

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

In the matter of an Application for Leave
to Appeal

Sriya Balage,
No. 420, Matara Road,
Magalle.

Plaintiff

C.A. No. LTA-0272/03

D.C Galle No. P/10953

-Vs.-

1. Gintota Vithana Gamage Wimalasiri,
No. 412, Matara Road, Magalle.

1st Defendant

2. Uduweriya Rathnamalla Bandaralage
Edward,
No. 414, Matara Road, Mgalle.

2nd Defendant

3. Luke Steven
No. 418, Matara Road, Magalle.

3rd Defendant

4. A.K. Susan Nona,
No. 416A, Matara Road, Magalle.

4th Defendant

5. Wasantha Ediriweera,
No. 416C, Matara Road, Magalle.

5th Defendant

6. Liyanage Piyasiri,
No. 416D, Matara Road, Magalle.

6th Defendant

7. Wijewickrama Vidana Mudiyanselage
Misilin,
No. 416E, Matara Road, Magalle.

7th Defendant

8. Nanda Ratnamalla,
Matara Road, Magalle.

8th Defendant

9. A.P. Piyasena,
Matara Road, Magalle.

9th Defendant

10. Pettigala Gamage Chathurika
Vimarshani,
No. 118B, Heenapendala Road, Galle.

10th Defendant

11. Sriyani Balage,
No. 410, Matara Road, Magalle.

11th Defendant

AND NOW BETWEEN

Sriya Balage

No 420, Matara Road, Magalle.

Plaintiff - Petitioner

Vs.

1. Gintota Vithana Gamage Wimalasiri,
No. 412, Matara Road, Magalle.

1st Defendant - Respondent

(Deceased)

1 (a). G.W. Prasanna Sampath
No. 412/A, Matara Road, Magalle.

1 (a) Substituted- Respondent

2. Uduweriya Ratnamalala Bandaralage
Edward,
No. 414, Matara Road, Magalle.

2nd Defendant - Respondent

(Deceased)

2 (a). Sajeewa Lankani Thalduwa
Gamage,
“Sripalee”, Dorape, Angulugaha.

2nd Substituted- Respondent

3. Luke Steven,
No. 418, Matara Road, Magalle.

3rd Defendant - Respondent

4. A.K. Susan Nona,
No. 416A, Matara Road, Magalle.

4th Defendant - Respondent

(Deceased)

4 (a) Kalegana Koralage Sominona,
No. 416A, Matara Road, Magalle.

4th Substituted - Defendant-Respondent

5. Wasantha Ediriweera,
No. 416/C, Matara Road, Magalle.

5th Defendant - Respondent

6. Liyanage Piyasiri,
No. 416D, Matara Road, Magalle,

6th Defendant - Respondent

7(a) Patabendi Maddumage Santi Sinno,
No. 416A, Matara Road, Magalle.

(c) Patabendi Maddumage Champa,
No. 416A, Matara Road, Magalle.

7th Substituted-Defendant-Respondents

7 (b) Patabendi Maddumage Dickson
Jayalath,

7th Substituted-Defendant-Respondents
(Deceased)

7 (b) (1) Patabendi Maddumage Kasun
Dishantha,
No. 416A, Matara Road, Magalle.

7 (b) 1 Substituted-Substituted-
Defendant - Respondent

8. Nanda Ratnamalala,
Matara Road, Magalle.

8th Defendant - Respondent

(Deceased)

8(a). Sanjeewa Lankani Thalduwa Gamage,
“Sripalee”, Dorape, Angulugaha.

8th Substituted-Defendant-Respondent

9. A.P. Piyasena,
Matara Road, Magalle.

9th Defendant – Respondent

10. Pettigala Gamage Chathurika
Wimalasiri,
No. 118B, Heenapendala Road, Galle.

10th Defendant - Respondent

11. Sriyani Balage,
No. 410, Matara Road, Magalle.

11th Defendant – Respondent

(Deceased)

11(a). J.M. Manure Niranjala Dasanayake,
No. 410, “Anjalee”, Matara Road,
Magalle, Galle.

11th Substituted-Defendant-Respondent

BEFORE : Shiran Gooneratne J. &

Dr. Ruwan Fernando J.

COUNSEL : A.D.H. Gunawardena for the
Plaintiff-Petitioner.

Rohan Sahabandu, P.C. with
S. Wickremasinghe for the

5th and 7th Substituted-Defendant - Respondents.

ARGUED ON : 10.07.2020

WRITTEN SUBMISSIONS

FILED ON : 07.07.2020 (by the Plaintiff-Petitioner)

08.07.2020 (by the 5th and 7th Defendant-Respondents)

DECIDED ON : 02.09.2020

Dr. Ruwan Fernando, J.

Introduction

[1] This is an application for leave to appeal filed by the Plaintiff-Petitioner from the order of the learned Additional District Judge of Galle dated 11.07.2003. By that order, the learned Additional District Judge of Galle approved the alternative scheme of partition proposed by Mr.M.C.Mendis, Licensed Surveyor as contained in Plan No. 2027 dated 19.05.2001 marked ‘Y’.

Background

[2] The Plaintiff-Petitioner (hereinafter referred to as the Plaintiff) instituted the above-mentioned action in the District Court of Galle by Plaintiff dated 17.01.1990 seeking to partition a land called ‘Pelawatta alias Talapathtattitottam” in extent of 1 rood and 18 perches. The said land is depicted in the Preliminary Plan No. 150 dated 19.01.1992 marked “X” made by Mr. A. Weerasinghe, Licensed Surveyor in extent of 1 rood and 8 perches.

