ALFRED FERNANDO

v.

JULIAN FERNANDO

COURT OF APPEAL.
G. P. S. DE SILVA, J. (President, C/A) AND ABEYWIRA, J.
C.A. No. 53/81.
D.C. NEGOMBO L 1972.
JANUARY 16, 19, 23 AND 26, 1987.

Definition of boundaries–Actio finium regundorum–Requisites of an action for definition of boundaries–Suit for vindicating title to encroachment in the guise of suit for definition of boundaries–Can a co-owner sue his neighbour also a co-owner of the neighbouring land for definition of boundaries?–Burden of proof.

The plaintiff sued his neighbour the defendant for a definition of boundaries pleading that the boundary between the two lands had become obliterated and undefined. The plaintiff claimed that the boundary which stood earlier on the East of his land is now defaced but shown in a plan of 1879 superimposed on plan No. 163 of 1973 prepared by surveyor W. L. Fernando. For the purpose of the case surveyor Mr. Dharmawardena prepared plan No. 823 of 8.2.1976 on which he superimposed the old plan of 1879 from a tracing. The old Plan of 1879 was marked as P3 in the case but not tendered to court. The plan No. 163 of 1973 of surveyor W. L. Fernando was marked P4 and admitted subject to proof but not proved.

Mr. Dharmawardena in his plan No. 823 showed the existing western boundary of the disputed lot and in a red line the eastern boundary as superimposed according to the plan of 1879. The Lot so formed he marked as Lot A in extent 02.31 perches. The existing western boundary of Lot A had live trees 6 to 7 years old according to Dharmawardena (which later he conceded could be much older). Lot A had 3 coconut trees about 25 years old which before the surveyor were claimed by the defendant without any objection by the plaintiff (though in his evidence in Court the plaintiff claimed these trees). The plaintiff was co-owner of his land and the defendant was a co-owner of the adjacent land.

Held:

(1) A co-owner can sue his neighbour also a co-owner of the adjacent land for definition of boundaries but he takes a risk because even if he is successful the decree in his favour will not bind the other co-owners of the adjacent land.

(2) The burden of proving the essential facts in a suit for definition of boundaries is on the plaintiff.

(3) In the guise of an action for definition of boundaries a plaintiff cannot vindicate title to an encroachment.

(4) From the age of the existing fence trees on the Western boundary of Lot A the undisputed claim before the surveyor by the defendant of the three 25-year old coconut trees and the failure of the plaintiff to complain immediately to a person in authority when in 1946 he found barbed wire strands removed from his barbed wire fence, the plaintiff must be held to have failed to establish the requisites of an action for definition of boundaries. He has failed to show that there did exist a prior live or other physical boundary fence along the eastern boundary of Lot A as claimed by him. Further in the guise of having his eastern boundary defined the plaintiff was in fact seeking to have himself declared entitled to Lot A.

(5) Because of the failure of the plaintiff to produce the plan of 1879 and prove the plan of 1973 the correctness of Dharmawardena's plan No. 823 is also in doubt.

Cases referred to:

(1). *Jacolis Appu v. David Perera–(1967) 69 NLR 548, 551.*

(2) *Ponnuthurai v. Juhar–(1959) 66 NLR 375, 378.*

(3) *Maria v. Fernando–(1913) 17 NLR 65.*

(4) *Ponna v. Muthuwa–(1949) 52 NLR 59.*

APPEAL from Judgment of the District Court of Negombo.

P. A. D. Samarasekera, P.C. with *G. L. Geethananda* for substituted plaintiff-appellants.

Harsha Soza for substituted defendant-respondents.

Cur. adv. vult.

February 27, 1987.

ABEYWIRA J.

This matter has come up for consideration and determination before the Court of Appeal in view of the papers in appeal dated the 17th of March 1981 tendered by the original plaintiff-appellant who has sought to have the judgment and decree of the learned District Judge dated the 16th of January 1980 set aside for any one or more of the reasons mentioned in his petition of appeal.

