

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

In the matter of an Application for Leave to Appeal under and in terms of Section 5C (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006

SC Appeal No: 126/2016

SC/HCCA/LA/No.60/2016
WP/HCCA/COL/253/2008 (F) A
D.C Colombo Case No. 20519/L

B. Premarajah Jayawardena,
No.1, Alwis Avenue,
Mount Lavinia.

PLAINTIFF

-VS-

1. B. Upali Dayananda Janapriya Jayawardena,
87/3, Bandaranayake Mawatha,
Katubedda,
Moratuwa.
2. Alvarapillai Vengadasam,
104, 4th Cross Street, Colombo 11,
and No. 125, Bankshall Street,
Colombo 11

RESPONDENTS

AND BETWEEN

Alvarapillai Vengadasam,

104, 4th Cross Street, Colombo 11,
and No. 125, Bankshall Street,
Colombo 11

2nd DEFENDANT-APPELLANT

-VS-

B. Premarajah Jayawardena
No.1, Alwis Avenue,
Mount Lavinia.

PLAINTIFF-RESPONDENT

B. Upali Dayananda Janapriya
Jayawardena,
87/3, Bandaranayake Mawatha,
Katubedda,
Moratuwa.

1st DEFENDANT- RESPONDENT

AND BETWEEN

B. Premarajah Jayawardena,
No.1, Alwis Avenue,
Mount Lavinia.

PLAINTIFF-RESPONDENT-

PETITIONER

-VS-

B. Upali Dayananda Janapriya
Jayawardena,
87/3, Bandaranayake Mawatha,
Katubedda,

Moratuwa.
(Now Deceased)

**1st DEFENDENT-RESPONDENT-
RESPONDENT**

1a Kananke Acharige Wimalawathie,
1b Hiranya Keshini,
1c Harendra Geethal Jayawardena,
1d Buddika Dananjaya Jayawardena,
All of 87/3, Bandaranayake Mawatha,
Katubedda,
Moratuwa.

**DEFENDANTS- RESPONDENTS-
RESPONDENTS**

Alvarapillai Vengadasam,
104. 4th Cross Street, Colombo 11
and No.125, Bankshall Street
Colombo 11.

**2nd DEFENDANT-APPELLANT-
RESPONDENT**

BEFORE : **PRASANNA JAYAWARDENA, PC, J.**
L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Harsha Soza, PC with Shantha Perera, PC and Ms Sudarshani
Ukwatte for Plaintiff- Respondent- Petitioner instructed by S.
Mahanama

Gamini Jayasinghe with P.P. de Silva for substituted 1st
Defendant-Appellant- Respondent

ARGUED ON : 26th August 2019

WRITTEN : Plaintiff – Respondent – Appellant on 11th September 2019

SUBMISSIONS Substituted 1st Defendant – Respondent – Respondent on
23rd September 2019

DECIDED ON : 17th December 2019.

S. THURAIRAJA, PC, J.

B. Premarajah Jayawardena the Plaintiff – Respondent – Appellant – Petitioner (hereinafter referred to as the Plaintiff - Appellant) instituted action in the District Court of Colombo against B. Upali Dayananda Janapriya Jayawardena (1st Defendant – Respondent – Respondent hereinafter referred to as the 1st Defendant - Respondent) and Alvarapillai Vengadasam (2nd Defendant – Appellant – Respondent – Respondent hereinafter referred to as the 2nd Defendant - Respondent) stating that he was entitled to the property described in the first schedule to the plaint, that his brother, the 1st Defendant - Respondent, was the owner of the property bearing No. 104, 4th Cross Street which was adjacent to No. 113, 5th Cross Street owned by the Plaintiff – Appellant, in January 2004 the 1st Defendant - Respondent had illegally and forcefully annexed 1.95 perches from the plaintiff's property and given it over to the 2nd Defendant – Respondent.

