IN THE SUPREME COURT OF SEYCHELLES

Sybille Cardon de Lichtbuer
Of Cote d'Or, Praslin **Plaintiff**

Vs

Jemma Rene
Of Cote d'Or, Praslin **Defendant**

Civil Side No: 320 of 2004

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Mr D. Belle for the plaintiff
Mr C. Lucas for the defendant

D. KARUNAKARAN, J

JUDGMENT

The plaintiff in this action prays the Court for a judgment against the defendant seeking in essence, the following reliefs: -

i) A declaration that the plaintiff has a motorable right of way from her land Titles PR995 and PR996 over defendant's land Title PR3709 leading from the public main road to the plaintiff's property; and

ii) An order directing the defendant not to interfere with the exercise of the said right by the plaintiff; and

iii) All with costs.

On the other side, the defendant in her statement defence has not only denied the plaintiff's claim for a right of way, but also has made a counterclaim against the plaintiff in the total sum of Rs100, 000/- towards loss and damage, which the defendant allegedly suffered as a result of the plaintiff's fault in trespassing and causing injury to the defendant's land.

The facts of the case as transpire from the evidence on record are briefly as follows:-

The plaintiff and the defendant are residents of Cote d'Or, Praslin. They are neighbours. They own adjacent properties. Undisputedly, the plaintiff owns two contiguous plots of land registered as Title PR995 and PR996 respectively, on which she is running a small guesthouse business and a restaurant known as ***"Lorye"***. The defendant owns and lives on an adjoining land Title PR3709, a subdivision of former parcel PR549, which originally - in the early 1970s - formed part of a large extent of land, hereinafter called the "mother parcel" with an area of about 10 acres. Prior to 1975, the "mother parcel" belonged to the family of one Mrs, Andre Rene as per the transcription dated 15th December 1975 registered under the old Land Register vide exhibit P3. In 1975, the mother parcel was subdivided into several plots, which were shared among the members of the Rene's family. The defendant and the previous owners of the plaintiff's property are also relatives, in that; they are decedents either in linear or collateral line of the said Rene's family. Be that as it may.

The plaintiff's parcels PR 996 and PR 995 and the defendant's parcel PR3709 are subdivisions that were excised from the same parcel

PR550 and PR549, both of which together originally formed part of the said *mother parcel*. Indeed, the plaintiff bought PR995 in 2000, from one Mrs. Joycelline Esslemont-Rogan and Miss. Caroline Simone Esslemont (the relatives of the defendant) with a small guesthouse and a running business thereon known as ***"Lorye".*** This business comprised of a restaurant and a disco which had already been in operation over 20 years prior to the purchase by the plaintiff. Subsequently, in 2002 the plaintiff purchased Title PR 996 from one Ben Leon, again a relative of the defendant. The defendant's Title PR 3709 is bordering Cote d'Or main road.

In fact, the Court, at the request of the parties, visited the properties, the *locus in quo*. During the visit both parties were present on the scene with their respective counsel and assisted the Court in identifying the properties, boundaries and the location of the access road in dispute. At the locus in quo, the Court observed the existence of a well- demarcated motorable access road about 3 meter-wide, connecting the plaintiff's property to the main road. This access road appeared to have been in use and enjoyment of the plaintiff or her predecessors in title and of the public who had been accessing the restaurant using the same access road over several years in the past.

Indeed, the Esselmonts, the previous owners of PR995 had already constructed the said "Restaurant" on the property and had been running the business therein until they sold it to the plaintiff in 2000. It is evident from the physical observation of the site as well as from the cadastral plan exhibit P1 and the photographs exhibits D1-D10 that the access road, which starts from the main road passes along the boundary of the defendant's parcels of land at a distance of about 5 meters away from the defendant's house. It was also observed that the defendant's

property is the only adjacent parcel that can serve the most convenient and the shortest route to the plaintiff's property from the main road.

Undisputedly, the plaintiff has been maintaining the access road in good condition for the use of her own business, since she purchased it from the previous owner. The previous owners of the plaintiff's property had also been using the same access road for their business for several years without any objection from the defendant. The Court also observed that the defendant's Title PR 3709 is situated not only adjacent to that of the plaintiff's property but also it is the only parcel of land, through which the plaintiff can have access to the main road.

