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

Weerasinghe Thilakaratne,
Indilanda, Galpatha.
Plaintiff

SC APPEAL NO: SC/APPEAL/75/2013
SC LA NO: SC/HCCA/LA/452/2012
HCCA KALUTARA NO: WP/HCCA/K/2/2005/F
DC KALUTARA NO: 4333/L

Vs.

1. Mathota Arachchige Shiran Mahinda,
   Indilanda, Galpatha.
2. Vinietha Chandralatha Edussuriya,
   Dapiligoda, Agalawatta.
   Defendants

AND BETWEEN

1. Mathota Arachchige Shiran Mahinda,
   Indilanda, Galpatha.
2. Vinietha Chandralatha Edussuriya,
   Dapiligoda, Agalawatta.
   Defendant-Appellants

Vs.

Weerasinghe Thilakaratne,
Indilanda,
Galpatha.
Plaintiff-Respondent

AND NOW BETWEEN

Weerasinghe Thilakaratne,
Indilanda,
Galpatha.
Plaintiff-Respondent-Appellant

Vs.

1. Mathota Arachchige Shiran Mahinda, (Deceased)
1A. Gamage Dona Kamani Chandra Kumari,
Both of
Indilanda, Galpatha.
2. Vinietha Chandralatha Edussuriya,
Dapiligoda, Agalawatta.
Defendant-Appellant-Respondents

Before: P. Padman Surasena, J.
K.K. Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Harsha Soza, P.C., with Anuruddha Dharmaratne for the Plaintiff-Respondent-Appellant.

Dr. Jayatissa De Costa, P.C., with Chanuka Ekanayake for the Defendant-Appellant-Respondents.

Argued on: 27.04.2021

Written submissions:

by the Plaintiff-Respondent-Appellant on 01.07.2013

by the Defendant-Appellant-Respondents on 28.10.2013

Decided on: 10.06.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action in the District Court of Kalutara against the two Defendants seeking a declaration in the prayer to the plaint that he has obtained a permanent servitude to use the road described in the third schedule to the plaint, ejectment of the Defendants from the encroached area of this road, and damages.

As I will explain below, instead of stating "he has obtained a permanent servitude to use the road described in the third schedule to the plaint", it would have been clearer had the Plaintiff simply stated that he has the right to use the road described in the third schedule to the plaint.

At the request of the Plaintiff, the District Court issued a commission to depict the encroached portion of the said road.

Plan No. 717B produced in evidence as P1 through the Court Commissioner shows the encroached portion marked Lot X.

After receipt of the said Plan and before filing the answer, the Defendants also moved for a commission. In execution of this commission, Plan No. 732 was received by Court. However, the Defendants did not produce this Plan in evidence.

Having studied both Plans, the Defendants filed answer stating that they have prescribed to the portion marked X in Plan No. 717B and therefore the Plaintiff's action shall be dismissed.

After trial, the District Court entered Judgment for the Plaintiff except for damages.

On appeal to the High Court of Civil Appeal, the High Court set aside the Judgment of the District Court but did not say the Defendants were entitled to their cross-claim of prescriptive title over the encroached portion of the road.

Being dissatisfied with the Judgment of the High Court, the Plaintiff preferred this appeal to this Court.

The High Court set aside the Judgment of the District Court on the ground that the Plaintiff failed to identify the subject matter in dispute:

> *[T]he Plaintiff has failed to show the exact width of the road that was there before the encroachment and the present width of the road that is existing now. Hence the Plaintiff has totally failed to prove the width of the road which should be depicted on the said roadway. Hence*

the Plaintiff has failed to identify the subject matter in dispute.

The identity of the subject matter was never in controversy before the trial Court. There was no issue raised by the Defendants to that effect. Before the District Court, "the subject matter in dispute" was identified by both parties and the Court as Lot X in Plan No. 717B.

The Plaintiff's position was that the said Lot X was a portion of the road depicted as part of the western boundary of Lot 1 in the Final Partition Plan No. 2824 marked P3, whereas the Defendants' position was that they had prescribed to that portion of the road.

