

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRILANKA

1. Nanayakkara Senarath
Appuhamilage Karunaratna
Nanayakkara (deceased),
2. Karunaratna Senarath
Appuhamilage Indra Biyatrice
Nanayakkara,
Banduragoda.

PLaintiff

C A 948 / 2000 (F)
D.C. Negombo No. 3552 / L

Vs.

Jayasinghe Arachchige Somaratne,
Banduragoda.

Defendant

NOW BETWEEN

Jayasinghe Arachchige Somaratne,
Banduragoda.

Defendant Appellant

Vs.

1. Nanayakkara Senarath
Appuhamilage Karunaratna
Nanayakkara (deceased),
2. Karunaratna Senarath
Appuhamilage Indra Biyatrice
Nanayakkara,
Banduragoda.

Plaintiff Respondent

BEFORE : UPALY ABEYRATHNE, J.
COUNSEL : Ranjan Suwandarathne with Anil Rajakaruna for the
Defendant Appellant
M.P. Ganeshvaran for the Plaintiff Respondent
ARGUED ON : 13.06.2013
DECIDED ON : 23.10.2013

UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted the said action against the Defendant Appellant (hereinafter referred to as the Appellant) in the District Court of Negombo seeking a declaration of title to the land described in the schedule B to the plaint and to erect the boundary fence which separated the two lands occupied by the Plaintiff and the Defendant and to eject the Defendant from the land described in the schedule B to the plaint. The Respondent has filed an answer praying for a dismissal of the Appellant's action. The case proceeded to trial upon 14 issues. After trial, the learned Additional District Judge has delivered a judgment in favour of the Respondent. Being aggrieved by the said judgment dated 04.07.2000 the Appellant has preferred the present appeal to this court.

At the hearing of this appeal the learned Counsel for the Appellant contended that though the action of the Respondent is a rei-vindicatio action, the Respondent has joined a cause of action for Definition of Boundaries in the rei-vindicatio action.

I now advert to the said submission. It clearly appears from prayer (a) of the plaint that the Respondent has sought a judgment declaring him as the owner of the land described in the schedule 'B' to the plaint. In contrary to the said relief the Respondent, in prayer 'b' of the plaint, has sought to erect the boundary fence between the Appellant and the Respondent's lands. It seems from paragraph 12 and prayer 'b' and 'c' of the plaint that the Respondent's action is for Definition of Boundaries.

The scope of a rei-vindicatio action is larger than that of a definition of boundaries. In a vindicatory action the claimant need nearly prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. (See *Jinawathie and Others vs. Emalin Perera* [1986] 2 Sri L.R. 121 and *Theivandran vs. Ramanathan Chettiar* [1986] 2 Sri L.R.219)

On the other hand an action for definition of boundaries lies only where parties are admittedly owners of contiguous lands and the common boundary between the two lands has become uncertain. In an action to define boundaries the plaintiff must show that an ascertainable common boundary previously existed on the ground and such boundary had been obliterated subsequently. If there is no ascertainable common boundary the action should come to an end.

It was apparent from the evidence of the Respondent that there was a fence between the two lands and the Appellant has destroyed said fence and has encroach the Respondent's land. Hence it was clear that there had been an ascertainable common boundary between the two lands and such boundary had

been obliterated subsequently. Apart from that the Appellant has encroach the Respondent's land. But in an action for definition of boundaries a plaintiff cannot seek to eject a person from a land or from a portion of land which has been encroach by a Defendant.

In the case of Alfred Fernando vs. Julian Fernando 1987 2 SLR 78 it was held that "In the guise of an action for definition of boundaries a plaintiff cannot vindicate title to an encroachment."

Section 35(1) of the Civil Procedure Code stipulates that in an action for the recovery of immovable property, or to obtain a declaration of title to immovable property, no other claim, or any cause of action, shall be made unless with the leave of the court. In the present case the Respondent has failed to obtain the leave of the court.

The proceedings do not show that any application was made by the Respondent at any stage to amend the plaint. Even at the hearing of this appeal the Counsel for the Respondent did not seek for permission of court to amend the plaint by striking out one of the causes of action. Though the power of amendment conferred by section 93 is vested both in the original as well as in the appellate Court, I do not think I should exercise that power without a proper application and without giving the Appellant an opportunity of showing cause.

Therefore the Respondent cannot have and maintained an action for a declaration of title coupled with an action for definition of boundaries. For the forgoing reasons I am of the view that issue No 13 should have been answered in the negative. Hence I set aside the judgment of the learned Additional District Judge dated 04.07.2000 and allow the appeal of the Appellant with costs

Appeal allowed.

Judge of the Court of Appeal