(16)

IN THE SEYCHELLES COURT OF APPEAL

ROGER VARGIOLU **APPELLANT**

VERSUS

RICHLIEU VERLAQUE **RESPONDENT**

Civil Appeal No. 15 of 2002

[Before: *Ayoola P, Silungwe & Matadeen JJA]*

Ms. D. Zatte for the Appellant
Mr. J. Hodoul for the Respondent

JUDGMENT

(Delivered by Matadeen, JA)

This is an appeal against a judgment of the Supreme Court which found that the appellant, then defendant, had maliciously and unlawfully cut and disconnected a water pipe bringing water to Parcel PR306 belonging to the respondent, then plaintiff, from a source in PR311 belonging to a third party and crossing Parcel PR309 belonging to the appellant, and awarded a total sum of SR23,000 as damages for the prejudice suffered by the respondent.

It is not disputed that Parcels PR306, PR309 and PR311 formed part of a larger plot belonging to one Verlaque which was partitioned amongst his heirs in 1977. The respondent was allotted PR306 whilst PR309 was attributed to his late sister who was the appellant's mother.

The claim of the respondent was based on the existence of a right to lay pipes across the property of the appellant to draw water from a stream on

PR311 belonging to a third party who was not involved in the present proceedings.

The respondent claimed that he held that right by virtue of a deed of partition amongst the heirs of the late Verlaque which was subject to a proviso that each heir be granted a right to draw water from the streams. Alternatively, he claimed that he had acquired the right to lay the pipe across the respondent's land by continuous use over a period of 20 years.

We need not set out in extenso the evidence adduced by both parties. Suffice it to say that after considering that evidence, the learned trial Judge found that the respondent had established his right *"both under the agreement and by acquisitive prescription."*

The present appeal is based on no less that 9 grounds which we need not reproduce here but which essentially challenge that finding of the trial Judge as well as the award of damages.

We shall deal first with the evidence relating to the agreement and the learned Judge's finding that the right claimed by the respondent can be grounded on that agreement. That agreement which was produced before the trial Court turned out to be an agreement on beacons and boundaries. It was signed by the appellant's mother and witnessed by the appellant's father. Their signatures were confirmed as genuine by the appellant. Appended to the agreement was a footnote indicating that the agreement was subject to a proviso that each heir would have a right to draw water. That footnote was not signed by any of the parties to the agreement.

The learned trial Judge accepted the submission of learned Counsel for the respondent that the agreement was an authentic document within the

meaning of Article 1317 of the Civil Code as it was drawn up by a Land Surveyor, who is a public official, in accordance with the prescribed forms and was therefore pursuant to Article 1319 proof of the agreement between the contracting parties and their heirs. He also found that since the evidence did bear out the fact that all the contracting parties had been drawing water from the streams ever since the agreement was drawn up in 1977, the appellant could not renege on the proviso. The learned Judge therefore held that the proviso should be read as part and parcel of the agreement on beacons and boundaries and that the respondent had established his right to lay a water pipe across the appellant's land under the agreement.

We have reviewed the evidence on record as well as the learned Judge's finding thereon. We have come to the conclusion that his finding is not legally tenable. We say so for the following reasons. First, the agreement on beacons and boundaries was one between heirs Verlaque who had surveyed and partitioned the property of their late predecessor in title, on the one hand, and the adjoining owners of that property, on the other. That agreement was signed by the Land Surveyor in February 1977 and by the contracting parties in September 1977. The footnote which provided for a right to draw water was signed only by the Land Surveyor but was undated and not signed by any of the contracting parties including the mother and father of the appellant. Secondly, a document acquires authenticity only if it is drawn up in accordance with the prescribed forms. There is no doubt that the agreement on beacons and boundaries was drawn up in accordance with Schedule C of the Land Survey Regulations and is valid in relation to beacons and boundaries. But the footnote made after the wording in the prescribed form cannot be said to be part of the agreement. Moreover, there is nothing to show that the Land Surveyor did have any authority to make such a statement which, in any event, was not signed by any of the heirs of the late

Verlaque. Consequently, we take the view that the right, if any, was not created by agreement.

We shall turn now to a consideration of the evidence and the finding of the learned Judge on the acquisition of such right grounded on prescription. The right claimed by the respondent was the right to draw water from the stream on Parcel PR311, which was not in issue, and the right to lay a water pipe across PR309.

There was evidence before the trial Court emanating from the respondent and the carpenter employed by him as to the fact of drawing water from the stream in PR311 through a pipe across PR309 since 1979 until the pipe was cut and disconnected by the appellant in 1999. Now the laying of a pipe across PR309 to bring water from PR311 to PR306 is, in terms of Article 690 of the Civil Code, a continuous and apparent easement capable of being created by acquisitive prescription by possession or use for twenty years. The right to draw water simpliciter may be a discontinuous easement requiring human intervention. But the right to draw water by laying a pipe across the servient property is a continuous one. It is equally one which is apparent: vide: **Beynon v Attorney-General 1969 SLR 183.**

We hold therefore that the learned Judge properly held that the respondent had acquired a right to lay a pipe across PR309 to bring water from PR311 to PR306 by 20 years' use.

The present appeal also questions the award of damages to the appellant for loss of revenue to his restaurant business and for the reconnection costs. We have reviewed the learned Judge's award in the light of the submissions made by learned Counsel for the appellant but have found

no reason to depart therefrom as there was ample evidence before the trial Court to justify the sums awarded under those two heads of damages.

For the reason given above we dismiss the appeal with costs.

Delivered at Victoria, Mahe, this 11th day of *April* 2003