1967 *Present :* **Siva Supramaniam, J.**

M. JACOLIS APPU *et al.*, Appellants, *and* W. A. DAVID PERERA, Respondent

S. C. 66/1966—C. R. Gampaha, 9074/A

Action for definition of boundaries—Scope—Jurisdiction of Court of Requests.

An action for definition of boundaries presupposes that the parties to the action are admittedly owners or occupiers of contiguous lands. Such an action cannot be maintained in a Court of Requests if the plaintiff is in reality seeking a declaration of title to one of the lands which is worth more than Rs. 500.

APPEAL from a judgment of the Court of Requests, Gampaha.

Frederick W. Obeyesekere, for the Defendants-Appellants.

F. R. Dias Bandaranaike, for the Plaintiff-Respondent.

Cur. adv. vult.

March 15, 1967. SIVA SUPRAMANIAM, J.—

The plaintiff-respondent to this appeal, claiming to be the owner of the allotment of land depicted as lot 4B on Plan No. 1194 (P8) dated 8.2.1962 made by A. R. C. Kiel, Licensed Surveyor, instituted this action for a definition of the western boundary of that allotment, namely, the boundary separating that allotment from the allotment marked Lot 4A on the said plan. He averred in the plaint that the defendants-appellants were in possession of lot 4A, and, about two months prior to the date of the action, pulled out a live fence that existed between the two lots and obliterated the boundary. The appellants denied that there had been any fence separating the two lots and stated that they had been in possession of lots 4A and 4B as one lot for a period of over twenty years and claimed to have acquired prescriptive right and title to the said lot.

Lots 4A and 4B had originally formed part of a larger land which was the subject matter of a Partition action in Case No. 51206 D. C. Colombo. In terms of the Final decree and the scheme of partition in the said case, lot 4 on plan No. 172 (P6) dated 1st October 1940 made by V. Karthigesu, Licensed Surveyor, was allotted to the 2nd plaintiff in the said action. The respondent claimed to be the successor in title of the aforesaid 2nd plaintiff. Lots 4A and 4B constitute the southern portion of lot 4 on the said plan. The mother of the 2nd appellant who was also a party to the said action was allotted lot 5.

In case No. 8287/L. D. C. Gampaha, the respondent as well as certain other persons who claimed to be the owners of lots 6-15 on the said Partition plan P6 sued the appellants on 1st February 1960 for a definition of the boundary between lot 5 and lot 6. It was averred in the plaint that the appellants had been in wrongful occupation of some of the lots 6-15 for a period of eight months prior to the date of the action. On a commission issued in the said action to M. S. Fernando, Licensed Surveyor, a plan No. 1578 dated 20th May 1960 (D2d) was prepared by him. Lots 5-15 on the said plan correspond to lots 5-15 on the partition plan P6. Lot 4 on the said plan which forms the northern boundary of lots 5-15 forms the southern portion of lot 4 on the Partition plan P6 and corresponds to lots 4A and 4B on P8. In the answer filed by the appellants in the said case (D2b) they stated that they were in possession of lots 4-8 on the said plan No. 1578 (D2d) since 1942 and had acquired prescriptive right and title to the said lots. They claimed all the buildings and plantations on the said lots, and pleaded that the respondent and the other plaintiffs were attempting, in the guise of an action for definition of boundaries, to claim title to premises, possession of which they had lost many years prior to the date of the action. Among the issues on which the trial proceeded were :—

(*a*) Are the defendants the owners of lots 4 to 8 in plan No. 1578 filed of record ?

(*b*) Have they acquired prescriptive title thereto ?

During the course of the trial the case was settled and the plaintiff's action was, by consent of the parties, dismissed on 2.11.1960.

The respondent, thereafter, on 27th July 1961, instituted another action against the appellants—Case No. 9207/D. C. Gampaha—stating that the appellants had on or about the 13th day of December, 1960, " forcibly and unlawfully entered into the southern portion of lot 4 on plan 172 " (P6) and praying, *inter alia*, for a declaration of title to the said portion and for ejectment of the appellants therefrom. The portion of land referred to was described in the schedule to the plaint as follows :—

> " All that southern portion of lot 4 depicted in plan No. 172 dated 1st October 1940....bounded on the North by the remaining portion of lot 4 belonging to the plaintiff, on the East by cart road, on the South by lots 5 to 15 depicted on the said plan No. 172 and on the West by cart road, containing in extent about one and a half roods. "

On a commission issued in the said case, surveyor Kiel prepared plan No. 1194 dated 8th February 1962 (P8)—Lots 4A and 4B on the said plan correspond to lot 4 on plan 1578 (D2d). According to his report P3c, a superimposition of plan No. 172 (P6) on his plan 1194 showed that 4A in extent 19½ perches was an encroachment by the 1st and 2nd defendants (the present appellants). He also stated in his report that Lot 4B in extent 31 perches was in plaintiff's (the present respondent's) possession. There was no boundary in existence between lots 4A and 4B, and the surveyor's report in regard to the possession of Lot 4B was apparently what he had gathered from the respondent at the survey as, according to the report, the appellants were not present. The appellants, in their answer (P3b), re-asserted that they had been in possession of Lots 4A to 8 on Plan 1194, for over ten years and prayed for a declaration of title in respect of the said lots in their favour. In paragraph 3 (*a*) of the answer they stated that lot 4A in plan 1194 was identical with lot 4 in plan 1578. This was obviously an error as lot 4 in the latter plan comprised of lots 4A and 4B of plan 1194. After trial, the plaintiff's action in respect of lot 4A was dismissed on 29th May 1963. There was no reference in the decree in regard to the rights of the parties to lot 4B, although the land described in the schedule to the plaint in respect of which a declaration of title was prayed for by the respondent comprised of lots 4A and 4B.

The respondent, thereafter, instituted the present case on 14th October 1964 praying for a definition of boundaries between lots 4A and 4B. The learned Commissioner of Requests gave judgement in favour of the plaintiff and the defendants have appealed therefrom. The Commissioner has held that the respondent " had possessed lots 2 and 4 in Final Partition plan P6 since 1938 without interference when the defendants encroached upon a portion of lot 4 of this land in 1961. " In arriving at his conclusion that the respondent had established his title to and possession of Lot 4B so as to entitle him to maintain this action for definition of boundaries, the leaaned Commissioner appears to have been

influenced considerably by his finding that the appellants had not preferred any claim to lot 4B in the earlier action No. 9207/L. He states in the course of his judgment as follows :—" It is, however, significant that in case 9207/L filed in 1961, he did not prefer any claim to lot 4B. If in fact he possessed lot 4B since 1938, he would have preferred a claim to this lot as well when he filed his answer in that case. Vide his answer P3B where he preferred a claim to lots 4A *and* 5 to 8 in Plan P8. The surveyor's report P3c filed in that case shows that the lot 4B was in the possession of the plaintiff. The probabilities clearly are that the defendants did not possess any portion of lot 4 B and that was why no claim was preferred by them to that lot..........I feel that the defendant has set up a claim to lot 4B for the first time in this action with a view to wrongfully claim lot 4B as well. " In reaching the foregoing conclusions, the learned Commissioner has clearly misdirected himself on the facts. In the first place, in the answer filed by the appellants in case No. 9207/L, they claimed and prayed for a declaration of title in their favour to lots 4 A *to 8* and not lots 4A *and 5 to 8*. The expression " lots 4A to 8 " will undoubtedly include lot 4B. The appellants also made it clear in paragraph 3 (*a*) of their answer that they were claiming the portion depicted as Lot 4 on plan 1578 filed in case No. 8287. Lot 4 on plan 1578 unquestionably includes lot 4B . The learned Commissioner does not appear to have correctly appreciated the significance of the plan 1578 and the connected documents when he brushed them aside as irrelevant. It is clear that in the very first action between the parties in 1960 the appellants laid claim to the portion of land now described as lot 4B. Surveyor Kiel was not called as a witness at the present trial and the statement contained in his report P3c that the plaintiff was in possession of lot 4B was clearly hearsay and should not have been acted upon by the learned Commis ioner. As stated earlier, the appellants were not present at Kiel's survey and he had not questioned the appellants. The respondent's own amended plaint in Case No. 9207/L set out that the appellants were in wrongful possession of the portion of land on plan 172 (P6) which was bounded on the south by lots 5 to 15 and on the north by the remaining portion of lot 4. The portion of which the appellants were said to be in wrongful possession therefore included lot 4B. That the respondent, at a later stage of the action, decided to confine his claim to lot 4A only cannot affect the appellants' position that they were entitled to and were in possession of Lot 4B as well.

It is clear from the facts which I have set out above in some detail that at least from the time action No. 8287 was instituted in February 1960, the title to the portion now described as lot 4B was in dispute between the parties. The respondent was aware of the claim put forward by the appellants. In seeking a definition of boundaries between lots 4A and 4B the respondent was in reality seeking a declaration of title to lot 4B. An action for definition of boundaries presupposes that the parties to the action are admittedly owners or occupiers of contiguous lands. The question of title raised in issues Nos. 1 and 5 at the trial was not incidental to the question of the respondent's right to have the boundary

defined but was the real crux of the dispute between the parties. The disputed extent of land was the whole of lot 4B which, according to the respondent himself, was worth more than Rs. 500. The Court of Requests, therefore, had no jurisdiction to hear and determine the action. Issue No. 6 should have been answered in favour of the appellants.

I set aside the judgment and decree and dismiss the plaintiff-respondent's action with costs in both Courts.

Appeal allowed.