Verlaque v Vargiolu
(2002) SLR 127

Jacques HODOUL for the Plaintiff
Phillippe BOULLE for the Defendant

Judgment delivered on 23 September 2002 by:

PERERA ACJ: This is a delictual action based on alleg nlawful acts of the Defendant whereby the Plaintiff's water supply was disconnec / cutting the supply pipes and damaging them. The Plaintiff avers that consequent survey and partition done in 1977, there was agreement among the co-owners of F s PR. 306, PR. 309 and PR311 that they would have a common right to draw wate n a "Prise d'Eau" on Parcels PR. 311 belonging to the Verlaque family.

It is not in dispute that the Plaintiff is presently co-owner and so cupier of Parcel PR. 306, and then he operates the "Bonbon Plume" Restaurant, an : he also resides on the land. The Defendant is admittedly the present owner of Pa PR. 309. Parcel PR 308 is co-owned by heirs Mederick Verlaque. Hence betw Parcel PR. 306 co-owned and occupied by the Plaintiff, and Parcel 309 owne the Defendant, the Plaintiff is also the sole owner of Parcel PR. 307.

The Plaintiff testified that the water supply which emanated the Prise d'Eau on Parcel PR 311 was originally being used by one of the heirs erick Verlaque who was farming on Parcel PR. 308. After the agreement, Parcel 06 was served with water from Parcel PR 311 along a galvanized pipe. The I ff claimed that he personally started to use that supply in 1988, but that since 19 here always existed the supply to Parcel PR 308 over Parcel PR. 309 from the sar urce, albeit through a smaller three-quarter inch pipe. But in 1988, he changed entire line from the source into a half inch polythene pipe, but neither the location c pipe nor the system were changed.

The Plaintiff further testified that the Defendant, who admittedly or Australia in 1988, returned in 1997. Prior to that, the Defendant's father had an in ndent supply from a different part of the stream on PR. 311 to Parcel 309. Later ather died and the house and the water supply system became dilapidated. The ndant, on his return wanted to repair it and also start a business venture as a Res eur. At his request, the Plaintiff supplied water "from his own pipe". However, later, the Defendant restored the independent supply from the stream in Parcel PR. 311, and cut the supply to the Plaintiff's house and restaurant on Parcel PR. 306. The Defendant in his defence has admitted disconnecting the supply pipe going over his land and avers that that was done as that pipe had been laid over his land unlawfully. The Defendant is presently operating a business on his land under the name "Cafeteria, Restaurant and Boutique".

The Plaintiff further testified that consequent to the disconnection of the water supply by

the Defendant, his restaurant business was affected for 15 days, and lost about R22,000. Then he got a connection from the P.U.C. That installation cost about R6000.The Plaintiff also claims damages for the pipe that is now disused and for moral damages. Cross examined by learned counsel for the Defendant the Plaintiff stated that he had no licence to draw water from the stream, although his predecessors may have had one. He however maintained that the quality of water was good for human consumption. He stated that although he now has the P.U.C. supply, he wanted the supply from the stream as it was cheaper to maintain,, and also as he has other agricultural activities on the land. As regards the disconnection, the Plaintiff said that the Defendant cut the pipe at a point where the line crossed his property (PR.309) so that the water stopped flowing to both properties. The Defendant had by then installed his own independent supply from the same stream, after receiving water from the existing supply of the Plaintiff.

Alex Morel, a carpenter who was working for the Plaintiff corroborated the evidence of the Plaintiff and testified that in 1999, the Plaintiffs land was served by a water supply from the stream on Parcel PR 311 through the Defendant's land. The Defendant's father had a separate supply from the same source, but from a different point, flowing to a storage tank. But after the death of the Defendant's father, that pipe line rusted and perished. When the Defendant returned from Australia, that line could not be used, and hence he used a connection from the Plaintiffs supply. Later, after repairing the previous system, the Defendant cut off the supply to the Plaintiff’s land near the boundary of the two properties. On being cross-examined, this witness stated that there was a small stream on the Plaintiffs land, which dried up completely during the period of drought. Normally that water was sufficient for the flowers and plants. But after the supply from Parcel PR. 311 was disconnected by the Defendant, the Plaintiff used that source for about two weeks until he got the PUC connection. That source was adequate for limited purposes as September was the rainy season. He further stated that he was engaged in the changing of pipes in 1988 from a three quarter inch metal pipe to a half inch polythene pipe, as testified by the Plaintiff. He further stated that the previous metal pipe line was left in the same position. The disconnection to fix the polythene pipe was done at a point on the Plaintiff’s land. The new polythene pipe line was laid from the source to the Plaintiff’s land over the Defendant's land, a distance of about 800 metres.

