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[FULL BENCH.]

Present: Wood Renton A.C.J., Pereira J., and De Sampayo A.J.

LOWE *v.* FERNANDO *et al.*

106—D. C. Chilaw, 4,808.

Misjoinder of parties and causes of action—Action for declaration of title—Defendants severally in possession of separate blocks—Civil Procedure Code, ss. 14 and 5.

Held, per WOOD RENTON A.C.J. and PEREIRA J. (DE SAMPAYO A.J. *dissentiente*)—That where a plaintiff claimed the entirety of a block of land on one title and complained that the defendants were severally in possession of separate and defined portions of it, it would be misjoinder of defendants and causes of action to institute one action against all the defendants for the recovery of the whole block, unless it could be shown that the defendants were acting in concert in depriving the plaintiff of the possession of the entire block.

Per PEREIRA J.—The words "denial of a right" as used in the interpretation of "cause of action" in section 5 of the Civil Procedure Code do not mean the mere verbal denial of a right, but a withholding of, or refusal to allow the exercise of, a right.

THE facts are set out in the judgment of Wood Renton A.C.J.

J. Grenier, K.C. (with him *V. Grenier*), for the defendants, appellants.—There is a misjoinder of defendants and causes of action. The several defendants have not been acting in concert. They are

in possession of different portions of the land. Section 14 of the Civil Procedure Code only permits the joinder of 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. Here the cause of action is not the same. The cause of action against one set of defendants is that they are unlawfully in possession of one lot, and of another set of defendants is that they are in possession of another lot. The decisions under the Indian Code do not apply to Ceylon on this point, as the words of the Indian section are different from the words of our section. The words of the Indian section are " same cause or matter."

The words of the Indian Code are wider. But even in India it was held in *Sudhenda Mohun v. Durga* [1] and *Ram Narain v. Annoda Prosad Joshi* [2] that a joinder of defendants and causes of action in a case like the present is irregular.

Counsel also cited *Sado v. Nona Baba*,[3] *Aiyampillai v. Vairavanath Kurrukel*,[4] *Parbati Kunwar v. Mahmudfatima*,[5] *Smuthwaite v. Hannay*.[6]

A. St. V. Jayewardene (with him *Sansoni*), for plaintiffs, respondents.—*Jayamaha v. Singappu* [7] is a direct authority in point. Indian cases are in conflict. The Indian cases discuss the question whether there is the same cause of action in a case like this. In the later Indian cases it has been held that there is no misjoinder in a case like this. See *Ishan Chunder Hazra v. Rameswar Mondul*, [8] *Nundo Kumar Nasker v. Banomali Gayan*.[9]

[Wood Renton A.C.J.—If two persons are encroaching on two different sides of an estate, can you sue both in one action?] Yes. Plaintiff cannot know that they are not acting in concert. [Pereira J.—Plaintiff does not say that the defendants acted in concert.]

Grenier, K.C., in reply.

Cur. adv. vult.

October 22, 1913. Wood Renton A.C.J.—

The plaintiffs in this action claim a declaration of title to, and the ejectment of the defendants from, four lots of land marked A, B, D, and F in the sketch filed with the plaint. They allege that the first, second, third, fourth, and fifth defendants are in possession of A, the sixth defendant of B, the seventh and eighth of F, and the ninth and tenth of D. These allotments form a single land, and the plaintiffs claim title to each of them through the same source. But the lots are distinct, and each group of defendants sets up title

[1] (1887) 14 Cal. 435.
[2] (1887) 14 Cal. 681.
[3] (1907) 11 N. L. R. 162.
[4] (1913) 16 N. L. R. 231.
[5] (1907) 29 All. 267.
[6] (1894) A. C. 501.
[7] (1910) 13 N. L. R. 348.
[8] (1897) 24 Cal. 831.
[9] (1902) 29 Cal. 871.

