

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

G.N. Francis Clement Aponso of Aponsu
Villa, Ihala Katuneriya, Katuneriya.

Plaintiff.

C.A. Appeal No. 1176/00 F

D.C. Marawila Case No. 626/L.

Vs.

1. Liyanage Don Joseph Antony (Deceased)
 - 1A. Mary Catherin Marasinghe.
 - 1B. Nelka Priyanthi
 - 1C. L. Sujeewa Shriyamalee,
 2. Milan Liyanage
- All of whom at Lekamwatta, Mudugatuwa.
Marawila.

Defendants.

AND NOW BETWEEN

- 1A. Mary Catherin Marasinghe.
Lekamwatta, Mudugatuwa.
Marawila.

1A Defendant – Appellant.

Vs

G.N. Francis clement Aponso of Aponsu Villa,
Ihala Katuneriya, Katuneriya.

Plaintiff – Respondent.

Warnkulasuriya Rita Mary Grace Dabrera of
“ Registra Niwasa” Ihala Katuneriya, Katuneriya.

Substituted Plaintiff – Respondent

- 1B. Nelka Priyanthi
 - 1C. L. Sujeewa Shriyamalee,
 2. Milan Liyanage
- All of whom at Lekamwatta, Mudugatuwa.
Marawila.

1B, 1C, 2 Defendant – Respondents.

Before : E.A.G.R. Amarasekara, J

Counsel : Manohara de Silva, P.C. for the Defendant.
Navin Marapana for the Substituted- Plaintiff - Respondent.

Decided on : 28.12.2018.

E.A.G.R. Amarasekara, J

The Plaintiff in the Case No. 626/L of the District Court, Marawila filed his Plaintiff dated 12.08.1993 seeking the demarcation of the common boundary between lot Nos. C 2 and C 3 depicted in plan bearing No. 6616 dated 10.10.1963 drawn by V.F. Warnakulsuriya, Licensed Surveyor. The said plan was marked as P2 during the trial.

The Plaintiff's position was that he became the owner of the aforesaid lot No. C2, which is morefully described in the 1st schedule to the Plaintiff, by Deed No. 2865 dated 11.01.1965, which was marked as P1 at the trial. The Plaintiff had further stated in his plaint that the Defendants own and/or possess Lot C3 of the aforesaid plan, which is morefully described in the second schedule to the Plaintiff. The Plaintiff averred in his plaint that the fence existed between the aforesaid two lots was completely obliterated by the damaging acts of the Defendants. Thus, the Plaintiff's position was that a cause of action has accrued to him to file an action to get the common boundary demarcated. In their answer, the Defendants took up the position that the 1st Defendant, who was deceased by the time they filed the answer, was the owner of Lot No. C 3 by virtue of deed No. 2706 dated 21.10.1963, which was marked as P5 at the trial. The Defendants had further stated that the

1st Defendant was in possession of Lot Nos. C2 and C3 as one land and cultivated them with coconut and other crops. The Defendants' position was that the Plaintiff was never in possession of Lot C2 but it was the 1st defendant who was in the possession of the said Lot C2 and thus, they claimed prescriptive title to Lot C2.

The Plaintiff and a Police constable U. Jayasinghe testified on behalf of the Plaintiff while the 1A Defendant and 6 others gave evidence on behalf of the Defendants at the trial. The learned District Judge delivered his Judgment dated 21.12.2000 in favour of the Plaintiff and this appeal has been preferred against the said Judgment by the 1A Defendant - Appellant.

The 1A Defendant – Appellant (hereinafter sometimes referred to as the Appellant in this judgment) argues that the Plaintiff Respondent (Sometimes referred to as the Plaintiff in this judgment) could not have filed an action for demarcation of boundaries and the proper action that should have been filed is one of declaration of title and ejectment. The Appellant further argues that they have proved title to the Lot C2.

