PARAMOUNT INVESTMENTS LIMITED

v.

CADER

SUPREME COURT.
WANASUNDERA, J., RANASINGHE, J. AND SENEVIRATNE, J.
S. C. APPEAL 41/85.
C.A. (S.C.) 879/75.
D.C. COLOMBO 2717/ZL.
MARCH 20, 1986 AND MAY 19, 1986.

Servitude–Right of way by notarial grant–Non-user–Abandonment.

A servitude of right of way can be lost by abandonment express or tacit. A servitude is lost by express abandonment when the dominant owner clearly and intentionally abandons it. Tacit abandonment takes place where the servient owner is permitted to do something which necessarily obstructs the exercise of the servitude and makes the servitude inoperative. Where, as in the instant case, express abandonment based on non-user owing to a wall built by the dominant owner's predecessor-in-title is what is relied on, the position is that under our law a servitude of right of way created by notarial grant cannot be lost by mere non-user.

Cases referred to:

(1) *Chellappah Ariyaratnam v. Chelliah Subramaniam–(1978) 79(2) N.L.R. 121.*

(2) *Rajentheram v. Sivarajah–(1963) 66 N.L.R. 324.*

(3) *Fernando v. Mendis–(1911) 14 N.L.R. 101.*

(4) *Nagamani v. Vinayagamoorthy–(1923) 24 N.L.R. 438.*

(5) *Senathiraja v. Marimuttu–(1949) 53 N.L.R. 5.*

(6) *Terunanse v. Menika–(1895) 1 N.L.R. 200, 202.*

(7) *Emmanis Appu v. Sadappu–(1896) 2 N.L.R. 261.*

(8) *Keewatin Power Company Limited v. Lake of Woods Milling Company Limited–[1930] A.C. 640.*

(9) *Bulstrode v. Lambert–[1933] 2 All E.R. 728.*

APPEAL from judgment of the Court of Appeal.

H. W. Jayewardene, Q.C. with *Miss D. Guniyangoda* for appellant.

A. C. Guneratne, Q.C. with *C. Ladduwahetty* for respondent.

Cur. adv. vult.

August 8, 1986.

SENEVIRATNE, J.

The plaintiff-appellant-petitioner in this appeal filed this action in the District Court of Colombo against the defendant-respondent-respondent stating that the latter was obstructing the use by him of a right of way shown as lot B10 in Plan No. 2183 of 20.12.1934 marked P2/F. The learned District Judge dismissed the action. The Court of Appeal to which an appeal was made, has by its judgment dated 1.2.85 affirmed the judgment of the District Court and dismissed the appeal. This is an appeal to this Court with leave having been obtained from this Court.

One Fredrick Joseph de Mel was the owner of the premises called Wilhelm's Rhue, Assessment No. 1602/14, Kollupitiya situated at Turret Road and Boyd Place, Kollupitiya. The said owner being a lunatic the Public Trustee was the Manager of the Estate. This land was blocked out as per Plan No. 2183 of 20.12.1934 made by H. Don David, Licensed Surveyor marked as P2/F. On this plan the said land was divided into blocks B1, B2, B3, B4, B5, B6, B7, B8, B9 and Lot B10 a roadway which gave access to Lots B3, B4, B5, B6, B7 and B8 from Boyd Place, which was the boundary of this land on the North. The only access to Lots B1 and B2 was from Turret Road, which was the boundary of this land on the North.

