[ZEKIA, J. and ZANNETIDES, J.]

MICHAEL PANAYI of Vassili

Appellant (Plaintiff)

v.

GEORGHIOS NICHOLA LEFTERI of Vassili

Respondent (Defendant).

(Civil Appeal No. 4251)

1958
May 9, July 4
—
MICHAEL PANAYI
v.
GEORGHIOS N. LEFTERI

Easement—Agricultural holding—Right of way—Scope and Extent—Excessive user—Prescription—The Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, Section 10 (1) (b).

In an action, brought by the appellant, for trespass upon his land, the respondent - defendant pleaded a right of way alleged to have been acquired by user for over 40 years, and counterclaimed accordingly. The trial Court found that the respondent and his predecessors in title used the passage (marked in the plan, Exhibit in the case) over the land of the appellant without hindrance for over 40 years in order to proceed to their agricultural land with their cart, animals and agricultural implements. The trial Court held accordingly that a right of way had been thus acquired by the respondent over the appellant's land. For the last 17 years prior to the institution of the action the respondent was taking his flock of sheep through the passage in question to and from the dominant tenement. The period of prescription is thirty years: *See :* Section 10 (1) (b) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231.

The trial judge (Vassiliades, P.D.C. of Famagusta) held that "the grazing of sheep or other farm animals on an agricultural holding was part of the use and enjoyment of such holding and, notwithstanding that it was only during the last 17 years that defendant took his flock through the said passage, yet he was within his rights in doing so".

Consequently, the learned President dismissed the action and gave judgment for the defendant - respondent upon his counterclaim.

On appeal by the plaintiff, the Supreme Court confirming the judgment of the trial judge :

Held : (1) The scope and extent of the right of way chiefly depends on the kind of user actually made of this right but need not be limited

to actual user. As Parke B. said in *Cowling* v. *Higginson* (1838) 4 M. and W. 245, at p. 256 : "you must generalise to some extent".

(2) The respondent and his predecessors in title proceeded for a period over 40 years with their cart, agricultural implements and animals to their land through the passage (shown in the plan) on the land of the appellant, for agricultural purposes. He thus acquired by prescription an easement over the land of the appellant for agricultural purposes.

(3) Leading a flock of sheep through the aforementioned passage to and from the dominant tenement for grazing is not foreign to the farming purposes, the original and present use the dominant plot was put to. It is not something which could not be reasonably contemplated by the parties involved in the creation of the right of way in favour of the dominant tenement. Furthermore the fact that for 17 years the flock was allowed to pass without objection, corroborates the view that the appellant and his predecessors in title impliedly admitted that the passage of flock was within the scope of the respondent's right of way.

(4) Consequently the trial Court was right in holding that the leading by the respondent of his flock to and from the dominant plot through the passage in question did not amount to an excessive user.

(5) In the circumstances, the fact that the respondent was leading his flock through the passage referred to above only for the last 17 years—the full period of prescription of 30 years provided by Section 10 (1) (b) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, having thus not been completed—is immaterial.

Appeal dismissed.

Cases referred to :

Cowling v. *Higginson* (1838), 4 M. and W. 425; 150 E.R. 1420.

Ballard v. *Dyson* (1808) 1 Taunt 279; 127 E.R. 841.

Williams v. *James* 36 L.J. C.P. 256; L.R. 2 C.P. 577.

R.P.C. Holding Ltd. v. *Rogers* (1953) 1 All E.R. 1029.

Appeal.

Appeal by the plaintiff against the judgment of the District Court of Famagusta, (Vassiliades, P.D.C.) dated the 10th February 1958, (Action No. 130/57) dismissing the plaintiff's claim for trespass upon his land and declaring that the defendant acquired a right of way over the plaintiff's same land.

I. Boyadjis for the appellant.

A. Pouyouros for the respondent.

Cur. Adv. Vult.

The facts sufficiently appear in the judgment of the Court, delivered by:

ZEKIA, J.: The appellant (plaintiff) is the registered owner of a house and yard under Registration No. 1680 and Plot No. 145 in the village of Vassili. The respondent (defendant) is the registered owner of a piece of garden land in the vicinity of the said house and yard with a wheel well and trees standing thereon. The garden land is Plot No. 165/1/1. Adjacent to this land respondents's wife owns another piece of land. Appellant had claimed an injunction to restrain respondent, his servants, vehicles and animals from passing through the yard of his aforesaid house. Respondent on the other hand counterclaimed for a declaration that he had a right of way over plaintiff's said property to his field Plot 165/1/1, on foot, on cart and otherwise. Between the yard, the alleged servient tenement, and the dominant land, there appears to be a threshing floor and another piece of land but the owners of both these properties declared to the Land Registry Clerk who carried out the *locus in quo* that they had no objection to the defendant's right of way through their said properties.

