

PREMARATNE AND ANOTHER
v
AMARADASA AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.
C.A.L.A.193/2000 (LG)
D.C.PUGODA 214/P
JUNE 6, AND
JUNE 27, 2003

Partition Law, No. 21 of 1977 – Scheme of partition – Right of way lying outside corpus – Can it be utilised?

Held:

- (i) 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.

APPLICATION for leave to appeal from the order of the District Court of Pugoda with leave being granted.

Cases referred to :

1. *Amarasinghe v Wanigasuriya* – (1994) 2 Sri LR 203
2. *Kanthia v Sinnethamby* – (1913) 2 Balasingham Notes of Cases 19.
3. *Thambiah v Sinnathamby* – 61 NLR 421

S.F.A. Cooray with Muditha Premachandra for petitioner-appellants.

Nizam Kariapper for plaintiff-respondents

Other respondents absent and unrepresented

December 11, 2003

GAMINI AMARATUNGA, J.

This appeal arises from an application for leave to appeal made against the order of the learned District Judge of Pugoda confirming the final scheme of partition submitted by the Court Commissioner. This Court granted leave to appeal to the petitioners. 01

Court Commissioner, Surveyor Dissanayake has submitted final plan No 1372A dated 2/3/1999. According to this plan, on the western side of the corpus there is a land said to belong to K.A. Amaradasa, the plaintiff-respondent. This land is not a part of the corpus to be partitioned. From the western side of that private land two public roads extend in two directions. One road, from Mandawala to Pugoda extends from the west towards the north. The other road from Mandawala to Banagala extends from the west to the south. One portion of the corpus to be partitioned is situated bordering the Mandawala-Banagala road. The western and the north western boundary of the corpus dose not extend up to the Mandawala-Pugoda road at any point. As stated above, the private land of the plaintiff-respondent stands between the corpus and the Mandawala-Pugoda road. In the commissioner's plan at the north-western edge of the corpus a 20 feet wide road extends from that edge of the corpus up to Pugoda-Mandawala road but this road is not a part of the corpus. It is a road situated outside the corpus. The common roadway, provided by the Court Commissioner in his plan begins from the north-western edge of the corpus and runs southwards through the corpus providing access to all lots allocated to parties. This road, marked Lot 7 does not, at its northern end, extend to the Mandawala-Pugoda road. The parties have to gain access to that road by going through the 20 feet wide road situated outside the corpus. It is stated that this roadway belongs to the plaintiff-respondent Amaradasa but it has not been specifically proved at the partition action. There was also no proof that the co-owners of the corpus have acquired a servitude to use this land. Thus for all intents and purposes of the partition action this road remains a private road situated outside the subject matter of the partition action. The Commissioner has not provided an access to the corpus from the Mandawala-Banagala public road although a portion of the corpus is directly bordering that public road. 10 20 30

The 2nd and 4th defendant-appellants, (hereinafter called the appellants) objected to the commissioner's plan. They had two objections. The first objection was that the commissioner has not provided an access to lot No. 4 allocated to the 2nd defendant-appellant from the Mandawala-Banagala road and according to the commissioner's plan access to lot No. 4 from the Mandawala-Pugoda public road is through the above mentioned private road situated outside the corpus. The other objection was to the one metre wide pathway allotted between lots 2 and 4 for the purpose of providing access to the paddy fields situated on the eastern side of the corpus. Those paddy lands do not form a part of the corpus. Having obtained a commission from an alternative plan, the appellants submitted alternative plan No. 6510 dated 10/6/1999 prepared by surveyor Hubert Perera.

The Court held an inquiry to decide on the final partition scheme to be adopted. At the time of the inquiry, the commissioner who prepared final plan No. 1372A was dead. The 2nd defendant-appellant and surveyor Hubert Perera gave evidence. In the alternative plan, the roadway providing access to all lots of the corpus begins from the Mandawala-Banagala road. The common roadway extends from that road along the northern boundary of lot No. 5 allotted to the plaintiff (lot 6 in the commissioner's plan) towards the interior of the corpus and extends upto lot No. 1 situated at the northern end of the corpus. On northern side of lot No 5. allotted to the plaintiff, the private land belonging to the plaintiff stands. The roadway provided in the alternative plan runs between lot No 5. allotted to the plaintiff and his private land. One of the matters taken into consideration by the learned District Judge was that if the alternative plan is accepted, the roadway provided by it separates lot No 5. allotted to the plaintiff from the plaintiff's private land thus preventing the plaintiff from having the lot allotted to him by the partition decree and his private land as one entity.

Referring to the 20 feet wide road situated at the northern edge of the corpus, which has been used by the Court Commissioner to connect the common roadway demarcated within the corpus with the Mandawala-Pugoda road, the learned Judge has held that if the appellants say that it is a private road, they must prove it. With respect this was an erroneous conclusion. That road is situated

outside the corpus and not a part of it. It is not a public road. If it is to be used to connect the common roadway demarcated within the corpus with the Mandawala-Pugoda public road there must be evidence that the co-owners of the land to be partitioned have acquired a right of servitude to use that road way. There was no such evidence. Accordingly it is a private road not belonging to the corpus. 80

The question of law to be considered in this case, namely whether a surveyor in effecting partition could utilize a right of way lying outside the corpus to facilitate the division of the corpus, has been considered by this Court in *Amarasinghe v Wanigasuriya* (1) S. N. Silva J. (as he then was) having considered previous authorities on the subject explained the legal position as follows.

“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*⁽²⁾. 90
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 belong 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 100
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*⁽³⁾. 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 110
corpus to the distinct allotments, as means of access to a public right of way* (pp 206–207 emphasis added).

The legal principle explained above very clearly indicates that the use of a 20 feet wide road situated outside the corpus to provide to the parties a means of access to the public road was wrong and contrary to law and therefore plan No. 1372A should not have been accepted for that reason. The alternative plan No. 6510 provides the common roadway directly from the Mandawala-Banagala public road. The foot path one metre wide extending from the West to the East in order to provide access to the paddy fields situated outside the corpus on its Eastern side was also unnecessary. It has been stated that all parties could gain access to their paddy fields through the lots allocated to them. In any way the provision of a foot path through the corpus to paddy fields situated outside the corpus was unnecessary and unwarranted. The learned Judge's order approving the scheme of partition proposed by Commissioner's plan No. 1372A was wrong and contrary to law and therefore that order is hereby set aside. The alternative plan No. 6510 which provides access to all lots from Mandawala-Banagala public road is according to law and the learned Judge is hereby directed to accept that plan. In a situation like this the normal procedure is for the Court to direct the commissioner to modify his scheme of partition according to the alternative plan accepted by the Court. In this instance the commissioner who prepared plan No. 1372A is dead. If the surveyor who prepared plan No. 6510 is in the panel of surveyors the Court may accept that plan or get another commissioner to prepare the final scheme of partition in accordance with the alternative plan. Whatever may be the course adopted by Court, the Court has to ensure that the common access to the corpus must have a direct link with the Banagala-Mandawala public road and that there is no foot path running across the corpus from the West to the East providing a means of access to the paddy fields situated outside the corpus. The appeal is allowed and the order accepting plan No. 1372A is hereby formally set aside and the Court is directed to give effect to the directions set out above and enter final decree accordingly. The 2nd and 4th defendant-appellants are entitled to the cost incurred by them to get the alternative plan No. 6510 prepared.

Appeal allowed.