The Public Trustee as Manager of the Estate auctioned and sold these lots in Plan No. 2183. Lots B1, B2 and B3 were transferred on Deed No. 1897 of 6.4.36 (P3) to R. Rustomjee. The said Rustomjee on Deed No. 2992 of 14/15.12.1956 (P6) transferred the said Lots to A. K. Adamally. The said Adamally by Deed No. 6387 of 1971 (P5) transferred the said Lots B1, B2 and B3 to the plaintiff-appellant-petitioner in this case. The original transfer deed (P3) of 1936 conveyed to Rustomjee "the right of way and passage over the road (16 feet wide) marked Lot B10" denoted in the Plan No. 2183 to and from Boyd Place to the said Lot B3. The subsequent deed (P4) of 1956 to Adamally and the later deed (P5) of 1971 to the plaintiff also conveyed to these parties the roadway over B10. Schedule 3 to deed (P5) of 1971 which transferred Lot B3 to the plaintiff specifically referred to the transfer of the use of a "reservation for a road 16 feet wide marked B10". The other relevant lot to this appeal is Lot B8. This Lot was transferred by the Public Trustee on

Deed No. 43 of 1936 (P6) together with the right of way over the road marked B10 to P. C. A. Nelson. The said Nelson transferred this lot by Deed No. 4280 of 1.7.70 (P7/J) together with the right of use of the roadway marked B10 to A. A. Cader the defendant-respondent-respondent. Similarly the Public Trustee transferred Lots B4, B5, B6 and B7 to others, which parties are not relevant to this case. But it has transpired that the plaintiff has also filed actions on the same basis as against this defendant, against the transferors of the above-mentioned lots. The Public Trustee as Manager of the Estate of Fredrick Joseph de Mel transferred to the respective transferors, only the right to use the roadway B10. The title to the roadway B10 continued to be in Fredrick Joseph de Mel (and later in his heirs).

The Plan No. 2183 (P2/F) shows as "XY" a wall constructed on the plaintiff's Lot B3, which wall has blocked the entrance to Lot B3 from the roadway Lot B10. This wall was in existence when the plaintiff became the owner of Lot B3 in 1971. The plaintiff filed this action stating that the plaintiff's predecessors-in-title Adamally had constructed this wall "XY" in October or November 1964, for security purposes. After becoming the owner of Lots B1, B2 and B3, the plaintiff-appellant-petitioner decided to break down the wall "XY" on Lot 3, and exercise the right of way over the said road B10. This defendant-respondent-respondent the owner of Lot B8 objected to and prevented him from demolishing the said wall "XY", and further objected to his use of the right of way over B10. Thus, in this action the plaintiff-appellant-petitioner sought the following reliefs:–

(*a*) A declaration that the plaintiff is entitled to the said right of way over the said Lot B10 and to demolish the said wall,

(*b*) For a permanent injunction restraining the defendant preventing the plaintiff from exercising the said right of way over Lot B10 and from demolishing the said wall.

It is admitted by both parties that the right of the plaintiff appellant-petitioner and the defendant-respondent-respondent respectively in respect of Lot B10 in Plan (P2/F) is only a right to the use of the roadway B10, as the title to Lot B10 remained in the said Joseph Fredrick de Mel when those lots were transferred to the original transferees. Thus the plaintiff-appellant-petitioner and

defendant-respondent-respondent are both only the owners of two dominant tenaments in relation to the servient tenament – Lot B10. A question arises whether one dominant owner can claim that another dominant owner has no right or has lost the right to the servitude; or whether it is only the servient owner who can take up that position. I will not express an opinion, as this aspect of the dispute was not argued.

The defendant filed answer stating that the predecessors-in-title of the plaintiff had abandoned the use of the roadway Lot B10 and due to such abandonment and non-user the plaintiff has lost his rights to use the roadway B10. The defendant further stated that by Deed (P5) of 1971 Adamally could not have transferred a right of roadway over Lot B10 to the plaintiff, as by that time the plaintiff's predecessors-in-title had abandoned the use of the roadway B10, and had no right of way whatsoever over the said Lot B10.

The main issues on which the trial proceeded in the original Court were as follows. I will set out only the relevant issues:–

(1) Did Rustomjee erect a wall to separate Lot B3 from Lot B10?

(6) Was this wall constructed more than 20 years ago?

(7) After this wall was constructed, did the owners of Lots B1, B2 and B3 abandon the use of the right of way B10?

