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

Gamini Mallikarachchi
45/19, Weligoda Road,
Kurunegala

Substituteed - Plaintiff-Appellant

Vs

C.A.NO.117/98 (F)
D.C.KURUNEGALA CASE NO.4919/P

Gallage Dayawanthi Jayatissa
55/4, Pollathupitiya,
Kurunegla

1A Substituted-Defendant-Respondent
And 10 other Defendant-Respondents

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

COUNSEL : Gamini Jayasinghe with Purnima de Silva for the substituted Plaintiff-Appellant

Ajith Munasinghe for the 1A Substituted-Defendant-Respondent

Geoffrey Alagaratnam P.C. with Suren Fernando and Luwie Ganeshathawan for the 2nd - 8th and 14th –18th Defendant-Respondents

ARGUED ON : 25.10.2013 & 29.11.2013

WRITTEN SUBMISSIONS FILED ON : 18th December 2013 by the 2nd – 8th & 14th – 18th Defendant- Respondents

18th December 2013 by the 1A Substituted-Plaintiff- Appellant

DECIDED ON : 19th MARCH 2014

CHITRASIRI, J.

Substituted-Plaintiff-Appellant preferred this appeal seeking *inter alia* to have the judgment dated 15.12.1997 of the learned District Judge of Kurunegala, set aside. By that judgment, trial judge having upheld the position taken up by the 1st defendant-respondent dismissed the partition action filed. The reason for the dismissal of the action is the failure to bring in the correct land as the land sought to be partitioned having shown only the Lots 1 & 2 in the Plan 286 dated 01.10.1973 marked "X", as the corpus in this case leaving out lot 3 found therein. The position advanced by the 1st defendant-respondent also is that the land sought to be partitioned should not have been restricted to the said lots 1 and 2 since it becomes a part of a larger land without the lot 3 referred to in the said plan 286 being included. The said position taken up by the 1st defendant-respondent was put in issue by him as the 23rd point of contest. The points of contest bearing Nos.1 to 3 of the plaintiff also are to determine the identity of the corpus. Learned District Judge answered the said issue 23 affirmatively and then he dismissed the action without looking at the merits of the rest of the issues. Accordingly, he has stated that he need not answer all other points of contest as those do not arise in view of the answers to the issues 1, 2, 3 and 23.

The original plaintiff having instituted this action by the plaint dated 23.11.1972, amended the same by the amended plaint dated 05.04.1976, by which he sought to partition lot "B" depicted in Plan 32 dated 21.08.1935 which was marked P4 in evidence. [vide at page 84 in the appeal brief/para (1)

in the amended plaint dated 05.04.1976]. Substituted plaintiff in his evidence has identified the land sought to be partitioned as the land consisting of lots 1 and 2 depicted in the preliminary plan 286 dated 16.11.1973 marked "X" and has said that it is the land shown as lot "B" in the Plan 32 which lot is the land sought to be partitioned by the plaintiff. Court Commissioner, in his report has mentioned that the lot "B" in plan 32 had been superimposed by him on to his plan 282 by showing it in a red line. He then has mentioned in his report that the lots 1 and 2 in his plan 282 depict the lot "B" in Plan 32. [vide at page 482 in the appeal brief]

The position taken up by the 1st defendant–respondent is that the land shown in Plan 282 marked "X" consists not only lots 1 and 2 but it includes lot 3 as well. Accordingly, his position is that the land sought to be partitioned is restricted, only to the said lots 1 and 2 then it would become a part of a larger land.

Learned District Judge in his judgment has stated that the witness for the plaintiff has failed to explain the manner in which the lot "B" shown in the Plan 32 came into existence. In that impugned judgment, he has further stated that a building found on the land sought to be partitioned cut across the northern and the eastern boundary of the corpus. [Vide at page 346 in the appeal brief] Basically, the decision of the learned District Judge seems to have been arrived at, by merely looking at the physical nature found on the land

shown in the preliminary plan marked "X" without considering the other available evidence in respect of the identity of the land.

Both the Counsel who appeared for the appellant and for the 2nd to 8th and 14th to 18th respondents have submitted that it is wrong to have dismissed the action having considered only a section of the evidence available on the question of identifying the land leaving out more important material on the issue. Hence, I will now turn to look at the said evidence alleged to have not been considered by the learned trial Judge in order to ascertain whether those would have any effect on the decision of the learned District Judge.

Before looking at the said material alleged to have not been considered by the learned trial Judge, I need to mention that it is incorrect on the part of the learned District Judge to depend on the failure of the plaintiff's witness to explain the way in which the plan 32 marked P4 came into existence. He seems to have heavily relied upon the said evidence when considering the identity of the land referred to in plan 32 as well. [vide at page 344 in the appeal brief] The said plan 32 had been prepared in the year 1935. The evidence on behalf of the plaintiff was given by his grand-son who is the substituted plaintiff and he was only 39 years in age at the time he gave evidence and that was in the month of October 1995. [vide at page 151 in the appeal brief] Hence, it is incorrect to expect the manner in which the plan 32 came into existence, from a person who was not even born then. Without addressing his mind to those facts, the learned District Judge has relied upon the said failure of the witness

(substitute plaintiff) to explain the Plan 32 when deciding the identity of the corpus. Accordingly, it is seen that the learned trial judge has assumed things erroneously in determining the identity of the land sought to be partitioned.