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only to the particular lot of which they or he are in possession. There is no suggestion that the defendants are acting in concert. In these circumstances the question has arisen whether the plaintiffs can sue them all in a single action. There is admittedly the objection to the defendants alleged to be in possession of each of the separate lots being sued in respect of such lots. The point is whether the plaintiffs are entitled to say that as these lots, although divided, constitute only one land, they have one cause of action only against the collective body of persons in possession of different portions of the land. Section 14 of the Civil Procedure Code provides that " 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." Is then the cause of action here one and the same? In my opinion it is not. The lots are divided. Each group of defendants disputes the plaintiffs' title only in regard to the lot of which it is itself in possession. His cause of action against each is its denial of his title to that lot and to that lot alone. He has, therefore, a different cause of action as against each group. If we uphold the view taken by the learned District Judge in this case, I see no reason why a plaintiff, who has inherited from his father a number of distinct lands within the same province, should not sue, in one and the same action, any number of different persons in possession of them, merely by reason of the fact that they descend to him from one ancestor. The Indian authorities on the point are divided. The cases of *Sudhenda Mohun v. Durga* [1] and *Ram Narain v. Annoda Prosad Joshi* [2] support the view which I have here taken of the meaning of section 14 of the Civil Procedure Code. They are decisions on the corresponding provision in the old Indian Code of Civil Procedure. *Ishan Chunder Hazra v. Rameswar Mondul*[3] and *Nundo Kumar Nasker v. Banomali Gayan*[4] are decisions on the other side, although I agree with the observation that fell from my brother Pereira during the argument of the appeal that the idea of concert runs through most of the Indian authorities in that sense. The decision of Sir Joseph Hutchinson C.J. and van Langenberg A.J. in *Jayamaha v. Singappu* [5] is not, I think, on all fours. The defendants there claimed title under the same *sannas*, and although they had acquired title at different dates, it would appear from the judgment that they were acting in concert in denying the plaintiffs' title as a whole. The cases of *Appuhamy v. Marthelis Rosa*,[6] *Sado v. Nona Baba*,[7] and *Aiyampillai v. Vairavanath Kurrukel*,[8] in which English authorities to the same effect are cited, show what has been the view hitherto taken in Ceylon as to the

[1] *(1887) 14 Cal. 435.*
[2] *(1887) 14 Cal. 689.*
[3] *(1897) 24 Cal. 831.*
[4] *(1902) 29 Cal. 871.*
[5] *(1910) 13 N. L. R. 348.*
[6] *(1906) 9 N. L. R. 68.*
[7] *(1907) 11 N. L. R. 162.*
[8] *(1913) 16 N. L. R. 231.*

meaning of " cause of action " in section 14 of the Civil Procedure Code. I prefer the reasoning in the older to that of the later Indian decisions above referred to.

I agree to the order proposed by my brother Pereira.

PEREIRA J.—

In this case the question is whether there is not a misjoinder of causes of action and of the defendants. The plaintiff traces title to the entirety of the block of land shown on sketch Z, and complains that the defendants are severally in possession of separate and defined portions of it. He states in paragraph 18 of the plaint that the first, second, third, fourth, and fifth defendants are in possession of the portion marked A, the sixth defendant of the portion marked B, the seventh and eighth defendants of the portion marked F, and the ninth and tenth defendants of the portion marked D. From what follows in the plaint and the discussion that took place on July 30, 1913, it is clear that the plaintiff's case is that the different defendants or sets of defendants are in possession, independently of one another, of different portions of the land. That being so, is the action maintainable in its present form? The section of the Civil Procedure Code under which it is sought to justify the present form of action is section 14, which enacts that 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. That section substantially enacts the provision of Order 16, Rule 4, and Order 18, Rule 1, of the Rules of the Supreme Court of Judicature in England. The former allows the joinder of several persons as defendants against whom different forms of relief are sought, and the latter authorizes the joinder in one action of several causes of action; and in *Berstal v. Beyfus* [1] it was held that where the cause of action against one defendant is totally disconnected with that against the other defendants, except so far as it arises out of an incident in the same transaction, there is misjoinder, and it is not the case contemplated by Order 18, Rule 1. In the course of his judgment Lord Selborne L.C. observed: " To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected in the way I have suggested), is not contemplated by Order 18, Rule 1, which authorizes the joinder, not of several actions against distinct persons, but of several causes of action." There are two decisions of the Indian Courts (see *Sudhenda Mohan v. Durga* [2] and *Ram Narain v. Annoda Prosad* [3]) that entirely support the view that I take in the present case, but there are others that apparently favour the