The substantial issue at the trial was whether defendant had acquired by prescription a right of way over the yard of the plaintiff at all. The scope and extent of such right, if in fact it existed, did not constitute the subject of a separate and distinct issue in the pleadings of the case. The learned President of the District Court tried this case and found that the defendant and his predecessors in title used the passage without hindrance or objection in order to proceed to and from the defendant's present agricultural plot 165/1/1. with their cart, agricultural implements and animals for over 40 years. There was evidence for the learned President to come to this conclusion and we do not think it is open to us to disturb his finding. As ancillary to the main issue the question cropped up whether defendant could take his flock through the said passage to and from his aforesaid land. The President gave his opinion that the grazing of sheep or other farm animals on an agricultural holding was part of the use and enjoyment of such holding and, notwithstanding that it was only during the last 17 years that defendant took his flock through the

said passage, yet he was within his rights in doing so. The evidence undoubtedly supports a private right of way by prescription for agricultural purposes. There, it must be considered whether defendant's practice of leading his flock of sheep through the passage in question may amount to excessive user. Appellant's counsel referred us to *Ballard* v. *Dyson* (1) where the plaintiff contended that a right of way for all manner of carriages necessarily included the right of way for all manner of cattle. It appears that the passage involved was a narrow one and the doors to some houses were opening into the passage. The driving of horned cattle through the passage turned to be dangerous to the residents of the abutting houses. Mansfield, C.J. directed the Jury to say whether there was sufficient evidence of a right of way to drive cattle loose, or whether they could consider the grant or prescription as only co-extensive with the use that had been made of it. The Jury found a verdict for the defendant. Gale, On Easements, dealing with this case says: (2)

> "On the authority of *Ballard* v. *Dyson* proof of one right cannot afford more than presumptive evidence of another of equal or inferior degree. Supposing qualifying circumstances to appear in evidence on either side it would be a question for the Jury to say whether the presumption of law as to the superior including the equal and inferior class of easements, was rebutted by the evidence laid down before them. With reference to this question it might be important to show what had been the conduct of the parties in modern times, *even modern user of the right claimed if unobjected to, though not of itself sufficient to confer the right, would be obviously corroborative of the presumption of law.*".

The scope and extent of the right of way chiefly depends on the kind of user actually made of this right but need not be limited to actual user; as *Parke, B.* said: "You must generalise to some extent.". (*See: Cowling* v. *Higginson* (1838) 4 M. and W. 245 p. 256). In *Williams* v. *James* (3) where excessive user was alleged *Bovil, C.J.* in his judgment said (L.R. 2 C.P. p. 580):

(1) (1808) 1 Taunt 279; 127 E.R. 841.
(2) Gale, On Easements, 11th Edition, pp. 236–237.
(3) 36 L.J. C.P. 256; L.R. 2 C.P. 577.

"In all cases of this kind which depend upon user the right acquired must be measured by the extent of the enjoyment which is proved. When a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it an additional burden.".

Willes, J. in his judgment in the same case said (at. p. 582): "Where a way has to be proved by user, you cannot extend the purposes for which the way may be used, or for which it might be reasonably inferred that parties would have intended it to be used.".

Harman, J. in *R.P.C. Holding Ltd.* v. *Rogers* (1) having considered authorities on excessive user concludes:

"It seems to me as a result of these three authorities that the question of the extent of the right is one of fact which I as a juryman have got to determine, but that I am not to conclude from the mere fact that while the property was in one state the way was for all purposes for which it was wanted, therefore, that is a general right exercisable for totally different purposes which only came into existence at a later date. Sitting as a juryman I can feel no doubt that the way here was a way limited to agricultural purposes and that to extend it to the use proposed would be an unjustifiable increase of the burden of the easement.".

The right of way *Harman, J.* was dealing with was one confined to using in connection with agriculture. The dominant land owner wanted to turn his field to a camping ground where caravans, vehicles and persons to and from the proposed camping ground would have the right of access to and egress from the ground through a defined track.

In the present appeal we are invited to say that defendant is not entitled to pass his flock of sheep through the passage defined in the plans, mainly because he did not exercise

(1) (1953) 1 All E.R. 1029 pp. 1035–36.

such a right for a period of 30 years but only 17 years. If defendant had no right of way whatsoever then indeed plaintiff would have been justified in insisting for the full period of 30 years for the exercise of such right. But this is not the case. The Court found as a fact that for over 40 years defendant and his predecessors in title proceeded with their cart, agricultural implements and animals to the plot, the dominant tenement, for agricultural purposes. Taking a flock to such holding for grazing is not foreign to the farming purposes, the original and present use the plot was put to. Leading a flock by a farmer to his land partly used as garden and partly for growing cereals is not something which could not reasonably be contemplated by the parties involved in the creation of the right of way in favour of the dominant tenement. Furthermore, the fact that for 17 years the flock was allowed to pass without objection, corroborates the view that plaintiff and his predecessors in title impliedly admitted that the passage of flock was within the scope of the defendant's right of way. The learned President was right, therefore, in finding that the leading by the defendant of his flock to and from the dominant plot through the passage in question did not amount to an excessive user. Undoubtedly the defendant did not possess a general right of way in the sense that he could exercise such right for any purpose he liked whether connected with reasonable use of agricultural land or not. The nature of the easement implies its limits, and such limits in the light of what has been cited and .said can easily be defined. Subject to what has been stated as to the generality of the right of way the appeal is dismissed with costs.

Appeal dismissed with costs.