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

C.A. APPEAL NO.1064/98

C.A. APPEAL NO.1065/98

C.A. APPEAL NO.1067/98

D.C.HORANA CASE NO.2635/P

Don Justin Kannangara,
Bathalawaththa,
Wewa Road,
Bandaragama
7th Defendant-Appellant
(in C.A.No.1067/98)

Dona Angelina Sriyani Attigalle,
Bathalawaththa,
Wewa Road, Bandaragama
9th Defendant-Appellant
(in C.A.No.1065/98)

Wijekoon Mudiyanselage Bandara Menika
Wewa Road,
Bandaragama
10th Defendant-Appellant
(in C.A.No.1064/98)

Vs

Cyril Malcom Pelpola,
Galthude, Bandaragama

Plaintiff-Respondent

1. Dona Sisiliya Atapaththu,
   Moranthuduwa
1A. Pulahinge Indrani Rodrigo,
   Moranthuduwa

and others

Defendant-Respondents

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

COUNSEL : Aravinda Athurupana with Nilmini Vitharana,
Attorneys-at-Law for the 7th Defendant-Appellant

and 8th Defendant-Respondent (C./A.No.1067/98)

Dr.Sunil Cooray with Sudharshini Cooray Attorney-at-Law for the 9th Defendant-Appellant (C.A.No.1065/98)

Mihiri Abeyrathne Attorney-at-Law for the 10th Defendant – Appellant (C/A. No.1064/98)

H.Peiris Attorney-at-Law for the Substituted-Plaintiff-Respondent

Nadeeja Dias Attorney-at-Law for the 2A, 3rd, 4th,5th and 6th Defendant-Respondents

ARGUED ON : 28th FEBRUARY 2013, 11th MARCH 2013 and 25th MARCH 2013.

DECIDED ON : 14th MAY 2013

CHITRASIRI, J.

There are four appeals filed by four different parties where they have sought to set aside or to vary the judgment of the learned District Judge of Horana, delivered on 14.08.1998. The appeal bearing No.C.A.1066/98 (F) had been filed by the plaintiff-appellant seeking to have the allocation of shares adjusted to fall in line with the judgment. Indeed, it had been filed to correct a typographical error. The issue in the said appeal of the original plaintiff was settled as there was no objection or dispute over the adjustment of shares according to the judgment. Accordingly, terms of settlement were recorded on 11.03.2013 and the proceedings in that appeal was concluded.

The other three appeals bearing Nos.CA 1064/98 (F), 1065/98 (F) and 1067/98 (F) filed by the original 7th, 9th and 10th defendants respectively were taken up for argument on several days. Thereafter, a suggestion was made to settle the dispute in those appeals as well. In fact the terms

of settlement were recorded on 11.03.2013. However, subsequently Court made order disregarding those terms of settlement on the request of Mr.Athurupana who appears for the 7th defendant-appellant as he was not personally present on the day; the settlement was recorded though his client was represented by an Attorney-At-Law. Court then decided to consider the merits of the three appeals filed by the 7th, 9th and 10th defendants.

Contention of the 7th, 9th and 10th defendant-appellants is to have Lot "A" shown in the Preliminary Plan No.2077 marked as **"X"** excluded from the land sought to be partitioned. The plaintiff-respondent contended that Lots A and B in the said Plan No.2077 should be the corpus leaving out Lot C since it had been used as a roadway for a considerable period of time. Learned District Judge accepting the aforesaid position taken up by the plaintiff-respondent had decided to include both Lots A and B into the corpus leaving out Lot C. Accordingly, the issue in all the three appeals is to ascertain whether Lot A in the said Plan No.2077 should be excluded or not from the land sought to be partitioned.

I will now turn to consider whether the learned District Judge is correct when he concluded to include Lot A in the said Plan No.2077 into the corpus. In coming to this conclusion learned District Judge has compared the boundaries as well as the extent of the land referred to in the schedule to the plaint with that of the preliminary plan marked X and also with the extent and the boundaries of the lands referred to in the deeds marked and produced in evidence. The land referred to in the schedule to the plaint is a land in extent of 1½ acres. The land shown in the plan marked "X" consists of One Acre One Rood and Decimal Six Perches which is close upon 1 ½ acres. Lot A alone in the preliminary plan is in the extent of 2 Roods and 19.6 Perches. Therefore, if Lot A is excluded the corpus will be limited to 2 Roods and 21 perches which is much less than the lands referred to in the deeds which had been marked by both the parties.

Extent found in the Deed of Lease marked P7 by which the mother of the 7th defendant had leased out the land referred to therein to the plaintiff is in extent of 1½ acres which is similar to the extent or the area needed to plant 200 rubber plants. The 7th defendant himself in his evidence had admitted that 1½ acres of land is required to plant 200 rubber trees. (vide evidence at page 490 of the brief). Therefore, as far as the extent referred to in the preliminary plan and the extent of the lands referred to in the relevant deeds is concerned, I do not see any error in concluding that the corpus includes even Lot A in the plan marked X.

Learned District Judge has also considered well, the boundaries of the land shown in the plan marked X with that of the boundaries found in the deeds marked and produced in evidence. The manner in which he has compared and considered those boundaries is found in the paragraph quoted below from the impugned judgment.