Notwithstanding the Defendants' appeal was allowed on the said ground, the High Court also raised some concerns about the presence of trees over 10 years of age and an electricity post fixed to draw an electricity line to the Plaintiff's house in the portion marked X in Plan No. 717B. The High Court states that the Plaintiff did not explain how such old trees came into being on this road if he had been using that road over the years.

In my view, the presence of old trees within the encroached area is beside the point. Let me explain.

The Plaintiff filed the partition action No. 4834/P in the District Court of Kalutara to partition Lot Nos. 1C and 10 in Partition Plan No. 934 marked P9 among the Plaintiff and several Defendants. The Preliminary Plan No. 2693 marked P6A and the Report marked P7 were prepared for the said partition action. According to this Preliminary Plan and Report, the disputed road in the instant action was part of

the corpus in the said partition action. This Plan and Report further go to prove that a portion of this disputed road had been encroached by the 1st Defendant in the instant action at that time. The Court Commissioner had shown the encroached portion as Lot C in the said Preliminary Plan. However the 1st Defendant had not made an application to be added as a party to that action, which he ought to have done if he had a claim to that portion. The Final Partition Plan is Plan No. 2824 marked P3 where the now disputed full road is shown as part of the western boundary of Lot 1, which was allotted according to the Final Decree dated 21.02.1984 marked P4 to the Plaintiff in the instant action. Hence, the Plaintiff has every right to use this road as part of the subject matter in that partition action. He does not need to show any other right to use this road.

What the Court Commissioner did in the instant action was to superimpose the said roadway in Plan No. 2824 on his Plan No. 717B and show the existing encroachment. This is similar to what the Court Commissioner in partition case No. 4834/P did when he prepared the Preliminary Plan No. 2693 marked P6A.

Admittedly, the Final Decree in partition case No. 4834/P marked P4 was entered on 21.02.1984 and, according to her own police statement marked P11, the 2nd Defendant in the instant action put up a barbed wire fence enclosing the encroached area on 25.04.1994.

It is irrelevant to give unwanted prominence or importance to the ages of trees found on the encroached portion of the road. The Court Commissioner carried out the survey in the instant action in 1995. According to the Report, one tree is about 20

years old and the other about 15 years old. This means when the Final Partition Decree P4 in partition case No. 4834 was entered in 1984, the trees were already on that portion of the road. The Defendants cannot say that they planted these trees after the Final Decree P4 because the trees are much older than 11 years. Nor can they claim any prescriptive rights to that portion because the Final Decree P4 wiped out all such rights, if they had any.

The electricity post, which has been fixed to draw an electricity line to the Plaintiff's house is also within the portion marked X in Plan No. 717B. The 2nd Defendant in her evidence admits that the area the electricity post is fixed onto belongs to the Plaintiff. Electricity posts are not fixed on lands belonging to outsiders. They are fixed either on the side of the road or on the customer's land.

There is no evidence acceptable to Court that the Defendants acquired prescriptive title to the encroached area marked X in Plan No. 717B as required by section 3 of the Prescription Ordinance. Even the High Court did not come to such a finding.

The High Court set aside the Judgment of the District Court on the completely erroneous basis of non-identification of the subject matter of the dispute.

This Court granted leave to appeal against the Judgment of the High Court on the following questions of law:

Have the learned Judges of the High Court erred in law by:

(a) arriving at the finding that the Plaintiff has failed to identify the subject matter of the action?

(b) arriving at the finding that the Plaintiff has not established a right to the use of the said roadway described in the third schedule to the plaint?

(c) setting aside the Judgment of the District Court dated 06.01.2005?

I answer all three of these questions in the affirmative.

I set aside the Judgment of the High Court and restore the Judgment of the District Court. The appeal is allowed with costs payable by the Defendants to the Plaintiff in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

K.K. Wickramasinghe, J.
I agree.

Judge of the Supreme Court