Trial and the Judgement

[3] After trial, the judgment was entered on 09.01.1992 and the interlocutory decree was entered accordingly. No appeal was filed against the said judgment of the District Court of Galle. The interlocutory decree was however, amended by the learned District Judge to reflect the orders made by him in the judgment (Vide-journal entries nos. 57 and 68).

[4] The commission was issued to the Commissioner Mr. A. Weerasinghe who tendered the proposed scheme of partition as contained in Plan No. 150/A dated 23.07.1998 marked “Z” (**Annexure “A”**). At the instance of the 5th and 7th Defendants, Mr. C. M. Mendis, Licensed Surveyor prepared an alternative scheme of partition and tendered his Plan No. 2027 dated 19.05.2001 marked “Y” (**Annexure “B”**).

Scheme Inquiry and Order

[5] At the scheme inquiry, Mr. C. Mendis who prepared the alternative plan No. 2027 marked “Y” gave evidence in support of the said Plan No. 2027 while Mr. A. Weerasinghe who prepared the Commissioner’s Plan No. 150A gave evidence in support of his Plan No 150A marked “Z”.

[6] At the scheme inquiry, the Plaintiff’s position was that (i) as the Plaintiff has not been given a frontage to the Galle-Matara Road due to the location of her lot “K” on the south of the road closer to the sea shore and its vulnerability to sea erosion, she is entitled to a 10 feet wide roadway to her lot marked “K” as suggested by the Commissioner; (ii) the 3 feet wide road that has been proposed by Mr. Mendis marked “N” in common is a footpath which is inadequate to reach the public road to the East.

[7] On the other hand, the position of the 5th and the 7th Defendants was that (i) as the 11th defendant was not a co-owner and she had claimed only the cesspit and the concrete slab, she was only entitled to a cess pit and the

concrete pit (item ‘4’ in both plans) in terms of the amended interlocutory decree, but the Commisisoner had given a land in extent of 4.5 perches contrary to the interlocutory decree; (ii) their garbage cannot be taken to the main road due to the location of the buildings which are adjacent to each other and thus, the road marked “N” given by Mr. C. Mendis as contained in Plan No. 2027 marked “Y” to be used by all the parties is just and reasonable.

[8] The learned Additional District Judge by his order dated 11.07.2003 rejected the Commissioner’s Plan No. 150A on the ground that it is contrary to the amended interlocutory decree and held that the alternative Plan prepared by Mr. C. Mendis as contained in Plan No. 2027 marked “Y” is in conformity with the amended interlocutory decree and that the said alternative Plan is a just and reasonable division of the corpus of the action.

Leave to Appeal

[9] Being aggrieved by the said order of the learned Additional District Judge of Galle, the Plaintiff has filed this application for leave to appeal. Leave to Appeal was granted by this Court by order dated 12.06.2020 on the following question of law:

Has the learned Additional District Judge of Galle erred in law by accepting the alternative scheme of partition proposed by M. C. Mendis, Licensed Surveyor in Plan No. 2027 dated 15.01.1992 marked “Y” without appreciating the fact that the scheme of partition proposed by the Commissioner, A. Weerasinghe in Plan No. 150A dated 23.07.1998 marked “Z” is in conformity with the interlocutory decree and that it ensures a fair and equitable division of the land in question?

[10] At the hearing, we heard the submissions of the learned Counsel for the Plaintiff, Mr. A.D.H. Gunawardena and the learned President's Counsel for the 5th and 7th Defendants, Mr. Rohan Sahabandu.

The directions given in the interlocutory decree for the division of the corpus depicted in the Preliminary Plan No. 150

[11] In terms of the interlocutory decree, the following parties are entitled to shares and buildings:

- | | | |
|--------------------------------|---|--|
| The Plaintiff | - | 7 perches (a bare land); |
| The 1 st Defendant | - | building No. 5 depicted in Plan "X" with the land underneath the said building |
| The 2 nd Defendant | - | building No. 8 depicted in Plan "X" with the land underneath the said building |
| The 3 rd Defendant | - | building No. 16 depicted in Plan "X" with the land underneath the said building |
| The 4 th Defendant | - | building No. 13 depicted in Plan "X" with the land underneath the said building |
| The 5 th Defendant | - | building No. 19 depicted in Plan "X" with the land underneath the said building |
| The 6 th Defendant | - | building No. 23 depicted in Plan "X" with the land underneath the said building (subject to the Deed No. 2723 marked 10V3 and Deed No. 2855 marked 10V4 executed by Premaratna Tiranagama, Public Notary). |
| The 7 th Defendant | - | building No. 26 depicted in Plan "X" with the land underneath the said building |
| The 11 th Defendant | - | cesspit with the concrete slab and the said strip of land |

The 12th Defendant - building No. 1 depicted in Plan "X" with the land underneath the said building

Buildings

1 + 2	-	12 th Defendant
3	-	unallotted
4	-	cesspit with the concrete slab -11 th Defendant
5 + 6 + 7	-	1 st Defendant
8+9+10+11	-	2 nd Defendant
12	-	to the soil
13+14+15+	-	4 th Defendant
16+17+18	-	3 rd Defendant
19+20+21+22	-	5 th Defendant
23+24+25	-	6 th Defendant
26+27+28	-	7 th Defendant

The parties are only entitled to compensation in respect of temporary buildings referred to in the Preliminary Plan. If any balance land is, however, available after allotting the Plaintiff's and the said Defendants' rights, the Commissioner has a right to allot the temporary buildings within the balance portion of land on a priority basis having regard to the date and the period of purchase.

