

1932

*Present: Garvin S.P.J. and Maartensz A.J.*FERNANDO *v.* SENERAT

33—D. C. Kalutara, 14,463

Public path—Partition decree—Rights of public—Ownership of Crown—Determination of right.

A public path over a land is not extinguished by a partition decree, affecting the land, to which the Crown is not a party.

A PPEAL from a judgment of the District Judge of Kalutara.

H. V. Perera, for plaintiff, appellants.

Ranawake (with him *S. C. Perera*), for defendant, respondents.

January 28, 1932. GARVIN S.P.J.—

The plaintiffs brought this action alleging that the defendants falsely claiming to be entitled to a right of way over their premises had cut the barbed wire fence erected by them and had forcibly entered the same.

They sought a declaration that their premises were free of any such right of way.

The defendants on the other hand pleaded that the plaintiffs had wrongfully blocked up a public path to their damage. The path claimed as a public path is depicted in the plan 10,366 made by B. M. Flamer Caldera, Licensed Surveyor, marked D 1, and indicated in that plan by the letters U. V. W. X. Y. Z.

The District Judge held that it was a public path over which the public have enjoyed a right of passage from time immemorial. In my judgment there is ample evidence of user by the public for over a third of a century. Moreover, the plans D 2 of 1883 and D 4 of 1862, on each of which this path is marked, show that it was in existence for over sixty years. The decision of the learned Judge is therefore well founded.

It was urged, however, that inasmuch as a certain portion of land traversed by this public thoroughfare and over which it lay was the subject of proceedings under the Partition Ordinance, which resulted

in a final decree, which makes no mention* of and does not expressly reserve this thoroughfare or recognize its existence, that the rights of the public have been determined and that the title to the track is now in the plaintiffs freed from the rights of public passage which have been proved to have existed till then. Section 9 of the Partition Ordinance makes the final decree entered in a proceeding under the Partition Ordinance "good and conclusive against all persons whomsoever whatever right or title they have or claim to have in the said property". These words appear to me to contemplate the rights of persons and not such rights as those of the public in a highway which are not the subject of individual personal ownership. The proposition that, if the owners of the land on either side of a highway, by concealing from the Court the existence of a highway contrive to obtain a partition decree in terms of which the highway is assigned to one or more of them, the highway is determined and all rights of the public extinguished, is one to which I cannot assent. Rights in a road may not be acquired by prescription, *vide* section 90B of the Public Thoroughfares Ordinance. A public path is a road within the meaning of that Ordinance. Once a road always a road, unless the road be stopped up, by order of the Governor under section 9 of the Public Thoroughfares Ordinance or by other lawful authority.

It is well settled law that the Crown is not bound by a final decree entered in a proceeding under the Partition Ordinance, and it was conceded that, if a highway lay over land which belonged to the Crown, it would remain unaffected by such a decree. It is not possible to say in this case to whom the land belonged when this path came into existence. The Roman-Dutch law recognized two classes of public roads—*viae publicae* and *viae vicinales*. A *via publica* was one which was declared to be a public road by the public authority. Originally a *via vicinalis* was one which was made up of contributions of the ground of private landowners and used by the owners of such farms in common under express or implied agreement. The term appears to have been applied later to all unproclaimed public roads. "The difference between these and proclaimed roads is that in the latter the rights of the public are a matter of ownership exercised through the Divisional Councils, whereas in the former they are a matter of servitude exercised by each member of the public in his own right." (*Maasdorp, Vol. II., p. 189.*)

It was argued that a public path such as this was a *via vicinalis* and that the rights of the public being merely in the nature of a personal servitude exercisable by each member of the public were extinguished by the partition decree.

Whether any such distinction between public thoroughfares ever existed in Ceylon is extremely doubtful. I have not been able to trace in our reported cases any mention of a *via vicinalis* as distinct from a *via publica* in any of our earlier cases. The first reference I have found is as recent as 1926 in the case of *Appuhamy v. Alapatha*¹ in which the passage in *Maasdorp* above referred to is cited. No such distinction is to be found in our legislation relating to public thoroughfares. Such a thing as a "proclaimed road" or an authority empowered to proclaim

¹ 7 C. L. Recorder 107.

what are to be deemed public roads does not exist and evidently never did exist. Public roads are those which have existed from time immemorial or which have from time to time been constructed on land belonging to the Crown or acquired for the purpose and thereafter used by the public as means of communication. Every public path is a public road within the meaning of the Public Thoroughfares Ordinance, No. 10 of 1861, and I am aware of no difference in the legal status of the different types of public thoroughfares. All public roads including public paths are vested either in some local Government authority or in the Provincial and District Road Committees.

Even if it be assumed that there is a presumption of title to the soil in the adjoining landowners *usque ad medium flum.* it is subject to the right of the Sovereign to passage for himself and his people. If this be all the rights exercisable against the owners of the lands adjoining the road, they are rights which cannot be affected since the Crown is not bound by the decree upon which the plaintiffs rely.

But a public road is not merely a matter of servitude. It is something corporeal and as such the subject of ownership and extends at least to the surface and the whole area of user if, indeed, under our law it does not extend to the freehold. To the extent to which it is the subject of ownership a public road is the property of the public, that is, of the State, and cannot be affected by a partition decree.

There are however indications in the Public Thoroughfares Ordinance that the property in public roads was at least assumed to extend not merely to the area of user but in all cases to the freeholds. Section 9 which authorizes the Governor with the advice of the Executive Council on the application of the Provincial Committee to stop up or divert a road and to substitute a new road for the one so diverted empowers the Chairman of the Committee when so ordered to stop up or divert a road to take possession of the land of any owner for the public use and "to make an agreement on behalf of Government with the owner for the recompense to be made for such land . . . either by allowing him to possess the ground, of the former road, or by the grant of other Crown land in exchange, or by payment in money . . . and the certificate of such Chairman that any person has been allowed by the Governor to possess any part of the former road or other Crown land . . . shall be sufficient evidence of the title of such person to the same". There is no recognition here of the rights of the adjoining landowners to the soil of the road *usque ad medium flum viae* even in the case of roads which would answer to the description of *viae vicinales* as known to the Roman-Dutch law.

But it is not necessary for the determination of the question before us to ascertain whether the State ownership of public roads extends beyond the area and includes the freehold. It is sufficient to say that the State has rights of ownership in public roads and such rights are not affected by a decree for partition to which the Crown is not a party.

The appeal is dismissed with costs.

MAARTENSZ A.J.—I agree.

Appeal dismissed.