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

1920.

APPUHAMY *v.* WALKER *et al.*

86–87—D. C. Kurunegala, 7,139.

Misjoinder of defendants—Cause of action—Action by plaintiff for a declaration that no road exists over his land—Assertion by defendants that a cart road existed over plaintiff's land.

Plaintiff sued the two defendants, who were neighbouring estate owners, alleging that they had unlawfully attempted to open a cart road through the centre of his land, and claimed a declaration that no road exists over the land. The defendants filed separate answers denying that they had unlawfully attempted to open the road, and both asserting a right in themselves and in the public to use the road. The first defendant also pleaded that he had been improperly joined with the second defendant in the action.

Held, that there was no misjoinder.

"The two defendants were both asserting before the action, in their pleadings and throughout the course of the trial, a right of way as members of the public to a cart road down the centre of the plaintiff's land. The plaintiff was therefore entitled as against both of them to the same declaration, namely, that there was no public right of cart road along the track contended for."

Lowe v. Fernando[1] explained.

THE facts are set out in the judgment.

A. St. V. Jayawardene, for appellant in 86 and respondent in 87.

F. de Zoysa, for appellant in 87 and second defendant-respondent in 86.

Keuneman, for first defendant-respondent in 86.

September 27, 1920. SHAW A.C.J.—

The plaintiff brought this action against the two defendants, who were neighbouring estate owners, alleging that they had unlawfully attempted to open a cart road through the centre of his land Ambagahagewela, and claimed a declaration that no road exists over the

[1] *(1913) 16 N. L. R. 398.*

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land. The defendants put in separate answers, both denying that they had unlawfully attempted to open the road, and both asserting a right in themselves and in the public to use the road.

The first defendant also pleaded that he had been improperly joined with the second defendant in the action. The District Judge has dismissed the action as against the first defendant with costs, on the ground that the cause of action against the two defendants are not the same. He has held upon the evidence that there was no permanent road in the position claimed by the defendants until quite recently, and that until two or three years ago carts found their way across plaintiff's field when it was not under paddy cultivation, and along the high land on the east when it was. He has, however, held that the second defendant, like the rest of the public, has a right of way for himself and his carts over the land, but not to any permanent way in the position claimed by the defendants. He has accordingly made a declaration that the second defendant is not entitled to a road as claimed, but has declared him entitled to a cart road along the eastern boundary of the land, to be constructed by him at his own expense, and has ordered the costs between the plaintiff and second defendant to be divided. Nothing is said in the decree about the costs as between these parties, and I understand the judgment to mean that each of these parties, as between themselves, shall bear their own costs. The plaintiff appeals against the order dismissing his action against the first plaintiff with costs, and against the order dividing the costs as between him and the second defendant. The second defendant also appeals against the order declaring him not entitled to a road along the line claimed by him.

In view of the findings of the Judge on the evidence there may be some doubt whether there should have been a decree for a permanent road even along the eastern boundary of the land, but the plaintiff has not appealed from that part of the order. The Judge was probably influenced to make this order by the expression of the plaintiff's willingness, made at the commencement of the trial, to allow a cart road in such a position.

With regard to the Judge's order as to misjoinder of defendants, I think the plaintiff's appeal should be allowed. On the face of the plaint there was certainly no misjoinder, as the plaintiff alleged that the road had been jointly made by the two defendants, the evidence, however, failed to connect the first defendant with the making of the road by the second defendant, and, therefore, did not show that he was acting in concert with the second defendant. The two defendants, however, were both asserting before the action, in their pleadings, and throughout the course of the trial a right of way as members of the public to a cart road down the centre of the plaintiff's land along the course of the road recently made up by the second defendant. The plaintiff was, therefore, entitled as against

both of them to the same declaration, namely, that there was no public right of cart road along the track contended for.

The two defendants are asserting the same right to the same road under the same title. The cause of action with regard to the declaration was, therefore, in my opinion, the same. The Full Court case of *Lowe v. Fernando*[1] was a case of a very different nature. In that case a number of defendants were claiming under different titles different portions of a land claimed to be the property of the plaintiff. It was held by the majority of the Court that, under these circumstances, the cause of action against the various defendants was not the same, and, therefore, there had been a misjoinder of defendants. The Court did not hold, and I think would not have held, that, had the defendants been claiming the whole of the land under the same title, there would have been any objection to making them defendants together. This view appears to have been borne out by expressions used in the judgments of the Judges constituting the majority of the Court. Wood Renton C.J. says at page 400: "Each group of defendants disputes the plaintiff's title only in regard to the lot of which it is itself in possession. His cause of action against each is denial of his title to that lot and to that lot alone. He has, therefore, a different cause of action as against each group." Pereira J. at page 402 says: "I think that the proper course will be to dismiss the plaintiff's claim, reserving to him the right to proceed against each defendant or each group of defendants claiming a separate portion of the land by a separate action."

These expressions seem to me to clearly show the opinion of the majority of the Court that if several people claim the same thing under the same title they can be jointly sued. This also was held to be the law in India under the provisions of the old Indian Civil Procedure Code in *Sudhendu Mohan Roy v. Durga Dasi*.[2] With regard to the second defendant's appeal, I see no reason to differ from the Judge's finding. There was abundant evidence on which he might properly hold, as he has, that no public cart way exists along the line contended for by the defendants.

With regard to the plaintiff's appeal as to the costs, I think he is entitled to them as against both defendants. The real dispute in the action was as to the existence of a public cart way through the centre of the plaintiff's land as claimed by the defendants. The plaintiff has got a declaration negativing this, and all the defendants have obtained is a declaration for a cart way in a position they never asked for, and which they were offered by the plaintiff at the commencement of the trial, and which they then refused and still say they do not want.

I would vary the judgment and decree appealed from, and declare that the defendants are not entitled to a road over the land in the position claimed by them and as depicted in the plan filed in the

[1] *(1913) 16 N. L. R. 398.*

[2] *I. L. R. 14 Cal. 435.*

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case, and further declare that they are entitled to a cart road along the eastern boundary of the land, and that they should be at liberty to construct such road at their own expense.

The plaintiff is, in my opinion, entitled to costs against both defendants of both the action and the two appeals.

DE SAMPAYO J.—I agree.

Varied.