The original plaintiff had instituted this action on the 25th of February 1974 in the District Court of Negombo stating *inter alia* that he is the lawful owner and possessor of the land called Kongahawatte situated at Ja-ela within the jurisdiction of the said District Court and in extent about 30.75 perches and more fully described in the schedule A to the plaint. It is also averred that the original defendant was himself the owner and proprietor of the adjoining land to the East of the plaintiff's land also called by the name Kongahawatte in extent about one rood and more fully described in the schedule B to the

plaint. These two lands are stated to be contiguous to one another—the land belonging to the plaintiff lying to the West of the land belonging to the defendant.

The plaintiff has also averred that the common boundary fence which existed between the two lands is at present obliterated and undefined on the ground, and by this action seeks to have the same redefined by an order obtained from this Court.

The plaintiff, prior to the institution of this action, had his own land called Kongahawatte surveyed privately by a surveyor named W. L. Fernando, with reference to another plan bearing the number 2465 of 10th May 1879 prepared by surveyor F. W. Smith. The plan accordingly prepared by surveyor W. L. Fernando is Plan No. 163 of 14.10.1973 (P4). This Plan No. 163 has been tendered along with the plaint though not produced and proved at the trial.

It is the contention of the plaintiff that the defendant was not prepared to accept the correctness and accuracy of this private plan No. 163 of 1973 in order to demarcate on the ground the common boundary which had existed between their two lands and this had compelled him to institute this action to have the common boundary between the two lands defined on the ground as shown in Plan No. 163 of 14.10.1973.

It will be relevant to note at this stage that the private plan No. 163 of 1973 prepared by surveyor Fernando shows by black lines the existing physical features on the ground when he went to the said land to prepare this plan. He has also shown by the red lines in his plan the superimposed boundaries of Plan No. 2465 of 1879 stated to have been prepared by surveyor F. W. Smith and which plan had been given to him by the plaintiff in order to assist him in the preparation of his own plan No. 163 of 1973. It will be seen that his superimposition of plan 2465 of 1879, shows an area of land to the East of the then existing eastern boundary of the plaintiff's land which thereby constitutes an encroachment of the plaintiff's land by the possessor of the land to the East of it which according to the plaintiff was owned by the defendant.

It is therefore quite obvious that the said encroachment on the eastern side was well known to the plaintiff before he instituted the present action and that the original defendant was not prepared to

accept the red line shown on the eastern side of this corpus in Plan No. 163 of 1973 as forming the correct common boundary between the two lands.

The original answer to this case filed on the 27th of February 1975 shows that the defendant accepts the averments in paragraph one of the plaint with reference to his residence and that these two lands referred to by the plaintiff fall within the jurisdiction of the District Court of Negombo, as they are situated at Kanuwana in the Ja-ela District. He however denies that any cause of action has accrued to the plaintiff to institute the present case since the common boundary between their two lands is in existence and distinctly found on the ground. The defendant further states that his land which is to the East of the land said to belong to the plaintiff is larger than the extent given in the schedule B to the plaint. According to the defendant his land is about 2 roods or more in extent and described in the schedule to his own answer.

The defendant has denied the averments in paragraphs 2, 3, 5, 6, 8 and 10 of the plaint. It is the contention of the defendant that the common boundary between their two lands, is distinctly shown on the ground by the existing live fence which had up to then been accepted by both landowners to be the common boundary between these two lands called Kongahawatte. The defendant has stated that he is only a co-owner of the land to the East called Kongahawatte and he claims title to the same by virtue of a deed of gift and also by prescriptive possession.

The defendant thus states that on the pretext of seeking to have the common boundary between the two lands defined by an order of Court, the plaintiff is in actual fact seeking to vindicate his title to that extent of land which falls to the East of the existing eastern boundary of his land as shown in Plan No. 163 of 1973 and the red line on the east of it which has come into being as a result of the superimposition of Plan No. 2465 of 1879. The defendant thus maintains that the plaintiff has failed to institute a *rei vindicatio* action for the strip of land claimed by him but disputed by the defendant, and has wrongly filed an action for definition of boundaries which thus could not be maintained in law.

