Rose v Monnaie & Or
(1997) SLR 177

Philippe BOULLE for the Plaintiff
Bernard GEORGES for the Defendants

Judgment delivered on 11 June 1997 by:

BWANA J: William Rose, the plaintiff, is the proprietor of parcel PR 319 at Baie Sainte Anne, Praslin. Sidney Monnaie, the first defendant, is the proprietor of parcel PR 320 which is contiguous to the plaintiffs' piece of land. Jude Monnaie, the second defendant, lives farther up the driveway and runs a taxi business. He is being sued jointly with the first defendant for continuous trespass on parcel PR 319.

It is not disputed that parcel PR 320 is enclaved. It has no means of egress.

The plaintiff states:

> The only way he (the first defendant) can get to his property it has to be via my property and to his property. There is no access at all from the main road in connection with his property. There is one big retaining wall from one boundary to the other (emphasis mine).

It is also not in dispute that when the plaintiff bought parcel PR 319 on 13th July 1982 (exhibit P1), the first defendant was residing there already. It was admitted in cross-examination by Aloise Rose, PW4, the father of the plaintiff and one who sold parcel PR 319 to him, that when he bought that land in 1969, the first defendant was living there already. He admitted that by then the first defendant "had completed constructing the wall and was building his house".

Furthermore, it is not in dispute that the title deed, exhibit P1, resulting from the transaction between the plaintiff and PW4, contains the following, namely that the plaintiff purchased parcel PR 319 of the extent of 2391 square metres:

> together with all rights, privileges, easements, servitude and appurtenances thereto belonging or in anywise appertaining to or used or enjoyed therewith or reputed or known as part and parcel thereof and all the estate right, title, property claim and demand …

Because of the foregoing quotation it cannot be disputed that when the plaintiff bought parcel PR 319, if there existed any easements etc thereon, then he is bound to accept and honour them unless the same have been lawfully terminated or prescribed.

The plaintiff's case, therefore, is based on two claims, namely-

1. That the first defendant has unlawfully constructed a retaining wall

which encroaches on the plaintiff's land; and

2. That the defendants have continuously trespassed on parcel PR 319 by walking and driving motor vehicles thereon to reach parcel PR 320.

Insofar as claim 1 is concerned, and for the avoidance of doubt, the wall claimed against is not the entire retaining wall referred to above. It is, rather, the small part at the bend near where the existing drive way joins the main road to and from Baie Sainte Anne - as shown on the plan, exhibit P4. That small part, it is averred, was constructed to allow the first defendant have a gate which gives him access to the driveway. The total area of encroachment is given (by David G Lebon, PW2 a surveyor in Seychelles with 40 years experience) as being 60 square metres. As concerns "unlawfully causing works to be carried out on parcel PR 319" shown in the plaint, it is the plaintiff's case that the first defendant has constructed a motorable way on his land without his consent.

In so far as claim 2 is concerned, it is the plaintiff's case that the two defendants have repeatedly used the motorable way (the existing driveway as per exhibit P4) without his consent. In so doing, they disturb him and cause inconvenience. Initially he talked to the first defendant requesting him to remove this driveway, but had no success. The matter was reported to the police and ,only after failing to secure a solution to the issue, he took legal action in 1994 - exhibit P2. The said exhibit P2, a letter written by the plaintiff's counsel to the first defendant, states inter alia:

> I am instructed by my client, Mr William Rose, to give you notice that you must cease using the road you have unlawfully built on my client's land ..... which you are presently using to have access to your adjoining property ..... Furthermore, you are also requested to remove all constructions you have made on my client's land including a wall you have erected along his boundary...
>
> Signed
> P Boulle
> 11th May 1994.

However, SP Andre Valmont of the Police force, PW3, deponed that sometime between 1986 and 1991 he had received a complaint from the plaintiff that a road was being constructed on his property. When he went to the site, the driveway was there already but found out that the plaintiff's complaint was based on an extension being built to the driveway to accommodate parking space (emphasis mine).

The first defendant admits to have constructed that portion of the wall that encroaches on the plaintiff's land. He estimates that the area of encroachment is only one metre. As to the area of encroachment caused by the drive way, he admits PW2's estimate of 60 square metres. It is this defendant's averment that he had offered the former owner - PW4 - to purchase the said area but that the latter declined the offer. Instead, PW4

allowed the defendant to go ahead with the construction. The defendant avers that he built that driveway in 1971, well before the plaintiff bought the land. This period of construction is supported by John Charles, DW2, who worked thereat as a labourer when the road was being built. During that period, it was deponed by DW2, PW4 was present, stood by but never objected to the construction. Likewise, Gaetan Hoareau, DW3, a senior court process server since 1970, testified that he has been driving on that driveway (when he goes to Praslin on duty) for over twenty years now.

Initially the motorway was built by the defendant of earth and stone but later concrete was added. It is the defendant's averment that he was on good terms with PW4 and they met frequently. He never objected to the construction taking place.

I will, first of all, examine the issue as to when the driveway was constructed. As regards the wall, it was submitted by consent of both counsel - Mr Boulle for the plaintiff and Mr B Georges for the defendants thus:

> By consent only regarding the construction of the wall, five years ago. The road and everything will be on the evidence before the Court....

