

APPELLATE CIVIL.

Before U Thaung Sein, J.

MA CHO AND ONE (APPELLANTS)

v.

THAKIN ANT GYI (RESPONDENT).*

H.C.
1948

July 15

Suit for damages for wrongful use and occupation—S. 42, Specific Relief Act.

Held: There is no rule that as soon as plaintiff's title to property is challenged the plaintiff must also pray for declaration of title. It is sufficient that he proves that he is the owner of the property and entitled to possession.

M. P. Sayed Mohamed v. K. S. Ebrahim Das and one, (1947) R.L.R. 98, referred to.

Tun Sein for the appellants.

Yan Aung and *Win Maung* for the respondent.

U THAUNG SEIN, J.—The plaintiff-respondent Thakin Ant Gyi sued the appellant-defendants Ma Cho and Ma Mya in the Court of the 1st Subordinate Judge, Pakôkku, for recovery of Rs. 180, being damages and compensation for the wrongful use and occupation of a house belonging to the plaintiff-respondent. The appellant-defendants contested the suit and pleaded that the house in question had been transferred to them by the plaintiff-respondent in exchange for their own house and hence the question of payment of damages or compensation did not arise.

The learned Subordinate Judge held that there had been an exchange of houses as alleged by the appellant-defendants but that, as the transaction had not been registered, there was no valid transfer of title in the disputed house. However, the learned Subordinate Judge went on to say that the appellant-defendants were not trespassers on the property and

* Civil Second Appeal No. 41 of 1948 against the decree of the 1st Assistant Judge's Court of Pakôkku in Civil Appeal No 2 of 1948, dated the 19th January 1948.

that no notice to quit had been served on them and they were therefore not liable to pay any damage or compensation in respect of the house. The plaintiff-respondent's suit was accordingly dismissed.

An appeal was filed before the 1st Assistant Judge of Pakôkku (U Pu) who has been invested with appellate jurisdiction under section 13 (1) (a) of the Courts Act, 1945 (Burma Act No. XIV of 1945). The learned Assistant Judge allowed the appeal and decreed the plaintiff-respondent's suit on the following grounds. He has pointed out that the exchange of houses between the parties was invalid owing to lack of registration and as such the ownership in the house under consideration remained with the plaintiff-respondent. Then again, it was stressed that notice to quit was served on the defendant-appellants who admitted receipt of it and they had failed to comply with it and were thus bound to pay damages and compensation as claimed by the plaintiff-respondent.

The defendants have now come up on second appeal to the High Court against the decree of the 1st Assistant Judge, Pakôkku, and the main ground put forward by the learned counsel for the defendant-appellants is that on the pleadings the suit was in fact one for a declaration of the plaintiff-respondent's title to the house but has been purposely disguised as a suit for damages and compensation for wrongful use and occupation. The learned counsel has argued that the plaintiff-respondent cannot succeed in his suit without praying for a declaration of title. My attention was drawn to *M. P. Sayed Mohamed v. K. S. Ebrahim Das and one* (1) where it was held as follows :

"In deciding the court fees payable for a plaint the Court should look to the matter as a whole case and find out what in

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substance the suit is for. It is the real nature of the relief that matters, whatever garb it is clothed in. Suit in substance for possession cannot be converted into a suit for declaration with consequential relief by adding a prayer for declaration."

The learned counsel has laid great emphasis on the portion which says that it is the real nature of the relief that matters, whatever garb it is clothed in, or in other words that the suit must be examined as a whole to discover its true nature. According to him, the suit under consideration was in fact one for declaration of the plaintiff-respondent's title with consequential relief—namely, recovery of damages and compensation for wrongful use and occupation of the house—and as the plaintiff-respondent failed to pray for a declaration the suit must be dismissed.

Now, in considering the claim for damages and compensation for wrongful use and occupation it was necessary to go into the question of the plaintiff-respondent's ownership in the property as the defendant-appellants had also set up their own title to it. But there is no enactment or ruling which lays down that as soon as the plaintiff's title in respect of a house or land is challenged in a suit for ejectment, compensation or mesne profits, the plaintiff must also pray for declaration of his title. On the other hand, it is open to a person whose title to an immoveable property has been challenged to file a suit for declaration of his title. But if he is able to seek further consequential relief and omits to do so his suit is bound to fail, *vide* section 42 of the Specific Relief Act. In other words, a suit for a bare declaration does not lie if the plaintiff is able to seek consequential relief also. The converse of this proposition does not, of course, hold, *viz.* that where the plaintiff sues for a certain relief based on his title to certain property and his title is disputed, then he shall not succeed unless he also prays for a

declaration of title. The learned counsel's arguments are based on this converse proposition and he is not able to cite any authority on the point. Section 42 of the Specific Relief Act does not make it imperative for a plaintiff to sue for a declaration whenever his title is challenged.

In the present case, in order that the plaintiff-respondent might succeed in the suit he must first prove that he is the owner of the property and entitled to possession of it. This does not mean that he must also pray for a declaration of his title to the property. The plaintiff-respondent was admittedly the original owner of the house in question and his title in the property has not passed to the defendant-appellants by the invalid exchange of houses. The defendant-appellants had no legal right to be in possession of the property as against the plaintiff-respondent and hence they are liable to pay damages for wrongful use and occupation of it.

This appeal fails and is accordingly dismissed with costs.

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