

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

1. W.Karunawathie
2. J. I.Hemalatha
3. J.I.Upali Chandrakeerthi

All of Haldanduwana, Dankotuwa

Plaintiffs.

C.A.No.26/97(F0

D.C.Marawila No.402/L.

Vs.

N.D.M.Ariyaratne,

Haldanduwana, Dankotuwa.

Defendant.

1. W.Karunawathie
2. J. I.Hemalatha
3. J.I.Upali Chandrakeerthi

All of Haldanduwana, Dankotuwa

N.D.M.Ariyaratne,
Haldanduwana, Dankotuwa.

Defendant-Respondents.

Before : Deepali Wijesundara,J. &
M.M.A.Gaffoor,J.

Counsel : Rohan Sahabandu P.C. with
S.Vithanage for the plaintiff-
Appellant
M.C.Jayarathe, with H.D.J.Bandara
for the
Defendant-Respondents.

Argued on : 27.03.2015.

Decided on : 29.09.2015.

M.M.A.Gaffoor, J.

The Plaintiffs have filed this action on 07.07.1990 stating that they are entitled to the land morefully described in the schedule to the Plaint and they further state that the eastern boundary is not property fenced and when they wanted to erect the eastern boundary fence, the Defendant obstructed and they pray for a declaration to fix the boundary as they are entitled to that boundary.

The Defendant denies all the averments in the Plaint. At the trial 1-8 issues were raised by the Plaintiffs and issues 9-12 by the Defendant.

Issues 1 and 2 refer to paragraphs 2-5 of the Plaint where the Plaintiffs have stated how they became entitled to the said land and their prescriptive right to the same. Issue 3 states whether the said land is shown in Plan No.556 dated 90.07.27 and drawn by T.K. Dharmasena, Licensed Surveyor. Issue No. 4 is about the eastern boundary and whether there are any marks remaining to show that there was a fence in existence.

The District Judge has answered the issues 1-3 in the affirmative but answered issue 4 in the negative. The Plan

No.556 is marked as “ප්‍ර 3” (See page 161 of the appeal brief), and according to this plan, the land on the eastern side of the plaintiff's land is the land claimed by the Defendant and between the Plaintiff's land and the Defendant's land, there is a clear boundary marked with remains of trees etc. The learned District Judge has filed to observe these marked to show that there was a fence which existed earlier. The evidence of the surveyor Dharmasena is very clear on this point. He has said that there was remnants of halmilla, atacheriya, arliya and gasaka portion of the trees at the place where the fence was. This evidence was admitted by the Defendant in his cross examination (see page 114 of the appeal brief).

This is an action filed by the plaintiff to define the eastern boundary of their land. “ This type of action is known as ‘ actio finium , regundorum’ to define the boundary is provided by the Roman Dutch Law, whenever the boundaries of the land belonging to different owners have become uncertain, whether accidentally or through the acts of the owners or some third person.” (see Voet 10.1.1) . The onus of proving the essential facts in such an action is on the plaintiff (Voet 10.1.3). The plaintiffs has established the necessary essential facts in the case and have shown the existence of an old fence at the disputed boundary. The evidence of the

plaintiffs and their witnesses, especially the surveyor Dharasena satisfies that the plaintiffs have discharged their onus of proving the existence of an old fence. The plaintiffs need not prove their title in this type of case. The other matter is that the Court has answered the issued 1 and 2 in favour of the plaintiffs and as such their title to the land is admitted by Court . In this case, the plaintiffs are not asking for declaration of title to that land but only a declaration to ascertain their eastern boundary.

In the case of Deeman Silva vs. Silva and others – 1997 (2) Sri L.R. 382, this Court has held that 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”. In view of the Roman Dutch Law proposition the plaintiffs have a right to claim definition of their eastern boundary can be maintained.

It must be noted that the right of the trial Judge to fix the new boundary arises where the old boundary cannot conveniently be restored. In this case, the new boundary is sought when the old boundary is proved to be in existence, hence, the trial Judge has no difficulty in permitting the fence

to be erected at the place where the old eastern boundary is shown in plan No. 557 of Surveyor Dharmasena.

The learned trial Judge was of the view that " the plaintiffs action though was instituted for the definition of the eastern boundary, it appears that the action is instituted to obtain a declaration to the disputed area" and held that the plaintiff has not asked for a declaration of title to that portion and therefore he cannot maintain the action. This view is utterly wrong. The Plaintiffs need not ask for a declaration of any portion of this land. What is disputed is the eastern boundary. It is abundantly clear that the plaintiffs have proved that there did exist an earlier physical boundary fence on the eastern boundary of their land which is not there now an which they want to replace at the same place where the earlier fence has stood.

As regards this matter, we find that the plaintiffs have satisfactorily proved and convinced the Court by the evidence of the surveyor Dharmasena and other witnesses. That there was boundary separating the lot from the rest of the corpus on the eastern side of his land and also the defendant failed to prove that the position occupied by the plaintiff was occupied by plaintiff was commonly possessed by all the parties to the

case. We would therefore set aside the judgment and decree of the District Court and remit the case for trial de novo on the issues 4-12 or the Court may deem it necessary to frame new issues in view of the scope of the action as explained above. All costs will be costs in the cause

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundara,J.

I agree.

JUDGE OF THE COAURT OF APPEAL

WC/-