[1] *(1884) 26 Ch. D. 35.*

[2] *(1887) 14 Cal. 435.*

[3] *(1887) 14 Cal. 681.*

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contrary view. But in the application of decisions of the Indian Courts it must be remembered that there is no definition in the Indian Code of Civil Procedure of the expression " cause of action," and it is left to the Courts to evolve a suitable definition as the term presents itself for interpretation in individual cases. Our Code defines " cause of action " as " the wrong for the prevention or redress of which an action may be brought," including, *inter alia*, the denial of a right. I might at once explain that in my view the expression " denial of a right " as used here does not mean the mere verbal denial of a right. The word " denial " here is used in the secondary sense of a " withholding " or " refusal to grant," as the word " deny " is used in the phrase " to deny bread to the hungry." I say this because it has been argued that the mere fact that each defendant, by way of a step in the defence, denies the plaintiff's title to the entirety of the block of land shown on sketch Z gave the plaintiff a common cause of action against all the defendants. I think that this contention is altogether untenable. When each of two persons has ousted the plaintiff from a separate and distinct portion of one block of land and holds possession of such portion, the cause of action against each is the wrong done by him, and that is his unlawful ouster of the plaintiff from the particular portion of land claimed by him and the denial by him to the plaintiff of enjoyment of that portion. The two persons cannot be sued together, unless, of course, it can be shown that they were acting in concert or conspiracy with each other in taking possession of the plaintiff's land.

I do not think that the present action can be maintained by the plaintiff in its present form. As there is not only a misjoinder of parties, but a misjoinder of causes of action, 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 and distinct portion of the land by a separate action. I would set aside the order appealed from and make order as stated above. The appellant is, I think, entitled to his costs in both Courts.

DE SAMPAYO A.J.—

In this action the plaintiffs alleged title by right of purchase to a certain specific land and sued the defendants, who are ten in number, for a declaration of title and for possession and damages. To the plaint was annexed a sketch of the land, and it was stated that the father of the first, second, third, and fourth defendants was planter of the portion marked A, the sixth defendant of the portion marked B, the father of the tenth defendant and grandfather of the ninth defendant of the portion marked D, and the father of the seventh and eighth defendants of the portion marked F. The plaintiffs then proceeded to state their grievance as follows :—"The defendants

above named, of whom the first, second, third, and fourth defendants are in possession of the portion marked A, the sixth defendant of the portion marked B, the seventh and eighth defendants of the portion marked F, and the ninth and tenth defendants of the portion marked D, dispute the title of the plaintiffs to the landowner's share of the said portions, to wit, the entirety of the soil and a half share of the trees thereon, and are since January 17, 1912, in the wrongful possession thereof, to the plaintiffs' loss and damage of the sum of Rs. 750." Each set of defendants filed a separate answer denying the plaintiffs' title. The first, second, third, and fourth defendants further claimed the planter's half share of the plantation on lot A, and pleaded that the sixth defendant was entitled to the landowner's half share. The sixth defendant claimed the entire soil and the landowner's half share of the plantation on lots A and F and certain other lots, with which we are not concerned, and he further pleaded the title of the ninth defendant to the landowner's interest in lot D; the seventh and eighth defendants claimed the planter's share in lot F, and pleaded the title of the sixth defendant to the landowner's interest therein; the ninth defendant claimed the planter's as well as the landowner's interest in lot D, and the tenth defendant, in addition to denying the plaintiffs' title, disclaimed all right in himself, and pleaded that the ninth defendant was entitled to the lot D.

At the trial certain issues relating to the question of plaintiffs' title and common to all the defendants were stated, as well as other issues special to the defences and claims set up by the several sets of defendants. One of the issues was whether there was a misjoinder of defendants and of causes of action. The District Judge dealt with this preliminary issue and decided it in favour of the plaintiffs. The present appeal is from that decision.

The contention of the appellants is that the plaintiffs had a separate and a distinct cause of action in respect of each portion of the land, and that the joinder of the several defendants in one action was bad. The provision of the law on this subject is contained in section 14 of the Civil Procedure Code, which enacts: " 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. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." The question accordingly is, whether the defendants are joined in this action " in respect of the same cause of action " within the scope of that section of the Code. I venture to think that the plaint discloses but one cause of action, and that the defendants are properly joined in one action.

In the first place, it should be borne in mind that this is an action for ejectment, or what under our law should more properly be

termed *rei vindicatio*, in respect of a land which plaintiffs claim as one whole. The plaintiffs seek to establish their title to the land, of which, as a result of the joint or several acts of the defendants, they have been completely kept out of possession, and to recover damages from the defendants for their unlawful possession of it. It is, therefore, what in the old classification would have been called a mixed action, that is to say, one partaking of the nature of a real and a personal action. It is not a mere personal action founded on tort, such as an action for damages for trespass would be.

