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

In the matter of an application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act read with Article 127 of the Constitution of the Republic.

SC Appeal 73/2010
SC HCCALA No.218/2009
SP/HCCA/KAG/50/2007 (F)
DC Kegalle Case No.3971/L

1. Akurange Jayasinghe
2. Akurange Samarasinghe

Both of Medagaladeniya,
Udagaladeniya,
Rambukkana.

PLAINTIFFS

Vs.

Akurange Gunawathie(Deceased)

(a) I. Lakshman Weerasekera
Medagaladeniya,
Udagaladeniya,
Rambukkana.

SUBSTITUTED DEFENDANT

AND BETWEEN

1. Akurange Jayasinghe
2. Akurange Samarasinghe
Both of Medagaladeniya,
Udagaladeniya,
Rambukkana.

PLAINTIFF-APPELLANTS

Vs.

(a) I. Lakshman
Weerasekera
Medagaladeniya,
Udagaladeniya,
Rambukkana.

SUBSTITUTED
DEFENDANT-RESPONDENT

AND NOW BETWEEN

1. Akurange Jayasinghe
Medagaladeniya,
Udagaladeniya,
Rambukkana.
1st PLAINIFF-APPELLENT-
PETITIONER

2. Akurange Samarasinghe
(Now Deceased)

Vs.

(a) I. Lakshman Weerasekera
Medagaladeniya,
Udagaladeniya,Rambukkana.
SUBSTITUTE DEFENDANT-RESPONDENT
RESPONDENT.

BEFORE: BUWANEKA ALUWIHARE, PC, J,
PRIYANTHA JAYAWARDENA,PC, J &
K.T.CHITRASIRI, J.

COUNSEL: Shantha Jayawardena for the 1st Plaintiff-Appellant-Appellant.
Amrit Rajapakse with Oliver Jayasuriya for the substituted-Defendant-Respondent-Respondent.

ARGUED ON: 12.01.2016

DECIDED ON: 27-03-2018

ALUWIHARE, PC. J:
Leave to appeal was granted in this matter on the question of law set out in paragraph 11 (a) of the Petition of the Petitioner dated 7.09.2009.

The question raised is as follows:-
"Did the Provincial High Court exercising its civil appellate jurisdiction err in law, when it held that the defendant has acquired the right of way over the Plaintiff's land by prescription?"

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court seeking a declaration that the Plaintiff is the owner of the land referred to in the schedule to the plaint, free of any servitude appertaining to the said land and for a declaration that the Defendant (the substituted Defendant-Respondent-Respondent as far as the present case is concerned) has no right of way or any such servitude over the land in question.

In her considered judgment the learned District Judge did hold that the Plaintiff has title to the impugned land, but held that his title is subject to a servitudal right of the Defendant. The learned District Judge in answering an issue raised by the defendant held that the defendant having used the disputed roadway for a period of over 10 years had gained prescriptive rights for the use of the roadway over the land of the plaintiff.

The Plaintiff aggrieved by the said judgment of the District Court had appealed to the High Court of Civil Appeals and the learned Judges having considered the matter, affirmed the judgment of the learned District Judge stating that they see no reasons to interfere with the findings of the learned trial Judge. The learned District Judge had based her finding on the primary facts and as such it would be necessary to consider the facts in order to determine as to whether the learned District Judge had misdirected herself in applying the applicable law to the facts.

The learned District Judge, as referred to above, held that the Defendant had acquired prescriptive rights to use the disputed road way. As such the only issue the court is called upon to decide is the correctness of the findings of the learned District Judge on the issue of prescription.

