JANE NONA AND ANOTHER
v
PADMAKUMARA AND OTHERS

COURT OF APPEAL
DISSANAYAKA, J. AND
SOMAWANSA, J.
C.A No. 982/93 (F)
D.C. TANGALLE 2282/L
JANUARY 11, AND
FEBRUARY 28, 2002

Rei vindicatio action – Absence of evidence of an amicable partition – Averred in plaint that a cause of action has accrued to obtain order of peaceful possession – Prayer for damages until possession is restored – Can ejectment be ordered ? – No prayer for ejectment.

Held:

(i) It is to be observed that there is no prayer for ejectment.

(ii) In paragraph 17 of the plaint it has been averred that a cause of action has accrued to the plaintiff to obtain an order of peaceful possession and in prayer (c) the plaintiff-respondent had prayed that a sum of Rs. 200/- per month be ordered as damages until possession is restored to the plaintiff-respondent.

Per Dissanayake, J.

> "a prayer for ejectment of the defendant-appellant is implicit in issue 10, as it encompasses paragraph 17 and prayer (c) of the plaint.

(iii) In the absence of evidence of an amicable partition, the plaintiff-respondent is entitled to maintain the action for declaration of title.

APPEAL from the judgment of the District Court of Tangalle.

Cases referred to:

1. *Wanigasekera and others* v *Kiri Hamy and others* (Distinguished) - 7 CLW 134

2. *A. Jamaldeen Abdul Latheef and another* v *Abdul Majeed Mohamed Maharoof* - CA 37/96
CAM 28.3 1996 - D.C. Anuradhapura 12862/L

J.A.D. Udawatta with *Upali Gunaratne* for 1st and 2nd defendant-appellants

W.Dayaratne with Ranjika Jayawardena for plaintiff-respondent.

Cur.adv.vult.

May 17, 2002

DISSANAYAKE, J.

The plaintiff-respondent by his plaint dated 27.01.1987 instituted action against the 1st and 2nd defendant-appellants seeking a declaration of title to the land morefully described in schedule two to the plaint which was described as a divided and defined portion of the larger land described in schedule one to the plaint.

The defendant-appellants by their joint answer dated 22.08.1994 whilst denying the averments of the plaint prayed for dismissal of the plaintiff-respondent's action.

The case proceeded to trial on twenty issues and at the conclusion of the trial the learned District Judge by his judgment dated 01.11.1993 entered judgment for the plaintiff-respondent as prayed for in the plaint.

It is from the aforesaid judgment that this appeal is preferred.

Learned counsel for the defendants-appellants contended that the learned District Judge erred in entering judgment for the plaintiff-respondent because he failed to consider the following matters:-

(a) no deed or a plan was produced to establish an amicable partition of land morefully described in schedule two to the plaint;

(b) failure of the plaintiff-respondent to plead for eviction of the defendants-appellants from the land described in schedule two to the plaint.

It is common ground that the 1st and 2nd defendants-appellants are husband and wife and that the 1st defendant-appellant is the daughter of P.G. Podihamy the predecessor in title of the plaintiff-respondent. It is also common ground that the defendants-appellants are in occupation of the premises in suit morefully described in schedule two to the plaint.

The plaintiff-respondent in his testimony setting out his devolution of title asserted that A.K. Seemonhamy was the original owner of the land described in schedule one to the plaint, which is about one acre in extent.

On the death of Seemonhamy, the property devolved on his two children Thomashamy and Baba Nona who became entitled to1/2 each of the land.

On the death of Baba Nona her children Sopi Nona and Charlis Appu became entitled to 1/4 share each of the land. Sopi Nona by deed No. 18 dated 30.01.1956 (P1) transferred her 1/4th share to A. Odiris Appu. Odiris Appu by deed No. 24496 dated 28.03.1959 (P2) transferred his share to D.S. Uparis Appu. Uparis Appu by deed No. 2718 dated 30.01.1930 (P3) retransferred his share to P.G. Podihamy.

