1918

[PRIVY COUNCIL.]

Present: Lord Dunedin, Lord Shaw, and Lord Moulton.

PALANIAPPA *v.* SAMINATHAN *et. al.*

D. C. Colombo, 30,719.

Res judicata—*Civil Procedure Code s. 34—Cause of action—Note granted as conditional discharge of debt—Action on note dismissed—Material alteration—Subsequent action for money due.*

Parties settled their existing disputes by entering into a new agreement in terms of an award of arbitrators, and as conditional discharge of that agreement the defendants granted two promissory notes for Rs. 14,000 each. Plaintiff sued on the notes, but the action was dismissed on the ground that the notes were materially altered. The plaintiff thereupon brought this action to recover two sums (Rs. 11,566 and Rs. 771), which were included in the award and settled by the new agreement.

Held, that the action was not barred by section 34 of the Civil Procedure Code.

"A claim on the bills and a claim for the amount found due under the award, and for which payment was provided by the agreement, are not the same cause of action, but are in truth inconsistent and mutually exclusive causes of action."

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 transactions.

The form of the plaint is such that it is clear that the plaintiff was attempting to assert in the action two of the claims which were included in the award and settled by the new agreement. This he was not entitled to do, since they had been extinguished by the acceptance of the new agreement . . . . . Their Lordships think that justice will be done by treating the sum sued for as being part of the amount found due by the arbitrators, the payment of which

was provided for by the agreement, and in respect of which the notes were given ..... But this amendment will entail the consequence that, inasmuch as the plaintiff has sued for a part only of the total sum due, he cannot bring a fresh action for the remainder.

THIS was an appeal from a judgment of the Supreme Court (reported in *15 N. L. R. 161*). The facts appear from the judgment.

December 16, 1913. Delivered by LORD MOULTON:—

The respondent is a money lender carrying on business in Colombo, and the first appellant was for a time his agent and manager. He was at the same time carrying on business as a money lender in partnership with the second appellant.

For about three and a half years prior to June, 1909, the respondent was absent from Ceylon, and the first appellant carried on his business during his absence. On his return serious disputes arose between them. The respondent alleged that there was a large balance due to him from the first appellant, and also that the first appellant had not credited the respondent with certain profits made by discounting promissory notes at the banks for firms in which the second appellant was a partner. Ultimately all the parties to the present suit agreed that these disputes should be referred to two other money lenders named Ramanathan Chetty and Mutu Ramen Chetty, who, after the completion of the investigation, drew up, on August 30, 1909, what has been termed "a receipt," which the appellants signed, the arbitrators witnessed, and the respondent accepted and acted upon. This document deals *seriatim* with seven sums thereby admitted to be due from the appellants to the respondent, amounting in all to Rs. 28,224 5/32, and it then proceeds as follows:—

"And this sum of Rs. 28,224 5/32 we have this day settled with you in the following manner:—

"Rs. 224 5/32 paid to you by us this day in cash; Rs. 14,000 by an on demand promissory note, payable with interest on September 15; and Rs. 14,000 by another on demand promissory note given on the same date, payable with interest on November 30; all aggregating to Rs. 28,224 5/32.

"And this matter having been thus arranged and settled in respect of all the accounts between us, this receipt shall be the witness that there is no other claim against us by you or by us against you."

Accordingly Rs. 224 5/32 were thereupon paid by the appellants to the respondent, and two promissory notes, each for a sum of Rs. 14,000, were handed to him. Their Lordships entertain no doubt that, although informally conducted, the proceeding was in the nature of an arbitration, and the so called "receipt" expresses

1912.

LORD MOULTON

Palaniappa v. Saminathan

the findings of the arbitrators, and the mode in which it was to be performed. But the question whether or not it should so be regarded is immaterial for the decision of the present appeal. The "receipt" given by the appellants, and accepted by the respondent, and acted on by both parties, proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the "receipt." It is a clear example of what used to be well known in common law pleading as "accord and satisfaction by a substituted agreement." No matter what were the respective rights of the parties *inter se*, they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.

There appears to be no doubt that it was the intention of all the parties that the sums for which the promissory notes were given should bear what is known as Chetty interest, which is at a rate dependent on the current bank rate, and would in the present case have been between 6 per cent. and 7 per cent. But, probably by an oversight, no rate of interest was inserted in the promissory notes, and the respondent, without communication with the appellants, went to one of the arbitrators and persuaded him to alter both promissory notes by inserting therein 9 per cent. as the rate of interest. Though this was an irregularity of a grave kind, their Lordships do not understand that it was done with bad faith either on the part of the arbitrator or the respondent. It appears to have been the result of a misunderstanding, and accordingly their Lordships treat it as a material alteration innocently made.

On October 18, 1909, the respondent commenced an action in the District Court of Colombo upon the two promissory notes so given to him. The appellants raised as a defence that a material alteration had been made in them, and on this ground the action was dismissed on February 8, 1910.

On April 20, 1910, the respondent commenced the present action for the two sums of Rs. 11,526 7/32 and Rs. 771. These were two out of six items referred to in the receipt, all going towards making up the total of Rs. 28,224 $\frac{5}{32}$, which was the basis of the new agreement. The form of the plaint is such that it is clear that the respondent was attempting to assert in the action two of the claims which were included in the award and settled by the new agreement. This he was not entitled to do, since they had been extinguished by the acceptance of the new agreement.

At the trial of the action the District Judge found in favour of the appellants, on the ground that the two promissory notes were given in absolute payment of the debt, and that, therefore, no remedy remained to the respondent, excepting upon those notes. On appeal

the Judges of the Supreme Court held that the notes were only accepted as a conditional discharge, so that they only amounted to payment if paid, and that, inasmuch as they had not been paid, the original debt of Rs. 28,000 remained. They accordingly allowed the appeal. It is from this decision that the present appeal is brought.

Their Lordships are of opinion, as has already been stated, that the form of the claim was faulty, inasmuch as the sole existing liability was under the agreement set out in the receipt. But they are also of opinion that the arrangement for the discharge of the amount found due by means of the promissory notes only expressed the mode of payment contemplated and arranged for at the time. This was essentially a matter of form only, the substance of the award being that the specified amount was actually due from the appellants to the respondent. Through an innocent act the promissory notes have become incapable of being enforced, and the appellants have availed themselves of this and have refused to pay the notes, so that payment in the form contemplated has failed. But this does not affect the substance of the award or the basis of the arrangement, which was liability, and therefore it was open to the respondent to bring an action for the unpaid balance of the sum found due, *i.e.*, for the amount of the promissory notes. He has brought his action for an amount less than this and based it on wrong grounds; but, on the other hand, the appellants omitted to raise their true defence in their pleadings, when there would have been an opportunity for the respondent to correct the grounds of his claim.

The learned Judge at the trial held that this action was barred by section 34 of the Ceylon Civil Procedure Code, and counsel for the appellants relied strongly upon this section in the argument before us. On account of the importance of the point it is desirable to cite the section in full:—

"Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any Court.

"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. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

"For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

1913.

LORD MOULTON

Palaniappa v. Saminathan

Their Lordships are of opinion that the learned Judge took an erroneous view of the object and meaning of this section. It 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 transactions. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph, in their Lordships' opinion, is not intended to be an illustration of the foregoing provisions, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the section.

Viewed thus, it is evident that a claim on the bills and a claim for the amount found due under the award, and for which payment was provided by the agreement, are not the same cause of action, but are in truth inconsistent and mutually exclusive causes of action. So long as the bills were outstanding, there was no right of action otherwise than upon the bills. It is therefore impossible, in their Lordships' opinion, to hold that the claim for the amount due was the same cause of action as the claim upon the bills and ought to have been included in the prior action.

Their Lordships therefore think that justice will be done by treating the sum sued for as being part of the amount found due by the arbitrators, the payment of which was provided for by the agreement, and in respect of which the promissory notes were given. They hold that, as such, it is recoverable by the respondent, and that the appeal should be dismissed. But this amendment will entail the consequence that, inasmuch as the respondent has sued for a part only of the total sum due, he cannot bring a fresh action for the remainder.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, but without costs.

Appeal dismissed.