RATNAYAKE AND OTHERS
VS
KUMARIHAMY AND OTHERS

SUPREME COURT
S. N. SILVA, C. J
UDALAGAMA, J AND
FERNANDO, J.
SC APPEAL 14/2002
CA No. 693/93 (F)
D. C. KURUNAGALA CASE No. 5548/P
10TH DECEMBER 2004

Partition - Extent of land claimed according to kurakkan sowing extent - Plan No. 426 - Challenge to the extent of corpus - Decision of court required to be on

a balance of evidence including boundaries shown on previous deeds - Burden of challenging the extent of corpus on defendant's witnesses.

In the above action, the plaintiff claimed a land 4 Lahas Kurakkan sowing extent. As per preliminary Plan No. 426 (Lots 1, 2 and 3) the extent of the corpus was 8A 1R 16P.

The defendants claimed that the corpus should be limited to Lot 3 only and amount to 4 acres. The relevant deeds P1, P2, P3 and P5 showed that some boundaries of the land had been trees which probably disappeared in course of time. Hence the defendants attempted to limit the extent by referring to the names of adjoining owners. Further, children of the 1st defendant (now deceased) claimed only Lot 2 as being outside the corpus.

HELD:

1. The trial court had decided the extent of the corpus correctly as being 8A, 1R, 16 perches on the basis of the oral and documentary evidence on a balance of evidence. The burden of controverting the extent of the corpus as claimed by the defendants they had failed to do. It was also not specfically put to the plaintiffs that the corpus considered of only Lot 3.
2. It is difficult to proceed on the basis that 4 Lahas Kurakkan sowing extent amounted to 4 acres as claimed by the defendants as the Kurakkan sowing extent would vary from district to district depending on the fertility of the soil and the quality of grain etc.

APPEAL from the judgment of the Court of Appeal reported in (2002)1 SLR 65

Lakshman Perera for 1st, 4th and 5th defendants - appellants

G. R. D. Obeysekera for 2nd defendant - respondent

D. M. G. Dissanayake with *C. G. Liyanage* for plaintiffs - respondents.

Cur.adv.vult

February 2, 2005

UDALAGAMA, J

The plaintiff instituted D. C. Kurunegala case No. 5548/P to partition the land called Hapugaspitiya watte morefully described in the schedule to the amended plaint and depicted in plan No. 426 dated 12.12.1975 made by W. C. S. M. Abeysekera, Licensed Surveyor, marked X.

Admittedly, the extent *vide* the aforesaid schedule to the amended plaint was 4 Lahas of Kurakkan sowing and the land depicted in the aforesaid plan showed the extent to be 8A, 1R, 16P. Also admittedly the amended plaint filed on 28.09.1988, after the amended statement of claim filed by the 1st, 4th and 5th defendants on 07.08.1987, contained a 2nd schedule stating therein that the extent of the corpus sought to be partitioned was 8A, 1R, 16P.

The claim of the 1st, 4th and 5th defendants in the District Court *vide* the aforesaid amended statement of claim appeared to be that the corpus sought to be partitioned was only lot 3 of plan No. 426 referred to above and that lots 1 and 2 formed a separate land called Rawana ella *alias* Hapugahapitiya Hena and the 1st, 4th and 5th defendants prayed for a dismissal of the action.

The learned District Judge by his judgment dated 23.04.1993 whilst *inter alia* holding that lots 1, 2 and 3 of plan No. 426 referred to above comprised the corpus sought to be partitioned, decreed that the corpus be partitioned as prayed for by the plaintiff.

Aggrieved by the said judgment the 1A, 4A and 5th defendants - appellants appealed to the Court of Appeal.

The substantial issue for decision in the Court of Appeal, *vide* paragraph 4(b) of the petition of appeal to the Court of Appeal bearing No. C. A. 693/93 (F) was as to whether the corpus sought to be partitioned was the land belonging to Kiri Banda as stated by the plaintiff or whether it was the land belonging to Tikiri Banda as stated by the contesting defendants.

At the hearing of the appeal in the Court of Appeal the contention of the learned Counsel for the defendants - appellants was that the plaintiff - respondent failed to prove the identity of the corpus at the trial court and that the extent of the land shown in the preliminary Plan No. 426 referred to above was 8A, 1R., 16P which was far in excess of the extent described in the schedule to the amended plaint and that the boundaries as stated in the title deeds produced at the trial differed from those as shown in the aforesaid plan.

The Court of Appeal by its impugned judgment dated 09.11.2001 for the reasons stated therein dismissed the appeal with costs.

Aggrieved, the 1A, 4A and 5th defendants - appellants - petitioners sought *inter alia* special leave to appeal against the judgment of the Court of Appeal dated 09.11.2001 referred to above.

This court on 05.03.2002 granted special leave to appeal on the question as to whether the Court of Appeal erred in law in concluding that the land surveyed and depicted in the preliminary plan 'X' was the same land sought to be partitioned as described in the schedule to the plaint.

