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

P. W. G. Ariyawansa
P. W. G. Siriyawathie
Both of Pelelegama
Hakbellawaka

4th and 5th Defendant- Appellants

C.A. NO.915/99(F)
D.C.AVISSAWELLA CASE NO.17553/P **Vs**

G. A. Aruna Gajasinghe
Pelelegama
Hakbellawaka

1A1 Substituted-Plaintif-Respondent

P. W. G. Belin Nona
Ganepaila, Thiligama,
Yatiyantota.

1st Defendant-Respondent
Anc others
Defendant-Respondent-Respondents

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

COUNSEL : Wijeyadasa Kulatunga for the 4th and 5th Defendant-Appellants

Thishya Weragoda for the substituted Plaintiff-Respondent

B.O.P.Jayawardane for the 1st Defendant-Respondent

ARGUED ON : 28.05.2014

WRITTEN SUBMISSIONS
FILED ON : 23. 06.2014 by the 1A1 Substituted-Plaintiff Respondent

DECIDED ON : **04. 08. 2014.**

CHITRASIRI, J.

This action was filed originally against the first two defendants in order to have a partition decree in respect of the land called Ketapitawatta which is morefully described in the schedule to the plaint dated 20.07.1984. Pursuant to the affixing notice on the land sought to be partitioned in terms of the provisions contained in the Partition Law No.21 of 1977, 3rd defendant-respondent was added as a party. [J.E. 10 at page 14 in the appeal brief] 4th and the 5th defendant-respondents were added as parties to the action as they have claimed rights to the land, before the Court Commissioner who prepared the preliminary plan.

3rd defendant-respondent claimed that Lot No.3 in the Preliminary Plan 231/P drawn by A.C.P.Gunasekera, Licensed Surveyor marked "X", be excluded from the land sought to be partitioned. Said claim of the 3rd defendant-respondent was allowed by the learned District Judge and accordingly the said lot 3 in plan "X" was excluded from the corpus in this action. No appeal has been lodged to challenge the said decision to exclude Lot 3 in Plan 231/P.

4th and the 5th defendant-respondents' claim was to have Lots 1 and 2 in the aforesaid Plan 231/P also to have excluded from the land sought to be partitioned. 4th defendant has claimed that the land referred to as Lot 1 is the land called Ketapitiyawatta Meda Irawella whilst the 5th defendant's claim to Lot 2 was on the basis that it is the land called Ketapitiywatte Uda Irawella. Learned District Judge having declined to accept the claims of the 4th and the

5th defendant-appellants, has concluded that both the Lots 1 and 2 forms part of the land sought to be partitioned. This appeal is to challenge the aforesaid decision of the learned District Judge. It must be noted that no appeal has been preferred challenging the devolution of title set out by the plaintiff-respondent.

Hence, the only issue in this appeal is to ascertain whether the learned District Judge is correct or not, when he decided that Lots 1 and 2 in Plan 231/P forms part of the land sought to be partitioned. Therefore, it is seen that the identity of the land sought to be partitioned is in question in this instance.

The extent, boundaries and the names of the respective lands are the material factors that are to be looked at when the identity of the corpus is being questioned. At the outset, it must be noted that the Commissioner, in paragraph 5 of his Survey report dated 4.11.1986, has stated that he was not certain whether the land he surveyed is the identical land referred to in the schedule to the plaint. (vide at page 295 in the appeal brief). In such a situation, in terms of Section 18(2) of the Partition Law No.21 of 1977, it is the duty of the trial Judge:

- ✓ to re-issue the Commission with specific instructions; to survey the land as described in the plaint; or
- ✓ to permit the plaintiff to proceed with the action to partition the larger land as depicted in the preliminary survey; or
- ✓ to permit any of the defendants to seek a partition of the larger land as depicted in the preliminary survey.

In this instance, the learned District Judge has opted to continue with proceeding with the action in order to partition the land which is shown in the preliminary plan 231/P.

Surveyor in his evidence has explained the reasons as to why he reported as to the certainty on the issue of identifying the land sought to be partitioned. In that evidence he has stated that the difference in the extent of the land is only about 1/4th of an acre. When compared with such an extent with that of the extent of the land shown in the preliminary plan marked "X" which has an extent of approximately five acres, it is an extent that should not be regarded as a material difference. Learned District Judge has carefully examined the boundaries of the respective lands too and has come to the conclusion that those differences are not that material. I have no reason to disturbed such a conclusion. Therefore, I do not see any error when the learned District Judge decided to proceed with the action despite the surveyor's comments as to the certainty of the land sought to be partitioned.

I will now turn to consider whether or not the lots 1 and 2 claimed by the two appellants should form part of the land sought to be partitioned. Title set out by the plaintiff has emanated from the deeds marked P1 and P2. Both these deeds refer to a land in extent of ඒ අමණ. The Surveyor in his evidence has stated that the extent described as ඒ අමණ amounts to an extent of five acres of land, if it is a highland and if it is a paddy field, then it has only half of that extent amounting it to 2 1/2 acres. Admittedly, this land is not a paddy field. It is a highland. Therefore, ඒ අමණ when converted according to English

standards of measurements comes to five acres in extent. His evidence in this regards is as follows:-

"පැමිණිල්ලේ උපලේඛණයෙහි විස්තර කරන ඉඩමේ ප්‍රමාණය වී අමුණු එකකි. මම අවුරුදු 8 ක් පමණ මේ අන්දමට මිනින්දෝරු කෙනෙකු වශයෙන් සේවය කර ඇත්තෙමි. මේ ප්‍රදේශයේ මැණිම් ද මා විසින් කර තිබේ. කෑගල්ල දිස්ත්‍රික්කයේ මෙම ඉඩමේ ප්‍රමාණය අක්කර වලින් කියනවා නම් අක්කර 5 කි. ඉඩමේ මුළු ප්‍රමාණය අක්කර 5. රූ.1. පාර් 8.5 කි 'X' සැලැස්මේ පෙන්නුම් කරන ඉඩමේ ප්‍රමාණය එපමණකි. කැබලි අංක.1 සිට 5 දක්වා පැමිණිල්ලේ උපලේඛණයෙහි විස්තර කරන ඉඩම ලෙස පැමිණිලිකරු පෙන්වා දුන් පරිදි මැන සැලැස්ම සහ වාර්තාව ඉදිරිපත් කළෙමි. වාර්තාවෙහි ඉඩමේ ඇති වගාව සහ වැඩි දියුණු කිරීම් සඳහන් කර තිබේ. වාර්තාවේ පාර්ශවකරුවන් අයිත්වාසිකම් ඉල්ලා සිටි අන්දම ද සඳහන් කර තිබේ. ඒ අනුව මම වාර්තාව සකස් කළේ. 'X' සැලැස්මේ සහ වාර්තාව මම ගරු අධිකරණයට ඉදිරිපත් කළෙමි.

හරස් ප්‍රශ්න : උපාලි ගුණවර්ධන මහතා : නැත.

හරස් ප්‍රශ්න : විජේමාන්න මහතා (2-7 වෙනි විත්තිකරුවන් වෙනුවෙන්)

'X1' වාර්තාවේ 5 වෙනි පේළියේ ' මණින ලද ඉඩම පැමිණිල්ලේ උපලේඛණයෙහි සඳහන් ඉඩමද යන වග නිශ්චිත ලෙස කිව නොහැකියි' කියා මා විසින් සඳහන් කර තිබේ. ප්‍රමාණයේ පොඩි වෙනසක් තිබුණු නිසා මම එසේ සඳහන් කළෙමි. නියම ප්‍රමාණය නැති නිසා මම එසේ සඳහන් කළෙමි.

[Vide proceedings at pages 83 and 84 in the appeal brief]

The evidence referred to above, show that the Surveyor with no uncertainty has stated that extent of the අමුණ comes to five acres in extent if it is

a highland and 2 1/2 acres if it is a paddy field. He being a person knowledgeable in the rules governing that area, the Court is not in a position to reject such expert evidence without any cogent reason being assigned. Moreover, in the case of **Ratnayake and others v. Kumarihamy, [2002 (1) SRI L.R. at 81] Weerasuriya, J** quoting from C.A.C.Times Green Book and Ferguson's Directory, has stated that one amunam's sowing paddy is equivalent to 2 acres 2 roods and 37 1/2 perches, if it is in respect of paddy lands.