Is the Commisioner's Plan No. 150A conformity with the amended interlocutory decree?

[12] At the hearing the learned President's Counsel for the 5th and the 7th Defendants, Mr. Rohan Sahabandu submitted that although the 11th Defendant was entitled only to the cesspit with the concrete slab as shown in item 4 of the Preliminary Plan No. 150 marked "X", the Commissioner had given lot "B" in extent of 4.5 perches to the 11th Defendant which is in

excess of the land area of the cesspit and the concrete slab contrary to the amended interlocutory decree when the extent of the land with the cesspit and the concrete slab is only $\frac{1}{2}$ perch as admitted by the Commissioner in his evidence.

[13] Mr. Sahabandu submitted that Mr. C. Mendis in the alternative Plan No. 2027 has given lot "B" to the 11th Defendant which is in extent of 1.4 perches in conformity with the amended preliminary Plan. The submission of Mr. Sahabndu was that the learned District Judge has clearly observed that the Commissioner has acted without authority whereas Mr. C. Mendis has acted in conformity with the amended interlocutory decree.

[14] The learned Counsel for the Plaintiff did not make any submission with regard to the finding of the learned Additional District Judge in allotting lot "B" in extent of 4.5 perches to the 11th Defendant as his main complaint was that the Plaintiff had been deprived of a proper roadway within the corpus to reach the public rodway.

[15] Section 36 (1) of the Partition Law reads as follows:

"On the date fixed under section 35, or on any later date which the Court may fix for the purpose, the Court may, after summary inquiry,

- (a) confirm with or without modification the scheme of partition proposed by the surveyor and enter a final decree of partition accordingly;
- (b)"

[16] There are two conflicting plans submitted by the Plaintiff and the 5th and 7th Defendants and hence, the District Judge has to consider which scheme of partition is in conformity of the amended interlocutory decree and which proposed division is a just and equitable division of the corpus.

Adjustment of Lot “B” in line with the amended interlocutory decree

[17] A perusal of the order of the learned Additional District Judge of Galle, reveals that he had proceeded to consider which plan is in conformity with the amended interlocutory decree and which scheme is a just and equitable division of the corpus. The learned Additional District Judge has observed that the Commissioner had given a portion of land to the 11th Defendant in excess of the land area given in the amended interlocutory decree whereas Mr. C. Mendis has acted in conformity with the amended interlocutory decree.

[18] According to the Plaintiff's pedigree, the Plaintiff has not given undivided shares to the 11th Defendant who is living in the adjoining land to the West of the corpus of action. The 11th Defendant who was present at the preliminary survey had only claimed the cesspit and the concrete slab (item No. 4 of the preliminary plan) as it is shown in the Commissioner's Report marked “X1”. The 11th Defendant who is the sister of the Plaintiff had not, however, intervened, claiming undivided rights in the corpus of the action.

[19] At the trial, the Plaintiff had stated that the 11th Defendant was only entitled to the cesspit shown as item No. 4 of the preliminary plan and at her instance, the 11th Defendant was added as a party to the action on 07.06.1996. The 11th Defendant had not filed a statement of claim and her lawyer had told the learned District Judge that no statement of claim would be filed on her behalf (Vide- proceedings dated 07.02.1996).

[20] Although the original interlocutory decree referred to the 11th Defendant's rights as the cesspit with the concrete slab and the land underneath, the learned District Judge had corrected the interlocutory decree by stating that the 11th Defendant is only entitled to the cesspit and

the concrete slab with the said strip of land (x පිහුරේ අංක 4 වගයෙන් පෙන්වා ඇති කොන්ක්‍රීට් ලැබූ සහිත වැසිකිලි වල සහ එම බිම තීරුව). (Vide- the amended interlocutory decree submitted to Court on 26.01.1998 and the journal entry no. 68 dated 24.02.1998).

[21] When the scheme inquiry was proceeding, the learned Additional District Judge has further observed on 23.01.2003 that the 11th Defendant is entitled to the cesspit with the concrete slab and the said strip of land ("X" පිහුරේ අංක 4 වගයෙන් පෙන්වා ඇති කොන්ක්‍රීට් ලැබූ සහිත වැසිකිලි වල සහ එම බිම තීරුව) and thus, the amended interlocutory decree was further corrected (vide- amended interlocutory decree at page 377 of the record). It is crystal clear that in terms of the amended interlocutory decree, the 11th Defendant who is not a co-owner is only entitled to the cesspit with the concrete slab and the said strip of land.

[22] According to the evidence of the Commissioner, Mr. A. Weerasinghe, the land area that falls within the cesspit and the concrete slab is only $\frac{1}{2}$ perch in extent, but he had given a block of land in extent of 4.5 perches (lot "B" in Plan No. 150A) to the 11th Defendant, which is 8 times more than the land extent of the cesspit and the concrete slab (Vide- pages 272-273 of the record).

[23] On the other hand, the Commissioner had valued the cesspit and the concrete slab at Rs. 2000/- and the land extent thereof in extent of 4.5 at Rs. 27,000/- when the 11th Defendant was not a co-owner of the land and thus, she was only entitled to the cesspit with concrete slab and the said strip of land. The Commissioner has admitted in evidence that he had no authority to allot a block of 4.5 perches to the 11th Defendant in terms of the amended interlocutory decree when the land area of the cesspit and the concrete slab was only $\frac{1}{2}$ perch (Vide- page 272 of the record). Under such circumstances, the learned Additional District Judge has correctly decided

that as regards lot "B" given to the 11th Defendant, the Commissioner's Plan No. 150A is not in conformity with the amended interlocutory decree entered in the partition case.

