

Present : Schneider A.J.

1921.

## ABDUL CADER v. OMARDEEN.

224—C. R. Kalutara, 9, 109.

*Appeal—Action in Court of Requests for cancellation of deed of sale of land and for refund of consideration—Decree for cancellation and refund—Appeal without leave of Court.*

Plaintiff alleging that defendant had not given vacant possession of land sold sued in Court of Requests for cancellation of deed and refund of consideration paid. Two issues were framed as to delivery of possession and *quantum* of damages. The Commissioner entered judgment cancelling deed and ordering refund of money paid.

*Held*, that no appeal lay, except upon a point of law or with the leave of Court.

THE facts appear from the judgment.

*Abdul Cader*, for plaintiff, respondent.—This is an action for “damage or demand” within the meaning of section 13 of “The Court of Requests Amendment Ordinance, 1895.” No appeal lies without leave of Court. The cause of action is a breach of contract, viz., that the defendant had failed to deliver possession of the land to the plaintiff. The issues in the case were (1) whether possession had been given, and (2) the *quantum* of damages. The plaintiff only asks for damages, and not that he be placed in possession of the land. *Punchirala v. Appuhamy*<sup>1</sup> is directly in point. Counsel also cited *Babunhami v. Subahami*.<sup>2</sup>

*J. S. Jayawardene*, for defendant, appellant.—The action in substance is one relating to an interest in land. Although the plaintiff does not demand possession of the land, he asks that the deed of transfer be cancelled, and the Court has therefore to adjudicate upon the question as to whether the defendant validly conveyed an interest in land to the plaintiff. It has been held in *Appuhamy v. Appuhamy*<sup>3</sup> that if the form of an issue is such as to raise the question of an interest in land, no leave is necessary. Counsel also referred to *Maricar v. Ismail*.<sup>4</sup>

October 12, 1921. SCHNEIDER A.J.—

The plaintiff alleged that the defendant had sold certain undivided shares of land to him by a deed, but had failed to give him vacant possession. He prayed that the deed be cancelled, and the

<sup>1</sup> (1913) 16 N. L. R. 360.

<sup>2</sup> (1900) 3 Bal. 244.

<sup>3</sup> (1913) 16 N. L. R. 365.

<sup>4</sup> (1913) 16 N. L. R. 362.

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defendant ordered to repay to him the sum of Rs. 200, which was the consideration paid for the land, and a further sum of Rs. 24 as damages. The defendant pleaded that he had given possession. Upon these pleadings two issues were formulated and tried of consent. The first was, whether possession had been given; and the second, what was the *quantum* of damages. The learned Commissioner held in favour of the plaintiff on the first issue, and gave judgment for him, by which he declared the deed of transfer cancelled and null and void, and ordered that the defendant should pay Rs. 200 to the plaintiff. From this decree the defendant has appealed. A preliminary objection to the appeal was taken by respondent's counsel. He contended that the defendant had no right of appeal, except upon a matter of law or with the leave of the Court, as the action must be regarded as an action for "damage or demand" within the meaning of section 13 of the Court of Requests Amendment Ordinance, 1895.

In support of this contention he cited the case of *Punchirala v. Appuhamy*.<sup>1</sup> That case is identical in all respects with the present case. I agree with the reasons given by the distinguished Judge who decided it, and I should have been content to uphold the objection in this case upon the authority of that decision alone without saying more, but for the fact that counsel for the appellant cited *Appuhamy v. Appuhamy*<sup>2</sup> and *Maricar v. Ismail*.<sup>3</sup> The latter case does not help him. On the contrary, Wood Renton A.C.J. in his judgment cites with approval the decision of Pereira J. in *Punchirala v. Appuhamy*.<sup>1</sup> Nor does the other case of *Appuhamy v. Appuhamy*<sup>2</sup> help him. That case was decided by my brother Ennis upon the ground that the issues raised involved a question of an interest in land. Here the issues do not raise any question of an interest in lands. To adopt the language of Pereira J.: "Clearly the first issue involved no question of right or title to any immovable property. It is an issue based upon an illegal breach of contract."

Mr. Jayawardene, for the respondent, contended that the allegations in the plaint must alone be considered in determining the question of the nature of the action, because section 13 of the Courts Amendment Ordinance, 1895, speaks of "an action for debt, damage, or demand." I cannot agree with this contention. So far back as in 1900 Bonser C.J. took the contrary view. In the case of *Babunhami v. Subahami*,<sup>4</sup> where the plaintiff sued for a declaration of title to immovable property and for damages for trespass, and the defendant admitted the plaintiff's title but denied the trespass, and the only issue tried was whether the defendant did, in fact, commit the trespass, he held that the action was "no less an action for damages, because it was originally joined with an

<sup>1</sup> (1913) 16 N. L. R. 360.<sup>2</sup> (1913) 16 N. L. R. 362.<sup>3</sup> (1913) 16 N. L. R. 365.<sup>4</sup> (1900) 3 Bal. 244.

action for a declaration of title." In other words, he held that the character of the action is to be determined by the issues raised and tried. I would therefore uphold the preliminary objection, and dismiss the appeal, with costs.

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*Appeal dismissed.*

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