

3/2/90

IN THE HIGH COURT OF JUSTICE.

SAINT VINCENT AND THE GRENADINES.

1987 NO: 1

BETWEEN

FRED JOSEPH DARE

AND

THE ATTORNEY GENERAL OF SAINT VINCENT
AND THE GRENADINES,
PATCON LIMITED

PLAINTIFF
10-15

DEFENDANTS.

Mr. Andrew Cummings for the Plaintiff.

Mr. Oscar Ramjeet, Solicitor General for the Attorney General.

Mr. O.R. Sylvester Q.C., Mr. Mark Williams with him for Patcon Limited.

(January 17, 18, 29, February 1st, 1990.)

JUDGEMENT

SATROHAN SINGH J.

In this matter the plaintiff and the second named defendant are owners of adjoining properties.

The defence claims that there is a public road between these two properties and sometime in March, 1986 the second named defendant informed the plaintiff of its intention to repair the said road. On or about September 27, 1986 and in pursuance of that intention, the second named defendant employed workmen to repair the said road and to make it motorable when they were stopped by the plaintiff who then caused a concrete block wall to be erected across the road thereby effectively closing off access to the said road from Murray's road. This wall was broken down but was subsequently rebuilt by the plaintiff.

The plaintiff in his statement of claim states that there is no or no such road between these two properties and that the premises in dispute are his property conveyed to him by Deed of Conveyance dated December 30th, 1946 made between Conrad Bute of the one part and plaintiff of the other part

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and registered in the Registry of the State bearing number 16 of 1947.

The defence of the second named defendant denies that Conrad Bute was ever the owner of this disputed parcel of land and says that at all material times this disputed area was laid out as a road and remained between these two adjoining properties and was known and described as a road serving the residential lands of the subdivision on plan G2/66.

By way of reply, the plaintiff admits that a certain portion of the premises was laid out as a road to serve lots 1,2 and 3 of the subdivision of rural lot No. 6 but denies that the said road was ever intended to service lots 4 and 5 of the said subdivision both of which abutted on the main public highway known as Murray Road. The plaintiff also denies that any easement of right of way ever arose in favour of the second defendant or any of its predecessors in title over and along any part or parts of the premises in dispute whether by Grant or prescription or any other manner whatsoever. The plaintiff further contends that none of the lots 1,2 and 3 was ever sold by Rosina Cox the then owner of rural lot No.6 and that the portion of land laid out as a road was never required and/or used for the said purpose and has never been used for the said purpose by anyone up to the present time.

The plaintiff contends further in his reply that if the second defendant and/or predecessors in title ever had a right of way over and along any part or parts of the disputed premises the same has never been used by the second named defendant or by its predecessors in title for a period in excess of forty years and that one of the predecessors in title of this defendant had constructed a solid unbroken stone wall dividing the property of this defendant from the property now alleged to be a road with the result that the said property of this second named defendant was not accessible therefrom.

In the circumstances the plaintiff contends that the said right of way as alleged, if it ever existed, has been abandoned and became extinguished.

At the commencement of the hearing of this matter the plaintiff applied for and obtained the leave of the Court to discontinue these proceedings as against the first named defendant.

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From these allegations the plaintiff claims against the second named defendant:

1. A declaration that the plaintiff is seised in fee simple and in possession of the premises.
2. A declaration that no easement of right of way either public or private subsists over and along any part or parts of the premises and in particular but without prejudice to the generality of the foregoing over and along the Western portion adjacent of the boundary between the premises and land of the second defendant lying to the West thereof.
3. An injunction to restrain the second defendant by its servants and/or agents and all persons authorised from time to time by it and/or them from trespassing and/or entering upon the premises and/or upon any part or parts thereof for any purpose whatsoever.
4. Further or other relief.
5. Costs.

And the second defendant counterclaims against the plaintiff for

1. A declaration that the plaintiff is not the owner in fee simple of the road between the respective properties of the plaintiff and the Co.
2. An order to compel the plaintiff to remove and/or break down the concrete wall erected across the said road.
3. An injunction to restrain the plaintiff from building or erecting a wall or any structure or obstructing and or blocking the said road and or impeding or preventing access over and along the said road at any time or times by day or by night with or without vehicles.
4. Damages.

