

EUGIN FERNANDO
V.
CHARLES PERERA AND OTHERS

COURT OF APPEAL
S. B. GOONEWARDENA, J. AND
VIKNARAJAH, J.
C. A. NO. 299/80
D. C. AVISSAWELLA NO. 12308/L
MARCH 16, 1988.

Rei Vindicatio Action — Plaintiff parting with title pendente lite — Joinder of Purchaser — Civil Procedure Code, Ss. 18, 204.

A party who has parted with his interests in the corpus *pendente lite* can bring a rei vindicatio action against the defendant adding the purchaser, as a co-plaintiff.

Cases referred to

1. *Elias Appuhamy v. Punchi Banda* 14 NLR 113
2. *Silva v. Jayawardena* 43 NLR 551, 552
3. *Ossen Lebbe v. Cader Lebbe* (1899) 2 ACR 175
4. *Silva v. Jayasekera and another* 30 CLW 111, 112
5. *Manindra Chandra Nanday v. Ram Kumar* AIR 1922 PC 307

6. *Murugesu v. Gunaratne* CA/LA 29/79 Court of Appeal Minutes of 18.7.1979

7. *Kandasamy v. Meenambikai* CA/LA 17/79 C. A. Minutes of 22. 8. 1979

Appeal from judgment of the District Court of Avissawella.

N. R. M. Daluwatte P.C. with *Rohan Sahabandu* and *Miss Jayasinghe* for defendant-appellant.

Daya Guruge with *Mrs. K. Sivapathasuntharam* for plaintiff-respondent.

Cur. adv. vult.

May 17, 1988

S. B. GOONEWARDENE, J.

The only point that arises for consideration in this appeal is as to the effect upon the result of the action, of a transfer pendente lite of the interests of the original plaintiff in the subject matter to another who was brought in as an added plaintiff.

The action was one for a declaration of title to a property called Lots 3 and 4 and a portion of lot 2 depicted on plan No. 830 of 4th February 1963 made by D. J. Nanayakkara, Licensed Surveyor from and out of an Estate called Tekkawatte being a part of Verdun Group situated at Hanwella.

The original plaint of 1st October 1967 was one filed by Mahapatunage Charles Perera upon which he sought a declaration of title to these premises against the defendant Walimuni Dewage Eugin Fernando and asked by way of additional relief that the latter be ejected from the premises and that he be awarded damages against her.

By deed No. 8852 of 12th April 1969 produced marked P18 at the trial, Charles Perera transferred these premises to Iddamalgodage Dona Gunawathie pending the action, and upon an application made in that behalf the latter was brought in and an amended plaint filed whereon Charles Perera figures as the 1st plaintiff and Gunawathie as the 2nd. The relief sought upon the amended plaint was the identical relief sought upon the original plaint, with the difference that both plaintiffs asked for such relief.

At the conclusion of the trial the District Judge held with the plaintiffs and granted them the relief asked other than the damages. There can be no doubt that the evidence produced at the trial established in ample measure the title relied upon by the plaintiffs.

In this appeal the point taken by Counsel for the defendant-appellant is that in view of the transfer by the 1st plaintiff of his title to the 2nd plaintiff during its pendency, the action necessarily must stand dismissed notwithstanding her presence before the Court as the 2nd plaintiff. Counsel for the defendant-appellant has relied strongly on the decision of the Full Bench in *Elias Appuhamy v. Punchi Banda* (1) and the following passage from Voet 6:1:4 (Gane's Translation Volume 2 p. 214:—"If in a vindicatory action plaintiff loses ownership pendente lite, defendant is discharged. Then again if he who sets this action in motion was owner at the time of joinder of issue, but loses ownership pendente lite, reason tells us that the defendant is discharged, for the reasons firstly that the matter has come to this pass that the action could not at that stage have a starting point nor any ground of existence from it; secondly, that the plaintiff has ceased to have an interest; and thirdly that the one and only basis for such an action has been removed and wiped out".

With respect to this passage Keuneman J. in the case of *Silva v. Jayawardena*(2) said "It is clear that the action contemplated by Voet was the action rei vindicatio, and I think it follows that all rights in rem against the property are lost, when the dominium has been transferred pending the action to another person".

I do think that the authorities lay down clearly that a plaintiff who has transferred his title to the immovable property under consideration pendente lite cannot seek to vindicate the title he earlier had in a declaratory sense and consequently cannot seek to recover possession of the property either, and that without doubt would be the position of the 1st plaintiff here. The question yet remains as to the resultant position that the 2nd plaintiff has been brought before the Court (and jointly with the 1st plaintiff her vendor has asked for the same relief) a step

apparently taken here under the provisions of section 404 of the Civil Procedure Code.

