May 30, 1910

Present: Mr. Justice Grenier.

HOLLOWAY *et al.* *v.* PERERA.

C. R., Panwila, 2,301.

*Action for rent and ejectment—Subsequent action for rent accruing after the date of the first action—*Res judicata*—Civil Procedure Code, ss. 34 and 35.*

Plaintiff obtained judgment against defendant for rent due up to date of action and for ejectment. Subsequently, after plaintiff was put in possession, he brought the present action for the rent that accrued between the institution of the first action and the present action.

Held, over-ruling a plea of *res judicata*, that the present action was maintainable.

THE facts are fully set out in the judgment of Grenier J.

A. St. V. Jayewardene, for the defendant, appellant.—Plaintiff could have claimed rent till he was restored to possession in the first action. He elected not to do so. Section 196 of the Civil Procedure Code gives the Court power to decree the payment of rent from the date of the institution of the action until delivery of possession. But the Court has not done so. Under these circumstances the present action cannot be maintained (*Kiri Banda v. Slema Lebbe*,[1] *Kirihamy v. Dingiri Amma* [2]).

H. A. Jayewardene, for the plaintiff, respondent.—Under section 35 of the Civil Procedure Code the plaintiff could not include in his plaint in the first action a claim for future rent. Section 196 merely gives the Court the power to decree future rent; but it does not enable the plaintiff to claim future rent as a matter of right. Counsel

[1] *(1908) 11 N. L. R. 348.*

[2] *(1905) 1 Bal. 146.*

cited *Sirkar v. The Secretary of State for India in Council*;[1] *Hays v. Padmanand Singh*;[2] *Dayal v. Lal*;[3] *Bhivrav v. Sitaram*;[4] *D. C., Galle, 6,340*.[5] The present case can be distinguished from the Ceylon cases cited by the appellant's counsel. In those cases there was a prayer for damages accruing after the institution of the action.

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

May 30, 1910. GRENIER J.—

The defendant was the tenant of the plaintiff of certain boutiques on a monthly rental of Rs. 5. Plaintiff obtained judgment against defendant in C. R., Panwila, 2,032, for the sum of Rs. 54.20, being rent due to the end of January, 1908, and also obtained an order for ejectment of the defendant from the premises. On May 22, 1909, the plaintiff was put in possession of the premises, the defendant having remained in possession up to that date.

The defendant admitted the tenancy averred in the 2nd paragraph of the plaint, but denied his liability to pay the amount claimed, on the ground that he was not the tenant of the plaintiff, and was not in occupation of the premises during the period between February 1, 1908, and May 22, 1909. He denied he was ejected from the premises by the Fiscal, but this was an unnecessary denial, as the plaintiff never averred any ejectment in his plaint. The defendant averred that he was not aware that plaintiff had been put in possession of the premises.

Following on the above statements and denial came this extraordinary defence, raised as a matter of law, that the amount claimed, which, according to defendant, was not due, and for which he had never made himself liable, should have been included and formed part of the plaintiff's claim in action No. 2,032, and that having omitted to do so, the plaintiff cannot have and maintain this action. At the trial two issues were framed, the first relating to defendant's tenancy from February 1, 1908, to May 1, 1909, and the other relating to the question of law.

The defendant gave no evidence. On behalf of the plaintiff his son was called, as he was in charge of the boutique tenanted by the defendant. He stated that defendant paid rent up to March, 1907, and the action No. 2,032 was instituted to recover rent from April 1, 1907, to end of 1908. Judgment was entered for plaintiff in that case for rent up to end of January, 1909. Writ of possession was issued, and on May 22, 1909, the Fiscal placed him in possession. Between the end of January, 1908, as before that, and May 22, 1909, the defendant was in occupation of one of the tenements (No. 36), having sublet the others to some third parties; the witness also

[1] *(1890) 17 Cal. 968.*
[2] *(1903) 32 Cal. 118.*
[3] *(1899) 21 All. 425.*
[4] *(1894) 19 Bom. 532, 11 Mad L. J. 462.*
[5] *S. C. Min., June 29, 1903.*

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stated that after judgment was entered against defendant in case No. 2,032, he quitted tenement No. 36, and one of his tenants, who was in occupation of another house, took possession of it—a not uncommon proceeding amongst a certain class of tenants.

In cross-examination the witness stated that the plaintiff did not pray in case No. 2,032 for further rent until defendant was ejected. This omission, upon which the issue of law was raised, formed the foundation of an elaborate argument by the appellant's counsel, who contended that the plaintiff could not recover the amount claimed in this action by reason of the omission, and that the matter was *res judicata*. Neither at the argument nor after could I appreciate a point which may be supported by an isolated authority of this Court, but which, if decided in favour of the appellant, would work manifest injustice to him. In my opinion section 34 of the Civil Procedure Code must be read intelligently with section 35. Section 35 is clear, that except claims in respect of mesne profits or arrears of rent, no other claim on any cause of action shall be made, unless with the leave of the Court, in an action for the recovery of immovable property or to obtain a declaration of title to immovable property; the use of the imperative "shall" is significant. Rent which may subsequently accrue after the institution of the action cannot possibly come under the description of arrears of rent. In bringing an action for arrears of rent a plaintiff cannot surely anticipate what the tenant's tactics may be, especially if he is inclined to dishonesty, as in this case, and introduces into the premises a third party in order to give trouble to the landlord while he is all the time in occupation himself.

In the present case the plaintiff did in fact and in law include in his first action the whole of the claim which he was entitled to make in respect of his cause of action, which was for arrears of rent due by defendant to him. His cause of action was that defendant had not paid him rent for a certain ascertained period before institution of suit. He fully complied with the provisions of section 34, because he was not entitled to more than one remedy in respect of his cause of action, and in suing as he did for arrears of rent, without a prayer for future rent, which may or may not accrue—for the tenant was at liberty to quit the premises without being ejected by process of law—he was, in my opinion, acting in strict compliance with the provisions of both the sections 34 and 35.

The object of these two sections is undoubtedly to prevent a multiplicity of suits, but I cannot well see how the present suit could have been avoided by a claim being made in the first suit for rent which had not accrued at the time, and in respect of which the plaintiff had no cause of action then against the defendant.

I would dismiss this appeal with costs in both Courts.

Appeal dismissed.