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Present : Lascelles C.J. and De Sampayo A.J.

SILVA *v.* PERERA.

1—D. C. Kalutara, 5,263.

Claim in reconvention—Nature of—Power of Court to reject a claim in reconvention and refer party to another action.

A claim in reconvention should be of such a nature that the respective claims of the plaintiff and the defendant may be mutually adjusted, and a final decree entered in favour of one party or the other. The claim in reconvention need not be based on, or connected with, the transaction or matter out of which the plaintiff's cause of action arises, but it should in its nature be capable of being set off against or adjusted with the plaintiff's claim. It is within the power of a court to refuse to allow a claim in reconvention to be set up if it is such as likely to cause embarrassment or to prejudice and delay the trial of the action.

THE facts are set out in the judgment.

Bawa, K.C. (with him *Morgan de Saram*), for the defendant, appellant.—The District Judge has no power to reject the claim in

reconvention. The claim in reconvention need not have any connection with the original claim. See *Babapulle v. Rajaratnam*, [1] *Soysa v. Soysa*.[2] Our Procedure Code did not advisedly take over the provisions of the Indian Act limiting the claim in reconvention to matters connected with the claim in convention. In the District Court any cross-claim may be set up in the answer, but in the Court of Requests we should be guided by the English practice as to counterclaims, and not by the rules of the Roman-Dutch law.

The evidence shows that the defendant was asked to buy the land in his own name and transfer half to plaintiff. This does not create a trust in favour of the plaintiff, but is only an agreement which could not be enforced, as it was not notarial. *Amarasekera v. Rajapaksa* [3].

H. J. C. Perera (with him *Canekeratne*), for the plaintiff, respondent.—The Civil Procedure Code does not say what matters may be claimed in reconvention. We must look to the law before the Civil Procedure Code for the decision of the point. Section 4 of the Code enacts that where no provision is made in the Code the procedure existing before that date should continue. A claim in reconvention, according to the Roman-Dutch law, should be of the same nature as the claim in convention. *Van Leeuwen (Kotze's), vol. II., pp.* 409, 410.

In *Soysa v. Soysa* [2] Wood Renton J. seems to have overlooked the provisions of section 35 of the Civil Procedure Code in deciding the case. The defendant was in the nature of a plaintiff for the purposes of the claim in reconvention, and under section 35 he could not have joined the various claims without leave of Court. Section 35 is a bar to the defendant's counterclaim in this case.

In *Soysa v. Soysa* [2] and *Babapulle v. Rajaratnam* [1] the question whether the Court has a power to strike out a claim in reconvention was not considered.

Counsel cited *Dona Sophia v. Punchi Banda*,[4] *Ahamadde Lebbe v. Mutappa Chetty*,[5] *21 Ch. D. 138, 18 Bom. 719.*

Defendant bought the land for the plaintiff with plaintiff's money. In the circumstances the defendant must be held to have bought the land in trust for plaintiff. (*15 N. L. R. 16; 9 N. L. R. 187, 189*).

Bawa, K.C., in reply.—The effect of the decision in *Dona Sophia v. Punchi Banda* [4] is in favour of the appellant. It shows that even under the old law it would not be repugnant to a defendant to set up a foreign matter in reconvention, but that Courts had power to strike out the claim for embarrassment.

Cur. adv. vult.

[1] *(1900) 5 N. L. R. 1.*
[2] *(1910) 5 Bal. 47.*
[3] *(1911) 14 N. L. R. 110.*
[4] *(1884) 6 S. C. C. 39.*
[5] *Ram. 1860–62, 191.*

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Silva v. Perera

February 23, 1914. LASCELLES C.J.—

This is an appeal from a judgment of the District Court of Kalutara declaring that the defendant purchased an undivided half share of the land called Rukmalgahahena in trust for the plaintiff personally and for him as executor of one Bernard Silva, and ordering the defendant to execute a conveyance accordingly.

The objection which was raised in argument to this decree has been removed by the plaintiff consenting to an amendment to the decree, to which I shall presently refer.

The substantial ground of appeal is with regard to the learned District Judge's refusal to entertain the defendant's claim in reconvention.