The Defendant in his testimony stated that his father, when building the house on Parcel PR. 309 in 1976, installed a polythene pipe line from Parcel PR. 311 to draw water from the stream. Galvanized pipes were used only from the water tank on the land to the house. When he came from Australia in 1997, the polythene pipe had been removed by someone. Then he got a temporary connection from the Plaintiff as he arrived, but his wife told the Plaintiff that he should remove the pipes on his land as people were trespassing on his property to cut bushes and repair blockages in the line. Thereafter he disconnected the system from a point behind his house. Then Alex Morel and two other men came and reconnected. Then he disconnected once again. They came and reconnected for the second time. On the third occasion he cut the polythene pipe of the Plaintiff with a knife. Then the Police got him to reconnect, but after the Police Officers

went, he cut it again. No one has re-connected it so far.

Delictual damage consists of prejudice caused to a legitimate interest or right protected by law. The Defendant contends that the laying of pipes over his land was unlawful and hence he was entitled to prevent the usage of his land to exercise any right to the easement.

As regards the agreement dated 16 February 1977 (exhibit P2) the Defendant identified the signatures of his father and mother who are now dead and stated that the agreement was limited to the agreement on boundaries. He denied that they had agreed to all parties drawing water-from the stream in Parcel PR. 311. He stated that prior to 1976, the Plaintiff's predecessors in title used a stream on Parcel PR. 306 and at that time he (the Defendant) was also living on that property with her two aunts. He however conceded that that stream ran dry during the dry season. The Defendant contests the Plaintiff's right to draw water from the stream on Parcel PR. 311, and the accessory right to exercise that right over his land. As regards drawing of water, the Defendant has submitted that in terms of Section 8(1) of the Public Utilities Corporation (Miscellaneous) Regulations, the Plaintiff has no right to draw water from a private source without a licence, and hence the entire claim being unlawful, the right claimed is against Public Policy. That regulation prohibits the abstraction of water from "any source of supply", without the permission of the Corporation. "Source of supply" is defined as "any rivers and streams" or "underground state". Those Regulations came into force on 24 March 1986, when the Plaintiff was already exercising a vested right to abstract water. The changing of pipes from galvanised to polythene did not affect the right. It is a principle of interpretation that past rights which became vested before the new law or Regulations came into operation are not affected retrospectively, unless stated expressly. Hence this Regulation does not apply to the Plaintiff's vested right.

Still on the right to draw water, the Plaintiff has submitted that the drawing of water is a "continuous and apparent' servitude, which under Article 690 of the Civil Code can be acquired by a document of title or by possession for twenty years. Mr Boulle however submitted that such a right was neither continuous nor apparent, as it needs the intervention of man, in which case it is discontinuous within the meaning of Article 688, and also that it could not be seen with the eye. This Court, in the case of *Leite v Republic of Seychelles* (1981) SLR 191 held inter alia that the right to draw water from a Prise D'eau was "an apparent continuous" easement within the meaning of Article 690. That finding was not disturbed by the Court of Appeal (SCAR 1978-1982) 212. The plaint in the present case is based on the proviso contained in the agreement, and alternatively on prescription.

In the case of *Beynon v A-G* (1969) SLR 183, it was held that culverts built by the Defendant over the Plaintiffs land to discharge water constituted an easement which was "continuous and apparent" and since they had peaceful and uninterrupted possession of them for more than 20 years, acquisitive prescription applied. Here what was "continuous" was the "culvert" which is Akin to a "drain" as envisaged in Article 688, and "apparent" within the meaning of Article 689.

As regards prescription in the present case the Plaintiff has averred in paragraph 4 of the plaint that his predecessors in title drew water from the source on Parcel PR. 311 since 1979. Admittedly, the supply was cut off by the Defendant in July 1999.

