

1909.  
December 2.

*Present* : The Hon. Sir Joseph T. Hutchinson, Chief Justice,  
and Mr. Justice Middleton.

APPUHAMY *et al.* v. DIONIS *et al.*

*D. C., Kurunegala, 3,422.*

*Action by lessee against trespasser for ejectment and damages—Alternative prayer against the lessor for damages—Civil Procedure Code, ss. 55 and 46.*

In an action in a District Court by a lessee of land for recovery of possession and damages against a person who has ejected him from the land, the Judge has power, even after the filing of the plaint, to grant special leave to join an alternative claim against the lessor for damages and for the refund of purchase money.

HUTCHINSON C.J.—It seems convenient that the lessee should be allowed to join in the same action a claim against the lessor for damages in case he does not defend the title.

**A** PPEAL from a judgment of the District Judge of Kurunegala (C. S. Vaughan, Esq.).

The plaintiffs, who were third defendant's lessees, were ejected by the first and second defendants from the leased premises. Thereupon the plaintiffs instituted this action, and prayed—

“(1) That the first and second defendants be ejected from the said land, and the plaintiffs be restored to possession.

“(2) For damages against the defendants, jointly and severally, 1909.  
at the rate of Rs. 75 per mensem from May 21, 1908, December 2.  
until the plaintiffs are restored to possession; or in the  
alternative—

“(a) That the said lease be cancelled.

“(b) That the Court do order the third defendant to refund the said sum of Rs. 500 to the plaintiffs above named.”

On the date fixed for trial the third defendant raised the following issues of law :—

- (1) Does the plaint disclose a cause of action against the third defendant, in view of the fact that plaintiffs admit that possession of the land was given to them ?
- (2) Can plaintiffs maintain this action, in view of the fact that no leave of Court was given to make an alternative claim, in addition to the prayer for possession, as required by section 35, Civil Procedure Code ?

The District Judge held (1) that plaintiffs were entitled to join third defendant as a party ; (2) that leave should have been obtained before institution of action to join the alternative prayer against him ; that the Court had no power to give such leave at that stage ; he ordered that the claim for damages and the alternative prayer against the third defendant be deleted.

The plaintiffs appealed.

*Bawa* (with him *Wadsworth*), for the plaintiffs, appellants.—The lessor has been made a party defendant for the purpose of enabling him to warrant and defend his title. If the alternative claim against him for damages be not joined, it may be *res judicata*. [HUTCHINSON C.J.—Can you join such a cause of action without leave ?] When the Court accepted the plaint, it had granted the leave ; the acceptance is tantamount to the granting of the leave ; otherwise the Court must have rejected the plaint. [HUTCHINSON C.J.—If the acceptance of the plaint is tantamount to the granting of leave, why should section 35, Civil Procedure Code, enact that “no other claim shall be made unless with the leave of the Court” ?]

*Sampayo, K.C.* (with him *B. F. de Silva*), for the respondent.—[HUTCHINSON C.J.—Why should not the Judge give leave in this case ?] Leave should have been obtained at the time of filing the plaint. It has been held in England that leave should be obtained before summons (*In re Pitcher*, 11 Ch. Div. 905). Counsel also referred to *Lloyd v. Great Western Dairies Co.*<sup>1</sup>

<sup>1</sup>(1907) 2 K. B. 727.

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Where the plaintiff, a purchaser of land, sues a man who has ejected him, from the land to recover possession and damages from him; and joins as defendant his vendor in order that the vendor may defend his title, it seems convenient that he should be allowed to join in the same action a claim against the vendor for damages in case he does not defend the title. The plaintiffs in this case had not obtained special leave to join the claim for damages against their lessor with the claim to recover possession. When this objection was brought to the notice of the Judge, I see no reason to doubt that he had power to give the leave then, and that it would have been right for him to give it. The case of *Fernando v. Wans*<sup>1</sup> is one which I think we ought to follow. I think, therefore, that the order of the District Court must be set aside, and that leave be given to the plaintiffs to join the claim against the third defendant as they have done in the plaint. We think the appellants should have their costs of the appeal.

MIDDLETON J.—

I agree. According to the provisions of section 35 and the example thereto, the Judge, no doubt, was strictly right, but the provisions of our Code to be found in section 46 show that the presentment of a plaint is subject to the approval of the Judge, and his reception of the plaint in this case was a tacit waiver of the terms of section 35. It seems to me, therefore, that it was a case in which the Judge might well have exercised his discretion, and have made the order requisite under section 35 at a later period in the action. I think, therefore, that we, on the grounds given by my Lord of convenience and for the avoidance of the multiplicity of actions, should now make the order which the Judge declined to make.

*Appeal allowed.*

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<sup>1</sup> (1891) 9 S. C. C. 189.