

Present : Pereira J.

1913.

MARIA *et al.* v. FERNANDO *et al.*

259—C. R. Negombo, 20,382.

Action for definition of boundaries—when it lies.

An action for defining and settling boundaries was provided for by the Roman-Dutch law whenever the boundaries of lands belonging to different owners had become uncertain, whether accidentally or through the act of the owners or some third person. The onus of proving the essential facts in such an action was on the plaintiff, but the action was not allowed to one co-owner against another when a boundary of the common property and one of a property belonging exclusively to one of the co-owners had become "mixed up."

Under our procedure an action for the definition of boundaries would be a proceeding in the nature of an application for relief referred to in section 6 of the Civil Procedure Code, the fact justifying the application being that the boundary between the lands of the parties has become uncertain. No specific "cause of action," as the term is defined in section 5, is necessary.

THE first plaintiff (wife of second plaintiff) was the owner of the land called Ambagahawatta. She averred in her plaint—

- (2) The first and second defendants are the owners of the land to the north of that of the plaintiffs, and all the defendants jointly with the plaintiffs are the owners of the land to the west of that of the plaintiffs; the boundary limits on the north and west of the plaintiffs' land having been from time to time shifted by these defendants, there is now no proper fence or landmark defining the said boundaries.
- (3) The defendants, though often thereto requested, do not consent to have the said boundaries defined and to have a proper fence erected.

The plaintiff prayed:—

- (a) That a commissioner be appointed to define the proper boundaries between the plaintiffs' land and those to the north and west of their land, &c.

The defendants, first to third, merely denied that they objected to the erection of a fence along plaintiffs' boundaries; and fourth defendant alleged that there was a good live fence between his land and that of the plaintiffs.

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The following issues were framed:—

- (1) Is there a cause of action disclosed in the plaint?
- (2) Has plaintiff requested defendants to have the boundaries defined?

The Commissioner (J. R. Walters, Esq.) made the following order:—

Some overt act of obstruction must, in my opinion, be alleged to justify such an action as this, viz., that plaintiff has sought to define his boundaries and has been prevented.

The plaintiff appealed.

A. L. R. Aserappa, for the plaintiffs, appellants.—The action was wrongly dismissed. An action for definition of boundaries lies under the Roman-Dutch law when the boundaries between the lands of neighbours become uncertain and doubtful owing to any cause. (*Voet, bk. 10, tit. 1.*) The mere fact that defendants say that the boundary is defined will not justify a dismissal of the action without trial of the issue raised by the plaintiffs as to the doubtful character of the boundary between the two lands.

De Zoysa, for the first and third defendants, respondents.—Even if an action for definition of boundaries would lie in a case where the boundaries were not defined and were not ascertainable, it was not open to the plaintiffs to bring such an action, as there were old fences in existence which marks the limit between the plaintiffs' land and that of the defendants.

G. Koch, for the fourth defendant.

Cur. adv. vult.

July 25, 1913. PEREIRA J.—

This is intended to be an action for the definition of boundaries. It is a very common form of action under the Roman-Dutch law, and it has been recognized by this Court as obtaining in Ceylon. The plaint in the present case, however, has been so clumsily drawn as very nearly to defeat the object of the action, and the whole case has been proceeded with in Court below under some misconception as to the exact scope of the action. An action for defining and settling boundaries (*actio finium regundorum*) is provided for by the Roman-Dutch law whenever the boundaries of lands belonging to different owners have become uncertain, whether accidentally or through the act of the owners or some third person. (See *Voet 10, 1, 1.*) The onus of proving the essential facts in such an action is on the plaintiff (*Voet 10, 1, 3.*) As stated by Voet, the action is "not allowed to one co-owner against another when a boundary of the common property and one of a property belonging exclusively to one of the co-owners have become mixed up" (*Voet 10, 1, 6.*)

In view of this last proposition the plaintiff's claim to a definition of his western boundary cannot be maintained, and the dismissal of the action with costs as against the third and fourth defendants will stand affirmed. As regards the case against the first and second defendants, I think that the averments in the plaint are sufficient to show that the boundary between the plaintiffs' land and that of the first and second defendants has become uncertain, and that, therefore, the averments in the plaint are sufficient to entitle the plaintiffs to maintain this action to have the boundary defined and settled by the Court. A "cause of action" in the strict sense in which that expression is used in the Civil Procedure Code is not absolutely necessary in a case like this. The present case is rather in the nature of an application, warranted by the Roman-Dutch law, for relief under section 6 of the Civil Procedure Code, the fact justifying the application being that the boundary between the land of the plaintiff on the one side and that of the first and second defendants on the other has become uncertain. The first issue framed is, therefore, unnecessary, and I strike it out. I set aside the order appealed from, and remit the case for the trial of the second issue and such other issues as the parties may agree to, or the Court may deem it necessary to frame, in view of the scope of the action as explained above. All costs will be costs in the cause.

Appeal dismissed as against third and fourth defendants.

Case sent back as against first and second defendants.

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