The case of *Elias Appuhamy v. Punchi Banda* (Supra) was a decision of three Judges. The question there revolved around a similar one as here, where certain defendants pleaded in their answer that as the plaintiff after the institution of the action conveyed all his interests in the land in question to two others, he was not entitled to maintain the action. According to the narrative of facts preceding the judgement (vide page 114), at the trial the District Judge there framed an issue embodying this proposition and while holding on that issue that the action was not maintainable, yet ordered that the transferees from the plaintiff be brought in as added plaintiffs within a specified time. The judgment of Hutchinson C.J. appears to suggest that the plaintiff did acquiesce in such order, but what must be observed is that the bringing in of the transferees from the plaintiff was not a step initiated by the plaintiff himself or by the transferees. Indeed it would appear that in the appeal before the Full Bench, Counsel appearing for the plaintiff contended that the Court, should not have ordered the vendees to be joined as plaintiffs. (vide the arguments of Mr. Bawa set out at page 115). The importance of this is to highlight that the principal relief that appears to have been sought was the damages caused to the plaintiff by an alleged wrongful removal of plumbago from the land in dispute while the declaration of title sought with respect to the land was only incidental to that claim. That this is so appears in particular from the following words of Hutchinson C.J. (at page 116) "The plaintiff contended before the District Court that he should maintain his claim for damages in this action without adding the purchasers as plaintiffs; the Judge expressed his option that the action must be dismissed unless the purchasers were added; and the plaintiff accordingly asked that they should be added, and the Judge allowed his request". It is also reflected in the words of Middleton J. (at page 118) "The fact that his action is supposed to be in the form of an action rei vindicatio does not prevent him from abandoning that part of his claim seeking a declaration of title and ejectment and reducing his claim to one of damages only".

The question of whether the transferees from the plaintiff were properly ordered to be joined in the circumstance of that case was what the majority (Hutchinson C.J. and Middleton J.) concerned themselves with and such question was approached in the background of whether a particular form of action was necessary to be adopted for the plaintiff to succeed in getting his damages. Middleton J. (at page 118) put it thus: "If therefore he (the plaintiff) had a right to claim such damages I cannot see that he is precluded by the form of his action from proceeding in conformity with it for their recovery". The argument that had been adduced for the defendant appellant and his (Hutchinson C.J.'s) response thereto is contained in the following words (at p. 116) "The appellant's contention if I have rightly understood it, is that the order adding plaintiffs was irregularly made and should be set aside, and that when that is done, the plaintiff's action must be dismissed, because there is a rule that a man cannot recover what are called 'mesne profits' from a trespasser on his land, unless he gets at the same time a decree declaring him to be entitled to the land; that the plaintiff admittedly cannot now get such a decree, and that the damages he claims are 'mesne profits', or at any rate should be dealt with in the same way as if they were 'mesne profits'. The case of *Ossen Lebbe v. Cader Lebbe* (3) was cited in proof of the alleged rule. If there is such a rule the original plaintiff's claim must fail, whether the purchasers are added or not, because he is not now entitled to the land, and the added plaintiffs are not entitled to damages for the plumbago removed before their purchase. From any point of view, therefore, it was not necessary to add the purchasers as plaintiffs. For if there is such a rule, the plaintiff's claim must fail whether the purchasers are added or not". Rejecting the argument as put forward, he concluded (at page 117) by adding "They (the authorities cited) do not say and I cannot believe they meant that, if a man has a right to recover damages for trespass on his land he loses it, and no one else acquires it when he sells the land. And if he still had the right, he must have a remedy; the form of the action is no longer material".

The majority of the Judges directed the setting aside of the order of the District Judge to bring in the vendees as added plaintiffs and also directed that the case go back to the District

Court for a trial to be had on the other issues and interestingly upon the basis that the plaintiff (who had filed a cross objection in the appeal) had substantially succeeded he was awarded his costs.

I have been at pains to cite extensively from these judgments to emphasize that the whole question in that case centred around the plaintiff's right to continue the action with respect to his claim for damages, for which purpose the vendees from him were held to be unnecessary and the ratio decidendi, therefore in the case must be thought to fall within that compass.

The dissenting judgment of Grenier J. however is the one that causes some problem. He said (at page 121)

"The plaintiff is in this position, now that he has parted with the dominium to a third party, that he cannot obtain a declaration of title under any circumstances. I do not think that either section 18 or section 404 is helpful to the plaintiff in the position in which he has placed himself by conveying the property in question to third parties, for no declaration of title can be made in this action in favour of the purchasers so long as the plaintiff is on the record. It may be that the defendants have grounds of defence against the purchasers which cannot be raised in the present action, and it would not, I think be convenient or proper, or indeed right in law, to allow the plaintiff, after he has once parted with the dominium, to go on and maintain his action for a declaration of title for a land of which admittedly he is no longer the owner. He cannot claim mesne profits because he has alienated the res, and the fructus cannot be allowed to be claimed by him".

