

Judgment
25/1/1965

IN THE PRIVY COUNCIL

No. 34 of 1964

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEG STUDIES
- 5 FEB 1966
25 RUS SQUARE
LONDON, W.C.1.

ON APPEAL FROM THE SUPREME COURT
OF THE ISLAND OF CEYLON

B E T W E E N :-

DR. M.G. PERERA (Defendant)
Appellant

80974

- and -

MISS DARIA MEMALTA (Plaintiff)
HENRY Respondent

10

CASE FOR THE RESPONDENT

Record

1. This is an appeal from a Decree of the Supreme Court of the Island of Ceylon, dated the 4th day of December 1962, whereby the said Court dismissed the Appellant's appeal from a Judgment and Decree of the District Court of Colombo (A.L.S. Sirimanne, A.D.J.), dated the 14th day of September 1960, whereby Judgment was entered for the Respondent declaring that the erection by the Appellant of two pillars upon a plot of land referred to in the proceedings as Lot D was a trespass and encroachment and a restraint on the free exercise and user of the Respondent's right of way over the said plot of land, awarding the Respondent damages therefor and ordering the Appellant to remove the said pillars within two months.

p.48

p.41

p.44

20

2. The main questions raised in this appeal are whether the Respondent has a subsisting right of way over the said plot of land and whether the Defendant by erecting the said pillars trespassed and encroached on such right of way. It was not in issue that the Appellant did erect the said two pillars upon the said plot of land.

30

3. The said plot of land referred to as Lot D and the plot of land owned by the Respondent to which she claimed that a right of way over Lot D attached, viz. Lot N, are shown on the plan marked "A" which was annexed to the plaint of the Respondent and also produced in evidence on her behalf as P4. Lot D is a strip of land which runs on the East side of Lot N

p.15

p.23 1.22

<u>Record</u>	to give access to Lauries Road to the South of Lot N and of other land which lies between Lot N and Lauries Road.	
p.57 p.23 1.8	4. The Respondent's said plot of land, Lot N, originally formed part of a larger plot of land owned by the Respondent's father comprising Lots B and C as shown in a plan dated the 29th March 1924 which was produced in evidence as P1. He purchased these lots by Deed No.1645 dated the 28th June 1924, (P2), which shows that he bought the said lots together with a right of way over Lot D which was therein described as a reservation for a road.	10
p.59 p.23 1.13	5. After the death of the Respondent's father, his four children, one of whom is the Respondent, divided among themselves Lots B and C in the plan PL by Deed of Exchange No.139 of 1955, dated the 20th July 1955 (P3), into the five lots L,M,N,O and P, shown in plan P4 which is dated the 25th February 1954. By this Deed of Exchange the Respondent became the owner of Lot N.	20
p.23 1.18 p.57 p.78 p.15	6. The Appellant became the owner of Lot A shown in plan PL (which lies to the North of the original Lots B and C) by Deed No.2010 dated the 14th May 1954 (D4). By this Deed he purchased Lot A together with a right of way along the private road leading therefrom to Lauries Road which is the road reservation Lot D in plan PL.	
p.31 1.1 p.57 p.74		
p.57		
p.12	7. The Respondent by her plaint, dated the 31st January 1958, alleged that the Appellant had wrongfully erected two pillars on Lot D narrowing the width of the road and obstructing the Respondent's use of her right of way over it. She sought an order for the removal of the pillars and damages for the obstruction caused by their erection.	30
p.22 1.15	At the trial damages were agreed at Rs.1/- per month subject to liability.	
p.18	8. The Appellant by his amended Answer, dated the 31st March 1960, alleged that the Respondent had lost her right of use of the roadway by non-user and abandonment, that he and his predecessors in title had "prescribed to the said right of way by user for well over the prescriptive period" and that since he had acquired his land comprised	40

in Lot A the road reservation, which had before then not been in use for vehicular traffic, had been repaired by him at a cost of Rs.7,500/-, and he counterclaimed a sum of Rs.6,000/-.

Record

The Appellant also pleaded that the Respondent could not maintain the action without joining the other owners of Lots L, M, and O in plan 4, but it was subsequently conceded by the Appellant that the Plaintiff was entitled to claim for her right to use the roadway up to her Lot viz. Lot N.

p.43 1.9

9. The Respondent's mother, Magdalene Henry, gave evidence as to the purchase by her late husband of Lots B and C in Plan 1 in 1924. Lots B and C were used as one land, there was a house St. Gerards on Lot B and they lived in this house from 1932 to 1936, and from 1942 up to date. There were two gates to the South of Lot C leading to Lauries Road and one gate to the East of Lot B leading to the road reservation i.e. Lot D. The concrete posts with barbed wire dividing Lots B and C from the road reservation and also the gate leading from Lot B to the road reservation were erected by her husband. She gave evidence as to their user of the right of way over the road reservation through this gate both on foot and by car.

p.23 1.12

p.23 1.36

p.23 1.40

p.26 1.27

10. The evidence of the Respondent's mother was corroborated by Dr. Sandarasekera who testified that when he was living in Lot A from 1952 to 1954 he had used the road reservation to go to Lauries Road, that he remembered a gap through which one could enter Lot B from the road reservation and that the Respondent's mother and her family went along the road reservation.

