

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

Mandadige Sirisena Perera,
No. 28/1,
Goods Shed Road,
Aluthgama.
Plaintiff-Appellant

CASE NO: CA/821/1996/F

DC KALUTARA CASE NO: 4171/L

Vs.

Ratnayake Mudiyansele
Chandrasiri,
No. 214,
Welipenna Road,
Aluthgama.
And 2 Others
Defendant-Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Rohan Sahabandu, P.C., with Chaturika
Alvitigala for the Appellant.
H. Withanachchi for the Respondents.

Argued on: 25.09.2019

Decided on: 28.10.2019

Mahinda Samayawardhena, J.

The plaintiff filed this action against the defendants in the District Court of Kalutara seeking declarations that (a) he is the owner of the land described in the second schedule to the plaint, and (b) he is entitled to a right of way of 8 feet wide along the northern boundary of the land described in the third schedule to the plaint, which is more fully depicted as Lot 1A in Plan No. 7700 marked P1¹, to have access to the land described in the second schedule to the plaint.

The defendants did not contest the relief (a) above, but contested the relief (b) above. The position of the defendants was that the plaintiff was not entitled to such a right of way.

After trial, the learned District Judge held with the defendants on relief (b). Hence this appeal by the plaintiff.

The land described in the second schedule to the plaint is Lot 3 of *Modarayawatta*², and the land described in the third schedule to the plaint, which is the southern boundary of *Modarayawatta*, is Lot 1 of *Eramudugahawatta*.³ Both these lands had earlier belonged to Mebel whose children are Sriyalatha and Thilakadasa.

Lot 1 of *Eramudugahawatta* is 27.5 perches in extent.

¹ Vide page 59 of the brief.

² Vide Plan No.39/1993 marked P4 at page 357 of the brief.

³ Vide Plan No.2320 marked P3 at page 355 of the brief.

Mebel by deed No.997 dated 23.01.1980 marked 1D1⁴ has transferred undivided 13 perches from Lot 1 of *Eramudugahawatta* including the house bearing Assessment No.253/1 to the defendants. The defendants admit that⁵ the said house was located to the western portion of Lot 1, and it is also crystal clear by reading the schedule to the subsequent deed No.3170.⁶

In addition to the soil rights, Mebel by the same deed No.997 also granted a right of way of 8 feet wide along the northern boundary of the said Lot 1 to have access to house No.253/1⁷, which was in the western side of Lot 1.

Thereafter Mebel by deed No.3170 dated 01.08.1981 marked 1D2 has donated the balance portion of Lot 1, 14.5 perches in extent, which lies to the eastern side of Lot 1, to the daughter, Sriyalatha.⁸ By this deed, Mebel donated the whole soil rights of the balance portion of Lot 1 to Sriyalatha without any reference to the servitude created over northern boundary for a right of way by the earlier deed No.997 in favour of the defendants.

Although no reference has been made in the said deed No.3170, the law is that the benefit to the dominant tenement and the burden to the servient tenement of a real servitude are

⁴ Vide page 288 of the brief.

⁵ Vide paragraph 3.8.(vii) of the written submissions of the defendant filed with the motion dated 02.08.2019.

⁶ Vide page 294 of the brief.

⁷ Vide the schedule to the deed at pages 289-290 of the deed.

⁸ Vide the deed at page 292 of the brief.

inseparable from the land to which they are attached, in that, they pass with the land to every succeeding owner.⁹

That means, the donation by deed 3170 shall be subject to the servitugal right created earlier by deed No.997 in favour of the defendants for 8 foot right of way along the northern boundary of Lot 1.

Mebel, immediately after executing deed 3170 referred to above, has executed deed 3171 through the same Notary to donate *Modarayawatta* to her two children, Sriyalatha (the donee in deed No.3170) and Thilakadasa.¹⁰ It may be recalled that northern boundary of *Eramudugahawatta* is *Modarayawatta*. By deed 3171, Mebel gave ½ share of *Modarayawatta* (from the western side) to Thilakadasa, and the balance ½ share of *Modarayawatta* (from the eastern side) to Sriyalatha. In addition to the said soil rights, Mebel, by the same deed, granted to both of them, a right of way of 8 feet wide, along the northern boundary of Lot 1 of *Eramudugahawatta*, to have access to *Modarayawatta*.

The question is whether Mebel could create a right of way over Lot 1 of *Eramudugahawatta* to have access to *Modarayawatta* when she was not the owner of the servient tenement of Lot 1 of *Eramudugahawatta*.

Obviously, a person who is not the owner of the servient tenement cannot create a servitude of right way over it.

⁹ *Suppiah v. Ponnampalam* (1911) 14 NLR 229, *Maheswary v. Ponnudurai* (1957) 59 NLR 498, *Vincent v. James* [1982] 1 Sri LR 332 at 337-338

¹⁰ Vide deed No.3171 at page 243 of the brief.

But in the facts and circumstances of this case, which I narrated above, there is a confusion about the two donations made by Mebel by the said two deeds 3170 and 3171 in relation to the right of way. In such circumstances, the Court is entitled to ascertain the intention of the parties.