The claim in reconvention is based on an agreement dated December 3, 1906, between Bernard Silva, the plaintiff, and the defendant with regard to mining operations on certain lands belonging to the defendant, including amongst other lands the land which is the subject of the action. This agreement provided for the division of the plumbago between the co-adventurers, and for the carrying on of a shop on a joint account in connection with the works.

The claim in reconvention avers that the accounts rendered by the defendant are not true and correct, that compound interest has been improperly charged, that the profits earned in the shop have not been accounted for, and sets out a number of alleged breaches of the agreement. The prayer in reconvention is for an account of the working of the pits, for the cancellation of the agreement of December 3, 1906, for the restoration of the defendant to the possession of another land as well as that referred to in the plaint, for damages, and for the execution of an agreement by the plaintiff in terms of his letter of April 8, 1912.

The defendant-appellant contends that the District Judge had no power to decline to entertain his claim in reconvention. The question is merely one of the powers of a Judge to reject a claim in reconvention. For if a Judge has a discretion in the matter, if it is competent to him to reject a claim in reconvention on the ground that it is embarrassing to the plaintiff, or because it cannot conveniently be disposed of in the action, the present case is eminently one for the exercise of that power.

Mr. Bawa, for the defendant-appellant, contended that under the Civil Procedure Code the power to set up a claim in reconvention was not less extensive than the power to set up a counterclaim under the English practice,[1] but that, on the other hand, there exists in Ceylon no power on the part of the Court, analogous to that possessed by the English Courts, of disallowing or striking out a claim in reconvention on the ground that it cannot conveniently be disposed of in the action.

[1] *Rules of the Supreme Court, O. 19, r 3.*

I find it difficult to believe that our Code has placed no restriction on the power of a defendant to set up a claim in reconvention. The present case is an example of how the trial of a perfectly simple case might be complicated and delayed by a claim in reconvention.

The provisions of the Civil Procedure Code with regard to claims in reconvention are singularly meagre. In the part of the Code relating to trials in District Courts, section 75 (*e*) is the only provision which deals with the subject; and this is almost confined to matters of form. The claim in reconvention must be prepared in the same form as a plaint; it has the same effect as a plaint in a cross-action, so as to enable the Court to pronounce a final judgment both on the original and on the cross-claim.

But I do think that because the Code is silent as to any restriction on the power of setting up claims in reconvention, it would be a correct inference that no such restriction exists.

The claim in reconvention is not the creation of the Code. It is a procedure recognized by the common law of Ceylon long before the Code. The Code, when it gave directions as to the form and effect of a claim in reconvention, must not, in my opinion, be understood to have removed the limitations which existed under the common law. The rule of the Roman-Dutch law is that " the thing claimed in reconvention must be of the same right, kind, and quality as the matter claimed in convention, because they are as it were set off and extinguished by compensation against each other, which cannot take place in things that are in any way dissimilar." [1]

It is said that the decisions of this Court in *Babapulle v. Rajaratnam* [2] and *Soysa v. Soysa* [3] are not consistent with this view of the scope of the claim in reconvention. In the first-named case Bonser C.J. stated that he was not aware of any authority for the proposition that a claim in reconvention must arise out of or be closely connected with the original claim. There is nothing in this expression of opinion which is inconsistent with the limitations laid down by Van Leeuwen. In the latter case Wood Renton J. enunciated the same opinion. But, on the facts of the case, there is room for doubt whether what was the subject of the claim in reconvention was strictly " of the same right, kind, and quality as the matter claimed." Possibly in that case the claim in reconvention for compensation may be regarded as being of the same kind as the claim for rent, and the claim in reconvention for declaration of title as of the same kind as the claim to quit the premises. But, however this may be, the question now under discussion, namely, the question whether the defendant's right to set up a claim in reconvention is absolutely unrestricted, was not raised in either of these two cases.

It has been suggested that the rejection of the claim in reconvention might be supported on the ground that it unites with a claim for

[1] *Kotzé's Van Leeuwen, vol. 11., p, 410.* [2] *(1900) 5 N. L. R. 1, at page 4.*

[3] *(1910) 5 Bal. 47.*

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the recovery of immovable property, claims which are inadmissible under section 35. But this, I think, would be ground for requiring amendment rather than for the total rejection of the claim.

