

1952 Present : Nagalingam A.C.J. and Gunasekara J.

SAPARAMADU. *et al.*, Appellants, and SANDERATNE *et al.*,
Respondents

S. C. 285—D. C. Colombo, 4,699

Partition Ordinances (Cap. 56)—Section 2—Order for sale—Special circumstances necessary.

The policy of the law is to favour the partition of a common land rather than to direct a sale. The fact that one section of the land is unbuildable and valueless is not by itself a sufficient ground for ordering a sale.

APPEAL from a judgment of the District Court, Colombo.

G. P. J. Kurukulasuriya, for the defendants appellants.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiffs respondents.

Our adv. vult.

March 24, 1952. NAGALINGAM A.C.J.—

This is an appeal from an order of the learned Additional District Judge of Colombo entering a decree for sale in a partition case where the shares to which the parties are entitled to are not in dispute. Roughly speaking, the plaintiffs are entitled to a 47/80 share while the defendants are jointly entitled to the remaining 33/80 share of the soil and the buildings standing thereon excepting the timber shed which belongs exclusively to the 2nd defendant. The defendants-appellants seek a partition of the land while the plaintiffs-respondents are keen that the entirety of the land should be sold and the proceeds divided.

The reason which seems to have found favour with the learned Additional District Judge in directing a sale was that a sale would be advantageous to the parties in view of the shape of the land. The land may be described as one comprised of a narrow elongated strip running from East to West and a better and well proportioned portion running from North to South. The narrow strip, it is common ground, is one that cannot be built upon and must be regarded as a sterile portion of the land. But the major portion of the land, which is the portion described as running North to South, is a valuable plot abutting on the main Galle Road and situate at Dehiwela.

The entire extent of the land is 76 perches, of which roughly about 15 perches consist of the narrow strip while the remaining 61 perches form the remaining portion. The fact that the narrow strip cannot be put to any satisfactory use seems to have been the determining factor in ordering the sale. I fail to see how the circumstance that a portion of the land is valueless can be said to affect the question as to whether a partition would be impossible or inexpedient. It cannot be said that a sale of the entirety of the land would fetch a better price by reason of the narrow strip

having to be sold along with the rest of the land. In fact it seems to me that the purchaser would discount the existence of the narrow strip and offer a price which in his opinion it would be proper to pay for the portion of the land that would be of utility to him. It is not even suggested that if the entirety of the narrow strip were left undivided it could be put to some use and so fetch a better figure for the entire land at the sale. Had there been such a suggestion, then one might have understood the reason underlying the order for sale. In fact it is not uncommon in partition cases to find that the land sought to be partitioned consists of a fertile portion and of an unfertile rocky and barren portion. The existence of the barren portion has not been regarded as a ground by itself for ordering a sale but on the other hand a partition is directed and the commissioner is instructed to allot portions out of both the fertile and unfertile parts.

In this case, therefore, I do not think that the reason given by the learned Additional District Judge for ordering a sale can be regarded as sound. The policy of our law based on Roman Dutch Law, unlike that of the English Law, is to favour the partition of a common land rather than to direct a sale and turn the occupants out of it. This view is supported by section 2 of the Partition Ordinance, which declares it to be competent to one or more co-owners to compel a partition, while special circumstances must be made out by a party for desiring a sale. Jayawardene in his work¹ sets out the matter thus :—

“ A co-owner can *compel* a partition but cannot *compel* a sale, although he may *apply* for one. The former is a matter of right, the latter has to be justified. ”

The plaintiffs, then, have to justify their application for a sale, and as I have already indicated, the only ground upon which the sale has been ordered is that one section of the land is unbuildable and valueless, which, as I have indicated, is not a sufficient ground for ordering a sale. Besides, there is evidence that the defendants are in occupation of the house on the land. The plaintiffs themselves do not want the house to live in as they have another house. The defendants are anxious to continue in occupation of the common house as they have no other to go to. Furthermore, in order to meet the plaintiff's objection in regard to the sterility of the narrow strip the defendants have now gone out of their way, although they did not do so in the District Court, to have the entirety of the narrow strip allotted to them.

In these circumstances I think the ends of justice would be best served by entering a decree for partition superseding the order for sale. I would therefore set aside the order of the learned Additional District Judge in so far as it directs a sale and order that a decree for partition be entered instead. I would also give further directions in regard to the mode of partitioning : The defendants will be jointly allotted the Southern portion of the land abutting Frazer Avenue so as to include the entirety of the house No. 27, which will also be allotted to them, but as far as possible the extent of the soil should be the minimum consistent with the commodious use of the house. The Western boundary of the land adjoining Lot 8B shown in plan X will be extended in a straight line up to the passage

¹ *Partition* : page 109.

in the North, as indicated by me in the plan, roughly to the point N marked by me in blue, and the narrow strip to the West of the line will also be allotted jointly to the defendants. The rest of the land, including the buildings other than the timber shed, will be allotted to the plaintiffs. The 2nd plaintiff will demolish and remove the timber shed, for which no compensation will be paid. Compensation will, of course, be assessed by the Commissioner in respect of the soil and all the other buildings, and the plaintiffs jointly or the defendants jointly will be directed to pay compensation to the other party as the case may be.

The appellants will be entitled to the costs of appeal.

GUNASEKARA J.—I agree.

Order set aside.
