

**SOMARATNA
v.
LUWIS NONA**

COURT OF APPEAL
WEERASURIYA, J. (P/CA) AND
DISSANAYAKE, J.
CA NO. 242/95 (F)
DC MT. LAVINIA NO. 439/Spl
NOVEMBER 22, 2000
JANUARY 23, 2001
MARCH 20, 2001
MAY 20, 2001

Right of Administratrix to recover business carried out in part of building – Can an intestate/co-owner be evicted? – Business not included in inventory – Can action be instituted to recover same? – Should the Administratrix plead title to the immovable property? Should letters be stamped? – Civil Procedure Code – Cap. LIV – Amendment No. 19 of 1977, No. 20 of 1997, S. 35, 217, 386, 530, 530 (2) 531, 533, 534, 538, and 547, form 87. Estate Duty Ordinance No. 8 of 1919 – S. 30 – Estate Duty Ordinance, No. 1 of 1938 – Stamp Ordinance 1909.

The plaintiff-respondent administratrix of the estate of one M instituted action to recover the business owned and run by late M in a part of the building which he resided. The defendant-appellant resisted the application on the basis that, he is a co-owner and therefore cannot be evicted.

The District Court held with the plaintiff-respondent.

On appeal it was contended that –

- (1) The defendant-appellant being an intestate heir/co-owner cannot be evicted.
- (2) The business was not included in the inventory.
- (3) The plaintiff-respondent has not prayed for a declaration of her status, and therefore is precluded from seeking possession of the property.

Held:

- (1) The subject-matter of the action is the business. The possession of the materials and the occupation of the premises are merely an adjunct or ancillary to the business. An action for the recovery of a business has to be distinguished from an action for the recovery of possession of the building where the business is being conducted.
- (2) The assets to be collected is the business and is not an immovable property. An administrator is vested with the duties of collecting assets of a business by way of equipment, utensils, book debts from customers and goodwill, therefore the question that the defendant-appellant is a co-owner does not arise.
- (3) Compilation of an inventory is a subsequent step, provided for by s. 538 after grant of letters. According to the scheme of the C.P.C. the administrator is required to fulfil his duties and then render a true and accurate inventory, which is a step in the culmination of the process of administration of the estate to be followed by the distribution of the estate.
- (4) Even under the old s. 547, CPC, no reference has been made to an inventory. The request that letters should be stamped was in terms of the Stamp Ordinance. The Estate Duty Ordinance repealed the provisions of the Stamp Ordinance applicable to the stamping of letters/probate. Thereafter, there was no requirement of duly stamping of letters/probate. Legislation has thus rendered unnecessary the provisions relating to the due stamping of letters/probate.

Per Weerasuriya, J. (P/CA)

"The reference to the inventory had been made presumably for the purpose of ascertaining whether the letters were duly stamped since the best evidence for the full value of estate could be found in the inventory. The requirement of an inventory which was the incidental step adopted to test whether the documents was properly stamped ceased to exist."

- (5) As the subject-matter of the action is the business, occupation of the premises and possession of the materials are merely an adjunct or ancillary to the business. Therefore, plaintiff's title to the immovable property does not arise.

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to :

1. *Charles Appuhamy v. Abeygunasekera* – 54 NLR 243.
2. *Mustaffa v. Nizam* – 1981 – 1 Sri LR 58.
3. *Somasundaram v. Wijeratna* – 66 NLR 193.
4. *Fernando v. Unnanse* – 20 NLR 378.
5. *Chelliah v. Wijenathan* – 54 NLR 337.
6. *Silva v. Weerasuriya* – 10 NLR 73 – Distinguished.
7. *Wijesinghe v. Attorney-General* – 48 NLR 56.
8. *Pathirana v. Jayasundera* – 58 NLR 169.
9. *Jayasinghe v. Tikiri Banda* – 1988 2 Colombo Appellate Law Reports 24.

Nihal Jayamanne, PC with *Ms. Noorani Amarasinghe* for defendant-appellant.

Gamini Jayasinghe with *P. P. de Silva* for plaintiff-respondent.

Cur. adv. vult.

August 24, 2001.

WEERASURIYA, J. (P/CA)

This action was instituted by the plaintiff-respondent in her capacity as administratrix of the estate of D. S. Meeriyagalla, to recover the business that was owned and carried on by late Meeriyagalla, in a part of the building where he resided. ¹

The defendant-appellant who had come to reside with him as a student seeking support and later assisted in the business, claimed that he was an intestate heir of the late Meeriyagalla and therefore a co-owner of the premises No. 45/1, Udahamulla, Nugegoda.

