1978 *Present :* **Samarakoon, C.J., Thamotheram, J., and Wanasundera, J.**

CHELLAPPAH ARIYARATNAM and ANOTHER, Plaintiffs-Appellants

and

CHELLIAH SUBRAMANIAM and FOUR OTHERS, Defendants-Respondents.

S. C. 197/71 (F)—D. C. Jaffna, No. L. 2827

Servitude--Action for declaration—Pled of abandonment and non-user--Ingredients to be established by the party who takes such a plea—Mere inaction by owner of dominant servitude insufficient—Non-user for third of a century.

The plaintiffs-appellants instituted an action for a declaration that they were entitled to certain servitudes. The defendants-respondents contended that since 1942 when the plaintiffs' predecessor in title who was also the owner of the adjacent land had bought this land he abandoned his rights in the land in suit as these rights were also available in the adjacent land. The learned District Judge while holding that the appellants were entitled to the said servitudes on the title they pleaded, dismissed the action on the basis that the plaintiffs-appellants and their predecessor in title had since 1942 tacitly abandoned the exercise of these rights or had lost them by non-user.

Held : (1) That the learned District Judge had erred when he came to the conclusion that these rights were lost by the plaintiffs-appellants and their immediate predecessor in title by reason of waiver. This was not a case of express waiver nor did the conduct of the respondents during the relevant time show that they themselves had inferred a waiver or surrender of those rights on the part of the appellants.

(2) That the ground of non-user relied on by the respondents did not arise as the period under the Roman Dutch Law was a third of 100 years and even assuming that such law is applicable here, and that non-user was a valid ground, such period had not elapsed by the time the plaintiffs-appellants filed this action.

Cases referred to :

Senathirajah v. Marimuttu, 53 N.L.R. 5.
Nagamani v. Vinayagamoorthy, 24 N.L.R. 438.
Fernando v. Mendis, 14 N.L.R. 101.
Rajentheram v. Sivarajah, 66 N.L.R. 324.
Margate Estates Ltd. v. Urtel (Pty.) Ltd., (1965) 1 S.A.L.R. 278.
King v. Finegan & another, (1953) 3 S.A.L.R. 412.
Braun v. Powrie, (1903) 20 S.C. 476.
Edmeades v. Scheepers, (1880) 2 S.C. 334.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, Q.C., with *C. Chellapah* and *I. Hasheem*, for the plaintiffs-appellants.

P. Somatilakam, with *S. Ruthira Moorthy*, for the defendants-respondents.

March 3, 1978. WANASUNDERA, J.

In this action, the 2nd plaintiff-appellant, (her husband is joined as the 1st plaintiff), as owner of lot 1 depicted in Plan No. 3379 marked "X", has asked for a declaration that she is entitled to the use of the 9 ft. wide pathway shown as lot "A" in the said plan and for her share of the water in the well, way, and water-course situated on the adjacent land to the west, and belonging to the 2nd and 3rd respondents. These features are also indicated in the plan.

Prior to 1905, the lands of the plaintiffs and the defendants constituted one single entity of an extent of 15 3/8 lms. and was owned in common by three brothers : Shanmugam Ponnambalam, Shanmugam Arumugam, and Shanmugam Vaithilingam. In 1905, by deed P1, the land was amicably partitioned by the brothers into three equal lots of 5 lms. 2-1/4 kls. each. The plaintiffs' predecessor-in-title, Shanmugam Vaithilingam, was allotted lot 1, which is the one on the east. The middle lot where the well is situated, now owned by the 2nd and 3rd defendants, was given to Shanmugam Arumugam ; (the 1st defendant is the husband of the 2nd defendant). The third lot on the west was given to Shanmugam Ponnambalam and it has now devolved on the 5th defendant ; (the 4th defendant is her husband).

In P1, the plaintiffs' allotment is described as follows :—

"The said extent of 15-3/8 Lms. V.C. Of this, 1/3rd share on the east in extent 5 Lms. V.C. and 2-1/4 kls., with the palmyrahs contained herein, and cultivated plantations, bounded on the east by land Puddani belonging to Suppar Sinnathamby, on the north by land Puddani belonging to Kanapathy Aiyar Muttaivar, on the west by the frontage of the path-way-ground set apart by us newly at present out of the said entire land of 15-3/8 Lms. V.C. to have access to and from the lands (lots) divided and allotted hereinbelow and by the land Puththani allotted hereinbelow to the 2nd named person the said Shanmugam Arumugam, and on the south by the land Puththani belonging to Sinnathangam wife of Sangarapillai. The whole of the land contained within these boundaries and all those contained therein and the share of water appurtenant hereto out of the well lying in the land on the west allotted to the 2nd named person the said Sanmugam Arumugam and the right of use of the watercourse and way and the right of the said path shall belong to the 1st named person the said Sanmugam

Vaithilingam. Valued at Rs. 200."

