Present; Drieberg and Akbar JJ.

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NOORBHOY *v.* MOHIDEEN PITCHE.

19—D.C. Colombo, 28,315.

Action by way of summary procedure—Promissory note—Grant of leave to defend—Addition of money count for goods sold and delivered—Powers of Court.

Where, in an action by way of summary procedure on a promissory note, the defendant was given leave to defend, the Court has power to allow an amendment of the plaint by the addition of an alternative cause of action for goods sold and delivered.

APPEAL from an order of the District Judge of Colombo. The facts appear from the judgment.

A. E. Keuneman, for plaintiff, appellant.

H. V. Perera (with Nadarajah), for defendant, respondent.

June 20, 1929, AKBAR J.—

The plaintiff sued the defendant in summary procedure for the recovery of Rs. 450 due to plaintiff on a promissory note dated April 11, 1928.

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The defendant filed affidavit alleging that the note was a forgery and obtained leave to appear and defend the action.

The case went to trial only on one issue, but during the course of the trial on certain admissions by plaintiff's kanakapillai that he had inserted the rate of interest of 12 per cent. a further issue was raised whether the note was not void for material alteration. Notwithstanding plaintiff's objection the issue was allowed, whereupon the plaintiff suggested an issue on an alternative cause of action for goods sold and delivered, which issue was disallowed by the learned District Judge. The District Judge has dismissed the plaintiff's action on the ground that the note was materially altered by the unauthorised insertion of the rate of interest. The appeal is from both these orders dismissing the plaintiff's action with costs on the ground of material alteration and the refusal of the District Judge to allow the new issue for goods sold and delivered. Several interesting points of law were argued on the question of the refusal of the District Judge to allow the alternative cause of action. One of the grounds on which the District Judge refused the amendment was that he had no power to allow such an amendment in an action brought in summary procedure when the entire scope of the action was liable to be changed by the addition of a count for goods sold and delivered, a count which could only be maintained in an action framed under the regular procedure. On this point the District Judge has gone wrong. The question has been concluded in a recent judgment in an English Court of Appeal Case, namely, *Thomas v. Alderton, Limited.* [1] In an interesting judgment, the Master of the Rolls points out that once leave to defend has been given, an action under Order XIV became in no way differentiated from all other actions. The remarks of the Court of Appeal will apply similarly to a case instituted under Chapter LIII of the Civil Procedure Code.

The second argument on the law on the question of the refusal of the District Judge to allow the amendment depends to some extent on certain facts in this case. There is evidence in this case that the defendants bought goods on January 24, 1928, for the sum of Rs. 502.49. The memorandum of the goods and the promissory note were sent to the defendant, who is a trader in Badulla, but the defendant refused to sign the promissory note.

When the defendant came to Colombo in April, 1928, he is said to have given the promissory note for Rs. 450 (the subject of this case) and promised to pay the balance Rs. 52.49. As there was default on the part of the defendant in the payment of these two sums, two actions were filed on the same day (June 11, 1928), namely, this case and C. R. case No. 44,581 for the balance Rs. 52.49. It is argued by Mr. Perera for the respondent that there was a novation