So, when was the driveway built? The plaintiff claims it was built after he had purchased parcel PR 319, that is after 1982. It was not there when he purchased PR 319. However this evidence is controverted by the defendant and his two DWs. They say it was built in 1971. As PW3 stated, he left Praslin in 1991. However when he was called by the plaintiff (sometime between 1986 and 1991), the drive way was there. The dispute was only on an extension of parking space. DW2 deponed that he had participated in the construction of the said motor way. That was in 1971. DWS, a well respected senior court process server, says he had been using that motor way for over 20 years. It has been there. I examined the demeanour of the first defendant and the two DWs and am satisfied that what they stated is the truth and correct version. The same credit cannot be given to Alois Rose, PW4, the father and vendor of parcel PR 319 to his son, the plaintiff. It appeared, particularly during cross-examination that either he was not sure of his answers or was trying to hide some information. Therefore, it is my considered view that the said motorway was built by the first defendant in 1971 when PW4 was still the lawful owner of parcel PR 319.

The foregoing conclusion leads to the next issue namely, that of prescription. I would, however, first consider the issue of permission to build that motorway. Was it given? The defence case has shown that the construction was not objected to. PW4 stood by when construction work was going on. He never stopped it. Only the plaintiff in 1994 - some 23 years later - started raising objections.

To that, it is the defence case that the plaintiff took such steps following other misunderstandings that have occurred between the parties. His action is therefore prescribed. Be that as it may, it is, however, my considered view is that when construction was taking place, PW4 never objected to it. Does this validate the construction? In an earlier ruling of this Court on the issue, it was decided that

permission to build on another person's land, be it a wall or driveway, is a judicial issue which should be proved by document. Citing Sauzier J in his booklet *Introduction to the Law of Evidence in Seychelles*, it is stated in chapter 2 that:

> Sometimes the two are mixed up. In that case oral evidence of the "fait material" is admissible, whereas the "fait juridique" must be proved by a document. Eg someone who builds on someone else's land with his permission. The fact of building without hindrance may be proved by oral evidence but the giving of permission to build must be proved by a document if oral evidence is objected to. One cannot presume permission from the fact of building without hindrance ... (emphasis mine).

The substance of this ruling forms, in part, the basis of Mr Boulle's submission, wherein, in addition, he cites arts 691; 1353; 2229; 2240 - 2241 of the Civil Code. He also cites the cases of *Payet v Labrosse* (1978) SLR 222 and *Mirabeau &Others v Camille &Another* (1974) SLR 158.

Indeed, I concur with Mr Boulle that art 691 of the Civil Code clearly states the law as it is in this country, namely that right of way is not governed by prescription. It states:

> Non-apparent continuous easements and discontinuous easements, apparent or non-apparent, may not be created except by a document of title. Possession, even from time immemorial, is not sufficient for their creation.

Thus, the right of way forming the substance of this suit is partly governed by this general provision of the law. However most important, it is my considered view that the issue of this motorable way is governed basically by the provisions of art 682(1) of the Code. The said article states:

> The owner whose property is enclosed on all sides and has no access or inadequate access on to the public highway, either for the private or for business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause.

The foregoing legal principle has been applied in several cases including in the case of *Azemia v Ciseaux* (1965) SLR 199 , where it was stated inter alia

1. The land owner whose property is enclaved and who has no access whatever to the public road can claim a right of way over the property of his neighbours ....

2. A property may be deemed to be "enclave" not only from the fact that it has no access to the public road but also in the case where the passage to the road is impracticable.

The same principles have been applied by this court in many cases. In addition thereto, in cases where such right exists, then the "assiette du passage" can be prescribed by use for at least 20 years (*Mirabeau v Camille* (supra)). The above cited authorities are in agreement with the facts of the instant case. First, it is not disputed - as stated above - that the first defendant's land is enclaved. Second, it is in evidence that the steps formerly used to reach the defendant's property lie directly on the major retaining wall (exhibit P3 and P4). It would therefore be "impracticable" to presume that a motorable access to the main road could be cut through that area. Third it has been established above, that the said access road used as an egress from the defendant's land was built in 1971. It was therefore in use for over 20 years when this suit was filed or when exhibit P2 was written to the first defendant. The defendant has raised the defence (and successfully so) of extinctive prescription. For the above reasons, I do agree with the defence case that this action relating to the construction of the motorable road on the plaintiff's land is prescribed. It follows therefrom that the plaintiff's claims against the defendants for trespass over the said land also fail.

Concerning the encroachment of the wall on the plaintiff's land as shown on exhibit P4, it was submitted by both counsel that the said wall was constructed about five years ago. As such the law governing prescription does not apply. Examining the evidence before this court, it is clear that in so constructing the encroaching wall (at the bend near where the drive way adjoins the main road from Baie Sainte Anne), the first defendant did not seek and obtain permission from the plaintiff. That was and still remains unlawful. On this aspect therefore, judgment is entered in favour of the plaintiff and I order that the first defendant remove the said retaining wall that encroaches on the plaintiff's land. He is also ordered to compensate the plaintiff the sum of R2000 for the damage caused resulting from this encroachment.
In summary therefore-

1. The plaintiff's action against the two defendants with regard to trespass on his land - parcel PR 319 - is dismissed - it is prescribed.

2. Judgment is entered in favour of the plaintiff in respect of the encroaching retaining wall. The first defendant is ordered to remove the said wall and he is also ordered to compensate the plaintiff in the sum of R2,000 with interest from the date of this judgment.

3. Parties to bear their respective costs of this suit.

Record: Civil Side No 245 of 1995