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

C.A. 234/98

D.C. Kurunegala Case No: 2301/P

Nilamba Arachchige Rupasiri Wasantha Perera
No: 72/C,
Wallawa.

Appellant

Vs.

Kaduharallage Wijerathna
Olagama,
Wallawa.

Respondent

C.A. 234/98 D.C. Kurunegala Case No: 2301/P

Before : K.T. Chitrasiri,J.

Counsel : V. Kulatunga with Mrs. Sagarika Dharmabandu for the 7th Defendant-Appellant.

R. Chula Bandara with Sidath Bandara for the Plaintiff-Respondent.

Argued &

Decided on : 28.05.2013

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K.T. Chitrasiri,J.

This is an appeal seeking to set aside the judgment dated 05.02.1998 of the learned District Judge of Kurunegala. In that judgment, learned Judge made order to divide the land sought to be partitioned according to the shares that he has allocated to the respective parties. Learned counsel for the 7th Defendant-Appellant submitted that she is restricting her appeal to the question of identity of the corpus. Therefore, this Court decides to limit this appeal to the issue as to the identity of the land sought to be partitioned and therefore the matters other than the identity of the corpus, raised in the petition of appeal stand not pursued. Accordingly, she made submissions to support her case. Thereafter, the learned Counsel for the plaintiff-respondent also made submissions in support of his case.

Learned District Judge has decided that the land sought to be partitioned should be the land depicted in the plan bearing No: 895 marked as 'X' in evidence. However, the learned Counsel for the appellant submitted that it is wrong to have decided so when the extent of the land depicted in the schedule to the plaint comprises only 01 rood and 34 perches. Land referred to in the plan marked 'X' has an extent of 2 roods and 7 perches. Therefore a difference of 14 perches of land is found between the two lands referred to, in the plan marked 'X' and in the schedule to the plaint. Accordingly, she submitted that it should be a reason not to accept the land shown in the plan 'X' as the land sought to be partitioned. She also submitted that the northern boundary of the plan marked 'X' and the northern boundary referred to in the schedule to the plaint also differs.

These matters pointed out by the learned Counsel for the appellant has been well considered by the learned District Judge in his judgment. His findings on those matters are found in page 2 and 3 of the judgment. It reads thus:

5 සිට 8 දක්වා විත්තිකරුවන් මෙම ඉඩමේ මායිම් සම්බන්ධයෙන් ප්‍රශ්නයක් මතුකර තිබේ. පැමිණිල්ලේ සඳහන් මායිම් එක්ස් දරණ පිඹුරේ තිබෙන මායිම් සමග නොගැලපෙන බවට විත්තිය තර්ක කරයි. මෙම තර්කය මා ප්‍රතික්ෂේප කරමි. පැමිණිලිකරු සාක්ෂි දෙමින් බෙදීමට

අදාල ඉඩම එක්ස් දරන පිඹුරේ මැන පෙන්වා තිබෙන බවට සාක්ෂි දී ඇත. එසේම පැමිණිල්ලේ උපලේඛණයේ රේල්පාරට වෙන් කර ඇති බිම් තීරුව සම්බන්ධයෙන් සඳහන් කර ඇති බැවින් මෙහි දී මායිම් පිළිබඳව නොපැහැදිලිතාවයක් නොමැති බව මාගේ මතයයි. තවද විත්තිය අයිතිවාසිකම් කියන ඔප්පුවක් වන අංක. 20435 දරණ ඔප්පුව පැ.6 වශයෙන් ලකුණු කර ඉදිරිපත් කර ඇති අතර, එහි දී රේල්පාරට හැර තිබෙන බිම් තීරුව පිළිබඳව සටහනක් කර ඇත. එම නිසා මෙහි දී නොගැලපෙන මායිමකට ඇත්තේ උතුරු මායිම පමනයි. එසේ වු පමණින් ඉඩම හඳුනා ගැනීමට නොහැකි තත්වයක් තිබේ යයි 5 සිට 8 දක්වා විත්තිකරුවන්ගේ තර්කය මා ප්‍රතික්ෂේප කරමි. ඉඩම් ප්‍රමානය සම්බන්ධයෙන් 5 සිට 8 දක්වා විත්තිරුවන් තර්කයක් මතු කරයි. පැමිණිල්ලේ රූඩ්. 1 යි පර්චස් 34 ක් වශයෙන් දක්වා ඇතත් බෙදීමට යෝජිත ඉඩම රූඩ්. 2 යි පර්චස් 7 ක් වන බැවින් ඒ පිළිබඳව විත්තියෙන් තරක කරයි. මෙහි දී පැමිණිල්ලේ උපලේඛණයේ රූඩ්.1 යි පර්චස් 34 ක් වශයෙන් දක්වා ඇතත් කිසිදු පිඹුරක් ආශ්‍රය කර ගැනීමකින් තොරව එසේ දක්වා තිබීම නිසා එය දළ අගයක් වශයෙන් පමනක් සැලකිය හැකිය. තවද උපලේඛණයේ සඳහන් කුරහන් සේරු 2 ක වපසරිය වශයෙන් දක්වා ඇත. මෙකී තත්වය මත සුලු පර්චස් ප්‍රමානයක් ඉඩමේ ප්‍රමානය වෙනස් වුවහොත් ඉඩම හඳුනා ගැනීම සම්බන්ධයෙන් එමගින් ගැටලුවක් ඇති නොවන බව පෙනී යයි.

