

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A :No.668 of 1995

BETWEEN

SITA MAHARAJ

Plaintiff

the Trustee of the Mahilla Sabha

AND

ANNUP BEHARRYSINGH

Defendant

Before the Honourable Justice P. Moosai

APPEARANCES:

Mr. Vashist Maharaj for the Plaintiff

Dr. Charles Seepersad for the Defendant

JUDGMENT

This case has, to a large extent because of the adversarial nature of the proceedings, been hotly contested on all issues of fact and law. However it is my respectful view that when one looks at the facts which are not in dispute in this matter, it is apparent that the facts which are in issue are not really decisive for the proper determination of this case.

The Mahilla Sabha is the unincorporated body comprising at this time of some 30 members which, since some time in the early 1920s, has been in occupation of, and in charge of the day-to-day management and control of the Hindu Temple known as the Green Street Temple ("the Temple") situate at Green Street, Tunapuna.

Sita Maharaj, the trustee of the Mahilla Sabha, brings this action on behalf of herself and all the other members of the Mahilla Sabha for, inter alia:

- 1) A declaration that the plaintiff is entitled to a right of way from Green Street, Tunapuna to the Hindu Temple along the disputed way situated on the Eastern portion of Lot No. 9 and measuring 120 feet long by 15 feet wide (“the disputed way”).
- 2) An injunction restraining the defendant from interfering with their reasonable enjoyment of the said right of way.

It is not seriously disputed, and in any event I have found, that from 1858 until the actions of the defendant herein in or about October or November 1994, Hindus of the Tunapuna community would use the disputed way which at present stands on lot No 9 to get to the Temple. In the circumstances the plaintiff is essentially claiming a customary right of way and/or an easement whether by implication, prescription or otherwise.

In or about October or November 1994 the defendant, who together with his wife became the owner of Lot No 9 on 8th April, 1994, prevented members of the Temple from using the disputed way to get to the Temple. The defendant did so for the reason set out in his Defence. In that Defence the defendant denied that the plaintiff was entitled to any right of way. However at trial the defendant's contention was modified to a certain extent. The defendant testified that after purchasing the property at Lot No 9, he never refused, nor does he propose to refuse entry to anyone wishing to get to the Temple. It would appear that his main grouse might have been his unwillingness to permit vehicular traffic along the disputed way.

The central issue seems to be, at the end of the day, what was the nature of the right, if any, enjoyed by persons going to the Temple along the disputed way.

I have in my judgment come to the conclusion that the Mahilla Sabha as occupiers of the Temple and/or the lands on which same stand, are entitled to the benefit of a right of way along the disputed way by implication, it being the intention of all the relevant parties that the disputed way was to be so used for the purpose of going to and from the Temple. Having interfered with their use and enjoyment of the right of way, there will be an injunction restraining the defendant by himself his servants or agents or otherwise

howsoever from preventing or otherwise interfering with the reasonable enjoyment of the disputed way by the members of the Mahilla Sabha, its servants and/or invitees and/or licencees on foot and with motor vehicles and other conveyances at all times and for the purpose of going to and from the Temple and from doing any act whereby the members of the Mahilla Sabha its servants and/or invitees and/or licencees may be hindered or obstructed in the free use thereof.

With respect to the passage of motor vehicles along the disputed way, no more than two motor vehicles are permitted to pass along the disputed way for the purpose of going to and from the Temple.

There will be an understanding by the Plaintiff:

- i. To shut the gate at the entrance to Lot No. 9 after religious activities are concluded on each and every occasion.
- ii. Not to park any motor vehicles on any part of the disputed way situate on Lot No. 9.

I should indicate that I would have been prepared, in the alternative, to come to the conclusion that the disputed way was and is by immemorial custom a churchway for Hindus of the Tunapuna community to go to and from the Temple and to grant an injunction restraining the defendant, its servants or agents or otherwise howsoever from disturbing the Mahilla Sabha, its servants and/or invitees and/or licencees in the exercise or enjoyment of their right to use the disputed way.

In order to get a clear understanding of the layout of the area I think it would be helpful if I provide an outline sketch of the general area. This is for the purpose of illustration only.

The disputed way is situate on the Eastern portion of Lot No. 9 and is 120 feet long and 15 feet wide. At present the disputed way is paved. Entry along the disputed way from Green Street is obtained by passing through the gate at the entrance. There is a parking area to the back of the house situate on Lot No.9 which is used at present by the tenants in occupation of same for parking their vehicles.

After the commencement of legal proceedings, Eminthra Rampersadsingh, who lives on lot No. 11 which is the Lot immediately East of the defendant's premises and who has exercised a certain amount of control of the Temple, erected a gate on the Northern boundary of Lot No. 9, effectively preventing entry to the Temple by occupants of Lot No. 9.