p.27 1.34-

p.28 1.5

p.28 1.26

p.29 1.5

There was further corroborative evidence by Mr. Thiedeman who had visited the occupants of the annexe of the house on Lot B from 1953 to 1957 and himself lived in the annexe from 1957 to 1959 and who testified that he had used the road reservation to get to and from the annexe.

p.29 11.17-23

p.30 11.6-9

11. The Appellant called a Mr. Kurera, the Auctioneer who sold Lot A to the Appellant. He said that at the time of the purchase on the 14th May 1954 the road reservation was not a built up roadway but was just a piece of land reserved for a road. He said that he was unable to say whether or not

p.31 11.3-6

<p><u>Record</u> p.31 1.18</p> <p>p.32 1.12 p.63</p> <p>p.32 11.16 -22</p> <p>p.32 11.29 -31</p> <p>p.32 1.36 -p.33 1.8</p> <p>pp.36-41</p> <p>p.40 1.13</p> <p>p.41</p> <p>p.42 1.8</p> <p>p.42 1.32</p> <p>p.43</p> <p>p.43 1.5</p>	<p>there was a gate at the top. He added that there were a lot of trees on the road reservation.</p> <p>The Appellant also called Mr. Tudugalla, a Surveyor who had prepared a plan (D3) dated the 27th February 1954, just before the auction of the property by Mr. Kurera. He testified as to the condition of the road reservation in 1954 saying that at that time it was not a constructed road and that there were trees on the sides of the road reservation and one or two in the centre also. The evidence of this witness was that at the date of his survey the concrete posts with barbed wire marking the western boundary of the road reservation and the opening from Lot B to the road reservation were in existence.</p> <p>The Appellant called two other witnesses as to the condition of the roadway in 1954, as to his having carried out certain improvements upon it and as to the cost of the work. It was admitted that the two pillars were erected by the Appellant's workmen.</p> <p>12. On the 14th day of September 1960, A.L.S. Sirimanne, the learned Additional District Judge, gave judgment in favour of the Respondent, stating that the Respondent's documentary title to Lot N and her right to the use of Lot D could hardly be denied, accepting wholly the evidence of the Plaintiff's mother, Dr. Sandarasekera, and Mr. Thiedeman, and rejecting the evidence of the Appellant's witnesses as to the condition of the roadway in 1954. The learned Additional District Judge found that the right of way over Lot D which the Respondent and her predecessors in title had, had not been lost by non-user or abandonment and that no prescriptive rights barring the Respondent's right of way could be shown by the Appellant. The Appellant's counter-claim was dismissed, the learned Additional District Judge stating that the amount which the Appellant said the improvements to the road had cost him was considerably exaggerated and that in any event he was not entitled to claim any sum from the Respondent for these improvements which were carried out without consulting the Respondent and for his own benefit.</p>	<p></p> <p></p> <p>10</p> <p></p> <p>20</p> <p></p> <p>30</p> <p></p> <p>40</p>
---	--	---

13. By petition of appeal dated the 19th day of September 1960, the Appellant appealed to the Supreme Court of the Island of Ceylon, which Court, by Decree dated the 4th December 1962, dismissed the said appeal with costs. Record
p.45
p.48
14. The Appellant applied to the Supreme Court of the Island of Ceylon for Leave to Appeal to the Privy Council, and was granted Conditional Leave to appeal on the 6th March 1963 and Final Leave on the 13th May 1963. p.51
p.53
15. The Respondent respectfully submits that the Judgment and Decree of the District Court of Colombo, dated the 14th day of September 1960, and the Decree of the Supreme Court of the Island of Ceylon, dated the 4th day of December 1962, were right and ought to be affirmed and this appeal ought to be dismissed for the following amongst other
- R E A S O N S
1. BECAUSE the said Supreme Court rightly upheld the findings of fact of the said District Court of Colombo, which findings ought not to be disturbed.
 2. BECAUSE the documentary and oral evidence clearly showed that a right of way over the said Lot D attached to the Respondent's said land comprised in Lot N and was still subsisting, that the Appellant had trespassed and encroached on such right of way and that the Respondent was entitled to the relief claimed.
 3. BECAUSE there was no evidence upon which it could have been found that the Respondent or any predecessor in title had lost the right of way over Lot D by non-user or by abandonment. On the contrary the evidence showed that the said right had been consistently used and not abandoned and the Courts below rightly so found.
 4. BECAUSE the Appellant failed wholly to establish any prescriptive right which extinguished or barred or limited the Respondent's right of way over Lot D.

6.

5. BECAUSE upon the facts as found, it is submitted correctly, by the learned Additional District Judge, there is no principle of law upon which the Appellant could recover against the Respondent upon his counterclaim.
6. BECAUSE the Judgment of the District Court of Colombo was right for the reasons given by the learned Additional District Judge and the Supreme Court of the Island of Ceylon was right in dismissing the Appellant's appeal against it.

MONTAGUE SOLOMON

LEARIE CONSTANTINE

No. 34 of 1964

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME
COURT OF THE ISLAND OF CEYLON

BETWEEN:-

DR. M.G. PERERA
(Defendant)
Appellant

- and -

MISS DARIA MEMALTA HENRY
(Plaintiff)
Respondent

CASE FOR THE RESPONDENT

T.L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1.
Solicitors for the Respondent.