(10) If so, can the defendant object to the use of Lot B10 by the plaintiff?

The learned District Judge answered all these issues and the other connected consequential issues in the affirmative, that is, in favour of the defendant, and held that the plaintiff had no right to use the right of way depicted as Lot B10 in the Plan (P2), and as such the defendant had a right to object to the use of Lot B10 by the plaintiff. Having come to these conclusions the learned District Judge dismissed the plaintiff's action. The learned District Judge has based these conclusions on the following items of evidence accepted by the learned Judge:–

(1) That the wall-"XY" had been built by Rustomjee in 1939 or 1940. That is at least 33 years before the filing of this action on 9.1.73.

Thus the learned District Judge rejected the plaintiff's case, that this wall "XY" was built by his predecessor-in-title Adamally in October or November 1964.

(2) That Rustomjee used Lots B1, B2 and B3 as one unit, and in fact built a large house which encompassed all these three lots.

(3) That Rustomjee built the wall "XY", blocked the entrance to the roadway B10 leading to Boyd Place and used only the entrance from Turret Road to these three lots, which he possessed as one unit.

(4) There was a coconut tree and an amberella tree by the wall "XY" in Lot B3. The learned District Judge has expressed the view that this was a permanent plantation and not a kind of temporary plantation.

On these findings of fact the learned District Judge held that the plaintiff's predecessors-in-title did not use the right of way B10 for at least 34 years. On these conclusions on the facts, the learned District Judge held that in law there has been an abandonment and a non-user of the right of way B10 by the plaintiff's predecessors-in-title. The learned Distirct Judge further held that in view of his conclusions, in law, as there has been a non-user and an abandonment of the right of way B10 by the previous owners of the dominant land, Lots B1, B2 and B3, that the deed from Adamally (P5) of 1971 to the plaintiff could not have passed to the plaintiff a right of way over B10. To come to this conclusion the learned District Judge had to overcome the recital in the deed (P5) which stated as follows:

"All that roadway in and over that defined and divided alotment of land (presently a roadway 16 feet wide) marked Lot 10 in Plan No. 2183.....".

This particular recital conveying the roadway over B10 in deed (P5), the learned District Judge got over by calling it a mere repetition of the references to the roadway mentioned in the previous deeds, and in fact a notarial flourish which was of no consequence. The Court of Appeal has also adopted this line of reasoning of the learned District Judge in respect of the reference to the roadway in deed (P5) of 1971, the title deed of the plaintiff. I shall deal with this specific conclusion later.

The learned Queen's Counsel for either party did not contest the findings of fact made by the learned District Judge. The learned Queen's Counsel for the plaintiff-appellant-petitioner strenuously contested the legal conclusions of the learned District Judge on which was based the dismissal of the plaintiff's action. The learned Queen's Counsel for the defendant-respondent-respondent supported the legal conclusions of the learned District Judge. The learned Queen's Counsel for the plaintiff-appellant-petitioner submitted that in considering whether there has been an abandonment and non-user of the servitude–right of way over B 10 by the plaintiff and his predecessors-in-title, both the original Court and the Court of Appeal have lost sight of the material fact, that this case was an instance where a servitude–a right of way, has been created by a notarial grant, that a distinction has to be drawn between a servitude created by prescription or by verbal agreement, and a servitude created by a notarial grant. When a Court has to consider whether there was an abandonment or non-user of a servitude created by a notarial grant different considerations have to apply. I will deal later with this legal submission.