[24] On the other hand, Mr. Mendis had given a land in extent of 1.4 perches (lot "B" in Plan No. 2207 marked "Y") to the 11th Defendant which comprises the cesspit and the concrete slab, which I find is in conformity with the amended interlocutory decree as observed by the learned Additional District Judge. Accordingly, the Commissioner's Plan No. 150A shall be adjusted in line with the order made by the learned Additional District Judge by allotting lot "B" in extent of 1.4 perches to the 11th Defendant as depicted in Plan No. 2207 marked "Y".

Adjustment of Lot "K" in line with the amended interlocutory decree

[25] It is not in dispute that all other Defendants are occupying buildings facing the Galle-Matara Road except the Plaintiff and thus, there is no way of giving the main road access to the Plaintiff. The next question is when the 11th Defendant's lot "B" is adjusted as depicted in Plan No. 2207 marked "Y", whether the Plaintiff's lot "K" together with a 10 feet wide road access to a public road to the East can be accommodated as depicted in the Commissioner's Plan No. 150A marked "Z" in a manner which would be beneficial to the Plaintiff.

[26] When lot "B" is adjusted in line with the amended interlocutory decree as depicted in Plan No. 2207 marked "Y", there is a portion of land left below the adjusted lot "B" on the southern and western side of the corpus. Lot "C" which is adjoining lot "B" cannot be further adjusted within the remaining portion of lot "B" depicted in Plan No. 150A marked "Z" due to the location of lot "C" within the corpus. When the 11th Defendant's lot "B" in extent of 1.4 perches is adjusted in line with the

amended interlocutory decree, it is inevitable that lot "K" shall also be shifted to the west of the corpus of the action as correctly depicted in Mr. C. Mendis's Plan No. 2207 marked "Y" as a separate lot in extent of 7 perches. .

[27] Under such circumstances, the learned Additioanl District Judge cannot be faulted in accepting a part of the scheme of partition as regards the adjustment of lots "B" in extent of 1.4 perches and lot "K" in extent of 7 perches as depicted in Plan No. 2207 made by Mr. C. Mendis marked "Y".

Proper roadway to be given to the Plaintiff and the other parties within the corpus

[28] The next question that arises for determination is whether the 10 feet wide road suggested by Mr. A. Weerasinghe or a 3 feet wide road suggested by Mr. C. Mendis is the proper right of way to be given to the Plaintiff and the other parties.

[29] It is seen from the Plan suggested by Mr. A. Weerasinghe that the Plaintiff has been given a 10 feet wide road within lot "K" along the southern boundary to reach her lot "K" from the public road on the East on the ground that due to sea erosion, it cannot be further reduced. On the other hand, the road marked "N" suggested by Mr. Mendis in Plan No. 2207 marked "N" is a common roadway to be used by all the parties as a road access to the public road on the East of the corpus.

[30] The important question is whether the road suggested by Mr. C. Mendis marked "N" to reach lot "K" from the public road to the East is a proper roadway having regard to its width and the location of lot "K" and its beneficial use to the Plaintiff.

[31] At the hearing Mr. Gunawardena submitted that as the judgment is silent on the nature of the roadway to be given, it is the duty of the District Judge to provide a proper right of way to the parties from within the corpus as access to a public right of way. He relied on 2 authorities in *Amarasinghe v. Wanigasuriya* (1994) 2 Sri LR 203 and *Udalagama and others v. Kempitiya* (2002) 3 Sri L.R.1. In both cases, the Court of Appeal held that in the process of partitioning, proper rights of way should be provided from within the corpus as access to a public right of way

[32] He further submitted that the Commissioner had given a 10 feet wide road within the Plaintiff's lot "K" as depicted in Plan No. 150A due to the sea erosion that takes place as lot "K" is located closer to the seashore and thus, the said 10 feet wide road cannot be further reduced. His contention was that Mr. C. Mendis in his alternative plan had reduced the width of the road from 10 feet to a 3 feet wide footpath, which cannot be used at least to take a Three-Wheeler Taxi to lot "K" from the public road to the East. He further submitted that the Plaintiff's grievance is that while all other parties enjoy the road frontage of the Galle-Matara Road as well as the road marked "N" given to them by Mr. C. Mendis in Plan No. 2027, the Plaintiff's road had been reduced to a mere 3 feet wide footpath as depicted in Plan No. 2207, which is unreasonable and against the purpose of the scheme of partition.

[33] As noted, when the 11th Defendant's 1.4 perch lot "B" is adjusted in line with the amended interlocutory decree, the Plaintiff's lot "K" also has to be adjusted by shifting it to the South-West of the corpus. Under such circumstances, if the Plaintiff's lot "K" is also to be provided with a 10 feet wide road within her 7 perch block of land after shifting lot "K" to the South-West of the corpus, it is obvious that the Plaintiff's lot "K" will

become a narrow strip of land making it impossible for the Plaintiff to use the land for any beneficial purpose.

[34] Mr. Shabandu submitted, however, that as the entire land is a small land in extent of 48 perches and consisting of several buildings, there is no other way, other than the manner suggested by Mr. C. Mendis in Plan No. 2027 marked "Y". Mr. Sahabandu conceded, however, that the road marked "N" was further reduced to provide a road to the parties who occupy the buildings which are adjacent to each other as it becomes clear that the removal of garbage should be done only through the road to the East.

[35] His contention was that the learned District Judge had accepted the Plan marked "Y" which had given the road marked "N" to be used by the parties who occupy the buildings which are adjacent to each other to reach the public road to the East after having evaluated the evidence of two Surveyors on the balance of probability and therefore, his findings which are based on pure questions of facts cannot be treated as perverse or unreasonable. In support of contention, he cited several judgments.

