1946

Present : **Dias J.**

PODIHAMY *et al.*, Appellants, *and* SEIMON APPU *et al.*, Respondents.

190—C. R. Matara, 1,047.

Misjoinder of parties and causes of action—Court not bound to dismiss the whole action—Servitude of right of way—Clear proof necessary.

The Court is not bound to dismiss an action on the ground of misjoinder of parties and causes of action. It can strike out a wrongly joined defendant and allow the action to proceed as against the other defendants.

Clear, precise and cogent evidence is necessary to establish a servitude like a right of way.

APPEAL from a judgment of the Commissioner of Requests, Matara.

H. W. Thambiah, for the first and second defendants, appellants.

C. V. Ranawake (with him *H. A. Koattegoda*), for the plaintiffs, respondents.

Cur. adv. vult.

October 18, 1946. DIAS J.—

The plaintiffs sought to establish a right of footpath from their land to the Village Committee road as against three defendants, of whom the first and second are the appellants.

In the plaint it was asserted that the plaintiffs were the owners of a divided land marked lot C 2, and that the three defendants " are the owners of a divided lot . . . . towards the north " and that this land lay between the plaintiff's land and the Village Committee road. The plaintiffs stated that for over twenty years they had been using a footpath " across the defendants' land in order to reach the land called Range Mahawatte and the Village Committee road ". It is pleaded that the defendants wrongfully and unlawfully obstructed the path.

A commission was issued to Mr. Ferdinands, a surveyor, to locate the corpus in dispute. This he has done in the presence of the parties and submitted a plan and his report to the Court.

When the surveyor went to the land the plaintiffs pointed out to him the paths R-X-Y-T and T-S-U as being the footpaths claimed by them. Clearly therefore what the plaintiffs want are a path over the lands of the appellants, as well as a pathway from T-S-U to the Village Committee road on the east over the third defendant's land. It is clear that such claims cannot be made in this action without creating a misjoinder of parties and causes of action. Plaintiffs' counsel therefore moved to

withdraw the action as against the third defendant. Counsel for the appellants then cited the case of *Ettaman v. Narayanan* [1], and asked that the whole action should be dismissed. The Commissioner refused that application and ordered the trial to proceed.

It has been urged before this Court that there being a misjoinder of parties and causes of action, there is no alternative but to dismiss the whole of the plaintiff's action, and the case of *Abraham Singho v. Jayaneris Singho* [2] was also cited. I am however content to follow the decision in *Kudhoos v. Joonoos* [3].

A Court should not be fettered by technical objections based on matters of procedure. Where the law permits it, the Judge should brush them aside by rectifying the mistake and by casting the offending party in costs. *Wickramatillaka v. Marikar* [4].

I am of the view that a Court is not bound to dismiss an action on the ground of a misjoinder of parties and causes of action. It was open in this case for the trial Judge to strike out the third defendant from the case, and to allow the action to proceed as between the plaintiffs and the appellants.

On the question of fact I do not feel disposed to interfere. The Commissioner saw the witnesses and probably heard the very same arguments which have been adduced before me. Undoubtedly clear, precise and cogent evidence is necessary to establish a servitude like a right of way. I agree that it is not sufficient that witnesses should come forward and merely say that they saw plaintiffs possess the land or use a footpath without specifying precisely how the land was possessed or how the path was used. If there is any insufficiency in the evidence on this point, one may ask what was the appellants' counsel doing in not cross-examining adequately ? It is urged that the Commissioner has not discussed the evidence. I think he has done so, although he might have elaborated his findings. No doubt this pathway is rather inconvenient for the appellants, but I am satisfied that the findings of the trial Court should not be disturbed.

I dismiss the appeal with costs.

Appeal dismissed.

[1] *(1938) 18 Ceylon Law Recorder 111.*
[2] *(1930) 14 Ceylon Law Recorder 121.*
[3] *(1939) 41 N. L. R. 251.*
[4] *(1895) 2 N. L. R. at 12.*