I will first consider whether the facts accepted by the learned District Judge and affirmed by the Court of Appeal constitute any intention express (or tacit) on the part of the plaintiff's predecessors-in-title to abandon the use of the roadway B 10. In considering this aspect of the case I will refer in detail to a leading reported case on this subject which has not been considered either in the original court or in the Court of Appeal. The facts of this case and the legal submissions made in this case, which I now refer to, are almost similar to that before me now. This is a decision of the Supreme Court by Samarakoon, C.J., Thamotheram, J. and Wanasundera, J. The judgment has been delivered by my brother Wanasundera, J. and it was my brother Wanasundera, J. who in the course of the argument drew attention of the Court to this case of *Chellappah Ariyaratnam and Another, plaintiffs-appellants and Chelliah Subramaniam and 4 Others, defendants-respondents* (1). This was an action by the plaintiffs-appellants as owners of the land, the dominant-tenement, against the defendants-respondents as the owners of the land, the servient tenement, for a declaration that the former were entitled to the following servitudes–a right of way, a right to draw water and a right to a water course, in respect of the land of the defendants-respondents. The facts of this case were as follows. It is

necessary to refer to this case at length. Three brothers owned a parcel of land and by Deed of Partition in 1905 (P1), these three brothers amicably partitioned the land among themselves as depicted in Plan No. 3379 marked "X". Shanmugam Vaithialingam was alloted Lot 1, that is plaintiff's predecessor-in-title. Shanmugam Arumugam was allotted the middle lot where the well was situate, which lot at time of action was owned by the 2nd and 3rd defendants. The 1st defendant was the husband of the 2nd defendant. Shanmugam Ponnambalam was allotted the third lot which had devolved at time of action on the 5th defendant. The 4th defendant was the husband of the 5th defendant. In this amicable partition a path was demarcated outside the limits of these three specific lots, and which pathway was to be held in common by these three persons, as a pathway to and from the land, to the well, and to the water course. The 2nd plaintiff-appellant as owner of Lot 1 depicted in Plan 'X' filed this action for a declaration that she was entitled to use the 9-foot wide pathway shown as Lot A in Plan 'X' and to use the water well and the water course situate in the land belonging to the 2nd and 3rd defendants. 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. The trial judge held that the following facts have been proved:

(1) 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 Lot 1 in Plan 'X'. (The 1st plaintiff was the father of the 2nd plaintiff). At that time the 2nd plaintiff's father already owned and possessed the land immediately to the North of this land Lot 1 in Plan 'X' and adjacent to it. This Northern land had access to the main road on the North. It also had a well. Those amenities had been used by the 2nd 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, Lot 1 in Plan 'X', he continued to use his former access to the North and the well in the Northern land.

The learned District Judge's findings were as follows:–

(1) The learned Judge did not accept the evidence of the 2nd plaintiff's father that this path in Lot 1 Plan 'X' had been used by him, or by the plaintiffs in recent times. His finding was that it had never been used since its purchase by the witness in 1942.

(2) The 2nd and 3rd defendants had a Tobacco business and used this path claimed for the burning of tobacco waste on this path.

(3) The plaintiff's predecessor-in-title had put up a barbed-wire fence on the whole of the western boundary, which had the effect of closing the entrance from this land to the path in Lot 1 that is, the path in question.

(4) The 2nd and 3rd defendants claimed that in 1964 they had cut a coconut tree and a palmyrah tree which was growing in lot A, that is, the path in question.

On the above findings the learned District Judge came to the conclusion that the plaintiffs and her predecessors-in-title had not used the pathway claimed since the purchase of the land Lot 1 in Plan 'X' by her father in 1942 up to the filing of this action in 1966. On this finding the learned District Judge held that the plaintiffs and their predecessors-in-title had since 1942, tacitly abandoned the use of these rights and lost them by non-user. It will be noted that the findings of fact (1) and (3) above among others also on which the judge's conclusions on abandonment and non-user were based are closely similar to findings of fact in the present case before me.

