

1943 Present : Moseley S.P.J. and Keuneman J.

DE SILVA, Appellant, and ALAHAKOON *et al.*, Respondents.

296—D. C. Kandy, 993.

*Joinder of parties and causes of action—Damages for wrongful arrest—  
Defendants acting in concert—Notice of action—Civil Procedure Code,  
s. 461.*

Where in an action to recover damages against three persons for wrongful arrest and detention the plaintiff alleged one act performed by all of them and the implication was that they were acting in concert.

*Held*, that there was no misjoinder of parties or causes of action.

A notice of action under section 461 of the Civil Procedure Code addressed to a Receiving Post Office at which the addressees have to call for their letters on receipt of a notice is not regular.

**A**PPEAL from a judgment of the District Judge of Kandy.

*L. A. Rajapakse*, for second and third defendants, appellants.

*F. C. W. Van Geysel* (with him *Ivor Misso*), for plaintiff, respondent.

*Cyril E. S. Perera*, for first defendant, respondent.

*Cur. adv. vult.*

August 24, 1943. MOSELEY J.—

The plaintiff brought this action against the three defendants who respectively hold the offices of Korale, Peace Officer, and Aratchie, claiming damages for wrongful arrest and detention. The third defendant had taken offence at something the plaintiff had done and sought to implicate the latter on a charge of selling kerosene oil at a price in excess of what was alleged to be the control price. The plaintiff was taken into custody by, or in the presence of, the three defendants, but no charge was preferred against him as, by the time he appeared in Court, it was realised that the price of kerosene was not in fact controlled. The plaint sets out that the three defendants, purporting to act in their respective official capacities, falsely and maliciously and without reasonable or probable cause, wrongfully arrested the plaintiff and detained him in their custody. The learned District Judge held that the first defendant has not acted maliciously and the action against him was dismissed. In regard to the action against the second and third defendants the plaintiff succeeded and was awarded Rs. 200 damages. Against this judgment the second and third defendants now appeal. The first defendant, somewhat unnecessarily it would seem, has been made a respondent to the appeal. The grounds of appeal are as follows:—

(1) that there is a misjoinder of parties and causes of action ;

(2) that the notices required by section 461 of the Civil Procedure Code have not been delivered to the defendants or left at their offices ; and

(3) that the learned District Judge was wrong in holding that it was unnecessary to prove malice, or that, if it was necessary, that malice had been proved.

It is convenient to deal with the third ground first. As I have already pointed out, the first defendant was absolved of acting maliciously. But the learned District Judge went on to say "I have no option but to hold the third defendant with the assistance of the second defendant acted maliciously in charging the plaintiff with profiteering." Now the second defendant who, it will be remembered, is a Peace Officer might perhaps be expected to know the law to the extent that he ought to have known that no offence had been committed by the plaintiff. In that respect the second defendant might be accused of negligence, but I am unable to find any evidence upon which a finding could be made that he acted maliciously. It is difficult, in my opinion, to distinguish between the part played by him and that played by the first defendant. The action against the former should, as it was in the case of the latter, have been dismissed. His appeal must therefore succeed. The case against the third defendant stands upon an entirely different footing. He was

instigated by a private grudge against the plaintiff to effect his arrest upon an unsustainable charge and was actively instrumental in bringing about that arrest.

It becomes necessary therefore to consider the second ground of appeal. The plaintiff's proctors, for reasons best known to themselves, selected the Post Office as the means of delivering the necessary notices to the defendants. The Post Office at Marassana, at which the registered letters addressed to the defendants arrived, is only a Receiving Office. Letters are not delivered to the addressees. Notices are sent intimating that a letter has arrived and is awaiting collection. Such notices were sent to the defendants, but they, possibly having got wind of the contemplated proceedings, took no steps to collect them. There is no evidence that any one of the defendants received his notice. It is not necessary for me to express an opinion as to whether section 461 of the Civil Procedure Code contemplates the delivery, in normal circumstances, of such a notice by registered post. I am, however, certain that it does not contemplate a procedure which involves the attendance of a prospective defendant at a given place in order that the notice may be handed to him. I find, on this point, that no notice was delivered to the third defendant, nor was one left at his office. It is, however, conceded that the third defendant, if he was acting with malice, cannot set up that there has not been compliance with the section.

There only remains the question of misjoinder. Counsel for the appellants contends that the plaintiff had, if any, three separate causes of action, and that there is no averment that the three defendants were acting in concert. The plaint, however, does allege one act performed by three people and the implication is, I think, strong that they were acting in concert. It is true that the evidence did not support that averment and that the action against the first defendant was dismissed by the District Court. The same state of things now exists in regard to the second defendant. I do not think that the case, as it was presented in the District Court, involved any misjoinder. It has merely failed as regards the first and second defendants for want of evidence against them. The third defendant has been in no way prejudiced.

The appeal of the second defendant is allowed with costs against the plaintiff-respondent. The appeal of the third defendant is dismissed with costs. The first defendant-respondent will get his costs of appeal from the second and third defendants-appellants. The judgment of the District Court as regards the second defendant-appellant is set aside and the action against him is dismissed without costs.

KEUNEMAN J.—I agree.

*Appeal of 2nd defendant allowed.*

*Appeal of 3rd defendant dismissed.*