Plaintiff Appellant filed this action seeking inter alia, a declaration of title to the property bearing assessment N.s 111, 113 and 114 5th Cross Street as described in the first schedule of the plaint, ejectment of the 2nd Defendant-Respondent from

the portion of the property described in the second schedule of the plaint and certain injunctive reliefs to prevent the 1st and 2nd Defendant - Respondents from selling, mortgaging, renting and/or otherwise alienating the property described in the second schedule of the plaint and in extent 1.95 perches, and further to prevent the first and second defendants from effecting any constructions on the said property.

In the District Court the Plaintiff – Appellant had pleaded that he was entitled to the property described in the first schedule to the plaint, that his brother, the 1st Defendant - Respondent, was the owner of the property bearing No. 104, 4th Cross Street which was adjacent to No. 113, 5th Cross Street owned by the Plaintiff – Appellant, in January 2004 the 1st Defendant - Respondent had illegally and forcefully annexed 1.95 perches from the plaintiff's property and given it over to the 2nd Defendant – Respondent.

The 1st Defendant - Respondent by his answer pleaded that the said portion of land claimed by the Plaintiff - Appellant was in fact an undivided portion of his property No. 104, 4th Cross Street, owned by him and the 2nd Defendant - Respondent was his tenant in possession of the said premises. The 1st Defendant - Respondent prayed for the dismissal of the action.

The cause of action in this suit was based on an alleged 'forcible annexation' of a part of the Plaintiff's land by the 1st Defendant – Respondent.

The allotment of land described in the first schedule belonged to the Plaintiff – Appellant and 1st Defendant – Respondent's mother, Mulin Felicia Dulcie Wijewardena who by Deed No. 240 of 07/08/1942 gifted the portion of land bearing assessment No. 104 to the 1st Defendant - Respondent and gifted the allotment of land bearing assessment No. 111,113 and 115 to the Plaintiff – Appellant.

The Plaintiff - Appellant asserts that he lives abroad and came to Sri Lanka around twice or thrice a year. Owing to that he asked his younger brother (1st

Defendant – Respondent) to whom he had given his power of attorney to look after the property. However from 1985 the Plaintiff - Appellant had taken full control of the property.

When the Plaintiff - Appellant had visited his property in January 2004 he had observed that the extent of his land was around 2 perches less than 8.75 perches. Thereupon he hired surveyor M.M.S Fernando to survey the land and find out its extent. The surveyor had then prepared Plan no. 927 dated 30th September 2004 and a report dated 1st October 2004. According to this Plan, lot 4 which is 1.95 perches and is described in the second schedule to the plaint in extent represents the encroached portion. He states that the present extent of the Plaintiff's property is 6.80 perches, when it should be 8.75 perches. The common boundary between the two properties is an old wall, it is the Plaintiff – Appellant's position that the old wall had been burned down during the communal riots in 1983 and the 1st Defendant – Respondent had reconstructed the wall and in doing so had encroached upon 1.95 perches of the Plaintiff – Appellant's property.

Thereafter the Plaintiff - Appellant had lodged a complaint at the Mediation Board to resolve the issue with the 1st Defendant - Respondent. Counsel for the Plaintiff – Appellant submits that the 1st Defendant - Respondent had made a promise to return the encroached portion of land back to the Plaintiff - Appellant. However the 1st Defendant - Respondent had failed to honour his promise and as a result the Plaintiff - Appellant instituted action at the District Court.

After trial was concluded the additional District Judge of Colombo by his judgement dated 26.09.2008 granted the Plaintiff - Appellant all the reliefs prayed for in the plaint.

Being aggrieved with aforementioned judgement the 1st and 2nd Defendant – Respondents appealed to the High Court of Civil Appeals of the Western province Holden at Colombo by two separate petitions of appeal. The High Court by

judgement dated 06.01.2016 allowed the appeals of the Defendant - Respondents and gives the following reasons.

"If there is no evidence whatsoever that the common old wall separating the two properties has been changed, and if it is quite clear (by plans P3 and P6) that there is a discrepancy between the extent and boundaries of the two properties conveyed, then the question is which one shall be given preference or to shall prevail?"

*"The description of boundaries in the Title Deed of both parties, namely P1, is precise and has subsisted to the present date and admitted by both parties as correct until January 2004 when the plaintiff wanted to do some constructions in his property (page 150 of the Brief) he felt that he does not have the full extent mentioned in the Deed. **When there is a variation between description and extent given in a Deed, in law, description must prevail.**"*

(Emphasis added)

Being aggrieved with the judgement of the High Court, the Plaintiff - Appellant appealed to the Supreme Court and leave to appeal granted on the questions of law stated below;

- i. Did the High Court of Civil Appeals, Colombo err in law in substituting its findings in place of the factual findings of the District Court which are not held to be perverse?*
- ii. Did the High Court of Civil Appeals err in law in disregarding the views of the surveyors who are both experienced and experts without any valid reasons?*
- iii. Did the High Court of Civil Appeals err in law in failing to consider that the totality of the evidence in this case shows beyond doubt that the first Defendant has encroached upon the plaintiff's property?*

- iv. *Did the High Court of Civil Appeals fatally err in failing to consider that a new wall was constructed after the communal riots of 1983, and that the said encroachment took place with the construction of the new wall?*

The decisive factor in regards to this issue is the old wall which separates the Plaintiff – Appellant and 1st Defendant – Respondent’s properties. According to the Defendant – Respondent’s the wall is around 70 years old and the height of the wall is about 12 ½ feet. The Plaintiff - Appellant however disputes the age of the said old wall stating that the wall had been burnt down during the communal riots of 1983. The Plaintiff – Appellant’s position is that the 1st Defendant - Respondent had reconstructed the wall, and in doing so he encroached an extent of 1.95 perches of the Plaintiff – Appellant’s property.

The western boundary of the Plaintiff Appellant’s Property and the eastern boundary of the 1st Defendant – Respondent’s property is a common boundary. This common boundary is the old wall. The Boundaries of the Plaintiff- Appellant’s property have been described in Deed No. 240 dated 7/8/1942 as;

*“උතුරට පස්වන හරස් වීදියේ වරිපනම් නො . 117 දරන ගොඩනැගිල්ල ද
නැගෙනහිරට පස්වන හරස් වීදියද
දකුණට පස්වන හරස් වීදියේ වරිපනම් නොමිමර 105 දරන ගොඩනැගිල්ල ද
බස්නාහිරට හතරවන හරස් වීදියේ වරිපනම් අංක 104 දරන මෙම ගොඩනැගිල්ලේ
ඉතිරි කොටසට අතර බිත්තිය ද”*

English Translation of the above paragraph as follows;

“Bounded on the North by premises bearing assessment No. 117, Fifth Cross Street

On the East by 5th Cross Street

On the South by Premises bearing assessment No. 105, Fifth Cross Street

On the West by the wall separating the balance portion of the building bearing Assessment No. 104"

And the boundaries of the 1st Defendant's property have been described in Deed No. 240 dated 7/8/1942 as;

*"උතුරට හතරවන හරස් වීදියේ වර්පනම් නො . 108 දරන ගොඩනැගිල්ල ද
නැගෙනහිරට පස්වන හරස් වීදියේ වර්පනම් නොමිමර 111, 113 සහ 115 ක් දරන මෙම
ගොඩනැගිල්ලේ ඉතිරි කොටසට අතර බිත්තියද,
දකුණට හතරවන හරස් වීදියේ වර්පනම් නොමිමර 100 දරන ගොඩනැගිල්ලද
බස්නාහිරට හතරවන හරස් වීදියද'*

English Translation of the above paragraph as follows;

"Bounded on the North by premises bearing assessment No. 108, Fourth Cross Street

On the East by the wall between this and the balance portion of the building bearing Assessment Nos 111, 113 and 115

On the South by Premises bearing assessment No. 100, Fifth Cross Street

On the West by 4th Cross Street"

Nonetheless there was no evidence led at the trial to prove that the boundary wall has been shifted in January 2004 leading to an encroachment of the Plaintiff – Appellant's property. The High Court Judge in his Judgement stated that

*"Let alone in January 2004 there is **no iota of evidence to say that the 1st defendant encroached upon any portion of the plaintiff's land** at any time after the execution of the deed in 1942"*

(Emphasis added)

Thus there is no evidence to support the Plaintiff - Appellant's claim that the old wall had been replaced by a new wall which had been constructed to encroach upon his property.

In the first schedule to the Deed No. 240 the extent of the Plaintiff - Appellant's property is given as 8.75 perches. The complaint of the Plaintiff - Appellant is that he is occupying a lesser extent of land and that therefore there is an encroachment. The pivotal legal issue that then arises is where there is a discrepancy between the description of the property by reference to definite physical boundaries and the description by extent, which of these ought to prevail?

In **W.B. Appuhamy v W.M.A Gallella and others (78 NLR 404)** Sharvananda J held as follows;

"Where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties. It is permissible to resort to extrinsic evidence in order to resolve the ambiguity relating to the subject matter referred to in the conveyance. In such circumstances it is proper to have regard to the subsequent conduct of each of the parties, especially when such conduct amounts to an admission against the party's proprietary interest."

In **Woodroffe & Amir Ali on Law of Evidence**, 14th Edition, Page 2062 it stated as follows;

"In case of a discrepancy between dimensions and boundaries, the rule is now well established that the area specified within the boundaries will pass whether it be less or more than the quantity specified"

Monir in **Principles and Digest of the Law of Evidence**, 3rd Edition, page 759 stated as follows;

"In a conflict between the description of the boundaries and that of the quantity of the land conveyed, the description of the boundaries, if precise and accurate, dominates the description of the quantity, in every case the question of intention of the parties must be taken into consideration"

I have observed as per the submitted facts and evidence In this case that there is no extrinsic evidence to justify taking a different view.

Answering the 1st question of law, did the High Court of Civil Appeals, Colombo err in law in substituting its findings in place of the factual findings of the District Court which are not held to be perverse? I find that the learned Judge of the District Court had come to his conclusion by relying on statements made at the Mediation Board. However the problem that arises is that the Mediation certificate had not been produced at trial. Further the Provisions of Section 16 (2) of the Mediation Board Act No. 72 of 1988 reads;

"No statement made by any person before a Mediation Board shall be admissible in evidence in any civil or criminal proceedings".

For this reason I answer the first question of law negatively.

Answering the 2nd question, did the High Court of Civil Appeals err in law in disregarding the views of the surveyors who are both experienced and experts without any valid reasons? However as there is no proof of encroachment and for the reasons given in this judgement I answer this question negatively

Answering the 3rd question of law, did the High Court of Civil Appeals err in law in failing to consider that the totality of the evidence in this case shows beyond doubt that the first Defendant has encroached upon the plaintiff's property? The

Plaintiff – Appellant’s main argument on the encroachment is that the wall which is the common boundary between the two lands had been rebuilt by the 1st Defendant – Respondent after the Communal riots of 1983. However there isn’t any evidence to prove this claim. Hence I answer this question negatively.

Answering the 4th Question of law, did the High Court of Civil Appeals fatally err in failing to consider that a new wall was constructed after the communal riots of 1983, and that the said encroachment took place with the construction of the new wall? For the reasons given above I answer the 4th question negatively.

In these circumstances, the general principle that, where there is a variation between description and extent in a deed, description will prevail. Consequently I find that the Learned Judge of the High Court of Civil Appeal had considered all the information and made his decision. Thus I am not inclined to disturb his findings. Accordingly I dismiss the appeal and award no costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

PRASANNA JAYAWARDENA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT