

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

Hettige Dona Dayawathie
 Neelammahara
 Boralessgamuwa.

Substituted-Plaintiff-Appellant in 148/98

Hettige Don Hendrick
 Neelammahara, Boralasgamuwa

Hettige Don Tilakasiri
 Neelammahara, Boralasgamuwa

Hettige Don Kalyanaratna
 Neelammahara, Boralasgamuwa

1st, 2nd and 4th Defendant-Appellants
in 148/98A

C.A. APPEAL NO.148/98 &
148/98A(F)

D.C.MT.LAVINIA CASE NO.1455/P

Vs.

1. Hettige Don Hendrick
 and others.

Defendant-Respondent-Respondents

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

COUNSEL : Ranjan Suwandarathane Attorney-at-Law for the
 Substituted-Plaintiff-Appellant in C.A.148/98

Rohan Sahabandu, P.C. with S.Perera and Wilfred
 Perera Attorneys-at-Law for the 1st, 2nd and 4th
 Defendant-Appellants in C.A. 148/98A

D.P.Mendis, P.C. with J.G.Sarath Kumara for the
 14A,16,17,18, 20 & 21st Defendant-Respondents.

ARGUED ON : 1ST APRIL 2013

WRITTEN SUBMISSIONS

FILED ON : 2nd May 2013 by the Substituted-Plaintiff-Appellant.

2nd May 2013 by the 1st, 2nd and 4th Defendant-Appellants

15th May 2013 by the 14A,16,17,18,20 & 21st Defendant-Respondents-Respondents.

DECIDED ON : 30th MAY 2013

CHITRASIRI, J.

Two appeals have been filed by the plaintiff-appellant (hereinafter referred to as the plaintiff) and by the 1st, 2nd and the 4th defendant-respondents challenging the judgment dated 30.12.1997 of the learned District Judge of Mt.Lavinia. Both the appeals were taken up for hearing together and the respective Counsel made their submissions in support of their cases. The relief prayed for in the appeal of the plaintiff is to set aside the judgment dated 30.12.1997 holding that the corpus of the action consists of both Lots A and B shown in the Preliminary Plan No.2003 marked "X". However, in the submissions filed on behalf of the plaintiff, an application has been made to remit the case for retrial. The relief prayed for in the appeal filed by the 1st, 2nd and the 4th defendant-appellants is also to set aside the judgment holding that the land sought to be partitioned consists of both Lots A and B shown in the plan marked X and to remit the case back to the District Court for re-trial. Therefore, it is seen that the desire of all the appellants is to have this matter sent back for re-trial after setting aside the judgment dated 30.12.1997. Their position is that it is wrong to have decided to exclude Lot B from the corpus.

This action was filed to partition the land referred to in the schedule to the plaint filed by the plaintiff. Consequent upon filing the action, the land sought to be partitioned was surveyed and Surveyor S.Wickremasinghe has submitted his Plan bearing No.2003 and it was marked in

evidence as "X". At the trial, out of the 4 issues, 3 of those had been raised to identify the land sought to be partitioned while the issue No.2 was framed to establish the pedigree shown in the plaint. No appeal has been lodged to challenge the findings as to the pedigree. Accordingly, the issue before this Court is to determine whether the decision of the learned District Judge as to the identity of the land sought to be partitioned is correct or not.

The plaintiff and the 1st, 2nd and the 4th defendant- appellants took up the position that the land shown in the Preliminary Plan marked "X" should be the corpus whilst the 14A, 16 to 21st defendant-respondents were of the view that the block of land marked "B" in the said plan should be excluded since it is a different land called Hettige Watte. Plaintiff has described the land sought to be partitioned as Dimiyange Watta. Indeed, this is the issue before the learned District Judge and then he has decided to exclude Lot B from the corpus rejecting the application of the plaintiff as well as the 1st, 2nd and 4th defendants.

Therefore, it is necessary to determine whether the block of land marked "B" shown in the Preliminary Plan is Hettige Watta or is it a part of the land called Dimiyange Watte. Learned District Judge has decided that the said block of land marked "B" is Hettige Watte and not a part of Dimiyange Watte as claimed by the plaintiff.

Learned District Judge has found that the land shown in the plan marked "X" and the land referred to in the extracts obtained from the Land Registry are two different lands. However, the plaintiff in his evidence has given an explanation to this difference but it had not been properly evaluated by the learned District Judge. It must also be noted that when he came to the said conclusion in respect of the western boundary of the land shown in plan "X", he has not compared with that of the western boundary of the other deeds marked in evidence. When he compared the eastern boundary of the plan X with that of the eastern boundary of the relevant deeds, the learned District Judge has once again failed to consider the eastern boundary in the deeds other than the

deed marked P9 and the Land Registry extracts marked 14V1. Hence, it is possible to think that the learned District has purposely evaded considering the boundaries of the relevant deeds in coming to his conclusions.

The name of the land described in the document 14V1 is Pallage Watta. In that deed the eastern boundary of Pallage Watta is mentioned as Hettige Watta. Relying upon this particular evidence he has come to the conclusion that the Lot B should be Hettige Watta. However, it must be noted that he has referred only to P9 and 14V1 when he came to the said conclusion disregarding all the other deeds produced in evidence. Also, when he considered the northern boundary, he has looked at only the documents marked P9 and 14V2. In that consideration, he has disregarded the deed marked P10 without a valid reason being assigned.

It is also significant to note that the learned District Judge has not considered the fact that there are no physical boundaries visible on the ground to separate the Lots "A" & "B" shown in the plan marked X. Absence of physical boundaries on the land may lead to indicate that both the Lots "A" & "B" had been possessed as one and the same land. Therefore, I am of the view that the learned District Judge has not evaluated the evidence properly when he decided that Lot B is Hettigewatta and not a part of Dimiyangewatta.

More importantly, it is to be noted that the burden, to establish the facts within the knowledge of a particular person, rests on that person, in the event he/she makes a claim relying upon those facts within his/her knowledge. In this instance, the 14A, and 16 – 21st defendants have failed to produce in evidence, the plan bearing No.625 found at page 159 of the brief even though the said plan had been prepared on their behalf to support the claim to exclude Lot B shown in the plan X. Had they called the Surveyor who drew the said plan bearing No.625, the position would have been clearer. Hence, it is seen that the learned District Judge has not

addressed his mind to this aspect namely burden of proof of the facts within the knowledge of a particular person and to the consequences thereof.

In the circumstances, it is my opinion that the learned District Judge has failed to consider the evidence in the manner as required by a trial judge. Therefore, this Court does not wish to allow his findings to stand as they are. Accordingly, I decide to set aside the judgment dated 30.12.1997 of the learned District Judge. However, it must be noted that the matters argued before this Court are basically in relation to the facts of the case. No particular question of law has been raised. Therefore, in the event this Court, at this stage, decides to write a judgment considering the available evidence, it may lead to arrive at a wrong conclusion. Trial Judge being the best person to consider those matters consisting of facts and circumstances, I make order to have *a trial de novo*.

Having considered those circumstances and also upon considering the reliefs prayed for by both sets of the appellants, I make order to have a trial *de novo* in this instance. Accordingly, this case is remitted back to the District Court of Mt.Lavinia and the learned District Judge in that Court is directed to hold *trial de novo*. He is also directed to hear and conclude this case expeditiously.

Appeals are allowed subject to the above condition. Parties are to bear their own expenses in this appeal.

Appeals allowed. Case remitted back for re-trial.

JUDGE OF THE COURT OF APPEAL