I do not think that the general picture as to the early years of the Temple is in dispute. All the parties seem to agree that it was Beharrysingh who constructed the first temple (the Lord Shiva Temple) on a 4-acre parcel of land owned by him. That 4-acre parcel of land was described in the 1927 deed hereinafter referred to as being bounded on the North by a road reserve and by lands of Joseph Warner, on the South by Green Street, on the East by lands of Joseph Warner and on the West by Tunapuna Road. The evidence of Sita Maharaj who was born in 1933, is that her grandmother and all the older members of the temple told her that the Temple was built in 1858. Further she had seen a bronze plaque with the year 1858 inscribed on it and she was told by her grandmother and the older members of the Temple that the plaque commemorated the date the Temple was built. I accept the evidence of Sita Maharaj in this regard. The evidence is supported by the affidavit evidence of Rajmath Seepersad and is consistent with the time span in the evidence of the defendant's witness Roop Narinesingh.

Whilst much of the evidence which has led to the conclusion that the Lord Shiva Temple was built in 1858 is hearsay, in **Rajendra Narain v Gangananda Shah** (1925) P.C. 213, Lord Carson at p.216 confirmed the exception of hearsay evidence for establishing that a custom existed from time immemorial:

“As to the date from which the custom is said to have prevailed, after the existence of the custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence, and it is for this reason that such evidence is allowable as an exception to the hearsay rule.”

Phipson on Evidence, 13th Edn. para. 24-62, in dealing with declarations as to pedigree, sets out the principal forms in which hearsay upon matters of pedigree may be

tendered and suggests that inscriptions, if publicly exhibited, would be admitted on the presumption of family acknowledgement.

“Inscriptions on *tombstones, coffin-plates, mural tablets, hatchments, family portraits, rings and pedigrees* are also admissible. If these are proven to have been made by, or under the discretion of a deceased relation, they will be received as his declarations; **if they have been publicly exhibited, they will be admitted on the presumption of family acknowledgement**, though their authors be alive. The value of mural and other funeral inscriptions as evidence depends on the authority under which they were set up, and the distance of time between their erection and the events they commemorate. **Where immovable, defaced or destroyed they are provable by secondary evidence.** Emphasis Added.]

Sita Maharaj and the defendant are both descendants of Beharrysingh and the Beharrysingh family was at all material times involved to a substantial extent in the development, management and control of the Temple. The plaque, to the knowledge of the family, publicly commemorated the year the Lord Shiva Temple was built (1858) so that the family would be presumed to have acknowledged that this was the date of construction of same.

Roop Narinesingh, who was approximately 80 years old at the time of trial, a descendant of Beharrysingh and the father-in-law of the defendant, helps us to bridge the gap by providing us with what was on that 4-acre parcel of land around the 1920s. Before dealing with his testimony I should make the point that at times he appeared to me to be somewhat hostile. He also gave me the impression that he was not willing to divulge too much to the Court although he assisted the Court greatly in the neutral history of the early years of the Temple. However when it came to issues which he thought were central to the case he seemed unhelpful. That served to diminish the weight I attached to certain aspects of his testimony.

Roop Narinesingh testified that he was born at Monte Grande, Tunapuna and has been living at No. 66 Eastern Main Road, Tunapuna for the past 50 years. His great-

grandfather was Beharrysingh. His grandfather was Bachanusingh. Bachanusingh was married to Beharrysingh's daughter. His father's name is Ramjass Narinesingh. His father told him that Beharrysingh built the Temple.

Roop Narinesingh testified that since he was a little boy he knew Eminthra Rampersadsingh's house (the house on Lot No. 11) to be there. That was the family house. When he was a little boy there were no houses at Lot No. 7, Lot No. 9 nor were there any house on the lots immediately North of the Temple. A reasonable inference to be drawn from his testimony is that the Temple and the family house which is at present occupied by Eminthra Rampersadsingh (Lot No.11) were the only structures on that 4-acre parcel of land at the time the first Temple (the Lord Shiva Temple) was built, with Beharrysingh probably living in the family house.

Rajmath Seepersad also provides us with a picture of what was taking place with the Temple in the 1920's. But before I deal with her evidence I think I ought to set out the circumstances in which I admitted her affidavit as evidence.

When evidence was being led on behalf of the Plaintiff, Mr. Maharaj indicated that he was not relying on the affidavit of Rajmath Seepersad. Thereafter he closed his case and evidence was adduced on behalf of the Defendant. After Dr. Seepersad closed his case, and after 2 days of addresses by him, the Court enquired of Mr. Maharaj whether the affidavit of Rajmath Seepersad contained a factual matrix which might assist the court in determining some of the factual matters which had happened a long time ago, even though it might be beneficial or detrimental to his case. Mr. Maharaj then made the application to have the affidavit admitted.

