

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

S. Marasinghe alias Siripina of
Udagama, Gantuna. (deceased)

PLAINTIFF

Vs.

C.A 287/1997
D.C Kegalle 2610/L

V. Jayaratne
Udagama, Gantuna

DEFENDANT

- 1A. K. C. Marasinghe
Senehasa Niwasa, Gantuna.
- 2B A. Marasinghe
Pallegama, Gantuna.
- 1C. S. Marasinghe
Udagama, Gantuna
- 1D. S. Marasinghe
Walgampaya, Dantura
- 1E. D. Marasinghe
No. 216/8, Nelum Place,
Kalapaluwawa, Rajagiriya.
- 1F. S. Marasinghe
Senehasa, Gantuna
- 1G. C. Marasinghe
Pallegama, Gantuna.
- 1H. T. Marasinghe
Walgampaya, Dantura.

**1A TO 1H SUBSTITUTED
PLAINTIFF-RESPONDENTS**

Vs.

V. Jayaratne
Udagama, Gantuna

DEFENDANT-APPELLANT

BEFORE: Anil Gooneratne J.

COUNSEL: Appellant absent and unrepresented
Athula Perera for Substituted-Plaintiff-Respondent

ARGUED ON: 26.04.2011

DECIDED: 20.05.2011

GOONERATNE J.

This appeal arises from the judgment of the District Court, Kegalle in a land case. The Plaintiff –Respondent by his amended plaint has sought a declaration of title to the land described as lot 1 in the schedule, and for eviction of the Defendant from a portion of land forcibly occupied by the Defendant and also this is an action to define boundaries and claim damages, according to the prayer to the amended plaint.

Perusing the docket although the Appellant and Respondent deposited brief fees and obtained the brief, the Appellant was absent and unrepresented on the dates of hearing of this appeal. This court observes that the Appellant has failed to act with due diligence and prosecute this appeal. As such this appeal is liable to be rejected and dismissed in terms of the rules of this court. Nevertheless this court at the hearing on 26.04.2011, considered the merits of this appeal and heard the learned counsel for the Substituted Plaintiff-Respondent Mr. Athula Perera, who made submissions and assisted court in the disposal of this appeal.

In the original court parties proceeded to trial on 6 issues, raised by the Plaintiff. The Defendant-Appellant did not suggest any issues. An important admission was recorded admitting Plaintiff-Respondent's title to the land described as 'Heenne Hena' referred to in the schedule to the plaint. (title derived by Plaintiff from partition case No. 1293). The learned counsel for Respondent referred to certain items of evidence which favour his client and to material in the Surveyor's plan. He also drew the attention of this court to the evidence of the Defendants witness who had been disbelieved by the learned District Judge. In the judgment at folios 147/148 learned District Judge has given cogent reasons to disbelieve the version of the Defendants witness, who was the Grama Seveka. The case revolves on the question of

causing damage or removal of a stone wall or fence which is described as a 'ଉଡ଼ି ଭାଠ' situated in the North-Eastern boundary of the land in dispute. Defendant resides in the adjoining land and removal of the stone fence resulted in encroachment of Plaintiff land by Defendant.

In the Petition of Appeal the Appellant raise the question of the stone wall being situated on the eastern boundary of the property in dispute and states, at the trial a different situation had been suggested. Issue No. 1 refer to North-Eastern boundary and stone wall being demolished by Defendant. In other words issue No. 1 suggested differ from that pleaded in the plaint and amended plaint as regards the situation of the stone wall. At the trial there had been no objection raised by the Defendant. It is trite law that with framing of issues the pleadings recede to the background and entire case revolves on the issues accepted by court. In law the requirement under under Section 187 of the Civil Procedure Code which deals with requisites of a judgment refer to the points for determination, i.e issues or points of contest and the decision thereon. Therefore once issues are framed pleadings recede to the background. People's Bank vs. Lokuge Int. Garments – Bar Association Law Journal 2010 Vol. XVI Pg. 261. This is a frivolous ground of appeal. The learned District Judge has also considered above in his judgment at folio 138.

The Petition of Appeal also state the learned District Judge has failed to consider the Surveyor's report. I am unable to accept that position as the judgment deals with the Surveyor's evidence in detail. In fact trial Judge refer to the fact that the Surveyor had been cross-examined at length. Extract from the judgment of the District Judge reads thus:

මානක කුරැකුලසුරියගේ සාක්ෂියෙන් දීර්ග වශයෙන් හරස් ප්‍රශ්න අසා ඇත. එනමුත් ඔහු නොපැකිලිව කියා සිටින්නේ ඒ සිට බී දක්වා ගල් බැම්මක් තිබෙන බවත්, එය අඩි 20 ක් පමණ දුරට පිහිටා තිබුනත් අඩි 4 ක් පමණ උසට තිබුන බවත්, අගල් 9, අඩි 1, අඩි 1 ½ පමණ ලොකු කලුගල් වලින් සාදා තිබුන බවත් පැහැදිලිව ප්‍රකාශ කරන ලදී. තවද 'ඒ සිට බී' දක්වා තිබුන ගල් බැම්ම කඩා නොතිබුන බව ඔහු කියයි. 'බී, සී' වශයෙන් පෙන්වා ඇති කොටසේ අඩි 50 ක් 60 ක් පමණ දිග බවත්, එය ඉවුරක් බවත්, එම ස්ථානයේ ගල් බැම්මක් නොතිබුන බවත් ඔහු කියයි. පැමිණිලිකරු තමාගේ ඉඩමෙන් කොටසක් විත්තිකරු අල්ලා ගත් බව කියා සිටියා දැයි ප්‍රශ්න ඇසූ විට එයා කිව්වා එයාගේ බැම්ම කැඩුවා වශයෙන් මානක වරයා පිලිතුරු දෙයි. විත්තිකරු විසින් බැම්ම කැඩුවා යයි කිවු ස්ථානය තමාට පෙන්නු බවත් 'බී, සහ සී' වශයෙන් තමා පිඹුරේ සටහන් කල බවත් මානකවරයා කියයි. 'බී, සහ සී' වශයෙන් දක්වා ඇති බැම්ම තිබූ බවත්, එය විත්තිකරු විසින් කඩා දමන ලද බවත් තමාට පැමිණිලිකරු ප්‍රකාශ කල බව පවසන මානකවරයා ඇලේ සිට අඩි 18 ක් උසට ඉවුර දක්නට තිබූ බවත්, ගල්

බැවීම ඒ වාගේ තත්වයේ තිබූ බවත්, තමාට කියූ බවත් තවදුරටත් ප්‍රකාශ කරයි.
කැඩුන ගල්බැවීම තමාට නොපෙනුන බවත් මානකවරයා කියා සිටී.

The Survey plan describes the encroached stone wall portion as B & C. Evidence and Surveyor's Report gives details of points A to B and B & C. Taken on its entirety I find that Surveyor's evidence has assisted the District Judge in his conclusion.

Judgment deals with the evidence of witness Martin. Although the Appellant alleges bias of this witness, the District Judge had considered and accepted his evidence. Martin has been aware of the dispute and had provided details of encroachment by Defendant and damage caused to the stone wall. This witness gives a clear picture of the situation of the land in dispute. I find that on perusal of Martin's evidence very many factual matters have been considered and dealt with by the learned District Judge in his judgment. This court is reluctant to interfere with primary facts of this case, based on evidence of Plaintiffs and his witnesses which is supportive of the Original Court judgment. Court of Appeal should not generally interfere with primary facts unless cogent reasons could be adduced 1993(1) SLR 119; 20 N.L.R 337.

Plaintiff-Respondent has discharged his burden by providing material to prove his case. On a balance of probability the version of Plaintiff-Respondent is more probable.

As Voet says whatever the boundaries of lands belonging to different owners had become uncertain, whether accidentally or through the act of the owners or of some 3rd person, and action for definition and settling them was provided by Roman Dutch Law (Voet 10.1.1)

I would also refer to few case laws since this type of action is common in our country.

In *Silva Vs. Silva* (53 N.L.R 377) Palle J. held that where a building has been erected not wholly on the ground of another, but is built partly on one's own ground and only encroaches partially on the ground of another, the Court may, where it is equitable to do so, order the owner of the ground encroached on to transfer that portion on reasonable terms to the party who made the encroachment. In *Kuruneru Vs. Haththotuwa* (1983(2) S.L.R 429) H.A.G. de Silva J. held where a defendant is found to have encroached on the plaintiff's lot, the Court may according to the circumstances, order the removal of the encroachment or order the defendant to buy the land encroached upon or order the defendant to pay compensation.

In *Deeman Silva Vs. Silva* (1997 (2)) S.L.R 382) the plaintiff filed plaint for definition of boundaries. He simply pleaded that he was the legal owner and the defendants were the reputed owners of the adjacent lands. The plaintiff averred that he wanted to fix his northern boundary in terms of the defendant's plan, but

as the defendant had failed to respond, wanted the Court to fix the boundary in terms of the plan. District Court held in favour of the plaintiff, and on appeal it was held that an action for definition of boundaries lies only to define and settle boundaries between adjacent owners when ever the boundaries have become uncertain whether accidentally or through the act of the owners or some third party. The plaintiff must come into Court stating (1) that an ascertainable common boundary previously existed on the ground, and (2) that such boundary had been obliterated subsequently.

In all the above circumstances I see no merit in the case of the appellant. This is a frivolous appeal. It is apparent that the previously built stone wall had been disturbed by Defendant subsequently. Judgment of the District Court affirmed.

Appeal dismissed with costs.

JUDGE OF THE COURT OF APPEAL