AMARASINGHE
v.
WANIGASURIYA

COURT OF APPEAL
S. N. SILVA, J. (PRESIDENT/CA)
R. B. RANARAJA, J.
C.A. APPLICATION NO. 672/87
D.C. MOUNT LAVINIA NO. 1204/P
SEPTEMBER 30, 1994.

Partition – Scheme of Partition – Roadway – Via vicinalis – *Can use be made of a private road outside the corpus to provide access to the divided lots?*

Where in a partition case a scheme of partition had been confirmed and final decree entered showing as access to some of the partitioned lots a roadway on the boundary outside the corpus which in the preliminary plan had been shown as a private road separated off by a continuous barbed wire live fence –

Held:

1. In the process of partitioning, proper rights of way should be provided from within the corpus as access to a public right of way.

2. The road claimed by the petitioners was not a *via vicinalis*. There was no proof of immemorial user of the disputed roadway or prescription.

3. There was fundamental error in confirming the scheme of partition without affording the petitioners an opportunity to object to it.

4. A glaring blemish which taints the proceedings in a partition action and results in a miscarriage of justice to a person not being a party to the action may appropriately be remedied by an application in revision.

Cases referred to :

1. *Kanthia v. Sinnathamby* (1913) 2 Balasinghams Notes of Cases p. 19.
2. *Thambiah v. Sinnathamby* 61 NLR 421.
3. *Peacock v. Hodges* 6 Buch 65.
4. *Somawathie v. Madawela* [1983] 2 Sri LR 15, 31.

Application for revision of the order made by the District Judge of Mount Lavinia.

P. A. D. Samarasekera P.C. with H. Soza for petitioners.
A. K. Premadasa P.C. with *B. O. P. Jayawardena* for respondents.

Cur. adv. vult.

October 28, 1994.

S. N. SILVA, J.

This is an application in revision and/or for *Restitutio* in *integrum*, filed from the order dated 22-7-1985 made by the District Court confirming the scheme of partition as contained in the final plan 1155 and the report of the Surveyor submitted with the plan. The petitioners also seek relief from the final decree entered upon confirmation of the said plan.

The Petitioners were not parties to the above partition action and they have no interests in the corpus for partition. The only matter of dispute, in this application, relates to the "road" as depicted along the North Western boundary of the corpus in the final plan 1155. The Petitioners claim that the said "road" is a "private road" serving the Petitioners who own land to the West of the corpus, to the exclusion of the co-owners of the corpus. They submit that their rights are affected by the scheme of partition as contained in the final plan wherein the Surveyor has partitioned the corpus using the said "private road" as the only means of access to lots 2,3,4 and 5 of the corpus. That, the order confirming the scheme of partition and the final decree that has been entered, have the effect of creating a servitude of way in favour of the parties to the partition action over the

"private road" which is outside the corpus, without the Petitioners being heard on this matter. On this basis, they move that the final decree be set aside and suitable direction given by this Court to the District Court to safeguard the interests of the Petitioners in relation to the "private road" to which they are exclusively entitled.

The Respondents (being the parties to the partition action), between whom there was no contest at the trial and as regards the scheme of partition, concede that the said "road" falls outside the corpus. However, it is submitted that the "road" is a "via *vicinalis*" or in the alternative that they have acquired a servitude of way by prescriptive user of the road. In any event, it is submitted that this application is misconceived and that the Petitioners may institute an *actio negatoria* against the Respondents for a declaration that the Respondents are not entitled to a servitude of way over the said "private road".

It is common ground that the road being the subject-matter of the dispute now under consideration falls outside the corpus sought to be partitioned in the above action. In the preliminary plan C1192 dated 7.1.1981 drawn by C. C. Coomaraswamy, Licenced Surveyor, the disputed road is described as a "private road". Furthermore, the plan shows that the "private road" is separated from the corpus by a continuous barbed wire and live fence. It is thus clear that the co-owners of the corpus, being the Respondants to this application had no access to the corpus from the "private road" at the time of the preliminary survey. In that plan the "private road" is depicted merely as a boundary of the corpus.

A commission is issued in terms of section 27 of the Partition Law to a Surveyor for the partition of the corpus into separate lots in accordance with the interlocutory decree. Section 31 requires the Commissioner to prepare a scheme of partition. The scheme of partition must necessarily set out the means of access to each divided lot. If not, a partition decree, which is intended to terminate common ownership and bring to an end disputes that arise from such common ownership will be the beginning of a new wave of litigation for servitudes of way in respect of the divided lots.

In this case the commission for the final survey was issued to Mervyn Samaranayake who prepared plan 1155 dated 30.1.1985, referred above. In the plan the "private road" depicted in the

preliminary plan is depicted as a "road". The only means of access to lots 2,3,4 and 5 of the plan, allotted to different Defendants in the action is along this road. In this report dated 22.2.1985 (paragraph 7) he states as follows:

"For the purpose of dividing the land into lots I have made use of a road 20 feet in width which runs along the Western boundary. Although this road has been previously described as a private road, it now serves several houses to the West and the Kotte U. C. has laid electric wires and water mains along this road. The parties to the action are now using this road. Therefore I have made use of this road for division of the lots without providing alternative road from within the land".