Here the laying of pipes and drawing of water are both "continuous and apparent" easements. In terms of Article 2228(3) - for purposes of prescription, "possession" in the case of easements or other land charges, consists of the effective exercise of such rights. Hence, in the absence of any challenge by the Defendant, the Plaintiff had, through his predecessors in title possessed the easement for 20 years from 1979 to 1999 at the time of interruption. When the agreement to beacons and boundaries was signed on 16th February 1977 (exhibit P2), the land surveyed as Parcels PR. 306 to PR. 311 were co-owned by heirs Verlaque. The Defendant is the Plaintiff's father's sister's son, and therefore a cousin.

Parcel PR. 311 has a larger stream than the one on Plaintiff's land, from which the Defendant presently draws water and the Plaintiff was also drawing water till his supply was admittedly cut off by the Defendant in July 1999. The Plaintiff testified that the Public Utilities Corporation water supply was available in the area only 1995. The agreement dated 16 February 1977 has been drawn up in the format prescribed in Schedule C of the Land Survey Act Regulations (Cap 109). At the foot of the attestation, there appears a note signed by the Land Surveyor stating inter alia that "the acceptance of the partition of the property is subject to the proviso that a right to draw water from the rivers be granted to each and every one of the heirs..... ". The parties to the agreement have however not signed the declaration at paragraph (c), which in fact should have been paragraph (e). The Defendant submits that his parents did not agree with, or sign the proviso and hence he is not bound by it.

Mr Hodoul, learned counsel for the Plaintiff submitted that the agreement to beacons and boundaries (exhibit P2) which is drafted by a Land Surveyor, who is a "Public Official", in accordance with prescribed forms, is an "authentic document" as defined in Article 1317 of the Civil Code. Hence under Article 1319:

> it shall be accepted as proof of the agreement which it contains between the contractual parties and their heirs or assigns, and under Article 1320 such proof of agreement shall be found even if expressed in terms of statements, provided that statement is directly related to the transaction. Statements foreign to the transaction, shall only be accepted as writing providing initial proof.

The main *"transaction*" in that agreement was the agreement of the co-owners regarding the beacons and boundaries. The statement regarding the common right to draw water from the streams on Parcel PR 311 has been recorded as a proviso to the acceptance of the main transaction. Hence such statement, though made by the Land Surveyor, shall, pursuant to Article 1320 be accepted as proof of agreement between the parties, and consequently on their heirs and assigns under Article 1319. This

document was not challenged, nor was any evidence adduced)uttal. In any event, the Defendant and his predecessors in title, admittedly, hav :e the date of the agreement in 1977 drawn water from the same source on Parc :. 311. This should have been pursuant to the statement in the proviso to the a(ient. According to evidence the Plaintiff and his predecessors in title have al: ne the same until interrupted in 1977. These facts corroborate the statement in roviso contained in exhibit P2, and the Defendant as an heir of the original p to the "authentic document", would not be competent to rebut the proviso record the Land Surveyor under his signature. I therefore hold that the proviso should be as part and parcel of the agreement on beacons and boundaries, and that the Pla has established his right to draw water from Parcel PR 311 over the land of the D lant both under the agreement and by acquisitive prescription.

Mr Boulle, Learned Counsel for the Defendant also submitte t the right to draw water on a Parcel of land does not carry with it the accessory under Article 696, which provides that "when a person creates an easement, hall be deemed to provide everything necessary for its use. Thus, the easement o ving water from the fountain of another necessarily carries with it the right of way". s submitted that on the *Authority of Dalloz Codes Annotes* Art. 697 notes 31, 32 a , and note 2926 of *Planiol's Treatise on Civil Law* Vol, Part 2, that those acces rights can only be exercised over the land owned by the person who created th ement. Mr Hodoul Learned Counsel for the Plaintiff however submitted that those orities would apply to a third party and not to the Defendant who is an heir of original contracting parties. In the *Leite case* (supra) the Court of Appeal held inter hat an easement is a right granted in favour of a dominant tenement and not its o against a servient tenement and not its owner, and that it was a right appu it to the dominant tenement and the benefit of such right accrues to the trans or grantee of the dominant tenement. It was also held that the owner of the serv enement cannot be required to do a positive Act. In that case, the Plaintiff who h right to draw water from a river, over state land, sought to require the government pair a damage that had been caused to the supply line due to a storm. The Cou Appeal upheld the decision of the Supreme Court that the government had no sucl to perform.

