

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA.

C.A. No. 454/96(F)

D.C. Balapitiya Case No. 1484/P

Malgama Kankanamge
Senarath Jayasinghe,
Jayabima,
Poddiwela,
Mattaka.

10th Defendant-Appellant

Vs

Malgama Kankanamge
Gunawathie Karunaratne,
Poddiwela,
Mattaka.

Plaintiff-Respondent

- 2) Malgama Kankanamge
Saranelis Gunasena,
- 3) Malgama Kankanamge
Sopinona
- 4) Malgama Kankanamge
Siripala Piyasena
- 5) Malgama Kankanamge
Nandawathie
- 6) Malgama Kankanamge

Jayasiri Jayasinghe
7) Malgama Kankanamge
Piyadasa Jayasinghe
8) Malgama Kankanamge
Gunadasa Jayasinghe
9) Malgama Kankanamge
Jayawathie Jayasinghe
10) Malgama Kankanamge
Senadeera Jayasinghe
11) Malgama Kankanamge
Hemawathie Jayasinghe
All of Poddiwela, Mattaka.

12) Galle Development Council
13) Poddiwela Hewage
Sumathipala
14) Poddiwela Hewage Hemasiri
15) Poddiwela Hewage
Somawathie
16) Mattaka Gamage Gunadasa
17) Mahagama Kankanamge
Premaratne
18) Poddiwela Hewage
Davith Singho
19) Mattaka Kankanamge
Hinninona
All of Poddiwela, Mattaka

Defendant-Respondents

Before : A.W.A. SALAM, J.

Counsel : S.A.D.S. Suraweera for the 10th Defendant-Appellant and Bimal Rajapakse with M.A. Ravindra Anawaratne for the Plaintiff-Respondent.

Written Submissions tendered on: 22.02.2011.

Decided on: 11.05.2011

A.W.A. SALAM, J.

The 10th defendant-appellant seeks to set aside the order of the learned District Judge dated 24.04.1996 confirming the scheme of partition submitted by the Commissioner, viz. plan No. 4092 dated 03.09.1993, of Garvin de Silva, Licenced Surveyor and rejecting the alternative scheme submitted through Rabin Chandrasiri, Licenced Surveyor.

Among other grounds, he contends that the scheme submitted by the Commissioner is unreasonable in that he has totally wiped out the foot path marked as "C" in the preliminary plan. The trial in this matter has been taken up without the parties raising any points of contest. Therefore the question as to whether the 10th defendant-appellant is entitled to use the path in question did not arise for consideration at the trial. As a matter of fact the 10th defendant-appellant had claimed this path in order to gain access to the property on the boundary of the corpus. No evidence had been led at the trial as to the alleged

existence of the path which the 10th defendant-appellant claimed as having acquired the right to use. As such, no directions have been given in the interlocutory decree to the Commissioner to make provisions for the said path.

The 10th defendant-appellant in his endeavour to depict the path that he claimed, produced an alternative scheme of partition which has been properly considered by the District Judge. It is established principle of law that the plan prepared by the Commissioner should not be rejected unless it's unreasonableness is positively proved.

In this matter having considered the evidence led by both parties at the scheme inquiry, the learned District Judge has arrived at the irresistible conclusion that the scheme prepared by the Commissioner deserves to be confirmed. I see no reason to interfere with this judgment. Hence this appeal should stand dismissed subject to costs.

Judge of the Court of Appeal

NT/-