The plaintiff also testified that as far as she knew the said access road had been in existence at least for the past 20 years serving her land and the business thereon. The plaintiff further stated that the cadastral survey in exhibit P1, which was submitted by the Government Surveyor, also indicates the existence of the access road ever since 1986. Therefore, according to the plaintiff the said access road, hereinafter called the "access in dispute" has been in continuous use and enjoyment as a motorable driveway to reach her property ever since 1986. The plaintiff also testified that after she purchased PR 995 and PR 996, she carried out some repair works and resurfaced the "access in dispute" to enhance its utility.

Further, the plaintiff testified that the defendant was the owner of the original parcel PR 549, which was subsequently subdivided by her into several parcels and one among those parcels became PR 3709, presently owned by the defendant. According to the plaintiff the access in dispute had already been on PR 549 before the said subdivision, and had been in use and enjoyments by her predecessor in title and by the public, who were visiting the restaurant.

The plaintiff categorically testified that the “access in dispute” is the only shortest route possible, convenient, and available from the public road to the plaintiff’s property as well as to her clients, who come to the restaurant. Further, the plaintiff testified that her property is enclave and no other access available apart from the “access in dispute”. The plaintiff also produced the cadastral plan - exhibit P1- in respect of the said “access in dispute” that passes through the defendant’s land leading to Title PR995 and PR996 via PR3709.

The land surveyor Mr. G. Pragassen- PW2 - testified in essence, that he surveyed PR995 in 1986 and on 18th July 1986 he submitted his cadastral survey plan for approval by the Survey Division. According to him, the access in dispute was already in existence and use by the plaintiff’s predecessor in title. In view of all the above, the plaintiff has now come before this court seeking the remedies first-above mentioned.

On the other hand, the defendant denied all the allegations and the claims made by the plaintiff in this matter. According to the defendant, the plaintiff has no right of way over her property, as it has not been demarcated in the registered title deed burdening PR3709. It is the case of the defendant that since the plaintiff purchased PR996 from Benjamin Leon in 2002, to which a separate access is due only from the vendor to the plaintiff. The defendant is not under any obligation to provide access to the plaintiff. The previous owners of PR995 being a relative of the defendant, she had obtained the verbal permission from the defendant to have a footpath access to her premises. This arrangement did not create any right per se, for successors in title to use the access in dispute. It is the contention of the defendant that the plaintiff’s property is not enclosed. The plaintiff has other alternative

access without having to go through the access in dispute. According to the defendant, the plaintiff can have an alternative a right of way over another property - PR1040 - situated behind hers, where "Village du Pecher" is located. This would provide plaintiff's property access to another main road. She also testified that the existing "access road" reduces the area of the defendant's property its area of utility is minimised. According to the defendant, the right of way proposed by her, is more convenient than the existing one.

Moreover, it is the case of the defendant that the plaintiff without the defendant's permission or authority made improvements to the access in dispute. She filled it with coral, put up electric cables, billboards, water pipes and lighting along the defendant's land. According to the defendant, it is a fault in law for her to do so causing injury to her land. As a result of the injuries to her land, the plaintiff claims that she suffered loss and damages estimated in the sum of Rs100, 000/- Moreover, the defendant seeks this Court for a mandatory injection ordering the plaintiff to remove those structures namely, electric cables, billboards, water pipes and lighting which the plaintiff has put up along the access in dispute on the defendant's land and for a permanent injunction restraining the plaintiff from trespassing onto the defendant's land by using it to have access to her property.

In the circumstances, the defendant urged the Court to dismiss the plaintiff's action, allow the defendant's counterclaim and grant the injunctions against the plaintiff and enter judgment for the defendant accordingly with costs.

I meticulously perused the entire evidence on record including the documents adduced by the parties. I gave a diligent thought to the arguments advanced by both counsel in their written submissions.