I should make the point that the Court acting *ex proprio motu* brought this to Mr. Maharaj's attention as the Court was of the view that not only might private rights have been involved, but also community and even public rights. In any event the Court was of the view that the interests of justice required the court in the circumstances of this case to pursue such a course. The Court was therefore of the view that it ought to have all the material before it to determine all the issues. The Court was also prepared to grant Dr. Seepersad an adjournment at that stage to deal with any matter arising out of the course adopted.

After arguments certain parts of the affidavit were duly admitted. Thereafter the Court asked Dr. Seepersad if he wanted an opportunity to deal with that evidence whether by way of an adjournment to consider his position or by cross-examination or by calling further evidence. The matter was adjourned for a further six (6) days.

Thereafter Dr. Seepersad called Roop Narinesingh and Paul Williams as witnesses. I should make the point that the evidence of Rajmath Seepersad and Roop Narinesingh in particular proved invaluable in determining some of the issues germane to this case.

Rajmath Seepersad, who was born in 1912, lived at Maingot Road, Tunapuna from 1924 until her death on 4th September, 2000. In 1924 her mother-in-law, who was a member of the Mahilla Sabha, which was the ladies group responsible for the management and control of the Temple, brought her to join same and she remained a member until her death. The evidence of Sita Maharaj which I also accept, is that she is at present secretary of the Mahilla Sabha which now comprises about 30 to 35 members.

Rajmath Seepersad's evidence was that at about the turn of the 20th century, Tunapuna was considered to be the hub of activity in Hindu society, as the two main temples were located in Tunapuna. Pausing there I do not think that that bit of evidence suggests that there were only two temples in Trinidad at the turn of the 20th century. Hindus from all over Trinidad would come to the Temple and there would be great festivities and some would even sleep in the Temple compound before journeying to their homes. I believe I can take judicial notice of the fact that it was not uncommon for some Hindus, especially the holy men (the Sadhus) to spend nights or weekends in temples and that this tradition continued until the advent of mass transportation. Now even though Rajmath Seepersad refers to the two temples in Tunapuna, I believe I can also take judicial notice of the fact that the other temple in Tunapuna situated on the Eastern Main Road was certainly a grand temple, being the center of attraction for Hindus. It is clear that from the description of the temple provided by Rajmath Seepersad, the then existing Temple at Green Street would not have been as illustrious as the temple situate on the Eastern Main Road.

Rajmath Seepersad also described the state of the Temple when she joined in 1924. The Temple consisted of the Lord Shiva Temple and an adjoining Temple made of bamboo and partly covered with galvanize, with the floor and walls made of a mixture of dirt and cow dung. The ladies would carry the cow dung on their heads to paste upon the ground and walls to keep them clean, the process referred to as “lepea”. This adjoining Temple was the forerunner to the temple building that is there at present. This Temple building is now capable of accommodating approximately 200 people. Clearly this present structure was designed to accommodate worshippers and/or invitees on occasions when the Temple had any kind of religious activity.

I also consider inference Hindus of Tunapuna community. Pausing there, Rajmath Seepersad in her affidavit leaves no doubt that the Mahilla Sabha (meaning ladies’ group) was a very vibrant organization, soliciting donations from members of the public and promoting Hinduism.

It is also clear that the descendants of Beharrysingh, including the defendants and his family, the Plaintiff and her family and the Gobinsinghs, were all actively involved in temple activities and made outstanding contributions to the promotion and development of Hinduism in the Tunapuna community.

But the very fact that the defendant and Roop Narinesingh worshipped at the Temple would suggest, and I so find, that worshippers of the Temple were not seclusively from the ladies group, from the Mahilla Sabha.

I also think that in this matter a most reasonable inference to draw is that Hindus of the Tunapuna community have, since the construction of the temple in 1858, worshipped at this temple.

When one considers the evidence of both Roop Narinesingh and Rajmath Seepersad makes it clear that the disputed way was the means of gaining access to the Temple. This therefore provides us with direct evidence that in the 1920's the disputed way was so used to access the Temple.

If in the 1920's when there was only the family house and the Temple standing on that 4-acre parcel of land that disputed way was used to access the Temple, then it seems to be that a reasonable inference to be drawn would be that from 1858 onwards, that

disputed way was also used as the principal means of accessing the Temple, even though people coming from North of the Temple would possibly use the open lands there to gain access to the Temple. It is difficult to imagine Beharrysingh living in the family house on Lot No. 11 and attempting to pass anywhere else. I therefore find that the disputed way was and has always been used as, the principal means of accessing the Temple.

