1950 *Present:* **Dias S.P.J. and Gunasekara J.**

ARULANANTHAM *et al.*, Applicants, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 84 Inty.—D. C. Jaffna, 4,842

Contract—Suretyship—Separate agreements in two documents—Joinder of parties and causes of action—Meaning of "cause of action"—Civil Procedure Code, ss. 5, 14.

Where, in a contract involving suretyship, the parties executed two separate documents to embody their agreements and the obligee sued the obligor and the sureties in the same action—

Held, that the plaintiffs action was not bad for misjoinder of parties and causes of action. The two documents were in reality one document and created one cause of action.

APPEAL from a judgment of the District Court, Jaffna.

N. E. Weerasooria, K.C., with *H. W. Tambiah*, for the defendant appellant.

M. Tiruchelvam, Crown Counsel, for the plaintiff respondent.

Cur adv. vult.

June 14, 1950. DIAS S.P.J.—

Solomon Arulanandam, being desirous that his son David should qualify as an Irrigation Officer, entered into two agreements marked "A" and "B" bearing the same date, May 8, 1944, with the Director of Irrigation acting as the agent for the Government of Ceylon.

The parties to the agreement marked " A " are Solomon, David and the Director of Irrigation. David agreed that he would well and faithfully pursue his training as an " irrigation learner " for a period of three years, and to qualify himself for service as an Irrigation Field Assistant. David further undertook that, after becoming qualified, he would place his services at the disposal of the Ceylon Government for a period of not less than three years. He also promised that during that period he would efficiently and diligently discharge his duties. On behalf of the Government, the Director of Irrigation undertook to train David and pay him a subsistence allowance at a specified rate. It was further agreed that the Director of Irrigation should have power to rescind this agreement if it became necessary to do so either in consequence of the negligence of or the failure of David to attend the classes of instruction, or to perform such duties on irrigation works as he may be called upon to do, or in consequence of idleness, insubordination, or misconduct. *Solomon and David on their part solemnly undertook to enter into a bond with two sureties in a sum of Rs. 2,000 to serve as security for the due performance and fulfilment by David of his undertaking in the agreement marked " A "*, and also for the payment of *all loss or damage* which the Government may suffer for the loss of Government property through the negligence or carelessness of David. or by the breach of any of the terms of the agreement. The agreement then contains the following clause: " In the event of the agreement being rescinded under this clause, and the training and employment of the said . . . . David being terminated, or in the event of the said . . . . David resigning during the period of his training, the said Solomon . . . . *and his sureties* shall be liable to pay to the Government all sums of money paid to the said . . . . David during his training, and all sums of money paid, expended, or incurred by the Government in respect of the training of the said . . . . David up to the date of termination thereof, and the value of any property lost or damaged through the neglect or carelessness of the said . . . . David ".

The complementary document marked " B " was entered into on the same day. The parties to this agreement are Solomon, the principal debtor, and 2nd and 3rd defendants as the sureties referred to in " A ". By this bond Solomon, and the 2nd and 3rd defendants, after reciting the terms and conditions of the agreement marked " A ", state that the object of the bond " B " is " for the purpose of securing and indemnifying the Government of Ceylon against all loss and damage which it might or, may in any way suffer *by reason of the said agreement marked " A " being rescinded*, or by reason of the loss or damage to property through the neglect or carelessness of the said . . . . David, or by reason of the said . . . . David resigning during the period of his training, or quitting without permission the service of the said Government in less than three years after he has been appointed a field assistant by resignation or otherwise, *and for the purpose also of securing the refunding of the total cost incurred by the said Director* . . . . on behalf of the said Government in respect of the training of the said . . . . David at the said classes and works, and in consideration of the payment and training so as aforesaid to be made and given to the said . . . . David at the