But, I think, for the reasons which I have indicated, that the claim in reconvention was properly rejected.

With regard to the amendment of the decree, counsel agreed that the following clause should be inserted after paragraph 4 of the decree: " That the plaintiff do execute in favour of the defendant a transfer of the half share of the land decreed to him as above, when all mining operations on the said land have ceased."

Subject to the amendment, I would dismiss the appeal with costs.

DE SAMPAYO A.J.—

I also think that the order relating to the defendant's claim in reconvention is right. Considering the language of section 75 (*e*) and section 195 of the Civil Procedure Code, I am inclined to think that a claim in reconvention should be of such a nature that the respective claims of the plaintiff and the defendant may be mutually adjusted, and a final decree entered in favour of one party or the other. The claim in reconvention need not, of course, be based on, or connected with, the transaction or matter out of which the plaintiff's cause of action arises, but it seems to me that it should in its nature be capable of being set off against, or adjusted with, the plaintiff's claim. The case *Soysa v. Soysa* [1] may appear at first sight to be against this view. But there the plaintiff sued for arrears of rent and ejectment of the defendant on the footing of a tenancy, and the defendant denied the tenancy and set up title to a share of the land, and also reconvened for a certain sum of money as compensation for improvements. The plea of title was in reality a mere defence to the action, and the claim for compensation was of the same nature as the claim for rent, and it therefore seems to me that that was a case in which an adjustment and set-off were possible. This view is moreover confirmed by reference to the Roman-Dutch law, by virtue of which the right itself to claim in reconvention exists in Ceylon. Van Leeuwen in his Commentary [2] says: " The thing claimed in reconvention must be of the same right, kind, and quality as the matter claimed in convention, because they are, as it were, set off and extinguished by compensation against each other, which cannot take place in matters that are in any way dissimilar." In this case such a set-off or extinction is not possible. However this may be, I have no doubt that it is within the power of the Court to refuse to allow a claim in reconvention to be set up if it is such as likely to cause embarrassment or to prejudice and delay the trial of the action. It is argued that inasmuch as the Civil Procedure Code does not expressly confer such power the Court must entertain a

[1] *(1910) 5 Bal. 47.*

[2] *2 Kotze 409.*

claim in reconvention of whatever kind or nature. But, in my opinion, such express provision is not required; the Court has, I think, an inherent power in a matter like this. No doubt the English rules and the Indian Civil Procedure Code, upon which our Civil Procedure Code is in many respects based, do contain such an express provision in regard to a cross-claim made by a defendant, but that fact does not necessarily indicate, as suggested by counsel for the appellant, that the Legislature deliberately intended to deprive the Court of the power under special circumstances to exclude a claim in reconvention. In England and in India the whole right to set up a cross-claim is a creature of the statute, whereas in Ceylon the right, as above pointed out, existed under the Roman-Dutch law before the enactment of the Civil Procedure Code. This fact, I think, explains the reason why our Civil Procedure Code is merely concerned with the form of the pleading and of the final decree to be entered. Under the Roman-Dutch law the Court had a discretionary power to prevent a case being prejudiced or delayed by a claim in reconvention and to refer the defendant to an independent action. See *Ahamadde Lebbe v. Mutappa Chetty*,[1] *Dona Sophia v. Punchi Banda*.[2] This being so, is there any good reason to interfere with the District Judge's discretion in the present case? The claim in reconvention involves the dissolution of a partnership, the taking of accounts of a complicated kind, and the ejectment of the plaintiff from certain mining property of the partnership, and I have no doubt the District Judge is right in refusing to go into the defendant's claim in reconvention in this action, which as brought was merely concerned with the specific performance of an agreement to transfer a land. The modification of the decree in plaintiff's favour as agreed to by both parties is all that the defendant may reasonably ask.

Appeal dismissed.

[1] *Ram. 1860–62, 191.*

[2] *(1884) 6. S. C. C. 39.*