

**IN THE SUPREME COURT OF THE REPUBLIC OF SRI LANKA**

In the matter of an application for Special Leave to Appeal to the Supreme Court against Judgment of the Court of Appeal dated 23/10/2013 delivered in C.A. Appeal No.948/2000(F) D.C.Negombo Case No.3552/L.

**IN THE DISTRICT COURT**

**SC/APPEAL NO.46/2014  
SC/SPL/LA No.296/2013  
C.A. APPEAL 948/2000  
D.C. Negombo Case No.  
3552/L**

1. Nanayakkara Senarath Appuhamillage  
Karunarithne Nanayakkara, of  
Banduragoda.  
[Deceased]
2. Karunarithne Senarath Appuhamillage Indra  
Beatrice Nanayakkara, of Banduragoda.

**Plaintiffs**

**Vs.**

Jayasinghe Aratchige Somaratne, of  
Banduragoda.

**Defendant**

**IN THE COURT OF APPEAL**

Jayasinghe Aratchige Somaratne, of  
Banduragoda.

**Defendant Appellant**

**Vs.**

2. Karunarithne Senarath Appuhamillage Indra  
Beatrice Nanayakkara, of Banduragoda.

**Plaintiff Respondent**

NOW, IN THE SUPREME COURT

2. Karunarathne Senarath Appuhamillage Indra  
Beatrice Nanayakkara, of Banduragoda.

**Plaintiff- Respondent -Petitioner-Appellant**

Vs.

Jayasinghe Aratchige Somaratne, of  
Banduragoda

**Defendant- Appellant- Respondent**

**Before:** Buwaneka Aluwihare, PC, J  
L. T. B. Dehideniya, J  
S. Thurairaja, PC, J

**Counsel:** Dr Sunil Cooray with Sudarshani Cooray for the Plaintiff-  
Respondent-Petitioner- Appellant.  
Ranjan Suwandarathne, PC with Ineka Hendawitharana and  
Lahiru Abeyratne for the Defendant-Appellant-Respondent.

**Argued on:** 04. 03.2021

**Decided on:** 12.01.2023

## Judgement

**Aluwihare, PC, J,**

(1) This matter which was argued before the Court of Appeal was decided on a preliminary issue and as such the facts referred to here are confined, to the extent necessary to the issue in question.

### **Factual Background**

(2) The Plaintiff-Respondent-Petitioner-Appellant, [hereinafter the Plaintiff] jointly with his now deceased father who was the 1<sup>st</sup> Plaintiff, filed action against the Defendant-Appellant-Respondent [hereinafter referred to as the Defendant] seeking a declaration of title to the land described in the Schedule “B” to the plaint upon the deeds pleaded in the plaint, for an order permitting the erection of a boundary fence separating the lands occupied by the plaintiffs and the defendant and to have the defendant ejected from the land described in Schedule “B” to the plaint, and for damages and Costs.

(3) The Defendant by his amended answer dated 28<sup>th</sup> January 1992 took up the position that his father J.A.Stephen Appuhamy and he were entitled the entire land described in the Schedule to the said amended answer and depicted in Plan No. 5026 dated 3.9.1986 marked “P7” by uninterrupted and undisturbed possession for well over the prescriptive period and in addition, the Defendant also took up the position that there was a misjoinder of parties and causes of action and that the plaint was contrary to Section 35 (1) of the Civil Procedure Code and moved to have the plaintiffs’ action dismissed.

(4) By the judgment dated 4<sup>th</sup> July 2000 the learned Additional District Judge entered judgment for the plaintiffs as prayed for in the plaint with the exception that the damages in prayer (d) to the plaint were restricted to Rs.2500/-.

(5) The land described in Schedule “B” of the plaint is lot 1 of Koangahawatte depicted in plan no. 159 dated 2<sup>nd</sup> March, 1968 made by K.A.G. Amarasinghe

Licensed Surveyor, which is in extent of 1 acre 1 rood and 9 perch. The Plaintiff and the deceased Plaintiff in the plaint alleged that the property described in the Schedule “A” to the plaint was owned by the Deceased Plaintiff and his brothers and thereafter the deceased Plaintiff and his brothers, divided the said property by an amicable partition and in terms of the said division the Deceased Plaintiff claimed that he became the absolute owner of the property described in Schedule “B” to the plaint.

- (6) The Deceased Plaintiff and the Plaintiff further stated that the Deceased Plaintiff by deed no. 8015 dated 1.3.1970 gifted the said property to the Plaintiff subject to the life interest of the Deceased Plaintiff.
- (7) The plaintiff averred that a portion to the north west of the property described in Schedule “A” of the plaint at the time of the said division of the property was reserved for one J. A. Stephen Appuhamy and both the Deceased Plaintiff and the Plaintiff alleged that the Defendant around September 1985, removed a fence and caused damage to certain trees situated in the Plaintiffs’ land and the said action of the Defendant led to the institution of this action before the District Court.
- (8) The Defendant in his amended answer stated that his father and he, possessed a portion of the land depicted in plan no. 5026. The Defendant described the land as a property of 1 rood and 1.2 perches in extent, depicted in plan no. 2635 dated 29<sup>th</sup> December 1988 made by R. I. Fernando Licensed Surveyor. The Defendant claimed ownership by prescriptive title to this portion of land, whilst raising an objection that the Deceased Plaintiff and the Plaintiff had wrongfully joined causes of action in violation of Section 35(1) of the Civil Procedure Code.
- (9) At the trial, 2 admissions, 10 issues on behalf of the Plaintiff and 4 issues on behalf of the Defendant were recorded. The Plaintiff closed his case by calling the brother of the Appellant, Ariyaratne Nanayakkara as a witness and reading

in evidence documents marked P1 to P7a. On behalf of the Respondent, one Samarasena Senarath and one Wijerathna Arachchige Nimalsena were called in to give evidence.

(10) The District Court on 4<sup>th</sup> July 2000 entered judgment for the Plaintiff, granting reliefs prayed for, subject to the restriction of damages to Rs. 2,500/- in prayer (d) of the Plaint. Being aggrieved by the said judgement, the Defendant appealed therefrom to the Court of Appeal.

(11) The Defendant in his petition of appeal dated 17<sup>th</sup> August 2000 has set out ten grounds of appeal numbered (a) to (j). By judgement dated 23.10.2013, the Court of Appeal held that the Plaintiff's action did not comply with Section 35(1) of the Civil Procedure Code and proceeded to set aside the judgment of the District Court without addressing any of the other issues raised by the Defendant.

(12) Being aggrieved by the said Judgement of the Court of Appeal, the Plaintiff appealed to the Supreme Court. On 17.03.2014, this Court granted Special Leave to Appeal on the question of law set out in Sub-paragraph (a) of paragraph 17 of the Petition of the Appellant [Plaintiff] dated 02.12.2013. The court, however, was of the opinion that the issue on which the Court of Appeal decided the appeal and the question of law on which special leave was granted could not be reconciled. In the circumstances with the consent of the learned counsel who represented the parties it was agreed that, instead of the question of law on which special leave was granted on 02. 12. 2013, the appropriate questions that should be considered by this court are the questions of law that are referred to in sub-paragraphs (g) and (h) of paragraph 17 of the Petition. Accordingly, by order dated 30.03.2021, this Court resolved to consider the questions of law referred to in the sub-paragraph (g) and (h) of paragraph 17, instead of paragraph (a).

The said questions of law referred to in the said sub -paragraphs are reproduced below,

- (g) Did the Court of Appeal err by failing to appreciate that this action of the Plaintiff was for the recovery of land within the meaning of section 35(1) of the Civil Procedure Code, and that the prayers (a), (b) and (c) in the plaint were prayers only for the recovery of land and that therefore, so far as the said three prayers are concerned, there was no necessity to obtain leave under the said provisions of law;
  - (h) So far as prayers (d) and (e) in the plaint are concerned, was there no necessity to obtain leave of court as the said two prayers came within section 35(1)(b), and accordingly there was no necessity to obtain leave of court to include them in the prayer to the plaint, as held by the District Court [p.160].
- (13) The learned counsel for the Plaintiff contended that in deciding the cause of action on which a Plaintiff came to court, it is necessary to examine the plaint as a whole, including all its averments and reliefs prayed for. He further contended that on a plain reading of the plaint, the action instituted by the Plaintiff cannot be understood as an action for the definition of boundaries. He maintained that the court of appeal gravely erred in holding that the present action is an action for the definition of boundaries, even though several ingredients needed to be pleaded in an action for the definition of boundaries are not found in the plaint. He submitted that all the prayers set out in the Plaint are based on the title of the Plaintiff, and thus the action constitutes a *rei vindicatio* action. His position was that the relief prayed for, namely permission to erect a fence on the common boundary is part of and in furtherance of the “recovery of immovable property” within the meaning of section 35 of the Code. It was also submitted that if the relief for the erection of a fence on the common boundary was wrongly included in the prayer of the plaint because leave of the court under Section 35(1) of the Code was not obtained by the Plaintiff, only that particular relief should have been refused, without a dismissal of the action in its entirety.

(14) The learned Presidents' Counsel for the Respondent argued that paragraph [12] of the Plaint as well as prayer (b) taken together with prayers (a) and (c) of the Plaint make it clear that the Appellant is attempting to combine an action for declaration of title and ejectment, with an action for the definition of boundaries. He submitted that this is contrary to Section 35(1) of the Code since the Plaintiff has not first obtained leave from the Court to combine such actions. He noted that the Defendant by their answer dated 24<sup>th</sup> April 1987 has raised this objection. The learned Presidents' Counsel also referred to several decided judgements in support of the contention that an action for the definition of boundaries cannot be combined for an action for declaration of title. These judgements will be analysed later in this judgment. Accordingly, it was the Defendant's submission that the judgement of the Court of Appeal be upheld and that this appeal be dismissed.

(15) The observation made by the Court of appeal [page 3 of the judgement] was that; the *Plaintiff has sought to combine a rei vindicatio action with an action for definition of boundaries and proceeded to hold that "It clearly appears from prayer (a) of the plaint that the Respondent [the Plaintiff] has sought a judgement 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's [the Defendant] 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."*

(16) The Court of Appeal further observed that "It was apparent from the evidence of the Respondent [the Plaintiff] that there was a fence between the two lands and the Appellant [the Defendant] has destroyed the said fence and has encroached the Respondent's [Plaintiff'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 encroached 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 encroached by a Defendant.” [Emphasis added]**

(17) It is evident from the above observation, that the Court of Appeal has proceeded on the basis that Plaintiff’s action was one for definition of boundaries. Therefore, the first issue to be ascertained by this court is whether the Plaintiffs, by their Plaint sought an action for the definition of boundaries in addition to an action for declaration of title.

(18) The Court of Appeal has concluded that the action is one for definition of boundaries by referring to paragraph 12 and prayers (a), (b), (c) of the Plaint. Paragraph 12 merely sets out that a cause of action has accrued to the Plaintiff to sue for the reliefs claimed by the Plaint. By prayer (a) of the Plaint, the Plaintiffs had sought a declaration of title to the land described in the Schedule “B” to the plaint. By prayer (b) they had sought [for permission] to erect a boundary fence separating the lands occupied by the Plaintiffs and the Defendant. By prayer (c) she has sought the ejectment of the defendant from the land described in the Schedule “B” to the plaint, after the erection of the said boundary fence.

(19) Prayers (a) and (c) of the Plaint, namely, for declaration of title to the land in question, and ejectment of defendants from the same land, are standard relieves prayed in a *re vindicatio* action. In reality it is only prayer (c) of the Plaintiff’s plaint that may not strictly fall within the standard reliefs one would pray for in such an action. Considering the totality of the evidence led and the attended circumstances, however, I am unable to agree that prayer (c) along with averments in paragraph 12 of the Plaint one could conclude that the Plaintiff’s action was one for definition of boundaries.

(20) On behalf of the Defendant, several decisions were cited in support of their preposition that an action for definition of boundaries cannot be joined with



an action for declaration of title. However, in all those cases cited, the plaintiffs have sought a **definition or demarcation** of a boundary through the prayer.

In *Somawathie and Others v Illangakoon* [2013] 1 Sri L.R. 94, at page 96 it is stated that,

“In the prayer of the plaint, the plaintiffs have prayed for an order *demarcating the boundaries of their land*, ejectment of the defendant from that land and for damages as quantified in prayer ‘C’ of the plaint.” [Emphasis added]

In *Leelawathie hamine and another v Gnanasiri* [1989] 1 Sri L.R. 322, it is stated at page 322,

“The plaintiffs in the prayer to the plaint have asked that their western **boundary be defined** according to title plan No. 290399.”

In the case of *M. Jacolis Apphu v W.A. David Perera* (1967) 69 NLR 548, at page 549 it is stated,

“The plaintiff-respondent to this appeal, claiming to be the owner of the allotment of land depicted as lot 4B of Plan No. 1194 (P8) dated 8.2.1962 made by A. R. C. Kiel, Licensed Surveyor, instituted this action for a **definition of the western boundary of that allotment**, namely the boundary separating that allotment from the allotment marked Lot 4A on the said plan.” Emphasis added]

- (21) These cases are quite distinct from the present action, as the Plaint in the present action does not contain a prayer for the definition or demarcation of a particular boundary to a land. Prayer (b) is for an erection of a boundary fence separating the Plaintiff’s land from the Defendant’s. The said prayer in my view does not denote that the Plaintiff’s action is one for the definition of boundaries.

(22) A complete picture of the nature of the Plaintiff's action may be gleaned by referring to the issues and admissions of the parties. The following issues have been raised by the Plaintiff and the Defendant at the commencement of the trial,

Issues by the Plaintiff:

1. Were the 1<sup>st</sup> Plaintiff and his brothers the owners of the land described in Schedule "A" to the Plaint by virtue of Deed No. 699 dated 05.02.1951 attested by B.B.P. Wijewardena Notary Public and Deed No. 6454 dated 30.11.1925 attested by S.J.V. Wickremasuriya Notary Public?
2. Did the 1<sup>st</sup> Plaintiff and his brothers, by the deed of partition No. 40 dated 29.08.1968 attested by D.A.F.D. Jayawardena Notary Public, partition the land described in Schedule "A" to the Plaint?
3. In terms of the said partition, did the 1<sup>st</sup> Plaintiff become the owner of the land described in Schedule "B" of the Plaint?
4. Did the 1<sup>st</sup> Plaintiff by Deed No. 8015 dated 01.03.1970 attested by D.R.S. Gunawardena Notary Public gift the land described in Schedule "B" of the Plaint to the 2<sup>nd</sup> Plaintiff, subject to the life interest of the 1<sup>st</sup> Plaintiff?
5. Is the 2<sup>nd</sup> Plaintiff entitled to the said land described in Schedule "B" to the Plaint on deeds as well as prescriptive possession?
6. At the time the land described in Schedule "B" to the plaint was partitioned, was a portion from its northwestern side separated off to be possessed by J. A. Stephen Appuhamy?
7. After the death of the said J. A. Stephen Appuhamy, has the Defendant been in occupation?
8. On or about 01.09.1985 did the Defendant wrongfully and unlawfully break down the boundary fence separating the land occupied by the Defendant and the land described in Schedule "B" of the Plaint, cut down three Jak trees, cut down branches of a Mango tree and cause damage to the other trees?
9. If so, what is the quantum of damages?

10. If the above issues be answered in favour of the 2<sup>nd</sup> Plaintiff, is she entitled to the reliefs prayed for, in the Plaintiff?

The only issue relating to the boundaries of the land in question is issue no. 8. Referred to above. It is significant to note [from the issue no. 8] that the Plaintiffs were never in doubt as to what the northern boundary to the impugned property was. They are only alleging that the Defendant caused damage to the fence that was already in place, along the said boundary.

(23) As stated, none of the issues referred to above relate specifically to the issue of boundaries between the Plaintiff's and Defendant's lands. Issue No. 8, appears to have been raised in order to quantify damages that the Plaintiff has claimed as a result of the damage caused to the fence by the Defendant's alleged acts. The issues raised do not indicate in any manner that the Plaintiffs had endeavoured to maintain an action for the definition of boundaries.

(24) To my mind, there was only one cause of action and that is for declaration of title to the land referred to in schedule 'B' of the plaintiff. The claim for the damages caused to the fence is merely consequential in that the Plaintiffs alleged that the Defendant trespassed on to their property and in the process of cutting down some trees, caused damage to the fence as well.

(25) **Fernando vs. Lakshman Perera** 2000 (2) S.L.R 413 was a case where the Plaintiff not only sought a declaration that he was entitled to the land in question, but also a further declaration, *inter alia*, to invalidate two deeds. It was argued that the joinder violated the provisions of section 35[1] of the Civil Procedure Code, as in an action instituted in terms of Section 35, no other claim or cause of action shall be made unless with leave of court, except in cases enumerated therein.

Justice Jayawickrema delivering judgement held;

*“In paragraph 17 of the plaint he states that a cause of action has arisen to evict the Defendant and place the Plaintiff in possession of the land. On a perusal of this plaint, I find that there is only one cause of action as per Paragraph 17 of the plaint. **The prayer for invalidation of two deeds referred to above is consequential to the main cause of action to obtain a declaration of title to this land.** For this purpose, it is necessary to prevent the 1st and the 2nd Respondents from alienating the land by way of transferring, selling, agreeing to sell and mortgaging the said land. **Under Section 35(1)(b) of the Civil Procedure Code the Plaintiff in an action for declaration of title to immovable property is entitled to make a claim for damages for breach of any contract under which the property or any part thereof is held; or consequential on the trespass which constitute the cause of action.** In the instant case the claim to invalidate the deed and agreement itself is consequential to the main cause of action to obtain a declaration of title. It is necessary to prevent the alleged actions of the Defendant and to invalidate any illegal transfers or alienations. It is abundantly clear on a reading of the plaint which states in minute detail the alleged conduct of the Defendant to alienate the property which is the subject matter of this action, that the only cause of action is to obtain a declaration of title and possession of the subject matter.” [Emphasis added]*

(26) In *Peiris and Another v Siripala* [2009] 1 Sri L.R. 75, His Lordship De Silva J observed; [at page 78]

*“One of the main legal arguments of the Appellants, put forward in their submissions was based on section 35 (1) of the Civil Procedure Code. The relevant issue is issue number 6. The Appellants argued that a cause of action to have the deed P2 declared null and void cannot be joined with a cause of action for a declaration of title to immovable property without leave of the court first had and obtained. Appellants argued that the Respondent should have dropped one of the causes that is, the Respondent should have either maintained the cause of action for a declaration of title or should have*

*abandoned that cause of action and maintained a cause of action for a declaration that the aforementioned deed P2 was a fraudulent deed and therefore was void.”*

His lordship went on to hold that; [at page 79] *“On the other hand, assuming without conceding that the Respondent had formulated issues on both causes of action, namely the declaration of title and for a declaration that deed P2 is void, I find such procedure to be perfectly in order. The law permits one to adopt such a cause and is not repugnant to section 35 (1). There is no misjoinder as there is in reality only one cause of action. A prayer for invalidation of a deed (in this case P2) is consequential to a prayer for declaration of title.”*

(27) In the instant case too, the Plaintiffs, in their issues raised have confined themselves to an action for declaration of title, and to recover damages resulting from the wrongful trespass into their land by the Respondent. Accordingly, I find that the Court of Appeal has erred in deciding that the Appellant has instituted an action for the definition of boundaries.

(28) Considering the aforesaid, I hold that the action of the Plaintiff was for the recovery of the land in question and as such there was no need to obtain leave of the court in terms of Section 35(1) of the Civil Procedure Code. Accordingly, the question of law referred to in sub-paragraph (g) of Paragraph 17 of the Petition is answered in the affirmative. [The 1<sup>st</sup> question of law on which special leave was granted]

(29) The next issue to be determined is whether the inclusion of prayers (d) and (e) in the Plaint, makes the action contrary to Section 35(1) of the Civil Procedure Code as no leave of the court was obtained. [Question of law referred to in sub-paragraph (h) of Paragraph 17 of the Petition].

In paragraph (d) of the prayer to the plaint, the plaintiffs have claimed Rs. 5000/- as damages whereas in paragraph (e) they have sought an order for

ejection of the Defendant and peaceful possession of the land *after erecting the fence*.

(30) Section 35(1) of the Civil Procedure Code states,

“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, except

- (a) claims in respect of mesne profits or arrears of rent in respect of the property claimed;
- (b) damages for breach of any contract under which the property or any part thereof is held; or consequential on the trespass which constitutes the cause of action; and
- (c) claims by a mortgagee to enforce any of his remedies under the mortgage”

(31) As referred to earlier the several cases have held that Section 35(1) does not bar a Plaintiff instituting an action for declaration of title, from including in the prayer, other consequential reliefs flowing from the same cause of action. In *Fernando v Lakshman Perera* [2000] 2 Sri L.R. 413 the Plaintiff in his Plaint had prayed for a declaration of title to the land in suit as well as for invalidation of two deeds relating to the said land. Jayawickrema, J, at page 416 held,

*“On a perusal of this plaint I find that there is only one cause of action as per Paragraph 17 of the plaint. The prayer for invalidation of two deeds referred to above is consequential to the main cause of action to obtain declaration of title to this land.*

In *Peiris and Another v Siripala* [supra] referred to earlier, Ranjith Silva, J, states [at page 78],

“On the other hand, assuming without conceding that the Respondent had formulated issues on both causes of action, namely the declaration of title and for a declaration that deed P2 is void, I find such procedure to be perfectly in order. The law permits one to adopt such a cause and is not repugnant to section 35 (1). **There is no misjoinder as there is in reality only one cause of action. A prayer for invalidation of a deed (in this case P2) is consequential to a prayer for declaration of title.** It is to prevent the Respondents from alienating the land or in order to prove that he still retains title and that he has not alienated his rights.

(32) On a perusal of the Complaint of the Appellant in the present action, it is quite clear that there is only one cause of action. The cause of action alleged by the Appellant is that on or about 01.09.1985 the Defendant wrongfully and unlawfully broke down the boundary fence separating the land occupied by the Defendant and the land described in Schedule “B” of the Complaint, cut down, three Jak trees and branches of a Mango tree and caused damage to the other trees. All reliefs prayed for in the Complaint, namely, for a declaration of title to the land, for the erection of a boundary fence, for ejectment of defendants from the said land, and for damages, flow from this single cause of action. Accordingly, the relief prayed in paragraph (e) of the Complaint, which is for an erection of a boundary fence separating the lands occupied by the plaintiffs and the defendant, flows from the same cause of action and is consequential to the main relief prayed which is for the declaration of title to the said land. Therefore, the said prayer is not repugnant to Section 35(1) of the Civil Procedure Code.

(33) Accordingly, I find that the Court of Appeal has erred in finding that the action by the Appellant is contrary to Section 35(1) of the Civil Procedure Code. I answer the second question of law upon which Special Leave was granted, being on the questions of law referred to in paragraph 17(h) of the Petition of Appeal, also in the affirmative.

Accordingly, the judgement of the Court of Appeal is set aside and the appeal is allowed. We observe, however, that the Court of Appeal had not dealt with any of the other issues raised by the Defendant before it. As such this matter is referred back to the Court of Appeal for consideration of the appeal of the Defendant on its merits.

However, the Court of Appeal would not be required to re-visit the issue raised under Section 35(1) of the CPC as this court had already made a pronouncement.

The Court of Appeal is further directed to consider the appeal and to dispose of the matter as early as possible considering the delay that has already resulted in the process of litigation.

The appeal is allowed subject to cost of Rs. 50,000/-

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA PC

I agree

JUDGE OF THE SUPREME COURT