Obviously, the plaintiff in this matter claims right of way over the defendant's land relying on two grounds. They are:-

Ground (i): Since the plaintiff's land is enclosed on all sides, in law she is entitled in terms article 682 and 683 of the Civil Code to obtain a right of way over the defendant's property. These two articles read thus:

> ***Article 682***
>
> *1. 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 the 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.*
>
> *2. However, where the owner has been deprived of access to a public road, street or path in pursuance of an order converting a public road into private property, the person who has been granted such property shall be required to provide a right of way to the owner without demanding any compensation.*
>
> ***Article 683***
>
> *A passage shall generally be obtained from the side of the property from which the access to the public highway is nearest. However, account shall also be taken of the need to reduce any damage to the neighbouring property as far as possible.*

Ground (ii) – L'assiette de passage over the "access in dispute" has been used for a period in excess of 20 years and the plaintiff has prescribed the said "assiette de passage", which is the shortest route to the main road.

For the sake of convenience, I would like to examine first the Ground (ii) above. It is trite law that *right of way* is a discontinuous easement in terms of Article 688 of the Civil Code of Seychelles. This right cannot be created except by a document of title. Even possession, use and enjoyment from time immemorial, is not sufficient for its creation in terms of Article 691 of the Civil Code of Seychelles. See, **Payet vs. Labrosse and another SLR 1978 and Delorie vs. Alcindor and another SCAR 1978- 1982 P28.** Hence, as I see it, the right of way cannot be created by acquisitive prescription, even if the claimant had been in use and enjoyment for 20 years or more or even from time immemorial. However, it is interesting to note here that in cases of non-access (enclave) "L'assiette de passage et mode de servitude de passage" is subject to prescription by twenty years of continuous use in terms of article 685 of our Civil Code, which reads thus:

> *"1.The position and the form of the right of way on the ground of non-access are determined by twenty years' continuous use. If at any time before that period the dominant tenement obtains access in some other way, the owner of the servient tenement shall be entitled to reclaim the right of way on condition that he is prepared to return such a proportion of any compensation received under paragraph 1 of article 682 as is reasonable in the circumstances.*
>
> *2. The action for compensation as provided in paragraph 1 of*

article 682 may be barred by prescription; but the right of way shall continue in spite of the loss of such action"

Indeed, Article 685 of our Civil Code (supra) is just a replica of Article 685 of the French Civil Code, except for the number of years pertaining to the continuous use. Article 685 of the French Civil Code, which was in force in Seychelles until 1975, reads thus:

"L'assiette et le mode de servitude de passage pour cause d'enclave sont déterminés par trente ans d'usage continu.

L'action en indemnité, dans le cas prévu par l'article 682, est prescriptible et le passage peut être continué, quoique l'action indemnité ne soit plus recevable »

Therefore, it is evident that article 685 of our Civil Code simply specifies that only *the position and the form of the right of way are to be determined by twenty years' continuous use.* This article obviously, does not apply or refer to the substantive right that constitutes the right of way. The 20 years' use does not create the right of way (the abstract entity); but rather determines only the position and form of the access in use (the physical attributes) and thus protects their continuity and longevity by prescription of 20 years. To my understanding of the case laws, the right of way is a distinct discontinuous easement attached to an immovable property. It is not a license or a privilege granted to the owner of an enclave- property for personal use of access. It is a real right as opposed to personal. It is perpetually attached to the property, not to the owner/s or occupier/s of the property. Therefore, it requires a document of title or a declaration of the court for its creation. In this respect, I would like to restate herein the ***"Sinon Principle***", which this

Court first formulated and applied in the case of ***Georges Sinon vs. Maxim Dine and another, Civil Side No: 177 of 1999.*** It was subsequently, fine-tuned in the case ***of Pat Pascal Vs J. J Leveille, Civil Side 177 of 2000.*** This principle basically states that in the absence of any document of title or a declaration by a competent court of law, no owner of land is entitled to have any right of way over another's land. This is the general rule, which the Court applied in *Sinon* (Supra). When the occasion arose in a subsequent case of *Pat Pascal* (supra) this Court had to revalidate and fine-tune the said principle and appended two exceptions to the rule. Thus, in *Pat Pascal* this Court held that *a*lthough the creation of the right of way is governed by the general rule of that principle, there are two exceptions to it by virtue of articles 693 and 694 respectively, of the Civil Code of Seychelles. Those exceptions were referred to as the "statutory exceptions" vide judgement ***in Pat Pascal***. Obviously, these two articles relate to the category of contiguous plots of land, which were once owned by the same owner but subsequently subdivided and transferred to different owners. If the non-access had arisen from such division of land, the passage may only be demanded from such land, as has been the subject of such transaction. The right of way is therefore created by operation of law under article 693 and 694. In such cases, requirement as to the existence of any ***document of title*** or ***a declaration by court*** under Article 682 becomes irrelevant and thus constitute an exception to the ***"Sinon Principle"*** quoted supra.

