

LUWIS SINGHO AND OTHERS
V.
PONNAMPERUMA

COURT OF APPEAL.
WEERASEKERA, J.
WIGNESWARAN, J.
C.A. 710/83 (F).
D.C. BALAPITIYA 1942/L.
MARCH 15, 1996.

Rei Vindicatio Action-Property belongs to a third party-Jus tertii-Roman Dutch Law-Difference between Vindicatory Actions and Actions for Declaration of Title and Ejectment-De facto Possession - Prescription Ordinance. section 3

Held :

1. Actions for Declaration of Title and ejectment (as in this case) and Vindicatory actions are brought for the same purpose of recovery of property. In a *Rei Vindicatio* action the cause of action is based on the sole ground of violation of the Right of Ownership, in such an action proof is required that;

(i) the Plaintiff is the owner of the land in question i.e. he has the dominium and,

(ii) that the land is in the possession of the Defendant*

Even if an owner never had possession it would not be a bar to a vindicatory action.

2. In an Action for declaration of Title and ejection the proof that a Plaintiff had enjoyed an earlier peaceful possession and that subsequently he was ousted by the Defendant would give rise to a rebuttable presumption of Title in favour of the Plaintiff and thus could be classified as an action where dominium need not be proved strictly.

Per Wigneswaran, J.

"In an action for Declaration of Title and ejection the Plaintiff need not sue by right of Ownership but could do so by right of Possession and ouster. In fact in such a case the Plaintiff is claiming a possessory remedy rather than the relief of vindication of Ownership".

"While refusing to accept the submission that *jus tertii* as a defence in vindicatory actions is not available under our law, it must be admitted that *jus tertii* as a defence in cases filed for Declaration of Title and ejection based on the provisions of section 3 of the Prescription Ordinance would not be available if the third party is not a predecessor in Title or has not been joined in the action".

3. Even if the principle of *Jus tertii* be part of the law of this country in appropriate *Rei vindicatio* actions it is not relevant in respect of cases filed in terms of latter part of section 3 of the Prescription Ordinance in the form of declaration of Title and ejection.

4. It would appear that law permits a person who has possessed peacefully but cannot establish clear title or ownership to be restored to possession and be quieted in possession. This development of the law appears to have arisen due to the need to protect de-facto possession, it is different from the Right of an Owner recovering his possession through a Vindicatory Action.

APPEAL from the Judgment of the District Court of Balapitiya.

Cases referred to :

1. *Allis Appu v. Endiris Hamy* (1894) 3 SC 87.
2. *Dhammalankara v. Marikar* 54 NLR 181.
3. *Unnanse v. de Hoedt* 22 NLR 406.
4. *Dharmasena v. Alles* 1985 2 SLR pages 35 - 40.
5. *Le Mesurier v. Attorney General* 5 NLR 65.
6. *Punchihamy v. Arnolis* 1883, 5 SCC 160.
7. *Wanigaratne v. Juwanis Appuhamy* 65 NLR 167.

R.K.W. Gunasekera for 1B-4th Defendant-Appellants.

K.S. Tillakeratne for Plaintiff-Respondent.

June 07, 1996.

WIGNESWARAN, J.

The argument adduced by the learned Counsel for 1B to 4th Defendant-Appellants in this case is that, where it is proved that a property belongs to a third party who is not a party to the case while the action itself is between a Plaintiff on one side and a Defendant who is occupying the premises in suit on the other, the Court must dismiss the Plaintiff's action for the following reasons :-

(i) Plaintiff in an action for declaration of title and ejectment must prove his title and his right to possess.

(ii) Defendant need not do so and if Plaintiff fails on a balance of probabilities the defendant would succeed.

(iii) Under the Roman Dutch principle of *Jus tertii* the Plaintiff must not only prove a better title but also a title better than any known to the Defendant. In Sri Lanka too by raising *jus tertii* the Defendant could rebut the title set up by the Plaintiff and assert that title is neither with the Plaintiff nor the Defendant but with a third party.

(iv) It was submitted that in the present case the land in question undoubtedly belonged to the State and therefore the Plaintiff could not have had and maintained this action.

(v) It was argued that *jus tertii* was recognized in *Allis Appu v. Endiris Hamy*⁽¹⁾ and *Dharmalankara v. Marikar*⁽²⁾ though rejected in *Unnanse v. de Hoedt*⁽³⁾.

The learned counsel for the Plaintiff-Respondent argued that the principle of *jus tertii* was not part of our law. He cited the decision in *Dharmasena v. Alles*⁽⁴⁾.

The issues raised in this case and the answers given by the learned District Judge of Balapitiya are very relevant when dealing with the

submissions of the learned Counsel for 1B - 4th Defendant-Appellants. When translated they read as follows :-

(i) Does the land called Ambreliyagaha Hena belong to the Plaintiff & the 5th to 8th Defendants as set out in the plaint?

Answer :- Yes.

(ii) Is the said land depicted as lots 1 and 2 in plan No. 883 filed of record?

Answer :- Yes.

(iii) Are the Plaintiff and 5th to 8th Defendants entitled to possess the said land?

Answer :- Yes.

(iv) Are the 1st to 4th Defendants disputing the title of the Plaintiff and the 5th to 8th Defendants as from 16.12.69?

Answer :- Yes.

(v) If so what damages are payable to the Plaintiff?

Answer :- Rs. 500/- until the date of the plaint and thereafter Rs. 30/- per mensem until possession is restored.

(vi) Is the Plaintiff entitled to the reliefs claimed for in the plaint?

Answer :- Yes.

(vii) Is this land depicted on plan No. 833 made by A.G.F. Perera. Licensed Surveyor, a crown land?

Answer :- No. Not proved.

(viii) Is the said land depicted as No. 1 and 2 in preliminary Plan No. 11939 of the Southern Province?

in *Dharmasena v. Alles (supra)* that judgment in such cases must be declaratory of the right of a party to the suit and not of a stranger.

Therefore this court finds that :

- (i) *Jus tertii* as a defence was not available to 1B to 4th Defendant-Appellants in view of the answers given by Court to issues (vii) and (viii) and ;
- (ii) even if the principle of *jus tertii* be part of the law of this country in appropriate *rei vindicatio* actions it is not relevant in respect of cases filed in terms of the latter part of section 3 of the Prescription Ordinance in the form of declaration of title and ejectment.

The appeal is therefore dismissed with costs fixed at Rs. 325/-.

WEERASEKERA, J. – I agree.

Appeal dismissed.