

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

In the matter of an appeal in terms of
Section 5(c) of the High Court of the
Provinces (Special Provisions) Act No 19
of 1990 as amended by High Court of the
Provinces (Special Provisions)
(Amendment) Act No 54 of 2006.

SC / Appeal / 135/2015

SC/HCCA/LA/16/2015

WP/HCCA/COL/59A/2014 (F)

DC/Colombo No DLA/00048/09

Firoza Mohamed Hamza,
No. 15, Hill Castle Place,
Colombo 12.

Petitioner

Vs.

1. Road Development Authority,
Office of the Land and Land
Acquisition Officer,
3rd Floor. 'Sethsiripaya',
Battaramulla.

Plaintiff Respondent

2. Ummu Waduda Meera Sahib,
No. 22, Charles Place,
Dehiwala.
3. Seyyad Oaman Meera Sahib,
No. 22, Charles Place,
Dehiwala.
4. Mohammed Fasulul Rahman Meera
Sahib,
No. 22, Gajaba Housing Complex,

2nd Lane, Kolonnawa.

5. Riyazur Rahman Meera Sahib,
No. 24, Farm Road,
Maatakkuliya,
Colombo 15.
6. Siththy Navasiya Mohammed Rauf,
No. 22, Charles Place,
Dehiwala.

AND BETWEEN

Firoza Mohamed Hamza,
No. 15, Hill Castle Place,
Colombo 12.

Petitioner-Petitioner

Vs.

1. Road Development Authority,
Office of the Land and Land
Acquisition Officer,
3rd Floor. 'Sethsiripaya',
Battaramulla.

Plaintiff Respondent-Respondent

2. Ummu Waduda Meera Sahib,
No. 22, Charles Place,
Dehiwala.
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No. 22, Charles Place,
Dehiwala.
4. Mohammed Fasulul Rahman Meera
Sahib,
No. 22, Gajaba Housing Complex,

2nd Lane, Kolonnawa.

5. Riyazur Rahman Meera Sahib,
No. 24, Farm Road,
Maatakkuliya,
Colombo 15.

6. Siththy Navasiya Mohammed Rauf,
No. 22, Charles Place,
Dehiwala.

Respondent-Respondents

AND NOW BETWEEN

Firoza Mohamed Hamza,
No. 15, Hill Castle Place,
Colombo 12.

Petitioner-Petitioner Appellant

Vs.

1. Road Development Authority,
Office of the Land and Land
Acquisition Officer,
3rd Floor. 'Sethsiripaya',
Battaramulla.

Plaintiff Respondent
Respondent-Respondent

2. Ummu Waduda Meera Sahib,
No. 22, Charles Place,
Dehiwala.
3. Seyyad Oaman Meera Sahib,
No. 22, Charles Place,
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No. 22, Gajaba Housing Complex,
2nd Lane, Kolonnawa.
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No. 24, Farm Road,
Maatakkuliya,
Colombo 15.
6. Siththy Navasiya Mohammed Rauf,
No. 22, Charles Place,
Dehiwala.

Respondent-Respondent-
Respondents

BEFORE : SISIRA J DE ABREW, J.
UPALY ABEYRATHNE, J.
ANIL GOONARATNE, J.

COUNSEL : Faiz Musthapa PC with Hussain Ahamed for
the Petitioner Appellant
Mrs. Ashoka Siriwardena for the Plaintiff
Respondent-Respondent

WRITTEN SUBMISSION ON: 27.11.2015 Petitioner-Petitioner Appellant.

ARGUED ON : 23.09.2016

DECIDED ON : 15.06.2017

UPALY ABEYRATHNE, J.

The Director (land) of the Road Development Authority, 3rd Floor,
Sethsiripaya, Battaramulla, has instituted the said action bearing No DLA/00048/9

in the District Court of Colombo. According to the Journal Entry 01, the Director (land) being the plaintiff has sought to issue a Deposit Note enabling him to deposit a sum of Rs. 5,775,000/- to the credit of the case. Said Journal Entry indicates that the said application has been made upon a letter of the Acquiring Officer, Land, bearing No RDA/LA/CO/MAT/8917/2 dated 30.07.2009. The said letter of the Acquiring Officer has not been produced with the appeal to this court by the Petitioner-Petitioner Appellant (hereinafter referred to as the Appellant). As seen from Journal Entry No 3 a sum of Rs.5775/- had been deposited in the National Savings Bank, Pettah Branch. The Appellant has not produced the letter referred to in J.E. 3, with the appeal to this court in order to ascertain whether the amount sought to be deposited had been deposited to the credit of the case.

According to the Appellant (the Petitioner-Petitioner Appellant) of the present appeal to this court, has made an application to the District Court of Colombo, by way of a petition dated 14th May 2013, supported with an affidavit seeking an order to release the said amount of Rs 5.775,000/- to the Appellant and to 2nd to 6th Respondent-Respondent Respondents (hereinafter referred to as the Respondents) in proportion to the shares allocated to them by a final decree in a partition case bearing No. 18813/P, as prayed for in prayer (a) to the said petition.

It is seen from the proceedings of the case that an inquiry has been held in to the said application of the Appellant. The 2nd to 6th Respondents were absent and unrepresented at the said inquiry. After hearing the evidence of the Appellant and Surveyor and Court Commissioner J. G. Kammanangoda, the learned District Judge by order dated 30.04.2014, has dismissed the Application of the Appellant. The appellant has preferred an appeal from the said order to the High Court of Civil Appeal holden at Colombo, and the High Court has dismissed the said appeal. The present appeal is from the said order dated 01.12.2014.

This court has granted leave on the questions set out in paragraph 13 (a) and (b) of the petition filed on 08.01.2015. At the hearing, the learned President Counsel for the Appellant submitted that according to the final decree in partition case No. 18813/P of the District Court of Colombo, lot 7 in final partition plan bearing No. 2904 dated 25.10.2003 was allocated as an allotment of land earmarked for acquisition by the State for road widening and the said allotment was allocated in common to the Petitioner and the 2nd to 6th Respondents and a sum of Rs 5,775,000/- as compensation awarded for the said Lot 7 that was acquired. In the said premise, the learned President Counsel further submitted that the issue to be decided by this court is whether the soil rights and ownership of the said lot 7 acquired by the state, remain with the Petitioner and the 2nd to 6th Respondents and as such they are entitled to the compensation proportionately for the said lot 7 which is now deposited to the credit of the case.

As I have noted above the compensation deposited to the credit of this case has been made by the Plaintiff Respondent in terms of Section 33 of the Land Acquisition Act No. 09 of 1950. According to Section 33 the compensation shall be deposited in relevant District Court or Primary Court under the following circumstances, Namely;

- a. The person to whom any compensation for the acquisition of a land or a servitude under the Act is payable declines to receive it when it is tendered to him,
- b. When the person is dead,
- c. When the person cannot be found after diligent search,
- d. Where no person entitled to any compensation for the acquisition of a land or servitude is known.

In terms of Section 33 a notice of the payment of any sum to court as provided in the said Section shall be published in the gazette and in at least one Sinhala daily newspaper, one Tamil daily newspaper and one daily English newspaper. The appellant has averred that pursuant to a notice appearing in the newspaper he made the said application in the said case No DLA/00048/9, in terms of Section 33 of the Land Acquisition Act.

According to the documentation at pages 57 to 63 of the brief, the Land Acquiring Officer has held an inquiry in to an application made by 04 Claimants claiming the said compensation, and, has made an order in terms of Section 9 and 10 of the said Act. The caption of the said case bearing No DLA/00048/9 manifests that the said four Claimants have not made any claim before the District Court. The proceedings of the said inquiry at page 59 of the brief, indicate that the said four persons, namely, Mohamed Azver Mohamed Amshad, Mohamed Azver Mohamed Afthab, Mohamed Junaid Mohamed Azver and Zeenathul Munavara Azver have preferred their claims on the basis that they are the owners of Lots 1, 2, 5 and 3 respectively, depicted in the said final partition plan bearing No 2904.

Also, it is clear from the evidence of the Appellant that the said four Claimants have claimed the compensation awarded for said lot 7 on the basis that they had become the owners of said lots 1, 2, 5 and 3 by the deeds of transfers bearing No. 1754 of 02nd May 2005, No 108 of 02nd May, 2005 and No 109 of 02nd May, 2005, respectively. It is also an important fact to be noted that the Land Acquiring Officer, at the end of the inquiry in to the said application made by the said four claimants, has refused the said claim for compensation. But the said four claimants, in terms of Section 10(2) of the said Act, had not made an application

within fourteen days to the Land Acquiring Officer for a reference of the claim for determination by the District Court.

The Appellant and the 2nd to 6th Respondent have claimed the said compensation on the basis of the said final decree entered in the partition case bearing No. 18813/P of the District Court of Colombo wherein lot 7 in the said final partition plan bearing No. 2904 dated 25.10.2003 had been allocated as an allotment of land earmarked for acquisition by the State for road widening and the said allotment had been allocated in common to the Petitioner and the 2nd to 6th Respondents. The Appellant in his evidence has admitted the execution of the said deeds of transfer bearing Nos. 1754, 108 and 109. It is clearly seen that the said 03 deeds had been executed in consequent to the said final partition decree entered in the case bearing No 18813/P.

It was the contention of the learned President Counsel that a servitude is a *res incorporalis*, and may be defined as a proprietary right vested in a definite person or annexed to the ownership of a definite piece of land, overland or other property belonging to another person, and limiting the enjoyment by that person of his property in a definite manner. Lot 7 falls into such a category and certain persons enjoy a right to use lot 7 as a roadway. But however, the soil rights and ownership remains with owners of lot 7, who are the Petitioner and 2nd to 6th Respondents.

I now consider the said circumstances. It is clearly stated in the said three deeds bearing Nos. 1754, 108 and 109 that the transferees are entitled to “the right to use the road reservations marked over Lot 6 and 7 depicted in the said final partition plan bearing No 2904” and nothing more. Hence the said 3 deeds have to be construed according to its terms.

It must be noted that Servitudes are real rights that are "carved out of the full *dominium* of the owner" and confer benefit to another, either by affording him the power of use and enjoyment, or else by requiring the owner to refrain from exercising his entitlement. Conversely, the notion of servitude implies that the property serves either another property or another person, and that the *dominium* of the owner of the servient or burdened property must be diminished by the servitude. One cannot, by definition, have a servitude on one's own property (*nemini res sua servit*), because a servitude can only be a limited real right in the property of another.

The holder of the servitude has priority, in principle, as regards the exercise of the particular entitlement covered by the servitude. The servient owner may exercise all the usual rights of ownership, but he may not impair the rights of the servitude holder, and hence may not exercise those rights which are inconsistent with the servitude, or grant further servitudes that would infringe on the existing servitude.

R. W. Lee in his 'AN INTRODUCTION TO ROMAN-DUTCH LAW' (5th Edition) at page 164 state thus; "A real servitude is a fragment of the ownership of an immovable detached from the residue of ownership and vested in the owner of an adjoining immovable as accessory to such ownership and for the advantage of such immovable. Though ownership is thus divided and vested in two persons, the detached fragment is, as a rule, relatively insignificant in comparison with that remains. It seems natural, therefore, to speak of the person to whom the residue belongs as owner of the land, while the person in whom the detached right is vested is said to have a *jus in re aliena*."

The rights and duties of the dominant and servient owners depend primarily on the terms of the agreement that constitutes the servitude. That

agreement is construed strictly, and in a manner which is least burdensome for the servient owner. The dominant owner must exercise his rights *civiliter modo*, with due regard, that is, to the rights of the servient owner. Either party may approach the courts for a declaration of rights. Specific duties may be enforced by way of interdict, and damages may be awarded by a court where either party has exceeded the terms of the servitude and has suffered patrimonial loss.

“The servitude holder is entitled in principle to unrestricted enjoyment of the servitude, thus limiting the owner’s exercise of powers of ownership to those that are not inconsistent with the servitude. However, the servitude holder must exercise the servitude *civiliter modo*, namely in a civilized, considerate manner, causing as little inconvenience as possible to the owner of the servient land and may not increase the burden on the servient land beyond the express or implied terms of the servitude” Wille’s Principles of South African Law (Ninth Edition) 593.

In *De Kock Vs Hanel & Others* 1999 (1) SA 994 the court observed that “Utility is a requirement only for the constitution of a praedial servitude and not for its continued existence is unacceptable. Once a servitude is no longer of use for the exploitation of the dominant tenement, the servitude ceases to exist”.

“The owner of land or a moveable may approach court for a declaration of rights, if a person who apparently has no rights asserts a servitude over the land or movable, or if the holder of a servitude acts in excess of his or her rights. Such a plea can be coupled with a mandatory or prohibitory interdict and, in suitable case, with a delictual claim for damages”. Wille’s Principles of South African Law (Ninth Edition) 616.

“If a person unlawfully claims a servitude over land or claims greater rights under the servitude than it actually comprises, the owner of land may bring

action against him, known as *actio negatoria*, for a declaration that his land is free from the servitude claimed, or free from the excessive burdens as the case may be”. (Voet 8:5:5:)

When I consider the facts relevant to the case in hand in the light of the above basis, I am of the view that the ownership of lot 7, at the time relevant to the matter in question of this case, was remained on the Appellant and the 2nd to 6th Respondents. Hence the Appellant and the 2nd to 6th Respondents, as owners of lot 7, are entitled to the claim set out in the Petition preferred to this court on 08.01.2015. Hence, I answer the said questions of law in favour of the Appellant. Accordingly, the judgment of the High Court of Civil Appeal holden in Colombo dated 01.12.2014 and the order of the learned District Judge dated 30.04.2014 is hereby set aside. The Appellant is entitled to enter a decree as prayed for in the said petition filed in the District Court dated 14.05.2013 (X 2). The Appeal is allowed. The Appellant must bear costs in all courts.

Appeal allowed.

Judge of the Supreme Court

SISIRA J DE ABREW, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court