[36] I totally agree with Mr. Sahabandu that the Court of Appeal will not lightly disturb the findings of facts, especially with regard to the credibility of witnesses unless the findings are highly unreasonable or perverse. This view is supported by the judgment of the Privy Council in *Fraad v. Brown & Company Ltd* 20 NLR 282 wherein the Privy Council stated thus:

"It is rare that a decision of a judge so express, so explicit, upon a point of fact purely, is overruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any Judge of the Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare, in questions of

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veracity, so direct and so specific as these, a Court of Appeal will overrule a Judge of first instance.”

[37] In *Alwis v. Piyasena Fernando* 1993 (1) Sri LR 119 at 122, His Lordship the Chief Justice G.P.S. de Silva observed that “it is well established that the finding of primary facts by the trial judge who hears and sees witnesses are not to be lightly disturbed on appeal.”. In *Gunewardene v. Cabral and Others* 1980 (2) SRLR 220, Rodrigo J. held that the Appellate Court will set aside inferences drawn by the trial judge only if they amount to findings of fact based on:

- (a) Inadmissible evidence; or
- (b) After rejecting admissible and relevant evidence; or
- (c) If the inferences are unsupported by evidence; or
- (d) If the inferences or conclusions are not rationally possible or perverse.

[38] A perusal of Mr. C. Mendis’s Plan No. 2027 (“Y”) and his Report reveals that the road marked “N” is only 3 feet wide road that has been given within the corpus to be used by all the parties. The evidence of Mr. C. Mendis was that the road marked “N” could be used by all the parties, especially by those who occupy buildings which are adjacent to each other to take their garbage without going through the Main Road. The learned District Judge who inspected the corpus of action on 09.09.1999 had clearly observed that the blocked cesspit marked 27 could not be cleaned due to the fact that the Municipality Lorry could not reach the place where the cesspit was located from the rear side of the corpus. The relevant observations of the learned District Judge on 09.09.1999 are as follows:

1. අදාළ වැකිකිල් වල වහාම නිස් කළ යුතු බව අධිකරණයට පෙනී ගියේය.
2. එය කිදු කිරීම සඳහා මහනගර සභාවන් සපයනු ලබන සේවාව ලබා ගැනීමෙන් ඉටු කිරීමට නොහැකි වී ඇති බව පෙනී ගියේය. එයට හේතු වී

අභ්‍යන්තරේ නිස් කිරීමේ යන්තුය වැසිකිල් වල දක්වා ගෙන යමට තොහැකි විමස.

[39] Even if it can be assumed that the parties who occupy the adjacent buildings marked 1, 5, 13, 16, 19, 23 and 26 are able to take their garbage and use other utility services through the Galle-Matara Road, a perusal of both Plans reveals that a part of the corpus in extent of 3.6 perches between the front buildings and the Galle-Matara Main Road had already been acquired by the State for the expansion of the Galle-Matara Road. It seems to me that once the acquisition is finalized, it is likely that there will be no space whatsoever, on the northern boundary to be used as a utility area.

[40] In this context, the learned Additional District Judge having evaluated the evidence of two Surveyors has decided that since the parties who occupy the adjacent buildings are to be given strips of lots towards the south, it is reasonable to provide them with a roadway from the rear portions of their lots to reach the public road which is situated on the eastern side of the corpus. His findings at page 3 of the order are as follows:

විෂය වස්තුවේ පිහිටිම සලකා බැලීමේදී මෙම විෂය වස්තුව පාර්ශවකරුවන්ට බෙදා වෙන් කිරීමේදී ප්‍රධාන මාර්ගයේ සිං වෙරළ දෙසට දීවෙන ආකාරයට තීරු වශයෙන් ලබා දීම සිදු වන බව පෙනී යන අතර, එන්ද සියලුම පාර්ශවකරුවන්ගේ පරිහරණය පිනිස විෂය වස්තුවේ වෙරළබව දැක්න් ප්‍රවේශීම යදානා මාර්ග ප්‍රවේශයක් ලබා දීම යෝගා වන බව අයිතරනුයට පෙන්.

[41] I am of the view that the said decision of the learned Additional District Judge to provide the road marked “N” to be used by the **parties who occupy the adjacent buildings** marked 1, 5, 8, 13, 16, 19, 23 and 26 to reach the public road to the East from the rear portion of the corpus cannot be regarded as unreasonable having regard to the location of the corpus and the narrow strips of lots to be allotted to them.

Is the road marked “N” a proper roadway to reach Lot “K”?

[42] A perusal of Mr. Mendis's Report however, reveals that Mr. C. Mendis had originally carved out a 4 ½- 5 feet wide road along the southern boundary and thereafter, he had reduced the said 5 feet wide road to 3 feet to be used by the parties who occupy the adjacent buildings to reach the public road to the East from the rear portion of the land. His own Report confirms this position is as follows:

පාර්ශවකරුවන්ට 1997-09-09 නියෝගයෙහි සඳහන් පරිදි පැමිණිලිකාරීයට
නිමිවන කැබඳ්ල බස්නාහිරෙන් හා එයට අඩු 4 1/2 - 5 පළුලුති ප්‍රවීග
මාර්ගයක් වෙන් කරන ලදී. මෙම ප්‍රවීග මාර්ගය අඩු 3 ක් ලෙසට පළම ඇඩු කර
අහිමි කරන ලද අංක P කැබඳ්ලට ද අනිඛිත් පාර්ශවයන්ට මුහුදු වෙරළට
පිවිසීමේ පහසුව සඳහන් දික් කරන ලදී. මෙම ප්‍රවීග මාර්ගය කැබඳ්ල අංක N
ලෙස සඳහනු කරන ලදී.

