VERNON BOTEJU

v.

PUBLIC TRUSTEE

COURT OF APPEAL
WEERASURIYA, J.
UDALAGAMA J
C.A. 663/90
D.C. COLOMBO 4956/ZL
SEPTEMBER 30, 1989
NOVEMBER 30, 1999

Rei Vindicatio Action - Executor entitled to administer property - Order for ejectment - Is the Administrator functus officio - Delay in delivery of Judgment - Civil Procedure Code S 187 and 540, Constitution Article 138(1).

The Plaintiff - Respondent (Public Trustee) instituted action in the capacity as Executor of the Lastwill of the deceased one 'B' to recover possession of the property, in possession of the Defendant Appellant.

The Defendant - Appellant denied that he was in unlawful occupation. District Court entered Judgment in favour of the Plaintiff - Respondent.

It was contended by the Defendant - Appellant that the Plaintiff - Respondent was functus officio, and that there was a long delay of 33 months to deliver Judgment, and that the Plaintiff - Respondent has failed to prove the necessary ingredients for a rei vindicatio action.

Held :

(i) In this instance at the time of the institution of the action, the Executor had not completed the administration of the Estate, for the reason that the land in question was in the possession of the Defendant - Respondent. To be functus officio he has to duly complete the administration of the estate.

(ii) The case of the Defendant - Appellant was entirely dependent on the construction of documents and on the conclusion drawn from such documents. There is no allegation that the Trial Judge has over looked or misconstrued some features of the oral testimony. Therefore there is no material to establish that delay of 33 months though reprehensible has occasioned a failure of justice.

(iii) The direction in the Lastwill that Lot 11 has been bequeathed to 'N' indicate that before his death 'B' had acknowledged the existence of Lot 11 in lieu of his undivided rights to the said property. The admissions show that the Defendant - Appellant has accepted posession of the property allotted to the 16th Defendant which forms a part of the estate of 'B' in terms of his Lastwill admitted in T/1005/90. D. C. Colombo.

APPEAL from the Judgment of the District Court of Colombo.

Cases referred to :

1. *Aron Fernando v. R.M. Buddhadasa* 1986 Colombo Appellate Law Report - Vol. 2 page 112
2. *Edwin v. De Silva* 62 N.L.R. page 45
3. *Saravanamuttu v. Saravanamuttu* 61 N.L.R. 1
4. *Senanayake v. Edirisinghe* B.A.S.L. Law Journal 1990 Vol. III part - 2 page 5

Faiz Musthapa P. C., with *Chula Bandara* for Defendant - Appellant.

P. A. D. Samarasekera, P. C., with *Keerthi Sri Gunawardena* for Plaintiff - Respondent.

Cur. adv. vult.

May 19, 2000.

WEERASURIYA, J.

The Public Trustee (hereinafter referred to as the plaintiff-respondent) by plaint dated 10.05.1985, instituted action against the defendant-appellant seeking the following reliefs.

(a) a declaration that the land described in the schedule to the plaint belong to the estate of late Francis Joseph Botejue;

(b) a declaration that the plaintiff-respondent in his capacity as executor of the last will is entitled to the administration of the said property;

(c) a declaration that the defendant-appellant is not entitled to possess the property;

(d) an order for ejectment of the defendant-appellant and all persons holding under him there-from; and

(e) damages.

The defendant-appellant in his answer whilst denying the allegation that he was in unlawful occupation of the property prayed for dismissal of the action. This case proceeded to trial on 21 issues and at the conclusion of the case, learned District Judge, by his judgment dated 24.04.1990 entered judgment for the plaintiff-respondent. It is from the aforesaid judgment that this appeal has been lodged.

At the hearing of this appeal, the case of the defendant-appellant was presented on the following grounds.

(a) that the learned District Judge has failed to consider that the plaintiff-respondent was functus officio;

(b) that grave prejudice has been caused to the defendant-appellant as the judgment has been delivered 33 months after the conclusion of the case; and

(c) that the plaintiff-respondent has failed to prove the ingredients necessary for a rei vindicatio action.

The contention of learned Counsel for the defendant-appellant that the plaintiff-respondent was functus officio was based on the premise that the executor (plaintiff-respondent) by instrument dated 14.10.1992 conveyed this property to Neomi Perera a beneficiary named in the last will. It is significant to note that the executors conveyance has been effected in 1992 two years after the delivery of the judgment and seven years after the institution of the action.