This case proceeded to trial on 13 issues and the learned District Judge by his judgment dated 05. 06. 1995, entered judgment for the plaintiff-respondent. It is from the aforesaid judgment that this appeal has been preferred. ¹⁰

At the hearing of this appeal, learned President's Counsel for the defendant-appellant did not canvass the following findings of the District Judge:

- (a) That the defendant-appellant was accommodated and supported in Meeriyagalla's household for the purpose of attending a tutory.
- (b) That after the completion of studies the defendant-appellant was taken in as a helping hand in the management of the ²⁰ business by Meeriyagalla.
- (c) That the business was owned exclusively by Meeriyagalla who was a man of considerable means.

However, learned President's Counsel advanced the following arguments in canvassing the aforesaid judgment:

- (1) That the defendant-appellant being an intestate heir of the deceased, is a co-owner of the property in suit and therefore the plaintiff-respondent cannot seek his ejection.
- (2) That since the business which the plaintiff-respondent has sought to recover, was not included in the inventory of the ³⁰ testamentary proceedings, she is not entitled to file action for the recovery of the said business.
- (3) That the plaintiff-respondent has not prayed for a declaration of her status in respect of the substantive reliefs claimed and therefore is precluded from seeking possession of the property.

I propose to deal with the above submissions in the same sequence.

By deed bearing No. 596 dated 19. 05. 1985 attested by H.J.H.M. Fonseka, NP deceased Meeriyagalla and the plaintiff-respondent became owners of the land and the building bearing No. 41/5, Udahamulla, Nugegoda. The claim of the defendant-appellant was that after the death of Meeriyagalla he became an intestate heir as one of the children of the sister of Meeriyagalla. It was common ground that deceased Meeriyagalla had 4 brothers and 1 sister who had defendant-appellant and 5 other children. On the strength of the deed marked P1, the plaintiff-respondent is entitled to half share and heirs of the deceased Meeriyagalla would be entitled to other half share. The plaintiff-respondent was entitled to half share of such rights being his widow. The balance 1/4 rights devolved on the brothers and sister of Meeriyagalla and their descendants. On the basis of this devolution, the defendant-appellant being one of the 6 children of Meeriyagalla's sister would be entitled as an intestate heir to a fractional share of 1/120.

In dealing with this question it is significant to note that, the subject-matter of the present action as set out in the prayer to the plaint and crystalized in the issues is the business. The possession of the materials and the occupation of the premises are merely an adjunct or ancillary to the business. An action for the recovery of a business has to be distinguished from an action for the recovery of possession of the building where the business is being conducted.

In the case of *Charles Appuhamy v. Abeygunasekera*⁽¹⁾ the lease of a business was described as the giving over of management, control and conduct of the business, and the possession of the premises were given as ancillary to the primary object.

In the case of *Mustaffa v. Nizam*⁽²⁾ where the question that arose for determination was the effect of written agreement by which the plaintiff purported to lease to the defendant a business known as "Thaj Hotel" without notarial attestation it was held that on a consideration of all the terms and conditions of the said agreement, it was only

a lease of the business and the defendant therefore only become a licensee of the premises in which the business was carried on in order to enable him to carry on the same. This case highlighted the principle that where the dominant or primary intention of the parties to a transaction was to effect the lease of the business, then the fact that the lessee of that business has a personal privilege of occupying the land exclusively, does not give him any interest affecting land (*vide* P. 65). 70

Applying the above principles to the present case it would appear that the plaintiff-respondent (the administratrix) was seeking to recover the business from a person who had held a subordinate capacity under the proprietor and set up a right in himself after his death. Therefore, the present action is not an action to recover an immovable property but an action to recover a business. 80

This leads to the further question whether a person who was engaged in the business in a subordinate capacity and therefore living in the business premises as a licensee of the deceased could resist the claim of a duly appointed administratrix on the basis of a claim to an infinitesimal share of the premises.

In the case of *Somasundaram v. Wijeratna*⁽³⁾ at 200 the duties of an administratrix were spelt out in the following manner : 90

"His duties are to bury the deceased, to collect the estate, and if necessary convert it into money; to pay the debts in their proper order, then to pay the legacies and distribute the residue among persons entitled thereto."

Chapter LIV of the Civil Procedure Code makes provisions for aiding and assisting executors and administrators in the discharge of their duties.

