MANSIL

v.

DEVAYA

COURT OF APPEAL.
L. H. DE ALWIS, J. AND G. P. S. DE SILVA, J.
C.A. 417/78 (F).
D.C. MONERAGALA 272/1.
SEPTEMBER 4, 1984.

Rei vindicatio action – Withdrawal of previous suit without reservation – Civil Procedure Code, section 406 – Whether subject matter of the two actions was the same – Burden of proof.

The plaintiff sued the defendant for declaration of title, ejectment and damages. The defendant took up the preliminary objection that the suit was barred by the provisions of section 406 of the Civil Procedure Code because he had earlier filed a possessory suit for recovery of the same land and withdrawn it without being granted the reservation of the right to bring a fresh action on the same subject matter. The withdrawal of the earlier action was because the plaintiff had been refused leave to amend his plaint on the 14th date of trial. The defendant had produced only the proceedings of the day when the previous action was dismissed to support his plea under s. 406.

Held –

(1) The requirement of permission of Court to bring a fresh action is necessary whether the withdrawal is due to a formal defect or to the existence of sufficient grounds.

(2) The withdrawal of the previous action was not because of a formal defect.

(3) There was no proof that the subject matter of the two suits was the same, since –

(a) the plaint and answer of the previous suit were not before court.

(b) the previous suit was a possessory action under section 4 of the Prescription Ordinance and the present action was a rei vindicatory suit.

(4) The burden of proving that the subject matter of the present suit was the same as that of the previous suit was on the defendant as he relied on the bar under section 406 of the Civil Procedure Code.

Cases referred to :

(1) *Kandavanam et al v. Kandaswamy et al (1955) 57 NLR 241, 245.*

(2) *Jayawardene v. Arnolisharny (1965) 69 NLR 49.*

(3) *Aly Muhammad v. Karim Baksh AIR 1933 Lahore 943.*

(4) *Kanapathipillai v. Kandiah (1942) 44 NLR 42.*

(5) *Silva v. Appuhamy (1912) 15 NLR 297.*

(6) *De Silva v. Goonetileke (1931) 32 NLR 217, 219.*

APPEAL from the District Court of Moneragala.

P. Nanayakkara for plaintiff-appellant.

H. M. P. Herath for defendant-respondent.

Cur. adv. vult.

October 19, 1984.

G. P. S. DE SILVA, J.

The plaintiff filed this action on 26.7.76 for a declaration of title to a land called Ranawarawa Kele alias Mahaweliyaya Kele, for the ejectment of the defendant and for damages. In his plaint he set out his title and pleaded that the defendant unlawfully entered the land on a date between 9.5.70 and 13.5.70. The defendant in his amended answer of 8.6.77 denied the plaintiff's claim to title, set up title in himself, and further averred that the plaintiff cannot maintain this action in view of his unconditional withdrawal of the previous action No. 7457/L which was between the same parties and in respect of the same subject matter.

At the trial two preliminary issues of law were raised on behalf of the defendant, but for present purposes only one of such issues is relevant. That issue reads thus –

> "Can the plaintiff have and maintain this action as he withdrew action No. 7457/L in respect of the same subject matter without reserving his right to bring a fresh action ?"

It was agreed between the parties that the earlier action was in respect of the same land and that the parties too were the same. At the hearing before the District Judge no oral evidence was led and the only document produced in regard to action No. 7457/L was the proceedings of 11.5.76, marked D1. It is important to note that neither the plaint nor the answer in action 7457/L was produced. After hearing the submissions made on behalf of the parties, the District Judge answered the above issue against the plaintiff and dismissed the plaintiff's action. The plaintiff has now appealed against this judgment.

The circumstances in which the plaintiff withdrew the previous action on 11.5.76 are seen from the proceedings of that date (D1). The plaintiff moved to amend the plaint as there was an error in the description of the land in dispute. The application was objected to by the defendant. Since this was the 14th date of trial and the plaintiff had ample time to amend his plaint, the trial Judge refused the application to amend the plaint. The plaintiff was unable to proceed to trial and his Attorney-at-law withdrew the action stating that he would "bring a fresh action". Thereupon the District Judge made order dismissing the plaintiff's action with costs.

It seems to me, that the District Judge when he dismissed the plaintiff's action did not grant the plaintiff permission to bring a fresh action in terms of section 406 of the Civil Procedure Code. All that the proceedings show is that the Attorney-at-law for the plaintiff informed Court that he would file a fresh action.

Mr. Nanayakkara, Counsel for the plaintiff-appellant submitted that section 406 of the Civil Procedure Code did not require the permission of Court to bring a fresh action since the withdrawal of the action was on the ground of a 'formal defect' – vide s. 406 (1) (*a*). In my view, this submission is not well founded.

Subsections (1) and (2) of section 406 read thus –

"(1) If, at any time after the institution of the action, the court is satisfied on the application of the plaintiff –

(a) that the action must fail by reason of some formal defect, or

(b) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject matter of the action, or in respect of the part so abandoned,

the court may grant such permission on such terms as to costs or otherwise as it thinks fit.

(2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part."

On a plain reading of the section, I am of the opinion that the requirement of permission of court to bring the fresh action governs not only section 406(1)(*b*) but also section 406(1)(*a*). As observed by Gratiaen, J. in *Kandavanam et al v. Kandaswamy et al.(1)*

"Indeed, the court's power to grant liberty to institute fresh proceedings is itself strictly limited, being conditional upon a judicial decision, based upon proper material *that one or other of the alternative situations* (*a*) (*b*) does in fact exist." (The emphasis is mine)

Counsel's next submission was that the 'subject matter' of the two actions is not the same. As stated earlier, the defendant had failed to produce either the plaint or the answer in the previous action No. 7457/L.

The District Judge, however, in the course of his judgment states that action No. 7457/L was a possessory action. The present action is a rei vindicatio action. Therefore the question that arises for decision is whether the 'subject matter' is the same in the two actions.

The meaning of the expression 'subject matter' in section 406 of the Civil Procedure Code arose for consideration in *Jayawardene v. Arnolishamy* (2). Samarawickrema, J. in an illuminating passage at 499 expressed himself thus –

"The term 'subject matter'. . . . . does not, in my view, mean the property in respect of which an action is brought. In considering an almost identical provision in the Indian Code of Civil Procedure in *Aly Muhammed v. Karia Bakah.*(3) Shadi Lal, C.J., who was later a member of the Judicial Committee of the Privy Council, stated 'the phrase 'subject matter' is not defined in the Code but it is clear that it does not mean property, but has reference to the right in property which a person seeks to enforce'. In a passage which has been cited with approval by Howard, C.J., in *Kanapathipillai v. Kandiah, (4) Chitaley states, 'the term 'subject matter' means the plaintiff's cause of action for his suit, and a suit for a different cause of action is, therefore, not barred under this rule even though the suit may relate to the same property. Conversely, a suit based on the same cause of action as the first one is barred'. I do not think that cause of action in this passage has the meaning given to that term in our Code by the definition. It is used there in a wider sense and meant both the right asserted and its denial. I am of the view that the term 'subject matter' includes the facts and circumstances upon which the plaintiff's right to the relief claimed by him depends".* (The emphasis is mine)

The facts and circumstances upon which a plaintiff relies for relief in a possessory action are different from those relied on in a rei vindicatio action. The remedy of possessory action is one given by section 4 of the Prescription Ordinance. It gives a right to bring a possessory action on dispossession otherwise than by process of law and further provides that the action must be brought within one year of dispossession. Wood Renton, J., in *Silva v. Appuhamy* (5) observed –

"The proviso to the section enacts that the other requirements of the common law in regard to possessory actions are not affected and the old condition as to possession for a year and a day before ouster is, therefore, still in force."

Proof of title is not a requirement in a possessory action.

In a rei vindicatio action, on the other hand, ownership is of the essence of the action ; the action is founded on ownership. Macdonell, C.J. in *De Silva v. Goonetileke* (Full Bench)(6) set out the principle thus :–

> "There is abundant authority that a party claiming a declaration of title must have title himself. To bring an action rei vindicatio the plaintiff must have ownership actually vested in him. (1 Nathan p. 362, s. 593) . . . . . The authorities unite in holding that the plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie."

What is more, it was the defendant who relied on the statutory bar enacted by section 406. The burden of proving that the 'subject matter' of the two actions was the same was clearly on him. Samarawickrema, J. in *Jayawardene v. Arnolishamy (supra)* observed :–

> "It is incumbent upon a party who makes a plea of res judicata to place before Court, material necessary to show what the matters were in dispute in the earlier action and that matters in dispute in the action under consideration are the same".

Similarly, the burden was on the defendant in the present action to satisfy the court that by reason of section 406 the plaintiff was precluded from bringing the action. In my view, he failed to discharge that burden, for he produced neither the plaint nor the answer in the previous action. In the absence of the pleadings filed in the earlier action, the defendant failed to place before court the material necessary to support his plea that the present action was barred by the provisions of section 406 of the Civil Procedure Code.

I accordingly hold that the trial Judge was in error in answering the preliminary issue in favour of the defendant. The appeal is allowed, the judgment and decree of the District Court are set aside and the case is sent back for trial upon the other issues that arise. The defendant-respondent must pay the plaintiff-appellant the costs of the proceedings in the District Court as well as the costs of appeal.

L. H. DE ALWIS, J. – I agree.

Appeal allowed and case sent back for trial to be proceeded with.