Justice Gratiaen considered the requisites to acquire right of way by prescription in the case of ***Thambapillai, vs. Nagamanipillai*** ,52 N.L R 225 and held that *"It is a prerequisite to the acquisition of a right of way by prescription that a well-defined and identifiable course or track should have been adversely used by the owner of the dominant tenement for over ten years"*-and Justice Gratiaen in delivering the

judgement in the case referred to, cited with approval the decision in the case of ***Karunaratne v. Gabriel Appuhamy*** (*15 N. L. R. 257*) wherein Chief justice Lascelles held: *"In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly defined."*

In a subsequent judgement of ***Ranasinghe V Somawathie And Others (2004 2 Sri. L. R 154)***: the Supreme Court considered the matters that are required to be established to claim a right of way by prescription

Their lordships held:

" it has to be established by proof of the existence of the following necessary ingredients inter alia that are necessary to conclude the existence of such a right:- a) adverse possession. b) uninterrupted and independent user for at least 10 years to the exclusion of all others. (section 3 of the Prescription Ordinance) (cap.81) The above matters are all questions of fact and they have to be established by cogent evidence."

In view of the pronouncements referred to above, consideration of the facts would be necessary to arrive at the decision as to whether the defendant had, by placing evidence before court, established the requisite ingredients to secure a right of way by prescription.

The facts are as follows:

At the commencement of the trial before the learned District Judge, the plaintiff moved for a commission to have the corpus surveyed which was allowed. The survey plan and the report prepared by the surveyor consequent to the commission had been marked and produced at the trial as P1 and P2, respectively. (Plan No.3217 of 01.09.1990 prepared by T. N. Cader, Licensed Surveyor). The Plan depicts the land owned by

the Plaintiff (Lot 2) which is to the East of the land of the Defendant (Lot1). The disputed road way is depicted as 'A-B' in the said plan and the said road way connects the main road and Lot 1 which is owned by the Defendant. This disputed roadway traverses over another block of land owned by the Plaintiff which is shown as "Wedagewatta" in the said plan which is to the south west of Lots 1 and 2 referred to above. It is to be noted that the southern and southwestern boundaries of Lots 1 and 2 is a ditch which the surveyor had demarcated as a "dead stream". The disputed roadway which is 10 feet in width runs over the ditch referred to. According to the survey report, a culvert constructed of cement had been there, which the defendant claimed, was put up by him, about 10 years precedent to the survey.

The surveyor in his testimony affirmed to what he had stated in his report P1 (referred to above). In describing the culvert, the surveyor had stated, that a concrete slab 10 feet in width had been constructed over the ditch, resting on cemented side walls. He also expressed the opinion that the culvert appears to be about 10 years in vintage.

Plaintiff had not given evidence at the trial, however, his wife gave evidence and stated that the dispute over the construction of the road arose in 1987. What is significant of the evidence of this witness is her assertion, that the construction of the culvert and placing a slab over it had been completed within two to three days and the plaintiff complained to the Grama Sevaka with regard the said construction. The substituted defendant did not dispute the fact that the roadway in issue, runs over the land owned by the Plaintiff and the road leads from Rambukkana main road to his house. The Defendant's position was that he became the owner of Lot 1 of Plan No.3217 (P1) in 1970 and even at

that time this road was in existence. The only difference had been, according to the defendant, instead of a properly constructed culvert that is presently in place, he used a foot bridge what is commonly called as "Edanda" to cross the ditch. The defendant had said that in 1972 a concrete slab was placed over the ditch and he has used it since then. In 1987 the defendant says both the 1st and 2nd Plaintiffs obstructed the roadway by erecting a barbed wire fence. Consequently, the original defendant had lodged a complaint with the police. Reiterating that the construction of the culvert took place in 1972, the witness had said that it took about a month and a half to construct the culvert. What is significant is that the Plaintiff does not appear to have objected to this construction of the culvert at the initial stages.

According to the evidence of the Plaintiff the dispute had arisen in 1987, and the surveyor had visited the land in 1990. As referred to earlier, the Surveyor had said the culvert appeared to be about 10 years old.

Defendant also had called the Grama Sevaka who served in the G.S. Division within which the lands are situated. His evidence was that he served the Division between 1982 and 1994, and when he assumed duties in 1982, he used the disputed road to access the Defendant's house for official matters. This witness also had testified to the effect that the parties (Plaintiff and the Defendant) complained to him over this dispute and he had added that the complaint was with regard to the obstruction of the road that already existed.