While denying all and singular the other averments in the plaint that are not specifically admitted by him or which are inconsistent with the averments in his answer, the defendant prays Court for the dismissal of the said action.

Thereafter on a commission issued by Court at the instance of the plaintiff, a Commissioner of the District Court surveyor Dharmawardena has prepared his Plan No. 823 of 08.02.1976 together with his report and these have been produced at the trial marked P1 and P2 respectively. In his report P2 the Commissioner Dharmarwardena has mentioned the fact that both parties were present when he went to the land to prepare his plan, and that the black lines shown in his Plan P 1 represent the then existing boundaries of the plaintiff's land called Kongahawatte, while the red lines in his Plan depict the superimposition made by him of Plan No. 2465 of 1879 of surveyor Smith on to his surveyed Plan. According to the Plan 823(P1) it will be seen that the portion of soil in extent 2.31 perches falls to the East of the existing boundary of the plaintiff's land shown by a black line. This strip of land has been in the possession of the defendant at this time and he has alone claimed the 3 coconut trees of over 25 years in age falling within this strip of land marked 'A'. However the surveyor has stated in his report that the plaintiff also claimed title to the soil of Lot 'A' as being part of his own land called Kongahawatte.

In the amended answer filed thereafter the defendant has reiterated the claims made by him and the legal objections taken by him in the original answer. He has while claiming Lot A of Plan No. 823 of 1976 together with the soil and plantations standing thereon as a part of his own land called Kongahawatte and described in his answer, has also specifically pleaded title to the said Lot A by virtue of prescriptive possession. He has thus pleaded that the plaintiff's action be dismissed both in view of the legal objections taken by him to the plaint wherein he has stated that the plaintiff if at all should have instituted a *rei vindicatio* action for the strip of land disputedly possessed by him according to the plaintiff. The defendant also states that he has prescribed to the portion of land marked 'A' in Plan No. 823 of 1976 as the same was possessed by him as part of his own land called Kongahawatte which is to the East of the land claimed by the plaintiff.

The case was taken up for trial originally on the 22nd of September 1979 and the undermentioned issues have been recorded by the District Judge at the request of the Attorneys for both parties, viz: –

(1) Is the plaintiff entitled to the land described in the schedule 'A' to the plaint?
(2) Was the said land surveyed by the Commissioner Mr. Dharmawardena and depicted in his Plan No. 823 of 08.02.1976 as consisting of Lots A, B, C, and E?
(3) Is the defendant entitled to the land described in schedule B to the plaint?
(4) Is that land referred to as the land belonging to Julian Fernando in the said Plan?
(5) Is the plaintiff entitled to have the common boundary between these two lands which has got obliterated refixed according to law?
(6) Is the defendant a co-owner of the land described in the schedule to the answer and inclusive of Lot A shown in Plan No. 823 as pleaded in the answer?
(7) Is the western boundary of this land and the land claimed by the plaintiff divided by a live fence standing to the West of Lot A as shown in that Plan and which live fence presently consists of 8 boundary trees?
(8) Is title to the land claimed by the defendant as a co-owner in him by virtue of his legal title and also by his prescriptive possession?
(9) Is the plaintiff seeking to have himself declared entitled to that portion of land depicted as Lot A in the plan on the basis of an action filed for the definition of boundaries?
(10) If issue No. 9 is answered in the affirmative, can the plaintiff have and maintain the present action?
(11) Can the plaintiff have and maintain this action without making the other co-owners both of the plaintiff's land and of the land claimed by this defendant, parties to this action?

The Commissioner of Court, Surveyor Dharmawardena who prepared Plan No. 823 of 08.02.1976 and the accompanying report has submitted the same in evidence marked P1 and P2 respectively. He has stated to Court when giving evidence that he took all the help and other assistance available to him from the old Plan No. 2465 of 1879 prepared by surveyor Smith. This old Plan though marked in

evidence as P3 by the plaintiff, has not in fact been produced for the consideration of the trial Judge when preparing his judgment. A tracing of this Plan stated to have been taken has also not been produced at the trial though the field notes of the Commissioner Dharmawardena refers to this old Plan. He has also referred in evidence to the private Plan No. 163 of 14.10.1973 (P4) stated to have been prepared by Surveyor Fernando which too had been made available to the Court surveyor by the plaintiff. This plan had been allowed subject to proof of the same, but we find that this plan No. 163 of 1973 (P4) has also not been duly proved by the plaintiff at the trial. It will be thus seen that neither of these two plans used by the Commissioner of Court, Mr. Dharmawardena in the preparation of his own plan No. 823 of 1976 (P1) have been duly proved according to law and with this default the correctness of the Plan made by Surveyor Dharmawardena is in doubt, more specially as the present action is one for the definition of boundaries between two adjoining lands.

For the purpose of the present action it will be relevant to note that only Lot A in Plan No. 823 of 1976 (P1) need come for consideration by Court out of the Lots falling outside the black lines shown in the Plan P1.

In his report P2 the Commissioner has stated that the existing boundaries on the ground are depicted by the black lines in his plan. He has stated that the existing boundary on the Western side of the plaintiff's land or Lot E in Plan P1 is an old live fence which corresponds with the boundary shown in Plan No. 2465 of 1879 made by Surveyor Smith. It is as a result of the superimposition of this old plan on the plan pertaining to the existing boundaries, that the Commissioner has concluded that the said Lot A in his Plan P1 is also a part of the plaintiff's land called Kongahawatte. As stated by me earlier in this judgment the Commissioner has said both in his report and in the evidence given by him at the trial that the 3 coconut trees standing on Lot A have been specifically claimed by the defendant who is also in possession of the strip of soil in extent 02.31 perches and consisting of Lot A, while the plaintiff though accepting the fact these 3 coconut trees that belong to the defendant who also took the produce from them, has made a claim to the soil forming the said Lot A as part of his own land.

Under cross-examination the surveyor has stated to Court that the 'Eastern' boundary consists of a live fence, and that both parties did accept the fact that this fence stood on the correct boundary. On a reading of the evidence in this case, it is quite clear to one that what the surveyor did mean was that the, 'Western' boundary of the plaintiff's land (or the Western boundary of Lot E in Plan No. 823 (P1)) did constitute a live fence which was accepted as correct by both sides. He has also told Court in evidence that this Western boundary fence was in conformity with the fence found in Plan No. 2465 of 1879 prepared by Mr. Smith. However with the non-production of this document much of the value of this Commissioner's evidence on the point is lessened to that extent so as to make it of no value to a Court considering the evidence of the Surveyor on this point. Under further cross-examination the Surveyor has accepted the fact that on the black lines in his Plan No. 823 of 1976 (P1) which is the Eastern boundary of Lot E or the Western boundary of Lot A there are some live boundary trees which according to him would be about 6 to 7 years of age. He has however accepted the fact that these trees along the Western boundary of Lot A in his plan could be much older than this too. This evidence of the Commissioner is vague and 'loose' and unworthy of credit from an experienced Commissioner of Court sent on a specific job of work to find out and define certain boundary fences if found by him on the lands in question, since the ages of these boundary trees would usually give anyone an idea as to when this live fence on the West of Lot A did come up and who had possessed the said Lot A thereafter.

The evidence of the surveyor also shows Court that there has not been a single live boundary fence tree or any such tree along the Eastern boundary of Lot A, which in fact has only come into existence as a result of the superimposition done by the Court Commissioner. We are therefore of the view that these boundary trees on the western side of Lot A in Plan 823 of 1976 (P1) are very probably much older in age than the 6 to 7 years which the Commissioner has tried to make out at the trial Court and that for reasons best known to him, but not disclosed to others, he was not prepared to give their probable ages even when asked in cross examination.