In *Appuhamy v. Gallella*¹¹, it was held that:

Where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties. It is permissible to resort to extrinsic evidence in order to resolve the ambiguity relating to the subject matter referred to in the conveyance. In such circumstances it is proper to have regard to the subsequent conduct of each of the parties, especially when such conduct amounts to an admission against the party's proprietary interest.

In *Jeyasingham v. De Almeida*¹², it was held that:

[W]here different parts of a deed are inconsistent with each other, effect ought to be given to that part which is calculated to carry into effect the real intention of the parties, and that part which would defeat it should be rejected.

Although those two decisions relate to inconsistencies in the deeds themselves, the same principle, in my view, can be applied

¹¹ (1976) 78 NLR 404

¹² (1952) 54 NLR 416

to the facts of this case where two deeds 3170 and 3171 were executed by the same Notary, at the same time, one after the other.

In the facts of this case, the intention of Mabel was clear. That was to donate the eastern portion of Lot 1 of *Eramudugahawatta* by deed No.3170 to Sriyalatha subject to a right of way of 8 feet wide along the northern boundary of the eastern part thereof to have access to *Modarayawatta* to the benefit of both Sriyalatha and Thilakadasa. This has been accepted by Sriyalatha by subsequent conduct.

In my view, although the intention of Mabel was clear, the mistake has been done by the Notary. He should have first executed deed No.3171 and then 3170. Had that been done, there would not have been any room for argument, for the reason that, as the owner of the eastern part of Lot 1 of *Eramudugahawatta*, Mabel, without any difficulty, could have granted a right of way to Sriyalatha and Thilakadasa along the northern boundary of the eastern part of Lot 1 of *Eramudugahawatta* to have access to *Modarayawatta*.

At that time, that would not have been an issue to the defendants, as they were also using the same right of way by virtue of the right given to them by deed No.997 to have access to the western portion of Lot 1 of *Eramudugahawatta*.

Thereafter, Sriyalatha, by deed No.301 dated 06.08.1987 marked 1D3 has transferred what she got from deed No.3170 to the 1st defendant.¹³

Although it has not been expressly stated in deed 301, upon the principal that servitude is inseparable from the land to which it is attached and it passes with the land to every succeeding owner, the 1st defendant has got title to the eastern side of Lot 1 of *Eramudugahawatta* by deed 301 subject to the said servitude over that portion of the land.

Thilakadasa, by deed 719 dated 14.07.1993, has transferred the said servitudal right which he got from deed 3171, to the plaintiff.¹⁴

As the servitude is attached to the land and goes with the land, the plaintiff as the new owner of *Modarayawatta* is entitled to use that right of way.

Let me now identify the cardinal errors committed by the learned District Judge in the Judgment.

When I read the Judgment, it is clear to me that the learned District Judge has mixed up the facts of this case, which has led him to come to erroneous findings.

In the Judgment the learned Judge states that, Mebel, by deed No.997 has transferred all her rights (except the house bearing assessment No.251) to Lot 1 of *Eramudugahawatta*, including the strip of land meant for the right of way, to the defendants;

¹³ Vide deed No.301 at page 296 of the brief.

¹⁴ Vide deed No.719 at page 275 of the brief.

and therefore, Mebel could not have alienated a portion of land from Lot 1 by deed No.3171 subsequently.¹⁵ This finding is factually incorrect. As I have already discussed, Mebel did not transfer her entire rights to Lot 1 of *Eramudugahawatta* except house No.251 to the defendants by deed No.997.

Then the learned Judge says that, as seen from the second schedule to deed No.997, Mebel has also sold 23.5 perches from Lot 1 of *Eramudugahawatta*. He further says that, in order to have access to house No.253/1 located therein, the right to use a strip of land of 8 feet wide has also been sold.¹⁶ These findings are also factually incorrect.

Then the learned Judge says that, once Mebel by deed No.997 sold a strip of land of 8 feet wide as a servitude for a right of way, Mebel cannot thereafter by deed 3171 sell the same to Thilakadasa.¹⁷ This finding is also wrong in fact and in law. Mebel did not sell a strip of land to use as a right of way either by deed No.997 or 3171. She only granted the right to use that strip of land as a road. As the owner of the servient tenement, at that time, Mebel could have granted the right to use to more than one person.

The issues shall be answered in the following manner:

1. Yes.
2. Yes.

¹⁵ Vide last paragraph of page 196 of the brief which continues to page 197 and the second paragraph of page 197 of the brief.

¹⁶ Vide last paragraph of page 197 of the brief which continues to page 198 of the brief.

¹⁷ Vide last paragraph of page 198 of the brief.

3. Yes.
4. Yes.
5. Yes.
6. Yes. The plaintiff is entitled to the said right of way also by operation of law as explained in the Judgment.
7. Yes.
8. Yes.
9. Depicted as 1A.
10. Yes.
11. Yes.
12. Does not arise.
13. Issue is not clear to answer.
14. Does not arise.
15. No.
16. (i) Yes.
(ii) Does not arise.
17. (i) No.
(ii) Yes.
18. Does not arise.

For the aforesaid reasons, I set aside the Judgment of the District Court and direct the learned District Judge to enter Judgment for the plaintiff as prayed for in paragraphs (a) and (b) of the prayer to the plaint. The relief in paragraph (b) shall be

confined to Lot 1A of Plan No.7700 marked P1 at the trial. I
make no order as to costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal