

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

Hewa Pathiranage Siriwimala Pathirana
Baduwatta, Bowana, Thorayaya.

Substituted-Plaintiff-Appellant

Horatal Pedige Durayalage Dharmadasa
Mutthetugala, Kurunegala.

(Deceased Plaintiff)

C.A.NO.258/98 (F)
D.C.KURUNEGALA CASE NO.3326/P

Vs.

1. Dewata Tejjalage Mohotha
Gattuwana, Kurunegala

And 18 others

Defendant-Respondents

BEFORE : **K.T.CHITRASIRI, J.**

COUNSEL : Dr.Sunil Cooray for the Substituted-Plaintiff-Appellant
Nilantha Kumara with Yases de Silva, Attorneys-at-Law
for the 18th & 19th Defendant - Respondents

ARGUED ON : 25th MARCH 2013

DECIDED ON : 07th MAY 2013

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 19.12.1997 of the learned District Judge of Kurunegala. In that judgment, an application to partition the land referred to in the schedule to the plaint dated 17.11.1967 had been refused by the learned trial judge and accordingly the case filed by the plaintiff-appellant (hereinafter referred to as the plaintiff) was dismissed. The said dismissal of the action had been basically on the basis that the land to which the plaintiff claims title is a distinct and separate land with clear boundaries containing a specific extent.

However, the contention of the learned Counsel for the appellant is that the land referred to in the plaint is a co-owned land though the title of the plaintiff is to a separately identified land with a specific extent. He therefore submitted that it is incorrect to dismiss the plaint on the aforesaid basis that the title of the plaintiff set out in the plaint is to a specific and distinct land.

It is trite law that a party cannot seek to have a land partitioned, if it does not belong to in common. This position is clearly stated in Section 2 of the Partition Law No.21 of 1977. The said Section 2 of the Partition Law stipulates thus:-

“where any land belongs in common to two or more owners anyone or more of them may institute an action for the partition or sale of the land in accordance with the provision of this Law”.

According to the averments in the plaint, the land referred to in the schedule thereto is a co-owned land. Share claimed by the plaintiff from the said land referred to in the schedule to the plaint derives from three deeds bearing Nos.3644, 24695 & 3923 marked as P16, P17 & P18 in evidence. Title of the plaintiff had derived from the said three deeds, is to a particular

land with distinct boundaries having a specific extent and also had been identified with reference to a plan [Plan No.998 dated 22.6.1953] made long before the action was filed. Learned District Judge depending on those circumstances had dismissed the action stating that it is not necessary for the plaintiff to continue with this action as his land can be identified separately. Then the issue before this Court is to determine whether the plaintiff, being an owner to a distinct and separate land, could maintain this action in order to partition the land described in the schedule to the plaint.

The plaintiff, having accepted that he has title to a defined and distinct land shown with reference to a plan, had filed this case to partition a land in extent of Two Acres One Rood and Thirty Four Perches which extent is much more than the extent that he is entitled to. The land sought to be partitioned is depicted in the preliminary Plan bearing No.3148 dated 2.6.1969 drawn by Stanley T.Gunasekera, which is in extent of 2 Acres 1 Rood and 34 Perches. The plaintiff in his evidence has stated that the land he had purchased falls within the land sought to be partitioned. The said evidence of the plaintiff had not been controverted. Therefore, it is seen that the land to which the plaintiff claims title falls within the corpus. Unfortunately, this fact has not been adverted to by the learned District Judge. He, having stated that the plaintiff was unable to describe the boundaries and the plantation found on the land sought to be partitioned has decided that the identity of the corpus had not been established. Having concluded so, learned District Judge had dismissed the action on the basis that it is not necessary to have a partition since the plaintiff's land could easily be identified.

As described above, the land to which the plaintiff claims title falls within the corpus. Accordingly, his claim is to a particular share out of the corpus though his title is to a distinct and separate land. Also, it must be noted that the title of the plaintiff had derived from a

person by the name of Kalla Veda (paragraph 3 of the plaint). In paragraphs 28 and 29 of the Statement of Claim filed by the 5th to 10th, 12th, 14th, 18th and 19th defendant respondents also has stated that Kalla Veda became entitled to 3/4th share of the land sought to be partitioned by deeds bearing Nos.53725 and 21952. Accordingly, it is clear that the devolution of title shown by the opposing parties also refers to one and the same land. Moreover, it must be mentioned that no person is prevented from purchasing a land with specific boundaries and specific extents from a larger land becoming a co-owner to that larger land, as occurred in this instance.

In the circumstances, it is clear that the land sought to be partitioned is owned by more than one person at the time that this action was filed. Therefore, merely because the title claimed by the plaintiff refers to a specific land, this action could not have been defeated. Therefore, it is my considered view that the learned District Judge misdirected himself when he dismissed the action on the basis that the title of the plaintiff is to a specific block of land.

In the circumstances, I make order directing the learned District Judge of Kurunegala to have a re-trial and to deliver judgment accordingly. However, if it is possible, learned Trial Judge may consider adopting the evidence already recorded and to take necessary steps thereafter, as this action had been pending for nearly five decades. Learned District Judge is also directed to conclude this case expeditiously.

For the aforesaid reasons this appeal is allowed. I make no order as to the costs of this appeal.

Appeal allowed without costs.

JUDGE OF THE COURT OF APPEAL