

UDALAGAMA AND OTHERS
v.
KEMPITIYA

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKÉ, J.
CA NO. 735/95 (F)
DC KURUNEGALA NO. 1742/P
FEBRUARY 23 AND
MARCH 20 AND 26, 2001

Partition Act, No. 16 of 1951, sections 2 and 26 – Partition Law, No. 21 of 1977, sections 18 (a) (viii), 21 and 26 – Did the Partition Law authorise a court to partition or make an order relating to right, title or interest in a land that fell outside the corpus?

The District Court ordered that the plaintiff-respondents were entitled to the cart-way which fell outside the corpus as a means of access from the public road.

On appeal –

Held:

- (1) Section 26 of the Partition Law, No. 21 of 1977 sets out the orders a Court may include in the Interlocutory Decree in an action instituted under section 2 by any co-owner to partition a land owned in common.
- (2) Although section 18 (a) (viii) makes it obligatory to the Commissioner to include in his report, *inter alia*, the existing means of access to the land from the nearest public road, neither section 26 nor section 2 gives any right to a District Court to make an order with regard to such a roadway if it fell outside corpus. Section 18 (a) (viii) does not empower the District Court to adjudicate upon such road, if it fell outside the corpus.

Per Dissanayake, J.

"In my view section 18 (a) (viii) has been included in the Partition Law, No. 21 of 1977 to facilitate the District Court to allot shares to the parties

according to the respective rights in an equitable manner, taking into consideration the necessity to grant a right of access to each lot from the nearest public road."

APPEAL from the judgment of the District Court of Kurunegala.

Cases referred to :

1. *Kanthia v. Sinnathamby* – 2 Balasingham Notes of cases at 19.
2. *Thambiah v. Sinnethamby* – 55 CLW 55 and in 61 NLR 421.
3. *A. D. Dionis v. William Singho* – 77 NLR 103.
4. *Hewavitharana v. Themis de Silva* – 63 NLR 68.

P. A. D. Samarasekera, PC with *Keerthi Sri Gunawardena* for 1st and 2nd defendant-appellants.

S. A. D. S. Suraweera for plaintiff-respondents.

Cur. adv. vult.

October 19, 2001

DISSANAYAKE, J.

The plaintiff-respondent filed this action to partition the land called "Kolapellala Kanda" morefully described in the 2nd schedule to the plaint.

There was no contest between the parties with regard to the corpus and the share allotments.

The case proceeded to trial on 4 issues and at the conclusion of the trial the learned District Judge ordered entering of decree allotting shares to the plaintiff-respondent and the defendant-appellants. The learned District Judge also ordered that the plaintiff-respondents

were entitled to the cartway depicted as X to Z in plan X as a means of access from the Kandy-Kurunegala public road. 10

It is from the aforesaid judgment that this appeal is preferred.

The only substantial issue involved in this case was whether the plaintiff-respondent was entitled to the cartway, lying from the Kandy-Kurunegala public road depicted as X to Z in plan No. 682 of Commissioner H. M. S Herath dated 24. 02. 1983 produced marked 'X'.

The said cartway admittedly fell outside the corpus and lay to the North of the corpus. It was common ground that the said roadway fell across the lands of the 2nd and 3rd defendant-respondents. It was also common ground that the 3rd and 4th defendant-appellants were not named as parties in the plaint and the 3rd and 4th defendant-appellants were added as parties on their intervention subsequently. 20

Learned President's Counsel appearing for the defendant-appellants contended that the learned District Judge has misdirected himself in ordering a right of way over the lands of the 2nd and 3rd defendant-appellant's land that fell outside the corpus. He contended that the Partition Law did not authorize a Court to partition or make an order relating to right, title, or interest in a land that fell outside the corpus. To buttress his argument learned President's Counsel cited the decisions of the following cases : 30

- (a) *Kanthia v. Sinnathamby*⁽¹⁾ Balasingham's notes of cases at 19.
- (b) *Thambiah v. Sinnathamby*.⁽²⁾
- (c) *A. D. Dionis v. A. William Singho*.⁽³⁾

Lascelles, CJ. in the case of *Kanthia v. Sinnethamby (supra)* in considering the question whether the learned Commissioner was right in refusing to make an order with regard to a certain right of way claimed by the appellant's over certain land lying outside and to the North of the land which was the subject of the partition action observed : 40

"There can, in my opinion, be no doubt but that the Commissioner was right in refusing to adjudicate with regard to the existence of a servitude on land outside the land which was the subject-matter of the partition action. If the land to the North had belonged to a stranger, a person who was not a party to the action, it is clear that no order with regard to a servitude over the land would have any binding effect; and the accident that the land belonged to the plaintiff can in no way enlarge the powers of Court in a partition action." 50

The aforesaid judgment of Lascelles, CJ. has been followed in the case of *Thambiah v. Sinnethamby (supra)* which decided that in a partition action a declaration cannot be obtained, that a land outside the land to be partitioned is subject to a servitude. Weerasuriya, J. observed :