Wanasundera, J. had expressed the view that the learned District Judge has considered the plaintiff's action as a claim for the right of servitudes – a right of way etc., and has expressed the view that in this instance these parties were co-owners of the pathway and the rights of the parties should have been considered on that basis, that is as to whether there had been adverse and prescriptive possession of the pathway by the respondents, and referred to the decision of H. W. Tambiah, J. in the case of *K. A. Rajentheran, appellant and K. Sivarajah, respondent* (2). Having made this ruling on the law, Wanasundera, J. has nevertheless considered the submissions made by the learned President's Counsel for the appellants Mr. Ranganathan, Q.C. that the findings of fact by the learned District Judge cannot in

any event be construed as a clear intention on the part of the plaintiffs and their predecessors-in-title to abandon the servitude. Mr. Ranganathan, Q.C. has submitted that the erection of the barbed wire fence on the Western boundary–

> "which had the effect of closing the entrance to the path from their land..... was at most, equivocal and does not show a clear intention on the part of the plaintiffs and their predecessors-in-title to abandon their rights, or an intention not to use them". (Page 124).

Mr. Ranganathan has submitted that during this period the plaintiffs and their predecessors-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 plaintiff-appellants and their predecessors-in-title took the precaution of closing the entrance into their land in order to protect it. The fact that these two adjacent lands had not been amalgamated and that there was a fence 20 years old between the two lands show that Lot 1 continued to exist in its own right. Mr. Ranganathan has also submitted–

> That the deeds relied by the plaintiff-appellants including (p. 4) 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 servitude, and the plaintiffs-appellants were legally entitled to them by virtue of this chain of title. There is also an additional factor that in deed (P6), which is the deed executed by the 5th defendant in 1970, a reference to the path continues to persist". (Pages 124-125).

Mr. Ranganathan has submitted that these circumstances tend to negative that a waiver of these rights had taken place expressly or by implication.

Wanasundera, J. in dealing with these submissions has considered the authorities on Roman-Dutch Law–Voet, Grotius, Vanleeuwen, Walter Pereira's Laws of Ceylon and Lee's Introduction to Roman Dutch Law, and held that two modes of losing a right of servitude under Roman-Dutch Law are:–

(1) Waiver; and

(2) Non–user.

Then Wanasundera, J. has ruled as follows:–

"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". (Page 125).

Wanasundera, J. proceeds to cite futher authorities on Roman Dutch Law with reference to decided cases from South Africa and Ceylon, which are referred to and has commented as follows–

"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". (Page 126).

Finally Wanasundera, J. has summed up as follows:

"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 those rights were lost by the plaintiffs-appellants and their immediate predecessor-in-title by reason of waiver or non-user". (Page 126).

Having come to this conclusion Wanasundera, J. set aside the judgment of the learned District Judge and entered judgment for the plaintiff as prayed for. It must be noted how relevant, apt and close to the facts of this case before me, are the facts, and the submission of Mr. Ranganathan, Q.C. and his interpretation of the facts in *Chellappah's case,* relied on by the learned District Judge, to hold that there was an abandonment of the servitude on the part of the plaintiffs-appellants.

The abandonment of a servitude has been categorised by the Jurists and text-writers into two forms of abandonment, express abandonment and tacit abandonment.

"A servitude is lost when the dominant owner clearly and intentionally abandons it–Voet 8.6.5. (express abandonment). Tacit abandonment takes place when the servient-owner is permitted to do something which necessarily obstructs the exercise of the servitude, e.g. builds a house across a roadway, or raises his buildings when he is bound to receive the rainwater on his roof. If the dominant owner has stood by, and permitted erection of structures which make his servitude inoperative, without taking steps to prevent it....". (Voet 8.6.5; Grotius 2.37.4; Vanleeuwen, R. D. Law 2.22.3; *Servitudes*–Hall and Kellaway (p. 128).

In the case before me the facts indicate that the defendant has pleaded express abandonment by the plaintiff and his predecessors-in-title. As such there is no need to discuss the Law and the cases dealing with tacit abandonment.