The above reasoning of the learned trial judge show that the discrepancies pointed out by the learned Counsel for the appellant as to the Northern boundary and as to the extent had been well considered by him, having looked at the evidence led in the case. I do not see any wrong on the part of the learned District Judge when he came to his findings as to the identity of the land sought to be partitioned.

Submissions of the learned Counsel for the appellant is that the boundaries and the extent of the lands referred to in the deeds of the 1st defendant do not tally with that of the boundaries and the extent of the land sought to be partitioned. Having perused those deeds particularly, the deeds marked 1V1, 1V2 and 3V2, it is seen that the Western and the Southern boundary are bounded by the railway line whilst the Eastern boundary is a public road. Therefore, it is clear that three boundaries of the land shown in the plan marked 'X' and the deeds marked in evidence do tally very clearly. Accordingly, it is my considered view that this Court should not interfere with the decision as to the identity of the land sought to be partitioned only on the discrepancy in some of the deeds as to the Northern boundary. Moreover, the trial judge having looked at the evidence has assigned valid reasons as to why he has decided to disregard the discrepancy of the Northern boundary.

Difference pointed out as to the extent is only 14 perches, in a larger land having an extent of 87 perches. The deeds upon which the learned District Judge has relied upon had been executed three decades before the case was instituted. Such a long standing claim after the execution of the title deeds may have been a reason to have the discrepancy found in the extent. Accordingly, I am not inclined to agree with the contention of the learned Counsel for the appellant.

Learned Counsel for the appellant referred to the following authorities in support of her case . In the case of ***Sopaya Silva and another Vs. Maglin Silva [1989(2) SLR at page 105];*** it was held that the District Judge should have decided to reissue a commission when a discrepancy is brought to his notice. In this instance, I do not think that it has become necessary for the District Judge to take such a course of action, since no substantial discrepancy is found as to the extent. In the case of ***Piyasena Perera Vs. Margret Perera and Two others [1984 1 SLR page 57]*** it was decided that there would be a miscarriage of Justice if the land sought to be partitioned is not properly identified. In this instance, having referred to the three boundaries and also as to the gravity of the discrepancy in extent, learned District Judge had been able to identify the land clearly. In ***Jayasuriya Vs. A.M. Ubaid 61 N.L.R. at page 352;*** it was held that it is open to the trial Judge to call for further evidence if he needs

to satisfy himself as to the identity of the land. Such a requirement also has not arisen in this instance. In the case of ***Abeysinghe Vs. L. Kumarasingha and 9 others[Bar Association Law Reports 2008 at page 300],*** it was held that an error made by the trial Judge on the point of contest with regard to the identity of the corpus is sufficient to set aside the judgment in a partition action. Learned trial Judge has been able to identify the land with the available evidence. The authorities mentioned above is relevant only when the available material is insufficient to identity the corpus. Accordingly, it is my opinion that the authorities referred to by the learned Counsel for the appellant do not directly relevant to the issue at hand.

Having considered the aforesaid issues as to the facts and to the law carefully, I conclude that there is no reason to interfere with the findings of the learned District Judge.

For the aforesaid reasons this appeal is dismissed with costs.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Jmr/-