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Present: Mr. Justice Wood Renton and Mr. Justice Grenier.

SADO *et al. v.* NONABABA *et al.*

D.C., Galle, 8,108.

Malicious prosecution—Husband and wife defendants—Misjoinder—Waiver—Liability of husband for wife's tort—Dolus malus.

Where a husband and wife who were married after the passing of Ordinance No. 15 of 1876 were sued in one action for damages for malicious prosecution and judgment was entered against them, and no objection on the ground of misjoinder was taken in the lower Court—

Held, that the action was wrongly constituted, inasmuch as the causes of action were separate and distinct and could not be joined under section 11 of the Civil Procedure Code.

Sadler v. The Great Western Railway Co.[1] and *Appuhamy v. Marthelis Rosa*[2] followed.

Held, that the objection to misjoinder of causes of action not having been taken at the trial could not be entertained in appeal.

Held, that a husband married after the coming into operation of Ordinance No. 15 of 1876 is not liable for his wife's independent tort, and that no judgment could be passed him as a joint tort-feasor, unless there was complicity or participation on his part in the wife's tort.

Held, also, that, in order to succeed in an action for malicious prosecution, it is incumbent on the plaintiff to prove *dolus malus*.

Moss v. Wilson[3] *and Corea v. Pieris*[4] followed.

[1] *(1895) A. C. 450.*
[2] *(1906) 9 N. L. R. 68.*
[3] *(1906) 8 N. L. R. 368.*
[4] *(1906) 9 N. L. R. 276.*

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APPEAL by the defendants, husband and wife, from a judgment of the District Judge condemning them to pay to the plaintiffs Rs. 400 damages for malicious prosecution.

H. J. C. Pereira, for the defendants, appellants.

Sampayo, K.C., for the plaintiffs, respondents.

Cur. adv. vult.

June 7, 1907. WOOD RENTON J.—

This is an appeal from a decree of the District Court of Galle condemning the appellants, who are husband and wife, to pay to the respondents a sum of Rs. 400 for false and malicious prosecution.

Mr. H. J. C. Pereira impeached the judgment of the District Court on three grounds: (i.) That the action was wrongly constituted; (ii.) that, in any event, judgment ought not to have been entered against the second appellant, who is the husband of the first, inasmuch as he was not shown to have been in any way a party to the charge preferred by his wife against the respondents; and (iii.) that the respondents had failed to establish *dolus malus* as defined, for the purpose of cases like the present, by the well-settled jurisprudence of the Supreme Court.

I propose to deal with each of these points in turn. (i.) And first, as to the constitution of the action. Mr. Pereira contended, on the strength of the decision in *Appuhami v. Marthelis Rosa*,[1] following that of the House of Lords in *Sadler v. Great Western Railway Co.*,[2] that the action was bad, inasmuch as the causes of action of the respondents were separate and distinct, and could not be joined under section 11 of the Civil Procedure Code. Speaking for myself, I think that this objection would have been a sound one if it had been taken in time. So long as the words " the right to any relief claimed " and the " same cause of action " in section 11, and the definition of " cause of action " in section 5 of the Civil Procedure Code remain unaltered, I do not think that litigants in this Colony can get the benefit of the English decisions, of which the *Universities of Oxford and Cambridge v. Gill* [3] may be taken as an example, and which allow the joinder of parties who have " any right to relief " arising out of the same transaction or series of transactions. It was found necessary in England, so as to clear the way for such a joinder, to substitute for the words in R. S. C. Order 16, R. 1, " the right to any relief," the new words " any right to relief." No such substitution has been effected in Ceylon. Moreover, section 11 of our Civil Procedure Code contains the limiting clause " in respect of the same cause of action," which did not appear in the old English rule; in the new one we have the words " the same transaction or

[1] *(1906) 9 N. L. R. 68.* [2] *(1895) A. C. 450.*
[3] *(1899) 1 Ch. 55.*

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series of transactions," which, in view of the definition of that term in section 5 of the Civil Procedure Code, cannot be regarded as an equivalent for " cause of action " here. On these grounds I think that we are still under the old dispensation of *Smurthwaite v. Hannay* [1] and *Sadler v. Great Western Railway Co.* (*ubi sup.*). In the present case, however, no objection to the misjoinder was taken at the trial; and I think that, now that judgment has passed between the parties, we ought not to entertain it. The recent English case of *Bullock v. London General Omnibus Co.*[2] is an authority for this course. I cannot see that the ruling of the Court of Appeal on the point in any way depended on the special facts of the case. " If, in fact," said Collins M.R. (*ubi sup. at p. 270*). " there was such a misjoinder, it was for the defendants to take steps to remedy it, and it is much too late to complain of the irregularity, if there was one." Cozens-Hardy L.J. and Farwell L.J., express themselves in equally general terms. I think that the principle which they concur in affirming is sound, and that we should follow it here.

(ii.) I pass now to Mr. Pereira's second point. It is agreed that the parties were married after " The Matrimonial Rights and Inheritance Ordinance, 1876 " (No. 15 of 1876), came into operation; and it results, I think, from the evidence that the second appellant in no way inspired or adopted his wife's charge against the respondents. He was not sued on that footing, and the record discloses no facts on which a judgment against him based on it could stand. The question, therefore, arises whether, and, if so, to what extent, a husband married after the Ordinance of 1876, and married out of community, is liable for his wife's independent tort. In my opinion, he incurs no liability at all. " When a woman, " says Voet (*47, tit. 10, S. 3; De Villiers, pp. 48, 49*), " who is married out of community of property commits an injury without the complicity and participation of the husband, only her own estate will be liable for damages; " and see Nathan (*Com. Law of South Africa, III., S. 1,547*) to the same effect. It was, of course, quite proper that the husband should be made an added defendant in the action, but the judgment against him as a joint tort-feasor by implication of law is, in my opinion, bad; and as regards him, the damages must be set aside and the appeal allowed.

(iii.) As regards the wife, I have come to the conclusion that the appeal should, on the merits, be dismissed. I do not agree with the view attributed by the learned District Judge to Burnside C.J., that in cases of malicious prosecution " very slight evidence on the part of the plaintiff of want of reasonable and probable cause is all that is required," or that the plaintiff can satisfy the onus upon him by merely putting in the depositions in the criminal case. *Moss v. wilson*[3] and *Corea v. Pieris*[4] clearly show that this is not now, at

[1] (*1894*) *A. C. 494.*
[2] (*1907*) *1 K. B. 264.*
[3] (*1906*) *8 N. L. R. 368.*
[4] (*1906*) *9 N. L. R. 276.*

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any rate, the jurisprudence of the Supreme Court. But I think that, on the question whether *dolus malus* has been proved, there is a material difference between those cases and the present one. In *Moss v. Wilson* and *Corea v. Pieris* the defendant in bringing the charge which formed the subject-matter of the suit, was acting on information supplied by others. In the present case the first appellant purported to have herself seen the respondents setting fire to her house. It appears to me that, in view of this fact, the learned District Judge was quite entitled to consider not only the demeanour and credibility of the first appellant, but also the inherent improbabilities of her story, such as the commission of arson in broad daylight, and her entire indifference to the fate of her young children whom she left in the house before it was set fire to, and who, for aught that she knew to the contrary, were at the mercy of the flames. On the whole, I see no reason to differ from the District Judge's finding that *dolus malus* was established.

I would dismiss the appeal with costs as regards the first appellant, who will pay to the respondent the sum of Rs. 200, and allow it with costs as regards the second.

GRENIER A.J.—I concur.

Judgment varied.