[43] Mr. Sahabandu strenuously argued that the width of the road marked “N” cannot be further widened due to the smaller land consisting of several buildings and thus, the only way in which the road marked “N” could be given without affecting the rights of the other parties was the manner suggested by Mr. C. Mendis. His argument is however, not unsupported by the facts borne out by the record.

[44] It is seen from the observations made by the learned District Judge on 09.09.1999 that the Plaintiff's lot could be given from the western portion of the land and the road access to the Plaintiff's lot could also be given along the southern boundary in equal extent to the public road to the East. The learned District Judge had further observed that buildings 27 and 28 in lot “J” would not be affected by the allocation of a road on the southern boundary of the corpus. The said observations are as follows:

පැමිණිලිකාරීයට නිම් වන ඉඩම් කොටස මෙම නැවුවට අදාළ ඉඩම් බස්නාහිර
ප්‍රදේශයෙන් දීමට බොහෝ විට ඉඩ ඇත. ඒ සඳහා පාර දීමේදී ඉඩම් දකුණු

මායිම දිගේ ඉවමේ නැගෙනහිර මායිමේ තිබෙන පාරට සමඟ පළමුන් යුත් පාරක් දීම් සිදු වන අතර එම පාර වෙත් කිරීම සඳහා අංක 27, 28 ගොඩනගිලි වලට බාධාවක් වන්නේ නැන.

[45] A perusal of Mr. A. Weerasinghe's Plan No. 150A further reveals that even after having given a 10 feet wide road within lot "K", none of the buildings referred to in the Preliminary Plan No. 150 marked "X" or Plan No. 150A would be affected by the widening of the road along the southern boundary of the corpus.

[46] The reduction of the road marked "N" by Mr. C. Mendis in Plan No. 2027 marked "Y" has however, resulted in increasing the extent of the lots allotted to the 3rd Defendant, 5th Defendant, 6th Defendant and the 7th Defendants, in comparision with Mr. A. Weerasinghe's Plan No. 150A by 0.4, 0.5, 0.2 and 0.2 perches respectively, while the width of the road marked "N" had been drastically reduced from 10 feet to 3 feet.

[47] On the other hand, Mr. C. Mendis himself had observed in his Report marked "Y2" that the 7th Defendant who was given lot "J" by both Surveyors had illegally extended her parapet wall from the eastern and western boundaries of her lot up to the sea shore while the scheme inquiry was pending. The observations of Mr. Mendis at page 387 of the record are as follows:

මගේ පිළුවෙනි කැබලි අංක 'T' නි, 7 වන වින්තිකාරිය විසින් නැගෙනහිර සහ බස්නාහිර මායිම්වල තාප්ප වෙරළ මායිම දක්වා දික්කර ඇත. ඉහත සඳහන් ඇතින් ඉදිකිරීම මගේ සාලැස්මෙන් නොමැති අතර විකල්ප සාලැස්ම පිළියෙළ කිරීමේද මෙම ඇතින් ඉදිකිරීම සාලකිල්ලට හාජනය නොකරන ලද.

[48] The record further indicates that the District Court by order dated 01.05.2001 had issued an injunction against the 7th Defendant restraining her from making any constructions within the corpus while the Plaintiff

had also been prevented from making constructions within the corpus of the action.(Vide- order at page 203 of the record).

[49] It is absolutely clear that there is no merit in the submission that the road marked "N" cannot be further widened to provide a proper roadway to lot "K" when there were no permanent constructions whatsoever, in the corpus beyond buildings referred to in Plan No. 150A or Plan No. 2207. It is further seen that none of the buildings referred to in both Plans will be affected by widening the road marked "N" for the purpose of providing a proper road to lot "K".

[50] It is not in dispute that the road to the East of the corpus is a public road and the learned District Judge who inspected the land on 09.09.1999 had clearly observed that it is appropriate for the Plaintiff to be given a road along the southern boundary in equal extent to the public road on the East (Vide- notes dated 09.09.1999).

[51] I am of the opinion that it is not just and reasonable under such circumstances, to provide the Plaintiff with a 3 feet wide footpath to reach lot "K" which is threatened by sea erosion due to its location closer to the sea shore when none of the buildings referred to in Plan No. 150A marked "Z" or Plan No. 2207 marked "Y" would be affected by the widening of the road marked "N" along the southern boundary of the corpus.

[52] It is well settled that appellate court would not be justified in interfering with the domain of the fact-finding authority of the Trial Judge unless the same is found to be unreasonable or perverse. In *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath*, 1992 Supp (2) SCC 312 it was held:

"It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

[53] In *Smt. Rubi Sood And Another v. Major (Retd.) Vijay Kumar Sud &* decided on 28 May, 2015, the High Court of the Himachal Pradesh in described the nature of unreasonableness and perversity in the following manner:-

"25..... A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.

26- it was held that If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.

27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.

28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."

[54] I agree that the learned Additional District Judge was justified in holding that the Defendants who occupy the buildings which are adjacent to each other should be provided with the road marked "N" to enter the public road from the rear portion of their lots as depicted in Plan No.

2207. However, I am of the opinion that his finding that the Plaintiff must also be given the same 3 feet wide footpath marked "N" as suggested in Plan No. 2207 marked "Y" is wrong, unacceptable, unreasonable and against the weight of evidence and thus, that part of the order would be amenable to judicial scrutiny.