said classes and works, and as one of the conditions of the admission of the said . . . . David to the said classes ". The three defendants then solemnly state " that the said Solomon . . . . and the said . . . . (2nd and 3rd defendants) . . . . as his sureties shall execute the above written bond subject to the conditions hereinafter contained ; and whereas the said . . . . (2nd and 3rd defendants) . . . . have agreed to become sureties for the performance of the said covenants and agreements ; Now the condition of the aforewritten bond or obligation is, &c. ". Solomon makes himself liable to pay the full claim of the Government, and the sureties jointly and severally bind themselves to pay the Government a sum of Rs. 2,000. It is clear from the language used in the document " A " that the parties envisaged the execution of a bond with Solomon as principal debtor and two sureties who were to be bound up to a sum of Rs. 2,000 for the faithful performance by Solomon of the covenants in the agreement " A ". It is equally clear that the 2nd and 3rd defendants when they entered into the bond " B " were fully aware of the terms and conditions of the agreement " A ", and deliberately entered into the bond " B " in order to implement the agreement marked " A ". In my opinion, although the parties utilised two documents to embody their agreements, the two documents really form one composite agreement. One without the other is incomplete.

It is alleged that David, having been guilty of idleness, insubordination and misconduct, the Director of Irrigation rescinded the agreement " A " on March 18, 1947. It is stated that a sum of Rs. 4,086.97 had been expended by the Government on account of the boy. The Government therefore sued the three defendants claiming (*a*) the sum of Rs. 2,000 against all three defendants jointly and severally, and the sum of Rs. 2,086.97 against the 1st defendant alone.

At the trial, by agreement Issues 6 and 7 were taken up for decision first. They read as follows:—

6. Is the plaintiff's action bad for misjoinder of parties and causes of action ?

7. If so, is the plaintiff entitled to maintain this action ?

The District Judge held against the defendants in regard to both issues, and the question before us is whether he is right in so doing ?

The crucial question is whether the two documents " A " and " B " create one " cause of action " or more than one ? Section 14 of the Civil Procedure Code provides:

> " All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the *same cause of action* ".

Section 5 of the Civil Procedure Code thus defines the expression " Cause of action ":—

> " ' Cause of action ' is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty and the infliction of an affirmative injury "

The question then is whether the refusal or failure of the three defendants to fulfil their undertakings in the agreements marked " A " and " B " amount to a refusal to fulfill *one obligation or two?* Is it one " wrong " or two " wrongs "? If the former, Issues 6 and 7 must be answered in favour of the Government. If the latter, the joinder cannot be justified under section 14 of the Civil Procedure Code.

The case of *Aitken Spence & Co. v. The Ceylon Wharfage Co.*[1] is an authority in point, and has been cited with approval in at least two later cases. Although the question turned on the meaning of the words " the infliction of an affirmative injury ", the *ratio decidendi* is applicable to the present case. In that action, the plaintiff agreed with the Bibby Line of steamships (2nd defendant) to transport from Britain and to deliver to the plaintiff at Colombo 790 bundles of hoop iron bearing a certain mark. The Wharfage Company (1st defendant), as agent of the plaintiff, took delivery in the Colombo harbour of some hoop iron, but it was eventually discovered that 107 bundles were short. *The plaintiff being doubtful as to whether both defendants, or only one of them, and in the latter event, which of the two defendants was liable,* sued them jointly in one action and asked the Court to determine which of them was liable, and to give judgment accordingly. A plea of misjoinder having been raised, the District Judge upheld it. Moncreiff J. having pointed out that the expression " cause of action " had to be interpreted according to the meaning given to it by the Civil Procedure Code said:—" Then the question arises—the 107 bundles having disappeared when they were in the custody of either the Steamship Company or the Wharfage Company—does this joint and alternative suit rest in each case upon the same ' infliction of an affirmative injury? ' The ' affirmative injury ' is the same in each case—non-delivery of 107 bundles of hoop iron marked ' A S & Co.'. Is the ' infliction ', then, the same ? Granted that the Bibby Steamship Company from neglect, mistake, or wilful default made a short delivery, surely the ' infliction ' of the injury (non-delivery) is in each case the same? That, at least, is my opinion. The ' infliction ' was the short delivery made to the plaintiffs, and I think it is the same ' infliction ', whether it is caused by the Steamship Company delivering over the side of their vessel, or by the Wharfage Company which distributes the wrong goods to its customers ". Browne J. in a separate judgment agreed. In the Divisional Bench case of *London & Lancashire Fire Insurance Co. v. P. & O. Company* [2] Pereira J. said: " As regards the first (question raised) the position taken up by the plaintiff is this:—' Our cause of action is the ' infliction of an affirmative injury ' on us by either of the defendant companies by reason of its negligence. We cannot say which company inflicted the injury. It is for the Court to determine that matter. We claim in the alternative '. Clearly such a claim can be made under section 14 of the Civil Procedure Code ". Anyway, it is not necessary to labour the point, because the question involved has already been *authoritatively* decided by this Court in the case of *Aitken Spence & Co. v. The Ceylon Wharfage Company* [1]. In *Fernando v. Gomis* [3] Lyall Grant and Jayawardene JJ. held: " The

[1] *(1900) 4 N. L. R. 263.* [2] *(1914) 18 N. L. R. 15, at p. 21.*
[3] *(1926) 28 N. L. R. at p. 277.*

injury ' complained of was the result of the combined action of all the defendants. It seems to me clear that such a state of affairs implies the ' joint infliction of an affirmative injury ', and, accordingly, one ' cause of action ' . . . . Whatever the motives may have been the ' injury ' inflicted is one and the same. It is not the case of separate and unconnected acts, each of which gives rise to a claim in tort; but it is the case of one act done to the prejudice of the plaintiff by the defendants in combination. This is the principle underlying the decision in the case of *Aitken Spence & Co. v. The Ceylon Wharfage Company* [1] ". Finally, there is the case of *Croos v. Goonewardene Hamine* [2], the facts of which are instructive as they deal with the " refusal to fulfil an obligation ". C lent money to G and secured its repayment by a mortgage bond. G repaid part of that loan. C then lent G further sums of money, and by an oral understanding the two parties agreed that the mortgage bond was also to secure these further advances by C. G having defaulted, C filed action *on the bond*. On being advised that he could not maintain the action *on the bond*, C moved to withdraw the action. G objected to this. On the trial day C was absent, and his action *on the bond* was dismissed. C thereafter instituted another action against G alleging that he had lent money to G *on the oral agreement*. It was held that though the action in the first action was on the mortgage bond, and in the second it was for the alleged breach of an oral agreement, yet, both actions referred to the failure to pay one and the same debt, and that therefore the dismissal of the first action was a bar to the second. Wendt J. said: " I think that the word ' obligation ' in this definition is to be understood not in the narrower sense in which a parol promise to pay a promissory note and a mortgage, although given for the same debt may be described as three different ' obligations '; but in the more generally understood sense of a liability to pay that sum of money. Rading the definition in this case, the cause of action was the same in both cases, namely, the failure to pay one and the same debt ". *Croos v. Goonewardene Hamine* [2] was decided in the year 1902. It has not been dissented from in later cases. Although the cases of *Aitken Spence & Co. v. The Wharfage Co.*[1], which was decided in the year 1900, was not cited in *Croos v. Goonewardene Hamine* [2], the later cases which I have cited show that the principle underlying those cases are part of our law of civil procedure. Construing the word " obligation " as used in the definition of " cause of action " in section 5 of the Civil Procedure Code in the way Wendt J. did in *Croos v. Goonewardene Hamine* [2], I cannot hold that the agreement " A " and the bond marked " B " create two different " obligations ". I would go further and hold that the two documents are in reality but one document. On the breach of the conditions of that agreement there is but one obligation which arises, namely, the liability of the three defendants to indemnify the Government by the payment of the damages which accrued, i.e., to pay one and the same debt. I do not think the fact that while the 1st defendant is liable for all the damages, the 2nd and 3rd defendants are only liable to make good Rs. 2,000 of those damages makes any difference. Such questions, should they arise, will only assume practical form if the plaintiff wins the case and levies execution of the decree. The

[1] *(1900) 4 N. L. R. 263.*

[2] *(1902) 5 N. L. R. 259.*

three defendants would be jointly and severally liable to pay a sum of Rs. 2,000, while the 1st defendant alone will be liable to pay the balance. I hold that there is but one obligation in this case. Furthermore, on grounds of convenience and for the avoidance of a multiplicity of suits, it is expedient that these questions should be decided in one action and not in two. The law on the facts of the case allows this to be done.

It is therefore, unnecessary to consider the further submission made on behalf of the appellants that, assuming that the documents " A " and " B " create two distinct causes of action, their joinder would be justified under section 34 of the Civil Procedure Code.

The order of the District Judge is affirmed with costs. The case will now go back for the trial of the remaining issues.

GUNASEKARA J.—I agree.

Appeal dismissed.