DEEMAN SILVA
v.
SILVA AND OTHERS

COURT OF APPEAL.
WEERASEKERA, J. AND
WIGNESWARAN, J.
C.A. 34/88(F).
D.C. NEGOMBO 2852/L.
JANUARY 19, 1996.
MARCH 11, 1996.
OCTOBER 7, 1996.
OCTOBER 28, 1996.

Definition of boundaries – Actio finium regundorum only if there is an ascertainable boundary – Burden cast upon the plaintiff to prove his assertions.

The plaintiff-respondent filed plaint for definition of boundaries. He simply pleaded that he was the legal owner and the defendants were the reputed owners of the adjacent lands. The plaintiff-respondent averred that he wanted to fix his Northern boundary in terms of the defendants' plan, but as the defendant had failed to respond, wanted the Court to fix the boundary in terms of the plan. District Court held in favour of the plaintiff, on appeal –

Held:

1. 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.

2. No plaintiff should be allowed to come into Court and ask the Court to unveil the defendants case unless the law recognises such a right. It is a burden cast upon the plaintiff under our law to prove his assertions in such cases.

He cannot come into Court and ask the Court to use its jurisdiction to compel the defendant to prove title to the land the defendant is in occupation, or to identify its boundaries as per the defendant's plans and deeds.

3. The right of the judge to fix new boundaries arises where the old boundary cannot conveniently be restored. In this case new boundaries are sought where the old boundary was never known to the plaintiff.

(4) If there was no ascertainable boundary to be redefined this action *(actio finium regundorum)* should have been terminated. The action should have been then under the circumstances one of 'declaration of title' and not definition of boundaries.

***Per* Wigneswaran, J.**

"The plaintiff must fight his own battles not with the weapons and armaments of his adversary".

APPEAL from the judgment of the District Court of Negombo.

Cases referred to:

1. *Maria v. Fernando,* 17 NLR 65.
2. *Fernando v. Fernando,* [1987] 2 Sri. L.R. 78.

Sunil Cooray with *Chitrananda Liyanage* for defendant-appellant.

Bimal Rajapkse for plaintiff-respondent.

Cur. adv. vult.

April 04, 1997.

WIGNESWARAN, J.

The plaintiff-respondent filed plaint on 10.07.81 against the 3rd defendant-appellant and 1st and 2nd defendant-respondents for definition of boundaries.

The plaintiff-respondent's land described in schedule 'A' to the plaint did not refer to a plan. The lands of the three defendants were described with reference to a partition plan No. 6098 of 1945.

The plaintiff-respondent simply pleaded in his plaint that the plaintiff was the legal owner of land described in schedule 'A' to the plaint (hereinafter referred to as 'A' land) and that the 1st defendant was the reputed owner of land described in schedule 'B' to the plaint (hereinafter referred to as the 'B' land) the 1st and 2nd defendants were reputed owners of land described in schedule 'C' to the plaint (hereinafter referred to as the 'C' plan) and the 3rd defendant-appellant was the reputed owner of lands described in schedule 'D'

and 'E' to the plaint (hereinafter referred to as 'D' and 'E' lands). Then he pleaded that the Northern boundary of 'A' land and the Southern boundary of 'B', 'C', 'D' and 'E' lands was a common boundary . The plaint thereafter went on to say that this boundary was indefinite and uncertain and not traceable on ground. Then the plaint referred to the earlier mentioned defendant's partition plan No. 6098 filed of record in D.C. Negombo Case No. 12786/P.

The plaintiff then averred that he wanted to fix his Northern boundary in terms of the said defendant's plan but the defendants had failed to respond. He then placed his cause of action on their failure to respond and wanted the Court to fix the boundary in terms of the said plan.

The plaintiff prayed for the ascertainment of the boundaries in terms of the said plan No. 6098 and for the definition of same on ground and for costs.

The 1st and 2nd defendant-respondents failed to file answer after receiving summons. The case went *ex parte* against them. The 3rd defendant-appellant filed answer and after trial the learned District Judge of Negombo by judgment dated 19.02.88 held in favour of the plaintiff-respondent.

This is an appeal against the said judgment by the 3rd defendant-appellant.

The basis on which the learned District Judge held in favour of the plaintiff-respondent was a superimposition plan No. 1127 dated 26.01.82 prepared by R. I. Fernando, Surveyor.

Considering the pleadings, the plan, the evidence led and the judgment entered there is no doubt that the learned District Judge had misdirected himself on many fundamentals in this case. These would now be enumerated.

(1) An action for definition of boundaries viz. *actio finium regundorum* 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" (vide Voet 10.1.1 and *Ponna v. Muthuwa)*[1]. Therefore the plaintiff must come into Court stating (i) that an ascertainable common boundary previously existed physically on the ground and (ii) that such common boundary had been obliterated subsequently.

In this case the Northern boundary of 'A' land was referred to in the plaint as lots A1, A2, A3 and A4 belonging to the defendants. This could not have been the boundary of the plaintiff's land according to his title deeds unless the boundary on the North of the plaintiff's land was described in relation to Plan No. 6098. No such reference to either Plan 6098 or to any other plan is made in the schedule to the land (vide Northern boundary mentioned in P4). The plaintiff thus did not describe his land in terms of his title deeds as at or before the year 1945 (year of Partition Plan) or even as at 1978 (p4). Only if a common affirmatively ascertainable boundary existed between the parties in 1945 or thereafter could the plaintiff have taken up the position that the boundary had got obliterated. Here the plaintiff refers to the defendant's land as his Northern boundary and asks for the definition of the defendant's Southern boundary according to defendant's Plan to ascertain his Northern boundary. Clearly this should not have been allowed by the learned District Judge since the plaintiff had not referred to any ascertainable Northern boundary in his plaint in order to take up the position that such boundary had got obliterated. (vide *Maria v. Fernando*[1] and *Fernando v. Fernando*[2]).

(2) No plaintiff should be allowed to come into Court and ask the Court to unveil the defendant's title and plans to him to prove the plaintiff's case unless the law recognises such a right. It is a burden cast upon the plaintiff under our law to prove his assertions in such cases (vide Voet 10; 1; 3). He cannot come into Court and ask the Court to use its jurisdiction to compel the defendant to prove title to the land the defendant is in occupation, or to identify its boundaries as per the defendant's deeds and plans. Let us for a moment take a

hypothetical case. Let us suppose, a plaintiff, unaware that his Southern boundary owner had encroached upon his land by 10 perches files a case against his Northern boundary owner for encroaching upon 10 perches of his land. A plan of the Northern boundary owner's land superimposed on the plan of the plaintiff's land prepared as it stood at date (less 10 perches) would show an encroachment of 10 perches from the North. This would no doubt be incorrect since the 10 perches had already been lost to the Southern boundary owner and there had been no encroachment from the North even though the superimposition would show an encroachment of 10 perches from the North. That is why the law in its wisdom casts the onus on the plaintiff to prove the essential facts of his case in the first instances. Plaintiff should have given the boundaries in his title deeds as at 1945 to show that the Southern boundaries of Lots A1, A2, A3 and A4 on Plan 6098 were referable to the Northern boundary of 'A' land and that such common boundary by effluxion of time or by design of parties had got erased and therefore now uncertain. Without first ascertaining the plaintiff's boundary independent of the defendant's partition plan the learned District Judge should not have allowed a superimposition on the plaintiff's land depicted in a plan prepared **after** the filing of this action.

(3) The learned District Judge failed to consider the fact that when plaintiff purchased his land on Deed P4 in 1978 his Northern boundary was undefined. At page 113 of the brief the plaintiff said as follows:–

ප්‍ර: තමාට වුවමනාවක් තිබුනා නම් ලකුණු කර ගැනීමට තිබුනා නේද කුඩම්මාට කියා?

උ: අනෙක් විත්තිකරුවන්ගේ ඉඩම් කෙලින්ම මෙම ඉඩමත් තිබෙන නිසා ඒ කෙලින්ම ගසා ගත ගැකිය කියා මා එය ගනන් ගත්තේ නැහැ.

Under the circumstances the Court should have looked for any evidence of any predecessor in title or an independent witness to confirm the physical existence on ground of a common affirmatively ascertainable boundary. There was no such evidence of a common boundary between 'A' land on the one hand and 'B', 'C', 'D' and 'E'

lands on the other. Without such averments and evidence the Court should not have proceeded to entertain this action. If there was no ascertainable boundary to be redefined this action (*actio finium regundorum*) should have been terminated. The action should have been then, under the circumstances, one of declaration of title and not definition of boundaries.

