1958 *Present :* **Weerasooriya, J., and Sansoni, J.**

THAMBIAH, Appellant, *and* SINNATHAMBY, Respondent

S. C. 723—D. C. Jaffna, 10179/L

Partition action—Land outside the corpus*—Claim for a right of way across it—Not permissible—Partition Act, No. 16 of 1951.*

In a partition action a declaration cannot be obtained that a land outside the land to be partitioned is subject to a servitude.

APPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with *V. Arulambalam* and *S. Thangarajah*, for plaintiff-appellant.

S. J. V. Chelvanayakam, Q.C., with *V. Ratnasabapathy*, for 3rd defendant-respondent.

Cur. adv. vult.

January 21, 1958. WEERASOORIYA, J.—

The substantial point involved in this appeal is in regard to the right of way claimed by the plaintiff-appellant along the points XYZ in Plan P1 as a means of access from his land on the south, depicted as lots 6 and 7, to the public lane on the north through the by-lane represented by lot 5.

The plaintiff filed this action as a co-owner for the partition of the land depicted as lots 6 and 7 in Plan P1. The only other co-owner is the 2nd defendant. There is no dispute as regards their respective shares. The plaintiff also claimed a declaration that the land is entitled to a right of way as stated above. The 3rd defendant has been joined as a party because he is the owner of lots 2 and 3 within which XYZ fall. Lots 2 and 3 form a separate land to the north of the plaintiff's land.

It is not clear how in a partition action a declaration can be obtained that a land outside the land to be partitioned is subject to a servitude, for this in effect is what the plaintiff seeks. Our attention was drawn by Mr. Chelvanayakam who appeared for the 3rd defendant-respondent to the case of *Kanthia v. Sinnatamby* [1] 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 governs the present action. On this ground alone, therefore, the declaration sought for by the plaintiff should have been refused.

But as the point was not taken at the trial the learned trial Judge considered the matter on its merits and arrived at the conclusion that the plaintiff had failed to establish his right to a pathway along XYZ. The basis on which the plaintiff claims the pathway is a grant from K. Vinasy, the 3rd defendant's father, who originally owned lots 6 and 7

[1] (1915) 2 *Bal. Notes of Cases 19.*

and also lots 1–5, 8 and 9 in Plan P1 as one land of 46½ lachams. By P5 of 1907 Vinasy transferred an extent of about 20 lachams on the southern side from this land (and now represented by lots 6 and 7 in P1) to his daughter Vallipillai by way of dowry. In doing so he reserved for the use of the grantee a strip of land four cubits wide out of another portion of his land to the north in extent 2½ lachams as a means of access to the public lane further north. At the time of the execution of P5 there were two lands forming the northern boundary of the land transferred thereon. One of those two lands is represented by lots 4, 8 and 9 in Plan P1 and had been already transferred by Vinasy to the 3rd defendant on P4. The other land (exclusive of the strip referred to) consisted of lots 2 and 3 in Plan P1 and was still owned by Vinasy. That is the land described as " the northern boundary land belonging to the first named of us " in the clause in P5 in which the right of way is granted in the following terms : " together with the right of path four cubits wide running from the public lane on the northern side along the eastern boundary of the northern boundary land belonging to the first named of us, for people, cattle and sheep to pass and re-pass to and from this land ". It is to be noted that in the subsequent dealing with that land by Vinasy on P8 in favour of the 3rd defendant a path four cubits wide running along its eastern boundary is specially excluded. This seems to be the same strip reserved in P5 as a means of access (through the by-lane, lot 5) to the public lane on the north from the land transferred on P5.

There is, thus, much to be said in favour of the contention of Mr. Thiagalingam, who appeared for the plaintiff appellant, that a pathway as a means of access from his client's land on the south to the public lane was the subject of a specific grant by the original owner Vinasy on P5 and P8. He also contended that the reference in the subsequent deed P9 to a " right of path four cubits wide running from the public lane on the north along the eastern boundary of the northern land " is to the same pathway reserved in P5 and excluded from the land conveyed on P8, and that the learned District Judge was wrong in thinking that the reference was to a different path shown in Plan P1 as the eastern boundary of lot 8 and comprised of lot 9. With this contention too I agree. But even so, it is quite clear that the pathway granted on the deeds P5 and P8 cannot possibly fall within lots 2 and 3 but it must form the eastern boundary of those lots. Nor can the pathway fall within lot 4 (which is on the east of lots 2 and 3) since lot 4 is said to form a part of the extent alienated by Vinasy in favour of the 3rd defendant on P4 which is earlier than P5. But according to the plan P1, lots 2 and 3 on their eastern side abut on lot 4 and there is nothing in between in the nature of a path, nor are there traces of a path on lots 2 and 3 or on lot 4.

It is important in this connection to note that according to the plaint and also the statement made by the plaintiff before the surveyor who prepared the plan P1, the right of way claimed is a defined path six feet wide over lots 2 and 3 (on the eastern side) connecting XYZ. Although X is at the southern extremity of the by-lane (lot 5) which leads up to the

public lane on the north, there appears to be no direct access from the by-lane to lot 2 because of the intervening boundary fence of lot 2. But there is direct access from lot 4 to the by-lane at its southern end.

Although the plaintiff came into Court on the footing that the right of way claimed by him was over lots 2 and 3, he seems to have been in two minds about it at the time of the trial, for his evidence refers only to his having gone across lot 4 as a means of access from the public lane to his land on the south. In re-examination he stated categorically : " Ever since I understood things we have been using the path to the east of the 2½ lachams (land) as access to lots 6 and 7 ". Since lots 2 and 3 now form the " 2½ lachams " land, it is clear from the plan P1 that east of that land is lot 4. While the 3rd defendant probably had no objection to the plaintiff going across lot 4 (in which the well shares in common is situated) it is obvious that he would have strongly resented any attempt on the part of the plaintiff to go over lot 2 which is the 3rd defendant's residing land. That land, even on the plaintiff's evidence, is separated on its eastern side from lot 4 by a fence.

In the view of the trial Judge the plaintiff was content to use the path shown as lot 9 on the extreme east of lot 8 as the means of access from his land to the public lane until in more recent times he acquired by purchase (on 3D2 of 1952) a share in the northern land shown as lot 1 in P1 and which is situated between lot 2 and the public lane. Undoubtedly in order to reach his newly acquired land from his land on the south it would have been easier for the plaintiff to cut across lot 4 than go along lot 9. But the fact that he did so in no way advances his case that he is entitled to a right of way over lots 2 and 3. In my opinion the learned trial Judge was correct in holding that the plaintiff failed to establish his right to a pathway along XYZ, even though I do not agree with all his reasons for coming to that conclusion.

In addition to the pathway given in P5, certain reservations were also made in favour of the grantee relating to a share of a well and the " thoorvai " land both of which, it is common ground, are situated in lot 4 in Plan P1. At the hearing before us Mr. Chelvanayakam conceded that the present owners of the land sought to be partitioned are entitled to the rights in the well and the " thoorvai " land as reserved in P5, and Mr. Thiagalingam invited us to make a specific declaration in favour of the plaintiff in regard to those matters. But, as indicated earlier, I do not see how in a partition action such a declaration can be made in respect of a land outside the subject matter of the action. In the unlikely event, however, of a dispute arising in the future as regards the rights of the plaintiff to a share of the well and the " thoorvai " land on lot 4 in plan P1, I apprehend that nothing that has happened in the present case will preclude him from vindicating those rights in a properly constituted action.

The appeal is dismissed with costs.

SANSONI, J.—I agree.

Appeal dismissed.