1955 *Present :* Gratiaen, J., and Fernando, J.

R. W. PATHIRANA, Appellant, *and* R. E. DE S. JAYASUNDARA, Respondent

S. C. (Inty.) 144—D. C. Kurunegala, 9,003

Pleadings—Amendment of plaint—Lessor and lessee—Action against overholding lessee—Plea of prescriptive title raised by defendant—Right of plaintiff to amend plaint so as to alter action into one of rei vindicatio*—Distinction between tenancy action and vindicatory action.*

A lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligation as lessee is not entitled to amend his plaint subsequently so as to alter the nature of the proceeding to an action *rei vindicatio* if such a course would prevent or prejudice the setting up by the defendant of a plea of prescriptive title.

Plaintiff sued the defendant on the basis that the defendant was an overholding lessee by attornment. Defendant admitted the bare execution of the lease, but stated that the lessors were unable to give him possession of the land in question. He averred that the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. The plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment upon the footing that his rights of ownership had been violated.

Held, that the plaintiff was not entitled to amend the plaint if the amendment would cause prejudice to the defendant's plea of prescriptive possession by him.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *L. Mulutantri*, for the plaintiff-appellant.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *W. D. Gunasekera*, for the defendant-respondent.

Cur. adv. vult.

June 15, 1955. H. N. G. FERNANDO, J.—

The plaint in this action which was filed on 17th September, 1952 contained averments :—

(1) that at the material time certain persons were the owners of the land described in the Schedule.

(2) that those persons had let the land to the Defendant on 21st February, 1942.

2——J. N. B 62331—1,500 (11/57)

(3) that those persons sold the land to the Plaintiff on the 6th February, 1950, and that the Defendant as lessee attorned to the Plaintiff.

(4) that the Defendant is estopped from denying the title of the Plaintiff.

(5) that the Defendant failed and neglected to deliver possession of the land notwithstanding the determination of that lease on 21st February, 1952, and

(6) that the Plaintiff has sustained damages consequential to the Defendant's unlawful possession. The plaint then prayed for a declaration of title to the land, for the ejectment of the Defendant and for damages.

The Defendant in his answer admitted the bare execution of the lease, but stated that the lessors were unable to give him possession of the land and denied the alleged attornment. He averred that, on the same day (21st February, 1942) on which the lease was executed, the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. He however further stated that in the event of the Plaintiff obtaining a declaration of title he claims a sum of Rs. 27,000 as compensation for *bona fide* improvements.

The Plaintiff then sought to amend his plaint by setting out precisely the title of the persons who had leased the land to the Defendant and had subsequently sold the land to the Plaintiff, and by adding an averment that he and his predecessors had acquired title by prescription as well. The objections of the Defendant to this amendment have been upheld by the learned District Judge on the ground that it " alters the entire scope of the action and converts a purely tenancy action into an action for declaration of title ". Although the Defendant had pleaded that he had entered into possession under a deed of 21st February, 1942, and the dating back of the amendment to the date of the plaint, i. e., 17th September, 1952, would not *prima facie* prejudice the Defendant's plea of prescriptive possession, the Judge thought that the amendment would cause prejudice to the Defendant if he could only prove possession as from some later time than February 1942.

Mr. Jayawardene argues in appeal that the cause of action pleaded in the plaint was not purely the Defendant's refusal to fulfil an obligation arising from the alleged contract of tenancy and was in addition a denial by the Defendant of the Plaintiff's title to the land, and that accordingly the action upon the original plaint was an action *rei vindicatio* in which an issue as to the Plaintiff's title could properly have been raised. I shall try to deal *seriatim* with the arguments relied upon for the appellant.

The plaint in general terms recites that the Plaintiff's vendors were the owners of the land at the material time, and it is said that the object of the amendment is merely to set out in detail the source of vendor's title. But this recital was in any event necessary for the purposes of the tenancy action, because the Plaintiff's title as lessor was derivative

and he had therefore to state and prove from whom he derived it. While a recital that certain persons had let the land to the Defendant and that the Plaintiff had subsequently acquired the rights of the original lessors would have been a sufficient exposition of the derivation of title, I do not see how the express reference to the fact that the Plaintiff's vendors were owners can put in issue the question of their title, any more than the question of a Plaintiff-landlord's title would be put in issue by an averment that " the Plaintiff was the owner of the land and leased the premises to the Defendant ". The recital in paragraph 2 of the plaint is so clearly referable to the need to prove the derivative title that it is of little significance in determining whether the main question arising upon the original plaint would have been the proof of the Plaintiff's title.

