1960 *Present :* **Weerasooriya, J., and H. N. G. Fernando, J.**

S. NARASINGHAM, Appellant, *and* S. SINNATHAMBY and others Respondents

S. C. 167—D. C. Jaffna, 11,868/L

Tree—Leaves fallen on neighbouring land—Assertion of right by owner of tree to collect them—Maintainability—Thesavalamai (Cap. 51), Part III, s. 3.

The owner of a tree (or live fence) is not entitled to enter an adjacent land belonging to another person in order to gather the dry leaves which have fallen there from that tree.

APPEAL from a judgment of the District Court, Jaffna.

S. J. V. Chelvanayakam, Q.C., with *S. Sharvananda*, for the Plaintiff-Appellant.

E. R. S. R. Coomaraswamy, with *E. B. Vannitamby*, for the Defendants-Respondents.

Cur. adv. vult.

May 27, 1960. WEERASOORIYA, J.—

The substantial point that arises in this appeal filed by the plaintiff is whether the learned District Judge was right in holding that the defendants-respondents are entitled to the by-lane depicted as lot 2 in plan No. 38A marked X. This by-lane serves as a means of access from lot 1 (which is private land situated towards the east and appurtenant to the land of the defendants on that side) to the public lane depicted as lot 2A on the west. Immediately to the north of lot 2A is the plaintiff's land, lot 3. Along the southern extremity of lot 3 is a live fence which separates lot 3 from lot 2A and a part of lot 2. Dry leaves from this fence fall on to that part of lot 2 on which the fence abuts. The plaintiff's case, as set out in his plaint, is that lot 2 is a lane used in common by him and the other adjoining landowners and also by members of the public and that he is entitled to access to lot 2 in order to gather the fallen leaves, but since May, 1953, the defendants had prevented him from doing so on the ground that lot 2 is their private property. He filed this action against the defendants for a declaration that he is entitled to " the free and unfettered use " of lot 2 as the owner of the adjacent land, lot 3, for damages, and for an order restraining them from preventing him from gathering the leaves.

The defendants claim that lot 2 is an extension of their land on the east. According to them this land originally formed part of a larger land called Mithiyankaladdy which was dealt with on D3 of 1914 and D4 of 1915. The transferee on D4 is the father of the 2nd defendant. Both these deeds have the following recital describing the western boundary of

the land conveyed : " West by the property of Saravanamuttu Velupillai, by-lane appertaining to this land and the property of Sangarapillai Sinnathamby ". This recital is relied on by the defendants as showing that the by-lane referred to as " appertaining to this land " is the same as lot 2 and that it then formed part of the land Mithiyankaladdy. But even conceding the point, it is clear from the recital that the by-lane was *not* included in the corpus that was conveyed on D3 or D4. This is confirmed by the fact that in the subsequent action which the father of the 2nd defendant filed for the partition of the land, the by-lane did not find a place in the corpus depicted in the final partition plan P2A. According to that plan the land was divided into three lots marked A, B and C, and under the final decree (P2) lot A was declared to be the property of the 2nd defendant and her father jointly, lot C the property of the 3rd defendant and another jointly, while lot B was declared to be a lane common to all the parties. This lane is shown in plan P2A as extending to a " front lane ", which is probably the same as lot 2 in plan X. The private lane depicted as lot 1 in plan X would appear to be part of lot B in plan P2A.

Mr. Coomaraswamy who appeared for the defendants-respondents conceded that in view of this evidence he was unable to take up the position that the 2nd or 3rd defendant had established title to lot 2 in plan X. He also stated that he could not support the findings of the learned District Judge that in any event the defendants had acquired a title to lot 2 by prescription and also by virtue of the decree in D. C. Jaffna, Case No. 3,778. The plaintiff-appellant, it may be stated, was not a party to that action, which was filed by his niece Sivapakiam (whose land forms the eastern boundary of his land and has lot 2 for its southern boundary, as shown in plan X). That action was filed against the present third defendant and the father of the 2nd defendant for, *inter alia*, a declaration that lot 2 is appurtenant to the land of Sivapakiam and does not belong exclusively to the defendants. The District Judge has taken the view that under the decree entered of consent in that case the defendants were in effect held to be the owners of lot 2. But even if this view is correct, the plaintiff-appellant is not bound by that decree. Mr. Coomaraswamy submitted, however, that notwithstanding that he has conceded these matters, the plaintiff's action should be dismissed as he had failed to establish any right to the use of lot 2, either generally or for the limited purpose of gathering the dried leaves which fall on to it from his live fence.

The plaintiff relies on recitals in his deeds, the earliest of which is P5 of 1880, according to which the southern boundary of his land (lot 3) as well as the land of Sivapakiam (both of which, along with certain other extents, originally formed one land) is given as a lane. He also relies on the recitals in certain other deeds (one of which is P9 of 1909) dealing with lands to the south of lot 2 where the northern boundary is given as a lane. Mr. Chelvanayakam did not contend that these recitals are sufficient to prove that lot 2 is a public lane, but he urged that there is

ground for our holding that lot 2 is in the nature of a neighbour's road (*via vicinalis*) used in common by the adjoining land-owners as a means of access to the public lane, lot 2A. But even so, the plaintiff would appear to be excluded from the use of it as he has direct access from his land to lot 2A ; and, in my opinion, it is on this basis that the further claim of the plaintiff to be entitled to access to lot 2 for the purpose of gathering the dried leaves that fall from his live fence should be considered.

Although in his plaint the plaintiff claimed Rs. 175 as damages from May, 1953, to October, 1954, and a further sum of Rs. 50 per annum as continuing damages, resulting from the act of the defendants in preventing him from gathering these leaves, Mr. Chelvanayakam was content to accept the evidence of the 3rd defendant who placed their value at the nominal sum of Rs. 2 per annum. The learned District Judge has expressed the view that this " trivial " claim of the plaintiff is only a pretext for re-agitating a right to lot 2 which his niece Sivapakiam failed to establish in D. C. Jaffna Case No. 3,778. He also stated that a claim of this nature did not appear to have been previously made in the Jaffna Courts. I think that this statement, which is, no doubt, based on the learned Judge's wide experience of litigation in the Northern Province, may be accepted as correct.

According to the evidence of the plaintiff, the live fence consists of tulip and *kiluvai* trees, which are not fruit-bearing trees. Section 3 of Part III of the Tesawalamai Regulation (Cap. 51) deals with the division of produce of fruit-bearing trees which overhang the ground of another. The Regulation purports to be a collection of the customs then prevailing among the Malabar inhabitants of the " province of Jaffna ", many of which customs, it is stated, had been invented " for the sole purpose of plaguing one another ". It is silent in regard to any such right as is claimed by the plaintiff in the present case. Mr. Chelvanayakam submitted that in the absence of any provision in the Tesawalamai, the matter should be decided with reference to the Roman-Dutch law.

Under the Roman-Dutch law, if a tree growing on one land overhangs another land, the owner of that other land may appropriate to himself the fruits on the overhanging branches. He is also entitled to lop off these branches, but they must be given over to the owner of the tree—Maasdorp, Institutes of Cape Law (1903 ed.) Book Two, page 97 ; Walter Pereira, Laws of Ceylon (1913 ed.) page 491. There seems to be nothing in this statement of the law which even by implication recognises the right in the owner of a tree to enter a land belonging to another in order to gather the dry leaves which have fallen from that tree. Mr. Chelvanayakam failed to draw our attention to any other statement of the law by the text-writers which supports the plaintiff-appellant's claim.

I would, therefore, dismiss the appeal with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.