

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

1. Abdul Aziz Mohamed Buhary

Substituted 1st Defendant-
Appellant

2. M.A.A. Ramun Beebie

6th Defendant-Appellant

CA 1147/98 (F)

DC-KANDY 11174/P

VS

B.G.B. Hairul Mafia

Plaintiff-Respondent

T. Mahuthuma Umma

2nd Defendant Respondent

And others

Before : K.T.Chitrasiri,J

Counsel : H. Withanachchi for the Defendant-
Appellants

Murshid Maharoof for the plaintiff-
Respondents

Argued &

Decided on : 21.11.2013

K.T. Chitrasiri, J.

Learned Counsel for the appellant concluded his submissions in support of this appeal. This is an appeal seeking to set aside the judgment dated 25.08.1998 of the learned District Judge of Kandy. By this appeal, both the decisions made in the court below, as to the corpus as well as to the allocation of shares have been challenged.

Learned counsel for the appellant submitted that the southern boundary of the land shown in the plan marked X has no live boundary on the ground whereas there is a clear southern boundary is seen as depicted in the plan marked Y, it being a roadway. Therefore, his contention is that the land sought to be partitioned should be the land depicted in the plan marked Y and not the land shown in the plan

marked X. Learned District Judge has considered this issue carefully and has held that the land sought to be partitioned should be the land depicted in the plan marked X which comprises two lots. (Vide proceedings at pages 355-360 in the appeal brief).

In coming to this conclusion learned trial judge has compared and considered the evidence as to the extent and the boundaries of the deeds marked in evidence with that of the lands shown in the two plans marked X and Y. The deeds produced in evidence show that the entitlement of the parties is to a land in extent of 1 Pela or to a land of half an acre in extent. The extent shown in plan X is 89 perches which is almost similar to half an acre whereas the extent given in the plan Y is 113 perches which amounts to show a much bigger land. Learned District Judge also has considered the physical existence of the Southern Boundary of the land sought to be partitioned having looked at the southern boundary given in the title deeds.

I do not see any error in the manner in which he has considered the extent and the boundaries of the land sought to be partitioned when he accepted the land shown in plan X as the corpus in this case. Therefore, I do not see

any merit in canvassing the decision of the learned District Judge as to the corpus of the action. Hence, the appeal filed to challenge the decision of the learned District Judge in respect of the land that is subjected to be partitioned should stand dismissed.

At this stage, both Counsel submit that the parties have now come to a settlement as to the manner in which the allocation of shares should be determined, upon considering the rights derived from the deed marked 1V1. The rights in the deed marked 1V1 claimed by the 1st defendant-appellant had been rejected by the learned District Judge. His decision in this regard is on the basis that donor Zeenath Umma had already disposed of her rights to this land by the deed marked P2 and therefore she had no rights to the land in question to deal with, by the time she executed the deed of gift marked 1V1.

Having considered the contents in both the deeds marked as P2 and 1V1, it reveals that Zeenath Umma had retained 1/5 share of her entitlement when she executed the deed marked P2. Therefore, 1/5 share which she had dealt with by the deed marked 1V1 should remain even after having disposed of the balance 4/5 share by the deed marked P2. It is the said

balance of 1/5 share that had been transferred by the deed 1V1 and it is the same 1/5 share that the 1st defendant has claimed by the said deed marked 1V1. Accordingly, the learned Counsel for the plaintiff-respondent, conceding the said entitlement of the 1st defendant has no objection to allocate those rights referred to in the deed marked 1V1 to the 1st defendant.

At this stage, it is also brought to the notice of Court that the said 1/5 share claimed by the 1st defendant would amount to 1/20 share of the entire land to be partitioned since the aforesaid Zeenath Umma was entitled only to 1/4th share of the land, as correctly held by the learned District Judge having considered the law applicable to those who profess the religion of Islam.

Furthermore, it is necessary to note that the learned trial judge has kept 1/20 share of the land un-allotted stating that it should go to the successors of Hubbib Mohommed. However, it is brought to the notice of court that there is no person called Hubbib Mohommed. Existence of such a person has not been revealed even in the pedigrees filed by the parties. Accordingly, even if the said un-allotted share of 1/20 is allocated to the 1st defendant on the basis

of the deed 1V1, it will not disturb the share allocation of the other parties to the action. Therefore, with the consent of both the Counsel this Court decides to allocate un-allotted 1/20 share of the land to the 1st defendant-appellant having considered the rights referred to in the deed marked 1V1. Accordingly, the learned District Judge is directed to allocate 1/20 share which was kept un-allotted to the 1st Defendant-Appellant in addition to the shares that she has already been given.

The learned District Judge is directed to enter interlocutory decree accordingly. Subject to the above variations, this appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

LA/-