" මෙහිදී පෙනී යන කරුණක් නම්, පැමිණිල්ලේ උප ලේඛනයේ බෙදීමට යෝජිත විෂය වස්තුව පහත සඳහන් පරිදි විස්තර කර ඇත. එනම් උතුරට : දොන් ඇලෙක්සැන්ඩර් කන්නන්ගරට අයිති ඉඩම, නැගෙනහිරට : කහටගහ වත්තද, දකුණට : දොන් ඇලෙක්සැන්ඩර් කන්නන්ගරට සහ දොන් හෙන්රී කන්නන්ගරට අයිති අමු කොටුවද, බස්නාහිරට : මහ පාරද යන මායිම් තුල පිහිටා ඇති අක්කර 1, 1/2ක් පමණ වූ උස්වත්ත කියන ඉඩම වශයෙනි. 'X' වශයෙන් ලකුණු කරන ලද මූලික පිඹුර අනුව මායිම් දක්වා ඇත්තේ උතුරු මායිම වූ දොන් ඇලෙක්සැන්ඩර් කන්නන්ගරට අයිතිව තිබූ ඉඩම වශයෙන්ද, නැගෙනහිර මායිම කහටගහ වත්ත යනුවෙන්ද දකුණු මායිම අමු කොටුව යනුවෙන්ද, බස්නාහිර මායිම මහ පාර වශයෙන්ද යනුවෙනි. කෙසේ නමුත්, මෙහිදී පෙනී යන තවත් කරුණක් නම්, පැමිණිලිකරුගේ පැමිණිල්ලේ උපලේඛනයේ සහ 'X' දරණ මූලික පිඹුරේ බෙදීමට යෝජිත ඉඩම වශයෙන් දක්වා ඇති ඉඩමේ උතුරු මායිමේ දොන් ඇලෙක්සැන්ඩර් කන්නන්ගරට අයිතිව තිබූ ඉඩම ලෙසට සඳහන් කර ඇති නමුත්, පැමිණිලිකරු ඉදිරිපත් කල පැ.1 සහ 6වි4 සහ 6වි1 දරණ ඔප්පු අනුව ඒවායේ ඇති ඉඩමේ උතුරු මායිම ලෙස

දක්වා ඇත්තේ දොන් ජුවානිස් අප්පුහාමිට අයිති ඉඩම ලෙසටය. එසේම 'X' දරණ පිඹුරේ දකුණු මායිම අනුව එය අමු කොටුව වශයෙන් සඳහන් කර තිබුනේ පැ.1 සහ 6වි1 සහ 6වි4 දරණ ඔප්පු වල හෙන්ඩ්‍රික් අප්පුහාමි සහ තවත් අයට අයිති ඉඩම ලෙසට සඳහන් කර ඇති බවයි. කෙසේ නමුත්, පැමිණිලිකරුගේ නඩුව හබ කල 7 වන විත්තිකරුගේ මව වන දෝන මියියනෝනා අතපත්තු විසින් දී ඇති පැ.4 දරණ විකුණුම්කර ඔප්පුව අනුව, පෙර කී මායිම් දෙවරගයම සඳහන් කර ඇති අතර, ඒ අනුව පෙනී යන්නේ, එම මායිම් වරිග දෙකටම අයිති වී ඇත්තේ, එකම ඉඩමක් බවයි."

The above consideration as to the extent as well as to the boundaries of the land sought to be partitioned shows that Lot A in the preliminary plan marked X is not a part of Kahatagahawatta as claimed by the three appellants but it is a part of the land named as Uswatta which is the land sought to be partitioned. Hence, I do not see any error in the reasoning assigned by the learned District Judge when he decided to include Lot A in the plan marked X into the corpus.

Moreover, the mother of the 7th defendant has transferred her rights by deed bearing 6585 marked P4 which supports the pedigree of the plaintiff-respondent, of a land which consist of an extent of one and half acres. 7th defendant himself has signed as one of the witnesses to the said deed 6585. Also, in the deed bearing No. 5316 marked as **"3V1"**, by which a part of the land sought to be partitioned had been dealt with, the 7th defendant himself had placed his signature as a witness once again. The schedule referred to in the said deed 5316 too describes a land in extent of one and half acres. Having placed his signature to those two deeds produced by the opposing parties where one and half acre of land had been dealt with, the 7th defendant is estopped from stating that the land sought to be partitioned should be without Lot A in the preliminary plan marked X.

Submissions of Mr.Athurupana on behalf of the 7th defendant-appellant were basically directed towards the possession of the land. However, it must be noted that not a single issue had been suggested claiming prescriptive title to Lot A. Surveyor's report reveals that the 7th defendant has claimed 33 rubber trees and 19 coconut trees and few other trees such as mango and jack but not the buildings found thereon. Such a claim alone cannot be a cause to exclude Lot A when preponderance of evidence as to the boundaries and extent of the land is available over the claim made before the surveyor. Accordingly, Court cannot rely only on the evidence as to the possession of the land in order to decide the issue of exclusion of Lot A.

In the circumstances, it is clear that the learned District Judge had considered the evidence correctly when he decided to include Lot A into the corpus. Therefore, I do not see any error on the part of the learned trial Judge when he concluded to include lot A referred to in the preliminary plan marked X as part of the corpus. For the aforesaid reasons, I do not wish to interfere with the findings of the learned District Judge.

Accordingly, the three appeals bearing No. CA 1064/98, CA 1065/98 and CA 1067/98 filed by the 7th, 9th and 10th defendant-appellants respectively are dismissed with costs.

Appeals dismissed with costs.

JUDGE OF THE COURT OF APPEAL