The following observations of De Sampayo, J. in the case of *Fernando v. Unnanse*⁽⁴⁾ at 383 are highly relevant to the question in issue:

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"The very object of appointing a legal representative is that there may be one recognized person who is entrusted with the duty as well as the power of collecting assets, paying debt and necessary expenses and distributing the estate in the course of administration. He is liable to account for assets and disbursements and is responsible to the Court as well as to the parties interested for his proceedings. The realization of assets by the heirs for distribution among themselves according to their will and pleasure and without any responsibility is not only highly inconvenient, but in my opinion, disallowed by law."

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In the light of the foregoing reasons, the assets to be collected is a business, and is not an immovable property. An administrator is vested with the duties of collecting assets of a business by way of equipment, utensils, book debts from customers and goodwill.

In the circumstances, the question that the defendant-appellant was a co-owner of the premises and therefore cannot be ejected therefrom, does not arise.

To deal with the contention of learned President's Counsel that the business that the plaintiff-respondent sought to recover was not included in the inventory and therefore she is not entitled to file action for the recovery of the said business, it is useful to examine the provisions of the Civil Procedure Code relating to the application and to the grant of letters of administration.

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It is to be recalled that Meeriyagalla died on 14. 12. 1983 and letters of administration in respect of the intestate were obtained by the plaintiff-respondent on 21. 12. 1984 (*vide* admissions at page 32 of the brief).

Therefore, the provisions of the Civil Procedure Code reintroduced by Act No. 19 of 1977 and amended by Act No. 20 of 1977 are applicable. 130

Section 530 of the Civil Procedure Code makes provision for an application to be made to the District Court for grant of administration where a person dies without making a will. The mode of making the application is by way of petition setting out the relevant facts to the best of the petitioner's knowledge, supported by sufficient evidence to afford *prima facie* proof of the material allegations in the petition, naming the next of kin of the deceased as respondents. The petitioner is entitled to tender with the petition the consent in writing of such respondents who consent to the application. 140

In terms of subsection (2) of section 530 the petitioner is required to tender with the petition –

- (1) the declaration of property referred to in section 30 of the Estate Duty Ordinance in triplicate;
- (2) draft order *Nisi*;
- (3) the requisite stamps for the order *Nisi* and service thereof;
- (4) draft notice of order *Nisi* in the form No. 84A in the first schedule;
- (5) proof of payment of the estimated charges to cover the cost of advertising the notice of order *Nisi*. 150

Section 531 provides that upon an application for grant of administration being made, if the Court is of opinion that the material allegations of the petition are proved to make an order *Nisi* declaring the petitioner's status accordingly and making the grant prayed for. This section makes it obligatory to serve such order upon the respondent and upon such other person Court directs.

In terms of section 533 if on the day appointed for final hearing, if any respondent or any person upon whom order *Nisi* has been directed to be served, or any person appearing to be interested in the administration of the deceased's property, satisfies Court that there are grounds of objection to the application, Court is obliged to frame issues, and direct them to be tried on a day appointed under section 386. ¹⁸⁰

Section 534 stipulates at the final hearing, if it appears to the Court that the *prima facie* proof of the material allegations of the petition have not been rebutted, then the order *Nisi* shall be made absolute and the grant of administration shall issue.

The form of the letters of administration is contained in form 87 of the first schedule to the Civil Procedure Code.

In ascertaining the extent of the power of administration the following observations of Gratien, J. in *Chelliah v. Wijenathan*⁽⁵⁾ at 339 are useful: ¹⁷⁰

"The terms of grant in favour of the appellant in this action have been taken over from form 87 recommended in the first schedule to the Code. If the language of this grant be examined and summarised it becomes apparent that the authority of the appellant qua administrator, extended to all the well-recognized powers of administration namely: (1) the recovery and collection of the assets of the estate (2) payment of debt, expenses, etc and (3) finally payment and distribution in terms of a decree under section 740 of the Code . . . " ¹⁸⁰

Therefore, as a necessary corollary form that process of recovery and collection of assets, would arise a process of litigation against persons withholding such assets.

Learned President's Counsel for the defendant-appellant cited the case of *Silva v. Weerasuriya*⁽⁶⁾ in support of the proposition that an administrator is not entitled to maintain an action in respect of property, which is not mentioned in the inventory and the value of which has not been included in the sum on which stamp duty has been paid.

It would be apparent from the sections of the Civil Procedure Code 190 spelt out hereinbefore that the compilation of an inventory is a subsequent step, provided for by section 538 after a grant of letters of administration. According to the scheme of the Civil Procedure Code the administrator is required to fulfil his duties and then render a true and accurate inventory which could be justifiably described as a step in the culmination of the process of administration of the estate to be followed by the distribution of the estate.