(4) The manner in which the learned District Judge came to his conclusion gave no chance to the affected parties to prove prescription if in fact they had prescribed to the area they were in possession. Suppose the action was one of declaration of title or *rei vindicatio* the defendant had the right to claim even land proved to be part of the paper title of the plaintiff on the basis that it had been possessed adversely by the defendant thus seeking a title to such disputed part by prescription.

The learned Counsel for the plaintiff-respondent has argued –

(i) that the superimposed Southern boundary in red on P2 was the common boundary.

(ii) Surveyor Fernando was an impartial witness.

(iii) He contradicted 3rd defendant with regard to a ditch carrying water about 10 feet in length as being the boundary.

(iv) Plan P1 does not refer to a ditch.

(v) Judge has a right to fix a new common boundary "if the old boundaries cannot conveniently be restored". (Walter Perera; Laws of Ceylon Vol. 1 page 193).

(vi) The decree in partition case No. 12786/P was a decree in rem.

These submissions would now be examined.

The superimposed Southern boundary in Red on Plan P2 need not have been the common boundary. If the plaintiff's deeds or plans or

evidence on his behalf affirmatively established the course of the red line as the common boundary at any **prior** period of time, then this action could have been filed to redefine that common boundary. The whole exercise of getting the neighbour's plan superimposed by Court on one's land as it stood at date to ascertain one's boundary (unless it be with the consent of neighbours without interference by Court) cannot be encouraged in law. In any event the fact that the plaintiff did not know his northern boundary at all debarred him from filing an action of this nature (*actio finium regundorum*).

Whether Surveyor Fernando was an impartial witness or not the red line on Plan P2 cannot be accepted as the Northern boundary of the plaintiff's land. The plaintiff had no independent means by which he could have established his Northern boundary. In fact in 1978 when he became owner of 'A' land there was no boundary on land. The Surveyor himself says there was no Southern boundary of lot R existing on ground. On P3 he said nothing about the ditch referred to by the 3rd defendant. He had not stated that he checked on land and found no traces of the ditch. It is only in his evidence he denies the existence of the ditch. Since he made no mention of the ditch on his report he had to deny its existence. The 3rd defendant had referred to the ditch in his answer. The commission papers should have specifically directed the Surveyor to question about the ditch, investigate on its existence or otherwise and have his observations recorded. Since the Southern boundary was non existent it was necessary for the Court to have given specific instructions to the Surveyor in this regard. Merely because the Surveyor did not record anything about the ditch it did not prove or disprove the existence of a ditch. It is interesting to note that the plaintiff was unaware of an ascertainable boundary while the defendant volunteered to refer to such a boundary. Yet the Surveyor made no mention of it in P3.

The right of the judge to fix new boundaries arises where the old boundaries cannot conveniently be **restored.** (vide Walter Perera above referred to). In this case new boundaries are sought where the old boundary was never known to the plaintiff.

The decree in partition case 12786/P was no doubt a decree in *rem*. But that decree cannot form the basis for the plaintiff to establish

title to his land which is outside the *corpus* dealt with in the partition action. Furthermore this was not an area where registration of Plans had been specifically undertaken as in Wellawatte and Kirullapone in Colombo. If it had been so, the Registration Plans of both parties could have been examined and a conclusion arrived at.

Furthermore the 3rd defendant could have prescribed to additional land outside the area allotted to him or his predecessor in title in the partition decree after 1945. The plaintiff cannot seek to limit the 3rd defendant's rights to the decree in the partition case. The plaintiff must fight his own battles; not with the weapons and armaments of his adversary. This is particularly so in an action for definition of boundaries. The plaintiff's right to have and maintain an action based on *actio finium regundorum* depends on the plaint setting out the positive existence of an ascertainable boundary in time gone by, its obliteration later and the need at present to ascertain the correct boundary and have it delineated on ground.

In the absence of the plaint conforming to the requirements of such an action, in view of the learned Judge misdirecting himself with regard to –

(i) the nature of the *actio finium regundorum*,

(ii) the cause of action on which the plaintiff purportedly came into Court,

(iii) the assessment and evaluation of evidence tendered to Court,

this appeal of the 3rd defendant-appellant is allowed and the plaintiff's action in the District Court of Negombo is dismissed with taxed costs payable in both Courts by the plaintiff-respondent to the 3rd defendant-appellant. The *ex parte* decree against the 1st and 2nd defendant-respondents is also hereby set aside.

WEERASEKERA, J. – I agree.

Appeal allowed.