May 16, 1911

Present : Lascelles C.J. and Middleton J.

ALLAGASAMY *v.* THE KALUTARA CO., LIMITED, *et al.*

51—*D. C. Kalutara*, 4,391.

Res judicata—*Civil Procedure Code, ss. 34, 35, 207, and 406—Claim by kangany against employer for "pence money"—Withdrawal of action—Subsequent action for wrongful transfer of coolies from plaintiff's gang to another.*

Plaintiff, a kangany, sued the second defendant (the superintendent of an estate) in the Court of Requests for "pence money" due to him in respect of a gang of coolies. The defendant pleaded that the coolies had been transferred from plaintiff's gang to another gang, and that therefore no "pence money" was due to the plaintiff.

Ultimately a portion of his claim was admitted and paid, and it was recorded that the plaintiff was allowed to withdraw his action. The plaintiff then brought the present action against the first defendant company and the second defendant to recover a sum of Rs. 10,000 as damages for the wrongful transfer of the coolies.

Held, on a plea of *res judicata*, that the action was maintainable.

A great criterion of the identity of causes of action is that the same evidence will maintain both actions.

MIDDLETON J.—There is nothing to show that at the time of the institution of the Court of Requests case the plaintiff was aware that he could have claimed any other relief than that sought for in that case, and I think, therefore, that under section 207 of the Civil Procedure Code he is not now estopped from claiming the relief demanded in the present action.

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.

IN this case the plaintiff sued the two defendants to recover a sum of Rs. 11,201.33 as damages on three causes of action. The first cause of action was that, by reason of the defendants having wrongfully and unlawfully transferred forty coolies belonging to his gang as a kangany to another gang, the plaintiff had suffered damage to the extent of Rs. 10,000. The second cause of action was that owing to this conduct of the defendants the plaintiff is prevented from recovering the debts due from the coolies, and the defendants had thereby become liable to pay plaintiff the said Rs. 127.53. The third cause of action was to recover a sum of Rs. 1,074, which the plaintiff had paid defendants under protest.

As regards the first two causes of action, the defendants raised a plea of *res judicata* by reason of a judgment in a previous case (No. 5,767 of the Court of Requests, Kalutara) between the plaintiff and the second defendant. The learned District Judge (T. B. Russell, Esq.) upheld the plea of *res judicata* by the following order :—

The first issue must, I think, be decided in favour of the defendants as far as the plaintiff's first two causes of action are concerned. There is no doubt, though it was not stated in so many words in the plaint in 5,767, that the real cause of action in that case, as in this, was the alleged wrongful transfer of the coolies. This is shown by paragraph 5 of the answer, which gives the defendants' reason for the transfer, and the consequent failure to pay the " pence money " ; and this plea was accepted by the plaintiff's proctor himself, and made the basis of one of the issues suggested by him. Nothing seems to me clearer, and it was open to the plaintiff on this one cause of action to have combined the claim for " pence money " with the claim on the first two causes of action in this case. For all three claims arise out of the alleged wrongful transfer. Plaintiff's proctor urged that there was nothing to show that the claim on the second cause of action so arose, but he has not offered any other explanation, and the inference I draw from the words of the plaint is irresistible.

It seems to me beside the question to say that the Court of Requests had no jurisdiction to try the present case. There was nothing to prevent plaintiff taking his case to the higher court, and he cannot take advantage of his default now to over-ride the decision in the Court of Requests case.

It is also immaterial, in view of the provisions of the Procedure Code (sections 34 and 207), that the issues in 5,767 were not decided on their merits. It is sufficient that they were decided by the withdrawal of the case, and that no leave to re-institute was obtained from the Court.

As regards the statement that the two cases are not between the same parties, it is sufficient to point out that the second defendant was sued in the previous case in his capacity as superintendent of the first defendant's estate, and it is not even pretended that there is anything more than a merely technical difference in the defendants in the two cases. I accordingly decide the first issue as far as it affects the plaintiff's first and second causes of action in the defendant's favour.

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There remains the third cause of action. The parties are, however, agreed that, as this may involve the hearing of evidence, and as the plaintiff proposes to appeal against my decision, the consideration of this issue may be left over till the appeal has been decided. I agree also, if my decision is reversed, it will save time if all the issues of fact are heard at once instead of piecemeal, as would be the case if I proceeded on with the third cause of action now.

The plaintiff appealed.