According to the surveyor the plaintiff had himself told him at this land and when he had gone for its survey that the 3 coconut trees falling within the said Lot A in Plan 823 had been planted by the defendant and that their entire produce had been taken without any

objection from him by the defendant, without giving him any share of the produce or even by way of some money if the soil in Lot A was without any dispute acknowledged to belong to the plaintiff. It would appear more probable from the evidence of this surveyor himself that the live boundary trees which formed the Western boundary of Lot A in his Plan P1 were more than 10 years in age and with the 3 coconut trees in that Lot stated to be about 25 years old, were about that same age and that all these trees were possessed by the defendant as a part of the adjoining land to the East called Kongahawatte to which the defendant has claimed undivided rights. It will be also relevant to note that when giving evidence at the trial the plaintiff has completely contradicted this admission made by him to the surveyor when he stated to Court that it was he alone who did possess the said 3 coconut trees in Lot A.

Again though Plan No. 163 of 1973 prepared by surveyor W. L. Fernando at a private survey made at the request of the plaintiff, has not been duly proved, it will be seen that the Commissioner of Court Surveyor Dharmawardena has gone on the belief and understanding that it is an accurate plan depicting the land claimed by the plaintiff. However no judicial notice as to its correctness can be taken by Court especially as the defendant has put the plaintiff to the strict proof of the same and though the defendant has given an undertaking to Court that the same will be duly proved he failed to do so.

Even in re-examination, the surveyor while stating that the live fence to the West of Lot E in Plan No. 823 (P1) is a very clear and distinct live fence which corresponds with the fence found in the plan made by surveyor Smith in the year 1879, does again admit that he could not be sure as to the ages of the trees shown therein, and also that it is possible in the course of time for such a fence to get shifted. It will be also relevant to note that the plaintiff has failed to point out to the surveyor where the earlier barbed-wire fence which formed the Eastern boundary of his land did stand.

The plaintiff has stated in evidence that his land called Kongahawatte and described in schedule A to the plaint falls within the Village Committee jurisdiction of Ja-ela and that the said land is shown as consisting of Lots A, E and B in the Plan No. 823 of 1976 (P1) prepared by the Commissioner Mr. Dharmawardena on a Commission issued to him by Court at the request of the plaintiff. It is the evidence

of the plaintiff that his father was entitled to this property by deed of Sale No. 9689 of 1904 (P5) and that with the death of the father, he became entitled to the same. We find that here too the said deed of sale though marked in evidence, has not been tendered to Court at the conclusion of the evidence. The plaintiff has stated in evidence that the eastern boundary of his own land called Kongahawatte in about the year 1941 or so had consisted of a barbed wire fence. He has also stated that he was not residing on this land during this period since he was sent to various parts of the Island in connection with his job and that it was much later that he came to reside in the said land. In answer to Court the plaintiff has said that when he later came to reside on this land he observed that the Eastern boundary barbed-wire fence strands were missing but made no complaint of it then to any public authority. He has however stated that he subsequently made a complaint to the Conciliation Board of the area in order to have the Eastern boundary fence of his land defined on the ground. He has produced the certificate of the Conciliation Board dated the 18th of November 1973 issued on this complaint under Section 14 of the Conciliation Board Act as P3. A perusal of this document shows one that the complaint has been made to the effect that the barbed wire strands on both sides of his land were found missing. Strangely the complaint made to the Conciliation Board does not state anything in regard to the live fence which had been by then put up. Here too he has contradicted himself with the evidence given at the trial for before the District Court the plaintiff has only referred to a barbed wire fence on the eastern side of his land. The private survey Plan No. 163 of 14.10.1973 prepared by surveyor W. L. Fernando has been done before the issue of the Certificate by the Conciliation Board and it is very likely that having found to his satisfaction that a portion of his land named Kongahawatte was being possessed by the adjoining land owner called Julian Fernando, the original defendant, the plaintiff made a complaint against him to the Conciliation Board pertaining to the loss of the barbed wires from his eastern boundary. The said Certificate marked P3 also shows that the plaintiff was satisfied that the boundaries had been altered and thus it is not an obliteration of the fences by mere passage of time as stated in the plaint to Court. It will be seen that though the Commissioner in his Plan No. 823 of 1976 (P1) has shown no signs whatever of any live fence having been there earlier on the red line which forms the eastern boundary of Lot A in his Plan P1, there is also no reference even to the fact that the plaintiff did point out to him any place where this wire fence had stood earlier. As

