KURUNERU
v.
HATHTHOTUWA

COURT OF APPEAL
TAMBIAH, J. AND H. A. G. DE SILVA, J.
S.C. 793/75 &
S.C. 794/75 F
D.C. MOUNT LAVINIA 855/L
14, 15 DECEMBER 1982.

Rei vindicatio action — Encroachment — Remedies for encroachment.

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 deciding what to do the court will consider the conduct of the parties whether the encroachment was made in bad faith with knowledge that it was an encroachment, or whether he thought he had a right to do what he did and whether the plaintiff saw the encroachment while it was in progress and said nothing about it; or if he did not know of it until after it was finished whether he acquiesced in it for a long period or otherwise.

Where the defendant had put up a parapet wall and two sewerage pipes encroaching on plaintiff's lot at the time it belonged to his (plaintiff's) predecessor without any protest from the predecessor, and where when the plaintiff bought his lot the wall was there and the precaution of a survey at the time of purchase had not been taken, an order for compensation would meet the ends of justice.

Cases referred to :

1. *Silva v. Bastian* 15 NLR 132.
2. *Abeykoon Hamine v. Appuhamy* 52 NLR 49.
3. *De Silva v. Goonetilleke* 32 NLR 217.
4. *Mutusamy v. Seneviratne* 31 C.L.W. 94.
5. *Wanigaratne v. Juwanis Appuhamy* 65 NLR 167.
6. *Peeris v. Savunhamy* 54 NLR 207.
7. *Miguel Appuhamy v. Thamel* 2 Current Law Reports 209.
8. *Bisohamy v. Joseph* 23 NLR 350.

9. *Sego Nadar v. Makeen* 27 NLR 227.

APPEAL from judgment of the District Judge of Mt. Lavinia.

H. W. Jayewardena, Q.C. with *Miss P. Seneviratne* for plaintiff-appellant in S.C. 793/75 and for plaintiff-respondent in S.C. 794/75.

C. Ranganathan, Q.C. with *D. R. P. Gunatilake* for the defendant-respondent in S.C. 793/75 and for the defendant-appellant in S.C. 794/75.

Cur. adv. vult

February 08, 1983.
H. A. G. DE SILVA, J.

The Plaintiff in this case filed action against the Defendant seeking a declaration that he is entitled to the portion of the land marked 'X' in Plan No. 2051 (P3) which he alleges had been encroached upon by the Defendant; (b) for an order directing the Defendant to remove the encroachment; (c) that the Defendant be ordered to divert the sewage pipes fixed to the wall of the Defendant's house, from the Plaintiff's land; (d) if the Defendant fails to carry out the orders sought, such removal to be effected by officers of the Court and (e) damages.

The case went to trial on the following issues:

(1) Is the Plaintiff the owner of the land described in the Schedule to the Plaint upon Deed No. 23 of 1968?

(2) Is the strip of land depicted as Lot X in Plan No. 2051 of 2.3.74 a portion of the Plaintiff's land?

(3) If so has the Defendant encroached on the said portion depicted as X

(a) by putting up a parapet wall

(b) by putting two sewage pipes?

(4) If issues 1, 2 and 3 are answered in the Plaintiff's favour is the Plaintiff entitled

(a) to have the said encroachment removed?

(b) to recover damages?

(5) If issues 4(b) is answered in the Plaintiff's favour in what sum is he entitled to as damages?

(6) Are the Defendant and his wife the owners of the land to the East of the land claimed by the Plaintiff?

(7) Is Lot X in Plan No. 2051 a part of the land of the Defendant and his wife?

(8) If so can the Plaintiff maintain this action?