The plaintiff himself for medical reasons did not testify in this matter and he called only one witness, Jack Minors, seventy years old. The owner of the defendant Co. Arthur Connell testified on behalf of this defendant together with Chief Surveyor Clifford Williams and ninety year old Conrad

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Bute. Conrad Bute is the plaintiff's immediate predecessor in title. Title deeds showing the movement of the defendant's property and its consistent description thereof showing the disputed road as its southern boundary are also in evidence together with plans made in 1914 by Licensed Surveyor Donoh showing the subdivision of Rural Lot 6 in residential lots. This is the subdivision which according to the case for the defence created this road. Also in evidence is a plan by Licensed Surveyor Sebastian Alexander made in 1985 at the instance of the defendant. This plan also shows the existence of this disputed road. The plaintiff's title deed No. 16 of 1947 and a mortgage deed executed by Conrad Bute in 1942 which are also in evidence, in describing the plaintiff's property makes no mention of the disputed road as its Northern boundary, thereby giving the plaintiff the disputed road as his property. Chief Surveyor Clifford Williams' evidence is that if the road is the plaintiff's as is evidenced by the description in his title, then the plaintiff would be occupying 4,967 sq.ft. of land more than is measured in his deed. The overwhelming evidence on both sides also is that if in fact there is a road there to service the residential lots of the subdivision aforementioned then at least after 1946 if Conrad Bute's evidence is to be accepted, it was not used. If Bute's evidence is to be rejected on this issue the finding of fact will have to be that since its creation in 1914, the road was never used.

I have given a careful and comprehensive study of all the admissible evidence given in this matter and having seen and heard the witnesses, I make these findings of facts on a balance of probabilities.

Before 1914, Rural lot 6 was one undivided plot of land owned by Rocina Cox. In 1914 she had the land cut up into residential lots and the disputed road was created. Conrad Bute inherited the property now occupied by the plaintiff by will from Rocina Cox after the death of Rocina Cox and the defendant bought Lot No.5 from Robin Browne in 1983. Browne had bought this lot from one Baptiste who bought same from Rocina Cox in 1922. The plaintiff bought his property in 1946.

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Having found that the disputed road was created, I move now to the question whether it was actually put into such use by any one. My answer to that is no, until the defendant attempted to do so sometime around 1985 when the plaintiff objected by asserting ownership to same. In coming to this conclusion I find that user by Clifford Williams and Jack Minors as school boys to steal mangoes from the property is not the user that this Court can act on, and, I hesitate to accept the evidence of ninety year Conrad Bute on this issue. He did not impress me as to the truth of his testimony and I reject it on this issue. I would accept the evidence of Jack Minors that the only use that was made of the road after 1946 was by the plaintiff in order to transport debris from the demolished Barclays Bank building onto his property, and, for this to be done Minors had to clear away obstructions of truck chassis, among other things, therefrom.

The sum total of these findings is that the disputed road was in fact a road created in 1914 in that area but it was never used as such. It is now enclosed as part of the plaintiff's property but within this enclosure it gives the plaintiff more property than is a read in his deed. The plaintiff has not pleaded the Limitation Act in this case and is not relying on it.

The plaintiff claims this road to be part of the property he bought from Conrad Bute and he relies on his title deed in support of this claim. The title deed does give him the road within the boundaries set out therein even though the actual area is less in square feet than if the road was included. As an alternative he claims that if in fact there was a road or right of way to the plaintiff's property, this road or right of way was abandoned and thereby became extinguished.

When one looks at the issues raised in the pleadings and the evidence led, and, when one hears the addresses of both lawyers in this matter, the Court is left with the feeling that these two very Learned Lawyers have not done justice to the cases of their respective clients and this surprises the Court knowing the ability of these two lawyers as I do. I will give my reasons for so concluding. I will first deal with the plaintiff's case.

From the plaintiff's pleadings he is not claiming this disputed road as an easement of a right of way. He is claiming it as fee simple owner be

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property bought and paid for from Conrad Bute as evidenced by his deed of Conveyance No. 16 of 1947. The evidence by way of this deed prima facie shows the disputed road to be his. The evidence also clearly shows that he has been in possession and has been the sole user of this disputed property from 1946 when he bought until 1985 when the defendant attempted to interrupt this user. When he pleads abandonment and extinguishment of the use of the road as a right of way in the alternative, he is only using that as a bar in the event of the defendant claiming such an easement on the road. He himself is not claiming such an easement from his pleadings.

So, what this case is all about is an attempt by the defendant to dispossess a prima facie deeded fee simple owner of land who has been possessed of, and has used the said land, uninterrupted for a period of over 40 years. A deed which has been in existence and has never been challenged for some forty years until this case. A matter which this Court considers as a very serious matter.