The case of *Silva v. Weerasuriya (supra)* has been decided in 1906. The head note in this case states that an administrator is not entitled to maintain an action in respect of property which is not been mentioned 200 in the inventory and the value of which has not been included in the sum on which stamp duty has been paid.

In order to understand the true significance of the decision in *Silva v. Weerasuriya (supra)* it is necessary to make reference to the section 547 of the then Civil Procedure relevant to the decision in that case. Section 547 in the old Civil Procedure Code read as follows:

"No action shall be maintainable for the recovery of any property, movable or immovable in Ceylon belonging to or included in the estate or effects of any person dying testate or intestate in or out of Ceylon, where such estate of effects 210 amount to exceed in value of a sum of Two Thousand Five Hundred rupees, unless grant of probate or letters of administration duly stamped shall first have been issued to some person or persons as Executor or Administrator of such testate or intestate . . ."

Even in section 547 of the old Civil Procedure Code no reference has been made to an inventory. The requirement that letters of administration should be duly stamped, was in terms of Stamp Ordinance which was in force till 1919. The Estate Duty Ordinance No. 08 of 1919 repealed the provisions of the Stamp Ordinance of 1919 applicable to the stamping of letters of administration and probate. Thereafter, 220 there was no requirement of duly stamping of letters of administration or probate. With the enactment of the Estate Duty Ordinance No. 01 of 1938 the Commissioner of Estate Duty was required to issue a certificate upon a declaration of property. It is to be noted that by Act No. 20 of 1977 (Civil Procedure Code) the words 'duly stamped' were removed from the section.

Therefore, the reference to the inventory had been made presumably for the purpose of ascertaining whether the letters of administration was duly stamped since the best evidence for the full value of the estate could be found in the inventory. Since 1919 no provisions 230 relating to the affixing or cancellation of stamps were to be found in any statutory enactment. Legislation has thus rendered unnecessary the provisions relating to the due stamping of probate or letters of administration. (*vide Wijesinghe v. Attorney-General*⁽⁷⁾ at page 59).

In the light of the above material the requirement of an inventory which was an incidental step adopted to test whether the document was properly stamped has ceased to exist. The failure on the part of the legal representative to pay the Estate Duty, is now being treated as a revenue matter for which other remedies have been provided for in the Estate Duty Ordinance. 240

In view of the foregoing reasons, the principle enunciated in the decision of *Silva v. Weerasuriya* (*supra*) has no application today.

There remains to consider the last of the arguments advanced by Counsel for the defendant-appellant namely, the failure of the plaintiff-respondent to pray for a declaration of status.

Learned Counsel for the plaintiff-respondent contended that so long as the plaintiff in the action pleads and put in issue the ingredients essential to establish his legal entitlement, he is entitled to the relief flowing from such findings of fact and law without seeking in addition²⁵⁰ a declaration.

Section 217 of the Civil Procedure Code enumerates, the decree that the Court may make against a defendant under sub heads A – G. What is relevant for purposes of this appeal are found in sub heads B, C and D.

Sub head B provides for a decree for delivery of immovable property. Sub head C provides for a decree to yield possession of immovable property, while sub head G provides for a decree to declare a right or status.

It is necessary to emphasise that any one of these decrees may²⁶⁰ be pleaded to stand by itself or in combination with each other. However, section 35 of the Civil Procedure Code stipulates certain restrictions in respect of joinder of claims in actions for immovable property.

The following observations of Gratien, J. in *Pathirana v. Jayasundera*⁽⁹⁾ at 173 is useful in examining this question:

"A decree for a declaration of title may of course be obtained by way of additional relief either in a rei vindicatio action proper or in a lessor's action against his overholding tenant . . . as to procedure in section 35 of the Code permits the joinder of certain forms of relief in an action for the recovery of immovable property and/or for declaration of title."²⁷⁰

In *Jayasinghe v. Tikiri Banda*⁽⁹⁾ where section 35 of the Civil Procedure Code was analysed, it was held that although plaintiff has not asked for a declaration of title it does not prevent him from seeking the relief for ejection.

It has to be reiterated that the subject-matter of the present action as indicated on the prayer to the plaint and the issues framed, is the business and therefore the occupation of the premises and possession of the materials are merely an adjunct or ancillary to the business. Therefore, pleading title to immovable property does not arise. The title to the business has been pleaded and learned District Judge has come to the finding late Meeriyagalla was the sole owner of the business upto his death. ²⁸⁰

For the foregoing reasons, it seems to me that the plaintiff-respondent as administratrix is entitled to sue and recover the business described in the plaint.

Therefore, this appeal is dismissed with costs.

DISSANAYAKE, J. – I agree.

Appeal dismissed.