Mr. Jayawardene then points to a statement in paragraph 7 that the Plaintiff has sustained damages consequential to the Defendant's *unlawful possession*, from which he seeks to argue that his action was for a vindication of property which the Defendant possessed in denial of the Plaintiff's rights as owner. Here again, the statement follows immediately after the averment in paragraph 6 that " the Defendant has failed and neglected to deliver possession of the said lands notwithstanding that his rights as lessee thereof were duly determined on the 21st February, 1952 ". The two paragraphs constituted together the statement of the Plaintiff's first cause of action and it is clear that the unlawful possession of which the Plaintiff complained was the overholding by the Defendant after the cessation of his contractual rights.

There is however the further point that the Plaintiff in his prayer sought not only ejectment but also a declaration of title, a prayer for which latter relief is probably unusual in an action against an overholding tenant. I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty which arises is whether the action thereby becomes a *rei vindicatio* for which strict proof of the Plaintiff's title would be required, or else is merely one for a declaration (without strict proof) of a title which the tenant is by law precluded from denying. If the essential element of a *rei vindicatio* is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the Plaintiff can automatically obtain a declaration of title through the operation of a rule of estoppel should be regarded as a vindicatory action. The fact that the person in possession of property originally held as lessee would not preclude the lessor-owner from choosing to proceed against him by a *rei vindicatio*. But this choice can I think be properly exercised only by pleadings clearly setting out the claim of title and sounding in delict. I am unable to agree with Mr. Jayawardene that the pleadings here indicate a proper exercise of that choice.

Take for instance the case where a person alleges that he had leased his land for a twenty-year term with rent paid in advance, but subject to forfeiture for breach of covenant. If he purports to terminate after 12 or 15 years for such a breach, and then comes into Court averring that he is owner and that the Defendant has failed to deliver up possession despite the termination of the lease by forfeiture and asks for a declaration

of title and ejectment, can he, after answer is filed to the same effect as in the present case, seek to maintain that he had in the plaint put his title in issue in an action *rei vindicatio* ? If he can, then it would seem that although the plaint conceded by implication that rent was duly paid until the date of termination, he may nevertheless add by amendment a claim for damages for the 3 year period before action on the footing of a wrongful possession. I think the true position in such a case too would be that the owner originally decided to proceed upon a cause of action arising from a breach of the contractual obligation and cannot alter the nature of the proceeding to an action *rei vindicatio* if such a course would prevent or prejudice the setting up by the Defendant of a plea of prescription.

Upon the question of amendment of pleadings generally, Withers J. said in *Ratwatte v. Owen* [1] :—" After the plaint has once been accepted, I think as a general rule that it should not be amended till after the issue has been settled. The office of an amendment will generally be at that stage to square the plaint with the issue, if necessary ", thus indicating that the discretionary power to permit an amendment of the plaint should not be exercised unless firstly, a particular issue does arise upon the original plaint and secondly, further pleadings are necessary in order to explain or clarify matters relevant to the particular issue. Subsequent decisions show that the general rule as so stated is not to be regarded as inflexible and that relaxation is permissible in order to secure the more expeditious termination of disputes. But no such relaxation is proper if it would be prejudicial to a plea of prescription available to a Defendant.

The Defendant's attempt in this case to deny the operation against him of the rule of estoppel and to set up possession adverse to the Plaintiff and his predecessors constitutes merely a denial relevant to the issue of letting and attornment arising upon the plaint. It is argued that the inclusion by the Defendant of a claim for *bona fide* improvements in the event of the Plaintiff obtaining a declaration of title indicates that the Defendant understood the Plaintiff's action to be one of *rei vindicatio*. Even if the Defendant's state of mind at the time he filed the answer is of assistance in determining the character of the action earlier instituted by the Plaintiff, there is in this case the further consideration that such a claim is not necessarily out of place in an action between landlord and tenant . . . (Wille ; Landlord and Tenant, 4th Ed. Ch. 22).

For these reasons I think that the order of the learned Judge was right and that the appeal must be dismissed with costs.

GRATIAEN, J.—

I agree. In a *rei vindicatio* action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. " The plaintiff's ownership of the thing is of the very essence of the action ". *Maasdorp's Institutes* (7th Ed.) Vol. 2, 96.

