

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

1. Thalahe Podikoralalage Kamala
Dharmalatha wijewickrema.

2. Horagampita Manage Premaratne
Both of

Ronwood watta,
Hapugala,
Galle.

Defendant – Appellants.

Case No.CA 841/95(F)
D.C. Galle Case No. 11105/L

Kariyawasam Hewamanage Hemantha
Alias Hemantha Kariyawasam.
Kitulampitiya,
Galle.

Plaintiff- Respondent.

BEFORE : E.A.G.R.Amararasekara, J.

Counsel : Mr. Chanaka Jayamaha AAL with Ms. Oshini Chandradasa AAL
for the Defendant Appellants
Mr. Rohan Sahabandu PC. With Ms Sureka Withanage for the
Plaintiff Respondent.

Decided On : 2018.06.22.

E.A.G.R.Amararasekara, J.

The Plaintiff Respondent (herein after sometimes referred to as the Plaintiff) instituted this action in the District Court of Galle on 29.05.1987 praying inter alia;

- a) For a declaration of title to an 18 feet wide strip of land along the Southern boundary of the lands described in paragraph 2(a) and 2(b) of the Plaint which were encroached by the Defendant Appellants (herein after sometimes referred to as the Defendants.)
- b) For the eviction of Defendants and all under them from the aforesaid encroached strip of land.
- c) For the removal of the fence put up by the Defendants in encroaching the aforesaid strip of land.
- d) For a declaration that the encroached 15 feet wide strip of land by the Defendants, which is within the corpus described in the paragraph 2(e) of the Plaint, is part of the access road described in the aforesaid paragraph 2(e).
- e) For the eviction of Defendants from the aforesaid encroachment of the access road.
- f) For the removal of the fence erected by the Defendant in encroaching the aforesaid access road.
- g) For damages.

In paragraph 13 of the original Plaint the Plaintiff had stated that a commission would be taken out to depict the aforesaid encroachments. Accordingly, a commission was taken out to licensed surveyor G.H.G.A.A.de Silva. He has prepared Plan No. 1372, (which was later on marked as P1 at the trial) using a true extract prepared by S. Wickramasnghe, licensed surveyor of the Plan No. 880 of licensed

surveyor N.S.L. Fernando, to show the boundaries of the disputed lots and encroachments. On a later stage the true extract of the Plan No. 880 aforesaid prepared by licensed surveyor S. Wickramasighe has been marked as P2, at the trial. As per P2, plan no.880 seems to be a subdivision after resurvey of the amalgamation of lots 8 to 13 and lot 14 in the plan no.340 dated 01.06.64 Of R. Kodithuwakku, licensed surveyor. However, after taking out the commission and preparation of the Plan No. 1372, the Plaintiff has amended his plaint accordingly and made clarity in recognizing the encroached portions according to the aforesaid plan No.1372. The Defendants have filed their amended answer on 29.08.1987.

The parties went to trial on 17 issues, first 9 issues by the Plaintiff and issues No. 10 to 17 by the Defendant.

The Plaintiff averred that he is the owner of the lands depicted in Lots 15,16, 17 and 18 of Plan No. 880 dated 01.11.1969 made by N.S.L Fernando, Licensed Surveyor. He also claimed a right of way over Lot No. 32 of the said Plan.

The Plaintiff's stance was that the said lots were once owned by one Danaweera Thirimavithana who transferred the same to one Serasinghe by his deed No. 3339 dated 21.05.1969 and the said Serasinghe by his deed No. 1381 dated 19.10.1970 transferred them to Irangani Lorensuhewa, and she by her deed No. 234 dated 02.06.1984 transferred the title of the said Lots to the Plaintiff. The Plaintiff further stated that the right of way over Lot 32, was transferred to him along with the said lots by the same deed. The Plaintiff further claimed prescriptive title to the said lots and the right of way. The Plaintiff's position is that the Defendants had encroached on to parts of Lot 15 and 18, which are depicted as 15A and 18A in the Plan No. 1372 dated 12.06.1960. He further has stated that the Defendants have encroached and disturbed his right of way in the manner depicted by Lot 32A and 32B of the said plan. In the aforesaid circumstances, in his amended plaint the Plaintiff has sought a declaration of title from the District court that he is the owner of Lot 15A and 18A of Plan No. 1372 and further that Lots 32A and 32B are parts of Lot 32, his right of way.