In the 1920's the legal title to the 4-acre parcel of land was conveyed to another descendant of Beharrysingh. By deed dated 16th September, 1927 and made between Gangee Beharrysingh, widow, and Arjoon, also called Arjoon Beharrysingh, proprietor, of the one part and Bhagmaneah, widow, of the other part, the said Gangee Beharrysingh and Arjoon Beharrysingh conveyed the 4-acre parcel of land to Bhagmaneah. The 4-acre parcel of land, as I mentioned earlier, is described as bounded on the North by a road reserve and by lands of Joseph Warner, on the South by Green Street, on the East by lands of Joseph Warner and on the West by Tunapuna Road.

Attorneys have agreed that the road reserved referred to as part of the Northern boundary in that 1927 deed would be Maitajual Road. It would seem to me that a reasonable inference to be drawn from the description of the 4-acre parcel of land is that in 1927, the road now called Gobinsingh Drive, was not in existence as it escaped mention in the said deed.

It should be noted however that Paul Williams, the photogrammetric Engineer, tendered into evidence the aerial photograph of that Tunapuna area for the year 1942. From the said photograph he was able to discern what he subsequently referred to as a trace between Green Street and Maitajual Road. That trace would be the road that only recently, as I have found, acquired its name, Gobinsingh Drive. The evidence of Paul Williams and the defendant himself makes clear that that would have been a dirt trace. Whilst the evidence of Herbert Rouse suggests that that dirt trace would also have been used to access the Temple.

Coming back to the conveyance to Bhagmaneah in 1927, the disputed way continued after that to be used as the principal means of accessing the Temple. The evidence of Roop Narinesingh and Rajmath Seepersad supports this conclusion.

Sita Maharaj, who was born in 1933, provides us with a better understanding of what took place from the 1930's to the present. I should make the point that I found her to be a totally reliable witness, even though there were minor inconsistencies in her evidence.

The evidence is clear that her siblings, Eminthra Rampersadsingh, Sumbass Gobinsingh, Lall and she lived in the family house at Lot No. 11. Sita Maharaj testified that throughout her life she has always worshipped at the Temple and has always passed along the disputed way to get to same.

I therefore find as a fact that from 1858 until October or November 1994 when the defendant prevented the members of the Temple from using same, the disputed way had always been used as the principal means of accessing the Temple.

In cross-examination Sita Maharaj testified that the house on Lot No. 9 was built when she was a little child. There is documentary evidence together with the evidence of Roop Narinesingh to support her in this regard. By deed dated 19th February, 1938 and registered as No. 1710 of 1938, Bhagmaneah conveyed to Charles Leslie Gobinsingh Lot No. 9 which is described as being a portion of the 4-acre parcel of land, and as measuring 78 feet on the Northern and Southern boundary lines and 120 feet on the Eastern and Western boundary lines, and bounded on the North by the other lands of the vendor, on the South by Green Street on the East by lands of Dhanrajie and on the West by a road reserved 4 feet wide.

It emerged during the trial that the defendant sought to give the impression that the said road reserved 4 feet wide referred to as the Western boundary of Lot No. 9 was one of the paths used to access the Temple. The Defendant recanted in cross-examination, conceding that it was only in 1994 when he was searching the title to lot No. 9 that he discovered the existence of this 4 foot road reserve. This of course puts a serious dent in his credibility.

Charles Leslie Gobinsingh, who is referred to in the said 1938 conveyance as the purchaser, got married to Sita Maharaj's sister, Sumbass Gobinsingh. As the conveyance to Charles Leslie Gobinsingh was in 1938, it is reasonable to conclude that Charles Leslie Gobinsingh could only have constructed that house at the earliest in 1938 or 1939.

It is significant that even though Lot No. 9 was conveyed to Charles Leslie Gobinsingh in 1938, the disputed way continued to be used as the route to get to the Temple despite several intervening conveyances to his successors-in-title and so continued until the actions of the Defendant herein in 1994.

Sita Maharaj testified that ever since she was a child, she remembered there being a gate at the entrance to Lot No. 9. That gate would always be open. Even when the Temple had functions at nights that gate would be kept open by the Gobinsinghs and would only be closed after the functions were over.

Roop Narinesingh, in my view, supports Sita Maharaj's testimony on this issue. He testified that from the time he was a little boy he began going to the temple with his father. From about 1948 he began going to the Temple by car. Whether by foot or by car he had always passed along the disputed way. He would drive from Green Street, along the disputed way and park in Eminthra Rampersadsingh's yard. He testified that there has been a gate at the entrance to lot No.9 for about 50 years now. He confirmed that that gate at Lot No. 9 was always open for temple activities. The defendant himself testified that that gate was always closed, but that Gobinsingh, whenever there were religious activities, would open and keep open that gate. That would clearly suggest that it was the common intention of the parties that the disputed way was to be used as a church way. Interestingly enough throughout the course of his testimony, Roop Narinesingh kept referring to the disputed way as Eminthra's yard. That he would have to drive through Eminthra's yard to get to the Temple. That only serves to confirm that at an earlier point in time, the Beharrysingh family recognised this disputed way as being the way designated by the family to get to the Temple. Indeed the very manner in which the family house on Lot No 11 and Charles Leslie Gobinsingh's house on Lot No 9 were initially constructed, lends support to what I am saying, for the... aerial photograph (...) shows that at that time, Eminthra Rampersadsingh's wall was a mere... feet long. That would seem to suggest that the disputed way was, even though the legal title to lot No 9 had changed hands, still thought of by all concerned to be an extension of the family house on Lot No 11.