In the case of *Fernando v. Mendis* (3) the plaintiff filed action and claimed the right to draw water from a well standing on the defendant's land which adjoins his land. The plaintiff alleged that the defendants had filled up the well and have since prevented the plaintiff from drawing water therefrom. It was proved in this action that the well has been filled up with the consent of the plaintiff in the presence of the Inspector of Police and the Headman. Grenier, J. held that these facts, showed an express abandonment of the right which the plaintiff had acquired to draw water, by consenting to the closure of the well, and dismissed the plaintiff's action. The case of *Nagamani v. Vinayagamoorthy* (4) was an instance where a right of way had been created by a deed. In his decision in this case Sampayo, J. has dealt with the considerations that should prevail when a servitude is created by a deed, which legal aspect I have already stated, I will deal with later. In this case it was proved that the deed created a right of way, but the evidence showed that the path so created in the servient tenement had disappeared and there was no particular track to be seen. The defendants took up the position that the plaintiff did not pass exactly over the route indicated in the deed, but in the most convenient way over their land, that is, that the plaintiff merely passed over their land just as they passed over his land. Sampayo, J. ruled that this admission of passing over the servient land negatived the idea of abandonment, that the facts of this case were not covered by the decision in the case of *Fernando v. Mendis (supra)*, relied on by the defendants, and held that on the facts of this case there was no deliberate or intentional abandonment of the servitude by the plaintiff.

The learned authors of the textbook "Servitudes" – Hall and Kellaway in dealing with the principles of abandonment of a servitude by the dominant owner give the following instances of abandonment –

> "The position is, however, clear in the case where public notice has been given and all have been cited who could be considered to have any right over the servient land and the land has been alienated and transferred; if the dominant owner when not cited and warned does not enter appearance to assert his right he must be considered to have abandoned it and consequently the servitude is lost (Voet 8.6.14). Where the Court has after due notice to all interested parties calling upon them to claim rights of servitude, ordered, in default of any appearance, the land to be transferred free of servitude, any servitude must be taken as terminated (Voet 8.6.5)". (Page 129).

These instances given by Hall and Kellaway with reference to Voet can only be interpreted as two classic instances of express abandonment of a servitude.

I will now consider whether on the facts of the case before me, and the Law pertaining to abandonment as set out above, it can be held that in this instance that the plaintiff had abandoned his right to the use of the roadway Lot B10 in issue. The case of *Fernando v. Mendis (supra)* is an instance in which the plaintiff had voluntarily given up a servitude – express abandonment. The case of *Nagamani v. Vinayagamoorthy (supra)* is an instance where it was held on the facts that there was no deliberate intentional abandonment. The passage cited above from the text – *Servitudes* – Hall and Kellaway (Page 129) sets out two instances of express abandonment. Adopting the principles set out by Wanasundera, J. in the case of *Chellappah v. Ariyaratnam (supra)*, the principles set out in the other two cases referred to above, and the citation from Hall and Kellaway, to the facts of this case before me, I hold that on the facts of this case, and the legal principles applicable the plaintiff-appellant-petitioner has not abandoned his rights to the servitude in respect of Lot B10.

As stated earlier, both the original Court and the Court of Appeal have held that there has been both abandonment and non-user of the servitude by the plainfiff-appellant-petitioner, and as such he has lost his rights as dominant owner to the said lot roadway B10. The concept of non-user in this instance is closely tied up with the concept

of abandonment. The reasoning of these two Courts is that as there has been an abandonment there has been a non-user, and that as there has been a non-user there has been an abandonment.

I will consider whether the concept of non-user is applicable in our law. According to the Roman-Dutch Law-Jurists "Praedial servitudes are classed as immovable property". Nathan Common Law of South Africa–(Vol. 1 2nd Ed. Page 343, Para 432). "A real servitude is a fragment of the ownership of an immovable....." . Introduction to Roman-Dutch Law–R. W. Lee (5th Ed. Chap. 6. Page 164). Our Statute Law–Prescription Ordinance, (C.L.E. Vol. III, Chap. 68) section 2 defines–"immovable property" as follows:

> "....shall be taken to include all shares and interests in such property, and all rights, easements and servitudes thereunto belonging or appertaining".

