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

C.A 943/1998 (F)
D.C. Kegalle 2844/L

1. W. A. Dingiri Banda Weerasinghe
2. K. M. D. S. Weerawardema

both of Bathamure,
Rambukkana – 7100

PLAINTIFFS

Vs.

1. P. G. Nimal Wijesiri
2. Suramya Gunasekera

both of Bathamure,
Rambukkana – 7100

DEFENDANTS

1. W. A. Dingiri Banda Weerasinghe
2. K. M. D. S. Weerawardema

both of Bathamure,
Rambukkana – 7100

PLAINTIFF-APPELLANTS

Vs.

1. P. G. Nimal Wijesiri
2. Suramya Gunasekera

both of Bathamure,
Rambukkana – 7100

DEFENDANTS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Bimal Rajapaksa with Ravindra Anawaratne for the Substituted 1st & 2nd Plaintiff-Appellant

Nihal Perera for the 2nd Defendnat-Respondent

ARGUED ON: 02.08.2012

DECIDED ON: 05.11.2012

GOONERATNE J.

In this case the Plaintiff-Appellant complain of an encroachment by the 1st Defendant-Respondent on or about 1981 lot Nos. (1) and (2) are adjacent lots as shown in plans 3403 (1V1) of 28.4.1948 (partition plan). Plaintiff is the owners of lot (2). 1st Defendant owns lot 1 (11 perches). Lot 2 according to Plaintiff is 1 Rood; 37 Perches. Plaintiff's position seems to be that the 1st Defendant-Respondent had interfered or changed the boundaries of the Plaintiff-Appellant's land in March 1981, and thereby added a portion of land from his land, into to lot (1). Plaintiff relied on the evidence and plan of Surveyor Carder and according to the plan 'X' and report X1 the encroachment is about 2.50 perches.

Plaintiff-Appellant support his case by referring to Surveyor Carder's plan and state the fixation was accurate and that witness Carder is an impartial witness. Plaintiff also contends that Respondent admitted that there was no boundary separating his lot and that of the Appellant. Nor did the 1st Defendant move for a Commissioner to survey the land if he was not satisfied with Surveyor Carder's plan. Plaintiff also argue that the learned District Judge who delivered the judgment had misdirected, and that at pg. 117 states only lot 2 has been shown in Surveyor Carder's plan. But the encroachment is shown as lot (1) (0.25 perch) and lot 2 (2.25 perch) which add up to 2.50 perches of an encroachment. Another point is that the trial judge who delivered the judgment did not have the opportunity to hear and see the witnesses. I have perused the proceedings and I find that the proceedings of 30.6.1997 parties have consented to adopt the proceedings and go on with the case before the learned District Judge in the said days proceedings. As the system and practice prevalent in our original courts, trial judges after a period of time would be on transfer to another station in the island. Therefore the trial judge who assumes duties need to carry on with the available work load. If the parties so desired they could have intimated to the sitting judge, and thereafter the Judicial Service Commission could if it's in order gazette the Judge to hear and conclude the case. Nothing of this sort

has happened. Therefore this court cannot arrive at any conclusion on the aspect as urged by Appellants. Failure or refer to specific items of evidence or instances which is noted by this court would have prejudiced the case of the party concerned. As such the dicta in Silva Vs. Seneviratne 1981 (2) SLR 7 at 17 cannot be applied. (Appellate Court's right to reverse findings)

The so called encroachment as urged by the Plaintiff in 1981, should have been supported with some documentary evidence as a police complaint or a complaint to a Grama Sevaka. Any physical act of encroachment is doubtful of proof in the absence of such material. Action filed only in 1983. This is somewhat unexplained by evidence. The witness for the Plaintiff in his evidence speaks of an encroachment, no doubt, but in cross-examination the witness admitted that he is not an independent witness and he has interest to see that Plaintiff succeeds in the case. The 1st Respondent's position is that he is a bias witness.

The learned trial judge has considered the evidence of the Surveyor who gave evidence and arrived at a conclusion, though the appellant is critical of same, and emphasis that the trial judge has misdirected and I have to refer trial judge's views on Surveyor's evidence and on the encroachment.

(a) At pg. 124 of the record the correct extent of encroachment was not known to Plaintiff. කෙසේ වෙතත් එහි ප්‍රමාණය හරි හැටි කිමට නොදන්නා බව පැමිණිල්ල ප්‍රකාශකරයි.

(b) Another lapse as stated by the judge "මෙම පිඹුර සකස් කිරිමේදි තමා වපසරිය සැදුවේ නැතිබව පිලිගත්තේය.

As such Surveyor admit that it is a lapse on his part.

(c) There was no boundary as shown in 'red' in his plan. වැට තිබුණ තැන තමා රතු පාටින් පෙන්වා ඇත් බවත්, එහි වැටක් නොතිබුනු බවත් ඔහු කියා සිටි. (folio 12)

(d) That endaru trees (එඬරු ගස) as shown as the fence but it's age not recorded.

(e) Surveyor has not identified the boundary as shown in 'black'

(f) Surveyed only the earlier boundary 'ප්‍රථමයෙන් පෙන්වා තිබෙන මායිම පමණක් තමා මැන්න බවය'.

Trial Judge's observation on this point would be relevant.

"මේ අනුව මෙවැනි මායිම් ආරවුලකදි නියම මායිම කුමක්දැයි සොයාගැනිම සඳහා එනම් තිබිය යුතු මායිම් සොයාගැනිම සඳහා අවම වශයෙන් දෙවන මට්ටමෙ ආරෝපිත කිරිමක් අවශ්‍ය බව පැහැදිලිය. අනිත් අතට අවම වශයෙන් මුල් පිඹුරක් ආශ්‍රයෙන් ආරවුලට අදාල ඉඩම් කොටස් වල මායිම් පළමුව මෙම තිබිය යුතු මායිම සහ වාර්තා කර ඇති මායිම පැහැදිලි වශයෙන් පෙන්වා දිමක් කළයුතුය. මිනින්දෝරු වරයාගේ මෙම මැනුම අනුව ඔහු මැන ඇත්තේ ඉඩම් දෙන අතර කල ඉරෙන් පෙන්වා ඇති මායිම පමණි.

(g) On evidence it is not clear whether the earlier boundaries are shown in 'red'.

(h) Surveyor's evidence does not properly refer to the encroached portion (127). I would have to include the trial Judge's views in verbertim as regards the Surveyor's evidence.

'මේ අනුව මෙම මිනින්දෝරු වරයාගේ සාකිෂියෙන් අල්ලාගත් ඉඩම් කොටස එසේ අල්ලාගැනිමට පෙර තිබි මායිම කුමක්ද? යන්න පැහැදිලිව නොපෙන්වයි. මෙම සාක්ෂිය හැර වෙනත් මිනින්දෝරු වරයකුගේ සාක්ෂියක්ද මෙම නඩුවේ කැඳවා නොමැත. විශේෂයෙන්ම ඉඩම් වපසරිය මැන නැති අවස්ථාවක සහ මුල ඉඩම මැන නැති විමට මෙම පැරණි වැට හෝ එම වැට තිබුණු ස්ථානය පැහැදිලි නේවා නොසිටිම පැමිණිලිකරුගේ නඩුව කෙරෙහි මහත්සේ බලපෑමක්කර ඇතිබව මගේ අදහසය.

The trial judge has also considered the evidence of the Defendant-Respondent. On a balance of probability the Plaintiff's action has been dismissed. There seem to have been no permanent fence properly identified between the lands of Plaintiff and 1st Defendant based on evidence. Defendant's position was that he continued to possess the land, as it was from the date he purchased the property. Therefore the burden is on the Plaintiff to prove correctly before court on encroachment. Trial Judge having considered the evidence has given several reasons not to act upon the evidence of the Plaintiff party. This court does not wish to disturb the conclusion of the trial judge on primary facts (1993 (1)) SLR 119. This is an action that should be categorized and should have been approached as an action for definition of boundaries. Plaintiff had not filed action on that footing. The Roman Dutch Law provides an action where the boundaries of lands belonging to different owners have become uncertain whether accidently or through the act of the owners or some third party, 17 NLR at 66.

In all the above circumstances I affirm the judgment of the District Judge. Appeal dismissed.

JUDGE OF THE COURT OF APPEAL