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

In the matter of an Appeal to the Supreme Court from the Judgment of the Provincial High Court of the Western Province Holden in Mt. Lavinia (exercising Civil Appellate Jurisdiction) dated 11.07.2011, in terms of Article 128 of the Constitution read with section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act. No. 54 of 2006.

SC Appeal No. 73/2013
SC HC.CALA Application No. 328/2011
WP/HCCA/Mt: /82/2007
D.C. Mt Lavinia Case No. 1443/01/L

1. Nawagamage Ishari Udeshika Perera
No. 289 1/1. Dean's Road,
Colombo 10.

2. Pemseeli Aloma Perera

3. Nawagamage Richard Perera
Both of No. 289 1/1, Dean's Road,
Colombo 10.

PLAINTIFFS

v.

Asithanjan Panduka Sena Amarasinghe.
No.79/1, Jambugasmulla Road,
Nugegoda.

DEFENDANT

AND BETWEEN

1. Nawagamage Ishani Udeshika Perera**,**
   No.289/1/1, Dean's Road,
   Colombo 10.

2. Pemseeli Aloma Perera

3. Nawagamage Richard Perera,
   Both of No. 289 1/1, Dean's Perera,
   Colombo 10.

PLAINTIFFS – APPELLANTS

v.

Asithanjan Panduka Sena Amarasinghe.
No.79/1, Jambugasmulla Road,
Nugegoda.

DEFENDANT - RESPONDENT

AND NOW BETWEEN

1. Nawagamage Ishani Udeshika Perera**,**

   No.289/1/1, Dean's Road,
   Colombo 10.

   and presently at 955/5B3, Royal Gardens,
   Rajagiriya.

2. Pemseeli Aloma Perera

(DECEASED) 3. Nawagamage Richard Perera,
Both of No. 289 1/1, Dean's Perera,
Colombo 10.

3A. Nawagamuwa Ishari Udeshika Perera,

No. 289 1/1, Dean's Road,

Colombo 10.

and presently at 955/5B3, Royal Gardens,
Rajagiriya.

PLAINTIFFS– APPELLANTS - APPELLANTS

v.

Asithanjan Panduka Sena Amarasinghe.

No.79/1, Jambugasmulla Road,
Nugegoda.

DEFENDANT - RESPONDENT - RESPONDENT

BEFORE : S. Thurairaja, P.C., J.
Janak De Silva, J. &
M. Sampath K. B. Wijeratne J.

COUNSEL : Chandimal Mendis with Sarasi Paranamanna
Plaintiffs- Appellants– Appellants.

P.K. Prince Perera with D.M. Walpita for Defendant – Respondent – Respondent.

ARGUED ON : 04.03.2025

DECIDED ON : 31.07.2025

M. Sampath K. B. Wijeratne J.

This appeal arises from the Judgment of the Provincial High Court of Civil Appeals of Mt.Lavinia, dated July 11, 2011, by which the learned Judges of the High Court affirmed the judgment of the learned District Judge delivered on August 31, 2007.

Pursuant to the filing of an application seeking leave to appeal before this Court, and upon hearing submissions made by the learned Counsel for the Plaintiffs-Appellants-Petitioners and the learned Counsel for the Defendant-Respondent-Respondent, this Court granted leave to appeal on May 10, 2013, on the following two questions of law set out in paragraph 11 of the Petition dated August 22, 201, which I reproduce below as they appear;

> *(d) Whether their Lordships of the High Court erred in holding that in the absence of signatures giving their consent to the divisions made in Plan 4788(P1) and in the absence of a Partition Deed the land remained co-owned; when there was evidence that the Defendant had acted on the said plan and even accepted the said plan.*
>
> *(e) Whether their Lordships of the High Court failed to consider the issue of estoppel that operates against the Defendant which precludes him from denying that the subject matter is a divided portion.*

Consequently, this Court fixed the matter for argument. At the argument, the learned Counsel for the Plaintiff-Appellant-Appellants (hereinafter referred to as "Appellants") and the learned Counsel for the Defendant-Respondent-Respondent (hereinafter referred to as the "Respondent") made their respective submissions.

Factual Background

The Appellants instituted the instant action in the District Court of Mt. Lavinia, seeking a decree for demarcation of the common boundary between their land and that of the Respondent.

It was expressly admitted that the land described in the first schedule to the Plaint filed in the District Court, namely *Kahatagahawatta* was originally owned by Lokuralalage Rancina Hamine and Abeysinghe Arachchige Don Engonis Appuhamy who by deed bearing No.231 dated November 7, 1952 attested by A.B.W. Jayasekara Notary Public gifted the same to Abeysinghe Arachchige Dona Premawathie. It was further admitted that upon demise of Dona Premawathie, her husband, Eubert Silva Amarasinghe and three children Asithanjan Panduka Sena Amarasinghe, Vijitha Buwanaka Amarasinghe, and Kanchana Umanga Amarasinghe succeeded to the title of said land.

The aforementioned heirs of Dona Premawathie, being co-owners of the land described in the first schedule to the Plaint, divided the same into four Lots (with Lot No. 4 serving as a right of way), by Plan No. 4788 dated November 8, 1994, made by D.W. Abeysinghe, Licensed Surveyor (marked "P1"at the trial).

However, it must be noted that the co-owners had neither executed a deed of partition nor cross deeds.[1]It appears that they hadn't placed their signatures on the plan as an acknowledgment or approval of the division. Hence, the division in the said plan has no legal effect. As such, the land legally remained co-owned, notwithstanding the existence of a plan indicating a division.

Subsequently, three of the co-owners, namely, Eubert Silva Amarasinghe, Asithanjan Panduka Sena Amarasinghe and Vijitha Buwanaka Amarasinghe, gifted their respective rights in Lot No. 2 depicted in Plan No. 4788, along with the right of way, to Kanchana Umanga Amarasinghe by irrevocable Deed of Gift No. 1628 dated June 16, 1995, attested by Srimathie Kodikara Notary Public. Eubert Silva Amarasinghe, while gifting his rights, had reserved life interest for himself. As a result, Kanchana Umanga Amarasinghe became the sole owner of Lot No. 2, subject to the life interest of her father Eubert Silva Amarasinghe.

1 *In Githohamy Et Al ., v Karanagoda* Et Al., 56 NLR 250, it was decided that when a land is amicably partitioned among the co-owners it is usual to execute cross deeds among themselves or at least that all the co-owners should sign the plan of partition.

Thereafter, she got an extent of 26.85 perches separated and divided from and out of Lot 2 in plan No: 4788, depicting the same as Lot 2^2 by Plan No: 32/1998 made by B.K.P. Okandapola Licensed Surveyor and transferred the same together with the right of way depicted in the said plan to the 1st Plaintiff, Navagamuwage Ishari Udeshika Perera subject to the life interest of 1st Plaintiff's parents, Premaseili Aloma Perera and Nawagamuwage Richard Perera, the 2nd and 3rd Plaintiffs, upon deed No: 1437 dated 18th October 1999 attested by Ranjani Mendis, Notary Public. As Eubert Silva Amarasinghe had not joined as a transferor in deed 1437, life interest reserved by him remains in force.

Subsequently, by Agreement to Sell No. 2456 dated June 26, 2000, attested by H. Jayawardena, Notary Public, the Plaintiffs agreed to sell their land to Panduka Amarasinghe, a co-owner of Lots 1 and 3 in Plan No. 4788. However, this agreement was never given effect.

The Plaintiffs instituted this action in the District Court seeking demarcation of the common boundary between Lots No. 2 and 3 in Plan No. 4788, which had become obliterated. The relief prayed for, included demarcation of the boundary either in accordance with Plan No. 4788 or Plan No. 32/1998.

Analysis

As already stated above in this judgment, Dona Premawathie was the sole owner of the land described in the First Schedule to the plaint. Upon her demise, her husband and three children succeeded to the ownership. Having succeeded, they divided the land into four Lots with a common right of way. Thereafter, Eubert Silva Amarasinghe and two out of the three children gifted their rights in Lot No. 2 to the third child Kanchana Umanga Amarasinghe. However, in so gifting, Eubert Silva Amarasinghe had reserved life interest for himself. Hence, Kanchana Umanga Amarasinghe was vested with sole ownership in Lot No 2 subject to the life interest of her father.

Kanchana Umanga Amarasinghe then transferred 26.85 perches having divided the same from Lot No. 2, as depicted in Plan No. 32/1998, to the 1st Plaintiff, subject to the life interest of the 2nd and 3rd Plaintiffs.

The learned District Judge dismissed the action on the ground that, although Plan No. 4788 depicted a division, the legal status of co-ownership remained, as no deed of partition was executed and no signatures were subscribed to the plan. The Learned Judges of the High Court affirmed this reasoning.

As aforesaid, the parties neither subscribed in approval of the division nor executed a deed of partition or exchange. The Plan has been made depicting a purported division on 8th of November 1994 and this action having been instituted in the year 2001, no party had possessed each Lot exclusively for a period exceeding 10 years. Therefore, I am of the view that in so far as a Lot 1 and 3 in plan 4788 are concerned, the co-ownership has not come to an end and remains as a common property.

The next issue that arises is whether the heirs of Premawathie namely Eubert Silva Amarasinghe, Asithanjan Panduka Sena Amarasinghe, Vijitha Buwaneka Amarasinghe, and Kanchana Umanga Amarasinghe and their successors in title are estopped from claiming co-ownership due to the fact that they have signed the deed 1437 acknowledging the division. Section 115 of the Evidence Ordinance provides:

115: When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

It appears to me that the question of estoppel does not arise in this case as deed No.1437 has been executed by Eubert Silva Amarasinghe, Asithanjan Panduka Sena Amarasinghe and Vijitha Buwaneka Amarasinghe conveying title to the remaining co-owner, Kanchana Umanga Amarasinghe where by Kanchana Umanga Amarasingha was vested with absolute title. The deed itself would not have an effect of an acknowledgment of

division as it does not relate to the other Lots. It only conveys title to Lot 2 with a servitude in respect of Lot 4 being the means of access. Co-owners are free to divide a portion of common land and alienate the divided portion.

It appears to me that, both Courts have failed to consider that Kanchana Umanga Amarasinghe had lawfully acquired exclusive title to Lot No. 2 from the other heirs and thus had the capacity to alienate the entirety of Lot No. 2 A in plan 32/1998 subject to the Life interest of Eubert Silva Amarasinghe. Accordingly, the 1st to 3rd Plaintiffs have acquired absolute title to Lot No. 2[2] in Plan No. 32/1998, a subdivision of Lot No. 2 in plan 4788.

Since Lot No. 2 is contiguous with Lot No. 3 in Plan No. 4788, the Plaintiffs are entitled to seek demarcation of the common boundary between the two Lots.

Nonetheless, a pertinent issue arises: whether the Plaintiffs can maintain this action solely against Asithanjan Panduka Sena Amarasinghe, who is merely one of the co-owners of Lots 1 and 3. In ***Alfred Fernando v. Julian Fernando***[2], the Court of Appeal held that a co-owner may sue another co-owner of an adjoining land for the definition of boundaries. The Court of Appeal, has observed at page 90; *"As stated by us it is clear that such an addition of all the co-owners of both lands is not necessary*." It appears to me that this determination is a correct expression of law. It is a well-established principle of law that a co-owner could sue a trespasser without the participation of other co-owners. (***Hevawitrane v. Dangan Rubber Co., Ltd.*** 17 NLR 49; ***Arnolisa et al v. Dissan et al*** 4 NLR 163; ***Meera Lebbe Cassi Lebbe Marikkar v. Kalavilage Baba*** (1885) 7 S.C.C.)

If a co-owner could sue a trespasser, in the same way a co-owner should be able to be sued without participation of other co-owners. However, such an action may not bind the other co-owners. Thus, the same principle should be applicable in case of an action for definition of boundaries. Hence, I am in agreement of the judgment in case of ***Alfred Fernando v. Julian Fernando*** *(supra).*

2.1987 (2) SLR 78.

While the Plaintiffs are not barred from maintaining this action, further concerns warrant attention. A commission was issued through the District Court to S.J. Jayawickrama, Licensed Surveyor, who executed the same and tendered Plan No. 2128 dated February 2, 2003, (marked “P6” and the report "P6 A"). The Surveyor`s evidence and the report bear the fact that the common boundary superimposed and depicted as a red line was not demarcated on the ground. According to the surveyor, the superimposed boundary runs through a part of a building of which the balance part falls within Lot 3 in plan 4788. It is the evidence of the Surveyor that superimposition is precise, and accurate.

Nonetheless, the actual boundary on the ground remains uncertain, which may have hindered the Defendant’s ability to present his claims on the above matter at the trial.

Furthermore, the above evidence suggests possible encroachment onto Lot No. 2 by the occupants of Lot No. 3. It is trite law that a Plaintiff cannot use an action for definition of boundaries to vindicate title to encroached land. The appropriate remedy in such a case lies elsewhere.

In ***Alfred Fernando v. Julian Fernando*** (*supra),* it was held that a Plaintiff cannot in the guise of having a boundary defined, have a declaration of title to an encroachment. The test to be applied in an action for definition of boundaries is that the common boundary between two adjacent lands has got obliterated.

The scope of an action ‘*finium regundarum’* was set out in ***Silva v. Silva***[3] as “*whenever the boundary becomes uncertain whether accidentally or through the act of the owner or other party.*” In ***Alfred Fernando v. Julian Fernando*** *(supra)* (at pages 89-91) the Court of Appeal has quoted a passage from Gane in his translation of Voet's Pandects in Book 10 Title 1 Section 1(a) at page 611 as follows: *'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*

3.1997 (2) S. L. R. 382.

marking out of other boundaries of lands" In the same book, at page 617, the scope of an action for definition of boundaries is narrated as "*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*".

Maasdorp's institutes of south African law; the Law of Things – 8th edition at page 11 reads:

"There are several kinds of real rights which are so often spoken of as common that they have come to be somewhat incorrectly regarded as common property, e.g. a common wall, hedge, fence or ditch by which term is meant a wall, hedge, fence or ditch situate upon the common boundary of two adjoining or conterminous properties. It is submitted, however, that these common rights are not common property in the strict sense of the term, but are rather in the position of being the separate property of each of the owners of the adjoining properties up to the actual middle line or common boundary, with a reciprocal servitude as regards that portion of such wall, fence, hedge or ditch which is beyond the line or boundary."

However, the principles applicable to an action for vindication of title are different. A Plaintiff in a vindicatory action should prove his title and the fact that the Defendant is in possession of his land or part thereof.

In ***Alfred Fernando v. Julian Fernando*** *(supra)* it was rightly held that a Plaintiff cannot seek remedies in a vindicatory action in the guise of an action for definition of boundaries. At page 93 the Court of Appeal has observed, *"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)"*

The other obstacle as I observe in the action for the Plaintiffs is that Eubert Silva Amarasinghe is vested with life interest of the land claimed by the Plaintiffs. In such situation, the Plaintiffs are not entitled to take possession of the land to which they claim title.

Conclusion

Although the District Court and the High Court dismissed the Plaintiffs' action on the erroneous basis that the Plaintiffs and the Defendant were all co-owners of the same undivided land and therefore the action was not maintainable, I am of the view that the action nevertheless has to fail for the substantive reasons elaborated in this judgment.

Hence, while answering both the questions of law in the negative due to the aforesaid reasons and facts, I hold that the action of the Plaintiffs should be dismissed as the Plaintiffs cannot have the reliefs in an action for encroachment in the guise of an action for definition of boundaries.

Accordingly, the aforesaid portions of the judgments of the District Court and the High Court are hereby set aside. However, the orders dismissing the Plaintiffs' action in conclusion are affirmed.

No order is made as to costs.

JUDGE OF THE SUPREME COURT

S. Thurairaja, P.C,J.
I Agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J.
I Agree.

JUDGE OF THE SUPREME COURT