In the authoritative text Introduction to Roman-Dutch Law–R. W. Lee (5th Ed. Chap. 3. Page 130)–Lee deals with the acquisition and extinction on ownership in corporeal things. At page 144, Lee has summed up how ownership is lost in corporeal things as follows:

> "The modes of extinction of ownership are:–
>
> 1. Dereliction or abandonment of possession.
> 2. Accession (when it effects a transfer of ownership).
> 3. Tradition.
> 4. Prescription.
> 5. Expropriation by competent authority e.g. when land is taken for some public purpose.
> 6. Forfeiture for crime".

Thus, it will be seen that non-user is not set out as a mode of extinction of ownership of any corporeal thing–immovable property. It was submitted by the learned Queen's Counsel for the plaintiff-appellant-petitioner that any loss of a right to a praedial servitude must be in accordance with the Law by which one loses one's rights to immovable property. Under our Law title to immovable property cannot be lost by non-user (non possession). It is clear that one way of acquiring title to property is by prescription in terms of Section 3 of the Prescription Ordinance. Prescription is not pleaded in this action by any party. In the case of *Nagamani v. Vinayagamoorthy*

(supra), a right of way had been created by an ancient deed of Gift 1907, and the plaintiff brought the action to assert the right of way so created by deed. The defendant's position was that there was no track to constitute the lane on those blocks, as such the plaintiff cannot exercise a right of way. In considering this defence Sampayo, J. stated as follows:

> "There is no doubt about the right created by the deed. *It can only be lost by some means known to law*, such as an adverse right created in favour of a servient tenement against the dominant tenement by means, for instance, of prescriptive possession. There is really no possibility in the present case, and I think it cannot be held that the plaintiff lost the right of way by adverse prescriptive possession on the part of the defendants". (Page 349).

The later case *Senathiraja, v. Marimuttu* (5), was an action claiming a declaration of title to a servitude and right of way created by grant–by a series of deeds. In dealing with this claim Nagalingam, J. had made a passing reference to the loss of a servitude by non-user. Nagalingam, J. held that the plaintiffs have established a right of way by a series of deeds and if the defendants denied that rigtht of way:

> "It was for the defendants to establish either an abandonment by the plaintiffs of their right or the *loss of it by non-user*". (emphasis mine).

There is no further discussion in this case regarding the loss of the right to a servitude by non-user.

In the recent case referred to by me at length the case of *Chellappah v. Subramaniam (supra)* the learned District Judge held that the plaintiffs–"since 1942 had tacitly abandoned the exercise of these rights or had *lost them by non-user*". (emphasis mine). Under Roman-Dutch Law a right to a praedial servitude can be lost by non-user for a period of one third of a century, that is 30 years. In the Judgment Wanasundera, J. states that–

> "Mr. Ranaganathan 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".

After making this observation Wanasundera, J. refers to the case of *Senathiraja v. Marimuttu (supra)*, and then observes that it was unnecessary for him to decide that point as the period of non-user

required by the law had not elapsed by the time the plaintiff-appellant filed this action. It is pertinent to refer to the following dicta of Bonser, C.J. in a case dealing with the Prescription Ordinance the Divisional Bench case of *Terunanse v. Menika* (6):

> "The Ordinance was passed, as I venture to think to protect actual possessors only, and was intended to be used as a shield only and not as a weapon of offence.....If the person in possession was sued by the true owner, he could plead the Ordinance, or he might take the initiative if possession was disturbed or threatened, and apply for a decree establishing his title and quieting him in possession. The Ordinance differs essentially from the English Statute of Limitations, which at the expiration of a period, transfers the ownership to the possesser and extinguishes the title of the original owner".