In the description of the other two lots dealt with in the deed, there is a similar reference to the well and the pathway. It would be observed that in all the three descriptions the path falls outside the limits of the three specific allotments, and it is to be held by the three persons in common for their use as a pathway.

It was the position of the defendants that, although deed P1 had made provision for the rights claimed by the plaintiffs, such rights had not been demarcated on the ground, nor were those rights exercised by the parties or their successors-in-title.

After trial, the learned District Judge dismissed the plaintiffs' action with costs. While holding that the plaintiffs were entitled to the said path and the share of the water in the well, on the basis of the title pleaded in the plaint, he however came to the finding that the plaintiffs-appellants and their predecessors-in-title, since 1942, had tacitly abandoned the exercise of these rights or had lost them by non-user. The learned trial Judge has dealt with the matter on the basis that all these were servitudes. The authorities that have been cited both before him and before us also relate to servitudes.

Mr. Ranganathan for the appellants challenged this finding both on the facts and on the law. The sole point that is before us is whether on the facts placed before the court, the learned trial Judge had come to a correct finding on this issue.

The learned trial Judge was of the view that these rights had been exercised by the respective owners from 1905 till 1942. In 1942, the 2nd plaintiff's father, from whom the 2nd plaintiff obtained title on a dowry deed, had bought this land. At that time the 2nd plaintiff's father already owned and possessed the land immediately to the north of this land and adjacent to it. This northern land had access to the main road on the North. It also had a well. These amenities had been used by the plaintiff's father for a considerable time before he bought Lot 1 in Plan "X". Although the 2nd plaintiff's father had, in terms of this purchase, the rights and servitudes now claimed from the adjoining land, he continued to use his former access to the north and the well in the northern land.

Upon a careful consideration of the evidence, the learned District Judge was not prepared to accept the evidence of the 2nd plaintiff's father that this path had been used by him or by the plaintiffs in recent times. His finding is that it had never been used since its purchase by this witness in 1942.

The learned trial Judge has found that the 2nd and 3rd defendants, who had a cigar manufacturing plant on their premises, had, since 1944, been in the habit of leaving the waste tobacco veins towards the south-east corner of their land and on and about the path. The Grama Sevaka who visited the land in 1964 saw ashes at certain points on Lot "A", which indicated that the 2nd and 3rd defendants were in the habit of burning such tobacco waste on the path. In 1964, the 2nd and 3rd defendants attempted to plant a coconut plant. There was an immediate response from the plaintiffs, who made a complaint about this to the Grama Sevaka. The 2nd and 3rd defendants have also claimed that in 1964 they had cut a coconut tree and and a palmyrah tree which were growing on Lot "A". The present action was filed in 1966.

Having regard to the nature of these acts and their isolated instances, I am inclined to the view that this evidence would be insufficient to establish adverse possession of Lot "A" by the 2nd and 3rd defendants. In so far as the path is concerned, the defendants themselves have been using this pathway for entry into and egress from their lands at all times material to this action. Since this portion of the land is owned in common and they would be in the position of co-owners, this cannot give rise to any adverse possession or prescriptive possession on their part, *Rajentheram v. Sivarajah,* 66 N.L.R. 324.

One item of evidence that was stressed by counsel for the respondents was the action by the plaintiffs and their immediate predecessor-in-title in fencing with barbed-wire the whole of their western boundary, which had the effect of closing the entrance to the path from their land. Mr. Ranganathan submitted that this act was, at the most, equivocal and does not show a clear intention on the part of the plaintiffs and their predecessor-in-title to abandon their rights, or an intention not to use them. He submitted that during this period the plaintiffs and their predecessor-in-title had no occasion to exercise their rights since they were making use of the amenities provided by the adjacent land to the north. In this state of affairs, the plaintiffs-appellants and their predecessors took the precaution of closing the entrance into their land in order to protect it. The fact that these two lands had not been amalgamated and the plan shows a live fence over 20 years old between the two lands, shows that Lot 1 continued to exist in its own right. This fact is also of some assistance to the plaintiffs-appellants. Mr. Ranganathan also relied on the finding of the learned District Judge that the deeds relied on by the plaintiffs-appellants, including P4 which referred to the servitudes and was executed as late as 1957, constituted

a sufficient devolution of title in respect of these lands including the servitudes, and the plaintiffs-appellants were legally entitled to them by virtue of this chain of title. There is also an additional factor that in P6, which is the the deed executed by the 5th defendant in 1970, a reference to the path continues to persist. These circumstances tend to negative that a waiver of these rights had taken place either expressly or by implication.