stated earlier it is clear that the plaintiff had wanted the defendant to accept the red boundary line on the eastern side in Surveyor Fernando's Plan as the correct boundary between the two lands but when this was disputed and rejected by the defendant who ha. maintained that the live fence shown in black lines in the same plan was correct and the then existing boundary fence between the two lands, the plaintiff had decided on his legal action. Thus it is evident to anyone that the plaintiff was satisfied that the defendant had encroached on a portion of his land which is a thin strip of soil from North to South along his Eastern boundary even before he went before the Conciliation Board but for reasons best known to him and his Attorney, an action for the definition of boundaries between the plaintiff's land and the defendant's land was instituted in the District Court of Negombo by this case.

Under cross-examination the plaintiff accepts the fact that Lots A and B in the Commissioner's Plan 823(P1) are parts of his own land called Kongahawatte and that he had instituted this action in the expectation of getting back these two lots for himself, therefore admitting that this was in fact an action for the declaration of title to these lots. At the trial the plaintiff has confined his case to have only the eastern boundary of Lot A in Plan 823(P1) defined on the ground according to the red lines shown therein. The defendant has stated that the said portion marked A has been possessed by him as part of his own land which lies to the East of the land of the plaintiff and that he has also prescribed to the said Lot A.

The plaintiff has admitted under cross-examination that at the time he instituted this case he was not the sole owner of the land called Kongahawatte referred to in schedule A to the plaint though he has pleaded as such. He did accept the fact that 10 perches of his land had been conveyed to others. It was also shown that before the institution of this case the defendant Julian Fernando had by Deed of Gift No. 9361 of 1951 (D1) got only an undivided 1/2 share of the land described in the schedule B to the plaint. However it could be straightaway stated that both the plaintiff and the defendant need not be the sole owners of the respective lands claimed by them and that even a co-owner or occupier in possession could institute an action for the definition of boundaries between his land held as a co-owner and the adjoining land held by any other disputing co-owner. The Supreme Court case *Jacolis Appu v. David Perera* (1) is authority for the said proposition. In fact the other co-owners of the land claimed by the

defendant as an undivided 1/2 share holder of it, need not be added as defendants to this case under section 18 of the Civil Procedure Code for it may well be that the real trouble maker is only the defendant. The plaintiff does however take a risk when he does not add them as defendants for even if he is successful in the present case against this defendant called Julian Fernando none of the other co-owners to that land will be bound by the decree got by the plaintiff in the present case. (See *Ponnuthurai v. Juhar* (2) at p. 378.) Gane in his translation of Voet's Pandects in Book 10 Title 1 Section 1(*a*) at page 611 states as follows with reference to actions for the definition of boundaries –,

> "The action for the fixing of boundaries is provided when the boundaries of lands belonging to different owners have become unsettled either by chance or by the act of the adjoining owners, or of a 3rd party. It is an action *stricti juris*, two sided and mixed; and it principally consists in disputes between adjoining owners as to the space of five feet or as to the fixing and marking out of other boundaries of lands".

On this matter we have the decision reported in two Supreme Court decisions also for our consideration. In the case *Maria v. Fernando* (3) it was held that an action for the definition of boundaries was provided by the Roman Dutch Law where the boundaries of lands belonging to different owners had become uncertain whether accidentally, or through the act of owners or some third person. It also held that the onus of proving the essential facts in such an action was on the plaintiff.

