1963 *Present :* **Tambiah, J.**

K. RAJENTHERAM, Appellant, *and* K. SIVARAJAH, Respondent

S. C. 23/62—C. R. Trincomalee, 3045

Co-owners—Amicable partition—Reservation of an allotment to be in common ownership—Agreement that it should be used by one of the allottees as a path—Subsequent obstruction—Illegality.

Where the co-owners of a land execute a deed of partition allotting to themselves separate portions but reserving, in common ownership, an allotment which one of them is given the right to use as a path to proceed from his separate portion to the public road, the others are not entitled to obstruct the free use of the right of way by erecting a gate at the entrance to the pathway. In such a case, the interest of the person who has the right to use the reserved allotment as a pathway is one of co-ownership and not a servitude. He is entitled to use it in accordance with the object for which it is intended to be used.

APPEAL from a judgment of the Court of Requests, Trincomalee.

C. Ranganathan, for Plaintiff-Appellant.

N. Nadarasa, with *K. Kanthasamy*, for Defendant-Respondent.

Cur. adv. vult.

August 19, 1963. TAMBIAH, J.—

The plaintiff and the defendant, by deed No. 592 of 13.7.48, marked D4, became co-owners of the land depicted as lots 1 to 3 in Plan No. T52A, dated 4th May 1951, and marked as P1.

By deed No. 1701 of 12.5.51, marked P2, they partitioned a part of the land. By this deed, lot 1 in the said plan was allotted to the plaintiff and lot 2 to the defendant. The parties expressly agreed that the plaintiff was to have a right of way along lot 3 in the said plan and also the right to go and return from the well in lot 2 in the said plan. After execution of deed P2, the defendant became the sole owner of lot 2 and the plaintiff sole owner of lot 1 and by special agreement, the plaintiff was given the right to use lot 3 as a path to proceed from lot 1 to the public road which is on the south of lot 2. This appears to be the intention of the co-owners, who had divided a part of the land among themselves and left lot 3 in common ownership. The learned Commissioner of Requests, having rightly come to the conclusion that the plaintiff and defendant were co-owners of lot 3 with an express agreement that lot 3 should be used as right of way by the plaintiff, has contradicted his own finding later by a process of reasoning which is not tenable. He later finds that defendant is the sole owner of lot 3 and urges three reasons for this finding.

He states that the north eastern boundary of the land of the defendant is described as land belonging to Rajaperumal and therefore he states that lot 3 is the land of the defendant.

The intention of the parties must be gathered by the interpretation of the deed P2. It is clear that in the deed P2 lot 3 has been left in common ownership. There is no operative part of the deed P2 which specifically mentions lot 3 as the property of the defendant. Only the ownership in lot 2 has been transferred to the defendant. In these circumstances the north eastern boundary of the defendant's land is an erroneous description and the maxim *falsa demonstratio non nocet* applies.

The second reason he gives is equally untenable. He states that as the right of way is only given to the plaintiff, who is the owner of lot 1, and as no right of way had been given to the defendant, lot 3 is defendant's property. The defendant has road frontage on the south of lot 2 and therefore does not require right of way over lot 3. It is only the plaintiff who need have the right of way over lot 3 to proceed from lot 1 to the public road on the south. Therefore there was no necessity to mention in the deed any right of way to the defendant over lot 3.

Thirdly, the learned Commissioner adds the extents of lots 2 and 3 together and states that the aggregate extent of lots 2 and 3 is less than the extent of lot 1 and, therefore, the parties must have intended that lot 3 should be allotted to the defendant. The learned Commissioner has however failed to note that the defendant was getting the road frontage along the whole southern portion of lot 2 and therefore was getting a more valuable land than lot 1 and therefore more extent might have been given to the plaintiff in such a division.

For these reasons the learned Judge's finding that the defendant is the sole owner of lot 3 is untenable. Having erroneously misdirected himself in holding that the defendant is the sole owner of lot 3, the learned judge has discussed at length a series of cases dealing with servitudes which have no application to the facts of this case. (See *Jayasekera Hamine v. Agida Hamine* [1]; *Jayatilleke v. Amarasinghe* [2]; *M. Cornelis Singho v. V. P. S. Perera* [3]; *Harper v. Weerawickrema* [4].) Some of these cases establish the principle that an owner of a property subject to a servitude of right of way could in certain circumstances have a gate or stile at the entrance to a right of way so long as such an act does not reasonably interfere with the reasonable user of the servitude of right of way by the owner of the servitude.

The facts of the present case fall within the ambit of the ruling in *Muthaliph v. Mansoor* [5], which has been followed in later cases. (*See Perera v. Podisingho* [6] and *Agnes Perera v. Edward Perera* [7].)

[1] *(1944) 46 N. L. R. 38.*
[2] *(1957) 61 N. L. R. 193.*
[3] *(1960) 63 N. L. R. 48.*
[4] *(1956) 58 N. L. R. 310.*
[5] *(1937) 39 N. L. R. 316.*
[6] *(1946) 47 N. L. R. 347.*
[7] *(1954) 56 N. L. R. 241.*

In *Muthaliph's case* the co-owners allotted to themselves separate portions of the co-owned land and left a narrow passage, marked in pink in the plan produced in that case, as a right of way to be used by the co-owners. One of the co-owners built on this passage and another co-owner brought an action to restrain him from erecting buildings on this passage. It was held that this pink portion which was meant as a passage was still in the co-ownership of all the co-owners and since the co-owners have agreed that this should be put to a particular use, namely as a passage, another co-owner could not put it to any other use. In that case it was also laid down that a co-owner cannot erect a building or structure without the previous consent of the other co-owner, but this rule is subject to the important exception created by a long line of cases in Ceylon, which lay down the proposition that a co-owner can only put to use a co-owned property for the specific use to which it was intended without the consent of the other co-owners.

Applying this principle to the instant case, lot 3 is still in the common ownership of the plaintiff and the defendant, and as it had been expressly agreed the plaintiff should have the right of way along lot 3, it is not possible for the defendant to put lot 3 to some other use or to obstruct the plaintiff in the exercise of his right of way over lot 3. The defendant contended that as there was a building in lot 2 he could not erect a fence to the east of lot 2 and in order to secure his property he should have a fence on the east of lot 3 and also a gate at the southern end of lot 3. I am afraid this is a lame excuse. The defendant had tried to obstruct the plaintiff by planting some trees on lot 3 and in an earlier case he was ordered by Court to remove them. I am of the view that this is the second attempt on his part to obstruct the plaintiff in the use of lot 3. A gate at the southern end of lot 3, with the restrictions placed by the learned judge, would be a serious fetter on the right of use of lot 3 granted to the plaintiff. No advantage accrues to the defendant by putting up a gate at lot 3. The defendant attempted to show that there was a gate earlier at the southern end of lot 3. The learned Judge has chosen to disbelieve the defendant and I see no reason to differ from this finding.

Each joint owner is entitled to the reasonable use of the property, in accordance with the object for which the property is intended to be used. One of them is not entitled, however, to appropriate any portion of the property to himself (See *Sauerman and another v. Schultz* [1]). Therefore the defendant is not justified in putting up a gate at the southern end of lot 3 and obstruct the free use of the right of way specially granted to the plaintiff by deed P2.

For these reasons I set aside the judgment and decree of the learned Commissioner and enter judgment in favour of the plaintiff appellant as prayed for. The defendant is ordered to demolish the gate at the southern end of lot 3. The defendant will pay the plaintiff costs incurred in the lower Court as well as the costs of appeal.

Appeal allowed.

[1] *(1950) S. A. L. R. 455—Vol. IV.*