In support of his arguments the Appellant has brought this court's attention to the flowing authoritative text and the decisions of the Superior Courts.

a) **Walter Pereira in Laws of Ceylon, 2nd Edition 1913 at page 204. ---**

"wherever the boundaries of land belonging to different owners had become uncertain, whether accidentally or through the act of the owners or of some third person, an action for definition and settling them was provided by the Roman Dutch Law. The onus of proof of the essential facts in such an action was on the Plaintiff"

- b) **Leelawathie Hamine Vs Gunasiri (1989) 1 SLR 322:** - Where it was held that an action for definition of boundaries lies only where parties are admittedly the owners of contiguous land and the common boundary between the two land has become uncertain. When the dispute is to lots, the appropriate remedy is an action for declaration of title and ejectment.
- c) **Maria Vs Fernando 17 NLR 65** - Where it was held that an action for defining and settling boundaries is provided for by the Roman Dutch Law whenever the boundaries of land belonging to different owners had become uncertain, whether accidentally or through the act of the owners or some third person. The onus of proving the essential facts in such an action was on the Plaintiff, but the action was not allowed to one co-owner against another when a boundary of the common property and one of a property belonging exclusively to one of the co-owners had become "mixed up".
- d) **Jacolis Appu Vs David Perera 69 NLR 548** - Where it was held an action for definition of boundaries presupposes that the parties to the action are admittedly owners or occupiers of contiguous lands.

Since the Appellant disputes the Plaintiff's title to Lot C2 by claiming prescriptive title to it along with Lot C3 as one land, the Appellant appears to be bringing forth an argument that, at the time of filing the plaint, there were no two contiguous lands owned by two different individuals to file an action to demarcate a common boundary.

It is my considered view that this argument can hold water only if the Appellant can prove that the Defendants including the Appellant have prescriptive title to Lot C2 as averred in the answer. The Plaintiff has stated in his plaint that Lot C2 belongs

to him by the deed marked as P1. As per the deeds marked as P1 and P5, it appears that the Plaintiff's title to lot C 2 as well as the 1st Defendant's title to lot C3 originate from the same source, namely Dona Eugenia Hamine of Marawila. Respective paper title to the said lots were established by the Plaintiff by marking the said deeds during the trial. No objections were reiterated against the said deeds at the conclusion of the Plaintiff's case or when they were marked during the trial. Thus, they prove respective paper title of the Plaintiff and Defendants to the adjoining lots, namely C2 and C3.

The Appellant rely on the purported prescriptive possession of the 1st Defendant who is now deceased but as per the police statement (P4), which was made by the 1st Defendant on 19.08.1992, that was only about 1 year before the date of the plaint, the 1st Defendant had described the land as a co-owned land. The said statement(P4) was made in response to the police complaint made by the Plaintiff with regard to the removal of the fence constructed by the Plaintiff. The position of the 1st Defendant in the said statement was that the land in issue is a co-owned land and the fence erected by the Plaintiff was removed by some other persons. The 1st Defendant has further stated in the said statement(P4) that the Plaintiff had got the fence removed to implicate the 1st Defendant and his son to the dispute. It must be noted that 1st Defendant has not stated that the title to the land was only with him and the Plaintiff had no right to erect a fence on that. The 1st Defendant's position that he possessed the land as a co-owner stands against any claim of prescriptive right claimed by the Defendants in their answer. As the 1st Defendant has not refused the Plaintiff's right to the land in that statement (P4), it seems that the purported co-ownership he referred to there in the said statement was one with the Plaintiff. Anyway, the position taken up by the Defendants in their answer

and while leading evidence was not based on co-ownership to the land in question but on prescriptive title of the 1st Defendant which was not reflected in the aforesaid statement (P4) made by the 1st Defendant himself approximately 1 year prior to the filing of the plaint. On the other hand, it must be noted that the Defendants themselves have suggested while cross examining the Plaintiff that the fence with concrete poles was erected after demolishing the fence that existed there previously (vide page 95 of the brief). This too is contrary to the position taken by the Defendants that they possessed the land as one land for a long period. Though the 1A defendant has stated that the Defendants possessed the land, due to the position taken by the 1st Defendant in his statement to the police(p4), it cannot be presumed that the said possession, even if it is true, was an adverse one.

When prescriptive claim of the Defendants fails, the deeds marked as P1 and P5 confirm that the 1st Defendant and the Plaintiff got respective title to contiguous two lots, namely C2 and C3 and as per the schedules of those deeds, those lots are not undivided portions but divided portions of lands with exclusive identity. Hence defeating the Defendants' stance, the Plaintiff had established that there are two contiguous lots, namely C2 and C3 which belong to two different individuals, namely the Plaintiff and the 1st Defendant as at the date of filing the Plaintiff.

The Appellant attempts to argue that the Plaintiff failed in proving that there existed a common boundary which was obliterated by a subsequent event. The Plaintiff's position was that there was a stick fence separating the relevant lots and he replaced it with a fence made of concrete poles which was removed by the Defendants on the same date it was erected causing him to make the police complaint marked as P3. As mentioned before, even while cross examining the

Plaintiff, the Defendants have suggested that there was a fence before erecting the fence with concrete poles which was removed by the Defendants. However, it is my considered view, having bought the lot C3 as per the description of boundaries referred to in the schedule to the deed No. 2706 marked as P5, the Defendants or the Appellant cannot, while relying on the same deed, state that there did not exist a boundary as per the Plan No. 6166, since they have bought the lot C3 by accepting its metes and bounds as per the schedule in the said deed. Furthermore the 1st Defendant in his Police statement had not stated that the fence erected by the 1st Defendant and removed by some other persons, was a new introduction to the land. In P3, the police complaint made by the Plaintiff, the Plaintiff had clearly stated that he renewed the existing fence with concrete poles and barbed wires. Even the Appellant in his evidence has admitted that the Plaintiff on two occasions fixed the fence with sticks but the 1st Defendant removed them. Furthermore, the Defendants' stance that they possess the two lots as one land too supports the position that the common boundary was obliterated at the time the plaint was filed. These facts on balance of probability support the view that there had been a common boundary separating the two lots. Since the boundaries are described according to a plan, there is no doubt that the boundary separating lot C2 and C 3 is ascertainable.

At this moment, I would like to refer to the following decisions of the superior courts with regard to Actio Finium Regundorum i.e. actions for the definition of boundaries.

Ponna Vs Muthuwa 52 NLR 59 ‘The common Law remedy of an action for definition of boundaries presupposes the prior existence of a common boundary which has been obliterated by some subsequent event. It cannot be sought for the purposes of creating on some equitable basis a line of demarcation which had never been there before.’

Deeman Silva Vs Silva and others (1997) 2 SLR 382

“An action for definition of boundaries lies only to define and settle boundaries between adjacent owners, whenever the boundaries have become uncertain whether accidentally or through the act of the owners or some third party. The Plaintiff must come into Court stating (1) that an ascertainable common boundary previously existed on the ground and (2) that such boundary had been obliterated subsequently”

“If there was no ascertainable boundary to be redefined this action (Actio Fenium Regundorum) should have been terminated. The action should have been then under the circumstances one of ‘declaration of title’ and not definition of boundaries.”

Somawathie and others Vs. Illangakoan (2013) 1 SLR 94 “The action for definition of boundaries, known to Roman Dutch Law as Actio Fenium Regundorum lies whenever the boundaries between the lands of adjacent owners have become uncertain either by chance or by the act of adjoining owners or of the third party. {Voet, Pandects Book 10 title 1 section 1(a)}. This judgment has referred to the aforesaid two judgments **Ponna Vs Mutuwa** and **Deeman Silva Vs. Silva.**”

The decisions referred to above in this judgment indicate that to bring forth a successful action to demarcate boundaries following ingredients should be present;

1. Two contiguous lands belonging to two different owners
2. An ascertainable boundary that existed previously but subsequently obliterated due to act or acts of the owner or owners or a third party or by some other manner.

A careful perusal of the plaint reveals that the Plaintiff has averred that;

- 1.The lots C2 and C3 belong to him and the Defendants respectively.
- 2.The common boundary is shown in plan no.6616 of V.F. Warnakulasuriya, licensed surveyor.
- 3.The fence that separated the aforesaid two lots does not exist due to the acts of the Defendants.
- 4.Therefore the Plaintiff has a cause of action to get the common boundary between the aforesaid two lots demarcated.

