

KULAPALA AND ANOTHER

v.

SOMAWATHIE

COURT OF APPEAL
WIGNESWARAN, J.
TILAKAWARDENA, J.
C.A. 123/96
D.C. RATNAPURA 10162/L
JANUARY 21, 2000

*Possessory action - Prescription Ordinance S.4 - Institution of Action -
time period - Dispossession - Primary Courts procedure Act - S.66*

Held :

- (i) It is incumbent upon the Plaintiff Appellants to have instituted action within one year of the alleged dispossession.
- (ii) The action, by the institution of proceedings envisaged in S.4 of the Prescription Ordinance was one where the Plaintiff in such action shall be entitled to a decree against the Defendant for the restoration of such possession without proof of title.
- (iii) Dispossession is not an essential ingredient for actions instituted under the Primary Courts Procedure Act.

APPEAL from the Judgment of the District Court of Ratnapura.

Cases referred to :

1. *Perera v. Wijesooriya* - 59 NLR 529
- N. Malalasekera*, for Plaintiff Appellant.
T. A. J. Udawatte for Defendant Respondent.

Cur. adv. vult.

March 14, 2000.

SHIRANEE TILAKAWARDANE, J.

The Plaintiff Appellants by Plaint dated 14. 12. 1990 filed this action for a declaration of title to the land described in the second schedule to the said plaint with consequential relief.

The Defendant Respondent by her answer dated 15. 09. 1992 denied the averments in the Plaint and prayed for dismissal of the Plaintiff Appellant's action with costs.

Thereafter the Plaintiff Appellants filed amended Plaint dated 07. 07. 1993 and prayed for a possessory decree and eviction of the Defendant Respondent from the land in dispute and other reliefs.

By amended Answer dated 21. 01. 1994 the Defendant Respondent, *inter alia*, took up the position that the Plaintiff Appellants could not convert the original action for declaration of title to one of possessory decree. In any event it was pointed out that the action for possessory decree was prescribed in law since the action had been filed more than one year after the alleged dispossession in 1989.

When the case came up for trial on 12. 10. 1995 three preliminary issues were raised on behalf of the Defendant Respondent. They were:-

- (a) In accordance with the provisions of the Prescription Ordinance, should a possessory action be filed within a year of the date of dispossession?
- (b) According to the averments contained in paragraph 9 of the Amended Plaint, was this action instituted after such period of one year?
- (c) If so, can the Plaintiff obtain the reliefs claimed in the Amended Plaint?

The District Judge, Ratnapura by his Order dated 08. 02. 1996 held in favour of the Defendant Respondent on these preliminary issues and dismissed the Plaintiff's action with costs. This is an Appeal from the said Order.

The question that has arisen in Appeal is whether there is mandatory statutory requirement that proceedings should be instituted within one year of the date of dispossession. The

relevant Section 4 of the Prescription Ordinance reads as follows:-

"It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. And on **proof of dispossession within one year before action is brought**, the Plaintiff in such action shall be entitled to a decree against the Defendant for the restoration, of such possession without proof of title.

Provided that nothing herein contained shall be held to affect the other requirements of the law as respects Possessory cases."

Counsel for the Plaintiff Appellants contended that there was no need for a possessory action to be instituted within one year of dispossession. He relied on the Judgement of Basnayake C. J. in *Perera v. Wijesuriya*⁽¹⁾. It appears that the learned Counsel has misunderstood the *ratio decidendi* of that case. The matter resolved in that case was whether it was necessary for a party to have had possession of the land for a period of one year and a day at least, to entitle such party to maintain a Possessory action. This case did not deal with the issue of the time limit after dispossession within which a Possessory action should be instituted. Furthermore, the case also held that the Plaintiff could maintain an action under section 4 of the Prescription Ordinance, as long as the ousting was within one year. (Vide Page 536).

In the circumstances, we find that it was incumbent upon the Plaintiff Appellants in this case to have instituted this action **within one year** of the alleged dispossession on or about 20. 07. 1989. It is to be noted that Police complaint in this regard was made not by the Plaintiff Appellants but by the Defendant Respondent. We therefore hold that the action had been filed out of time and was prescribed in terms of the Prescription Ordinance adverted to above.

The learned Counsel submitted further that since action had been instituted within one year in the Primary Court of Ratnapura, there had been substantive compliance with the provisions of the Prescription Ordinance.

However, the action instituted in terms of section 66 of the Primary Courts' Act was not by the Plaintiff Appellants. In fact, while the Defendant Respondent filed the first complaint in this case, the institution of proceedings was a result of the report to Court lodged by the Officer in Charge of the Kiriella Police Station. Furthermore this section dealt with any dispute that may have arisen pertaining to land which led to a breach of the peace. Dispossession is not an essential ingredient for actions instituted under the Primary Courts' Act. The purpose of the action so filed was to obtain a temporary Order to maintain *status quo ante*, until a competent Court of civil jurisdiction could make a final Order on the dispute, based on the merits of the case.

The action by the institution of proceedings envisaged in Section 4 of the Prescription Ordinance was one where "the Plaintiff in such action shall be **entitled to a decree** against the Defendant for the **restoration of such possession** without proof of title." In other words "the action" referred in Section 4 of the aforesaid Ordinance was a **Possessory action** filed in the **District Court** and not an information filed in the Primary Court in terms of Section 66 of the Primary Courts' Act.

We therefore find the contention of the Counsel for the Plaintiff Appellants untenable in law.

We accordingly dismiss the Appeal. We Order taxed costs payable by the Plaintiff Appellants to the Defendant Respondent.

WIGNESWARAN, J. - I agree.

Appeal dismissed.