Furthermore, the extent of sowing paddy may differ in terms of grain capacity for sowing. Also, it may have a substantial effect on the strength and the experience of the person who sow paddy. Nature of the land and the area in which the land is situated also will have a great bearing when converting Amuna in to extents in Acres and Roods. Therefore, if the difference is not that material when compared with the entire extent of the land sought to be partitioned, it should not be considered as a material factor to determine the land to be partitioned.

In this instance, the land that had been partitioned has 4 acres 3 roods and 31 perches in extent becoming it almost five acres even after excluding Lot 3 in that plan. The land described in the schedule to the plaint when using English standards of measurements it becomes five acres. Therefore, hardly any difference in extent is found in the land depicted in Plan 231/P with that of the land referred to in the schedule to the plaint. Hence, I do not see any error

when the learned trial judge decided that the lots 1 and 2 in the preliminary plan forms part of the corpus in this case.

Then, it is necessary to consider whether the boundaries of the land referred to in the schedule to the plaint do tally with the boundaries in the Preliminary Plan X. The evidence of the Surveyor in this regard is as follows:

පැමිණිලිකරුගේ පැමිණිල්ල අනුව මෙම ඉඩමේ නම කහටගහඕවිටවත්ත. ඒ ඉඩමේ උතුරු මායිම වශයෙන් තිබෙන්නේ මල ඇල. මල ඇල කියා සඳහන් වී තිබේ. 'X' සැලැස්මේ උතුරු මායිම වශයෙන් සඳහන් වී තිබෙන්නේ මල ඇල සහ කහටගහගාව වත්ත. උතුරු මායිම බෝහෝ දුරට මෙම පැමිණිල්ලේ උතුරු මායිමට සමාන බවට මම සෑහීමට පත් වීමි. නැගෙනහිර මායිම කැළණි ගඟ. මෙම බෙදීමට අදාළ ඉඩම පැමිණිල්ලේ සඳහන් කරන කැළණි ගඟ 'X' සැලැස්මේ ද සඳහන් වේ. එම පැමිණිල්ලේ උපලේඛණයෙහි විස්තර කරන ඉඩමේ නැගෙනහිර මායිම සහ 'X' සැලැස්මේ නැගෙනහිර මායිම සමානය. දකුණට පිල්ලෙගාව වත්තේ වෙන් වීමට තිබෙන අගල 'X' සැලැස්මේ දකුණට ඇළක් සඳහන් වී තිබේ. දකුණට තිබෙන ඉඩම බතලවත්තඕවිට කියා සඳහන් වී තිබේ. බස්නාහිරට මායිම පැමිණිල්ලේ සඳහන් කර තිබෙන්නේ වේවැල්තලාව කියන ඉඩම. සැලැස්මේ බස්නාහිර මායිම සෝමලතාට අයිති ඉඩම. වේවැල්තලාවවත්තා රබර් ඉඩම සෝමලතාට අයිති ඉඩමේ නම සඳහන් කලේ නැත. බස්නාහිර මායිම ඒ අනුව නැති.

[Vide proceedings at page 86 in the appeal brief]

In answer to the questions put in cross-examination, surveyor has stated that he was satisfied with the northern boundary of the corpus though the

names appear in the schedule to the plaint and in the plan are not identical. (Vide proceedings at page 86 in the appeal brief). The surveyor also has stated that most of the boundaries in the land referred to in the schedule to the plaint and in the land, depicted in the plan X are tallying each other. [Vide proceedings at page 88 in the appeal brief] The evidence also shows that Ketapitiyawatta Meda Irawella and Ketapitiyawatte Uda Irawella as indicated by the appellants are part of the land called Ketapitiyawatta which is the land to be partitioned.

In the circumstances, the evidence recorded in this case show that the land referred to in the schedule to the plaint is the land depicted in the plan bearing No.231/P marked X which includes lot 1 and 2 claimed by the appellants.

Therefore, it is my opinion that the learned District Judge has correctly decided to include Lots 1 and 2 in the aforesaid plan marked X, as part of the land sought to be partitioned in this case. For the aforesaid reasons, I am not inclined to interfere with the findings of the Learned District Judge.

Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

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