Coming back to the case on hand, it is evident that the contiguous plots presently owned by the plaintiff and the defendant respectively, were about 50 years ago, part of the same "mother parcel", which was then owned by the same owner namely, Mrs. Rene's family (vide supra); but subsequently "mother parcel" was subdivided into several plots.

Those sub-divisions were also further subdivided over a period of several decades and transferred to different owners. Some of the owners in succession were the relatives and descendants of the said Rene's family like the defendant, and others were third parties like the plaintiff. As the defendant testified that as long as those contiguous plots were owned and occupied by the members/descendants/relatives of the same family, there arose no dispute over any right of way on the adjacent properties nor did arise any need to ascertain and demarcate or legalise the right of way. Now, the issue of non-access (alleged enclave) arises obviously, because of sub-divisions of the mother parcel and change of ownerships to third parties. Therefore, the passage may legally be demanded by the plaintiff in this matter from the land of the defendant, as that land has been the subject of such transaction, namely sub-division. In the circumstances, the requirement as to the existence of any ***document of title*** or ***a declaration by court*** under Article 682 becomes irrelevant, as the case of the plaintiff constitutes a statuary ***exception*** to the ***"Sinon Principle"*** quoted supra. Hence, the plaintiff, who admittedly, having no ***"document of title" or a "declaration by court"*** for the right of way, has now come before this court seeking a declaration that she has a right of way over defendant's land Title 3709 along the existing access road as contemplated under Article 682 of the Civil Code.

The plaintiff has purchased the properties only in 2000 and 2002. Obviously, she could not have been in continuous use in excess of 20 years whether it relates to ***the right of way*** as such ***or the position and form of the right of way.*** However, Mr. Pragassen - DW2 - unequivocally testified that even when he carried out the cadastral survey in 1985 for the property PR9995, the present access road - *the position and the form of the right of way* - had already been in existence on the defendant's property serving the dominant tenement, namely, the

predecessors in title in respect of PR 995 and 996. Therefore, the plaintiff is entitled to invoke article 685 of the Civil Code to establish "L' assiette et le mode de servitude de passage namely, *the position and the form of the right of way, as the condition of 20 years' use required under article 685 of the Code is satisfied.*

I will now move on to examine the merit of the Ground (i) supra, pertaining to the issue of enclave. From my observations of all the relevant documents admitted in evidence and based on the observations made by the Court on *locus in quo*, I find more than on a balance of probabilities, that the plaintiff's property is enclosed on all sides, in the present condition and nature of the surrounding terrain. The plaintiff has no other convenient and practicable access to the public highway for the private and business use of her property apart from the access in dispute. The alternative access proposed by the defendant in this respect is not only speculative but also it has to pass through more than two adjacent properties. In any event, the access proposed by the defendant cannot provide *a sufficient right of way to ensure the full use of the plaintiff's property.* Besides, the proposed alternative is not obviously, the nearest to the public highway compared to the "access in dispute". Therefore, the plaintiff is entitled to claim from his neighbour namely, the defendant the existing right of way - the "access in dispute" - to ensure the full use of her property in terms of article 682 of the Civil Code. A passage shall generally be obtained from the side of the property from which the access to the public highway is nearest vide article 683 (supra). Undoubtedly, the existing access road over the defendant's property is not only the shortest route to the public highway but also more practicable and more convenient in the circumstances. Hence, I find the existing right of way along the "access in dispute" on defendant's

property is the plaintiff's entitlement in law by virtue of article 683 of the Civil Code and so I find.