There was some attempt, clearly unmeritorious, by the Defendant and Roop Narinesingh to portray the membership of this Temple as being restricted solely to family members, that is, as being restricted to the descendants of Beharrysingh. Roop Narinesingh also gave me the impression that he was not willing to disclose how many times he had been to the Temple over a 50 year period. He also sought to give the impression that he did not know whether there were any prayers at the Temple, that he knew nothing about the Temple having any religious activities at nights, and that he did not know what the Temple hall was used for!

Astoundingly, in answer to the Court, Roop Narinesingh testified that he had heard the name Mahilla Subha before, and that the Mahilla Sabha was from Green Street, but he was unable to say what the name Mahilla Sabha was used for. He also referred to the Temple as Beharrysingh Temple and claimed to have only known that this Temple was called the Green Street Temple about a year or two ago. It is difficult for me to believe that someone attending that Temple over a 50-year period would not have had that kind of knowledge.

I believe I can take judicial notice of the fact that this temple has been called the Green Street Temple for many years. Additionally there is a sign on Green Street that refers to the Temple as the Green Street Temple. Further the Temple was constructed in such a way as to suggest that Green Street was the designated point of entry to the Temple. On the court's visit to the locus in quo steps were obviously taken by the plaintiff to provide access to the Temple via Gobinsingh Drive. These measures were understandably temporary in nature so that religious activities could have been continued until the determination of these proceedings.

It seems to me that Roop Narinesingh has tried to keep to himself any facts which could lead the Court to come to the conclusion that Hindus of the Tunapuna community, and not only family members, have attended and at present attend this Temple. That is, of course, an untenable proposition.

Sita Maharaj testified that the disputed way was originally a track but was paved by Moonan. She could not remember when it was paved, but testified that it was paved some time in the early 1980's.

However she went on to testify that she was not involved in the paving of the disputed way, that members of the Temple caused that disputed way to be paved when she was only a child. That clearly could not have been in the 1980's. Roop Narinesingh testified that he began driving along the disputed way from around 1948. And the 1975 aerial photograph (PW4) shows a paved driveway with a vehicle parked very close to the Temple entrance.

I therefore find as a fact that the disputed way was paved long before 1980. Sita Maharaj testified that the members of the Temple were responsible for the paving of the disputed way. I accept her testimony in this regard as it seems consistent with what the other witnesses in this matter are saying. Roop Narinesingh himself admitted giving Rajmath Seepersad monies for the Temple. That clearly indicates that the Temple solicited donations from the public for improvements to the Temple.

That would also suggest that the members of the Temple, including the defendant and his parents would, to the knowledge of the defendant's predecessors-in-title (who were also members of the Temple), be soliciting funds for the express purpose of the paving of the disputed way leading all the way up to the Temple. Clearly the defendant's predecessors-in-title would have been aware that the purpose of paving the disputed way was, in addition to members going to and from the Temple, also to facilitate the passage of vehicles to and from the Temple along same. Indeed the evidence of Sita Maharaj is that the Temple is also used to host weddings [and cars are accustomed driving all the way up to the entrance. If not, then Roop Narinesingh drove along the disputed way, and the car on the aerial photograph would allow you to say that right of way for vehicles.]

Perhaps I ought at this stage to say something about Gobinsingh Drive which seemed to have been paved only within recent times and which only recently acquired the name. It is highly improbable that Gobinsingh Drive could ever have been the principal entrance to the Temple although there is evidence to suggest that Gobinsingh Drive was also used on occasions to gain access to the temple by Hindus of the Tunapuna community. In this case I also accept the evidence which suggests that some people in earlier times would have used the vacant lands to the North of the Temple to gain access to same.

I say that Gobinsingh Drive could not have been the principal entrance to the Temple for many reasons. Firstly there is no reference in the 1927 deed aforesaid to that road reserve running through the 4-acre parcel of land. Sita Maharaj testified that it was only recently paved. Additionally even up to the present time there are no electricity lights on Gobinsingh Drive. Gobinsingh Drive, even at the present time, is such a dark and desolate road, that it would test the limit of the faith of members to travel along that road at night. Further Gobinsingh Drive is approximately 370 feet long, but only about 9 feet at its widest point.

