said judgment the Appellant preferred this appeal.

It was the contention of the Appellant that the right of way which was used by the Respondent-the road on the North edge of the Appellant's land and that road still available for reasonable access. Also it is revealed form the Plan bearing Nos. 2024 dated 20.04.1991 and 2194 dated 12.01.1989 correctly depict the road way used by the Respondent is A to B (vide: page 133-134 of the appeal brief). In addition to this road way (A to B), the Respondent claimed for a right of way which is depicted in Plan No. 2194 dated 12.01.1989.

It's clear from the trial proceedings that, the Respondent in his testimony stated that he commenced to use the right of way in question after he had got a cart which he bought 20-25 years ago; and he accepted that he bought the cart in 1985, but the dispute started even before that. (Vide: page 81 of the appeal brief).

It's further revealed that even, the Respondent argued that he used the road for more than 62 years he coherently had not lead any evidence in this regard.

In ***Kandaiah Vs. Seenitamby*** [17 NLR 29] it was held that,

> *"The evidence to establish a prescriptive servitude of way must be precise and definite. It must relate to a defined track, and must not consist of proof of mere straying across an open land at any point which is at the moment most convenient."*

In ***Adonis Fernando Vs. Livera*** [49 NLR 350] it was held that,

> *"The onus of proving a claim of this character is upon the person alleging it, and the claimant, to succeed, must show that he has no reasonably sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry on his*

farming operations. If he has an alternative route to the one claimed, although such route may be less convenient and involve a longer or more arduous journey, so long as the existing road gives him reasonable access to a public road he must be content, and cannot insist upon a more direct approach over his neighbor's property."

*[Vide: Graham J.P. in **Lentz Vs. Mullin** (1914) A.D.69 at 76]*

In the circumstances, I hold that the learned District Judge was not mindful on the above lacunas and the contradictions on the Respondent's case. Therefore, I set aside the judgment of the District Court and grant the reliefs sought by the Appellant.

However, I make no order as to costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL