SOPI NONA
VS
KARUNADASA AND ANOTHER

COURT OF APPEAL.
EKANAYAKE, J.
SRI SKANDARAJAH, J.
CA 201/2001(REV.).
DC EMBILIPTIYA 3091/L.
SEPTEMBER 9, 2005.

Civil Procedure Code, section 839 - Applicability - Relief of ejectment- Restoration of possession not prayed for - Can there be a decree for ejectment and restoration?– If evicted can he be restored to possession?

After an interpartes trial the 1st and 2nd plaintiffs were granted the relief of declaration of title in their favour. There was no prayer for ejectment. However writ was issued by the trial court and the defendent-petitioner-defendent was evicted. The petitioner moved under section 839 and sought an order to restore her to possession which was refused by court.

HELD:

1. By the judgment the reliefs that had been prayed in the prayer to the plaint had been allowed by the trial judge and there had been no relief for ejectment of the defendants and restoration of possession.

2. By allowing the writ of possession the trial judge had given relief to the plaintiffs which was not granted by the judgment and the decree.

3. The trial judge has erred by failing to invoke inherent powers under section 839 and to make order restoring possession when sufficient grounds have existed to make such orders as may be necessary for the ends of justice.

4. There had been no issue on ejectment and restoration of possession by the plantiff.

APPLICATION in revision from an order of the District Judge of Embilipitiya.

Cases referred to :

1. *Leechman Company vs. Rangala Consolidated* 1981 2Sri LR 373

2. *Seneviratne vs. Francis Abeykoon* 1986 2 Sri LR 1

Rohan Sahabandu for defendant–petitioner.

Anuruddha Dharmaratne for plaintiff-respondent

Cur. adv. vult.

November 3, 2005.

CHANDRA EKANAYAKE, J.

The 2nd defendant - petitioner by her petition dated 06.02.2001 (filed with an affidavit) has sought *inter alia* to set aside the judgment dated 10.05.1995 and two orders dated 08.04.1999 and 29.11.2000 and for a dismissal of plantiff's action. However it has to be noted that the impugned judgment bears the date 10.10.1995.

The 1st and 2nd plaintiff - respondent (hereinafter some times referred to as "plaintiffs" by their statement of objections dated 14.09.2001 whilst denying the averments in the petition had prayed for a dismissal of the application of the petitioner mainly on the ground that neither any grounds nor exceptional circumstances which would permit the petitioner to invoke the extraordinary jurisdiction of revision exist.

By the plaint dated 22.09.1987 the 1st and 2nd plaintiffs had averred that as set out in paragraphs 2 and 3 thereof that they had acquired title to the subject matter by deeds and by way of prescription and the defendants came into occupation of the house thereon with leave and license of the plaintiffs. As per paragraph 5 of the plaint it was further averred that from early part of 1987 the 1st and 2nd defendants by virtue of a deed said to have been in their favour in respect of the property morefully described in schedules to the plaint, disputed the ownership of the plaintiffs and thereby continued to be in unlawful occupation of the same.

The 1st and 2nd defendants by their joint answer dated 28.09.1988 whilst denying the averments in the plaint inclusive of the accrual of the cause of action by way of further answer pleaded that they came into possession of the same not on leave and license of the plaintiffs but on the leave and license of one temple, namely Keththarama Temple and moved for a dismissal of the plaintiff's action. Although it is seen from the certified copy of the District Court record that another answer dated

08.07.1989 is filed of record, in the absence of any journal entries to show that same was accepted, what has to be inferred is that the case had proceeded to trial on the original answer. After an *inter parte* trial the learned judge had pronounced the judgment dated 10.10.1995 granting only the relief of declaration of title inplaintiff's favour to the property morefully described in schedule A to the plaint.

It is common ground that appeal bearing C. A. No. 1109/95 had been preferred against the said judgment and same was rejected. Even as per paragraph 13 of the petition the said appeal had been rejected on 15.05.1997 for non - payment of brief fees. Thereafter on return of the original record the writ had been issued by the District Court by its order dated 08.04.1999 (vide journal entry dated 08.04.1999) As per journal entry dated 09.04.1999 the Fiscal had tendered the report after due execution of writ of possession.

Thereafter the present petitioner by a petition dated 22.04.1999 had moved the District Court to restore her to possession of the subject matter and recovery of damages in a sum of Rs. 2 lakhs. The above application had been made under section 839 of the Civil Procedure Code. The Plaintiff - Respondents by their statement of objections dated 27.10.1999 moved for a dismissal of the above petition on the ground that the decree was executed in accordance with the judgment and the decree entered in the case and further they averred that they had a right for recovery of possession of the property described in schedule B to the plaint. After inquiry the learned Trial Judge had refused the petitioner's application by his order dated 29.11.2000. This is the second order the 2nd Defendant has moved to set aside now as per sub paragraph (c) of the prayer to the present petition. By the impugned order dated 29.11.2000 the learned judge has dismissed the Petitioner's application onthe ground that his predecessor in office who had delivered the judgment dated 10.10.1995 had clearly stated that the land described in schedule B in the plaint is a portion of the land described in schedule A to the plaint and that the Plaintiffs were

granted declaration to title to the property in schedule A and therefore the application was not a *bona fide* application.

Section 839 of the Civil Procedure Code thus reads as follows :

> **"Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

In this context now the necessity has arisen to consider the decision in *Leechman Company vs Rangalla Consolidated*[1] where it was held that :

"This section merely saves the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Where no provision exists it is the duty of the judge and it lies within his inherent powers to make such order as the justice of the case requires."

In the instant case by the judgment dated 10.10.1995 the reliefs that had been prayed for in sub paragraph (1) of the prayer to the plant had been allowed by the learned Trial Judge and there had been no relief for ejectment of the defendants and restoration of possession of the property described in schedule B to the plaint. In the course of the judgment the learned Trial judge has very clearly arrived upon the specific finding that the Plaintiffs are entitled to a declaration of title to the property described in schedule A to the plaint and that the Defendants are in possession of the property described in schedule B. The learned judge has quite correctly analyzed the evidence and having duly considered the principle of law that when a Plaintiff is seeking a declaration of title it is he who should prove the title to the subject matter has answered the issues in favour of the plaintiffs. Therefore I see no basis to interfere with the impugned judgment.

What has to be considered now is whether the learned Trial Judge was correct in issuing writ of possession when the judgment was silent about same and specially in this case when the Plaintiff had totally failed to move for ejectment and restoration of possession by the prayer to the plaint.

In the case of *Seneviratne vs Francis Abeykoon*[2] this question was considered by the Supreme Court *viz* - "whether in the absence of a decree restoring possession of the premises to the defendant - tenant the Court still had the power to make and order that possession be restored to the defendant which the Fiscal could execute.

In that case the plaintiff landlord after his appeal from a judgment dismissing his action for eviction of his tenant the defendant was abated, forcibly took possession of the premises let alleging abandonment and consequential deterioration of the premises. The defendant - tenant denied abandonment and applied to the Trial Court to restore him to possession. The Court granted the application. Thereafter the Plaintiff moved the Court of Appeal by way of revision to have the aforesaid order of the District Judge set aside. The Court of Appeal dismissing the application upheld the learned Trial Judge's order and thereafter the Plaintiff in that case appealed to the Supreme Court from the order of the Court of Appeal. Supreme Court also dismissed the appeal while upholding the decision of the Court of Appeal. Per Thambiah,J at 5 :

"An extra - ordinary situation had arisen and to deal with it there was no express provision in the Civil Procedure Code. It is to meet such a case that section 839 was enacted. It empowered a Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court."

In view of the above principles of law I conclude that in the present case the learned Trial Judge had erred in having allowed the writ of possession when the relief of ejectment and restoration or possession was not granted

by the judgment nor was such relief even prayed by the prayer to the plaint. So obviously there cannot be a decree for ejectment and restoration of possession. It is to be noted that the decree which is filed of record and signed by the judge as per journal entry of 22.10.1997 is in conformity with the judgment.

Therefore, I conclude that by allowing the writ of possession by the order dated 08.04.1999 the learned Trial judge had given a relief to the Plantiffs which was not granted by the judgment and the decree and therefore same is hereby set aside.

Further on a perusal of the impugned 2nd order dated 29.11.2000 I conclude that the learned judge had erred by failing to invoke inherent powers under section 839 of the Civil Procedure Code and to make order restoring possession to the second defendant when sufficient grounds had existed to make such orders as may be necessary for the ends of justice. Therefore the above order dated 29.11.2000 too is hereby set aside.

It has to be further stressed here that ejectment and restoration of possession had neither been prayed for in the prayer to the plaint as a relief nor had there been any issue raised by the Plaintiff to that effect. Issue No. 7 raised on behalf of the Plaintiffs had been to the following effect :

7"ඉහත කී විසඳිය යුතු ප්‍රශ්නයට "ඔව්" නම් පැමිණිලිකරුවන්ට පැමිණිල්ලේ ඉල්ලා ඇති සහන ලබා ගත හැකිද?

It is quite evident from the above issue that the effect of the same was whether the Plaintiffs were entitled to the reliefs prayed in the plaint if the above issues (*viz* ; issues 1-6) are answered in the affirmative. It is clear from the above that there had been no issue on ejectment and restoration of possession by the plaintiff. The learned judge has correctly answered all the issues admitted to trial giving good reasons.

For the foregoing reasons while affirming the judgment of the learned Trial Judge dated 10.10.1995 , the orders dated 08.04.1999 and 29.11.2000 are hereby set aside and this court makes order that the 2nd defendant petitioner be restored to possession forthwith.

In all the circumstances of the case no order is made with regard to costs of this application.

SRISKANDARAJAH. J. – *I agree.*

Application allowed.

2nd defendant–petitioner to be restored to possession.