Let us now see how Mr. Cummings handles the matter. Quite erroneously, he does not in his pleadings as an alternative plea, avail the plaintiff with the benefit of pleading and relying on the Limitation Act. Quite correctly, he has produced no evidence of the creation of any legal easement. His case as pleaded and evidenced by Jack Minors was that there was no such easement. Again, quite correctly, he has produced strong prima facie evidence to show that the plaintiff is the fee simple owner of this road and then he climaxed the plaintiff's case with a most unexpected and erroneous address. In this address, he rests his case on the road being an easement which has been extinguished by abandonment. He says "the road was neither Connell's nor Fred Dere's, they both had an easement over it." By this address, he effectively abandons the plaintiff's case that he is the fee simple owner of this road as evidenced by his deed of Conveyance No. 16 of 1947. That being so, the Court is now precluded from a consideration and/or determination of that issue. And when one sees the plaintiff's pleading on the issue of easement, the Court sees the plaintiff not using it as a sword but as a shield. To my mind, what Mr. Cummings did, was to leave the plaintiff hang

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on to his possession and user of the property uninterrupted from 1946 to 1985 without pleading and relying on the Limitation Act.

I turn now to the case for the defence. No where in the defence as pleaded does this defendant claim to be owner of this road. Indeed he does not ask for such a declaration. He pleads quite clearly that Conrad Bute from whom the plaintiff bought was not the owner of this road and therefore he could not have conveyed same to the plaintiff and that at all material times this disputed area was laid out as a road and remained a road serving the residential lands of the subdivision on plan G2/66: This defendant is obviously relying here on the disputed property being an easement of a right of way. Indeed, in his reply, this is the issue to which the plaintiff responded and, the line taken by the defence, in cross-examination of the plaintiff's witness and evidence led on its own behalf, was to show this easement with its non abandonment thereof.

Let us now see what Mr. Sylvester does in his address to the Court. In this address, he claims the road as the defendant's property by a presumption of law based on his interpretation of the opinions expressed in the cases of Commissioners for Land Tax v. Central Railway Co. (1913) AC 364, In Re White's Securities (1898) 1 CH 659 and Vol. 11 of Halsbury Laws of England 3rd Ed. P.489. No question any more of an easement of a right of way. A total departure from his pleaded defence. By this address he has effectively abandoned the defendant's case based on the issue of an easement thereby, like Mr. Cummings, precluding the Court from a consideration and/or determination of that issue in so far as the defence goes.

The question now arises what should this Court do to bring order to the disorder created by the lawyers in this matter in an effort at ensuring that justice is done to the parties in this case. Both lawyers seemed to have abandoned their respective pleadings and to have forgotten the elementary rule that a party to civil litigation is bound by his pleadings. They just seemed to have lost their perspective in this case. What they did in their respective addresses was to switch their respective pleaded pleas around to each other without pleading such a switch.

Mr. Cummings abandons the plaintiff's fee simple ownership which

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he has pleaded and relies on easement which he has not pleaded. Mr. Sylvester abandones easement which he has pleaded and relies on ownership which he has not pleaded. If the Court were to utilise its powers under the Rules of the Court and amend the pleadings of its own volition to accommodate the stand taken by the lawyers at address stage, it might be interpreted or contended that the Court had entered into the arena of the conflict. Both lawyers addressed as they did without seeking amendments to their pleadings.

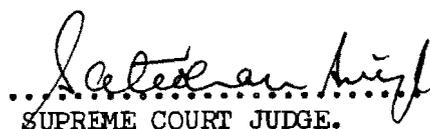
In the event, this Court is of the view that the interest of Justice in these proceedings would be best served to all concerned by the Court refraining from a determination of the issue whether or not the plaintiff is the fee simple owner of the disputed road. However, with the evidence being clear and uncontradicted that this plaintiff was and is in possession and has been using this property as his from 1946 when he bought until this day, except for the attempt by the defendant at interruption of this user in 1985, this Court will grant the plaintiff the declaration that he is seised in possession of the premises in dispute and will make the order for the injunction as prayed for in the Statement of Claim.

In the context of the above, Judgement is entered for the plaintiff on his claim for the declaration and injunction abovementioned.

Because the Court has not dealt with the fee simple issue raised in this matter on its merits, the Court will refrain from granting the orders prayed for in the Counterclaim.

Each party will bear its own costs of these proceedings.

To my mind, to deal with this matter as it is now before this Court in any other way would be to do an injustice to both parties. The primary function of this Court is to ensure that justice is done to all concerned and not to allow litigants to be deprived of their just rights as a result of their legal advisors indulging/unacceptable legal gymnastics in this Court.


SUPREME COURT JUDGE.