As noted above there was no contest in the case and it appears that the learned Judge did not give his mind to this aspect of the report and plan in deciding to confirm them and enter final decree.

The submission of the Petitioners is that the District Court by entering final decree on the basis of the said plan and report has in effect granted to the respective parties in the partition action a right to use the said "road" as a means of access to their lands. This submission is supported by the very ground that is urged by the Respondents who oppose this application. The Respondents submit that the proper remedy of the petitioners is to file an *actio negatoria* to obtain a negative declaration that the Respondents are not entitled to the "road" as depicted in the plan. Indeed, such a submission is possible only because the final decree of the District Court purports to give the respondents the right to use that "road".

The question whether a Surveyor in effecting partition could utilize a right of way lying outside the corpus, to facilitate a division,was the subject-matter in the case of *Kanthia v. Sinnathamby* [1]. In that case the Commissioner refused to take into account a right of way lying outside and to the North of the land which was the subject of the partition action. It appears that the land to the North belonged to the Plaintiff in the action. The decision of the Commissioner was challenged in the Supreme Court and Lascelles C.J. held that there was no error in the refusal of the Commissioner to effect a partition using the right of way which is outside the corpus. It was observed that the fact the right of way served the Plaintiff in respect of another

land was irrelevant to the decision to be made. The rationale of the decision is quite clear; that in the process of partitioning proper rights of way should be provided from within the corpus as access to a public right of way. If not, as noted above, the partition decree would be the beginning of a new wave of litigation for servitudes of way. This judgment was followed in the case of *Thambiah v. Sinnathamby* [2] Weerasuriya, J. firmly ruled out the possibility of a declaration being made in a partition action as to a right of way claimed in respect of a land outside the subject-matter of the action. Therefore, it could be taken as settled law that in effecting a partition proper rights of way should be provided within the corpus to the distinct allotments, as means of access to a public right of way.

In this case the preliminary survey depicts the disputed road as a "private road". Furthermore, as noted above, the continuous barbed wire live fence clearly establishes that there was no means of access from that road to the corpus. The surveyor to whom the commission was issued for the final survey should have been properly guided by the preliminary plan. Instead, he has set himself up as having jurisdiction to decide that what was a "private road" has now become a "road" over which the parties to the action would have access. Paragraph 7 of the report reproduced above is a demonstrable error on the part of the Commissioner since the Petitioners' claim exclusive rights in respect of the "private road". The scheme of partition could not have been confirmed without affording the Petitioners an opportunity to object to it. In these circumstances, I am of the view that there is a fundamental error in the proceedings of the partition action at the stage of confirming the scheme of partition. This fundamental error has caused prejudice to the rights of the Petitioners who are entitled to invoke the extraordinary jurisdiction of this Court by way of revision.

The submission of the Defendants that the road is via *vicinalis* is a mere claim which is not supported by the evidence in the case and is positively contradicted by the preliminary plan. In the book titled 'Servitudes' by Hall and Kellaway, 2nd Edition at p43, it is stated as follows:

> "The courts have repeatedly laid down that there are two kinds of public roads, via *publica* and via *vicinalis* . . . A via *publica* is a road which has been proclaimed as a public road by an

authority empowered by statute to do so, while a via *vicinalis* is a right of way which the public becomes entitled to use through immemorial user... Two other methods of creating public rights of way exist viz. by reserving them in Crown grants of land and through the owner of the land dedicating a road which crosses his property to public use".

The authors have further explained the acquisition of via *vicinalis* as follows:

"These roads were originally roads used by a number of neighbours jointly and known in Holland as 'buyrwegen' (Grotius, 2.35.10; Van Leeuwen 2.21.9; Voet, 43.7.1). In *Peacock v. Hodges* [3], de Villiers, C.J. said that they are either roads in a village or roads leading to a town or village, but close connection with an urban area does not seem to have been required in earlier times. **Use from the time immemorial without interference from the owner of the land over which they run is an essential factor...** Upon proof of user for thirty years and upwards the court is justified in holding that a state of things had existed from time immemorial if no evidence is adduced to show when it originated."

There is no evidence of such immemorial user in respect of the disputed road way. Certainly, the claim of prescriptive user is contradicted by the preliminary plan. It is indeed correct that the Petitioners may invoke the jurisdiction of the District Court for a negative declaration against the parties to the partition action, as submitted by counsel for Respondents. However, the question is whether their rights should be prejudiced in the partition action by an illegal act on the part of the Commissioner, being an officer of Court, without a proper consideration and hearing of the Petitioners. It is settled law that a glaring blemish which taints the proceedings in a partition action and results in a miscarriage of justice to a person not being a party to the action may appropriately be remedied by an application in revision (Vide *Somawathie v. Madawala)* [4]. For these reasons I see no merit in the submissions of learned counsel for the Respondents. I accordingly allow this application and set aside the order dated 22.2.1985 confirming the scheme of partition and the final decree entered in the case. The District Court will now issue a fresh commission for partition of the corpus with a direction to the

Commissioner that access to the divided lots from a public right of way be provided from within the corpus. Respondents will pay the Petitioners a sum of Rs. 5000/- as costs.

Dr. R. B. RANARAJA, J. – I agree.

Application allowed.