A. St. V. Jayewardene, for the plaintiff, appellant, contended that the District Judge was wrong in upholding the defendants' plea of *res judicata*. Before such a plea could prevail, it must be proved that the causes of action and the parties in the two actions are identical. The present claim could not have been included in the former action, as the causes of action are entirely different. In the former case the cause of action was a breach of contract ; in the present case the cause of action is a tort. Section 34 only requires that every action shall include the whole of the claim arising from one and the same cause of action, and not that every action shall include every claim or every cause of action which the plaintiff may have against the defendant (*Pittaput Raja v. Suriya Rau*,[1] *Amanat v. Imdad*,[2] *Hanuman v. H.*[3]), even where several causes of action arise from the same transaction (*Brunsden v. Humphrey*[4]). If the defendants' answer in the former action raised the same issue as is now raised in this case, the plaintiff could not have claimed in reconvention, as his claim is beyond the jurisdiction of the Court of Requests. (*Ibrahim Baay v. Abdul Rahim.*[5])

The parties to the two actions are different. Sections 34 and 207, therefore, have no application. The withdrawal of the former action without permission to institute a fresh action, does not bar the present action. That section only precludes a subsequent action being instituted in respect of the "same matter". The subject-matter of the present action is different from the subject-matter of the previous action. (Vide *Mulla's Civil Procedure Code (Indian)*, *p.* 375, *2nd ed.*)

There was no adjudication on the rights of the parties, as the action was withdrawn on the case being amicably settled as admitted by the defendants.

Elliott (*Wadsworth* with him), for defendants, respondents, contended that the plea had been rightly upheld. The issue raised in the present action was raised by the plaintiff's proctor in the former action when the issues were settled. It would have been decided in that action had the plaintiff not withdrawn the same. By withdrawing the action without permission to institute a fresh one, the plaintiff is now precluded from maintaining the present action

[1] *I. L. R. 8 Mad. 520.*
[2] *I. L. R. 15 Cal. 500.*
[3] *I. L. R. 19 Cal. 125.*
[4] *L. R. 14 Q. B. D. 141.*
[5] *(1909) 12 N. L. R. 177.*

under section 406 of the Civil Procedure Code. The determination of an issue in a Court of Requests case is *res judicata* in regard to the same issue if subsequently raised in a District Court case (*Dingiri Menika v. Punchi Mahatmaya*[1]).

The causes of action are practically the same in both actions, the same issues arise in both. As regards the parties, the second defendant, although sued alone in the first action, was sued as the superintendent and agent of the first defendant company. The mere addition of the first defendant company—the principals—should make no difference.

Jayewardene, in reply.—There is no definition of cause of action in the Indian Code, while our Code defines it (section 5). The Indian decisions on that point do not apply.

There is no proof that at the date of the institution of the first action plaintiff was aware that his coolies had been wrongfully transferred to another gang.

Cur. adv. vult.

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In this case the plaintiff sued the defendants, the second defendant being the superintendent of the defendant company, claiming for a first cause of action Rs. 10,000 as damages, on the ground that the second defendant, acting for and on behalf of the defendant company had wrongfully and unlawfully transferred forty labourers from the plaintiff's gang to another gang; and claiming further, as a second cause of action, Rs. 127.53, representing the difference between the debts owing to the plaintiff by these forty labourers and the plaintiff's indebtedness to the defendants. No question arises on the appeal with regard to the third cause of action.

At the hearing the defendants contended, and the learned District Judge has held, that in view of sections 34 and 207 of the Civil Procedure Code the plaintiff is barred from bringing the present action by reason of the action brought by him against the second defendant alone in C. R. Kalutara, 5,767. In this latter action the plaintiff averred that during the months of March and April his gang of coolies worked on the defendant's estate, and that their wages were duly paid, but the "pence money" due to the plaintiff had not been paid. The plaintiff claimed the "pence money," amounting to Rs. 110.

The defence was that on March 14 forty coolies were transferred from the plaintiff's gang to another gang, and the plaintiff's proctor suggested issues raising the question whether the plaintiff was entitled to "pence money" for these forty coolies after March 14, and whether the coolies were transferred with the consent of the plaintiff. Ultimately a portion of the claim was admitted and paid, and the plaintiff was allowed to withdraw the claim.

[1] (*1910*) *13 N. L. R. 59.*

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The principal question is whether the cause of action within the meanings of sections 34 and 35 of the Civil Procedure Code is one and the same in both actions. It may be true that both actions arose out of the same transaction, namely, the withdrawal of certain coolies from the plaintiff's control, but it does not follow that the " causes of action " as defined in section 5 of the Code are identical.

In the Court of Requests the action was founded on an implied contract between the parties with regard to payment of " pence money " and upon the plaintiff's refusal to pay the money so due. The " cause of action," in the words of section 5, was " the refusal to fulfil an obligation." The present action is for damages on account of the defendants' wrongful action in removing forty coolies from the plaintiff's gang ; in the language of section 5 the " cause of action " is " the infliction of an affirmative injury." It is plain to me, apart from authority, that the causes of action are not identical.

It was said by De Grey C.J. in *Kitchen v. Campbell*[1] that in cases such as the present one a great criterion of the identity of causes of action is that the same evidence will maintain both actions. Applying this test to the present case, it is obvious that the evidence which would be sufficient to maintain the Court of Requests action would not support the present action ; and, conversely, the evidence required to prove the present action would not prove the claim in the Court of Requests. The reasoning of Bowen L.J. in *Brunsden v. Humphrey*,[2] where the similarity between the two actions was far closer than in the present case, appears to me to be applicable here. This was a decision on the ancient rule of the common law, on which sections 34 and 35 of our Code of Civil Procedure are founded, namely, that " where one is barred in any action, real or personal, by judgment, demurrer, confession, or verdict, he is barred as to that or the like action of the like nature for the same thing for ever." It was there held that damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action ; and, therefore, the recovery in an action of compensation for the damage to goods is no bar to an action subsequently commenced for injury to the person.

With regard to section 406, it is clear that there is nothing in that section to bar the present action. The subject-matter of the action in the Court of Requests is obviously not the same as the subject-matter in the present action.

In the view which I take of this case, it has been unnecessary to consider whether, if the plaintiff would have been precluded from bringing this action against the second defendant alone, he would still be able to maintain it against the second defendant jointly with the Kalutara Company. I would set aside the judgment of the District Judge and remit the action for trial in due course of law. The appellant is entitled to the costs of the appeal.

[1] *2 W. Bl. 827.*

[2] *L. R. 14 Q. B. D. 146.*

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The question to be decided in this case was whether the learned District Judge was right in holding that the withdrawal of No. 5,767, C. R. Kalutara, and the decree therein was *res judicata* of the first two causes of action in the plaint in the present action.

The District Judge held that the real cause of action in the Court of Requests case, as in the present one, was the alleged wrongful transfer of the coolies. This, I think, is not correct. The cause of action in the Court of Requests case was an alleged breach of implied contract in the non-payment of "pence money." The present cause of action is tort by the alleged wrongful and unlawful transfer of a number of coolies from the plaintiff's gang to that of another kangany.

When the Court of Requests case was instituted, the alleged tortious act of the defendant had not apparently been disclosed, and the defendants' answer in that case developed what is now said to be the tort for which the plaintiff is suing here.

There is nothing to show that at the time of the institution of the Court of Requests case the plaintiff was aware that he could have claimed any other relief than that sought for in the Court of Requests case, and I think, therefore, that under section 207 of the Civil Procedure Code he is not now estopped from claiming the relief demanded in the present action. In *Amanat Bibi v. Imdad Husani*,[1] Lord McNaghten said ..... "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 ....."

The plaintiff might very well have supposed that the defendants were only neglecting or refusing to pay the "pence money," while in reality defendants were doing an act which in its effect against the plaintiff may be deemed a tortious act. When this is disclosed by the defendants' answer, it would be, I think, most unreasonable to hold plaintiff was estopped from bringing his action for the new cause of action so developed. I think, therefore, plaintiff is not estopped by section 34 of the Civil Procedure Code.

It is argued, however, for the respondents, that the second issue suggested by plaintiff's proctor in the Court of Requests case is in fact the material issue in the present case, and that "the matter in issue, the test of *res judicata*, is the same." I think the answer to this is that the issues, though suggested, do not appear to have been agreed to or tried, and the case was settled and withdrawn on the footing of a payment of "pence money" due, without any finding on the question now desired to be raised.

I do not think that plaintiff is barred by section 406, as he had leave to withdraw his claim, the subject-matter of which was breach of contract, while in the present action the subject-matter is an alleged unlawful act.

[1] *I. L. R. 15 Cal. 808.*

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As regards the parties to the action, as there is, in my opinion, no *res judicata* on the grounds discussed, the question as to their identity does not arise.

As regards the decision in the cab case of *Brunsden v. Humphrey*,[1] I think that there was, if I may respectfully say so, a very great deal to be said in favour of the view taken by Lord Coleridge C.J. ; that there was only one cause of action, though in respect of different rights, and I am much inclined to think that if such a case arose in Ceylon, considering the definition of cause of action in section 5 of the Procedure Code, it would not be possible to say logically that the first action was not *res judicata* of the second. I would allow the appeal with costs.

Appeal allowed.