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

1. W. Arthur Deepal Peiris
2. W. Sunethra Peiris
3. W. Ashoka Ajith Peiris

No. 256, Galle Road,
Mount Lavinia.
Plaintiff-Appellant-Appellant

SC/APPEAL/37/2014
WP/HCCA/MT/12/2008 (F)
DC MOUNT LAVINIA 701/02/SPL

Vs.

Ranil Perera
"Vajira Builders",
No. 2, Vajira Road,
Colombo 04.
and
"Seek Saloon",
No. 256B, Galle Road,
Mount Lavinia.
Defendant-Respondent-Respondent

Before: Hon. Justice S. Thurairaja, P.C.
Hon. Justice Janak De Silva
Hon. Justice Mahinda Samayawardhena

Counsel: Faisz Mustapha, P.C. with Hemasiri Withanachchi and Thushani Machado for the Appellant.

Navin Marapana, P.C. with Saumya Hettiarachchi and Uchitha Wickremasinghe for the Respondent.

Argued on: 31.07.2024

Written Submissions:

By the Appellant on 19.09.2024
By the Respondent on 24.09.2024

Decided on: 20.02.2025

Samayawardhena, J.

The 1st plaintiff became the owner of Lot 4 in Plan No. 7746 (V1) by a partition decree. He gifted it to his son, the 3rd plaintiff, subject to the life interest of himself and his wife, the 2nd plaintiff. Lot 4 is bounded on the east by the Galle Road, which is about 6 feet higher in elevation than the plaintiffs' land. The western and northern boundaries of Lot 4 are Lots 2 and 3 respectively, which are owned by the defendant. The northern boundary of Lots 2 and 3 is Vidyala Mawatha. The position of the plaintiffs is that, due to the higher elevation of the Galle Road, rainwater collected on Lot 4 was naturally discharged through Lots 2 and 3 into the municipal drain on Vidyala Mawatha. However, after the defendant constructed a four-storied building covering Lot 3, rainwater was redirected and discharged solely through Lot 2. On 13.11.2002 (P6), the defendant obstructed this flow by constructing a wall along the eastern boundary of Lot 2, causing rainwater to accumulate on Lot 4. This led to severe consequences, including flooding and rendering the toilets in Lot 4 unusable.

The plaintiffs filed this action in the District Court of Mount Lavinia on 14.11.2002 seeking in the prayer to the plaint a declaration that they are entitled to discharge rainwater and sewage waste through Lot 2. They

also sought an order directing the defendant to remove the wall constructed along the western boundary of the plaintiffs' land (Lot 4), which obstructed the natural flow of water to Vidyala Mawatha.

The defendant filed answer seeking dismissal of the plaintiffs' action.

After trial, in a brief judgment, the District Judge dismissed the plaintiffs' action stating that all servitudes were extinguished upon the entry of the Final Decree of Partition and that the plaintiffs had failed to prove the exercise of such right for a period of 10 years following the decree.

In my view, the District Judge neither understood the case, nor analysed the facts from the correct perspective. This is evident by the following paragraph of the District Court judgment.

> වැසි ජලයද, අප ද්‍රව්‍යද පිට කිරීමට පැමිණිලිකරුවන් ඉල්ලා සිටින්නේ දිර්ඝකාලීන බුක්තියේ අයිතිය මත වේ. එසේ නම් විත්තිකරුගේ ඉඩම උඩින් වසර 10 ක කාලයක් මෙවැනි පරවශතා අයිතියක් පැමිණිලිකරුවන් විසින් පාවිච්චි කර ඇති බව ඔප්පු කලයුතුය. නමුත් විත්තිකරුගේ ඉඩම උඩින් එවැනි කාණුවක් තිබෙන බව පෙන්වා දීමට පැමිණිලිකරුවන් අපොහොසත් වී ඇත. එවැනි විසදිය යුතු ප්‍රශ්ණයක්ද ඉදිරිපත් කර නැත. එවැනි සඳහනක් පැමිනිල්ලේද නැත. ඒ අනුව අධිකරණයට පෙනී යන්නේ විත්තිකරුට බෙදුම් නඩුවේ අවසාන තීන්දු ප්‍රකාශය අනුව හිමිකම් ලැබී ඇති ඔහුගේ කැබලි අංක 2 සහ 3 සම්පුර්ණයෙන් සහ නිදහස්ව බුක්ති විඳීම සඳහා ඔවුන්ට මායිම් තාප්ප ඉදි කිරීමට නිත්‍යානුකුල අයිතිවාසිකම් ඇති බවත්ය.