It is to be observed that the learned District Judge who delivered the judgment in this case had heard all the evidence save for the examination in chief of the surveyor. The learned District Judge had carefully analysed the evidence and had come to a finding that the

Defendant has acquired the right of way as a prescriptive user. The learned District Judge has also relied on the observation made by the learned Magistrate who was called upon to inquire into this dispute in terms of Section 66 of the Primary Courts Ordinance which was marked and produced as 1V1.

The learned Magistrate who inquired into the matter in the year 1987 itself and having visited the disputed road had observed that the Defendant (who was the 1st Respondent in the said 66 application) appeared to have used the roadway for a long period of time.

Upon consideration of all the material, the learned District Judge had come to the conclusion that the Defendant had acquired prescriptive rights to use the disputed road way.

The issue that this court is called upon to decide is as to whether the learned District Judge erred in arriving at her finding on the facts and if so, did the learned District Judge err in holding that the Defendant has acquired prescriptive rights.

As his Lordship Justice Chitrasiri held in the case of ***M. Abdul Gaffoor Vs. M. Jethum Uma*** (SC Appeal 95/2013 SC minutes 7.06.2016)

"…that when such an issue involving facts and circumstances of a given case is to be determined, the Appellate Courts are always slow to interfere with such decisions of the trial judges since trial judges are judges who personally hear the witnesses giving evidence. Hence, they become the best judges as to the facts of the case and His Lordship with approval referred to the observation made by Justice G.P.S.de Silva (as he then was) in the case of ***Alwis v. Piyasena Fernando*** 1993 1 SLR 111

wherein Justice de Silva observed that *"..it is well established that findings of primary facts by a trial Judge who hears and sees the witnesses are not to be lightly disturbed on an appeal."*

In the present case for cogent reasons the learned District Judge had believed the defendant's version which had received the approval of the judges of the High Court of Civil Appeals who heard the appeal.

The learned counsel for the Plaintiff-Appellant relied heavily on the credibility of the witness who testified on behalf of the defendant and other infirmities in the evidence.

The learned counsel drew the attention of the court to the evidence of the Surveyor who, in addition to stating that in his opinion the culvert is about 10 years old had added that the Defendant also conveyed to him that the culvert is of that vintage.

The learned counsel submitted that this position contradicts the position taken up by the substituted Defendant who said it was constructed in 1972. The expression of the opinion as to the age of the culvert appears to be a general one. The court cannot ignore the evidence which establishes the fact that the defendant had been using the same road even before the construction of the culvert, with the aid of a foot bridge.

It was also brought to the attention of court that all the witnesses who testified on behalf of the Defendant were partisan witness including the retired Grama Sevaka. The fact remains, however, that the learned District Judge had, having considered the credibility of the witnesses

had thought it fit to rely on the evidence of the Defendant. I am of the view that there are no cogent reasons to reject the evidence or to conclude that the learned District Judge was wrong in relying on the testimonies of the witnesses who testified on behalf of the Defendants.

I wish to cite with approval of the observations made by Justice Parinda Ranasinghe (as he then was) in the case of ***De Silva Vs. Senevirathne*** - 1981 2 SLR pg. 7, wherein His Lordship observed:

"Where the trial judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the appellate court that the trial judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving viva voce evidence, and the appellate court is convinced by the plainest consideration that it would be justified in doi ng so".

For the reasons set out above, I see no reason to interfere with the findings of the learned District Judge or the judges of the High Court of Civil Appeals.

Thus, I answer the question of law on which leave was granted in the negative and hold that the Provincial High Court exercising its civil appellate jurisdiction did not err in law, when it held that the defendant has acquired the right of way over the Plaintiff's land by prescription.

Accordingly the appeal is dismissed; however, I make no order as to costs.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE K.T CHITRASISRI

I agree

JUDGE OF THE SUPREME COURT