

1947

Present : Howard C.J. and Windham J.

MARIKAR, Appellant, and SITHTHIE MALEEHA,
Respondent.

S. C. 35—D. C. Kalutara, 25,535.

Possession action—Right of footway—Claim for damages—Claim in reconvention that land be declared free of servitude—Whether claim maintainable.

Where in a possessory action the plaintiff claims not only restoration to possession but also damages, it is open to the defendant to set up his title by way of defence.

A PPEAL from a judgment of the District Judge, Kalutara.

H. V. Perera, K.C. (with him H. W. Jayewardene), for the defendant, appellant.

No appearance for the plaintiff-respondent.

September 2, 1947. HOWARD C.J.—

We are of opinion that this appeal must be allowed. The plaintiff came into Court claiming that he be restored to his possession of a certain right of footway over the defendant's land for drawing water from the well on the defendant's land having access to the road called De Silva Street. He also claimed a sum of Rs. 100 being damages sustained by him and further damages at the rate of Rs. 2 per day from June 19, 1945. The defendant in his defence maintained that the plaintiff had no right of servitude over this land and also in reconvention asked that his land should be declared free of the right of way pleaded in the plaint. The learned District Judge has disallowed certain issues raised by the defendant which raised the question as to whether the plaintiff enjoyed a servitude for drawing water from the said well and a further issue also which raised the question as to whether the defendant's premises were free of the servitude referred to in the plaint.

If the claim of the plaintiff had been merely for restoration of possession to the right of footway, then we think the learned Judge's order would have been correct, but in view of the fact that the plaintiff has coupled with that claim a claim for damages, we think that the issues raised by the defendant should have been allowed. In this connection I would invite attention to the Second Volume of Maasdorp's *Institutes of Cape Law* (1903 Edition) at pages 25 and 26 where the following passage occurs:—

“Where, from the circumstances of the case, it is not one suitable to be decided by this summary method of procedure, or where the applicant in addition to restoration of possession wishes to sue for compensation in damages, the proper course would be to proceed by way of action, in which case the respondent or defendant may set up his defence of ownership or set up a counter-claim for a mandament of spoliation”.

In this case we think that the plaintiff has brought an action in which he claims not only a restoration to possession but also asks for compensation in damages and therefore the issues raised by the defendant must be allowed and the case remitted to the District Judge so that he can proceed to trial on that basis. The appellant will have the costs of this appeal.

WINDHAM J.—I agree.

Appeal allowed.