[1] *(1896) 2 N. L. R. 141.*

The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (*conductor*) cannot plead the *exceptio dominii*, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship . . . . " *Voet 19.2.32.*

Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation.

A decree for a declaration of title may, of course, be obtained by way of additional relief *either* in a *rei vindicatio* action proper (which is in truth an action *in rem*) *or* in a lessor's action against his overholding tenant (which is an action *in personam*). But in the former case, the declaration is based on proof of ownership ; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.

As to procedure, Section 35 of the Code permits the joinder of certain forms of relief in an action (either *in rem* or *in personam*) for the recovery of immovable property and/or for the declaration of title. For instance, in a *rei vindicatio* action proper, the plaintiff may ask for (*a*) mesne profits and (*b*) damages consequential on the trespass. Similarly, in the lessor's action *in personam* against the overholding lessee, he may claim (*a*) arrears of rent and (*b*) damages for breach of the contract of lease.

Analysed in the light of these simple rules, the plaintiff's original plaint had very clearly asked for relief against the defendant on the ground of an alleged contractual relationship created by attornment. Paragraphs 2, 3 and 4 contain averments which, if true, establish (1) the original contract of lease between the plaintiff's vendors and the defendant (2) the subsequent purchase of the property by the plaintiff pending the duration of the lease, and finally (3) an attornment in 1950. Paragraph 5 in effect relies on *the contractual relationship thus established* as giving rise to an estoppel against denying the lessor's title, and it is this averment which forms the foundation of the prayer for a declaratory decree as to title.

The rest of the plaint pleads three causes of action each of which is unambiguously based on an alleged breach of a contractual obligation, namely, (*a*) failure to restore the property upon the termination of the lease (*b*) failure to maintain the property in good condition during the

pendency of the lease and (c) failure in terms of the lease to improve the property. Upon these causes of action, the plaintiff has claimed restoration of the property, ejectment and damages.

It is therefore quite apparent that the action as originally constituted was not a *rei vindicatio* action proper in which any issues as to rights of ownership could properly arise for adjudication. Nothing that the defendant has since alleged by way of defence can by itself alter the scope of the real issues relevant to the granting of the relief prayed for in the plaint.

The defendant has denied attornment. If this be true, the entire foundation of the plaintiff's claim is destroyed. If it be false, the plaintiff's claim for a declaration of title (based on the legal consequences of a contractual relationship) and for ejectment must necessarily succeed. In the latter event, the defendant's claim for compensation could only arise on proof of special circumstances in which a lessee, as opposed to a *bona fide* improver who possessed *ut dominus*, could be compensated under our law.

In the situation which has now arisen, the plaintiff has sought to amend his plaint so as to ask, in the alternative, for the same relief as he had originally sought *but on entirely different grounds*. In other words, he claims a declaration of title and ejectment upon the footing that his alleged rights of ownership had been violated even if his original averment as to privity of contract by attornment be untrue. Similarly, his alternative claim for damages would stand on an entirely different footing.

To allow the amendment at this stage would be to convert an action *in personam* into an action *in personam* (founded on contract) coupled in the alternative with an action *in rem* (founded on ownership). I do not think that it would be proper to allow the scope of the action to be subjected to a fundamental alteration of this kind, because the addition of the alternative cause of action would potentially prejudice the defendant on the issue as to the plaintiff's prescriptive title if the date of the averment is to relate back (as it necessarily must) to the date of the original plaint. *Waduganathan Chettiar v. Sena Abdul Cassim* [1].

The Court should always refuse a party's application to amend his pleadings by asking for relief (even the same relief as he had originally claimed) upon a fresh cause of action which may have become prescribed in the interval. I am aware that in *Noorbhoy v. Mohideen Pillai* [2], the plaintiff, having originally sued the defendant on a promissory note, was permitted to amend his plaint by asking alternatively for a money decree for a like amount upon a cause of action for goods sold and delivered. But in that case the possibility of prejudice to the defendant on the issue of prescription was not raised. I do not doubt that *Noorbhoy's case* would have been differently decided if, at the date of the proposed amendment, the cause of action on the alternative count had already become barred by limitation.

Appeal dismissed.

[1] *(1952) 54 N. L. R. 185.*

[2] *(1929) 31 N. L. R. 3.*