Again in the case *Ponna v. Muthuwa* (4) it was held that the common law remedy of an action for the definition of boundaries presupposes the prior existence of a common boundary which has been obliterated by subsequent events. It went on to state that such an action cannot be used for creating a demarcation.

Walter Perera in his book entitled the "The Laws of Ceylon" 2nd Edition at page 294 refers to Book 10, Title 1, Section 6 of Voet which states that the onus of proof of the facts that are necessary to be proved in a definition of boundaries action is on the plaintiff. He also states that the right to bring such an action is available to and against contiguous occupiers of land whether they be owners, usufructuaries, mortgagees, emphyteutic tenants or bona fide possessors.

Again the case *Jacolis Appu v. David Perera (supra)* (1) at page 651 states thus:

"It is clear from the facts which I have set out above, that ..... the title to the portion now described as Lot 4B was in dispute between the parties. The respondent was aware of the claim put forward by the appellants. In seeking a definition of boundaries between Lots 4A and 4B the respondent was in reality seeking a declaration of title to Lot 4B. An action for the definition of boundaries presupposes that the parties to the action are admittedly owners or occupiers of continguous lands. The question of title raised in issues Nos. 1 and 5 at the trial was not incidental to the question of the respondent's right to have the boundary defined but was the real crux of the dispute between the parties."

Again Gane's translation of Voet's Pandects Book 10 Title 1 Section 6 at page 617 states thus:

"The action is granted against neighbours to neighbours, whether the latter are owners, usufructuaries, (in which case you would correctly reckon the Clergy also in respect of lands belonging to their livings) creditors holding a hypothec, quitrenters, or possessors in good faith. All such persons are endowed with a *jus in re*, and in virtue of these rights have a personal interest in unsettlement of boundaries being avoided; and as a general rule good faith bestows on a possessor as much as true fact if no law stands in the way".

On a consideration of the above authorities and Supreme Court decisions it is clear that one need not be the sole owner of a land before he could file an action for the definition of the boundary of that land with that of any other adjoining land. Also it is evident from our Court cases that the other land owner against whom this action is filed need not be the sole owner of that particular land.

It has been brought to the notice of the learned Judge of the District Court that as the plaintiff was only a co-owner of his land and the defendant too only an undivided share holder of the adjoining land, the action for the definition of boundaries will not be available to the plaintiff unless he made the other co-owners of both his land and of the defendant's land parties to the said case. As stated by us it is clear that such an addition of all the co-owners of both lands is not necessary. Thus we hold that on the evidence led at the trial the

plaintiff had sufficient proprietary interest in his land to enable him to institute this action provided the other requisites were also in him at the time of the institution of this action.

We would now consider whether the plaintiff did possess all the necessary requirements which the law required him to have at the time of the institution of this action. As mentioned earlier he had sufficient proprietary interests in his own land called Kongahawatte to institute this action against the defendant who was the co-owner and possessor of the other land adjoining the land of the plaintiff on the East.

As stated by Voet in his Book 10 Title 1 Section 1(a) at Page 611, this action is provided when the boundaries of land belonging to different owners have become unsettled either by chance or by the act of the adjoining owners or of a third party. In the Supreme Court case *Ponna v. Muthuwa (supra)* (4) Gratiaen J. when considering the above mentioned Book on Voet's Pandects has at pages 60-61 stated thus:

> "the actio finium regundorum only lies for defining and settling boundaries between adjacent owners 'whenever the boundaries *have become uncertain*, whether accidentally or through the act of the owners or some third party (Voet 10.1.1.).... Such proceedings, in my opinion, presuppose the prior existence of a common boundary which has been obliterated by some subsequent event. The remedy cannot be sought for the purpose of *creating* on some equitable basis a line of demarcation which had never been there before. The true basis of the remedy, as in England, is that there is a 'tacit agreement or duty between adjacent proprietors to *keep up and preserve* the boundaries between their respective estates".