That would mean that only one car can pass on this narrow road. It is unlikely that cars would have travelled East along Gobinsingh Drive to that Western gate of the Temple whenever there were religious activities. There being no place to turn, it would mean that cars would have to reverse the entire 370 feet to get to Tunapuna Road. It would also prove extremely inconvenient for residents wishing to get in and out of Gobinsingh Drive. Finally, on the Court's visit to the locus in quo, the access to the Temple from Gobinsingh Drive seems to have been hastily improved upon to overcome the impossibility of accessing the Temple from the disputed way due to the actions of the Defendant herein.

Sita Maharaj testified that around October, November 1994 she attempted to go to the Temple through the disputed way but observed that the gate was locked. She was then informed by the Defendant that no one could pass through that gate again, that from now on that gate would be locked. She told the Defendant that the Temple had "pooja" that morning, but the Defendant told her he did not want "any car and thing pass through the yard again." That bit of testimony does seem to suggest that the defendant was opposed to cars driving along the along the disputed way to get to the Temple. Some support for that can be gathered from what was suggested to the Plaintiff by the defendant's attorney, that is, that the defendant normally left that gate open from 8.00 a.m. to 5.00 p.m. and that the defendant has never refused to open that gate while anyone had asked him on behalf of persons going to the Temple. It would therefore seem to me that the defendant's main grouse in this matter is whether or not members of the Temple can drive along the disputed way. Implicit in that concession from the Defendant is the fact that the disputed way was at all material times the entrance to the Temple.

Prior to the purchase of Lot No. 9 by the defendant in 1994, Sita Maharaj testified that she spoke to him on the night before the purchase. She told the defendant not to purchase the property because she wanted to buy it and donate it to the Temple. The defendant sought in his testimony to put a more sinister spin to the plaintiff's testimony by suggesting that the plaintiff wanted use the Temple funds to purchase same for herself or alternatively to purchase same for her daughter, I reject the defendant's evidence in this regard. The plaintiff did not strike me as the kind of person who would do such a thing. The defendant's deliberate attempt to create such an impression would also affect his credibility.

With respect to this purchase of Lot No. 9, the defendant testified in cross-examination that he made no enquiries when he was purchasing the said property as to the type of access the Temple had across same as he did not see the necessity to do so. It is easy to understand why the defendant adopted such a course as the defendant was at all material times aware that the disputed way was used as a church way.

LAW

An easement can loosely be defined as some right which a person has over land which is not his own. It follows that an easement, being annexed to the dominant tenement, cannot be separated from it by being assigned to a stranger. See **Gale on Easements 16th edition, paras 1 -- 05 and 1 -- 09**. The Mahilla Sabha in the instant case is claiming a right to use the disputed way situate on the Defendant's lands.

Dr. Seepersad argues that the Mahilla Sabha being an unincorporated body of persons is not recognized in law as a legal entity and cannot hold an estate in land.

But **the use** of the dominant tenement, in this case the lands on which the Temple stands, (Bhadmaneah) is not confined to the dominant owner personally. The grant of an easement normally operates as a grant of the right to such user as the enjoyment of the dominant tenement reasonably requires, and this includes user by strangers: **Gale ibid. para 1 -- 09**. In considering who may sue for the disturbance of an easement, Gale ibid. para 14 -- 18 makes it absolutely clear that in the case of an easement which has been proven to exist, it would seem sufficient if the plaintiff has a proprietary or possessory

right to the dominant tenement and, pursuant to that right, a right to the benefit of the easement. Furthermore, it is sufficient in some cases, for example in the case of the plaintiff's home, for the plaintiff to be an occupier of the dominant tenement, and to have, pursuant to his right of occupancy, a right to the benefit of the easement.

It would follow that the Mahilla Sabha, the occupiers of the Temple, would be entitled to the use of the dominant tenement and to the [benefit] of any easement over the servient tenement and would be able to commence an action against anyone interfering with its right to enjoyment of same. At one point in her evidence Sita Maharaj testified that Bhagmaneah was the owner of the lands on which the Temple stands. However she went on later to testify that Bhagmaneah donated those lands on which the Temple stood to her great grandfather. I do not attach any importance to the difference in testimony as Sita Maharaj struck me as someone of reasonable intelligence but a lay person nevertheless. I gather from her evidence that no formal transfer of the Temple lands has ever been affected. In any event what is clear is that there is no dispute that the Temple lands are in the occupation of the members of the Temple.

The evidence establishes that the 4-acre parcel of land was owned firstly by Beharrysingh. In 1927 Bhagmaneah became the owner of same.

In 1938 Bhagmaneah conveyed Lot No. 9 to Charles Leslie Gobinsingh without expressly reserving any right to pass along the disputed way. Thereafter the Mahilla Sabha continued carrying on its religious activities as it did before, with the principal access to the Temple being along the disputed way situate on lot No. 9. That position continued even with Charles Leslie Gobinsingh's successors-in-title until 1994 when the Defendant, on acquiring title to lot No. 9, prevented the Plaintiffs from passing along the disputed way.

