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SALIH OMER PONOU
v
ZIVER FEHIM MOULLA IBRAHIM

[VASSILIADES, P., JOSEPHIDES, LOIZOU, JJ.]

SALIH OMER PONOU,
Appellant-Plaintiff,

v

ZIVER FEHIM MOULLA IBRAHIM,
Respondent-Defendant

(*Civil Appeal No.* 4835)

Right of way—Easement—Claimed by virtue of user for the period of prescription (or from time immemorial)—Section 11 *of Cap* 224 (infra)—*Finding that plaintiff was not passing over a fixed and ascertained part of defendant's land—But from whatever part it suited him best depending on the state in which defenfant's land happened to be at the time—Aforesaid finding not disturbed on appeal—Appeal dismissed—The Immovable Property (Tenure, Registration and Valuation) Law, Cap* 224, *before its amendment by Law No* 10 *of* 1966—*See also* infra

Easement—Right of way—Supra

Immovable Property—Supra

Right of way—Disputes concerning right of way—Now governed by Cap 224 *section* 11 (supra) *as amended by Law No* 10 *of* 1966

Appeal—Findings of fact made by trial Courts—Based on assessment of the evidence and credibility of witnesses—Approach of the Court of Appeal and principles applicable, restated

Findings of fact—Appeal—Approach of the Court of Appeal—See supra

The appellant, owner of a plot of land in the area of the village of Kazafani instituted proceedings in the District Court of Kyrenia against the respondent, as owner of a neighbouring plot abutting on a public road, claiming by virtue of prescription or user from time immemorial a right of way over respondent's land in order to proceed to and from the road to his said plot with his animals and agricultural implements. Appellant's case was that he exercised the right of way along the eastern boundary of respondent's plot for the period of prescription and over. But the trial

Court found that the plaintiff (now appellant) was passing over defendant's (now respondent's) land to go to his own property for a number of years but he was not passing over a fixed part of defendant's property but "from whatever part it suited him best", depending on the state in which defendant's property happened to be at the time.

Dismissing the appeal, the Court :—

Held, (1). Far from being satisfied that the finding oft he trial Court in this connection (*supra*) was unsatisfactory we found it unnecessary to call on the other side in support of the judgment appealed from in favour of the defendant (respondent).

(2). The approach of this Court to findings made by trial Courts, has been repeatedly stated. Findings resulting from the assessment of the evidence made by the Court who had the advantage of seeing and hearing the witnesses remain undisturbed, unless the appellant can persuade this Court that the reasoning behind such findings is unsatisfactory ; or that they are in any way defective and should be set aside varied or substituted (see *Hadji Antoni* v. *Vassiliadou*, 1961 C.L.R 103 at p. 106 ; *Patsalides* v. *Afsharian* (1965) 1 C.L.R. 134 ; *Imam* v. *Papacostas* (1968) 1 C.L.R. 207).

In this case the trial Court's findings should remain undisturbed.

Appeal dismissed with costs.

Cases referred to :

Hadji Antoni v. *Vassiliadou*, 1961 C.L.R. 103 at p. 106 ;

Patsalides v. *Afsharian* (1965) 1 C.L.R. 134 ;

Imam v. *Papacostas* (1968) 1 C.L.R. 207 ;

Hadji Demosthenous v. *Georghiou* (1969) 1 C.L.R. 187.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Kyrenia (Demetriades and Stavrinakis, D.JJ.) dated the 22nd May, 1969 (Action No. 148/63) whereby plaintiff's claim for a right of way over defendant's land was dismissed.

A. Emilianides, for the appellant.

M. Aziz, for the respondent.

The judgment of the Court was delivered by :—

VASSILIADES, P.: The apppellant and five other owners of plots of land in the area of the village of Kazaphani on the northern coast, instituted proceedings in the District Court of Kyrenia in March, 1963, (Action No. 148/63) against the respondent in this appeal, as owner of a neighbouring plot abutting on a public road, claiming a right of way over respondent's land in order to proceed to and from the road to their different plots with their animals and agricultural implements. The appellant was plaintiff No. 5 in the action ; and we shall refer to him for convenience, as the " plaintiff ", as none of the other plaintiffs joined in the appeal. To the respondent we shall refer as " the defendant ".

In their statement of claim all the plaintiffs in the action alleged that as owners of their respective plots, they and their predecessors in title exercised such a right of way from time immemorial or, in any case, for a period exceeding 30 years, thus acquiring a legal right of way for " a passage or pathway about 10 ft. wide all along the eastern boundary " of the defendant's plot, and from a point opposite the plaintiff's plot (which lies on the western side of the defendant's land) right across the defendant's land to the plaintiff's plot, as shown on a rough sketch prepared and produced by a Land Registry witness as *exhibit* 1 in the proceedings. As noted on the sketch, the passage claimed is hatched in red pencil on the defendant's plot 16 ; and serves five plots to the east and three plots to the west of defendant's plot, including that of the plaintiff now before us, which is plot 13 on the sketch.

