

## VARADH

v.

## RAM AUDH

[SUPREME COURT, 1969 (Thompson Ag. P.J.), 14th, 15th, 29th July]

## Civil Jurisdiction

*Easement—right of way—lease of servient land expired—lessee continuing in possession as de facto occupier—obstruction of right of way—provision of alternative way—right to insist on original line—damages.*

The plaintiff and the defendant were lessees of adjoining properties and after the defendant's lease expired he continued to occupy his area. It was common ground that the plaintiff was entitled to a right of way over the defendant's area along a specific line. This way was blocked by the defendant who, however, made available to the plaintiff access over a track which was adequate and equally convenient.

*Held* : 1. As *de facto* occupier the defendant was bound not to obstruct the plaintiff's right of way along the original line and he acted unlawfully in so obstructing it and continuing to do so: the plaintiff was entitled to an order that the defendant clear the original way.

2. In the circumstances the plaintiff had failed to prove any damage from the obstruction and only nominal damages would be awarded.

Case referred to: *Behrens v. Richards* [1905] 2 Ch. 614; 21 T.L.R. 705.

Action in the Supreme Court for removal of obstruction to right of way and damages.

A. D. Patel for the plaintiff.

M. V. Pillai for the defendant.

The facts are set out in the judgment.

THOMPSON Ag. P.J.: [29th July 1969]—

The plaintiff is the lessee of approximately seven acres of land, known as Nabia and comprised in Native Lease No. 8597 at Solovi, Nadi. The lessor is the Native Land Trust Board. The present lease, which is a renewal of a previous lease which the plaintiff had bought some time between 1940 and 1950, runs for 30 years from 1950.

The defendant was the lessee of an adjoining piece of land also belonging to the Native Land Trust Board. His lease expired on 7th March, 1964. It is not disputed by the defendant that the plaintiff had a right of way across that land. The defendant continued to occupy the land, apparently with the tacit consent of the Board, after the lease had expired. Early in 1965 the Board had a survey carried out of the land

A comprised in the defendant's former lease and of two adjoining portions and a plan was drawn up for this land to be re-parcelled. The plan was tendered in evidence as Exhibit 'A'. Apparently at some time in 1965 the defendant and the two persons who had formerly held leases of the other two portions adjusted the boundaries of the areas which they were actually occupying so that they conformed to the new plan. As a result, although the defendant has continued to occupy most of the area through which the right of way ran, he has not occupied since B 1965 that part of his former portion which actually adjoined the plaintiff's land. That part has been occupied since 1965 by Gopal Naidu.

In its plan, Exhibit 'A', the Board has made provision for the right of way to follow a different line from that which it previously followed. The defendant was notified in May, 1965, that his application to lease the new portion, as re-parcelled, had been provisionally approved. No C lease, however, has been issued yet. It is clear that the plan Exhibit 'A' is intended by the Board to form the basis for the lease, when it is issued.

The origin of this case lies in a dispute between the plaintiff and the defendant which started about 1962. It is clear that some disagreement arose about the plaintiff's use of a track which passed near the defendant's well where the defendant's wife and his children used to draw water and wash themselves. The right of way passed within about 2 D chains of the well. A panchayat was arranged to try to settle the dispute but to no avail and in 1964 the plaintiff commenced proceedings in this court similar to the present proceedings. The defendant consented to an order being made by the court that the plaintiff should have access to his land along the right of way and it was agreed between the two parties that the right of way should be defined by a registered E surveyor, Mr. Mahendra Prasad Singh. This was done. The plaintiff claims, however, that, notwithstanding the right of way having been defined, the defendant continued to deny access along it and in particular blocked it by planting it with sugarcane along the part nearest to the boundary of his land. He is seeking an order that the right of way F be cleared and access given to the plaintiff and the public, award of damages of £1,000 and his costs.

The defendant denies that the right of way was ever blocked or that he deprived the plaintiff of access along it. He also claims that, as a result of the Board's new plan with the alterations therein to the line of the right of way, the plaintiff has lost his right to have access by the old right of way and that he is now entitled only to access by the new G right of way provided for in that plan.

Evidence was given by the surveyor, Mr. Singh, that at the time when he carried out his survey in 1964, the right of way was blocked by sugarcane along the portion nearest to the boundary of the plaintiff's land. On the other hand, he agreed that there was a clear way through to H the plaintiff's land about one chain away from the correct line of the right of way and running more or less parallel with it and that that way was of sufficient width for a pair of bullocks with a plough to pass along it. The plaintiff himself gave evidence that that way was less than 6' wide. It ran along what was then the boundary of Gopal Naidu's land

and the defendant's land. Mr. Singh impressed me as a thoroughly truthful and independent witness and I have no hesitation in accepting his evidence rather than that of the plaintiff where there are conflicts between their evidence.

