

## ATTANAYAKE

v.

ALADIN

COURT OF APPEAL.

WEERASEKERA, J. AND

JAYASINGHE, J.

C.A. 687/84(F)

D.C. AVISSAWELLA 16621/RE

JULY 28 &amp; AUGUST 19, 1997.

*Land Development Ordinance – Permit – Recovery of Possession – Possessory Action – Rei Vindicatio Action – Ingredients – Dispossession section 4 of Prescriptive Ordinance 22 of 1877.*

The plaintiff-appellant instituted this action for recovery of possession of a certain field, on the basis of it being granted to him on a yearly permit under the Land Development Ordinance; and that the defendant-respondent forcibly entered the field and commenced to cultivate. The learned District Judge dismisses the plaintiff's action, on the basis that where there was no declaratory relief asked the plaintiff must establish possession, for a year and a day and further the plaintiff in order to claim the relief should have established his rights to possess and sought a declaration of his rights to possess as a permit holder or as a lessee.

**Held:**

- (1) The action is clearly not a possessory action. There is no averment of dispossession as required by section 4 of the Prescriptive Ordinance 22 of 1877. The averments indicate non-possession by plaintiff-appellant for three years and the consequent dispossession.
- (2) It is clear that the action is also not a *Rei vindicatio* action. The plaintiff-appellant pleads no title to be declared entitled to the land but to be only a yearly permit holder.
- (3) The plaintiff-appellant only states that he came to possess on the permit but did not seek a declaration that he was entitled to possess the land on the alleged yearly permit. The consequential relief of the ejection of the alleged trespasser cannot therefore arise.

**APPEAL** from the Judgment of the District Court of Avissawella.

**Case referred to:**

1. *Palisena v. Pera* – 56 NLR 467 at 408.

*L. J. N. de Jacolyn Seneviratne* with *Damayanthi Silva* for plaintiff-appellant.

*P. A. D. Samarasekera, PC*, with *G. L. Geethananda* for defendant-respondent.

*Cur. adv. vult.*

October 2, 1997.

**WEERASEKERA, J.**

The plaintiff-appellant instituted this action by his plaint dated 27.02.82 for the recovery of possession of field called *Messankedeniya* and described in the schedule to the plaint on the basis of it granted to him on a yearly permit under the Land Development Ordinance from 1941 and from that date that he cultivated the said field. By reason of his ill health he stated that he could not cultivate the field for 3 to 4 years and that the defendant-respondent forcibly entered the field and commenced to cultivate. The plaintiff-appellant sought the ejection of the defendant-respondent and for restoration of possession.

The defendant-respondent whilst, taking up the position that he was unaware of the plaintiff-appellant's right to possess under a permit claimed that the field was asveddumised by his father in 1941 and claimed a prescriptive right to the field and in the alternative for *bona fide* improvements.

At the trial 12 issues were adopted for adjudication. Of consent issues 5 and 6 were taken as preliminary issues. They are;

Issue 5 – can the plaintiff maintain this action as presently constituted?

Issue 6 – If issue 5 is answered in favour of the defendant, should the plaintiff's action be dismissed subject to the relief claimed by the defendant in this answer?

The learned District Judge of Avissawella by his order dated 18.09.84 answered issue 5 in the negative and dismissed the plaintiff's action with costs. This appeal is from that order.

Both Counsel filed written submissions at the appeal.

I have given my best consideration to the pleadings, issues, and the submissions of both Counsel in the District Court and before Court of Appeal and the reasoning of the learned District Judge.

The reasoning of the learned District Judge was based on two prepositions namely that where there was no declaratory relief asked for in the plaint the plaintiff must establish possession for a year and a day as conceived by section 4 of the Prescriptive Ordinance and the plaintiff in order to claim the relief by way of ejectment should have established his right to possess and sought a declaration of his right to possess as a permit holder or as a lessee.

Learned Counsel on behalf of the appellant strongly urged that as decided by Gratien, J. in the case *Palisena v. Perera*<sup>(1)</sup> at 408 that the learned District Judge has misunderstood the scope of the remedy sought by the plaintiff-appellant to be relief *rei vindicatio* and had failed to appreciate the nature of the permit holder's right to possess under the Land Development Ordinance.

Our law conceives of two types of remedies that a dispossessed individual could seek. An action *rei vindicatio* and a possessory action. To what category does this action fall?

This action is clearly on a reading of the plaint not a possessory action. There is no averment of dispossession as required by section 4 of the Prescriptive Ordinance No. 22 of 1877 after possession of a year and a day and is mandatorily required. On the contrary the averments of the plaint indicate non possession by the plaintiff-appellant for 3 years and the consequent dispossession. In such an event the action not being a possessory action the plaintiff-appellant would not in any event have been entitled to the relief sought in the prayer to the plaint.

It is clear from a reading of the plaint that the action is not based on the Roman Dutch Law relief of *rei vindicatio*. The plaintiff-appellant pleads no title to be declared entitled to the land but to be only a yearly permit holder under the Land Development Ordinance.

If so this action a vindicatory action and from which can the plaintiff-appellant seek the relief sought in the plaint.

**Gratien, J.** in the same judgment at 408 states –

“This was not a Possessory Action in which a person complaining of dispossession can in certain circumstances, without proof of his title, obtain a decree for ejectment of a person who has dispossessed him otherwise than by a due process of Law. This is a vindicatory Action in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks on proof that title, he places in possession against an alleged trespasser”.

Clearly therefore what was decided by Gratien, J. was that in a vindicatory action the relief of ejectment would only be the consequent to a declaration or vindication of the right to possess. In this case the plaintiff-appellant whilst only stating that he came to possess on the permit under the Land Development Ordinance did not seek a declaration from Court that he was entitled to possess the land in dispute on the alleged yearly permit issued under the Land Development Ordinance. The consequential relief of the ejectment of the alleged trespasser cannot therefore arise.

I am of the considered opinion that the learned District Judge had not misunderstood the scope of the remedy sought by the plaintiff nor failed to appreciate the yearly permit holder's right under the Land Development Ordinance.

For these reasons I do not propose to interfere with the judgment of the learned District Judge of Avissawella dated 18.09.84.

The appeal of the plaintiff-appellant is dismissed with taxed costs.

**JAYASINGHE, J.** – I agree.

*Appeal dismissed.*