The Final Decree of Partition entered on 03.04.1991 did not reserve such a servitude. Section 48(1) of the Partition Law, No. 21 of 1977, invests partition decrees with finality devoid of encumbrances other than those specified in the decree. It states, "*the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.*" What is meant by "encumbrance" is defined in the Partition Law and according to that definition "encumbrance" includes servitudes.

However, after entering the Final Decree of Partition on 03.04.1991, the plaintiffs enjoyed this right until the defendant finally constructed the wall along the eastern boundary of Lot 2 on 13.11.2002. More than 10 years elapsed from the date of the Final Decree of Partition until the action was filed in the District Court on 14.11.2002, which entitled the plaintiffs to claim the servitude by prescription.

Although the 1st plaintiff gifted Lot 4 to his son, the 3rd plaintiff, subject to the life interest of himself and his wife, the 2nd plaintiff, by Deed No. 324 dated 06.07.1999, the 3rd plaintiff can tack on to his possession the possession of his predecessors. Under Roman law and Roman-Dutch law, the possession of predecessors in title could be relied upon by a person who claims a prescriptive title. This principle continues under the Prescription Ordinance. Section 3 of the Prescription Ordinance allows a party to tack on to his possession the possession of "*those under whom he claims*" to satisfy the required ten-year period of possession. The requirement under section 3 is "*proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims*". As noted by E.R.S.R. Coomaraswamy in *The Conveyancer and Property Lawyer* (1948, Vol. 1, Part 1, page 311): "*The possession must be by the party to the action (who is usually the defendant) or by those under whom he claims; that is by his predecessors in title.*"

Therefore, the argument of learned President's Counsel for the defendant that the 3rd plaintiff could not have acquired a prescriptive right as the required ten-year period was not met, cannot be accepted.

I fail to understand what was meant by the District Judge when he states that the plaintiffs should have shown a drain (කාණුව) along the defendant's land (Lot 2) for the flow of water. There is no such requirement. The District Judge states that the defendant became

entitled to Lots 2 and 3 by the Final Decree of Partition entered in 1991. This is not correct. By the Final Decree of Partition, the land was partitioned among the five siblings of the 1st plaintiff, with each receiving exactly 6.84 perches. The 1st plaintiff was allotted Lot 4. The defendant purchased Lot 3 by Deed No. 2004 dated 12.01.1993, and Lot 2 by Deed No. 2051 dated 24.08.1993, from the siblings of the 1st plaintiff. When the land was partitioned among the siblings, there was no necessity to discuss about the flow of rainwater. This became an issue only after the defendant purchased the said Lots and made constructions blocking the flow of rainwater.

Being dissatisfied with the judgment of the District Court, the plaintiffs appealed to the High Court of Civil Appeal of Mount Lavinia. The High Court in its brief judgment affirmed the judgment of the District Court on the sole basis that "*the plaintiff has only made the defendant who is the proprietor of Lot 2 and have failed to make the proprietor of Lot 5 as a party to the said action as it is quite obvious that no water from the plaintiffs land Lot 4 could possibly flow on to the defendant's Lot 2 without it first flowing through Lot 5.*" This is not factually correct. If I may say with the risk of repetition, the plaintiffs' complaint is that the natural rainwater flow to Vidyala Mawatha was obstructed by the defendant by constructing a wall along the eastern boundary of his land, which is Lot 2. The western boundary of the plaintiffs' land (Lot 4), is Lot 2. The northern boundary of Lot 2 is Vidyala Mawatha. Lot 5, which is the southern boundary of Lot 4, has no connection to Vidyala Mawatha. The rainwater does not flow from Lot 4 to Lot 2, through Lot 5. The finding of the High Court that "*it is quite obvious that no water from the plaintiffs land Lot 4 could possibly flow on to the defendant's Lot 2 without it first flowing through Lot 5*" is completely erroneous. If the learned High Court Judge looked at the Final Partition Plan 7746 prior to arriving at that

finding, this would not have happened. He has only looked at the written submissions to arrive at the said erroneous finding.