In Lyttelton Times Co. v Warners [1907] A.C. 476, a lessor was carrying on activities on property retained by him in exactly the same manner as both parties at the time of the grant contemplated that he should do, neither more nor less, and under those circumstances the Court implied a reservation of the right to do it, notwithstanding that it occasioned a nuisance to the grantee.

The principles applicable to the creation of easements by implication were set out in **Pwllbach Colliery Co. Ltd. v Woodman** [1915] A.C. 634. Lord Parker of Waddington in delivering one of the opinions of the House of Lords which was (subsequently endorsed by the House of Lords in **Somvots Investments Ltd. v Secretary of State** [1977] 2 All ER 385, stated:

“ The right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in which an easement can be granted by implication may be classified under two heads.....

The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted **or some land retained by the grantor is to be used**. See **Jones v Prichard** [1908] 1 CH. 630 and **Lyttelton Times Co. v Warners** [1907] A.C. 476. But it is essential for this purpose that the parties should intend that the subject of the grant **or the land retained by the grantor should be used in some definite and particular manner**. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use.” [Emphasis Added.]

It seems to me that at the time of the conveyance in 1938 by Bhagmaneah to Charles Leslie Gobinsingh, the parties intended that the religious activities of the Temple would be continued and that the disputed way was to be used as the means of accessing the Temple. In my view anything short of that would have been, to the understanding of the parties, a heresy. Furthermore, the occupiers of Lot No. 9 were all members of the Temple and acquiesced in funds being raised by the Temple for the subsequent paving of

the disputed way. It is noteworthy that even when title to lot No. 9 changed, successors-in-title to Charles Leslie Gobinsingh never objected to the disputed way being used for the purpose of going to and from the Temple. (Expand.)

It also seems to me that there was at least a tacit recognition by the defendant of the existence of this right of way for the use of the members of the Temple when he erected a garage at the back of lot no. 9 for his tenants, thereby not hindering access by anyone along the disputed way.

In the circumstances I am of the view that the Mahilla Sabha, in its capacity as occupier of the Temple property, is entitled to the benefit of the right of way along the disputed way situate on lot No. 9. By preventing the members of the Mahilla Sabha from using the disputed way, the defendant has unlawfully interfered with their right to use same. The remedy by act of law for the disturbance of an easement is by an action for nuisance: **Gale *ibid.* para 14 -- 15; Paine and Co v. St. Neots Gas and Coke Co [1939] 3 All E.R. 812,823.** The Court may also grant an injunction.

I think that I ought to extract an undertaking from the Plaintiffs to shut the gate at the entrance to lot No. 9 after their religious activities are concluded on each and every occasion. [What about cars?]

[BUT WITH CARS: Should the disputed way be kept clear.] can I make a declaration in the instant case? That would mean that I am declaring that the plaintiffs are entitled to an easement. Does that mean that I am saying that Bhagmaneah donated the lands to them? Can I make that declaration without the estate of Bhagmaneah being present? In Jagroo no dispute as to ownership.

CUSTOM

I should indicate that had I not being of the view that the Mahilla Sabha were entitled to the benefit of a right of way by implication, I would have been prepared, in the alternative, to hold that the disputed way was, and is, by immemorial custom a

churchway for Hindus of the Tunapuna community to go to and from the Temple. I had already found that Hindus of the Tunapuna community have, since 1858, used the disputed way to get to the Temple. Does that usage from 1858 create a customary right of way? A custom is really local common law within a particular district. **Halsbury's 4th edition, Vol 12, Custom and Usage, para 401** defines custom:

"A custom is a particular rule which has existed either actually or presumptively from time immemorial and obtained the force of law in a particular locality although contrary to, or not consistent with, the general common law of the realm. As regards the matter to which it relates, a custom takes the place of the general common law and, in respect of that matter, is the local common law within the particular locality where it obtains. Custom is unwritten law peculiar to particular localities":

Both parties agree on the essential attributes of a custom: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect; and (4) it must have continued without interruption since its immemorial origin: **Halsbury's ibid., para 406.**

Dr. Seepersad is submitting that conditions (1) and (3) have not been satisfied for the creation of a custom. Dr. Seepersad is contending firstly that the custom must have existed since time immemorial. Secondly that there can be no custom where the nexus is not geographical, that the custom must for example be limited to a particular locality, such as the inhabitants of a parish. As that is one of the essential attributes, a custom cannot exist where the bond is religion, so that Sita Maharaj as the trustee of the Mahilla Sabha cannot claim a customary right.