In the next place, the expression " cause of action " generally imports two things, viz., a right in the plaintiff and a violation of it by the defendant, and " cause of action means the whole cause of action, *i.e.*, all the facts which together constitute the plaintiff's right to maintain the action " (Dicey's *Parties to an Action, ch. XI., section A*), or, as it has been otherwise put, "the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour " (Lord Watson's judgment in *Chand Kour v. Partab Singh* [1]). See also *Dingiri Menika v. Punchi Mahatmaya*,[2] where Wood Renton J. said that, " for the purpose of determining whether or not two causes of action are the same, we have to look not to the mere form, but to the grounds of the plaint and to the *media* on which the plaintiff asks for judgment." This is the sense in which the term is understood both in the English and Indian law, and I cannot think that our Civil Procedure Code, which in regard to the frame of an action is founded on the Indian Code of Civil Procedure and ultimately on the English rules under the Judicature Acts, meant to make a radical alteration of its meaning. In *Samichi v. Pieris*,[3] which is a Full Court decision on the subject of *res judicata*, the expression " cause of action " occurring in section 207 of the Civil Procedure Code was by the majority of the Court given its primary meaning, so as to include " the right in virtue of which the claim is made." It is true that in section 5 of the Civil Procedure Code " cause of action " is defined as " the wrong for the redress of which an action may be brought," and it may be that this definition directs attention more to the violation of the right than to the right violated, but in my opinion it is not meant to exclude the latter. " The wrong " is the combination of the right and its violation, and so the cause of action is " the wrong " in the broad sense referred to. Moreover, the definition is not absolute, but is to be good " unless there is something in the subject or context repugnant thereto." To my mind the narrow meaning contended for on behalf of the defendants cannot without repugnancy be applied to section 14, which is under consideration. For instance, the right to any relief against several defendants cannot exist in the alternative " in respect of the same cause of action " if the

[1] *(1888) 16 Cal. 98.*

[2] *(1910) 13 N. L. R. 63.*

[3] *(1913) 16 N. L. R. 257.*

narrow meaning is assigned to the expression. In this connection I may refer to the class of cases in which a purchaser of land is allowed to join in one action a claim founded on tort against a trespasser, and also a claim founded on the contract of sale against the vendor, *e.g.*, *Fernando v. Waas* [1] and *Paules Appuhamy v. The Attorney-General.*[2] In the case of *Child v. Stenning*,[3] in which the corresponding provision in the English rules was considered, Mellish L.J. observed: " If we were to say that two persons could not be joined as defendants, unless the causes of action against them were exactly the same, the object of the Legislature would be defeated." In a note in the Annual Practice, under Rules 4 and 5 of Order 16, reference is made to the Irish case of *O'Keefs v. Walsh*,[4] in which it appears to have been stated that " cause of action " there meant the subject-matter founding the action, and not merely the technical cause of action. Similarly, even if the definition in section 5 of our Code is confined to the technical cause of action, viz., the mere act of wrong complained of, which I have above ventured to say it is not, I think that as used in the particular section under consideration the expression must be regarded as including the subject-matter founding the action.

The English cases referred to at the argument, such as *Smurthwaite v. Hannay*[5] and *Sadler v. G. W. R. Co.*,[6] and the local decisions which follow them, do not afford much guidance. They are all cases in which claims for money in respect of torts or contracts were made against several defendants, and I see a clear distinction between such cases and an action for recovery of land. I have not been able to discover any case under the English rules which involves a claim for possession of land; but as illustrating the general principle under the English law, I may refer to *Commissioners of Sewers v. Glasse*,[7] in which it was held that a suit by claimants to rights of common within a forest against the lords of several manors, who had made separate inclosures of the waste land, and some of whom had dug up and destroyed the pasture on the wastes remaining uninclosed within their respective manors, was not bad for multifariousness. This, no doubt, was a Bill in Chancery before the Judicature Acts, but it is well known that the rules under the Judicature Acts with regard to joinder of parties and causes of action were intended to extend, and not to restrict, the old practice, so that multiplicity actions might be avoided. On the other hand, the cases decided in the Courts of India under the corresponding section of the Indian Code of Civil Procedure justify the form of action adopted in this case. *Ishan Chunder Hazra v. Rameswar Mondol*,[8] *Nundo Kumar Nasker v. Banomali Gayan*,[9] *Parbati Kunwar v.*