Upon that reasoning he directed a dismissal of the plaintiff's action.

If Grenier J. intended by these words to say that it was not permissible for the transferees from the plaintiff to come into the case if they wished to do so, I cannot agree and any such statement I think must be treated as obiter for the reason that

such a situation was not present in that case. Nor can I agree that no declaration of title can be granted in favour of the purchasers so long as the plaintiff is on the record because in my reading of them the clear terms of section 404 militate against such a view. I do think that section 404 of the Civil Procedure Code makes express provision for such a course. Section 404 reads thus:—

"In other cases of assignment, creation, or devolution of any interest pending the action, the action may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require"

In the case of *Silva v. Jayasekera and another* (4) Keuneman J. with respect to this section said

"The important and controlling words in my opinion are that 'the leave of the Court' must be obtained. I think that puts the Court in complete control of the case, and vests in the Court a discretion as to the persons to be admitted as parties plaintiff or defendant"

Keuneman J. also pointed out in the same case that in India, Order 22 Rule 10 is on the same lines as our section 404, and the position there may therefore usefully be looked at. Chitale & Rao in their work *The Code of Civil Procedure* 7th Edn (1963) Vol III at pages 3416-3417 explain the scope and applicability of the rule (Rule 10) thus:—

"The rule is an enabling one. It is based on the principle that the trial of a suit cannot be arrested merely by reason of a devolution of the interest of a party in the subject matter of the suit; that the person acquiring the interest may continue the suit with the leave of the Court; but that if he does not choose to do so the suit may be continued with the original party and the person acquiring the interest will be bound by.

or can have the benefit of, the decree as the case may be. But this is subject to the rule that when the plaintiff ceases to have the right and the cause of action therefore lapses, he cannot be allowed to continue the suit".

One finds in that work the following passages which state the effect of the authorities:—

"Where, however, there are two devolutions, viz one by the death of a party (coming under rules 3 and 4) and the other by a transfer of his interest (Prior to his death), the transferee has the right to be impleaded under this rule and the death of the party cannot take away that right" (at page 3419)

"As illustrations of 'other cases of assignment, creation or devolution of interest' falling within this rule may be mentioned cases of transfer inter vivos"

(at p.3420)

". . . . the 'interest' referred to in Rule 10 is the interest of a person who was a party to that suit, and it is the transfer of the interest of such a person to the applicant that entitles him to continue the suit under this rule"

(at p.3421)

". . . . a transfer inter vivos such as a sale, or any other kind of transfer will come within the rule" (at p.3421)

If authorities be necessary, these passages constitute I think sufficient authority for what in my understanding the plain language of section 404 of our Code provides.

One other matter requires to be mentioned. The earlier Indian provision, as in our section 404, was that the suit may with the leave of the Court be continued by or against the person to whom the interest has passed either in addition to or in substitution for the person from whom it has passed. The words "in addition to" have disappeared from the present rule as was pointed out by the Privy Council in *Marindra Chandra Nanday v Ram Kumar* (5). It is I think for that reason that the passages I

have cited above with respect to Rule 10 appear to suggest a substitution of the purchaser from the plaintiff in the cases under consideration. Our Code contains these words 'in addition to', and I think with advantage. It may well be that the issues in the case demand the presence of the plaintiff whose interests have passed and one instance that comes to mind is when there is a claim in reconvention made against the plaintiff by the defendant. I cannot, having regard to the language of section 404 of the Code go along with the view expressed by Grenier J. which I earlier referred to that 'no declaration of title can be made in the action in favour of the purchasers so long as the plaintiff is on the record'. I see no impediment, upon a true reading of section 404, to a purchaser of the plaintiff's interest being brought in, in addition to the plaintiff and the action continuing to enable such purchaser to get the relief the plaintiff might, but for his transfer, have got. On that basis the 2nd plaintiff here was clearly entitled to the relief the District Judge granted.

Since preparing this judgment I have been able to ascertain that a like view has been taken by Tambiah J. (with Ratwatte J. agreeing) in this Court in *Murugesu v. Gunaratne* (6) (See also *Kandasamy v. Meenambikai* (7)).

Since the 1st plaintiff was not entitled to these reliefs the judgment of the District Judge is varied so as to allow judgment as granted by him in favour of the 2nd plaintiff only.

Subject to this variation the appeal is dismissed with costs payable to the 2nd plaintiff-respondent.

VIKARAJAH, J. — I agree.

Appeal dismissed.