

ASSALA ARACHCHIE
v.
GUNASEKERA & OTHER

COURT OF APPEAL.
EDUSSURIYA, J. (P/CA).
CA NO. 457/99 (REV).
DC KALUTARA 4551/L.
30TH JULY, 1999.

Tenancy admitted - No declaration of title prayed for - Cause of action - Defendant not paying rent - Who should begin.

Held :

- (1) Plaintiff - Petitioner who admits tenancy in his plaint must prove that the tenancy was terminated.
- (2) Plaintiff - Petitioner cannot convert an action for ejectment and right to possession to an action for a declaration of title when firstly he had not asked for such a declaration and secondly merely because the ownership of the premises in suit which was never disputed was recorded as an admission.

APPLICATION in Revision from the Order of the District Court of Kalutara.

Case referred to :

Khan vs Jayman [1994] 2 Sri. L.R. 233 at 239

A.K. Premadasa, P.C., with *C.E. de Silva* for Plaintiff - Petitioner.

N.R.M. Daluwatta, P.C., for Defendant - Respondent.

Cur. adv. vult.

September 24, 1999.

EDUSSURIYA, J. (P/CA)

The Plaintiff - Petitioner has filed this application to have the order directing him to begin the case revised by this Court.

The Petitioner in his plaint pleaded that the Defendant - Respondent was a licensee who carried on a business at the premises in suit, on the payment of a rental of Rs. 250/- per

mensem but that he is now forcibly carrying on business without payment of rent.

The Petitioner also pleaded that a cause of action had accrued to him to sue the Respondent to recover the said premises because the Respondent was unlawfully and forcibly disputing his title and possession thereof (paragraph 9) and prayed for ejection of the Respondent therefrom. Although the Petitioner had pleaded his title he had not prayed for a declaration of title to the premises in suit.

The Respondent filed answer claiming tenancy and that he had been depositing the rent in the name of the Petitioner at the Aluthgama Development Council sub-office after January 1982 because neither his landlord Davith Singho nor his wife Jaci Nona came to collect the rent and that from November 1996 when he found that the Plaintiff (Petitioner) had become the owner of the premises in suit he had deposited rent in Plaintiff's (Petitioner's) name at the Beruwala Pradeshiya Council sub-office at Aluthgama.

At the trial an admission was recorded to the effect that the Petitioner is the owner of the premises and then the Petitioner's Counsel raised the following issues :-

- (1) Is the Defendant wrongfully and unlawfully on the premises in suit?
- (2) If so, is the Plaintiff entitled to the reliefs prayed for in the Plaint?

The Respondent's Counsel had then raised issues 3 to 10. Issues 3 to 7 being on the basis of tenancy.

At that stage counsel for the Petitioner had contended that the Respondent should begin as the burden had shifted to the Respondent to establish under what right they were in occupation.

The learned District Judge had thereafter made order directing the Petitioner to begin.

The Plaintiff - Petitioner came to Court on the basis that the Defendants - Respondents are licencees of the premises in suit and had paid rent to him. In other words that the Respondents are his tenants. The Respondents also filed answer claiming tenancy. The position being that, there was no question of the Petitioner's (landlord's) ownership of the premises being denied by the Respondent. In fact it was admitted by the Respondents in their Answer. The recording of the admission that the Petitioner was the owner does not alter the position. The Petitioner has not prayed for a declaration of title. The Petitioner came to Court pleading the cause of action that the Respondents are not paying rent and consequently trespassers. The Petitioner has not pleaded from when the Respondents are not paying rent nor has he pleaded that he had terminated the tenancy by serving on the Respondents a notice to quit and deliver vacant possession.

In these circumstances, in order to "get off the ground" the Petitioner must begin and lead evidence to establish from when the Respondents are in arrears of rent. In any event, the Petitioner must establish that the Respondent's "license" as the Petitioner calls it, was terminated resulting in the right to possession reverting to him.

This is clearly set out by *Kulatunge, J. in Khan vs. Jayman*⁽¹⁾ 239 "We are therefore left with the fact that the Plaintiff is the owner of the premises in suit and his uncontraverted evidence that the Defendant occupied a room by leave and licence. Admittedly the license was terminated in 1975. The Plaintiff has thus established the *factum probandum*, namely, the license and its termination and he is therefore entitled to judgment as prayed for".

This Court therefore holds that the Plaintiff - Petitioner who admits the tenancy of the Defendants - Respondents in his plaint must therefore prove that the tenancy was terminated.

I may also add that the Plaintiff - Petitioner cannot convert an action for ejectment and right to possession to an action for a declaration of title when firstly he had not asked for such a declaration and secondly merely because the ownership of the premises in suit which was never disputed by the Defendants - Respondents was recorded as an admission.

In any event, if one examines the position as to who would fail if no evidence is led at all, the obvious answer is that the Plaintiff - Petitioner fails unless he leads evidence to establish that the Defendants - Respondents are occupying the premises in suit wrongly and unlawfully to enable Court to answer issue 1.

For the above mentioned reasons, this application to revise the order of the learned District Judge is dismissed with costs fixed at Rs. 10,500/- as it is a frivolous application.

Application dismissed.