Hence, the plaint contains all necessary ingredients to file an action for the demarcation of boundaries.

As shown before, the Defendants' claim for prescriptive title must fail. It was also shown before that the Plaintiff has proved the defendants' title to lot C3 and the Plaintiff's title to lot C2 by submitting the relevant deeds.

As mentioned before, the Plaintiff has proved on balance of probability that there was a common ascertainable boundary which is obliterated subsequently.

Hence, it is my considered view that there was a proper cause of action for the Plaintiff as the owner of lot C2 to get the common boundary demarcated

and he has placed sufficient evidential materials before the learned District Judge to get the judgment in his favour.

However, the Appellant challenges the impugned judgment on another ground. As per the proceedings dated 29.02.1996, twelve issues were framed by the parties and when the case was taken up for trial on 28.01.1997, parties agreed to accept the issues so framed on 29.02.1996 and continue with the trial. Nevertheless, six further issues were raised on behalf of the Defendants on that date making the number of issues totaling up to 18. The learned District Judge in his judgment has stated that on 29.02.1996, six issues have been framed on behalf of the Plaintiff and six issues on behalf of the Defendants. However, the learned District Judge in his judgment has listed issues nos.1 to 6 framed by the Plaintiff on 29.02.1996 and the six further issues raised by the Defendants on 28.01.1997 and answered only the said twelve issues. Therefore, the learned District Judge has failed to answer the six issues framed on behalf of the Defendants on 29.02. 1996. It is true that, as per the section 187 of the Civil Procedure Code, the judgment shall contain the points of determination, the decision thereon and the reasons for such decisions. The failure to answer the aforesaid six issues is definitely a defect in the judgment. However, the proviso to the article 138(1) of the constitution states that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

Some of the issues which were not answered by the learned District Judge mainly relate to the prescriptive title of the Defendants to lot C 2 (vide issues nos. 6, 9, and 11 framed on 29.02.1996 but wrongly numbered as 7, 10, and 12). As mentioned before the Defendants' claim for prescriptive title to lot C 2 must fail. On the other hand, the reasoning of the learned District Judge contained in the body of the judgment too confirms that the learned District Judge was not of the view that the Defendants have prescriptive title to the lot C 2. Therefore, even if he answered the aforesaid issues, he would have answered them in the negative. Therefore, it is my considered view that the failure to answer aforesaid issues nos.6, 9 and 11 has not prejudiced the substantial rights of the parties.

Issue no.8 (wrongly numbered as 9) framed on 29.02.1996 relates to whether there was a boundary separating lot C 2 and lot C 3. However, issue no. 4 (wrongly numbered as 5) was raised on the same point and the learned District Judge has answered that in the affirmative. Therefore, failure to answer the said issue cannot prejudice the parties since the same point has been answered under issue no.4.

The issue no.10 (wrongly numbered as 11) raised on 29.02.1996 relates to the improvements and plantation in the land in question. The failure to answer this issue would have affected the rights of the Defendants only if the Plaintiff is entitled to take a writ of execution to dispossess the Defendants. This is an action to demarcate the boundary between lot C2 and lot C3. The Plaintiff has not filed this action based on a cause of action of unlawful encroachment or possession. Therefore, the Plaintiff is entitled only

to take a writ out to fix the boundary but not to take the possession of any part of the land if he is dispossessed by the Defendants.

As per the proceedings dated 23.09.1997 the Plaintiff has admitted that the possession of the land is not with him from 1992 (vide page 89 of the brief). Though the Plaintiff was successful in proving his case to get the common boundary demarcated, this court observes that he has not joined any other cause of action such as unlawful encroachment or possession by the Defendants. Therefore, he is not entitled to take out a writ of possession other than a writ to demarcate the common boundary. While making the said remarks, this court dismisses the appeal filed by the 1A Defendant Appellant without costs.

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E.A.G.R. Amarasekara, J
Judge of the Court of Appeal