The defendant himself gave evidence that the right of way was never blocked with sugarcane. The surveyor employed by the Native Land Trust Board to make the survey of the defendant's land and the two adjoining portions, and who prepared Exhibit 'A', Mr. Ewins, gave evidence that when his survey was carried out in March, 1965, the right of way was clear of cane. Mr. Ewins was careful to qualify his evidence by pointing out that it was his son, as his assistant, who carried out all the field work necessary for the survey and that he himself merely inspected the area in order to enable him to prepare Exhibit 'A' from the details provided by his son. He agreed that he did not specifically check the right of way but merely noticed that it existed on the ground. As the clear way through referred to by Mr. Singh was a mere chain from the correct line of the right of way and as it ran parallel with it, it may well be that what Mr. Ewins saw and assumed to be the right of way was that clear way.

I therefore find that there is no irreconcilable discrepancy between the evidence of Mr. Singh and that of Mr. Ewins, both of whom I am satisfied were completely honest and truthful and did their best to recall accurately what they saw over 4 years ago. I find as fact therefore that late in 1964, when Mr. Singh defined it, the right of way which existed at the time of the original dispute in 1962 was completely blocked with sugarcane along the part of it nearest to the defendant's land. That sugarcane was growing on land then still occupied by the defendant. Having viewed the scene in the course of the hearing, I have no doubt that that part of the right of way has been blocked with sugarcane ever since. However, for some time a second clear way has existed running more or less parallel with the correct line of the right of way, but on the opposite side of it from the clear way seen by Mr. Singh in 1962. It runs only part of the way to the plaintiff's land; between where it ends and the plaintiff's land sugarcane has been grown.

The clear way which Mr. Singh saw in 1962 along the old boundary between Gopal Naidu's land and the defendant's land was still clear when the court viewed the scene; it was apparent that it had not been planted with sugarcane for a very considerable time, if ever: There were signs that it had been well used as a track recently. I find as fact, therefore, that, although the correct line of the right of way has been blocked, there has been an adequate clear way through to the plaintiff's land parallel with it; it would have been as convenient for the plaintiff to use that way as to follow the correct line of the right of way.

The defendant has admitted that prior to 1964 the right of way existed in favour of the plaintiff. Mr. Pillai has submitted, however, that the landiord has changed the line of the right of way in the new plan (Exhibit 'A') and the plaintiff has lost his right to use the old right of way. It is not disputed that the old right of way existed from 1950 and possibly earlier and that the plaintiff was entitled, as lessee of his land, to use it to get to that land. A right of way can come into existence in a number

A of ways; it appears that provision for the right of way in dispute in this case was made by the Native Land Trust Board when it sub-divided the land. However, it is not specifically referred to in the plaintiff's lease. The Native Land Trust Board is not a party to the present action; there is insufficient evidence before the court to enable it to decide whether or not the Native Land Trust Board is entitled as landlord to change the line of the right of way. There is no evidence, however, that it has purported to do so yet. The plan, Exhibit 'A', was made in preparation for the grant of new leases but none has been issued yet.

B This action is only against the occupier of the land. He has admitted that before his lease expired the disputed right of way existed. He has adduced no evidence to satisfy the court that it has ceased to exist. The new leases are not yet issued in accordance with the new plan and there is no evidence that the Board has changed the line of the right of way, even if it is able to do so without the consent of the plaintiff.

C The defendant is no longer in occupation of the land by virtue of a lease and the nature of his occupation is not entirely clear; but his present interest is less, not greater, than his interest as lessee and, insofar as he is the *de facto* occupier of the land, he is bound not to obstruct the plaintiff's right of way. That being so, I find that the defendant acted unlawfully when he blocked the old right of way and continued to do so by keeping it blocked.

D The plaintiff is, therefore, entitled to the order which he seeks that the defendant should clear the right of way where it passes through the land which he is presently occupying. The court has seen that all the cane on that part of the right of way has now been cut and the defendant should have no difficulty in complying with the order. The plaintiff is not entitled to an order that access be given to members of the public but he is entitled to an order that access be given to himself and his servants to use the right of way for the purpose of taking his oxen and his implements of agriculture to and from his land and for removing sugarcane by lorry or tractor and trailer. There is no evidence that the right of way was granted, or has ever been used by the plaintiff, for any other purpose.

E As far as damages are concerned, the plaintiff's statement of claim relates only to obstruction of the right of way by sugarcane which has prevented him from using the right of way. Some suggestion was made in the course of the trial that the defendant had made threats against him but this was not pleaded as a cause of action. Throughout the whole of the period, the plaintiff had an adequate alternative and equally convenient way which he could have followed. It may well be that he has felt it necessary to follow another path because of the ill-feeling which existed between himself and the defendant but that, as I have just remarked, is not pleaded. The plaintiff has failed to prove any damage resulting from the obstruction of the right of way by the sugarcane. In such a case nominal damages only are appropriate (*Behrens v. Richards* [1905] 2 Ch. 614).

H Accordingly I enter judgment for the plaintiff and order that the defendant do now clear the right of way as defined by the surveyor, Mr. Singh, in 1964 throughout the whole of its length where it passes through the land presently occupied by him and allow the plaintiff and his

servants access along that right of way for the purpose of going to and from his land, of taking his oxen and his implements of agriculture thereto and therefrom and of removing sugarcane therefrom by motor-lorry or motor-tractor and trailer. I order that the defendant do pay the plaintiff \$2.00 damages. I also order the defendant to pay the plaintiff's costs of this action, to be taxed on the lower scale. A

*Judgment for the plaintiff.*