

1963

Present : Sansoni, J., and H. N. G. Fernando, J.

J. G. KATTO and another, Appellants, and M. J. PIYORIS APPU,
Respondent

S. C. 196/61—D. C. Hambantota, 786/L

Encroachment—Proof.

Plaintiff was entitled, under a partition decree, to Lot J in the partition plan. The 1st and 2nd defendants were entitled under the same decree to Lot I which adjoined Lot J on the North. The plaintiff brought the present action complaining that the defendants were in wrongful possession of a portion of Lot J since the entering of the partition decree.

The partition plan upon which the plaintiff based his action was not produced in evidence at the trial. Further, two commissions issued by the plaintiff to two different Surveyors produced two contradictory plans and reports.

Held, that there was no proof of encroachment.

APPEAL from a judgment of the District Court, Hambantota.

H. W. Jayewardene, Q.C., with *E. A. G. de Silva*, for the 1st and 2nd Defendants-Appellants.

A. F. Wijemanne, for the Plaintiff-Respondent.

Cur. adv. vult.

November 11, 1963. SANSONI, J.—

The plaintiff is entitled under the Final Decree dated 24th November 1954 entered in D. C. Tangalle Case No. 3199 to Lot J in partition plan No. 4012 A dated 15th October 1947. The 1st and 2nd defendants are entitled under the same decree to Lot I which adjoins Lot J on the North. The plaintiff brought this action complaining that the 1st and 2nd defendants and their cultivators the 3rd to 5th defendants were in wrongful possession of a portion of Lot J since the entering of the Final Decree. They asked for declaration of title, ejection and damages.

The 1st and 2nd defendants, who alone filed answer, denied the plaintiff's allegations. On a commission issued to him by the Court on the plaintiff's application, Surveyor Wijendra made Plan No. 1239 after surveying Lots I and J and superimposing the boundaries shown in Plan No. 4012 A. In his report he said that there was no encroachment on Lot J by the defendants, but there was an encroachment by the owners of Lot K which lies to the South of Lot J.

The plaintiff was evidently not satisfied with this plan and report, and he issued a fresh commission to Mr. Ferdinand who had made the Partition plan. Mr. Ferdinand was later asked to return the commission unexecuted, for no reason that appears on the record. He would have been the best person to define his own partition plan on the ground and say whether there had been an encroachment by the defendants or not.

The plaintiff then issued a commission through the Court to Surveyor Wickramasuriya, who made Plan No. 38 and reported that the defendants had encroached on the plaintiff's Lot to the extent of A.1 R.0 P.15.

With these conflicting reports before him, the learned District Judge after trial accepted Surveyor Wickramasuriya's report and gave judgment for the plaintiff. The defendants have appealed.

I am unable to accept the learned Judge's decision. The first serious objection to it is that the partition plan upon which the plaintiff based his action has not been produced in evidence. The Final Decree was produced, but the relevant document to prove his claim that there was an encroachment is the partition plan. Further, Surveyor Wickramasuriya has relied on the following data for his superimposition of the partition plan—(1) two land marks on the southern boundary of Lots K and P. Since he says that no land marks appear in the partition plan, there is no guarantee that they fix correctly the southern boundary of Lots K and P. There is no reason why it should be assumed that the southern boundary of Lots K and P as it now appears on the ground is the same southern boundary that appears in the partition plan. Mr. Wickramasuriya says that the plaintiff showed him the ridge which is the southern boundary of Lots K and P, but he cannot say whether it is the correct southern boundary. (2) The channel on the western boundary, and the eastern boundary of Lot K, were the other data which Mr. Wickramasuriya took for his superimposition. It is in evidence that the old channel shown in the partition plan is not the same channel as exists today. It cannot therefore be regarded as a satisfactory point upon which to base a fixation.

It is difficult to understand why Mr. Wickramasuriya has not surveyed Lot I, which is the defendants' Lot. In the absence of such a survey he is unable to say whether the defendants have taken possession of more land than they are entitled to.

According to Mr. Wijendra, Lot I as possessed by the defendants is A.3 R.3 P.12 whereas under the partition plan it should be A.3 R.3 P.30. If the defendants had encroached on the plaintiff's Lot, far from losing 18 perches of land, I should expect them to be in possession of more than A.3 R.3 P.30. Mr. Wijendra confessed that there were no permanent features on the ground which he could take for his fixation. I think this is probably the true position, in view of what I have already remarked about the data on which Mr. Wickramasuriya relied. Each Surveyor no doubt has done his best, but there is the unsatisfactory result that the two commissions issued by the plaintiff have produced two contradictory plans and reports.

In this state of things the only conclusion I can come to is that the plaintiff has failed to establish that there was an encroachment on his Lot by the defendants, and I would therefore set aside the judgment of the learned Judge and dismiss the plaintiff's action with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.