The Defendants in their answer averred that though the Plaintiff has described the relevant Lots referring to Plan No. 880 of N.S. L Fernando licensed surveyor and Plan No. 340 of I.R. Kodithuwakku Licensed surveyor, the Court Commissioner in making his plan No. 1372 has used only the said plan No. 880. While putting the burden of proving the title and rights averred in the amended plaint on the Plaintiff, the Defendants have further averred in their answer that the 1st defendant owns the lots they possess in the Rosewood Estate in the Batuwantudawa village though the deeds of sale No. 96/2182 dated 20.06.1964, and No. 579 dated 16.03.1969 and No.5979 dated 06.12.1978. The Defendants have stated in their answer that Lots 13, 14, 19, 20 and 32 of Plan No. 880 and Lots 18A and 15A of Plan No. 1372 are the lots they possess and own. They also claimed prescriptive title to aforesaid lots 13,14,19,20, and lots 18A,15A and 32A of the said Plan No 880. The Defendants' position was that right of access for the Plaintiff is over Lot 35 as shown in Plan No. 1372 and that the Plaintiff has no right to use Lot 32 as his access road. As said before the parties went on to trial on 17 issues. The main issues were based on the entitlement to Lots 18A and 15A of Plan No. 1372 and the right to use Lot 32 as the access road of the Plaintiff. The Plaintiff's position was lot 18A and 15A are portions of Lot 18 and 15 of Plan No. 880 while the Defendants' position was that they are parts of lots 19 & 14 of Plan No. 880. The Defendants also claimed prescriptive title to lots 18A and 15A and further claimed that lot 32 is access for their lands only.

The surveyor Silva who prepared the Plan No. 1372, Grama Niladhari and the Plaintiff himself gave evidence in support of the plaintiff's case while both the Defendants have given evidence in support of their case. The Plaintiff has marked documents P4 to P6. While the Defendants have marked documents V1 to V3. No document was objected to at the time of its marking or at the end of respective cases of Plaintiff or defendants. Therefore, those documents become evidence for all the purposes of this case.

To prove his title to the lands described in paragraph 18 2(a)(b)(c) (d) of the amended Plaint and the entitlement to right of way described in paragraph 2(e), the Plaintiff has marked and tendered the deeds No. 234 dated 04.06.1984 (P4)

and No. 1381 dated 19.10.1970 (P5). These two deeds were not subject to any objection and as said before they became evidence for all the purposes of the case before the learned District Judge. These two deeds prove the chain of title relied on by the Plaintiff in his amended plaint to the lots he claimed as his own and his entitlement to the disputed road access.

To prove the metes and bounds of the lots and road access he claimed the Plaintiff has marked in evidence through his witnesses the plans No. 1372 dated 12.06.1990 (P1) made by G.H.G.A.A. de Silva licensed surveyor along with its report (P1a) and a true extract prepared by P. Wickramasinghe licensed surveyor of Plan No. 880 made by N.S.L. Fernando licensed surveyor. No objections were taken to the marking of these documents during the trial or at the closure of Plaintiff's case. As said before they became evidence for all the purposes of the case. Furthermore, G.N.G.A.A. de Silva, licensed surveyor has given evidence with regard to the preparation of plan No. 1372(P1) and identification of the lots and road access claimed by the Plaintiff. He has stated that he superimposed P2 (Plan No.880) to identify the Lots and road access claimed by the Plaintiff and prepared his plan No. 1372. Neither through cross examination nor through counter evidence the defendants have shown the plans marked by the plaintiff are defective. The defendants have not led any evidence to counter the Plaintiff's rights and entitlements he gets from deeds marked P4 and P5.

By tendering in evidence, the deeds marked P4 and P5 and Plans and reports marked P1, P1a and P2 the Plaintiff by preponderance of evidence has proved that;

- 1) He has the title through deed marked P4 to lots 15, 18, 16 and 17 of plan No. 880 dated 11.01.1969 made by N.S.L Fernando licensed surveyor.
- 2) He is entitled by deed marked P4 to the Road access depicted by Lot 32 in said plan No. 880.
- 3) Lot 18A in Plan No. 1372 is part of Lot 18 in Plan No. 880 and Lot 15A in Plan No. 1372 is part of Lot 15 in Plan No. 880

4) Therefore, he has title to Lot 15A and 18A in Plan No. 1372.

5) Lots 32A and 32B in Plan No. 1372 are parts of Lot 32 (road access) in Plan No. 880.

Even the Defendant deeds refers to Lot 32 in Plan 880 as a road access in describing the defendants' lots. Under the aforesaid circumstances the Defendant could have been successful only if they could prove that they have prescribed to lots 18A, 15A, 32B and 32A in Plan No. 1372. However, the Grama Niladari Hemapala Kalansooriya giving evidence for the Plaintiff has stated that the Defendants undertook to hand over the possession to Plaintiff if it is found by a survey that the disputed areas belong to the Plaintiff. This is corroborated by the written statement of the Defendant marked as P4. This shows that the possession of the Defendants was not adverse to the Plaintiff.

On the other hand, the Defendants have bought the adjacent lots 14, 19 and other lots namely 13, 20 and 33 of Plan No. 880 by deed No. 5979 marked V1 only in December 1978. By that the Defendants had admitted the title of their vendor prior to December 1978. This action was filed in 1987. The predecessor in title of the Defendants, the vendor Thirimavithana has not come forward to give evidence to say that he adversely possessed lot 18A, 15A 32A and 32B against the Plaintiff. It must be noted that even the Plaintiff claims from the title that derives from Thirimavithana, vendor of V1. The time gap between V1 and the institution of District Court action is less than 10 years. Even if the Defendants possessed the disputed lots considering those lots as parts of the lots belong to them, they have not completed the 10-year period necessary for prescriptive title. I must also state that the learned District Judge has given ample reasons for his findings in his judgment. I do not see any grounds to hold that his findings are perverse.

On 02.02.2018 both parties informed court that they rely on the written submissions filed in this court as far back as 2010 and 2011 and that this court can deliver the judgment without taking the argument afresh. In his written

submissions the Defendant has tried to argue that in the guise of an action for definition of boundaries a Plaintiff cannot vindicate title to an encroachment. However, the Plaintiff's action is not an action for definition of boundaries. The cause of action in an action for definition of boundaries arise when the boundaries between relevant lands are not clear or defaced but in this action the Plaintiff in his original Plaintiff too had described the 1st cause of action as denial of his title by the Defendants to 18 feet wide strip of land along the southern boundaries of lot 15 and 18 of Plan No. 880 dated 11.01.1969. The 2nd cause of action has been described as the denial by the Defendants of plaintiff's right of way over lot 32 of the aforesaid Plan. (vide paragraph 2 and 9 of the Plaintiff dated 29.05.1987.)

After taking out a commission and according to the Plan No. 1372 made by the commissioner, the Plaintiff has amended the Plaintiff and has described the disputed areas of lands with much clarity.

Even in their answer and issues raised during the trial the Defendants have tried to claim prescriptive title to the disputed portions of land. Hence it is clear that this action is not an action to demarcate boundaries but an action to vindicate title of the Plaintiff of the disputed portions of land as well as to remove the obstructions to his right of way.

The defendants in their answer has averred that the surveyor G.H.G.A.A.de Siva had not used the plan No. 340 dated 1964.06.01 to prepare his plan No.1372 even though the Plaintiff has referred to plan No.340 to describe the subject matter (vide paragraph 3 ii of the answer). In his written submissions the defendants have brought to the notice of court that plan No. 340 was not marked in evidence and plan No. 880 not was not produced through the surveyor.

Though there are certain references to plan No. 340 in describing some boundaries of the subject matter in the Plaintiff, as the plaintiff describes the relevant lots with reference to the lots in Plan No. 880 and even the title deeds of the plaintiff and defendants describe the relevant portions of lands with reference to the lots in Plan No. 880, I do not see any shortcomings that may affect the identification of the

relevant portion of lands merely because the surveyor did not use Plan No. 340 to make Plan No. 1372. Furthermore, a true extract of Plan No. 880 has been marked during the re-examination as P2 through the surveyor during the trial. On the other hand, Plan No. 1372(P1) and true extract of Plan No. 880 (P2) were marked without any objection. They were not marked subjected to proof. No counter evidence was led by the defendants to show those plans are defective. Therefore, on balance of probability there was sufficient evidence as to the identity of relevant portions of land and encroachments before the learned District Judge. The surveyor has depicted the relevant lots and the encroachments done by the defendants by the superimposition of Plain No. 880. Therefore, I cannot concur with the defendants' argument that the plaintiff failed to prove his case.

Hence, I dismiss the appeal with cost.

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E.A.G.R. Amarasekara.