

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

In the matter of an application for leave to appeal in terms of Section 754(2) of the Civil Procedure Code as amended.

C.A.L.A. No.15/2003
D.C.Colombo -16855/P

Mohoppu Arachchige Jayasena Perera
134, Sunandarama Mawatha,
Mahabuthgamuwa,
Angoda.

Plaintiff

Vs.

1. Don Ariyawardana Ranasinghe, (decease)
No.7, Kohilawatta, Angoda.
2. Don Sumanawathie Ranasinghe
C/O. T.D.Wickramasinghe,
Ihala Dummalakotuwa,Dankotuwa.
3. Don Rupawathi Ranasinghe
14, Ganewatta Road,
Ihala bomiriya,
Kaduwela.
4. Lewanduwa Vithanage Sumathipali, (deceased)
134, Sunandarama Mawatha,
Mahabuthgamuwa,
Angoda.
5. M.Joslin Ranasinghe,
15/12 Pansala Para,
Mahabuthgamuwa,
Angoda.

6. N. Chandrawathie Perera
No. 270, Kandy Road,
Yakkala.

7. M. Girty Gunapali
133, Sunandarama Mawatha,
Mahabuthgamuwa,
Angoda.

Defendants

And now,
W.R.A.
Rohana Priyadarshana Ranasinghe
135A, Sunandarama Mawatha,
Mahabuthgamuwa,
Angoda.

5th A Defendant- Petitioner

Vs.

Mohoppu Arachchige Jayasena Perera
134, Sunandarama MAwatha,
Mahabuthgamuwa,
Angoda.

Plaintiff – Respondent

1(a) Don Sanjeewa Kumara Ranasinghe,
No. 7, Kohilawatta, Angoda.

1(a) Substituted-Defendant-Respondent

2. Don Sumanawathie Ranasinghe
C/O. T.D. Wickramasinghe,
Ihala Dummalakotuwa, Dankotuwa.

3. Don Rupawathi Ranasinghe
14, Ganewatta Road,
Ihala bomiriya,
Kaduwela.

4(a). Mohoppu Arachchige Jayasena Perera
134, Sunandarama MAwatha,
Mahabuthgamuwa,
Angoda.

4(a) Substituted- Defendant- Respondent

6. N. Chandrawathie Perera
No. 270, Kandy Road,
Yakkala.

7. M. Girty Gunapali
133, Sunandarama Mawatha,
Mahabuthgamuwa,
Angoda.

2nd, 3rd, 6th and 7th

Defendant-Respondents

Before : A.H.M.D. Nawaz, J
&
H.C.J. Madawala, J

Counsel : Nilantha Kumarage for the 5 A Defendant- Petitioner
M.H.B. Morais for the Plaintiff- Respondent

Argued on : 16 / 02 /2016

Judgment Date : 27 / 04 /2016

H. C. J. Madawala J

The 5th defendant- petitioner had filed this leave to appeal application to set aside the order of the Learned additional District Judge delivered on 3-1-2003. After considering the petition affidavit and documents and hearing the submissions of both counsels in this respect the court granted leave to appeal of this application on 18-01-2006. The appeal was thereafter fixed for argument on 20-06-2007 both counsels appearing in court invited court to decide this matter on the written submissions already filed. Accordingly court reserved its judgment for 25-01-2008. However this case was later taken up for argument before the present bench and oral submissions of both counsels were heard and judgment was reserved for 27-04-2016.

The 5th defendant- petitioner by his petition dated 2nd January 2003 has appealed to this court to set aside an order made to the surveyor/Court Commissioner to prepare a fresh scheme of partition. Allotting to the 5th defendant- petitioner her entitlement of 4.3 perches according to plan No. 2099 dated 7-1-2003 made by K.P. Wijeweera, Licensed surveyor or in the alternative allotting 3.8 perches according to plan No. 2101 dated 11-1-2003 made by K.P. Wijeweera, Licensed Surveyor. This action was instituted by the plaintiff-respondent seeking to partition the land called Siyambalagahawatte for 1/8th share. The corpus to be partitioned was depicted in plan No. 938 dated 21-4-1997 and the said plan and report were annexed here to marked as 'B' and 'B1' respectively. The Journal entries in case was annexed here to marked as 'A'. By the judgment dated 19-10-2000, and the Interlocutory Decree in terms of the 5th defendant petitioner was allotted 5 perches out of the said land. It was also decreed that the parties are entitled to the improvements in terms of the report to the Preliminary plan. The judgment and the Interlocutory Decree was marked 'C' and 'D' respectively. A commission was issued to the surveyor S.D, Ediriwickrema to prepare and forward to court a scheme of partition in terms of the Interlocutory Decree. The said surveyor forwarded plan

No. 1562 dated 20-11-2001 together with a report which said plan and report are marked as 'E' And 'E 1' respectively.