The High Court has dedicated the final paragraph of the judgment to state that the plaintiffs have failed to establish "prescriptive title" regarding "sewage system through the defendant's Lot 2". This finding is redundant. Although the plaintiffs initially sought to have both rainwater and sewage waste discharged through the defendant's land, in the written submission filed by the plaintiffs before the High Court on 04.09.2012, the plaintiffs' counsel stated that "*The appellants confine themselves to the right to discharge rain water only*." This is because, once the rainwater flows in its natural way, the sewage waste would go to the pit in the plaintiffs' land made for that purpose. The question of disposal of sewage water arises when the natural water flow is blocked.

Learned President's Counsel for the defendant argues that the plaintiff has not pleaded in the plaint for a servitude. Even assuming it to be so, it is common ground that both the District Judge and the Judges of the High Court of Civil Appeal decided the case against the plaintiffs on the basis that the plaintiffs failed to prove the servitude. The High Court commenced the judgment by stating that "*The crux of the matter to be determined is whether the plaintiffs have proved on a balance of probability that they are entitled to a servitude right over the defendant's land?*". On the other hand, apart from making the said claim as a servitude, a duty to receive water in such circumstances could still arise in different ways such as, through prescription, immemorial usage or statutory authority. Owners of contiguous lots have a corresponding duty to receive surface water, which arises from the natural situation of the land.

There is a servitude known to the Roman and Roman-Dutch Law recognizing the right of the owner of an upper tenement to discharge

rainwater onto the lower tenement due to natural gravitation, which is known as *ius fluminis*. This does not, however, include water diverted by artificial means, such as water discharged from industrial or commercial plants.

Walter Pereira, in his celebrated work, *The Laws of Ceylon*, (2nd edn, 1913), page 403, describes *ius fluminis* as "*the right of water-course, to allow one's water to flow onto the property of another who is bound to lead it off over to his own land or in a gutter, every one being otherwise, by the common law, obliged to direct his water onto his own property or conduct it through his property into the street…*" He further states that "*lower lands are said to be naturally subservient to the higher as regards the receiving of water. So that, ordinarily, the proprietor of higher land is not liable for injury caused by the flow of water therefrom to lower land. At the same time, in the absence of a duly acquired servitude the lower proprietor may by natural free right do anything on his land to keep off water likely to do him injury, and which flows from land above his; and if the upper proprietor by artificial means makes the water to flow onto lands lying lower than his, the lower proprietor may do what he can to prevent the upper proprietor acquiring a right to do this.*"

C.G. Hall and E.A. Kellaway, *Servitudes* (2nd edn, Juta & Co. Ltd., Cape Town, 1956) at page 85 explain the mode for acquiring the aforementioned right as follows:

> *The liability of a lower-lying land to receive water draining from the property above it, can originate in three different ways; viz:*
>
> *(a) Owing to its natural situation (natura loci);*
> *(b) By agreement, i.e., servitude (lex), and*
> *(c) By prescription or vetustas.*

> *Every owner of property is bound to receive the water which naturally drains onto his property from the land lying on a higher level than his own (de Villiers v. Galloway, 1943 A.D. 444), nor may he raise any obstruction on his land whereby the water is dammed back on the property above him (Retief v. Louw, 4 Buch. at 174; Ludolph v. Wegner, 6 S.C. 193).*

In *Fernando v. Fernando* (1907) 3 Balasingham's Reports 202, Wood Renton J. (as he then was) stated at 203:

> *[B]oth by the Roman and by the Roman-Dutch Law it is incumbent upon a lower proprietor to receive water flowing down from a higher ground by laws of natural gravitation and that he is liable to an upper proprietor for damages if he obstructs the flow. See Maasdorp, vol. 2, p. 122-123.*

A.F.S. Maasdorp*, Institutes of Cape Law,* Book II (Juta & Co. Ltd., 1903), pages 122-123, states:

> *[T]he upper proprietor is entitled to demand that the natural surroundings of his land and the natural laws to which these are subject shall be left undisturbed in so far as their continuance is essential to the proper and reasonable enjoyment of his right of ownership. And, though the lower proprietor is entitled to demand that no water or any other substance shall be discharged on to his ground by the upper proprietor, which would not have come there in the ordinary course of nature, unless he is bound by some servitude to receive the same, yet he will be bound to receive water flowing down to his ground, not in consequence of some act of an upper proprietor, but in obedience to the natural laws, and if he obstructs such flow, and damage is thereby caused to the upper proprietor, he will be liable to an action. On the other hand, the upper proprietor in*