It will be thus seen that the plaintiff will have to prove that there did exist an earlier physical boundary fence which is now not there, and which he was keen to replace at the same place where the earlier fence had stood. As regards this matter we find that the plaintiff has failed to satisfy and convince the Court that his evidence at the trial is correct. It will be observed that his plaint is on the basis that the common boundary fence between the two lands has got defaced very probably by the effluxion of time. He has nevertheless failed to point out to the surveyor who had prepared the Plan 823(P1) on the Commission issued in this case, where this earlier fence did stand. On the other hand when giving evidence he has told the learned Judge

that the eastern boundary of his land called Kongahawatte was clearly demarcated on the ground by a barbed wire fence and that in about the year 1946 or so, while he was elsewhere in connection with his job, he had when coming to this land on one occasion found the strands of barbed-wire missing. We note that even then he has made no complaint to any public authority in relation to this. He has however gone before the Conciliation Board of the area some time later and made a complaint regarding the removal of this barbed-wire fence and the said Board has issued its Certificate to him on the 17th of November, 1973 after which the present action has been filed.

The plaintiff has failed to establish in evidence at the trial, the fact that such a fence did exist along the eastern boundary of Lot A as shown in Plan No. 823(P1) which is shown as a red line and that it constitutes the eastern boundary of the plaintiff's land. This red line has come on to the said Plan prepared for this case only after the surveyor had superimposed Plan No. 2465 of 1879 which had been given to him to assist him in carrying out his work as authorised by the Commission. Thus we are satisfied that there is no reasonable and acceptable evidence adduced at the trial to establish the fact that there had been a barbed-wire fence on the eastern side of the plaintiff's land to indicate his eastern boundary. Further the black line shown in this Plan P1 which is shown to be the western boundary of Lot A is referred to as a live fence that has been put up by the defendant. Again the plantation in Lot A which consists of 3 coconut trees of about 25 years in age has been claimed before the surveyor only by the defendant who has also enjoyed their produce. Thus it is quite evident to us that the possession of Lot A has been exclusively by the defendant who has therefore acquired a prescriptive title also to the soil and plantations in Lot A.

We are therefore of the view that the plaintiff has failed to establish that he did have the necessary requisites expected in law from one who wants to file an action for definition of boundaries. As stated earlier in this judgment it is clear that prior to the institution of this action the plaintiff was aware of the fact that the defendant was not accepting the correctness of where the common boundary should be as he had refused to accept the accuracy and correctness of the private plan prepared by surveyor Fernando. He was claiming the live

fence which stood to the west of Lot A as the boundary fence and was thereby claiming the soil and plantation in that portion of land 02.31 perches in extent which was shown by the Commissioner in his Plan 823(P1). In these circumstances the proper action that the plaintiff had to bring was a *rei vindicatio* suit against the defendant and not one for a definition of boundaries (see *Jacolis Appu v. David Perera (supra)* (1) 551–552.) Learned counsel for the appellant submitted that in actual fact all actions for the definition of boundaries would involve a dispute to even a small quantity of soil which is taken up for the erection of the boundary fence. However in this case the facts do show that it is not that thin strip of soil on which the fence will stand that is disputed but an area of 02.31 perches to the West of the red line shown as the eastern boundary of Lot A in the Plan P1 and on which red line the correct boundary fence should have existed. For the said reasons stated in our judgment, we are satisfied that the plaintiff has failed to establish the fact that he was in law entitled to bring an action for the definition of boundaries especially as he has failed to show that there did exist a prior live or other physical boundary fence along the eastern boundary of his land which he maintains is the red line shown in the Plan P1 ; and further in the guise of having his eastern boundary defined, the plaintiff was in fact seeking to have himself declared entitled to Lot A in Plan 823 (P1).

We would therefore affirm the judgment and decree of the District Court and dismiss the appeal with costs fixed at Rs. 210.

G. P. S. DE SILVA, J.—I agree.

Appeal dismissed.

Note by Editor: Application No. SPL/LA/36/87 for leave to appeal from this judgment was refused on 29.5.87 by the Supreme Court.