

1962

Present : Tambiah, J.

J. P. CORNELIS and others, Appellants, and N. E. FERNANDO,
Respondent

S. C. 133—C. R. Gampaha, 7696/A

Servitudes—Right of way—Indivisibility of a servitude.

In an action in which the plaintiff claimed to be declared entitled to a right of way by prescription, it was shown that between the plaintiff's land and the defendants' land there was an intervening land over which the owner "allowed" the plaintiff to go.

Held, that, in the absence of a finding that the plaintiff established a right of way by prescription over the intervening land, the Court could not grant the plaintiff a right of way through the defendants' land.

APPEAL from a judgment of the Court of Requests, Gampaha.

G. E. Chitty, Q.C., with E. B. Vannitamby, for Defendants-Appellants.

E. A. G. de Silva, for Plaintiff-Respondent.

October 18, 1962. TAMBIAH, J.—

The plaintiff brought this action against the 1st to 5th defendants and claimed a servitude of a right of way. He claimed this servitude by prescription. The plaintiff's and the defendants' lands are shown in plan Pl. Between the plaintiff's and the defendants' lands there is an intervening land belonging to Nicholas Silva.

The plaintiff, in the course of his evidence, has stated that Nicholas Silva allowed her to go over this land. The learned Commissioner of Requests does not find that the plaintiff has established a right of way of prescription over the land of Nicholas Silva, but the learned Commissioner has held that the plaintiff has established a right of way through the defendants' land along the dotted path shown in the plan. "Servitude is one and indivisible, in the sense that it must be shown legally to exist at each and every point on the strip of land over which it is claimed and if the claimant fail to prove its existence at any one of such points, the servitude disappears not at that point only but at every other point." (Dictum of Macdonell, C.J., in 34 N. L. R. 114.)

Counsel for the Respondent concedes that this proposition of law is unassailable. Therefore the learned Commissioner has erred in holding that the Plaintiff has established a right of way by prescription from the point shown in the plan to the main road through the defendants' land.

By way of alternative claim the plaintiff also claims a right of way of necessity. The learned Commissioner has not investigated this matter. It may be noted that Nicholas Silva has not been made a party to this

case. The learned Commissioner has formally answered the issue that the plaintiff has a right of way of necessity over the defendant's land, but has given no reasons. It may be necessary to make Nicholas Silva a party to this case if a right of way of necessity is going to be claimed from the plaintiff's land, through Nicholas Silva's land and the defendants' land.

I therefore set aside the order of the Commissioner and send the case back in order that he may try the issue as to whether the plaintiff is entitled to a right of way of necessity over the defendants' land. The Appellant is entitled to costs of the trial as well as costs of this Court.

Order set aside.
