PATTIVIDANA
v.
SAMARANAYAKE

COURT OF APPEAL
ISMAIL, J.,
WEERASURIYA, J.
C.A. 262/89 (P)
D.C. MT. LAVINIA 762/ZL
SEPTEMBER 26, 1997.

Rei Vindicatio Action – Ejectment – Divorced wife – Plea that she is a co-owner due to her contribution towards construction of house – Vindicatory Action – a prayer for declaration of title – Is it a Sine quo non – Is the absence of same fatal ?– Legal position of a divorced wife – vis-a-vis the Matrimonial Home – Rule of Estoppel – Applicability of Roman Dutch Law and English Law.

The plaintiff-appellant instituted action against the defendant-respondent who was his divorced wife, praying for ejectment, from the matrimonial home. It was her contention that she is in occupation by virtue of her right as a co-owner due to her contribution towards the construction of the house.

The learned District Judge dismissed the action on the basis that the plaintiff-appellant has failed to seek a declaration of title which is a *sine-qua-non* in a vindicatory action.

On appeal–

Held:

(1) The defendant-respondent has come into occupation on the basis of being the wife of the plaintiff-appellant, who was legally bound to support her in the matrimonial home. However, when the marriage was dissolved with the entering of Decree absolute (17.9.82) the contractual relationship ended which had the legal effect of the defendant-respondent becoming a licensee as opposed to a legal right to use and enjoy the matrimonial home. The plaintiff-appellant having terminated the licence (23.9.82) the defendant-respondent has to be treated as an overholding tenant.

2) As the plaintiff-appellant has sought to eject his divorced wife who is in a position of a overholding licensee, the rule of estoppel precludes her from denying the title of the plaintiff-appellant.

An APPEAL from the Judgment of the District Court of Mt. Lavinia.

Cases referred to:

1. *Vaughan v. Vaughan,* 1153 QBD 762 at 769.
2. *National Provincial Bank Ltd. v. Ainsworth* 1965 – 2 All ER 672 at 485.
3. *Pathirana v. Jayasundera* – 58 NLR 165 at 171.
4. *Hameed v. Weerasinghe* – 1989 – 1 SLR 271.
5. *Wanigatunge v. Janis Appuhamy* – 65 NLR 167.

Gamini Jayasinghe with *Ms P. P. de Silva* for plaintiff-appellant.

J. A. J. Udawatte with *Upul Senaratne* for defendant-respondent.

Cur. adv. vult.

October 21, 1997

WEERASURIYA, J.

The plaintiff-appellant instituted action by plaint dated 10.11.82 in the District Court of Mount Lavinia against the defendant-respondent praying for ejectment of the defendant-respondent from the premises morefully described in the schedule to the plaint and damages for unlawful occupation.

The defendant-respondent who was the divorced wife of the plaintiff-appellant averred in her amended answer that she is in occupation of the premises in suit by virtue of her right as a co-owner due to her contribution towards the construction of the house.

The trial commenced on 08.11.81 on 13 issues and after conclusion of evidence and submissions of counsel, learned District Judge pronounced judgment on 18.02.84 dismissing the action. However, the learned District Judge has arrived at clear and definite findings in favour of the plaintiff-appellant to the effect –

(1) that the plaintiff-appellant is the sole owner of the land and the house described in the schedule to the plaint;

(2) that the defendant-respondent has made no contribution towards the construction of the house;

(3) that the defendant-respondent has not become a co-owner of the house; and

(4) that the defendant-respondent was in unlawful occupation of the premises.

Nevertheless, the learned District Judge has dismissed the action on the basis that the plaintiff-appellant has failed to seek a declaration of title which is a *sine-qua-non* in a vindicatory action. It is from this judgment, that the plaintiff-appellant has appealed. The defendant-respondent has filed a cross appeal in terms of section 772 of the Civil Procedure Code.

At the hearing of this appeal, learned counsel for the plaintiff-appellant submitted that the District Judge has misdirected himself on the question that the action instituted was a vindicatory action requiring a prayer for a declaration of title, absence of which is fatal to its prosecution. It would be necessary before this question is discussed, to clarify the legal position of a divorced wife vis-a-vis the matrimonial home. Apart from the Roman Dutch Law which is the source and foundation of our law of husband and wife, English law principles have contributed to the growth of principles on the right to use and enjoy the matrimonial home on divorce. Learned counsel for the plaintiff-appellant referred to page 386 of the treatise of Professor Hahlo (5th edition), The South African Law of Husband and Wife where it is stated that –

"While during the subsistence of the marriage each spouse is entitled to occupation of the matrimonial home by virtue of the marriage relationship, the right of occupation of the spouse who has no legal title or interest in the home comes to an end when the marriage is dissolved by divorce".

This principle has found support in the English case of *Vaughan v. Vaughan*[1] where Lord Denning has observed at p 769:

"Upon the decree absolute she became simply a licensee with a revocable licence to stay in the house".

