

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

D. M. Agnes 25,
Uda Kumbura, Panwila,
Plaintiff-Appellant.

C.A. No. 1286/96F

D.C. Kandy 11348/L

Vs.

1A Don Malani Tilakeratane,

1B Don Harishchandra Tilakeratne,

1C Don Iranganee Tilakeratne,

1D Don Indrani Tilakeratne,

28 Main Street, Panwila.

Substituted-Defendant-Respondents.

Before : A.W.A. Salam, J.
Counsel : A.M. Jiffry for the Plaintiff-Appellant.
Defendnat-Respondent absent and unrepresented.

Argued on : 31.01.2011,

Written Submissions

Tendered on : 03.03.2011.

Decided on : 26.05.2011.

A W Abdus Salam

The plaintiff appellant in this appeal seeks to set aside the order of the learned district judge dated 10 July 1996. The impugned order clearly shows the extent to which she has not been able to give effect to the right course of Justice.

Turning to the historical aspect of the case, the plaintiff filed action against the defendant on 1 October 1974 for a declaration of title to a paddy field, ejection of the defendant and damages. The defendant eventually filed his amended answer on 23 September 1992. However, much prior to the amended answer of the defendant being filed, viz on 9 January 1986 parties had agreed to abide by any decision to be made by court on the disputed question after inspection of the subject matter. For purpose of convenience and ready reference the terms of compromise entered into between the parties is reproduced below.

අද දින මෙම නඩුව පහත සඳහන් ආකාරයට සමථයට පත්වේ. අද දින මෙම නඩුවේ ආරාධුලට භාජනය වී ඇති ඉඩම් කැබලිල එනම් අංක 2117 දරණ සැලැස්මේ කැබලි අංක 02 බව පාර්ශවකරුවන් පිලිගනී. නීතිඥ අච්චිනාචේ මහතා කියා සිටින්නේ මෙම අධිකරණයේ පී.5739 දරණ නඩුවට ගොනුකර ඇති අංක 493 දරණ සැලැස්මේ කැබලි අංක 01 බවය. මේ සඳහා අධිකරණයට ස්ථිර නිගමනයකට එළඹීම පිණිස විරසේකර මිනින්දෝරු තැන විසින් මෙම නඩුවට ගොනුකර ඇති අංක 2118 දරණ පිඹුරේ දක්වා ඇති කැබලි අංක 02

මත 1966.02.26 වැනි දින ආර්. යටවර මිනින්දෝරු මහතා විසින් මෑත සාදන ලද අංක 493 දරණ සැලැස්මේ කැබලි අංක 01 මත අධිශ්‍යතාපනය කරන ලෙසත්, එසේ අධිශ්‍යතාපනය කිරීමේදී එක් කැබලි අංක 02 එක් 493 දරණ සැලැස්මේ කැබලි අංක 01 ලෙස මානක තැන විසින් තීන්දු කලහොත් එම කැබලි මේ නඩුවෙන් ඉවත් කිරීමට පැමිණිලිකරු එකඟ වේ. එසේ නොමැති වුවහොත් පැමිණිලිකරු ඉල්ලා ඇති පරිදි පැමිණිල්ලට නඩුව තීන්දු වීමට එකඟවේ. තවද එක් අධිශ්‍යතාපනය කිරීම සඳහා මැනීමට අවශ්‍ය වුවහොත් ඒ මහතා විසින් මෑත අධිශ්‍යතාපනය කල යුතුය. විත්තිකරුගේ වියදමින්. මේ අවස්ථාවේදී අලුතිනාරේ මහතා 1966.02.26 වැනි දින ජේ. යටවර මහතා විසින් මෑත සකස් කරන ලද පිඹුර ඉදිරිපත් කරයි. අලුතිනාරේ මහතා ඉල්ලා සිටි මිනින්දෝරු මහතාට කොමිසමක් නිකුත් කරන ලෙසට.

විත්තියෙන් කොමිසන් කඩදාසි :- 1986.02.12

In order to give effect to the compromise entered into between the parties the defendant had obtained several dates for commission to ascertain the allotment of land in dispute after superimposition. Thereafter the case had been called on several dates from 3rd June 1986 to 19 March 1992 to enable the defendant to take steps. However as the defendant repeatedly failed in his attempt to take steps, the matter was fixed for trial by the learned additional district judge on 30 July 1992.

Incidentally, on 27 August 1986 when the matter came up for trial the action of the plaintiffs was dismissed for non-appearance and later restored to the trial roll upon an application being made by

the plaintiff to purge his default. Thereafter the report on the commission was also received and the matter was once again fixed for trial. According to proceedings dated 31 March 1986, the learned additional district judge has specifically observed that the dispute needs to be resolved after trial, since he was unable to take a decision on the matter after inspection. This clearly shows that it was impracticable for the court to conclude the matter after inspection though it was originally contemplated on those lines. In the circumstances, as has been rightly done, the learned district judge has fixed the matter for trial and in fact was making a remarkable progress in the trial, when the defendant objected to the resumption of the trial and moved that the settlement be acted upon. Thereafter the learned district judge made order that the matter had been incorrectly taken up for trial and therefore all trial proceeding should be struck off and the settlement should be acted upon.

This order of the learned district judge which has been purportedly made relying on per incuriam rule, clearly appears to be made without considering the actual background in which the case had been fixed for trial, after every endeavour had been made by the learned district judge to give effect to the settlement.

In the circumstances, the learned judge ought to have ruled out the objection of the defendant and continued with the trial. For reasons stated above I am of the opinion that the appellant should succeed in his appeal and the impugned order set aside.

The learned district judge is directed to continue with the trial and conclude the matter according to law.

The appellant shall be entitled to costs of this appeal.

Judge of the Court of Appeal

NT/-