1949 *Present:* **Nagalingam J.**

SENATHIRAJA, Appellant, *and* MARIMUTTU, Respondent

S. C. 47—C. R. Mallakam, 14,009

Servitude—Right of way—Lost grant—Circumstances when it may be inferred—Burden of proof—Location of right of way—Right of owner of dominant tenement to elect route.

In an action for declaration of title to a servitude of right of way the plaintiffs were unable to establish affirmatively an actual grant but produced a series of deeds, one of which was ninety years old, bearing reference to the alleged right of way.

Held, that in the circumstances it was proper to draw an inference of a lost grant.

Held further, (i) that the plaintiffs, having established their legal right to the servitude, were under no obligation to establish further any prescriptive title. It was for the defendants to establish either an abandonment by the plaintiffs of their right or the loss of it by non-user.

(ii) that when a servitude of right of way has been granted and no particular portion of the servient tenement has been indicated over which the servitude may be exercised, the owner of the dominant tenement has the right of election as to the portion on which he will exercise his right of servitude.

APPEAL from a judgment of the Court of Requests, Mallakam.

Lot A and lot B, which belonged to the plaintiffs and the defendants respectively, were at one time contiguous portions of the same land. In a claim made by plaintiffs for a right of way over lot B plaintiffs were not able to establish affirmatively an actual grant by the owner of the defendant's land or by a common owner of both the allotments. Plaintiffs, however, produced a deed at least ninety years old which referred to

the alleged right of way. The servitude was referred to in some later deeds also. It was possible in the circumstances to draw an inference of a lost grant and to hold that it was either the owner of lot B or the common owner of both lots A and B who had made the grant.

S. J. V. Chelvanayakam, K.C., with *S. Thangarajah*, for the plaintiffs appellants.

C. Vanniasingham, with *S. Sharvananda*, for the defendants respondents.

Cur. adv. vult.

December 2, 1949. NAGALINGAM J.—

This is an appeal from a judgment of the learned Commissioner of Requests of Mallakam dismissing plaintiffs' action for a declaration that they are entitled to a right of way over defendants' land in order to get to a well standing further North of the defendants' land. The plan P1 filed of record shows in detail the various allotments belonging to the parties and the right of way claimed. The plaintiffs' land comprising of lots 1, 2 and 3 in the plan lies to the South of the defendants' land and is separated from it by a live fence. To the North of defendants' land is the land of one Annammah and to the North of that is another land belonging to one Thamotheram and others on which the well referred to above is situate.

The title of the plaintiffs is based upon a series of deeds commencing with a deed P8 dated as early as 1859. This deed expressly conveys to the transferee thereunder who is a predecessor in title of the plaintiffs *inter alia* share of the well lying to the North together with the usual watercourse to lead water to the land and way. This description is continued in all the later deeds of the plaintiffs down to the last deed P8 of 1933. It is not in dispute that the well referred to in the deed is the well depicted in Plan P1 and referred to as the well standing on Thamotheram's land. The defendants' land also bears the same name as that of the plaintiffs, namely, Akkathanai, and there are words in the defendants' chain of deeds which lead to the inference that the defendants' land and the plaintiffs' land formed parts of a bigger land of that name. In the deed P9 of 1876 which is the earliest deed relating to the defendants' title, the defendants' land is described as "Akkathanai *Northern portion* in extent ten lachams." The description "Northern portion" is significant and fully warrants the inference that plaintiffs' and defendants' land formed parts of a bigger allotment, for the plaintiffs' land lies immediately to the South of the defendants' land. The defendants themselves are entitled to a share in the said well and their land is entitled to servitudes of way and watercourse over the lands intervening between their land and the well. It would therefore appear that when the entirety of the land comprising the allotments belonging to the plaintiffs and defendants was divided, the plaintiffs' portion being the Southern portion was granted a right of servitude over the remaining Northern portion as well as the lands lying further North in order to enable the owners of that portion to exercise their

rights to the share in the well. That this right of servitude in favour of the plaintiffs' land was recognised by the defendants' predecessors in title is clearly established from the deeds P10 of 1891 and P11 of 1897, by which Ujitheenam, the transferee under P9 of 1876, executed mortgages in respect of the defendants' land. In both those mortgages, apart from reciting the fact that the land mortgaged had a share of the well standing towards the North and was also entitled to the usual watercourse and way, expressly states that the mortgage was exclusive of the usual watercourse and way to lead water to *the Southern lot through this land*. The Southern lot referred to, there can be little doubt, is plaintiffs' land. It is therefore clear that the plaintiffs' deeds expressly convey to them the right of servitude of way and watercourse over the defendants' land to enable them to get to the lands to the North of the defendants' land and beyond to the well.

It is true that the plaintiffs have not been able to establish affirmatively an actual grant by the owner of the defendants' land or by a common owner of both the allotments comprising the plaintiffs' and defendants' lands. But in view of the fact that reference to the servitude is made in a deed at least ninety years old, it is proper to draw an inference of a lost grant and to hold that it was either the owner of the defendants' land or more probably the common owner of the entirety of the land comprising the plaintiffs' and defendants' lands who had made the grant.