Further, in *National Provincial Bank Ltd. v. Ainsworth*[2] Lord Upjohn has observed at page 485:

"A wife does not remain lawfully in the matrimonial home by leave and licence of her husband as the owner of property. She remains there because as a result of the state of marriage, it is her right and duty so to do . . . she is not a trespasser, she is not a licensee of her husband, she is lawfully there as wife, the situation is sui generis".

It is common ground that the plaintiff-appellant who was legally married to the defendant-respondent instituted divorce proceedings in case No. 7 F. C. D. in the Family Court of Colombo where he obtained a judgment in his favour and the Decree Nisi was entered on 02.06.1982 dissolving the said marriage, which was made absolute on 17.09.1982.

The plaintiff-appellant has by letter dated 23.09.1982 asked the defendant-respondent to vacate and handover possession of the house. It would be relevant to state that once the licence to use and enjoy the matrimonial home is revoked, the defendant-respondent is turned into a position of an overholding licensee.

The question that arises for consideration is whether or not an action for ejectment of a divorced wife who is in the position of an overholding licensee in the eye of the law, is a *rei vindicatio* action. To answer this question one has to examine the basic principles of a *rei vindicatio* action. Learned counsel for the plaintiff-appellant made reference to the case of *Pathirana v. Jayasundara*[3] where H. N. G. Fernando, J. (as His Lordship then was) observed at page 171 that –

"It is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty which arises is whether the action thereby becomes a rei vindicatio for which strict proof of the plaintiff's title would be required, or else is merely one for a declaration (without strict proof) of a title which the tenant is by law precluded from denying".

It was further observed that –

"If the essential element of a rei vindicatio is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the plaintiff can automatically obtain a declaration of title through the operation of a rule of estoppel should be regarded as a vindicatory action".

In the instant case, the defendant-respondent has come into occupation of the premises in suit on the basis of being the wife of the plaintiff-appellant, who was legally bound to support her in the matrimonial home. However, when the marriage was dissolved with the entering of decree absolute the contractual relationship ended which had the legal effect of the defendant-respondent becoming a licensee as opposed to a legal right to use and enjoy the matrimonial home. The plaintiff-appellant having terminated the licence by letter dated 23.09.1982, the defendant-respondent, has to be treated as an overholding licensee.

In *Pathirana v. Jayasundara* which was referred to earlier it was held that a lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligation as lessee, is not entitled to amend his plaint subsequently so as to alter the nature of the proceeding to a *rei vindicatio* action, if such a course would prejudice the setting up of a plea of prescriptive title. It would be observed that the reasoning contained in this judgment is that the ingredients of the *rei vindicatio* action and of the action by a lessor against an overholding lessee for restoration and ejectment are dissimilar.

Learned counsel for defendant-respondent contended that since the defendant-respondent has averred in her answer that she is a co-owner of this property by virtue of her contribution towards the

construction of the house, plaintiff-appellant is bound in law to seek a declaration of title. On a careful consideration of submissions of counsel, pleadings and the totality of evidence, we are unable to accept that position.

It is to be noted that the learned District Judge after evaluation of the evidence has made a clear and definite finding that the defendant-respondent is not a co-owner of this property. Therefore, the contention of learned counsel for the defendant-respondent that the learned District Judge has not properly considered the evidence led at the trial is untenable.

The cases of *Hameed vs. Weerasinghe*[4] and *Wanigatunga v. Janis Appuhamy*[5] referred to by learned counsel for the defendant-respondent are authorities for the proposition that in a *rei vindicatio* action the plaintiff must prove and establish his title. In this case, what the plaintiff-appellant has sought is, the ejectment of his divorced wife who is in a position of an overholding licensee, and therefore the rule of estoppel precludes her from denying the title of the plaintiff-appellant.

It would seem therefore, that the learned District Judge was in error when he came to a conclusion that the action was in the nature of a *rei vindicatio* and the absence of a prayer for a declaration of title in the plaint is fatal.

We therefore, set aside the judgment of the learned District Judge and enter judgment for the plaintiff-appellant as prayed for in the prayer 'A' of the plaint. We answer issues No. 2, 10, 11, 12 and 13 in the following manner:

No. 3	–	yes.
No. 10	–	no.
Nos. 11, 12, 13	–	does not arise.

However, having regard to the circumstances of this case, we refrain from awarding damages till the filing of action, and continuing damages till the plaintiff-appellant is restored to possession and, costs as prayed for in prayer B, C, and D of the plaint, respectively. Enter decree accordingly.

We also make no oder as to costs of this appeal.

ISMAIL, J. – I agree.

Appeal allowed.

Note by Editor. The Supreme Court in SC/SPC/LA 56/97 on 3.3.98 refused special leave to appeal to the Supreme Court.