The learned Trial Judge in his Order answered issues 1, 2, 3(a) & (b) and 6 in the affirmative and issues 4(a) & (b) and 7 in the negative. In regard to issue 5 he held that the Plaintiff was not entitled to damages, and on issue 8, he held that the Plaintiff can maintain this action to recover the value of the portion of land encroached by the Defendant. He goes on to say in his Order, "I therefore hold that the strip 'X' (depicted in Plan P3) is part of Lot B3D of the Plaintiff's land. The Plaintiff is however not entitled to have the encroachment by the Defendant, the parapet wall and sewage pipes on the wall of the Defendant's house removed. The Plaintiff will however be entitled to compensation for the portion of his land encroached by the Defendant as assessed by the Commissioner of this Court. The Defendant will also pay the costs of the commission. On payment of the compensation Defendant will be the owner of the strip of land depicted as lot 'X' in Plan P3. The Plaintiff will also be entitled to the costs of this action". It is from this Order that both the Plaintiff and Defendant have appealed.

The Plaintiff's case was that he became owner of the Lot B3D depicted in Plan No. 2204 of 12.6.60 (P1) on Deed No. 23 of

10.7.68 (P4). He also purchased Lot B3C. The Defendant, it is alleged has built a parapet wall encroaching on the Eastern side of Lot B3D. This encroachment is said to be 18" wide, North to South, is 0.34 perches in extent, and depicted as 'X' in Plan 2051 of 2.3.74 (P3). The Defendant is said to be the owner of premises bearing No. 29/8, Visakha Road, Colombo, which premises lies immediately to the East of Lot B3D owned by the Plaintiff. At about the same time that he had purchased Lot B3D, he avers that he had also purchased Lot B3C.

When the Plaintiff commenced on 13th February 1974 to lay the foundation of the building to be constructed on a plan approved by the Colombo Municipality, he discovered the alleged encroachment. The Plaintiff had thereafter on 2nd March 1974 had this land surveyed and Plan P3 prepared which showed that the encroachment was all along the parapet wall constructed by the Defendant. Prior to the land being surveyed and the Plan P3 being made the Plaintiff had discussed this encroachment with the Defendant who had denied that there was any such encroachment but had said that if there was such an encroachment, he was prepared to pay for it but was not prepared to demolish the parapet wall. The Plaintiff had even offered to pull down the offending wall and construct a new one at his own expense but to this too the Defendant was unwilling to agree. The Defendant in his evidence at the trial has denied that any such discussions had taken place.

The Defendant's position was that he and his wife had become the owners of the land depicted as Lot 1 in Plan No. 1043 of 1967 (D2) and Deed No. 645 of 4.1.1966 (D4). He had inspected the land before he purchased it. There was a live and barbed wire fence on the West of Lot 1 and this is shown in Plan D2. Lot 1 had well-defined boundaries and Plan D2 showed boundary stones at the North Eastern, South Eastern and South Western corners of Lot 1. He had completed building his house and the parapet wall by March 1967. The parapet wall had been built by making use of the boundary stones. Dayananda Rodrigo the owner of the land now claimed by the Plaintiff saw him building his house and wall but made no protest.

Mr. Ranganathan contended that the Plaintiff has failed to prove title to the encroachment 'X' in P3 and hence his action must necessarily fail. It was his submission that this action was in reality a *rei vindicatio* action and it was incumbent that the Plaintiff proved his title to the alleged encroachment. He cited a series of cases in support of his contention.

In *Silva v. Bastian* (1) it was held that a Crown grant by itself created no presumption of the title of the Crown to the land it conveys. Similarly, it was held in *Abeykoon Hamine v. Appuhamy* (2), that in the maritime Provinces, a Crown grant does not raise a presumption that the grantee is vested with dominium. The Plaintiff in an action *rei vindication* cannot therefore rely on a Crown grant alone to discharge the initial burden of proof that rests on him to establish that he has dominium to the land in dispute.

This principle has been reiterated in a number of cases which makes it more or less axiomatic; the leading cases on this point are *De Silva v. Goonetilleke*, (3) ; *Mutusamy v. Seneviratne*, (4) ; *Wanigaratne v. Juwanis Appuhamy*, (5) ; *Peeris v. Savunhamy*, (6) and in Maasdorp's Institutes of South African Law, Vol II (9th Edition) page 68 it is stated that—

> "the Plaintiff's ownership in the thing is the very essence of the action and must be both alleged and proved, and the claim may therefore be met by the defence that a third party and not the Plaintiff is the owner. The action should as a rule be brought against the person who is in possession of the property claimed".