The learned Commissioner finds that certainly for over thirty years prior to 1940, there was no one residing on the plaintiffs' land and that therefore there was no need for the exercise of the rights of servitude or to the enjoyment of the rights in the well. But on the other hand there is evidence which shows that in 1940 a house was put up on the plaintiffs' land and that the water that was necessary for the construction of the building was taken from the aforesaid well and over the defendants' land and that after the house was occupied the residents used the well for their domestic purposes by making use of the defendants' land till October, 1945, when they were obstructed. The defendants admit the user of the land for these purposes but state that as the occupants were relatives of theirs they had granted them permission to do so. Seeing that the plaintiffs, and therefore their licensees, had a legal right to the servitude claimed, it is difficult to believe that any permission was asked for or granted. The truth of the matter, as is clear from the evidence, appears to be that the plaintiffs and defendants fell out over a claim asserted by the defendants to a garden well that stood in the land called Thambiappulam but which claim was resisted by the plaintiffs, and the plaintiffs say that it was in consequence of that dispute and in retaliation it was that the defendants obstructed the right of way that had been used since 1940 by the residents of the plaintiffs' land.

While the learned Commissioner finds that the plaintiffs are entitled by virtue of their deeds to a right of servitude, he holds that the plaintiffs have not established a prescriptive right thereto. But this is an erroneous approach to the determination of the rights of parties. The

plaintiffs having established their legal right are under no obligation to establish further any prescriptive title. It was for the defendants to have established neither an abandonment by the plaintiffs of their right or loss of it by non-user. But the defendants did not put forward any such pleas in their answer, for they had denied the existence of any servitude over their land and were content to present their defence on that footing; even when evidence was given not only of the plaintiffs' deeds but even of their own, indicating the existence of the servitude claimed, they did not deem it their duty to frame additional issues tending to establish that the plaintiffs, though they may have been entitled to the right claimed by virtue of their deeds, they had lost the right either by abandonment or by non-user. As the case stands at present, it must be held that the plaintiffs have established their right to the servitude claimed by them. The question is whether the case should be remitted to enable the defendants to put forward either of these pleas as urged by Mr. Sharvananda. There is already on record some testimony of a conflicting nature in regard to these questions and I do not think it advantageous or satisfactory that oral evidence should now be permitted to be led by the one side or the other in an attempt to establish new positions which had never been taken during the course of the whole of the proceedings in this case.

There remains for consideration the further question as regards the location of the right of way claimed by the plaintiffs. It would be noticed that the deeds to which reference has already been made are of no assistance in regard to this matter. The plaintiffs claim the right of way along the Eastern boundary of the defendants' land over lot 4 in plan P1. The principle of law applicable to a case where there is no grant of the servitude along a specified part of the servient tenement is stated by Nathan[1] thus :

> " When a servitude conferring rights of way, water rights or any other rural servitude has been unconditionally granted over the land or bequeathed by will and no particular portion of the estate has been indicated over which the servitude may be exercised, the owner of the dominant tenement has the right of election as to the portion on which he will exercise his right of servitude . . . . . This right of election is grounded on the presumption that where no particular portion of the estate is specified the whole farm is subject to the servitude."

To the same effect is voet[2]. See also the judgment of Lascelles C.J. in *Karunaratne v. Gabriel Appuhamy*[3].

It seems to me, therefore, that even assuming that the plaintiff is not in a position to show that the right of way had been granted over the Eastern portion, he is entitled by virtue of the right conferred on him by law to elect and to claim the right of way over the Eastern portion of defendants' land along lot 4.

Though I have used the term " way " in the course of this judgment, the word is not to be understood as having been used in the technical

[1] *Vol. I, 1904 ed. p. 468, sec. 710.* [2] *8. 3. 8*
[3] *(1912) 15 N. L. R. 257.*

sense of *via* but merely as a general term to indicate a path or way. The plaintiffs would be entitled to no more than a footpath to enable them to go to and from the well and to lead water from the well to their land; the footpath and the water channel must, however, run together. The plaintiffs are themselves to a large extent to blame for the dismissal of their action for they apparently seem to have contended in the lower Court that while the watercourse may lie in one direction the right of way may lie in another. This is wholly untenable. Any watercourse they claim to construct must lie along the footpath.

I therefore direct that decree be entered declaring the defendants' land to be subject to a servitude of footpath four feet wide and watercourse along the Eastern boundary of Lot 4 in favour of the plaintiffs' land called Akkathanai comprising lots 1, 2 and 3 to enable the plaintiffs, their servants, agents and licensees to make use of the well depicted in the plan P1. The plaintiffs will also be quieted in the user of the said servitude.

In regard to damages, there is no proof of any special damage sustained by them. I therefore award them nominal damages at Rs. 5 a year from 10th October, 1945, till restoration of user.

On the question of costs, in view of the presentation by the plaintiffs of their case in the lower Court I think the proper order to make is that each party should bear its own costs both of appeal and in the lower Court.

Decree set aside.