[55] Having regard to all the special circumstances enumerated above, including the extent of the land which is comparatively small in extent (48 perches), it is just and reasonable to expand the road marked "N" in Plan No. 2207 marked "Y" and make it a 7 feet wide road to be used in common from the entry point of the public road on the East of the corpus upto the entry point of lot "K" as depicted in Plan No. 2207 marked "Y" to enable the Plaintiff to reach the public road to the East from lot "K".

[56] I am of the view that the remaining part of the road marked "N" from the entry point of lot "K" upto lot "A" depicted in Plan No. 2207 marked "Y" shall remain unchanged as a 3 feet wide road to enable the other parties to use of the said 3 feet road after connecting with the said 7 feet wide road from entry point of lot "K" to reach the public road to the East.

Validity of the Petition filed by the Plaintiff

[57] Before I part with this order, I wish to deal with the submission made by Mr. Sahabandu that there is no question of law or fact that has been raised by the Plaintiff in the Petition dated 23.07.2003 and the only relief prayed for by the Plaintiff was the stay order and therefore there is no valid appeal before Court. The contention of Mr. Sahabandu was that the basic of attack on the order in question cannot be seen from the Petition and therefore, the Petition shall be dismissed *in limine*. A perusal of the Petition of Appeal dated 25.07.2003 reveals that the Plaintiff in her Petition had prayed for the following reliefs:

1. issue notice on the Respondents;
2. grant leave to appeal;
3. set aside the order dated 11.07.2003;
4. accept and confirm the scheme of partition contained in Plan 150A drawn by W.Weerasinghe, Licensed Surveyor and Court Commissioner dated 23.07.1998;
5. reject the scheme of partition contained in Plan 2027 drawn by M.C. Mendis, Licensed Surveyor dated 19.05.2001;
6. issue a stay order directing the learned District Judge not to implement the partition of the land in D.C. Galle P10953 till the final determination of this application; and
7. for costs.

[58] The Plaintiff in paragraphs 5 of the Petition has stated that in Plan No. 2027 marked “B”, road access has been given to the sea shore as the sea shore is the common boundary to all the allotments whereas in Plan No. 150A marked “A”, one common road access is given to all allotments from the main Galle-Matara Road to the sea shore to save land as far as possible as the corpus is comparatively small in extent.

[59] Section 758 of the Civil Procedure Code sets out the contents of a petition of appeal and provides in sub-paragraph (e) as follows:

- “(e). a plain and concise statement of the grounds of objection to the judgment, decree or order appealed against such statement to be set forth in duly numbered paragraphs”.

[60] It seems to me that there is no specific paragraph which has dealt with the main attack on the order except the above-mentioned paragraph 5 and the relief by which the Plaintiff is seeking to set aside the order in question,

reject the scheme of partition contained in Plan No. 2027 and accept the scheme of partition contained in Plan No. 150A. It appears that there is an omission or defect on the part of the Plaintiff in complying with section 758(1) (e) of the Civil Procedure Code.

[61] The question now is whether such omission or defect on the part of the Plaintiff in complying with section sub-section (1) of section 758 has materially prejudiced the Respondents before Court. Section 759 (1) of the Civil Procedure Code provides that if the petition of appeal is not drawn up in the manner set out in section 758 of the Civil Procedure Code, it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the court or amended then and there. However, section 759(2) of the Civil Procedure Code reads as follows:

“In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just”.

[62] Section 759(2) gives the Court of Appeal the discretion to grant relief in the case of a mistake, omission or defect in complying with the provisions of the foregoing sections which include both section 754, which deals with appeals from a judgment or a decree of an original court and section 756 which deals with applications for leave to appeal (*Thilagaratnam v. Edirisinghe* 1982 (1) Sri LR 56). Thus, section 759(2) only enables relief to be given in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections (section 754 relating to appeals and 756 relating to leave to appeal).

[63] Reliefs under section 759(2) can be granted when the following two mandatory elements are satisfied:

1. Any mistake, omission or defect has occurred on the part of any appellant in complying with the provisions of the foregoing sections; and
2. The respondent has not been materially prejudiced by the said mistake, omission or defect.

[64] Thus, it is actually for the Court to find out whether any mistake, omission or defect that had occurred in complying with the foregoing provisions of the Civil Procedure Code and then, find out whether it has materially prejudiced the Respondents in the case. As the power of the Court of Appeal to grant relief under section 759(2) of the Civil Procedure Code is wide and discretionary, relief may be granted even if no excuse for non-compliance is forthcoming provided however, that the Court of Appeal is of the opinion that the Respondent has not been materially prejudiced (*Nanayakkara v Wanakulasooriya* (1993) 2 Sri LR. 289).

[65] In the case of *Jayasekera v. Lakmini* (2010) 1 Sri LR 41, Ekanayake J. held that:

"If the issue at hand falls within the purview of a mistake, omission or defect on the part of the Appellant in complying with the provisions of section 755, and if the Court of Appeal is of the opinion that the Respondent has not been materially prejudiced, it is empowered to grant relief to the appellant on such terms as it deemed just..."

[66] This appeal was filed in 2003 and the case is pending in the Court of Appeal for the last 17 years. The Respondents had not invited this Court at the initial stage of this appeal to dismiss this appeal on the ground that the Plaintiff had failed to comply with sub-section (1) of section 758 of the Civil Procedure Code and that the Respondents had been materially

prejudiced by such failure. No submission was made at the hearing or argument that the Respondents had been materially prejudiced by the failure of the Plaintiff to comply with sub-section (1) of section 758 of the Civil Procedure Code.