Thereby P.G. Podihamy became entitled to 1/4 share of the land described in schedule one to the plaint.

P.G. Podihamy by deed No. 261 dated 09.05.1975 (P4) transferred 1/8th share of the land to Almis. Almis by deed No. 1703 dated 17.05.1979 (P5) retransferred the said share to P.G. Podihamy.

P.G. Podihamy who possessed the land described in schedule two to the plaint as a distinct and a separate entity transferred the said land to the plaintiff-respondent.

Despite the 1st defendant-appellant averring in her joint answer filed along with the 2nd defendant-appellant and raising issue No. 18 to the effect that she is entitled to a share to the land described in schedule one to the plaint, however under cross-examination she conceded that she did not have any rights in the land in suit which is a portion of land described in schedule one to the plaint. She conceded further that her mother was entitled to 1/4

share of the larger land and it was a defined and distinct portion of land which has a fence.

She further conceded that her mother had sold her rights to the plaintiff-respondent and that she and her husband did not have any rights in the land. She further conceded that they were in forcible occupation of the premises in suit.

Therefore it is apparent that the plaintiff-respondent is entitled to maintain this action for declaration of title to the land described in schedule two to the plaint in the absence of evidence of an amicable partition of the land.

Despite the defendants-appellants raising issue No. 16 and the 1st defendant-appellant adducing evidence with regard to the alleged insanity of her mother during the period she executed deed No. 416 of 19.07.1985 (O6), her evidence and the evidence of the Ayurvedic physician P. Diyaneris in this regard was rejected by the learned District Judge. In appeal before us learned counsel for the defendants-appellants submitted that he was not seeking to canvass the finding of the learned District Judge on that matter.

It is to be observed that there is no prayer for ejectment included in the plaint. Learned counsel for the defendant-appellant cited the decision in *Wanigasekera and others* v. *Kirihamy and another* [1] where it has been held that where a person obtains a declaration of title to land without an order for ejectment he is not entitled to a writ for delivery of possession.

The facts of *Wanigasekera and others* v *Kirihamy and another* (supra) are different to the facts of the instant case. In that case the plaintiff after he succeeded in the case decree was entered. About three months later the plaintiff's proctor moved for notice on the defendants to show cause why the decree should not be amended by entering an order for ejectment.

In this case no such application to amend the decree has been made. Therefore the decision in *Wanigasekera* v. *Kirihamy (supra)* does not apply to the facts of this case.

It is to be observed that although there is no prayer for ejectment of the defendant-appellant paragraph 17 had averred that a cause of action has accrued to the plaintiff to obtain an order of

peaceful possession of land and damages among other things. In prayer (c) of the plaint the plaintiff-respondent has prayed that a sum of Rs. 200/- per month be ordered as damages until possession is restored to the plaintiff-respondent.

It is also relevant to observe that the plaintiff-respondent by raising issue No. 10 which is a consequential issue to the effect that if the above issues (i.e. issue numbers one to nine) are answered in the affirmative whether the plaintiff-respondent is entitled to the reliefs claimed in the plaint.

Therefore I am of the view that a prayer for ejectment of the defendant-appellant is implicit in issue No. 10 as it encompasses paragraph 17 and prayer (c) of the plaint.

A similar question arose in the unreported case of *Jamaldeen Abdul Latheef and another* v *Abdul Majeed Mohamed Mansoor and another*[2] where it was held that even if there is no prayer for ejectment however when there is an issue with regard to the question of continuing damages to which plaintiff would be entitled until the plaintiff is restored to possession, there is implicit in that issue, a prayer for ejectment.

Therefore I am of the view that the learned District Judge has rightly entered judgment for the plaintiff-respondent.

There is no basis to interfere with the judgment of the learned District Judge.

I dismiss the appeal of the defendant-appellant with costs.

SOMAWANSA, J. I agree.

Appeal dismissed