> *his turn will not be entitled to interfere with the laws of nature affecting his land or that of his lower neighbour to the injury of the latter, and will therefore not be allowed to alter the natural drainage of his ground in such a manner as to discharge or divert water on to his neighbour's ground which would not have flowed there naturally, or by means of some artificial structures, such as embankments, watercourses, plantations, and such like, to cause water, which would have flowed there naturally, to flow down differently from what it would naturally have done, as, for instance, in increased volume, or in a more rapid or stronger or more compressed stream, or in a polluted condition, if injury is thereby caused to the neighbour. A man is not even allowed to let the rain-water drip from his roof onto a neighbour's ground, unless he has a servitus stillicidii recipiendi over it, nor may he discharge his rain-water by means of a down-pipe and spout into his neighbour's property unless he has a servitus fluminis recipiendi over it.*

In *Marikar v. Rosairo* (1912) 15 NLR 507, the trial Court directed the defendant-appellant to remove the obstruction in the drain leading the water which flows from the premises of the plaintiff-respondent through those of the defendant-appellant into the drain on the public road. On appeal, Lascelles C.J. affirmed the judgment of the trial Court and declared as follows at 507-508:

> *[T]here is a good deal of evidence, which is supported by the personal observation of the Commissioner, to the effect that the level of the premises of the defendant-appellant is lower than that of the premises of the plaintiff-respondent, so that, on the principle explained in Fernando v. Fernando 3 Bal. 202, it is incumbent on the defendant-appellant to receive the water flowing by gravitation from the plaintiff-respondent's premises. I do not think that it is material*

that the difference in level is small, provided that it is enough to direct the water from the upper tenement to the lower tenement.

A natural servitude of this nature is, of course, limited in its extent. The lower proprietor is obliged only to receive such water as flows in the ordinary course of nature from the upper tenement. He is not bound to receive water which the upper proprietor has discharged into his premises by any artificial means which alters the natural drainage of the land, such as a ditch or channel (Maasdorp, vol. ii., p. 172).

In my opinion the judgment of the learned Commissioner can be supported either on the ground that the plaintiff-respondent has acquired by prescription a jus fluminis, or on the ground that the premises of the defendant-appellant are subject to a natural servitude which obliges the proprietor to receive water flowing naturally from the plaintiff-respondent's premises.

In the instant case, there is uncontroverted evidence that, from the time the larger land was owned in common by the 1st plaintiff and his siblings, and for more than 10 years following the partition decree, rainwater collected in the upper tenement (Lot 4) naturally flowed by gravitation to the municipal drain on Vidyala Mawatha through the lower tenements (Lots 2 and 3). The plaintiffs who are the owners of Lot 4 did not discharge rainwater onto Lots 2 and 3 abutting the Vidyala Mawatha by any artificial means that altered the natural drainage of the land.

Learned President's Counsel for the defendant also argues that "*a servitude to divert rain water cannot be claimed when the natural situation of the land is changed by construction*". He cites Hall and Kellaway on *Servitudes*, op. cit., page 121, where it is stated "*When land has been divided up into building lots and dwellings are erected upon it the natural*

situation is changed, and the owner of an upper lot can no longer claim that the rain-water which falls on his property shall be permitted to flow down over lower-lying plots (Bishop v. Humphries 1919 W.L.D. 13)."

In the landmark case of *Bishop v. Humphries* 1919 WLD 13, the Supreme Court of Appeal of South Africa considered urban development as a relevant factor in deciding this issue. In *Bishop's* Case, the applicant filed the case seeking an interdict to restrain the respondent from interfering with an opening marked "A" in the fence on the respondent's Lot 1450, which stood between Lot 1450 and the applicant's Lot 1451. A portion of the applicant's stormwater flowed southward and discharged into a tank. When the tank overflowed, the water passed through the opening "A" onto Lot 1450. The respondent purchased Lot 1450 from the applicant, who was also the owner of the adjoining Lots 1449 and 1452.

The Court explained the impracticability of taking this right forward in its original form (the right of the owner of upper tenement to discharge stormwater onto the lower tenement based on natural gravitation) at pages 17-18:

> *The fact is that when land is sold in small building plots, a state of things is created and contemplated which puts an end to a large extent to the natural servitude which previously existed as regards the water which falls on the plots. Each owner puts up a building which covers a substantial part of the plot. He places an impervious surface over the naturally porous surface of the soil. He accumulates the water thereon. He alters the natural surface of the rest of the area of his plot by paving it or allocating temporary structures thereon or digging it up, and thereby annihilates the natural arrangement of the soil. The rainwater can no longer flow as it used to flow.*

The principle that a lower property is bound to receive water from an upper property implies that no person is entitled to interfere with the natural flow of water by altering its direction, increasing its volume or force, or concentrating it through the use of any artificial structure. The Court came to the finding that the applicant was responsible for changing the natural flow of water:

> *The Applicant has altered all the old conditions existing on the stand while it was virgin soil and in a state of nature and it is quite impossible for him to throw a burden on the adjoining stand which is based on the assumption that his stand has preserved rights which he himself has put an end to by his own constructions on the property.*

The Court also observed that the applicant had not taken steps to minimize the inconvenience caused to the respondent but had unreasonably insisted on the discharge of stormwater as a matter of right. This was disapproved by the Court:

> *As regards the water falling on the roof and entering the tank the applicant has not resorted to the device adopted on stand 1452 of making an overflow pipe from the tank to carry the water eastwards off the stand on to the sanitary passage. This could easily have been done, but he avoids this small expense and gets rid of the surplus water through "A" and claims to be entitled to do this.*

On the unique facts of that case, the Court disallowed the applicant's claim. This, in my view, cannot be construed as an authority for the proposition that "*a servitude to divert rain water cannot be claimed when the natural situation of the land is changed by construction*".

The facts of the instant case are distinguishable from those of the *Bishop's* case. In the instant case, the plaintiffs did not make any

construction that altered the character of the land. They continue to reside in the ancestral home that existed when the partition case was filed. The natural flow of water was obstructed only by the defendant, who erected a high-rise building on Lot 3 and constructed a wall along the eastern boundary of Lot 2, without making any provision to divert the rainwater collected on Lot 4 to the municipal drain on Vidyala Mawatha through his land (Lot 3).

I acknowledge that with urbanization and modern development, the traditional practice of allowing water to flow onto a neighbour's land due to natural gravitation is no longer feasible or practical. Urban areas are governed by bylaws regulating the disposal of rainwater, unclean water and sewage waste. Landowners cannot be expected to limit development on their land or accommodate such flows merely because their property is at a lower elevation. Protecting one's property through measures such as boundary walls is necessary. Thus, the concept of *jus fluminis* must evolve to balance the natural flow of water with the rights of landowners to develop and safeguard their properties, while adhering to urban planning and environmental regulations.

It is often preferable for matters such as these to be resolved amicably, as this approach often results in fair and sustainable solutions for both parties. The documents marked at the trial clearly demonstrate that the plaintiffs, with the support of the Municipal Council, made genuine efforts to settle the issue while causing the least possible inconvenience to the defendant. The plaintiffs are seeking to address basic human needs, as they are unable to use their toilets due to sewage pits being inundated by rainwater collected within Lot 4. Despite these efforts, the defendant remained uncooperative (see P4, P5, P7, P8, P10, and P11).

The questions of law on which leave to appeal were granted and the answers thereto are as follows (the first two are by the plaintiffs and the third is by the defendant):

(a) Did the Provincial High Court of Civil Appeal err in law in holding that the owner of Lot 5 has not been made a party by the appellants and as such they are not entitled to claim servitudal rights over the Respondent's land?

Yes.

(b) Did the Provincial High Court of Civil Appeal err in failing to appreciate that the appellants' rights have been violated by the Respondent due to a construction of a building on Lot 3 and construction of a wall on the Western boundary of the appellants' land?

Yes.

(c) Can an Appellant in appeal change the position upon which he based his claim?

The appellant has not altered his position; he has merely opted not to pursue one relief on appeal, which he is entitled to do.

The plaintiffs in this case have proved that they are entitled to the reliefs as prayed for in paragraphs (ඒ) and (ඓ) of the prayer to the plaint dated 14.11.2002. The defendant must pay costs of all three Courts to the plaintiffs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

Janak De Silva, J.

I agree.

Judge of the Supreme Court