1937 *Present* : **Poyser and Soertsz JJ.**

VANDERPOORTEN *v.* PEIRIS.

310—D. C. Kandy, 46,190.

Res adjudicata—*Action for recovery of arrears of rent and cancellation of lease —Subsequent action to recover damages caused to the leased premises— Civil Procedure Code, s. 34.*

The plaintiff sued the defendant in case No. 43,515 of the same Court to recover arrears of rent due on an indenture of lease and for a cancellation of the lease on the ground that the defendant had sublet the premises contrary to the terms of the lease.

The defendant agreed to the cancellation of the lease and the action proceeded on the question of the arrears of rent due and judgment entered in favour of the plaintiff.

The plaintiff thereupon instituted the present action to recover damages for failure to keep the premises leased in proper order and condition and for alleged negligence.

***Held*, that the action was barred by the decree in the previous action.**

APPEAL from a judgment of the District Judge of Kandy. The facts are given in the head note.

H. V. Perera (with him *G. E. Chitty*), for defendant, appellant,—This action is clearly barred by the judgment in the earlier case (D. C. Kandy, 43,515) which was brought upon the same cause of action. Section 34 of the Civil Procedure Code, read together with section 207, makes the subject-matter *res adjudicata* between these parties who are identical in both actions. When the plaintiff asked in the earlier case for cancellation of the lease she should have prayed for all the relief to which she would have been entitled under the contract and in respect of its breach. The failure to repair cannot be regarded as a fresh cause of action entitling the plaintiff to relief, for if that were so we would be reduced to the position that a lessee would be exposed to as many actions as there are covenants in his bond. The plaintiff should have claimed in the first case every item of damages to which she was entitled[1]. She cannot sue the defendant piecemeal. She always had a right of inspection in terms of the lease and could with reasonable diligence have ascertained all the damage.

N. E. Weerasooria, for plaintiff, respondent.—Sections 34 and 207 are directed towards exhausting the relief in respect of the same cause of action. These are different causes of action which we have here. If the plaintiff had included in the earlier action the damages she claimed in respect of the breach of the covenant to repair she could have been met with the defence that the lease was still subsisting and that the defendant was ready and willing to hand over the property, upon termination of the lease, in the same state of repair in which he had received it. That was his only obligation to the plaintiff on the covenant to repair. The cause of action in the present case had not accrued at the time of filing the earlier one.

Cur. adv. vult.

March 5, 1937. POYSER J.—

By a lease No. 1,506 of October 5, 1925, the plaintiff leased to the defendant certain premises situated at Colpetty in Colombo.

On March 14, 1933, the plaintiff (D. C. Kandy, No. 43,515), sued the defendant for arrears of rent and for cancellation of the lease above referred to on the ground that the defendant had contrary to the terms of the lease, sublet the premises to one C. D. Armstrong.

On September 12, 1933, the defendant moved that the plaintiff's application for cancellation of the lease be allowed, this motion was agreed to, the lease was cancelled and the plaintiff put in possession of the premises on October 1, the case then proceeded only on the question of arrears of rent.

[1] *17 N. L. R. 410.*

The plaintiff on this cause of action obtained judgment for Rs. 1,500 on January 8, 1934, and such judgment was affirmed in appeal on February 12, 1935.

In this action the plaintiff claimed damages on the following grounds—(5) *For a first cause of action.* The defendant in breach of the said covenants (*i.e.*, covenants contained in lease No. 1,506) failed and neglected to keep the premises in proper order and condition and grossly neglected the same whereby the following among other acts of damage were done to the buildings :—(*a*) The plaster work of the walls and the cement flooring broken up. (*b*) The roof of the lavatory removed leaving the walls exposed to the elements. (c) The roof tiles of the main building broken and in places moved out of position causing serious leakages and consequent damage. (*d*) The eaves rafters cut to allow access to motor vehicles to the porch of the building. (*e*) The valley gutters left leaking, thereby damaging the walls. (*f*) The eaves gutters removed in places. (*g*) The glazed doors and sashes removed. (*h*) The eaves, barge boards and sunshades allowed to fall into disrepair. (7) *For a second cause of action.*—The defendant having erected extra buildings and laid concrete floors in the compound of the leased premises removed the said buildings but failed and neglected to remove the concrete floors and to restore the compound to its former condition.

The Judge has awarded the plaintiff Rs. 750 on the first cause of action and on the second Rs. 600.

On appeal it was contended on behalf of the defendant, in view of the provisions of sections 34 and 207 of the Civil Procedure Code that, so far as this action was concerned the decree in D. C. Kandy, No. 43,515, was *res judicata* and the following points were urged in support of this contention. That as the plaintiff had elected in case No. 43,515 to treat the lease as cancelled they should in that case, have included all the causes of action which had then accrued to them and that the dilapidation and damage now alleged were not concealed and could easily have been ascertained before that action was filed as the lessor had the right to visit and inspect the premises at any time.

It was also pointed out that Mr. Hall, who gave evidence in regard to the dilapidations and damage and whose evidence the trial Judge accepts, stated that there had been four, five, or six years of neglect and "the damages looked as if they had been accumulating damages".

Mr. Hall did not state on what date he inspected the premises but it must have been before October 12, 1933, thus practically all the damage to the house, if not all, must have been caused before case No. 43,515 was filed.

Having regard to the wording of section 34 of the Civil Procedure Code, I think the appellant's contention must succeed.

The Privy Council have made the following observations in reference to a similar section in the Indian Civil Procedure Code :—

> "That section does not say that every suit shall include every cause of action or every claim which a party has, but every suit shall include the whole of the claim arising out of the cause of action . . . . meaning the cause of action for which the suit is brought."

Pittapur Raja v. Suriya Row [1]. Both in this case and the previous one the cause of action was the same, viz., the breach of covenants contained in lease No. 1,506. If in the first action the plaintiff had not claimed a cancellation of the lease and possession of the leased premises the position would have been different or it would have been different if the plaintiff had not at their disposal the materials necessary for including in their claim in the previous action the subject-matter of this one.

As previously pointed out, however, the plaintiffs could easily have ascertained, if they did not already know, the damage caused to the premises by the defendant and particularly so the construction of the concrete floors and could have without difficulty included in the previous action a claim in respect of these matters. There is no local decision quite in point, but in the case of *Mohideen v. Pitche* [2] Wood Renton A.C.J. lays down similar principles to those above set out.

I would allow the appeal and dismiss the plaintiff's action with costs both here and in the Court below.

SOERTSZ J.—I agree.

Appeal allowed.