As pointed out by the learned Counsel for the appellant, learned District Judge has failed to look at the lands dealt with, in the deeds marked in evidence in order to identify the land sought to be partitioned. He has not looked at the lands dealt with, in the deeds marked P1, P2, P5 and P3. Those four deeds show that those had been executed accepting the land referred to in the plan 32 as a separate land. Those same deeds have been relied upon and been marked as 1V9, 1V10, 1V6 and 1V4 even by the 1st defendant-respondent. In such a situation the 1st defendant is estopped denying the existence of a distinct land as shown in the Plan 32. This fact has not been looked at by the learned District Judge.

Moreover, an admission had been recorded at the commencement of the trial admitting the execution of the deeds of the plaintiff. Also, the parties have admitted that the 1st defendant himself had purchased 1/4th share from lot "B" in plan 32, i e the land sought to be partitioned. [vide proceedings at page 143 in the appeal brief] Having admitted that it is a land dealt with as a distinct land, the 1st defendant-respondent cannot subsequently claim that it is a part of a larger.

Moreover, it is evident by the extracts issued by the Land Registry marked P17, P18 and P19 that the land put in suit by the plaintiff had been dealt with and registered as a separate and distinct land for many years. In all those folios lot B in plan 32 is mentioned as a separate land in the place where the name of the land is to be inserted. [vide pages 385 to 396 in the original record] Learned District Judge has not considered those extracts from the Land Registry when he came to the conclusion that the land sought to be partitioned is a part of a larger land.

Mr. Alagaratnam P.C. in his written submissions brought to the notice of Court that there had been a partition action bearing No.992 filed to partition a land that included even the aforesaid Lot 3 which lot, the 1st defendant claimed as a part of the land that is to be partitioned in this case. Filing of the said partition action had been admitted even by a witness who gave evidence on behalf of the 1st defendant. [*vide proceedings at pages 273 & 282 in the appeal brief*]. In that partition case 992, judgment had been entered against the 1st defendant's successors and the said judgment had been affirmed, both by the Civil Appellate High Court and the Supreme Court. A copy of the decision of the Supreme Court is annexed and produced with the submissions filed by Mr.Alagaratnam P.C. It will be an important fact to decide that the lot 3 in plan 286 is not a part of the land sought to be partitioned in this case since it had already been a land subjected to in another partition action that had already been concluded now.

At this stage, it is also necessary to note that an attempt had been made by marking the deeds 1V7, 1V8, 1V15 and 1V16 by the 1st defendant to show that the lot "B" in Plan 32 is a part of a larger. However, those deeds had been executed after filing of this action and therefore, the Court cannot consider those deeds to determine the issue of identity of the corpus in this case.

In the light of the material referred to above, it is clear that the Lot B in Plan 32 is a separate and distinct land which depicts in the preliminary plan 286 as Lots 1 & 2. Hence, the lot 3 in that plan cannot be a part of the land shown in the said Plan 32 upon which this action has been filed on the basis that it is a separate land. Moreover, the parties to the action including the 1st defendant-respondent also have considered the said Lot B in plan 32 as a separate and distinct land when he and his predecessors have dealt with the land referred to as the said lot "B" in plan 32.

Learned District Judge has not addressed his mind to those matters discussed hereinbefore when he concluded that the land sought to be partitioned namely Lots 1 & 2 in the Plan 286 is a part of a larger land. In the circumstances, it is clear that the learned District Judge has misdirected himself when he decided to dismiss the action on that basis.

For the aforesaid reasons, I set aside the judgment dated 15.12.1997 of the learned District Judge of Kurunegala. Also, in view of the above findings arrived at upon considering the evidence recorded in this case, I answer the

points of contest [issues] 1, 2,3,23 and 24 in favour of the plaintiff and decide that the land sought to be partitioned in this case is depicted as lots 1 and 2 in the plan 286 dated 16.11.1973 prepared by W.C.S.M.Abeysekara Licensed Surveyor, marked "X".

At this stage, it must be noted that the trial Judge has failed to come to the findings in respect of the rights of the parties to the land that is to be partitioned in this case. Without looking at the evidence as to the devolution of title of the parties he has merely stated that the points of contest raised to determine the rights of the parties to the land in question will not arise. Hence, it is seen that there is no decision is made by the trial judge as to the rights of the parties to the land in question.

This Court also is unable to decide the rights of the parties by considering the available evidence since such a decision will not amount to a decision of an original court Judge against which an appeal could be filed as of a right. In the event this Court decides the rights of the parties, the said right to appeal given in law to an aggrieved party would be lost.

In the circumstances, I am compelled to have this matter remitted back to the District Court allowing the sitting District Judge of Kurunegala to determine the rights of the parties to the land put in suit by the plaintiff. District Judge of Kurunegala is directed to answer the points of contest other than the matters raised in issues 1, 2, 3, 23 and 24 and to write the judgment accordingly. In doing so, learned District Judge is directed to adopt the

evidence already recorded having obtained the consent of the parties and to write the judgment thereafter. However, he is free to record new evidence if it becomes necessary.

For the aforesaid reasons, I allow the appeal of the Substituted-Plaintiff-Appellant and set aside the judgment dated 15.12.1997 of the learned District Judge of Kurunegala. The 1st defendant shall pay Rupees Seventy Five Thousand (Rs.75,000/-) to the Substituted-Plaintiff-Appellant and another Rupees Seventy Five Thousand (Rs.75,000/-) to the 2nd – 8th and 14th – 18th Defendant-Respondents as costs of this appeal. Learned District Judge is directed to hold a re-trial for the limited purpose of answering the points of contest raised by the parties except for the issues 1, 2, 3, 23 and 24.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL