

M.O. Nazir

Appellant

v.

A.A. Bundhoo

Respondent

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
23RD JULY 1990

Present at the hearing:-

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD GRIFFITHS
LORD LOWRY
SIR ROBIN COOKE

[Delivered by Lord Templeman]

On 2nd April 1958 the appellant, Mr. Nazir, purchased 14 perches of land from Hamid Gokhool ("the vendor"). On the same day the respondent, Mr. Bundhoo, purchased an adjoining 15 perches of land from the vendor.

Mr. Nazir's land, according to his transfer, had a frontage of 32 feet to a public road and it was bounded:-

"Du troisieme cote par Mamode Issa Gokhool - un chemin de six pieds de large entre sur 175 pieds."

Mr. Nazir's land was therefore defined partly by reference to a track 6 feet wide. The question is whether that 6 foot track lies between the land granted to Mr. Nazir and the land of the adjoining neighbour Mamode Issa Gokhool ("the neighbour") or whether the 6 foot track is within the land granted to Mr. Nazir. The importance of the 6 feet wide track ("the access road") in these proceedings is that the access road provides the only means of access from the public road to the land conveyed to Mr. Bundhoo. The transfer to Mr. Bundhoo contained no express grant of a right of way. But it is clear that the vendor had no power to grant a right of way over the land of the neighbour.

In 1980 the access road on the site which had been enjoyed by Mr. Bundhoo was obstructed by Mr. Nazir who built a wall where the access road as then enjoyed debouched onto the public road. In 1983 Mr. Nazir built another wall where the access road enters the land of Mr. Bundhoo. Mr. Bundhoo applied to the Intermediate Court for an order directing Mr. Nazir to remove the obstructing walls which he had built and for damages. The magistrates (Mrs. P. Balgobin and Chui Yew Cheong) dismissed the application.

It appears that Mr. Bundhoo had built a house on his land and he gave evidence that following the obstructions by Mr. Nazir:-

"I had many difficulties. Police had even to bring my letters to my residence. I have a neighbour Suchita and I obtained his permission to pass on his land. Suchita gave me permission to pass on his land. Suchita said to me that he would henceforth obstruct his road. If Suchita refuse his permission I would be encircled and have no access to the road."

It also appears that sometime or other the neighbour built a wall intended to mark the boundary between the neighbour's land and the access road. A surveyor called by Mr. Nazir testified as follows:-

"(The neighbour) has erected a wall outside Mr. Nazir's land and there is no indication why the wall should be found there and not much further ... I know that in the title deed of Nazir between the property of Nazir and (the neighbour) there is a 6 feet wide road over a length of 175 feet ... and if we measure 175 feet from that road it finishes with the land of (Mr. Bundhoo). In my opinion that 6 feet wide road should not be on the land of (Mr. Nazir)."

When asked whether in his opinion the access road mentioned in Mr. Nazir's title deeds should be found on the land of the neighbour he said he could not answer yes or no. He had read the description of the land of Mr. Nazir and understood that there was a road 6 feet wide between his land and the land of the neighbour. "In my opinion the road is not in the land of Mr. Nazir. The road is between the two lands."

In their judgment the magistrates considered the evidence of a surveyor called on behalf of Mr. Bundhoo who said that:-

"... it is the custom in Mauritius that when the words 'un chemin entre' are mentioned in a title deed, the road should be taken from the land to which the title deed relates. In the present case therefore, the road of 6 ft should be taken from [Mr. Nazir's] land which should therefore be reduced to a width of 26 feet instead of 32 feet."

The magistrates preferred the evidence of Mr. Nazir's surveyor that the word "entre" meant "between" and rejected the evidence of Mr. Bundhoo's surveyor that the word "entre" meant "within". They concluded in the light of all the evidence adduced that Mr. Bundhoo did not have a right of way over Mr. Nazir's land by title.

On appeal the Supreme Court (Moollan C.J. and Proag J.) set aside the order of the magistrates and granted injunctions and damages to Mr. Bundhoo. The judges of the Court criticised the evidence of Mr. Nazir's surveyor and preferred the evidence of Mr. Bundhoo's surveyor. The Court observed that there was no mention of any access road in the title deeds of the neighbour (which title deeds have been inspected) and no mention of any access road in the title deeds of the vendor until 2nd April 1958 when the access road was mentioned for the first time in both the transfers of Mr. Nazir's land and Mr. Bundhoo's land. The Court pointed out that the vendor could not create a right of way over land belonging to the neighbour. In these circumstances the word "entre" could not mean "between". Their Lordships do not overlook that the latter proposition is a *non sequitur*. The Court said that when one finds that the access road starts from the public road and stops with the land of Mr. Bundhoo it becomes obvious that it was meant to give to Mr. Bundhoo a right of access to the public road, an essential requisite to enable him to enjoy his land. In 1958 the vendor caused to sell simultaneously a portion of land to Mr. Bundhoo and to Mr. Nazir with a mention in each deed of sale of a road of 6 feet wide on the length of one of their boundaries. "No doubt the object was to give a right of way to the immediate neighbour or neighbours".

Their Lordships would be reluctant to interfere with the conclusions of the Supreme Court dealing with documents and oral evidence in the language of Mauritius and with conveyancing law and practice of Mauritius. The Board would be reluctant to be driven to a conclusion which would result in the land of Mr. Bundhoo being landlocked. On behalf of Mr. Nazir counsel submitted that Mr. Bundhoo could in that case sue Mr. Nazir for a right of way of necessity, offering compensation or could sue the neighbour for a declaration that there was an access road which had been enclosed by the neighbour. But Mr. Bundhoo is only claiming to exercise the rights which he formerly exercised. If the neighbour's wall encroaches on Mr. Nazir's land then it is for Mr. Nazir to sue and prove the encroachment. In all jurisdictions a discrepancy between boundaries as described in title deeds and their accompanying plans and maps on the one hand and the boundaries as they appear on the ground frequently leads to doubts and difficulties and in many, if not most cases, the best course is to uphold the *status quo*

on the ground prior to any challenging obstruction or trespass. In the present case the Supreme Court has, for the reasons which they have set out disapproved of the action taken by Mr. Nazir forcibly to interfere with the access enjoyed by Mr. Bundhoo to the public road in 1980 and their Lordships see no reason for interfering.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed.