1930

Present : **Maartensz A.J.**

SUPPU NAMASIVAYAM *v.* KANAPATHIPILLAI *et al.*

92—*C. R. Trincomalee*, 736.

Right of way—Action for way of necessity—Conduct of plaintiff.

An owner of land, who by his own act deprives himself of access to a road, is not entitled to claim a way of necessity to the road over the land of another.

APPEAL from a judgment of the Commissioner of Requests, Trincomalee.

Keuneman (with *N. Gratiaen*), for plaintiffs, appellants.

Subramaniam, for defendants, respondents.

July 14, 1930. MAARTENSZ A.J.—

The plaintiffs in this action appeal from a dismissal of their action for declaration of title to a right of way from their land marked A in the plan filed of record over defendants' land which lies to the west of it.

The real issues between the parties were whether the plaintiffs were entitled to a right of way by prescription over the defendants' land, and, if not, whether they were entitled to a right of way of necessity over that land.

The land to the west and plaintiffs' land A admittedly belonged to one owner at one time. According to the plaintiff they belonged to his grandfather, Sithamparapillai Maniakaram, and his wife.

They died leaving as heirs two daughters, Tankam, first plaintiff's mother, and Valliammai.

Lot A was given to Tankam and she and plaintiff and her children lived in it for about fifty years up to about thirty-five years ago. During that time Tankam and her family used the right of way in question in going to and from the road and the well called Nagamany's well. Twenty years ago the plaintiff took up his residence on the land to the south. Where he lived in the intervening fifteen years is not in evidence.

For the last thirty-five years lot A has been given over to cultivators.—Some of the cultivators have been called to prove that they used the right of way in question during those thirty-five years. Their evidence however at best only proves that the right of way was used up to fifteen years ago. The learned Commissioner was therefore quite right in holding that there is no evidence of the use of the right of way by plaintiffs for ten years before the action was brought.

The plaintiffs in 1917 became the owners of the land to the south, and as the Commissioner observes there was no reason why the right of way should have been used by the plaintiffs or their cultivators after 1917.

Apart from the probabilities in the case the evidence of user is of a very indefinite character, and I agree with the learned Commissioner that the plaintiffs have failed to prove that they have acquired the right of way claimed by adverse user for the prescriptive period.

As regards the right of way of necessity I am clearly of opinion that the plaintiffs are not entitled to claim it. The plaintiffs, as I have stated, purchased the land to the south in 1917 and had access to the road from A over his land to the south. They donated the land to the south to their son just a year before this action was filed, and I cannot avoid coming to the conclusion that the deed of gift was executed with a view to claiming a way of necessity over the defendant's land.

I have no hesitation in holding that the owner of a land, who by his own act deprives himself of access to a road, is not entitled to claim a way of necessity over the land of another.

I dismiss the appeal with costs.

Appeal dismissed.