In the present case the Plaintiff prays for an order on the Defen to restore his water supply from Parcel PR. 311. Although there would be no obl n on him to do so under Article 696, yet as the damage has been admittedly caus / him, he is obliged in a delictual action to repair the damage he has caused and restore the supply. In addition he will also be liable in damages.

Damages

The Plaintiff claims R22,250 as loss of net revenue from the Restaurant for 15 days when he was deprived of water from the stream on Parcel PR. 311. He testified that his normal turnover per day was about R8000 - R9000, and abnormally it was about 3200 - R3400. He stated that he was claiming R22,250 for 15 days on a much lower assessment. He explained that due to lack of water, the guests were given snacks and drinks. Alex Morel, who was engaged in connecting and reconnecting pipes damaged

by the Defendant testified that as it was the rainy season, there was some water in the small stream on the Plaintiff's land, and that was used till the PUC connection was done. There is no evidence of the number of guests who patronized the Restaurant during the 15 days and the actual turnover by reference to documents. However, on the basis of other evidence in the case it is reasonable to accept that some prejudice was caused by the interruption of the normal water supply to the Plaintiff's house and Restaurant. Accordingly, I award a sum of R10,000 under this head.

The Plaintiff also claims R6400 as the cost of providing an alternative supply from the PUC. The fact of the PUC. connection is not being contested. In the absence of documentary evidence, I award a sum of R5000 which I consider to be reasonable under this head.

The Plaintiff claims R27,000 in respect of the damage caused to the pipe. He testified that since 1999, the polythene pipe line lay abandoned and that the pipes have cracked. He claimed that the entire length of 800 metres will now have to be replaced from the source on Parcel PR. 311, and the pipes alone would cost about R22,000. He also stated that the water tank has also cracked and would cost about R16,000 to repair. The labour cost would be another R5000. In the absence of any evidence of the actual damage, the Court is unable to accept that such extensive damage would have been caused to polythene pipes during a period of 3 years. Hence as an alternative to monetary compensation, the Defendant is ordered in terms of prayer (ii) to supply the necessary materials and labour and restore the supply which he had cut off. If he fails to do so within a month hereof, the Plaintiff or his servants or agents are hereby authorised to enter the land of the Defendant solely for the purpose of repairing and reconnecting the supply, and to recover from the Defendant the cost of materials and labour which should be supported by receipts of payments. These works are limited to the stretch of pipes on the Defendants land from the point where it was cut off to the point of exit into the Plaintiff's land.

The Plaintiff also claims a sum of R18,000 as moral damages for inconvenience, concern, disruption of business activity and domestic life. The Court accepts the evidence given by the Plaintiff in this regard. The Defendant in his evidence stated that he had through his wife asked the Plaintiff to remove the pipes on his land. That evidence was not corroborated but he took the law into his own hands after benefiting from the benevolence of the Plaintiff who ungrudgingly supplied him with water until he installed his own supply. He stated that he did so as the Plaintiff's workers were trespassing on his property to cut bushes and to repair blockages in the pipe. If that be so, as a law abiding citizen he ought to have sought his remedy through the Courts. Instead, he cut off the water supply on 23, 24 and 26 July 1999 on each occasion after it was reconnected, once on the orders of the Police. These Acts should have certainly caused anxiety, inconvenience and pain of mind to the Plaintiff as they affected his domestic and business supplies. Taking these factors into consideration, I award a sum of R8,000 as moral damages.

Judgment is accordingly entered in favour of the Plaintiff as follows:

1. The Defendant shall pay the Plaintiff a total sum of R23,000, and in addition, repair the damage he has caused to the Plaintiff's water supply at his own cost, failing which, after one month from today, the Plaintiff or his servants or agents will be entitled to enter the land of the Defendant for that purpose, effect the repair and reconnection and claim the cost of materials and labour supported by receipts.

2. The Defendant is restrained from interfering in any manner with the Plaintiff's water supply passing through his land Parcel PR. 309 after the necessary repairs and reconnection have been done.

The Plaintiff will be also be entitled to costs of action.

Record: Civil Side No 52 of 2000