

1943

Present : Jayetileke J.

MUTTUMENIKA, Appellant, and SUDUMENIKA, Respondent.

44—C. R. Badulla, 10,697..

Joinder of causes of action—Action for land—Recovery of value of goods—Same transaction—Power of Court to strike out cause of action—Civil Procedure Code, ss. 35, 93 and 805.

Plaintiff sued the defendants on two causes of action—

- (1) that acting in concert they unlawfully broke open the door of her house and removed articles of a certain value;
- (2) that on a later date they took forcible possession of the house and land in which she lived and reaped the paddy cultivated by her on a portion of the land.

Plaintiff claimed a declaration of title to the land and damages.

Held, that the joinder of the two causes of action was obnoxious to the provisions of section 35 of the Civil Procedure Code.

Held, further, that the plaint did not come within the purview of section 805 of the Civil Procedure Code.

Held also, that the power given to a Court to amend the plaint by striking out a cause of action should as a rule be exercised in the original Court on an application made after notice to the defendant.

A PPEAL from a judgment of the Commissioner of Requests, Badulla.

J. M. Jayamanne (with him *Herat*), for defendants, appellant.

M. Kumarasinghe, for plaintiff, respondent.

Cur. adv. vult.

December 7, 1943. JAYETILEKE J.—

The plaintiff brought this action against the defendants on two distinct and separate causes of action. She stated in her plaint that on December 16, 1940, the defendants acting in concert unlawfully broke open the door of her house and removed articles of the value of Rs. 40, and that on December 30, 1940, they took forcible possession of the house and land in which she lived and reaped the paddy cultivated by her on a portion of the land of the value of Rs. 20.

She claimed a declaration of title to the land, Rs. 20 as damages consequent on the ouster, and Rs. 40 being the value of the articles removed by the defendants.

The defendants pleaded that under section 35 of the Civil Procedure Code the two causes of action could not be combined and that the action should therefore be dismissed.

There can be no doubt that the joinder of the two causes of action is obnoxious to the provisions of section 35 of the Civil Procedure Code. The plaintiff sought to justify the joinder under section 805 of the Civil Procedure Code which is applicable to an action instituted in the Court of Requests. It reads:—"The plaintiff may unite in the same plaint two or more causes of action when they all arise (1) out of the same transaction or transactions connected with the same subject of action; (2) out of contract express or implied". But it must appear on the face of the plaint that all the causes of action so united are consistent with each other, that they entitle the plaintiff for the same kind of relief and that they affect all the parties.

An examination of the plaint shows that section 805 cannot possibly help the plaintiff. In the first place the causes of action do not arise out of the same transaction and, in the next, they do not entitle the plaintiff to the same kind of relief.

The question now arises what should be done in view of the defect I have alluded to. There is no provision in the Civil Procedure Code for striking out a cause of action which has been improperly joined, but section 93 gives the Court the power to allow the plaint to be amended.

In *Alagamma v. Mohamadu*¹ de Sampayo J. said—

"Even if the action be regarded as joining two distinct causes of action, it does not follow that the action, as far as the fourth plaintiff is concerned, should necessarily be dismissed. Section 17 of the Code is one of a number of sections concerned with the framing of an action, and it is obvious from the whole set of provisions that the intention of the Code is not to make technical defects wholly to defeat an action but to facilitate the correcting of such defects in order that the Court may once for all adjudicate on the merits of the case. Section 93 gives to the Court wide powers of amendment, and I think the District Judge should have exercised those powers in this case

¹ 4 C. W. R. 73

The proceedings do not show that any application was made by the plaintiff at any stage to amend the plaint. That may be due to the fact that the learned Commissioner was of opinion that there was no defect in the plaint.

Counsel for the plaintiff asks me for permission to amend the plaint by striking out the first cause of action.

In *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer*¹ an application for amendment was allowed in the most advanced stage before their Lordships of the Privy Council. Though the power of amendment conferred by section 93 is vested both in the original as well as in the appellate Court, I do not think I should exercise that power without a proper application and without giving the defendants an opportunity of showing cause.

I can, however, see no objection to the plaintiff being given an opportunity of making an application to the Court below with notice to the defendants.

I would set aside the judgment appealed from and send the case back to the Court below for the consideration of an application by the plaintiff to amend her plaint by deleting her claim for Rs. 40. If no such application is made within fourteen days of the receipt of this record in the Court below, the action will be dismissed with costs.

If an application is made and it is allowed, judgment will be entered for the plaintiff as prayed for in paras (a) and (b) of her plaint and Rs. 20 as damages. The appellant will be entitled to the costs of appeal but all costs in the Court below will be in the discretion of the Commissioner.

Set aside.

Case remitted.
