Present : Schneider A.J.

1921.

ALI MARIKAR *v.* OMARDEEN.

224—C. R. Kalutara, 9,109.

Failure to deliver vacant possession—Action for cancellation of deed and refund of price and damages—Judgment cancelling deed and ordering refund of price—Does appeal lie except upon a matter of law, or with the leave of Court—Court of Requests.

The plaintiff alleging that defendant who had sold certain undivided shares of land had failed to give him vacant possession prayed that the deed be cancelled, and that the defendant be ordered to repay the price Rs. 200, and a further sum, Rs. 24, as damages.

The Court held that possession was not given, and declared the deed of transfer cancelled and null and void, and ordered that the defendant should pay Rs. 200 to plaintiff.

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

THE facts appear from the judgment.

Abdul Cader, for plaintiff, respondent.—No leave to appeal was obtained. This is an action for damages consequent upon a breach of contract. The main issue in the case is whether defendant had failed to give possession of the land sold to the plaintiff. No interest in land is involved. The plaintiff does not ask that he be put in possession of the land. Counsel cited *Punchirala v. Appuhamy.*[1]

J. S. Jayewardene, for defendant, appellant.—It has been held otherwise in *Appuhamy v. Appuhamy*,[2] which was an action for cancellation of a lease or, in the alternative, for a refund of the consideration involved. It has been held that a suit by a lessor for rent is a suit for land. Counsel also cited *Maricar v. Ismail.*[3]

Abdul Cader referred the Court to *Babunhami v. Subehami.*[4]

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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 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

[1] *(1913) 16 N. L. R. 360.*
[2] *(1913) 16 N. L. R. 365.*
[3] *(1913) 16 N. L. R. 362.*
[4] *(1900) 3 Bal. 244.*

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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 Courts of Requests Amendment Ordinance, 1895.

In support of his contention he cited the case of *Punchirala v. Appuhamy*.[1] 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*[2] and *Maricar v. Ismail*.[3] 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*.[1] Nor does the other case of *Appuhamy v. Appuhamy*[2] 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 alleged 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 of Requests 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. Subehami*,[4] 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 orginally joined with an 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.

Objection upheld.

[1] *(1913) 16 N. L. R. 360.*
[2] *(1913) 16 N. L. R. 365.*
[3] *(1913) 16 N. L. R. 362.*
[4] *(1900) 3 Bal. 244.*