1975 *Present :* **Udalagama, J., Sharvananda, J., and Ratwatte, J.**

D. J. R. A. FERNANDO, Appellant, *and* THE VILLAGE COUNCIL OF ANDIAMBALAMA PALATHA, Respondent

S. C. 46/71 (F)—D. C. Negombo 1884/M

Civil procedure Code—Sections 34 and 207—One transaction gives rise to two distinct causes of action—Two actions instituted in respect of each cause of action—Plea of Res Judicata.

Where one transaction gives rise to two distinct causes of action neither section 34 nor section 207 of the Civil Procedure Code requires a plaintiff to include both causes of action in the same suit.

"It is essential to determine when a plea in bar is raised on the allegation that there has been a splitting of a cause of action such as prohibited by section 34 or by reason of res judicata in terms of section 207 whether the two suits really relate to the infraction of the same or a different right."

APPEAL from a judgment of the District Court of Negombo.

G. F. Sethukavalar, with *John Kitto,* for the Plaintiff-Appellant.

J. W. Subasinghe, for the Defendant-Respondent.

Cur. adv. vult.

March 5, 1975. SHARVANANDA, J.—

By notice dated 10.10.61 P1 the defendant Village Council called for tenders in respect of three beef stalls. The notice stipulated that three months' lease money mentioned in the tender or an amount not less than 1/4th of the amount mentioned in the tender should be deposited in the Village Committee no sooner the tender is accepted and that after deducting money due to the Village Council, if any, the balance will be paid to the tenderer at the end of the year. The plaintiff was the successful tenderer for the year 1962 in respect of the beef stalls. By letter dated 13.11.1961., the defendant-council notified the plaintiff that "it was decided to accept your tenders for lease for the year 1962" and called upon him to make three months deposit in a total sum of Rs. 2022 as stated in the tender. The plaintiff duly made the deposit. On 7.4.62 three contracts were entered into between the plaintiff and the defendant, two notarially executed and the third also in writing, but not notarially executed.

By letter dated 11.4.62 the defendant terminated the three agreements with effect from 30.4.62. By his plaint, in this action No. 1884/M, dated 20th October, 1967., the plaintiff complains that the defendant Council had wrongfully and unlawfully repudiated and cancelled the aforesaid three agreements dated 7.4.1962 and that by such unlawful repudiation and cancellation he had suffered in the aggregate loss and damage which he estimated at Rs. 47,946.72 and sued for judgment in that amount.

The defendant, by its answer, denied the claim of the plaintiff and inter alia took up the position that the judgment and decree entered in case No. 1015/M of the District Court of Negombo operated as res judicata between the parties under Section 207 of the Civil Procedure Code; in as much as, the plaintiff could have and should have claimed the relief he is claiming in the instant case in the said case No. 1015/M D.C. Negombo.

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Several issues were raised at the commencement of the trial. But the learned District Judge decided to try the issue of res judicata as a preliminary issue. Certain documents and proceedings in D.C. Negombo No. 1015/M were marked in evidence and after arguments the District Judge answered the preliminary issue 1 :

> " Does the decree in D.C. Negombo No. 1015/M operate as res judicata in respect of any one or more of the causes of action pleaded in the plaint ? "

in the affirmative and holding that the plaintiff cannot have and maintain this action dismissed the plaintiff's action with costs. The plaintiff has appealed to this Court against the said judgment. The plaintiff submits that the causes of action pleaded in the two cases are different and distinct and that the decree in D.C. Negombo 1015/M does not operate as res judicata to estop the plaintiff from maintaining this action.

Action No. 1015/M was instituted earlier by the plaintiff against the defendant-council for the recovery and the return of the sum of Rs. 2022 deposited by the plaintiff on 14th November, 1961 in response to defendant's letter dated 13.11.1961 referred to above. In the plaint in that case, the plaintiff stated that as required by the defendant, he deposited the sum of Rs. 2022 with the defendant-council and obtained the right to sell meat in the defendant's three stalls and in paragraph 6, averred that by letter dated 11th April, 1962 the defendant-council wrongfully and unlawfully cancelled the said contract with effect from 30th April, 1962. In paragraphs 7 and 8 of the plaint he stated that he had paid up fully the monthly rentals for the meat stalls during the period 1st January, 1962 to 30th April, 1962 ; and that no sum whatsoever was due to the defendant-council from him in respect of the said contract and that in spite of several demands made by him, the defendant-council was wrongfully refusing to pay back the said sum of Rs. 2022 deposited by him. He concluded that a cause of action had thus accrued to him to sue the defendant-council for the return of the aforesaid deposit to him. Action No. 1015/M proceeded to trial on the following issues, inter alia, raised by counsel for plaintiff :

1. Has the defendant-council wrongfully and unlawfully cancelled the said contract with effect from 30.4.1962 ?
2. Is the defendant-council wrongfully refusing to pay back the Rs. 2022 deposited by the plaintiff ?
3. If issue 2 is answered in the affirmative, is the plaintiff entitled to recover the said deposit ?

At the end of the trial, the above issues were answered in the affirmative. Judgment was entered for the plaintiff in a sum of Rs. 2,022 less Rs. 674 representing the rent for the month of April, 1962. An appeal to the Supreme Court was preferred by the defendant-council but the appeal was dismissed.

At the hearing of the present appeal, counsel for the defendant-respondent referred to sections 34 and 207 of the Civil Procedure Code, and argued that the alleged wrongful termination of the hire agreements by the defendant-council with effect from 30.4.1962 gave rise to only one cause of action entitling the plaintiff to sue in one action for the recovery of damages for wrongful cancellation and for the return of money deposited with the defendant. Since the plaintiff had failed to include the present claim for damages in action No. 1015/M, it was argued that he was barred by section 34 from maintaining this action. That section provides that :

> " every action shall include the whole of the claim which the plaintiff was entitled to make *in respect of the cause of action* and that if a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished ".

