

1957

*Present : Basnayake, C.J., and Pulle, J.*

DE SOYSA, Appellant, and FONSEKA, Respondent

*S. C. 33—D. C. Colombo, C,070/J.**Servitude—Prescriptive user by licensee—Quantum of evidence necessary.*

When a user of immovable property commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises.

**A**PPPEAL from a judgment of the District Court, Colombo.

*N. E. Weerasooria, Q.C.*, with *W. D. Gunasekera*, for Plaintiff-Appellant.

*N. Nadarasa*, with *S. Sharrananda*, for Defendant-Respondent.

*Cur. adv. vult.*

March 21, 1957. BASNAYAKE, C.J.—

The plaintiff-appellant and the defendant-respondent are the owners of adjoining premises No. 33 Park Avenue and No. 18 Gunasekera Lane. The plaintiff's father was the owner of both properties till 1919 in which year he gifted No. 33 to the plaintiff and No. 18 to her brother Dr. L. C. Gunasekera. By virtue of a reservation in the plaintiff's deed of gift the father took the rents and profits of No. 33 as he was entitled to until her marriage in 1933.

In that year the plaintiff's brother Herod Gunasekera began to look after her premises and collect her rents. Shortly after the execution of the deed of gift in his favour Dr. L. C. Gunasekera left for England to prosecute his medical studies. During his absence abroad his father managed No. 18 and collected its rents. He returned in 1927 or 1928. On his return from England he began to collect the rent of his house himself.

In 1924 the tenant of No. 33 was a Municipal Engineer who wanted a garage for his car. The plaintiff's father who was then managing both No. 18 and No. 33 built a garage for him in No. 18. The reason for building the garage in No. 18 and not in No. 33 would appear to be that at that time No. 18 had access to the main road while No. 33 had not. It would also appear that the tenants of No. 18 at all material times were medical students who did not need a garage.

In 1945 Dr. Gunasekera sold his house to the defendant. Disputes arose thereafter as to the right of the tenant in No. 33 to use the garage in No. 18 and the roadway to it. These disputes led to proceedings in the Magistrate's Court and finally to the present action.

The learned trial Judge has found that—

- (a) there has been no adverse possession of the garage and the roadway, and
- (b) even if adverse possession had commenced in 1933 the evidence does not establish an uninterrupted user of ten years thereafter.

I see no reason to interfere with that finding of fact.

Servitudes are onerous and the law does not favour them and it is incumbent on a person who claims a servitude to establish his claim by clear and satisfactory evidence of the strongest kind. There is no evidence that the user which commenced with the leave and licence of the owner of No. 18 was at any time converted to an adverse user. When a user commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescribed period is necessary to entitle the claimant to a decree in his favour. There is no such evidence in the instant case.

It would appear that the plaintiff's brother Dr. L. C. Gunasekera was present at the trial of this action, but he was not called by the plaintiff to testify to the fact that the user of the roadway and garage was not with his permission. He was a material witness for the plaintiff as he alone was in a position to testify to that fact. The burden of proof being on the plaintiff, the presumption is that Dr. Gunasekera's evidence would, if produced, have been unfavourable to her.

For the above reasons the appeal is dismissed with costs.

PULLE, J.—I agree.

*Appeal dismissed.*