The petitioner filed the statement of objections supported by affidavit objecting to the said scheme of partition and praying that her entitlement be given in Lot 1. The 5th defendant petitioner in her evidence at the trial stated that she was residing on the North Western boundary on the corpus and that she was in possession of a portion of the corpus which lay to the South of her residence. However the court commissioner has in the scheme allotted to the petitioner Lot 1 being in an extent of 1.83 perches, out of the land which she was in possession and Lot 4 a further extent of 1.97 perches towards the East of the corpus aggregating to 3.8 perches. The petitioner complained that by the said manner of division she could not make any practical use of the land which she was entitled to. She pleaded that the court commissioner should have given her full entitlement to abut her residence on the North West of the corpus and that the same would not cause any prejudice to the plaintiff who had been allotted Lot 2. She also pleaded that the registrar of the District Court has, without any authority of the court annexed to the commission issued to the surveyor a note to have regard to the boundaries marked in red lines in plan No. 2852 made by G.O.R. De Silva, licensed surveyor, and the court commissioner has, acting on the said notes, split up the petitioner's entitlement as Lots 1 and 4. The petitioner has also stated at the scheme inquiry that the surveyor Ediriwickrema testified and stated that the petitioner informed him that the land to the North of the corpus belong to the petitioner. He also stated that he allotted Lot 1 a narrow strip to the petitioner as the plaintiff objected to a larger portion being given complaining that if that was done Lot 2 would become narrow. In cross examination the surveyor admitted that Lot 6 provided access to all the Lots except Lot 1. By order delivered on 3-1-2003 the Learned District Judge directed the surveyor to give the extent of 1.83 perches to abut Lot 4 and the Learned District Judge has confirmed the scheme of the court commissioner subject to the said amendment. 11-2-2003 was ordered as the date for Final decree.

Being aggrieved by the said order of the Learned District Judge delivered on 3-1-2003 the petitioner has appealed therefrom on the grounds of appeal as set out in paragraph 7, (a) (b) (c) (d) (e) of the petition. It was contended by the 5th defendant- petitioner that the proposed scheme which was confirmed by the said order is wrong and erroneous in law in as much as it is not in conformity with the judgment and the Interlocutory Decree. It was urged that the said order cannot stand for this reason alone. It has been decreed that the parties are entitled to their improvements in terms of the report to the preliminary plan. The report to the preliminary plan states that the petitioner claimed the temporary buildings 1, 2, and 3 and the tube well. These building and the tube well are situated on the North Eastern boundary of the corpus. The petitioner claimed her entitlement of the land to include these improvements. It was urged by the counsel of the petitioner that these improvements should be allotted if possible to the co- owner who had made the improvements. He should not be required to pay the compensation to the other co-owner for these improvements. It was urged that if the land on which the improvements are made is superior in points of fertility to the rest of the land, a different consideration applies. It was urged that in the present case that petitioner had effected the improvements with the consent of the other co-owners. There is no evidence that the position of the land on which the petition has effected improvements is more fertile than the balance land. Accordingly it was also decided in the case of **Thevchanamoorthy Vs Appakuddy 51 NLR, 317 page** that the co-owner should be allotted the portion which contains his improvements, whenever it is possible to do so. It was also urged that the Learned District Judge erred that there was no evidence before court that the land to the north to Lot 1 belong to the petitioner. It was urged that the petitioner in her evidence at the trial categorically stated that by deed No. 2328 dated 23-12-1983 marked as D 5. She purchased 5 perches to abut her land. The court commissioner in his evidence admitted that the petitioner informed him that the house to the North of the corpus belong to the petitioner. The petitioner had stated that she purchased this land since there was no room in the land