"It is not clear how in a partition action declaration can be obtained that a land outside the land to be partitioned is subject to a servitude, for this in effects is what the plaintiff seeks. Our attention was drawn by Mr. Chelvanayakum who appeared for the 3rd defendant-respondent to the case of *Kanthia v. Sinnathamby (supra)* where it was held that such a declaration could not be granted. The position seems to be the same under the Partition Act, No. 16 of 1951, which governed the present action. On this ground alone, therefore, the declaration sought for by the plaintiff should have been refused." 60

In *A. D. Dionis v. A. William Singho and Others (supra)* it was held that in a partition action once a certain land has been excluded from the corpus sought to be partitioned, the Court has no authority, under the Partition Act to determine the right, title or interest of any person who claims to be entitled to the land that has been excluded, or to the plantations, buildings or other improvements on it.

It was the contention of learned Counsel for the plaintiff-respondent that under section 18 (1) (vii) of the present Partition Law, No. 21 of 1977 the Commissioner is obliged to include in his report the existing means of access to the corpus from the nearest public road and therefore under the present law as it stands today once the means of access from the nearest public road is included in the report of the Commissioner, the Court is obliged to make a determination with regard to the said roadway, even if such roadway fell outside the corpus.

The rights of parties whose land fell outside the land to be partitioned and the scope of section 2 of the old Partition Act, No. 16 of 1951, and the orders that can be made by a District Court in an Interlocutory Decree under section 26 of the old Partition Act which are on the same lines as sections 2 and 26 of the present Partition Law, No. 21 of 1977 has been dealt with in detail in the case of *A. D. Dionis v. A. William Singho (supra)* Pathirana, J. at page 105 quoting Thambiah, J. in *Hewavitharana v. Themis de Silva*⁽⁴⁾ had stated thus :

“There is no provision in the Partition Act that the Court is obliged to make any of the orders set out in section 26 (2), in respect of the land that is described in the plaint. Nor is there any provision in the Act providing for the declaration of title to a land solely owned by a person, which has been wrongly included

in the corpus sought to be partitioned. In such cases the practice hitherto has been to exclude the land which is outside the subject-matter of the partition action and which is proved to have been the property of a person who is not a party to the proceedings. It is not uncommon for a plaintiff to include small portions of land in the corpus belonging to other persons. In all such cases if the Court has to adjudicate also on the title of the owners of those lands, then the Court will be obliged to investigate the title of lands which do not come within the purview and scope of section 2 of the Partition Act. Further, if the Court has to examine the title of persons whose lands have been wrongly included in the corpus, great inconvenience and hardship may be caused to persons who may be quite content to possess such lands in common or if it happens to be the land of a single individual, to possess it by himself. In our view it is not the intention of the legislature in passing the Partition Act that the Court should partition any lands other than those that came within the ambit of section 2 of the Act."

Section 26 of the Partition Law, No. 21 of 1977 sets out the orders a Court may include in the Interlocutory Decree in an action instituted under section 2 of the Partition Law by any co-owner to partition a land owned in common.

Section 18 (a) (viii) of the Partition Law makes it obligatory to the Commissioner to include in his report *inter alia*, the existing means of access to the land from the nearest public road.

Although under section 18 (a) (viii) existence of such a means of access has to be included in the Commissioner's report, neither section 26 nor section 2 gives any right to a District Court to make an order with regard to such a roadway if it fell outside the corpus.

In my view section 18 (a) (viii) has been included in the Partition Law, No. 21 of 1977 to facilitate the District Court to allot shares to the parties according to their respective rights in an equitable manner, taking into consideration the necessity to grant a right of access to each lot from the nearest public road.

It would appear that section 18 (a) (viii) does not empower the District Court to adjudicate upon such access road, if it fell outside the corpus. ¹³⁰

Therefore, the contention of learned Counsel appearing for the defendant-respondent that section 18 (a) (viii) gave District Courts power to adjudicate on a right of access, even if such means of access fell outside the corpus, is untenable.

The learned District Judge misdirected himself when he came to the finding that the plaintiff-respondent is entitled to the cartway from the Kurunegala-Kandy public road, depicted as X to Z in plan No. 682 of the Commissioner dated 24. 02. 1983 produced marked (X). ¹⁴⁰

I set aside that part of the judgment of the learned District Judge delivered on 27. 09. 1995 and the Interlocutory Decree granting a right of cartway to the plaintiff-respondent from the Kurunegala-Kandy public road, depicted from X to Z in plan No. 682 dated 24. 02. 1983 (X) made by Commissioner H. M. S Herath.

The learned District Judge is directed to amend the Interlocutory Decree accordingly.

The appeal is allowed with costs.

T. B. WEERASURIYA, J. (P/CA) – I agree.

Appeal allowed.