[1] *(1891) 9 S. C. C. 189.*
[2] *(1907) 3 Bal. 286.*
[3] *(1877) 5 C. D. 695.*
[4] *(1903) 2 I. R. 718.*
[5] *(1894) A. C. 501.*
[6] *(1895) 2 Q. B. 688.*
[7] *(1872) 41 L. J. Ch. 409.*
[8] *(1897) 24 Cal. 831.*
[9] *(1902) 29 Cal. 771.*

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Mahmudfatima.[1] The following passage in the second of these cases will be useful as illustrating what I have said as to the English practice: "In England, as was pointed out in *Ishan Chunder Hazra v. Rameswar Mondol*,[2] in an action in ejectment 'all the parties in possession are joined,' and this includes the lessor as well as the tenants, if the lessor happens to be in possession of part of the land in suit (see *Dicey on the Parties to an Action, p. 495, n. (e)*). The old action of ejectment has, it is true, been superseded in England by the modern action for the recovery of land, but the rule as to the persons who should be made defendant to the action has not been changed, save in so far that it is no longer compulsory on the plaintiff to make all persons in actual possession defendants—a relaxation of the old rule which is in favour of the plaintiff—though it is considered to be the more convenient and proper course that all such persons should be made defendants." As against these authorities counsel for the appellants relied on *Sudhandu Mohun Roy v. Durga Dasi*,[3] but that case, though cited, was not followed in the later cases above referred to, and cannot I think be any longer regarded as an authority on the point at issue. It was said that in all these cases there was the underlying fact of a combination among all the defendants to keep plaintiff out, but when the cases are examined it will be found that such a circumstance did not determine the *ratio decidendi*. On the contrary, in the case of *Ishan Chunder Hazra v. Rameswar Mondol*, *supra*, the necessity for a combination was expressly urged by counsel, but the Court took no notice of the argument. The general principle deducible from these cases is that in an action such as this the plaintiff may join in one action all the persons in possession of the property he claims, whether they are in possession of specific portions of it separately or the whole of it jointly. It is true that the plaintiffs in their plaint in this case stated that some defendants were in possession of one portion and others of another portion, and so forth, but that does not, in my opinion, alter the true nature of their action. The statement of these details was in consonance with the rules of modern pleading, which require the plaint to contain a plain statement of all the circumstances constituting the cause of action, and was likewise convenient in order to bring out the fact that the subject of the claim was the landowner's interest in the land, and that the plaintiffs had no complaint as to the defendants' possession of the planter's share in the land. Moreover, if the element of concert or combination is absolutely necessary to entitle the plaintiffs to join all the defendants, it will, I think, be found in the fact that they set up the title of the sixth and ninth defendants as against the plaintiffs. It was said at the argument that the expression "denial of a right" occurring in the definition in section 5

[1] *(1907) 29 All. 267.*

[2] *(1897) 24 Cal. 381.*

[3] *(1887) I. L. R. 14 Cal. 435.*

of the Code did not mean a mere verbal denial. That no doubt is so, but in this case each set of defendants has done an act in pursuance of the denial, that is to say, his possession of a portion of the land of which the landlord's interest is denied to the plaintiffs and is assigned by each of them to one or other of their own number, and, as a consequence, the plaintiff is kept altogether out of the land.

Lastly, this case is covered by the authority of *Jayamaha v. Singappu*,[1] where the Court accepted and acted on the view that "the plaintiff's cause of action against all the defendants is one, viz., to recover the land, that the defendants may set up what defences they please, but that the plaintiff is entitled to recover possession of his land as a whole and not in fragments." It was sought to distinguish that case by reference to the fact that the claims of the defendants to the separate portions were referable to one *sannas*, and thus the element of combination was present. I do not see how the nature of the defendants' title can be said to have converted into one cause of action what according to the argument would have constituted distinct and separate causes of action, but it is sufficient to remark that the fact of the defendants claiming through the same source of title had nothing to do with the decision. As the present case is being considered by a Full Bench, it is, of course, competent for us to over-rule that decision, but as I agree with it I follow it. Some difficulty was also suggested to the effect that the decree would have to give separate damages against each set of defendants. But I do not see why a decree may not be in that form. The English rules provide for such a case, and I think our section 17 has the same purpose in view.

In my opinion the plaintiffs' action is rightly constituted, and I would dismiss this appeal with costs.

Appeal allowed.

[1] *(1910) 13 N. L. R. 348.*