Section 207 states that :

> " every right of property, or to money or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action *upon the cause of action for which the action is brought,* whether it be actually so claimed, set up or put in issue or not in the action becomes on the passing of the final decree in the action, a res judicata which cannot afterwards be made the subject of action for the same cause of action between the same parties ".

These two sections thus operate as a bar to the institution of a second action not only as to matters actually pleaded and tried but also as to matters which might and ought to have been pleaded and decided. For the former suit to operate as a bar to a subsequent action, the earlier suit should have been founded on the same cause of action or there should be identity of causes of action. It is essential to determine when a plea in bar is raised on the allegation that there has been a splitting of a cause of action such as prohibited by section 34 or by reason of res judicata in terms of section 207 whether the two suits really relate to the infraction of the same or a different right. A plaintiff is not required by these sections to include two causes of

action in the same suit. The rule contemplates a separate suit in respect of each distinct cause of action. If a cause of action for a certain claim or for certain remedies accrues to the plaintiff and if he chooses to bring an action only for a part of the claim or for some of the relief which were available to him, he is precluded from maintaining a second action as regards the rest of the claim or for the other remedies arising from the same cause of action. The rule does not, however, require that when several causes of action arise from one transaction the plaintiff is bound to sue for all of them in one suit. This section is directed against two evils, namely, splitting of claims and the splitting of remedies in respect of one and the same cause of action. As was said by the Privy Council in *Palaniappa vs. Saminathan* 17 N.L.R. 56.

> " Section 34 is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction ".

In the case of *Josephine Morais v Victoria* 75 N.L.R. 145, the Privy Council held recently that where a plaintiff is asserting his ownership of and right to possession of several distinct properties yielding different incomes, then even though the title to them arises under the same document and the defendant denies his title and right to possession to all of them at the same time and on the same grounds, he has a separate cause of action in respect of each property. Accordingly, he is entitled to institute a rei vindicatio action against the defendant in respect of some of the properties and another such action against the same defendant subsequently in respect of the other properties. In such circumstances, section 34 cannot bar the institution of the second action, even though the plaintiff knew when he started the first action the full extent of his claim under the same deed to all the properties covered by the two actions and could have combined both claims in the first action.

To determine whether in any case the causes of action are the same it is first of all necessary to determine what was the cause of action in the former suit. This cause must be sought for within the four corners of the plaint. A cause of action refers entirely to grounds set forth in the plaint or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour, and has no relation whatever to the defence which may be set up by the defendant.—per Lord Watson in *Chand Kans vs. Partap Singh* 15 I.A. 156 P.C. quoted with approval in *Samichi vs. Pieris* 16 N.L.R. 257 at 261.

In case No. 1015/M the cause of action pleaded was the defendant's refusal to fulfil a contractual obligation (section 5 of the Civil Procedure Code) i.e., to return the security deposited with the defendant on the cancellation of the agreement. By clause 21 of agreements No. 27 and 28 dated 7th April 1962 marked P3 and P4 it was stipulated between the parties that " on the expiration of the contractual period i.e. 31.12.1962 or on cancellation of the agreement, the plaintiff shall deliver peaceful possession of the stall assigned to him and shall be entitled to a refund of the amount in deposit or such portion of it as may not have een forfeited in terms of the conditions of the agreement ". Admittedly, the agreements were cancelled on 30.4.1962 prior to the expiration of the term of one year referred to in the agreements. Whether the cancellation was wrongful or not, the plaintiff would have been entitled on the factual cancellation of the agreement, to the refund of the security deposited unless he had forfeited any portion thereof in terms of the conditions. True, in the plaint and issue in case No. 1015/M, the plaintiff contended that the termination of the contract with effect from 30.4.1962 was wrongful and unlawful. It was not necessary for the plaintiff to allege and prove that the cancellation was wrongful and unlawful to make out his right to the relief claimed by him i.e., the refund of the security deposit in terms of the agreements dated 7.4.1962. Nor was the justification of the cancellation alleged in the defendant's answer relevant to determine the plaintiff's cause of action. In that view of the matter, all that the plaintiff was entitled to claim on the cause of action set out by him in case No. 1015/M was the refund of the security deposit only. The wrongful cancellation of the agreement, as pleaded in the present action No. 1884/M is the cause of action which gave the occasion for and formed the foundation of the present suit for the recovery of damages for breach of contract. That cause of action may stem from the same transaction as the cause of action in case No. 1015/ M but is distinct from the other—the grounds of complaint are different. The plaintiff could have included the present claim in the earlier action, but it was not obligatory on him to include the present claim in the earlier action. Each action referred to separate and independent obligations—*Saibo vs. Abuthahir* 37 N.L.R. 319 ; *Kandiah vs. Kandasamy* 73 N.L.R. 105. The plaintiff was not bound by the provisions of sections 34 and 207 or by any other rule of res judicata to incorporate both claims or causes of action in one action or to reserve with the leave of the Court his right to sue the defendant council for damages in respect of the 2nd cause of action.

In my view, the District Judge has erred in upholding the plea of res judicata and dismissing the plaintiff's action. He should

have answered issue 1 in the negative and issue 2 in the affirmative and proceeded to investigate the other issues. I set aside the order of the District Judge made on 28.1.1971 and send the case back to the District Court for further trial in respect of the other issues that have already been framed or may be framed. The plaintiff-appellant will be entitled to the costs of this appeal and of the costs of the trial held on 16.10.1970. Other costs will be costs in the cause.

UDALAGAMA, J.—I agree.

RATWATTE, J.— I agree.

Order set aside.