[67] It is crystal clear that the Respondents have not shown that they had been materially prejudiced by the said omission or defect in the Petition in not complying with sub-section (1) of section 758 of the Civil Procedure Code. This Court called for the original case records from the District Court, heard both Counsel, perused the original case record and found that the part of the order of the learned Additional District Judge as regards the failure to provide a proper roadway to the Plaintiff is unacceptable, unreasonable and against the weight of the evidence and hence, the Plaintiff is entitled to a part of the relief sought by her in her Petition subject however, to specific directions.

[68] Having considered the special circumstances and in the absence of any material that the Respondents had been materially prejudiced by such omission or defect in the Petition, I am of the view that the present appeal falls within the scope of section 759(2) of the Civil Procedure Code.

[69] For those reasons, the question of law formulated on 12.06.2020 is answered as follows:

1. The order of the learned Additional District Judge of Galle in accepting the part of the scheme of partition suggested by Mr. C. Mendis as contained in Plan No. 2027 marked "Y" as regards the adjustment of the 11th Defendant's lot "B", shifting the Plaintiff's lot "K" to the West of the corpus and giving a 3 feet wide road marked "N" to be used by the parties who occupy buildings adjacent to each

- other to reach the public road to the East is in conformity with the amended interlocutory decree and is just and reasonable;
2. The other part of the order of the learned Additional District Judge in providing only 3 feet wide road to the Plaintiff's lot "K" as depicted in Plan No. 2027 marked "Y" made by Mr. C. Mendis is unacceptable, unreasonable and is against the weight of the evidence and that part of the order is amenable for judicial scrutiny.

Conclusion

[70] For those reasons, the learned District Judge of Galle is directed to refer the Commissioner's Plan No. 150A marked "Z" to the Commissioner to modify his Plan No. 150A subject to the the following directions and prepare the scheme of partition for the purpose of entering the final decree accordingly.

1. Lot "B" given to the 11th Defendant shall be confined to 1.4 perches and shall be adjusted as depcited in Plan No. 2207 marked "Y";
2. The Plaintiff's lot "K" in extent of 7 perches shall be adjusted by shifting it to the western part of the land as a separate lot as depicted in Plan No. 2207 marked "Y" made by Mr. C. Mendis, Licensed Surveyor;
3. The road marked "N" in Plan No. 2207 made by Mr. C. Mendis, Licensed Surveyor shall be widened by making it a 7 feet wide road from the entry point of the public road to the East of the corpus upto the entry point of the adjusted lot "K" to be used by all the parties as a common road to reach the public road to the East. The extent of the lots "F", "G", "H" and "J" shall be adjusted proportionately for the purpose of widening the said road marked

“N” in Plan No. 2027 marked “Y” to be a 7 feet wide road as aforesaid;

4. The remaining part of the road marked “N” from the entry point of the adjusted lot “K” to the entry point of lot “A” in Plan No. 2207 marked “Y” shall remain unchanged as a 3 feet wide roadway as depicted in Plan No. 2207 marked “Y” to enable the other parties to use the said 3 feet wide roadway to reach the public road to the East by connecting with the 7 feet wide road as directed in this order.

[71] The order of the learned Additional District Judge of Galle dated 11.07.2003 in part which is inconsistent with this order is set aside. Subject the above mentioned directions, the appeal is partly allowed. The parties shall bear their own costs.

[72] The Registrar is directed to forward the original case record together with a copy of this order to the District Judge of Galle.

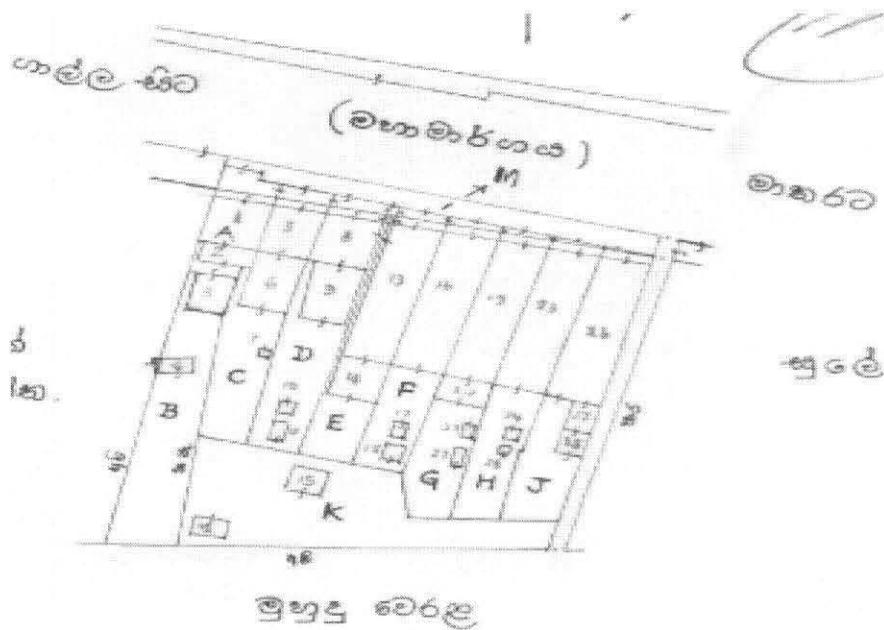
JUDGE OF THE COURT OF APPEAL

Shiran Gooneratne J.

I agree.

JUDGE OF THE COURT OF APPEAL

ANNEXTURE "A"-Plan No. 150A marked "Z"



ANNEXUTE "B" -Plan No. 2027 marked "Y"