Two of the modes by which the right of servitude could be lost in the Roman-Dutch law are: (1) Relaxation, Release or Waiver, and (2) Non-user (Voet, 8.6.5 ; Grotius, 2.37.3 & 4 ; Van Leeuwen's Commentary of the Roman-Dutch Law, 2.22.3 ; Censura Forensis, 1.2.14.45 ; Walter Pereira's Laws of Ceylon (2nd Edn.) 501 ; and Lee's Introduction to Roman-Dutch Law (5th Edn.) 175).

The onus of establishing such waiver or abandonment is clearly on the respondents and an intention to waive a legal right would not be lightly presumed by the court. They must show that the plaintiffs-appellants and their predecessor-in-title had, with full knowledge of their rights, decided to abandon them, whether expressly or by conduct plainly inconsistent with an intention to enforce them. This is not a case of an express waiver.

The Roman-Dutch law authorities cited by counsel seems to contemplate three situations in regard to implied waiver or abandonment. First, when two servitudes have been owed at the same time, one of which is principal and the other accessory, and if the principal one is relaxed, the accessory is also deemed to have been relaxed. Secondly, the servitude could be lost by the dominant owner granting to the servient owner some right which is inconsistent with the rights conferred by the servitude and which is obstructive of it. Thirdly, a waiver could also be inferred where the owner of the servient tenant, without permission, whether express and implied, does some act in defiance of the rights of the dominant tenant. Voet and Van Leeuwen appear to suggest that if the dominant owner stands by and allows the owner of the servient tenant to do some work or put up a building or obstruction, the dominant owner would not be allowed to enforce his rights by compelling the removal of the obstruction, but will have to be content with the recovery of damages. *Edmeades v. Scheepers,* (1880) 2 S. C. 334 ; *Braun v. Powrie,* (1903) 20 S. C. 476 ; *King v. Finegan and Another,* (1953) (3) S. A. L. R. 412 ; *Margate Estates Ltd. vs. Urtel (Pty.) Ltd.,* 1965 (1) S.A.L.R. 273 ; *Fernando v. Mendis,* 14 N.L.R. 101 ; and *Nagamani v. Vinayagamoorthy,* 24 N.L.R. 438.

The defendants-respondents have virtually relied on the mere inaction on the part of the appellants in proof of their case. It is not their case that there was a communication of any express intention by the plaintiffs-appellants to the effect that they were waiving their rights. The conduct of the respondents during the relevant time does not show that they have been exercising or asserting any significant rights on their own, consequent on any conduct on the part of the appellants from which they have inferred a waiver or surrender of those rights.

The other ground relied on was one of non-user. In the Roman-Dutch law, the period required was a third of a hundred years (Voet, 8.6.7 ; Van Leeuwen, 2.28.4 ; Grotius, 2.37.7.). Mr. Ranganathan submitted that this ground no longer obtains in this country having regard to the provisions of the Prescription Ordinance, which provides the only means of divesting title in these circumstances. There is a passing reference to this ground, however, by Nagalingam, J. in *Senathirajah v. Marimuttu*, 53 N.L.R. 5. It is unnecessary for me to decide the point in this case for even assuming that the Roman-Dutch law is applicable to this case, the period of non-user required by that law had not elapsed by the time the plaintiffs-appellants filed this action.

In all the circumstances of this case, I am of the view that the learned trial Judge erred when he came to the conclusion that these rights were lost by the plaintiffs-appellants and their immediate predecessor-in-title by reason of waiver or non-user. I would therefore set aside the judgment of the learned District Judge and enter judgment for the plaintiffs as prayed for with costs both of appeal and of the lower court.

SAMARAKOON, C. J.—I agree.

THAMOTHERAM, J.—I agree.

Appeal allowed.