In England the position is that every custom must be immemorial, that is, it must have been in existence from a time preceding the memory of man. That date has been fixed as 1189, the commencement of the reign of Richard I: **Halsbury's ibid. para 407.** But it is my view that it is not appropriate to simply import English local common law, for that is

what custom really is, into Trinidad and Tobago and say that is our custom, our local common law, the law that is applicable to a particular locality.

One obvious reason why English common law is not applicable is that our recorded history probably only dates back to around 1492. That would make it (nearly) impossible to establish the immemorial existence required under English law. The question therefore arises as to the usage required in Trinidad and Tobago to satisfy the requirements of a custom. I do not think it is appropriate to provide a general timeframe. Much will depend on the nature of the custom sought to be established and the time for which it has been in existence. It seems to me that as one of the basic attributes of a custom is its antiquity, indeed antiquity is the soul of custom, then I think that in the circumstances of this case, provided that the custom is sufficiently ancient and sufficiently acted upon, and satisfies the other essential attributes, I ought to uphold the validity of the custom. The Indian text, **Kattiya Law of Easements and Licences, 8th edition**, at page 468 suggests a three-pronged test:

"In England, a custom, in order to be ancient, must have been used so long that the memory of man runneth not to the contrary. But in India there is no such inflexible rule and **the question whether an alleged custom would be regarded as ancient or not depends on the nature of the custom, the time for which it has been in existence, and the number of instances in which it has been acted upon.**

It is not possible to have direct and positive evidence in many a case for the entire period of immemorial enjoyment of the customary right claimed. It is not also necessary that the custom should be traced back to the whole of the time required to make it immemorial; and it is not the essence of the rule that its antiquity must in every case be carried back to a period beyond the memory of man. The question should be decided upon the circumstances of each case, and no definite rule should be laid down as to the length of user of enjoyment which must be proved." [Emphasis Added.]

Valuable guidance on the essential attributes of a custom is to be found in the Indian case of **Prannath Kundu v. Emperor** (1929) I.L.R. 57 Calc. 526. There it was held that the English common law rule of immemorial user was not required to establish a custom in India. It was sufficient if the court was satisfied of its reasonableness, certainty and existence for a sufficiently long time to have become the customary law of the particular locality, the user being neither permissive nor fraudulent.

I have already found that the Hindus of the Tunapuna community have since 1858 used the disputed way to get to the Temple. I am of the view that that period satisfies the requirement of antiquity as when one considers that the history of East Indian indentureship in Trinidad and Tobago only began in 1845, then it would seem that Trinidad and Tobago was still in its embryonic stage of development in 1858. Indeed the history of East Indian indentureship could be regarded as the history of a people coming to a foreign land, under-populated, bringing with them their "jhagi bundle", religious beliefs, cultural traditions and work ethic, laying the foundation, in tandem with others of that era, to Trinidad and Tobago as we know it today.

With respect to Dr Seepersad's second submission that Sita Maharaj as the trustee of the Mahilla Sabha cannot claim a customary right, it seems to me that the facts of this case reveal that Hindus of the Tunapuna community have, since 1858, used the disputed way to get to and from the Temple. It is clear that the inhabitants of a community can claim a customary right. Indeed a customary right, unlike an easement, exists for the benefit of the inhabitants of a locality rather than to accommodate a particular piece of land: **Jackson, The Law of Easements and Profits, page 25.**

So that a custom for "all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in the close of A at all seasonable times of the year, at their free will and pleasure," was held to be good in **Fitch v. Rawlins** [1795] 126 E.R. 614. Similarly in **Abbott v. Weekly** 83 E.R. 357, a custom for the inhabitants of the vill to dance in the plaintiff's close for their recreation, was held to be good.

In the leading authority of **Brocklebank v. Thompson** [1983] 2 Ch. 344, where a path was used as of right for as long as living memory extends by the inhabitants of the

parish of Irton going on foot to or from the parish church, it was held that the path was a churchway by custom for the inhabitants of the parish.

A subset of that larger group can also claim a customary right. So in Mercer v Denne [1904] 2 Ch. 534, two fishermen sought a declaration that they and all other inhabitants of Wolmer carrying on the trade or business of fishermen were entitled as of right at all times necessary or proper for their trade or business to spread and dry their nets on a piece of shingle or beach. That Court held a custom for fishermen to spread their nets to dry on the land of a private owner at all seasonable times is a good and valid custom.

By analogy it seems to me the “Hindus of the Tunapuna community” satisfies the certainty test.

The defendant having prevented the members of the Temple from passing along the disputed way to get to the Temple, I would have been prepared to grant an injunction restraining the defendant, his servants or agents or otherwise howsoever from disturbing the Mahilla Sabha, its servants and/or invitees and/or licencees in the exercise or enjoyment of their right to use the disputed way as a churchway.

DATED this 30th day of July, 2003.

.....
PRAKASH MOOSAI

JUDGE