Present : Garvin A.J. and Jayewardene A.J. **1923.**

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104—D. C. Ratnapura, 3,851.

Civil Procedure Code, ss. 34 and 406—Action in Court of Requests withdrawn without obtaining leave before service of summons on defendant—Fresh action in District Court for larger sum on same cause of action—Is action barred ?—Date of institution of action—Service of summons—Interpretation of Statutes—Power of Court to add to the language of a Statute..

Plaintiff, a toddy renter, sued his tavern keeper for Rs. 24·28 as balance due on the accounts. But before service of summons on defendant, he discovered a mistake and withdrew his action, and brought this action in the District Court for Rs. 644·88 as balance due to him.

Held, that as plaintiff did not obtain leave to bring a fresh action when he withdrew the action in the Court of Requests, he was barred by section 406 of the Civil Procedure Code from instituting this action.

By the combined provisions of sections 34 and 406 the plaintiff is barred from claiming even the sum in excess of Rs. 24·28, if he was aware of it when he instituted the Court of Requests action.

The fact that the action was withdrawn before the service of summons does not take the case out of the provisions of section 406.

An action is instituted when a plaint is presented.

Courts have no power to add to the language of a Statute, unless the language as it stands is meaningless or leads to an absurdity.

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The words " omit " or " deliberately relinquish " in section 34 includes accidental omissions as well as acts of deliberate relinquishment, but a plaintiff cannot be said to have omitted to sue in respect of a part of his claim unless he was aware or informed of his claim at some time prior to his suit.

THE facts are set out in the judgment.

H. V. Perera (with him *Charles de Silva*), for the defendant, appellant.

R. L. Pereira (with him *Selvadurai*), for the plaintiff, respondent.

C. W. Perera, for added-defendant, respondent.

September 13, 1923. JAYEWARDENE A.J.—

This is an appeal from an order of the District Judge of Ratnapura in which he has held that the plaintiff is not barred by section 406 of the Civil Procedure Code from maintaining the action. The plaintiff who is a toddy renter brought this action to recover a sum of Rs. 644·88, subsequently reduced to Rs. 494·87, from the defendant who was his tavern keeper. He alleged that the defendant ceased to be tavern keeper in July, 1922, and in going through the accounts he found that the defendant was inbebted to him in the sum claimed as shown in the account, particulars filed with the plaint. The defendant filed answer denying liability, and making a counter claim. At the trial objection was taken that the plaintiff could not mainatin this action in view of his conduct in C. R. Avissawella, No. 11,892. In that case instituted in August, 1922, the plaintiff sued this defendant to recover a sum of Rs. 24·28. He alleged there that the defendant had sold toddy to the value of Rs. 637·28, from July 1 to 18, 1922, and that he had accounted for Rs. 613, leaving balance of Rs. 24·28 due to the plaintiff. The causes of action in both cases is, therefore, the same, and under section 34 of the Civil Procedure Code the plaintiff should have included in the action the whole of the claim which he was entitled to make in respect of the cause of action. He failed to do this, and only claimed Rs. 24·28 in the Avissawella case. After the filing of the plaint in that case and issue of the summons, but before service of the summons on the defendant, he discovered an error in the accounts. He then moved to withdraw the action and for a recall of the summons. This was allowed by the Court on September 13, 1922. A few days later—September 26—he instituted the present action.

The defendant contends that as that action was withdrawn without obtaining permission from the Court to institute a fresh action, it must be regarded as dismissed, and the present action cannot be maintained in view of section 406 of the Civil Procedure Code. Under this section the Court may, at any time after the institution of an action for certain reasons, grant permission to a plaintiff to withdraw from an action with liberty to institute a

fresh action. But if a plaintiff withdraws from an action without such permission, he is precluded from bringing a fresh action in respect of the same matter. The plaintiff in his application did not ask for permission to withdraw with liberty to institute a fresh action, nor was such liberty reserved to him in the order allowing his application, so that it must be taken that the withdrawal of the action was without such permission, that is, without liberty to institute a fresh action, and that the action was practically dismissed. The plaintiff is, therefore, clearly barred from instituting a fresh action for the same matter. But it is contended that the present action is not in respect of the same matter, but in respect of the same matters and of other matter which were not claimed in the previous case. But the plaintiff is confronted here with the provisions of section 34 which not only requires that a plaintiff should include in one action the whole of the claim arising from a cause of action, but also declares 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." The fact that the claim, as now ascertained, is beyond the jurisdiction of the Court of Requests cannot affect the position, for he has clearly offended against the provisions of section 34, which is intended to prevent the splitting of claims. If the Court of Requests case had been tried, and the plaintiff had succeeded or failed in it, he would not have been able to institute an action for the portion omitted, whether the value of the portion omitted fell within the jurisdiction of the District Court or the Court of Requests. Section 34 is not affected by any question of jurisdiction. Thus it was held in *Hari Nath Das v. Syed Hossan Ali,*[1] that where a suit was withdrawn under circumstances which made it a withdrawal without liberty to institute a fresh action, the suit must be regarded as dismissed, and when a suit has been so dismissed, a plaintiff cannot bring an action for a claim which he ought to have included in the former suit brought by him, in view of sub-section (2) of section 43 (identical with section 34 of our Code) of the Indian Civil Procedure Code.

The Court of Requests case must be regarded as dismissed, and the plaintiff cannot include in the present action any claim which he had omitted to include in the case he first instituted.

It was also contended for the plaintiff that section 406 has no application here, as the case was withdrawn before the defendant was served with summons. But the words of the section are :— " If at any time after the institution of an action, &c." By section 39, " Every action of regular procedure shall be instituted by presenting a duly stamped written plaint . . . ;" and it has been held in numerous cases that under the Civil Procedure Code, an action is instituted when a plaint is presented. If the plaintiff's

[1] *(1905) 2 Cal. L. J. 480.*

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contention is to be acceded to, the wording of section 406 would have to be altered so as to make it read : " If at any time after the defendant has been served with summons, &c."

Courts have no power to add to the language of a Statute unless the language as it stands is meaningless or leads to an absurdity. The language of section 406, as it stands, is not subject to either of these infirmities, although it may when the requirements of the section are not observed appear to work hardship. It is not surprising that no authorities, Indian or local, were cited in support of this contention. Section 406 embodies a rule of public policy that it is to the interest of the State that there should be an end to litigation, and creates a statutory bar to the institution of a fresh suit where a suit is withdrawn without liberty to re-institute it, which can only be granted for the reasons stated therein.

But there is one point on which I am not satisfied. The circumstances under which the excess over Rs. 24·28 now claimed in this case came to be omitted has not been explained. No doubt it has been held that the words " omit " or " deliberately relinquish " in section 34 included " accidental or involuntary omissions as well as acts of deliberate relinquishment," but it has also been held that plaintiff cannot be said to have omitted to sue in respect of a part of his claim, unless he was aware or informed of his claim at some time prior to his suit : *Venakali v. Krisnasami,*[1] *Sankarani v. Paravathi,*[2] *Batul Kunvar v. Murin Lal.*[3] As the Privy Council said in *Amanal Bibi v. Midad Husani,*[4] " a right which a litigant possesses without knowing or ever having known that he possesses, it can hardly be regarded as a portion of his claim. See *Allagaswamy v. The Kalutara Company, Limited.*[5] The plaintiff may not have known at the time he instituted the Court of Requests case that the defendant's indebtedness to him was in the amount he now claims. He should, I think, be given an opportunity of explaining how he failed to make the present claim in the first case. But as regards the sum of Rs. 24·28, in respect of which he brought the Court of Requests case, and which is included in the present claim, it must be declared that he cannot now sue to recover it. If his omission does not come within the exceptions referred to in the judgments I have referred to above, his action will be dismissed. If he succeeds in bringing himself within the exception, he will be entitled to maintain the action except in respect of the sum of Rs. 24·28. The case will, therefore, go back to the District Court for the purpose indicated. The plaintiff will pay the appellant his costs of this appeal. All other costs to abide the event.

GARVIN A.J.—I agree.

Sent back.

[1] *(1883) 6 Mad. 344.*
[2] *(1896) 19 Mad. 145.*
[3] *(1910) 32 All. 625.*
[4] *(1888) 15 Cal. 800.*
[5] *(1911) 14 N. L. R. 262 (265).*