In passing, I would like to observe that by granting a landowner "right of way" on another's property, the court in effect, interferes with the former's Constitutional "right to property and peaceful enjoyment", which is one of the fundamental rights, a sacrosanct guaranteed by the Constitution. In so doing the court indeed, sets limitations to the Constitutional right of that person, in order to accommodate a "statutory right" granted in favour of his enclosed neighbour under Article 682 of the Civil Code. At this juncture, I should mention that the list of such limitations - which may be prescribed by law - as contemplated under Article 26 (2) (a) to (i) of the Constitution, does not include or provide for the contingency of non-access due to enclosed lands, which is a common phenomenon in the Seychelles, given the nature and form of its terrain and topography. The Constitutional reflection in this respect indeed, originates from the noble thought of Mr. P. J. R Boullé expressed in his address before the Constitutional Court in the case of ***Alf Barbier Vs Government of Seychelles and another C. C No: 1 of 2003***. In passing, I wish to mention that it would be worthwhile for the Constitutional Review Committee to consider matters of this nature, while recommending amendments to the existing provisions of the Constitution.

Be that as it may. An enclosed neighbour when requires an access over another's property, the court should determine such requirement with utmost judicious mind and with diligence striking a balance between the *Constitutional right* of the landowner and the *statuary right* of his neighbour. In this process, the court obviously, ought to take into account all the relevant circumstances of the case. These circumstances

in my view, should include the fact as to how the non-access arose, the balance of convenience and hardship, the availability, practicability and cost of construction of the alternative access road on neighbouring properties, the peaceful enjoyment of one's property with least interference from others and the need to reduce as far as possible any damage to neighbouring properties and the like.

In fact, the plaintiff in this matter has now come before this court seeking a declaration, injunction and damages against the defendant. On the other hand, the defendant suggests that his neighbour, the plaintiff may build an alternative access road over the neighbouring properties belonging to others, situated several parcels away from that of the plaintiff. With due respect to the defence-suggestion on the alternative access, I would state that the extended application of the religious principle - the Golden Rule - **"Do unto others what you expect from others to do for you" - vide Mathew 7:12 & Luke 6: 31 -** embodied in Article 682 of the Civil Code should not be restricted only to other owners, brothers and relatives of Leons. The defendant herself should first set an example and observe this rule by extending her generosity and kindness to her neighbour, before she suggests it to be enforced by law on others. Having said that, it is pertinent to note what the court held in **Azemia V Ciseau SLR (1965),** which runs thus:

i) The land owner whose property is enclave and who has no access whatever to the public road can claim a right of way over the property of his neighbour for the exploitation of his property, conditioned on giving an indemnity proportionate to the damage he may cause.

ii) *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 such road is **impracticable**.*

iii) *If the accessibility is the result of the property having been divided by sale, exchange, partition or any other contract, a right of way can only be asked for over the properties affected by such contract.*

Bearing the above principles in mind, on the strength of the evidence and pleadings on record, I hold that the plaintiff is entitled to claim/maintain/possess the right of way over the defendant's property. In the circumstances, I conclude that the plaintiff's claim for a right of way over the defendant's land based on enclave is maintainable in law and on facts.

As I see it, the defendant's suggestion for the alternative access is based more on speculation than on facts. In any event, the alternative access canvassed by the defendant in my judgment, is impracticable, inconvenient and above all such an access road will have to pass over more than two parcels of land in the adjacent area, causing more inconvenience and damage to the neighbouring properties.

In the final analysis, I therefore, conclude that the plaintiff is entitled to the remedies first above mentioned. As regards the counterclaim made by the defendant, I find that the plaintiff's continuous use of the existing access road on the defendant's property does not amount to any trespass onto the defendant's property nor did the plaintiff commit any fault in law in using, maintaining and improving the existing access road for her personal and business use. Hence, I find the defendant's counterclaim in this suit is not sustainable in law or on facts.

In view of all the above, I enter judgment for the plaintiff and

against the defendant as follows:

i) *I hereby declare that the plaintiff has a motorable right of way for the private and business use of her property Title PR995 and PR996, over defendant's land Title PR3709 along the existing motorable access road connecting the plaintiff's property to the public main road at Cote d'Or, Praslin;*

ii) *Consequently, I order the defendant not to interfere with the exercise of the said right of way by the plaintiff over the defendant's land Title 3709, and allow the plaintiff or her assignees or successor/s in title or agents to have unobstructed access from the public road to the plaintiff's land Title PR995 and PR996.*

iii) I hereby dismiss the defendant's counterclaim in its entirety; and

iv) Having regards to all the circumstances of the case, I make no order as to costs.

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D. Karunakaran

Judge

Dated this 18th day of November 2011