The plaintiff-respondent has instituted this action in his capacity as executor of the last will of the deceased Francis Joseph Botejue to recover possession of the aforesaid property which was admittedly in the possession of the defendant-appellant. The plaint also disclosed that the plaintiff-respondent was appointed as executor of the last will as authenticated by

the issue of probate in testamentary case No. 1005/90 of the District Court of Colombo.

In terms of Section 540 of the Civil Procedure Code if no limitation is expressed in the order making the grant, then the power of administration, which is authenticated by the issue of a grant of probate, or is conveyed by the issue of a grant of administration, extends to every portion of the deceased person's property, movable and immovable, within Sri Lanka and extends until the whole of the said property is administered, or the completion of the administration which ever occurs first.

In the case of *Aron Fernando Vs. R. M. Buddhadasa*[1] it was held that an administrator could be considered functus officio not because he has rendered a final account nor even because there has been a judicial settlement of the estate. The true criterion appears to be whether he has duly completed the administration of the estate.

In the instant case, action has been instituted to recover possession of the property which was admittedly in the possession of the defendant-appellant. It was evident that at the time of the institution of the action, the executor has not completed the administration of the estate for the obvious reason that land described in the schedule to the plaint was in the possession of the defendant-appellant. Therefore, the executor in the instant case had complete power and authority to institute action for a declaration that the property described in the schedule to the plaint belong to the estate of Francis Joseph Botejue and to recover its possession and ejectment of the defendant-appellant therefrom.

The contention of learned Counsel for the defendant-appellant that grave prejudice has been caused to him, due to the delay of delivering the judgment 33 months after the conclusion of the case was based mainly on the premise that failure of the District Judge to answer issues Nos. 16 - 21 was caused by fading away of his memory with time.

Issues Nos. 16, 17 and 18 relate to the maintainability of the action as the executor of the last will of Francis Joseph

Botejue. However, issue No. 2 which has been answered in the affirmative was to the effect whether the plaintiff-respondent was the executor of the last will. Therefore, one cannot assert that the omission to answer issues Nos. 16, 17 and 18 would cause prejudice inasmuch as the capacity of the plaintiff-respondent was established.

Issues Nos. 19 and 20 relate to the question of prescription by the defendant-appellant. Despite the omission to answer these two issues learned District Judge on a consideration of totality of the evidence had come to a finding that defendant-appellant's plea of prescription cannot be sustained.

Similarly, issue No. 21 which has been formulated by the plaintiff-respondent relate to the maintainability of the claim in reconvention on the basis of prescription and the learned District Judge has made a finding that it cannot be maintained. Answer to issue No.13 in the affirmative appears to be inconsistent with his earlier finding that the claim in reconvention cannot be sustained. Therefore, this appears to be a mistake and the question to be examined is whether such mistake would invalidate the judgment.

Section 187 of the Civil Procedure Code provides that a judgment must contain the following :-

(a) a concise statement of the case;

(b) the points for determination;

(c) the decisions thereon; and

(d) reasons for such decisions.

On a careful scrutiny of the judgment, it is apparent that the above requisites have been satisfied despite a failure to answer some issues. It is noteworthy that a point for determination may involve several issues.

Proviso to Article 138 (1) of the Constitution provides that no judgment, decree or order of any Court shall be reversed or

varied on an error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

The learned District Judge has arrived at findings on the points for determination upon an evaluation of the evidence led in this case. Therefore, despite the error that has occurred in answering issue No.13 and his failure to answer some issues it is not open to the defendant-appellant to assert that prejudice has been caused to his substantial rights or has occasioned a failure of justice.

I shall now proceed to examine the pivotal question whether delay of 33 months (2 years and 9 months) in delivering the judgment has caused prejudice to the defendant-appellant or has occasioned a failure of justice. Learned Counsel cited the case of *Edwin vs. de Silva*[2] where it was ovserved that delay of nearly 2 years in delivering the judgment would cause prejudice to the parties. It was observed that a judgment of a Judge of a Court of First Instance based on a mere reading of the typescript is not of the same value as a judgment delivered while the recollection of the trial and of the demeanour and attitude of the witnesses and the impression created by them on him are fresh in his mind.

Further, in *Saravanamuttu vs. Saravanamuttu*[3] it was held that by reason of a delay of nearly one year between the conclusion of hearing and the preparation of the judgment, the Judge was bound to have lost the advantage of the impressions created by the witnesses whom he saw and heard and his recollection of the finer points in the case would have faded from his memory by the time he came to write his judgment.

However, in *Senanayake vs. Edirisinghe*[4] it was held that it is not that delay perse is presumed to vitiate a judgment but to vitiate a judgment on that ground, the effect of delay must be one occasioning a failure of justice and must be demonstrated by drawing attention to relevant items of evidence which the

Judge has misconstrued or overlooked or to features which indicate the Judge's recollection of the nicities of the evidence or the demeanour of the witnesses had faded with time thereby vitiating his acceptance of oral testimony.

In the instant case, the plaintiff-respondent produced documents marked P1 - P12 through witness Chandrapala a clerk of the District Court of Colombo. Therefore, the case of the plaintiff-respondent was entirely dependent on the construction of documents and on the conclusions drawn from such documents. In the circumstances, it would appear that the impressions created by the witnesses and fading away of the finer points of the evidence or the demeanour of the witnesses of the plaintiff-respondent would not arise. There has been no allegation that the District Judge has overlooked or misconstrued some features of the oral testimony of the defendant-appellant or his witness licensed Surveyor Nanayakkara which indicate that District Judge's recollection of the niceties of evidence or the demeanour of the witnesses had faded with time. Therefore, there is no material to establish that delay of 33 months in the instant case though reprehensible has occasioned a failure of justice.

The contention that the plaintiff-respondent has not proved the ingredients necessary for a rei vindicatio action is untenable. Francis Joseph Botejue was declared entitled to lot 11 of the land called Millagahawatta and Delgahawatta depicted in plan No. 1524 A as evidenced by the final decree in partition case No.1125 marked P7. Learned Counsel for the defendant-appellant sought to argue that when the defendant-appellant was substituted in place of the deceased 16th defendant Francis Joseph Botejue the rights allotted to him was the entitlement of the heirs of Francis Joseph Botejue. It is to be observed that defendant-appellant was substituted in place of the deceased as representative of the estate of the deceased 16th defendant. Therefore, it is clear that the rights that were allotted in the final decree were the rights which devolved on the 16th defendant.

Learned Counsel for the defendant-appellant submitted that there was no land called lot 11 in existence at the time of the death of Joseph Francis Botejue. Despite the fact that at the time of the death of Joseph Francis Botejue final decree has not been entered yet it cannot be forgotten that in the last will, Francis Joseph Botejue referred to lot 11 of the said land as the land bequeathed to Neomi Perera. The argument that there was no land known as lot 11 has no significance as lot 11 is a divided portion allotted to the 16th defendant in lieu of his undivided rights in the said property. The direction in the last will that lot 11 has been bequeathed to Neomi Perera indicate that lot 11 has been bequeathed to Neomi Perera indicate that before his death Francis Joseph Botejue had acknowledged the existence of lot 11 in lieu of his undivided rights to the said property. It is significant to observe that final plan is dated 20.11.1970.

Defendant-appellant has conceded that he is in occupation of this land and that he has built a temporary hut. Paragraph 11 and 12 of the plaint which have been admitted by the defendant-appellant refer to the acceptance of the possession of the land by defendant-appellant as the legal representative of the deceased 16th defendant and thereafter erection of a temporary hut on 17.10.1983 and intimation by letter of even date to hand over possession and to refrain from erecting a hut. Therefore, there is admission that there was an erection of a temporary hut on 17.10.1983 and the bare receipt of a letter of even date. Therefore, these admissions are clear proof of the fact that the defendant-appellant has accepted possession of the property allotted to the 16th defendant which forms a part of the estate of Francis Joseph Botejue in terms of his last will administered in case No.T 1005/90 D.C. Colombo.

For the foregoing reasons, it seems to me that there is no basis to interfere with the findings of the District Judge. Therefore, this appeal is dismissed with costs.

UDALAGAMA, J. - I agree.

Appeal dismissed.