I will now proceed to consider whether the Plaintiff has adequately proved his ownership of the portion encroached upon.

In paragraph 2 of his Plaint the Plaintiff avers that by virtue of Deed of Transfer No. 23 of 10.7.68, (P4) he became owner of premises described in the schedule to the Plaint. Schedule 1(a) refers to "all that allotment of land marked Lot B3D in Plan

No. 1104 of 10.6.1960 (P1) with the building thereon bearing assessment No. 28/1, Vajira Road ..... and which said Lot B3D is bounded on the North by Lot B3A (reservation for road) East by the property of Mr. N. L. Silva, South by the property of Mrs. N. L. Silva and on the West by Lot B3C and counting 5.2 perches.

The Defendant in para 3 of his answer states that he is unaware of the facts placed in paragraph 2 of the Plaint and calls upon the Plaintiff to prove the said facts if so advised.

Para 3 of the Plaint avers that the Defendant is the owner or reputed owner of premises bearing No. 24/8, Visakha Road, Colombo 4, which premises lie immediately to the West and adjoining the premises owned by the Plaintiff. In answer to this the Defendant denies that he owns any premises bearing No. 24/8, Visakha Road, Colombo 4, lying immediately to the West of and adjoining the premises alleged to be owned by the Plaintiff.

The Plaintiff in his evidence stated that on (P4) he purchased Lot B3D and that he had also purchased the adjoining Lot B3C. He had bought these two Lots to put up a house. He had purchased these lots in July 1968. At that time there had been two tenements and his idea was to demolish these two tenements and put up the house.

In cross-examination he had stated that the land was not surveyed before it was surveyed by Mr. Abeygunawardane for the purposes of this case. When he purchased this land he had gone to the spot. He had seen on the Eastern boundary of Lot B3D, a new parapet wall, about which he is now complaining. This parapet wall had been in existence in 1968 before he purchased the land. It was a new wall and it has been built recently. According to Plan (P1), the Eastern boundary of B3D is a live and wire fence. At the time he purchased this land there was no wire and live fence and the parapet wall had taken its place. He had noticed on the other side of the parapet wall a completely constructed house, and the Defendant was in occupation of it.

The Defendant stated in his evidence that he and his wife Pushpa Kumari by Deed No. 645 of 24.1.1966 (D4) purchased Lot 1 and he had constructed a house on the land which bears assessment No. 29/8, Vajira Road, Colombo. He stated that (D4) recites the title to Lot 1 which he and his wife purchased. He further states that when he was building the house and wall, there were persons living on the land to the West which is the **Plaintiff's land.** The owners of the land to the West did not object when he was building the house and the wall. He knows a man called Dayananda Rodrigo. This Dayananda Rodrigo was there when he was building his parapet wall on the Western side. Again in the course of his evidence, speaking of the alleged discussion that was said to have taken place between himself and the Plaintiff, he has said that he had told the Plaintiff that he, the Defendant had not encroached on the **Plaintiff's land.**

Dayananda Rodrigo, the Plaintiff's predecessor in title to this Lot B3D, gave evidence that at one time he was the owner of Lot B3 in Plan P2 at Vajira Road. He was the owner of this land. His father Shelton Rodrigo during his lifetime had got B3 partitioned by the Surveyor and divided B into four lots B3A to B3D. On Deed P4 he had sold Lot B3D in Plan P1 and also Lot B3A which is a road reservation from Vajira Road, to the Plaintiff in this case. He had become the owner of the land on Deed No. 536 of 28th August 1960 as stated in P4. Incidentally this Deed No. 536 was not produced.

Deed P4 recites the title of Dayananda Rodrigo, the predecessor in title of the Plaintiff. He has testified to such ownership in his evidence but there was no cross-examination on this point by the Defendant, nor was the Plaintiff so cross-examined. On the other hand the Defendant himself has in his evidence referred to the land adjacent to his land on the West as the Plaintiff's land. Deed P4 defines the land transferred by it as Lot B3D in Plan No. 2204 (P1). It is therefore quite clear that whatever the Defendant stated in his answer, during the course of the trial he has accepted that Lot B3D was transferred on P4 and that Lot B3D since D4 is owned by the Plaintiff. I therefore

agree with the conclusion come to by the learned Trial Judge that the Plaintiff has at the trial proved that he is the owner of Lot B3D and he was correct when he answered issue 1 in the affirmative.

As the learned Trial Judge has stated in his Order, the main question in this case is whether the portion marked 'X' in Plan P3 is an encroachment i.e. is it a portion of Lot B3D owned by the Plaintiff. There is no doubt that the strip 'X' is the portion on which the parapet wall has been built.

Mr. Ranganathan has contended that in 1968, when the Plaintiff is alleged to have purchased Lot B3D on P4, the wall was in existence. The Plaintiff saw this wall on his Eastern boundary. He did not get a survey done and a plan prepared prior to the purchase, but in P4, the metes and bounds of Lot B3D have been stated in reference to Plan P1, made in 1960 at the time when Deed No. 536 by virtue of which Dayananda Rodrigo derived his title was executed. The existence of the encroachment which is depicted as 'X' in P3 was discovered as a result of the survey done by Surveyor Abeygunawardane and superimposing it on Plan P1. I. W. Indatissa who prepared Plan P1 in 1960 and Abeygunawardane who did the last survey and made the superimposition have given evidence and their evidence has been accepted by the learned Trial Judge in preference to the evidence of W. O. Wijesingha who surveyed the Defendant's land and prepared Plan No. 780 (D1) by superimposing his plan on Plan No. 1043 (D2)which is referred to in Deed D4, by virtue of which the Defendant's land was purchased by the Defendant and his wife in 1966. The learned Trial Judge has dealt exhaustively with the evidence of these three surveyors and has come to the conclusion that he accepts the evidence of the two surveyors called by the Plaintiff, and in accepting the evidence of Abeygunawardane who made Plan P3, that the strip marked 'X' was an encroachment on Lot B3D owned by the Plaintiff.

Mr. Ranganathan also referred to the evidence of the Defendant who stated that he completed his house and parapet wall by March 1967 and Dayananda Rodrigo who owned

Lot B3D did not protest when the parapet wall was built. He contended that, had there been an encroachment, Dayananda Rodrigo would have protested to the Defendant immediately. Dayananda Rodrigo has stated that he was the owner and had seen the Defendant building the house, but at that time he was residing at Dehiwela. It may very well be, that on his visits to this Colombo land, Rodrigo, though he had seen the house and parapet wall being built, it did not occur to him that an encroachment was taking place. Had he been residing on that land itself or in close proximity to the house that was being constructed, he may have taken greater care to see that boundaries of his land were not being encroached upon.

Considering the evidence led in this case I do not think one could say that the learned Trial Judge was wrong in holding that the Defendant had encroached on the Eastern boundary of Lot B3D. Similarly regarding the sewage pipes and the down pipes, the learned Trial Judge has, as he is entitled to do, accepted the evidence of the Plaintiff and his surveyor Abeygunawardane, in preference to the evidence of the Defendant and his surveyor Wijesinghe. He cannot be faulted for coming to such a conclusion.

The Plaintiff-Appellant has in his petition of appeal prayed (a) that the Defendant-Respondent be ordered to remove the parapet wall built by the Defendant-Respondent on the encroached portion of the land and marked 'X' and the Plaintiff be restored to possession thereof; (b) that the Defendant-Respondent be ordered to remove the sewage pipes on the Western side of this house wall from the Plaintiff's land; and (c) that the Defendant-Respondent be ordered to pay the Plaintiff-Appellant damages in Rs. 5325/-. The Defendant has on the other hand in his cross-appeal maintained that the Defendant cannot be ordered to pay compensation for any encroachment.

Mr. Ranganathan contends that the order made by the learned Trial Judge in reference to the award of damages or to permit the Plainitff to have the encroachment by the Defendant viz., the

parapet wall and the sewage pipes on the wall of the Defendant's house need not be removed, is an equitable order and this Court should not interfere with such an order. He cited the case of *Miguel Appuhamy v. Thamel* (7), which held that where the Plaintiff asked the Court to order the Defendant to remove a building which is an encroachment on the Plaintiff's land, the Court may, according to the circumstances, either order the removal of the encroachment or order the Defendant to buy the portion of the land encroached upon", and it was also held by Hutchinson C.J. that "there may also be a power, instead of doing either of those things, to order the Defendant to pay compensation". Hutchinson C.J. went on to say at page 210, "In deciding what to do the Court of course will consider the conduct of the parties. Whether the Defendant's encroachment was made in bad faith with knowledge that it was an encroachment, or whether he thought that he had a right to do what he did, and whether Plaintiff saw the encroachment while it was in progress, and said nothing about it; or (if he did not know of it until after it was finished) whether he acquiesced in it for a long period, or otherwise".

In *Bisohamy v. Joseph* (8), "the Defendant built a house wall and in doing so encroached upon a very small strip of land belonging to the Plaintiff. The Plaintiff who was aware of the building raised no objection at the time. In the circumstances the Court, instead of giving judgment for the actual portion encroached upon, as prayed for by the Plaintiff, ordered Defendant to pay compensation for the encroachment. Sampayo J. said, "the strip is so narrow that it would be inequitable to compel the Defendant to break down the wall".

In *Sego Nadar v. Makeen* (9) it was held that if in the circumstances the plaintiff could be compensated by damages, an injunction to compel the Defendant to remove the building and restore a small strip of unbuilt land should not be granted.

In the instant case we have the following facts:

(1) In 1967 when the Defendant was putting up his house and constructing the parapet wall, Dayananda Rodrigo

the Plaintiff's predecessor-in-title who saw the house and parapet wall being built did not protest.

(2) At the time the Plaintiff purchased the land in 1968 on P4, the house and parapet wall were already in existence i.e. by that time the land the Plaintiff was purchasing had been encroached upon. He did not take the elementary precaution of having the land surveyed and a plan made. If, as it was elicited in evidence, the blank wall carrying the sewage pipes was on the boundary, and the parapet wall was not in line with the wall of the house but jutting 18" towards the Plaintiff's land, and had the Plaintiff been more observant and careful, he would have noticed this discrepancy and got a survey done. He had been negligent in not having got this done.

(3) The Plaintiff states that it was only when the foundation of the proposed house on Lot B3D was being laid in 1974 in accordance with the Municipal Council's approved plan, that the Engineer had told him that the foundation could not be laid as the ground extent was not enough. It was then that he discovered the encroachment. Mr. Ranganathan quite correctly submits that the evidence of what the Engineer told the Plaintiff was hearsay as the Engineer had not been called as a witness. Further he submits that there is no evidence that a house cannot be constructed on the extent of Lot B3D that is now left to the Plaintiff. Lot B3D is 4.79 perches and Lot B3C which is also owned by the Plaintiff has 4.2 perches, i.e. in all the Plaintiff has 9.04 perches (Vide P3). The encroachment 'X' is 0.34 perches. Therefore even if he had this additional strip the Plaintiff would only have 9.38 perches in all. There is no evidence that even if a house could be built on 9.38 perches that a house with the necessary modification cannot be built on 9.04 perches.

The Plaintiff states that though he purchased these two Lots in 1968, he commenced construction of the house only in 1974,

that is 6 years after he bought it. He also stated that he was away in the U.S.A. on scholarship for one year and that though the plans of his house had been approved in 1969, the loan that he had applied for to construct this house had only been finalised in 1974. Even if he had been away for one year, he still had five years to notice and protest at the encroachment. This he has failed to do. In the circumstances the order made by the learned Trial Judge is in my view eminently just and I affirm his findings on issues 4(a) (b), 5 and 8.

I therefore, in conclusion, affirm the Order of the learned Trial Judge in its entirety and I dismiss the appeals of the Plaintiff and of the Defendant. The parties will bear their own costs.

TAMBIAH, J.—I agree.

Appeals dismissed
Order of District Judge upheld