

1942

Present : Jayetileke J.

COORAY v. JAYAWARDENE.

83—C. R. Kalutara, 14,604.

*Res judicata—New claim on pending cause of action—Replication by plaintiff—
No right to include new cause of action—Civil Procedure Code, s. 79.*

Failure of plaintiff to include a claim upon a cause of action which arose after the institution of an action, although upon the same subject matter, is no bar to the institution of a subsequent action upon such claim.

New matter amounting to a new cause of action cannot be set out in a replication filed under section 79 of the Civil Procedure Code.

A PPEAL from a judgment of the Commissioner of Requests, Kalutara.

C. V. Ranawake (with him M. J. Molligode), for plaintiff, appellant.

E. B. Wickremanayake, for defendant, respondent.

Cur. adv. vult.

July 21, 1942. JAYETILEKE J.—

This appeal raises a very short point. It is whether the plaintiff's claim is *res judicata* by reason of the decree in action No. 22,061 of the District Court of Kalutara. That action was instituted by the plaintiff against the defendant on August 14, 1940, for a declaration of title to a land called Kosgahawatte, for ejectment and for the recovery of Rs. 50 as damages up to the date of action and further damages at Rs. 5 a month till she was restored to possession. Her cause of action was that the defendant has unlawfully got himself registered as the proprietor of the land under the Rubber Control Ordinance (Cap. 300) for the purpose of obtaining coupons and was disputing her title to the land.

The defendant denied that the plaintiff was entitled to the land and set up a claim in reconvention against the plaintiff for a sum of Rs. 50 as damages, alleging that the plaintiff had been in unlawful possession of the land from October 30, 1939, up to August 30, 1940.

The plaintiff filed a replication in which she stated that on August 30, 1940, the defendant forcibly ousted her from the land and took possession of it. She reserved her right to claim damages in respect of the ouster.

After the trial the District Judge entered judgment in plaintiff's favour as prayed for in her plaint with damages at Rs. 5 a month from October, 1939. After the termination of that action the plaintiff instituted the present action against the defendant for the recovery of a sum of Rs. 240 as damages in respect of the ouster referred to in her replication.

The cause of action pleaded in her plaint was that on August 30, 1940, the defendant took wrongful possession of the land, tapped the rubber trees standing thereon till March 1, 1941, and appropriated the rubber to himself. The defendant pleaded that the decree in the previous action was *res judicata*.

The Commissioner upheld the defendant's plea and dismissed the plaintiff's action with costs. He was of opinion that the plaintiff should have put forward her claim in the replication or obtained the leave of Court to reserve her claim. Neither of these grounds can be supported in law and, in my opinion, the Commissioner arrived at a wrong decision on the issue which he tried. The plaintiff could not have put forward her claim in the replication as new matter amounting to a new cause of action cannot be set out in a replication filed under section 79 of the Civil Procedure Code. Nor could she have applied to Court for permission to reserve her claim as there is no provision in the Civil Procedure Code which would have warranted such a step being taken in the circumstances of that case.

The Commissioner, perhaps, had in mind section 406 of the Civil Procedure Code but it is clear that it was inapplicable to that action. I have carefully considered the arguments that were addressed to me by Counsel and have come to the conclusion that the plea of *res judicata* fails.

Counsel for the respondent sought to support the judgment on section 34 of the Civil Procedure Code, which provides that a plaintiff should include the whole of his claim in his action and ask for the whole of his remedies. He contended that the cause of action in the first action was a dispute to the title and that the damages claimed in the present action flowed from that dispute and should have been included in that action.

The short answer to this contention is, as I have already pointed out, that the pleadings in the two cases do not support it. On the contrary, the pleadings show that the matters in issue in the two actions were substantially different. It has been held by the Privy Council in *Palaniappa v. Saminathan*¹ that section 34 of the Civil Procedure Code is directed to securing the exhaustion of a relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise in the same transactions.

The cause of action upon which the present action was founded was not in existence at the time of the institution of the first action and could not have been the subject of litigation in that action. I do not think that an issue as to damages, consequent on an ouster which took place after the institution of the first action; could have been entertained by the Court in that action. The Court could only have decided the rights of the parties as at the date of action.

On the above grounds, I am of opinion that the judgment of the Commissioner should be reversed. I would set aside the judgment appealed from and remit the case to the Court below for trial in due course. The plaintiff will be entitled to the costs of the last date of trial and of this appeal.

Appeal allowed.