[1] *(1928) 1 K. B. D. 638*

and an extinction of the old contract and that, therefore, plaintiff cannot now sue on a count for goods sold and delivered. Mr. Perera's argument places the plaintiff on the horns of a dilemma; either there was an extinction of the original contract, or there was not. If there was an extinction, then clearly the plaintiff cannot add the count for goods sold and delivered and must elect to go on with his action on the note. If there was no extinction, then it is urged that section 34 of the Civil Procedure Code estops the plaintiff from suing for the sum of Rs. 450 as a count for goods sold and delivered, because the Court of Requests action must be taken as an election by the plaintiff to sue only for that sum of Rs. 52.49, the subject-matter of that action upon the cause of action arising on the count for goods sold and delivered. It is not possible for the plaintiff to get out of this *impasse* by pleading that each item of the goods bought by the defendant on January 24, 1928, was a separate contract, because the form of the amendment of the plaint suggested by the plaintiff's Counsel, and which has been disallowed by the District Judge, treats the sale of the various items on January 24, 1928, as one sale, and it is not possible to separate the Rs. 52.49 from the Rs. 450 out of the total of Rs. 502.49 by any means of subdivision of the items sold on that day. In this state of affairs we thought that it was our duty to send for the record in the Court of Requests case to enable us to satisfy ourselves as to the manner in which that action has been framed and the stage which it has reached. I find from this record that the plaintiff sued the defendant for the sum of Rs. 52.49 as being due to him for goods sold and delivered on January 24, 1928, and the only issue in that case was whether plaintiff sold and delivered goods of the value of Rs. 52.49. The learned Commissioner has dismissed the plaintiff's action without awarding any costs to either party on the ground that there was a novation on April 11, 1928, and that the promissory note took the place of the earlier sale of goods to the value of Rs. 502.49. This judgment was delivered on October 7, 1928, and there has been no appeal filed in respect of it; so that the effect of the judgment is that the plaintiff has failed in his action on the count of goods sold and delivered on January 24, 1928. Therefore, not only does section 34 of the Civil Procedure Code operate, but also section 207. The plaintiff cannot, therefore, in my opinion, claim to add the money count in this action, and the District Judge was right in refusing to allow the amendment of the plaint. There is one other point left for decision in this case, and that is, on the order of the District Judge holding that the promissory note sued upon in this case was void on the ground of material alteration. When the issue on this count was allowed by the District Judge, an application was made by the plaintiff for a postponement of the case to enable him to call a witness of the name of Ally Bhoi, who was the manager

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and attorney of the plaintiff, who filed this case on behalf of the plaintiff, and who knew about the transaction, to prove that plaintiff had defendant's authority to insert the rate of interest in the note. It appears that Ally Bhoi was not in the Island, and as the postponement would occasion some delay, it was disallowed by the District Judge. The District Judge purported to do so, because the evidence of the kanakapillai proved in his opinion that the insertion of the rate of interest was clearly not authorized by the defendant. It is contended, however, for the plaintiff that defendant had transactions with the plaintiff much earlier than on April 11, 1928, and that it was during this earlier transaction that defendant authorized the insertion of the rate of interest. There is some corroboration of the plaintiff's contention in the fact that the promissory note sued upon, which is on a printed form, contains in two places references to the rate of interest which were obviously left blank, and which defendant must have noticed when he signed the note. In spite of the fact that Ally Bhoi would probably now be prepared to give evidence, as the District Judge says, to meet the new turn which the case has taken, I think that in all the circumstances plaintiff must be given this opportunity. As a matter of fact the defence was a plea of forgery of the signature of the note, and this new issue on the ground of material alteration only arose incidentally in the case. The defendant has not called any evidence to prove the alleged forgery, and I do not see, therefore, how he can be prejudiced by the Court giving an opportunity to the plaintiff to call Ally Bhoi as a witness. It is not as if Ally Bhoi is a witness who is introduced for the first time to suit the occasion. It is clear from the record that he was certainly plaintiff's attorney at the time of these transactions, and even supposing the kanakapillai's evidence can be construed strictly as the District Judge has done, yet the plaintiff is entitled to call Ally Bhoi for whatever it is worth to contradict the kanakapillai. I therefore think the order of the District Judge should be set aside and the case sent back to enable the plaintiff to call Ally Bhoi. The defendant will be at liberty to lead any evidence he desires, not only on the plea of material alteration, but also on the issue of forgery. I do not think, however, that the plaintiff is entitled to the costs of this appeal, because he himself is to some extent to be blamed for the difficulty that has now arisen. The costs of appeal will, therefore, be costs in the cause. The appeal is allowed and the case is remitted for the purpose indicated by me above.

DRIEBERG J.— I agree.

Appeal allowed.