**IN THE COURT OF APPEAL OF THE DEMOCRATIC**

**SOCIALIST REPUBLIC OF SRI LANKA.**

C.A. Appeal No. 571/99 (F)
D.C. Avissawela No. 1873/P

Kithsiri Balasuriya Siril and
Rajapakse Kanthi Sunethra Rajapakse,
Medagoda,
Amithirigala
**3rd and 4th defendant-appellants**

Vs

Kalthotage Jayaratna,
Medagoda,
Amithirigala
**Plaintiff-respondent**

Kanatta Badahalage Baby Nona
Kanatta Badahalage Emali Nona
Medagoda,
Amithirigala
**Defendant-respondents**

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

Counsel: Padma Bandara for the 3rd and 4th defendant-appellant and Sanjeewa Jayawardena with Asoka Niwunhalla for the plaintiff- respondent.

Argued on: 22.07.2010, 15.09.2010

Written submissions tendered on: 02.09.2010

Decided on: 09.02 2011

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A.W.Abdus Salam, J.



The plaintiff instituted this action seeking a partition of the land described in the schedule to the plaint which is depicted as lot 1 in in the earlier partition plan No 59/1973 filed of record in partition action No 12748/P.

As pleaded in the plaint, by virtue of the final decree entered in case No 12748/P the original owner of lot 1 was one Elisa. On a short chain of title set out in the plaint the undivided rights in the corpus devolved equally on the plaintiff and the 1st defendant. Further the plaintiff averred in the plaint that the 1st and the second defendant-appellants and the third defendant-respondent started to forcibly crossover his land from 1991 without being entitled to any right of access over the corpus.

The second and third defendant-appellants and 3rd defendant-respondent maintained that they were entitled to use a common public path across the corpus to gain access to a waterfall and a cemetery. (Vide points of contest 6, 7 and 8).

Significantly, the pivotal question that came up for determination in the partition action was the existence of this right away across the land. The previous plan filed of record in the first partition action was annexed to the plaint by the plaintiff in proof of his claim as to the nonexistence of the alleged right away.

The said plan No 59/1973 depicts lot 1 to 18 and lot 1 which is the subject matter of this partition action is shown at the extreme South West. This plan has not been disputed by the parties including the appellants. According to the entries made in the said plan the preliminary survey in relation to the earlier partition action has been done on the 13th and 14th of August 1969 and the boundaries reopened on 22nd September 1973. The final partition has been done on 24th, 28th and 30th November 1973. It is crystal

clear from the said plan that no roads had existed over or across the land, namely lot 1 in that year 1973. Quite significantly, a 10 feet wide road is located on the Northern boundary of the corpus and it extends further along the South Western boundary of lot 3 and 5 shown in the said plan. Above all a public road runs along the eastern boundary of the corpus and the 10 feet wide Road referred to above as being running on the northern boundary of the corpus abuts this public road. This clearly shows that in the year 1973 there had been no such road way as claimed by the appellants existed across the corpus.



It is interesting to note that the second defendant in his statement of claim denied the allegation contained in the plaint as to the non-existence of a right of way across the land and pleaded the existence of a 10 chain long 9 feet wide road across the corpus known as "Nakkawala Badahalage Hena Para" registered in Ruwanwella Prashiya Sabawa and that several families including the second defendant have acquired a prescriptive right for the use of the said roadway to gain access to an said waterfall and public cemetery.

First and foremost the claim made by the appellants to the alleged roadway across the land is hopelessly vague. Further the appellants also relied on the preliminary plan and the previous partition plan in substantiation of their claim. They claimed that the road in question was in existence for a period of over 50 years. If the road in question had existed over a period of five decades, it is surprising as to why it had not been shown in the previous partition plan.

In the preliminary plan No 813-P, Mr Gunasena, the Licensed Surveyor and Commissioner of court has shown roadway which is marked as lot 2 to the North of the land as opposed to the claim made by the appellants to a roadway towards the South West boundary. As a matter of fact the Commissioner gave evidence on

this matter and he had not been seriously cross examined by the appellants on this matter.

The failure on the part of the appellants to cross examine the Commissioner on salient points regarding the existence of the roadway across the land has been treated by the Learned District Judge as unfavourable to the appellants.



The Learned District Judge has also taken into consideration that the path shown in the preliminary plan is said to be two feet in width as opposed to the claim preferred by the appellants for a of a 10 feet wide road. Further the appellants have not called any Surveyors to testify on their behalf nor have seriously disputed the testimony of the Commissioner. The evidence relating to the superimposition of the earlier partition plan on the preliminary plan has been of immense assistance to the Learned District Judge to resolve the dispute. The Surveyor has clearly stated that the footpath shown by him to be 2 feet in width does not look like an old or clear path and therefore the Learned District Judge came to the conclusion that the claim made by the appellants is false. The Learned District Judge has come to this conclusion after considering the evidence of the witnesses who testified before her. Her observations with regard to the nature of the claim made by the appellants had attracted strong criticism.

A perusal of the judgment clearly shows that the Learned District Judge has taken immense pain to analyze the evidence. Her observation as to the claim made by both parties had been very fair are reasonable in the light of the evidence adduced at the trial.

For reasons stated above, it is my considered opinion that the appellant have not shown any acceptable grounds warranting the interference of this Court with the findings and the judgment of the

Learned District Judge. Hence, this appeal is dismissed subject to costs.



Judge of the Court of Appeal