At the argument before this court learned Counsel for the appellants drew the attention of this court to issues settled at the trial court and adverted to the fact that the extent given in the schedule to the plaint was 4 Lahas of Kurakkan sowing and that 1 Laha of Kurakkan sowing was equivalent to 1 acre. It appears to be the submission of the learned Counsel for the appellants that 4 Lahas of Kurakkan sowing is equivalent to 4 acres but that as the extent shown in the preliminary plan referred to above comprising lots, 1, 2 and 3 therein, refers to an extent of 8A, 1R., 16P, that a larger land in fact was surveyed.

Admittedly, the plaintiff - respondent claimed rights to the corpus *inter alia* on deed of transfer bearing No. 5671 dated 14.12.1975 marked P5 wherein the vendor of the latter deed, S. R. M. Wijesundara Banda Katupitiya, sold to the plaintiff - respondent an extent of 4 Lahas of Kurakkan sowing of the land called Hapugahapitiya Hena bounded on the North by Murutha tree and Ketakalagahamula, East by a ditch, south by Mahakongaha Thotilla tree and West by Oya.

Deed No. 71 dated 12.09.1922 (P3), a deed on which the earlier predecessor of the plaintiff - respondent is said to have acquired title signifcantly had the same boundaries as those in P5 referred to above. The same appears to be true of the boundaries as given in the 2 other deeds upon which the plaintiff - respondent traces title, to wit. P1 and P2.

On a perusal of the boundaries as stated in P1, P2, P3 and P5 the Northern and Southern boundaries are described with reference to trees. it is reasonable therefore to assume that with the advent of time that the trees so named which described the two Northern and Southern boundaries would have been non existant at a later period and the names of owners of the adjoining lands would have been inserted in place of the names of trees, resulting in the title deeds having different boundaries to that of the preliminary plan 'X'

The contention of the learned Counsel for the defendants - appellants on the matter of identity of the corpus sought to be partitioned also appeared to be that the trial court had erred in deciding the matter on evidence ignoring the deeds and that the court ought to have in fact decided the matter on a consideration of the contents of the deeds and not by oral evidence (page 4 of the written submissions of the appellants)

I would disagree with the above submission as oral evidence under oath and subject to cross examination, is equally important to arrive at a finding.

Perusing the evidence led before the trial court it is abundantly clear that while only the plaintiff - respondent testified in support of the averments in the plaint the defendants - appellants who are now before this court contesting the decision as to the identity of the corpus to be partitioned had on their behalf led the evidence only of one Nimal Ratnayake the substituted 1A defendant. Significantly even in cross examination of the plaintiff - respondent no question had been forthcoming to challenge the testimony of the plaintiff as to the identity of the corpus nor was it specifically put to the plaintiff that the corpus sought to be partitioned consists only of lot 3 in plan X. Also significantly the 2 children of the contesting 1st defendant (now deceased) had claimed only lot 2 before the Surveyor at the preliminary survey. They appeared to have been remiss in their duty, at the first opportunity available to them, to point out the correct corpus to be partitioned, as claimed by them.

Nimal Ratnayake the aforesaid 1A defendant - appellant under oath in his evidence at page 212 of the brief significantly and specifically states that the land as described in the plaintiff's title deeds P6 and P7 comprises the corpus as shown in plan X. The 3rd defendant who testified after the aforesaid 1A defendant confirmed the plaintiff's evidence in respect of the corpus to be partitioned and the aforesaid testimony taken in its entirety which also refers to the contents of the plan X and its report when considered on a balance of probability, conclusively establishes the fact that the land sought to be partitioned was in fact Lots, 1, 2 and 3 of plan X.

I would also reiterate the observations of the President of the Court of Appeal in the impugned judgment that land measures computed on the

basis of land required to be sown with Kurakkan vary from district to district depending on the fertility of soil and quality of grain and in the said circumstances difficult to correlate the sowing extent with accuracy. Thus there cannot be a definite basis for the contention that 1 Laha sowing extent be it Kurakkan or even paddy would be equivalent to 1 acre.

In Paragraph 3 of the statement of claims of the 1st, 4th and 5th defendants filed on 07.08.1987 (page 137 of the brief) they sought to identify lots 1 and 2 in the aforesaid plan marked X as Rawana ella *alias* Hapugahapitiya Hena which land was said to have been morefully described in the schedule to the statement of claim referred to above of the contesting defendants, importantly with reference to Plan No. 1119 dated 18.05.1929 made by D. H. de Silva Wickrematillaka, Licensed Surveyor, However admittedly no steps have been taken by the appellants to superimpose the said plan upon the preliminary plan marked, X, which procedure would have convincingly cleared any doubt, if any, as to the true identity of the corpus sought to be partitioned. There also appears to be no explanation or reason given as to the failure on the part of the appellant to have done so.

In the aforesaid circumstances I am inclined to the view that the trial court and the Court of Appeal on a balance of probability and on a consideration of evidence together with documents marked and led at the trial court came to a correct finding as to the corpus sought to be partitioned and on the single question to be decided by this court when special leave was granted, I would hold that the Court of Appeal was not in error in concluding that the land surveyed and depicted in the preliminary Plan No. 426 marked X referred to above was in fact the corpus sought to be partitioned, as claimed by the plaintiff - respondent.

This appeal is dismissed with costs fixed at Rs. 5000

S. N. SILVA, C. J - I agree.

RAJA FERNANDO, J. - I agree

Appeal dismissed.