The submission of the learned counsel Ranganathan, Q.C. "that the law pertaining to the loss of praedial servitudes by non-user no longer obtains in this country" is supported by the decision in this case which ruled as follows:

> "The effect of Ordinance No. 22 of 1871 and No. 8 of 1834 is to sweep away all the Roman-Dutch Law relating to the acquisition of immovable property by prescription except as regards property of the crown".

Later the Divisional Bench-case of *Emanis Appu v. Sadappu* (7)-of which Bonser, C.J. was a member followed the above ruling. I hold that under our Law a person does not lose the right to any ownership of immovable property e.g., a land, a servitude by mere non-possession (non-user). I hold that the District Court and the Court of Appeal erred in law when it was held that the plaintiff and his predecessors-in-title lost the right to the servitude-the right of way B 10 by non-user.

Both the District Court and the Court of Appeal have ignored the fact that this right of way has been granted to the plaintiff and his predecessors-in-title by notarial grants. These Courts have held that Rustomjee the original owner abandoned his rights to this right of way Lot B 10 by building the wall "XY", and that the subsequent references to this right of way in the deeds of transfer by which title devolved on the plaintiff were only notarial flourishes. Schedules 1, 2 and 3 of the transfer deed to the plaintiff (P5) of 1971 dealt with the transfer of the

said lots B1, B2 and B3 and the Schedule 2 of the said deed specifically deals with the transfer of the roadway Lot B10. In the construction of this deed it cannot at all be said that the 2nd Schedule is a mere notarial flourish, and a repeat of what has been stated in the transfer deeds to the plaintiff's predecessors-in-title. The opening words of the deed No. 63 can be considered as notarial flourishes – "To Whom These Presents Shall Come – Send Greetings". But the Schedule 2 cannot be considered in this light. It is an operative part of the deed (P3). I hold that the title to the right of way B10 has devolved on the plaintiff-appellant-petitioner on the title pleaded by him.

The two English cases which I now refer to are of assistance to determine the scope of a servitude created by grant. In the case before me the case of the defendant-respondent was that the predecessors-in-title of the plaintiff-appellant-petitioner did not use right of way B 10 created by a notarial grant and as such there was an abandonment and a non-user of this servitude. The Privy Council case of *Keewatin Power Company Limited v. Lake of Woods Milling Company Limited* (8) (On appeal from the Supreme Court of Ontario) was a dispute between these two parties in respect of two easements granted by patent to the appellant and respondent by the Crown to use the water of a Lake. In the course of the judgment of the Privy Council dismissing the appeal, His Lordship Viscount Dunedin ruled as follows:

> "When you are dealing with grant, the grantee may always if he chooses, not exercise his right under the grant to the full without in any way prejudicing his full right, if he finds it convenient to use it". (Page 657).

In the case of *Bulstrode v. Lambert* (9) the facts were as follows:-

> In 1944 the plaintiff's father sold bya conveyance a premises reserving to himself the right of way to take vehicles to and fro along a roadway. But this reserved right of way was not used. The plaintiff's father died in 1950. In 1951 the defendant bacame the owner of the said premises sold in 1944 by the plaintiff's father. The defendant improved the roadway which enabled heavy vehicles to use it. Then the plaintiff claimed the right to use this roadway reserved by the deed of conveyance, to the plaintiff's predecessor-in-title, and brought this action to assert the right. In

Appeal Upjohn, J. who held that the plaintiff was entitled to use the right of way, cited and followed the dictum of Viscount Dunedin, (in the Privy Council case) quoted above. The principle decided in these two cases referred to above is relevant to the case before me.

For the reasons stated above I hold that the District Court and the Court of Appeal have erred in law in dismissing the action of the plaintiff-appellant-petitioner, and set aside the judgments of the District Court and that of the Court of Appeal, and give judgment to the plaintiff-appellant-petitioner as prayed for. The plaintiff-appellant-petitoner will be entitled to costs of this Court, in the Court of Appeal and the District Court. Appeal allowed with costs.

WANASUNDERA, J. – I agree.

RANASINGHE, J. – I agree.

Appeal allowed.