This passage, the statement of claim further alleges, was obstructed by the defendant in March, 1963, when she placed a wire fence all along the frontage of her land abutting on the public road. Each of the plaintiffs in the action as owner and occupier of his respective land, therefore claimed for himself, his servants and agents, a judicial declaration of his alleged right of way ; an injunction against the defendant for interfering with such right ; damages and costs.

The defendant denied that such a right of way ever existed over her land, either from time immemorial or for the prescriptive period. She moreover alleged that a fence separating her plot from the public road existed in the past, during her father's lifetime from whom the defendant inherited the property in question.

At the trial, which took place in October and December, 1968, counsel for the plaintiffs called 8 witnesses (including several of the plaintiffs) in support of the claim. For the defence, counsel called the defendant and one other witness.

The Full District Court of Kyrenia, decided the case on May 22nd, 1969. In a carefully considered judgment, the Court dealt with the evidence in detail ; and decided the claim of each one of the plaintiffs. For the reasons stated in their judgment, the court dismissed one after another the claim of each of the plaintiffs. None of the other plaintiffs (excepting for the appellant before us) having joined in the appeal, the matter stands finally determined as far as they are concerned.

Dealing with the claim of the plaintiff now before us (plaintiff No. 5 in the action) the trial Court on the evidence adduced on both sides, found that this plaintiff--

> " was passing over defendant's property in order to go to his own property for a number of years, but he was not passing over a fixed part of defendant's property. We further find (the court say) from the evidence before us that the number of years during which he was passing over defendant's property, covered the period required by the law for acquiring a right of way but as the passage must be fixed and ascertained, this plaintiff failed to acquire such a right as the area over which he was passing has not been proved to have been the same at all material times. He was passing from whatever part it suited him best, depending on the state in which the defendant's property happened to be from time to time and when it was cultivated he was trying to cause as little damage as possible by passing along the eastern boundary . . .
>
> This to our mind (the judgment proceeds) is inconsistent with passing and repassing over one's land in exercise of a right and, furthermore, the cultivation by the defendant is a hindrance to the exercise of such a right. A further point about which we are not satisfied from the evidence, is the mode of use of the alleged passage. The evidence on this is general. It makes no mention whether a right was exercised on foot or by animals ; use by tractor was also mentioned but as none of the witnesses is a tractor driver, we do not know over which area the tractor passed. In addition to that we do not know on how many occasions or since when a tractor was used for the cultivation of plaintiff's property . . . . .

For all the above reasons—the trial Court conclude—the claim of plaintiff No. 5 is also dismissed."

The appeal was mainly argued on the contention that the evidence established sufficiently that the right of way claimed, was exercised along the eastern boundary of defendant's property ; and that the finding of the trial Court that the plaintiff " was passing from whatever part it suited him best ", depending on the state in which defendant's property happened to be at the time was against the weight of evidence. It should be substituted, counsel submitted, by a finding made by this Court to the effect that the plaintiff exercised the right of way claimed, along the eastern boundary of defendant's plot for the period of prescription ; and that he (the plaintiff) was, therefore, entitled to succeed in his action.

We find it unnecessary to go into detail regarding evidence which shows that the finding challenged by the plaintiff was well justified. Far from being satisfied, after hearing counsel for the appellant, that the finding of the trial Court in this connection was unsatisfactory, we found it unnecessary to call on the other side in support of the judgment in favour of the defendant.

The approach of this Court to findings made by trial Courts on issues of fact, has been repeatedly stated. Findings resulting from the assessment of the evidence made by court who had the advantage of seeing and hearing the witnesses remain undisturbed, unless the appellant can persuade this Court that the reasoning behind such findings is unsatisfactory ; or that they are in any way defective and should be set aside, varied or substituted. (See *Hadji Antoni* v. *Vassiliadou*, 1961 C.L.R. 103 at p. 106 ; *Patsalides* v. *Afsharian* (1965) 1 C.L.R. 134 ; *Imam* v. *Papacostas* (1968) 1 C.L.R. 207.) In this case, as we have already said, the trial Court's findings remain undisturbed.

Going now to the legal aspect of the case, this is governed by the provisions in section 11 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 ; which were recently discussed in *HadjiDemosthenous* v. *Georghiou* (1969) 1 C.L.R. 187. The trial Court having found against the plaintiff regarding the exercise of the right of way claimed, his action was rightly dismissed.

At the time when the action was brought in March 1963, section 11 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, contained no provisions

enabling the appropriate Land Registry authority to regulate matters concerning the access to property where such matters gave rise to disputes ; but in March, 1966, Law 10 of 1966 was enacted to amend section 11 so as to provide a way more practical than litigation, for the determination of such disputes.

Unfortunately the parties to this action did not avail themsleves of the machinery provided by the legislature to solve their dispute ; and in 1968 their advocates applied for trial of the action for a right of way under section 11, ignoring the amendment effected in 1966.

Faced now with the result of the trial, the parties may, perhaps, revise their course if they still have a problem of access to their property. Be that as it may, however, this appeal must fail ; and is dismissed with costs.

Appeal dismissed with costs.