where her house stood for the waste pit and the lavatory pit and the building put up of the 5 perches. It was also urged that the Learned District Judge erred in confirming the commissioner's plan subject to the variation of giving the petitioner allotment in one Lot far away from her residence. The proposed scheme at least gave the petitioner a small strip of land to abut her residence. The amendment does not give the petitioner any land to abut her residence. The strip of land given to the petitioner, is also so narrow that it cannot be put to any use. The commissioner had stated that it is only 10 feet wide and the Urban Development Authority will not grant permission for any building to be constructed there on. It was urged that the petitioner was allotted 5 perches in the judgment and in the interlocutory Decree. The two lots allotted to her by the commissioner amounts to only 2.3 perches. The commissioner had stated that the balance has been due to the proportionate reduction for the access road. If the petitioner's entitlement is given to abut her residence she does not require any access road. Further the petitioner stated that in fact by a proportionate reduction for the road she should not lose 1.2 perches but only 0.07 perches. Therefore petitioner's lots should be 4.3 perches. On the other hand, the extent reduced from the lots allotted to the plaintiff is less than what in fact it should be. It was also submitted that the entire entitlement of 3.8 perches as calculated by the commissioner or 4.3 perches as calculated by the surveyor K.P. Wijeweera can be given to the petitioner in one lot to abut her residence without any inconvenience or prejudice to the plaintiff respondent as evidence by the said two plans. Even if the petitioner entitlement is calculated at 4.3 perches there 12 feet left between the Southern boundary of that Lot and the means of access. The breadth of that portion would be about 14 feet if the petitioner is given the lesser extent of 3.8 perches. The petitioner stated that in addition to the 12-14 feet the plaintiff who has been allotted Lot 2 has the advantage of the means of access, for which the petitioner has contributed without having any use thereof.

The 5th defendant- petitioner has prayed that the order of additional District Judge delivered on 3-1-2003 be set aside and order be made to surveyor/Court commissioner to prepare a fresh scheme of partition allotting the 5th defendant- petitioner her entitlement of 4.3 perches according to plan No. 2009 dated 7-1-2003 made by K.P. Wijeweera, licensed surveyor or in the alternative allotting 3.8 perches according to plan No. 2101 dated 11-1-2003 made by K.P. Wijeweera.

On a perusal of the record we find that there is no plan filed of record numbered 2009 dated 7-1-2003 by K. P. Wijeweera, licensed surveyor. What is filed of record is plan no. 2099 dated 7-1-2003 marked as 'K'. The plan No. 2101 dated 11-1-2003 also drawn by K.P. Wijeweera, licensed surveyor is filed of record marked as 'L'. On a scrutiny of both these plans we find that the means of access to the public Road in respect of Lot 1 has not been demarcated by the surveyor. It is trite Law that in effecting a partition proper rights of way should be provided within the corpus to the district allotments as means of access to a public right of way.

In the present case these conditions have not been complied with by the surveyor. **C. Amarasinghe Vs. Wanigasooriya (1994)2 SLR 303 , Kanthaiya Vs. Sinnathamby (1913) 2 Balasingham notes of cases 19 , S. Thambaiya Vs. Sinnathamby 61 NLR 921.**

The 5th defendant- respondent has tendered to court the alternative scheme of partition and has produced plan No. 2101 dated 11-1-2003 which said scheme of partition is also not acceptable for the reason set above. Counsel for the 5th respondent- petitioner has indicated to court that the 5th respondent- petitioner portion of land has not been given at one unit and as such that the 5th defendant- respondent has been deprived of his legal entitlement accordingly. The Learned District Judge in his order dated 3-1-2003 has directed the surveyor to the said allotment of land to the 5th defendant- petitioner as one allotment of land including the improvements. However we find that the surveyor in alternative plan No. 2099 dated 7th Jan 2003 the right of way to the said allotment

Lot No. 1 is not provided. The 5th defendant- petitioner- respondent has waived his rights for right of way over the said land as shown in the premises to the North West adjoining the land in dispute. The right of access to said allotment marked Lot 1 would be provided over the plaintiff respondent land. It was contended that it would narrow the plaintiff allotment of land. However we find the portion of Land which the plaintiff- respondent loses will be provided from the Eastern side from said allotment. We do not think that the Learned District Judge has erred in coming to the decision that the 5th defendant- respondent should be given his portion of land in one allotment including the improvement he has made and thus for existing. However we are of the view that the said scheme of partition is not acceptable to this court. Accordingly we direct that the fresh scheme of partition to be drawn by the surveyor providing the 5th defendant- respondent access from the main road along the western boundary to the said allotment of land allotted to the plaintiff- respondent. Accordingly we affirm the Learned District Judge's order subject to above variation and dismiss this application with cost.

JUDGE OF THE COURT OF APPEAL

A.H.M.D. Nawaz, J

I agree.

JUDGE OF THE COURT OF APPEAL