Present: Mr. Justice Wendt and Mr. Justice Middleton.

1909.
June 4.

BASTIAN SILVA *v.* MARIANO SILVA.

D. C., Negombo, 7,100.

Res judicata—*Identity of cause of action—Civil Procedure Code, ss. 34 and 207.*

Plaintiff claiming title to a land of 9 acres sued the defendant in the Court of Requests (No. 14,632) to vindicate title to a house standing on the said land. The defendant claimed to be entitled to an extent of 3 acres of the said land, and alleged that he had built the house and resided there and acquired title by prescription. No issue was framed as to the title to the land; but the Commissioner found that the defendant had built the house and acquired prescriptive title thereto, and dismissed the plaintiff's action. The plaintiff then brought this action to vindicate his title to the 3 acres claimed by the defendant; the defendant pleaded the judgment in the previous action (C. R. 14,632) as barring the present suit.

Held, that the judgment in the previous action could not be relied on as *res judicata*, inasmuch as the cause of action there was not the same as the cause of action in the present suit.

ACTION *rei vindicatio*. Appeal by the plaintiff from a judgment dismissing his action on the ground that it was barred by section 34 of the Civil Procedure Code.

E. W. Jayewardene, for the plaintiff, appellant.

Sansoni (with him *F. M. de Saram*), for the respondent.

Cur. adv. vult.

June 4, 1909. MIDDLETON J.—

In this case it appeared the same plaintiff instituted action C. R., Negombo, 14,632, on November 28, 1906, against the same defendant, claiming that the defendant be ejected from a house standing on land described in the schedule to the plaintiff as 9 acres in extent, which had been donated to the plaintiff, subject to the donor's life interest, by deed of November 12, 1903. The plaint averred that the defendant had been allowed to occupy the house by the donors to the plaintiff free of rent. The defendant, in his answer, averred that the plaintiff's donors had given him 3 acres out of the 9 acres mentioned in the schedule to the plaint about thirty-five years ago, and that he had built the house in question, resided on it, and taken the produce of the said land and planted it, and he claimed title by adverse possession under section 3 of Ordinance No. 22 of 1871 :—

The issues framed in the case were :—

(1) Has the plaintiff gained a prescriptive title to the house ?
(2) Did the defendant build the house ?

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No issue was framed as to the title to the land at all.

The Commissioner of Requests found that the defendant had obtained a title by adverse possession to the house, and gave judgment for the defendant.

In the present action the plaintiff in his plaint averred that the defendant had been in the unlawful possession of 3 acres of the same 9 acres mentioned in the schedule to the plaint in the Court of Requests action since November 28, 1906, the date of the Court of Requests action, and prayed for a declaration of title to him and the ejectment of the defendant. In his answer the defendant pleaded again the gift to him of the 3 acres by plaintiff's donors, the building of the house and the planting of the said land, and its adverse possession by him for upwards of twenty years as against the donors, and further pleaded that the judgment in C. R., Negombo, 14,632, estopped the plaintiff from seeking to eject the defendant.

The District Judge gave judgment for the defendant and dismissed the plaintiff's action, holding that the doctrine of estoppel did not apply, but that section 34 of the Civil Procedure Code governed the case. The plaintiff appealed, and at the outset before us admitted by his counsel that as regards the house and land on which it stood the decision in the Court of Requests case was *res adjudicata* of his right to claim it, but he argued that he was not so estopped as regards his claim to the 3 acres either by section 207 or section 34 of the Code.

In *Ibrahim Baay et al. v. Abdul Rahim*,[1] I have set out what in my opinion constitute the elements necessary to establish a valid estoppel by judgment *in personam* under the English and Ceylon Law. If we look at section 34 it is clear that a plaintiff must include the whole of the claim he is entitled to make in respect of his cause of action, but he may relinquish a part of it to enable him to bring his action in a cheaper scale. If he omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he cannot afterwards sue in respect of the portion so omitted or relinquished. If he has more than one remedy for the same cause of action, and omits without the leave of the Court obtained before the hearing to sue for any of such remedies, he cannot afterwards sue for the remedy so omitted.

Section 207 makes it obligatory to claim every right of property ..... or relief of any kind which can be claimed, set up, or put in issue between the parties upon the cause of action for which the action is brought, and whether it be actually so claimed, set up, or put in issue or not, such right of property or to relief becomes *res adjudicata* on the passing of the final decree. It, therefore, is of the utmost importance to clearly ascertain what was the cause of action in every case, where the question of *res adjudicata* is raised in respect of its decision.

[1] (*1909*) *12 N. L. R. 177.*

The learned District Judge holds here that the cause of action in the two cases was the same, *i.e.*, an adverse possession by the defendant of the house and land on which the house stands. I cannot agree with his opinion. It certainly was the cause of action in the Court of Requests so far as the land on which the house actually stands is concerned, but in the District Court case it is specifically averred in the plaint that since the date of that action the defendant had been in unlawful possession of the 3 acres, thereby making the cause of action an adverse possession of the 3 acres, which had not been complained of by the plaintiff, or apparently asserted by the defendant until he filed the answer in the Court of Requests case.

The evidence given in the District Court case by plaintiff and defendant shows that the action was only instituted for the house, and that the defendant raised a claim to the land as a defence, not in reconvention. The Arachchi's evidence is of a contradictory character in his cross-examination, and does not to my mind show that the plaintiff knew at the time of the institution of his action of any claim to the 3 acres by the defendant, but wanted to eject defendant from the house as being the only claim he was then entitled to make on the defendant's adverse possession of it.

The defendant it is true raised the question of the 3 acres in his answer, but judging from the 4th paragraph of the plaint in the present case that would have been a claim which if raised in reconvention would have been far beyond the jurisdiction of the Court of Requests. No issue was settled on the point, and the Commissioner appears to have ignored it, and confined his inquiry into the rights of the parties as to the house raised by the plaintiff, upon which he gave judgment.

In my view, therefore, the plaintiff included in the Court of Requests case the whole of the claim which he was entitled to make in respect of the only cause of action he apparently had at the time, *i.e.*, the alleged adverse occupation of the house by the defendant. I also think that the cause of action in the Court of Requests case was different to that relied on in the District Court case, which I have already distinguished. I would hold therefore that neither under section 34 or section 207 of the Civil Procedure Code is the plaintiff estopped from bringing this action, and would set aside the judgment of the District Judge and send the case back to be tried in due course, allowing the appeal with costs.

WENDT J.—I agree.

Appeal allowed; case remitted.