ORIGINAL CIVIL.

Before Mr. Justice Braund.

DAW HLA GYI *v.* MAUNG PO THAUNG.*

1937

June 14.

Misjoinder of causes of action—Suit for possession of plots of land from several defendants—Title of each defendant separate—Tenants and trespassers—Denial of plaintiff's title to land—Same act or transaction—Civil Procedure Code, O. 1, r. 3; O. 2, r. 6.

The plaintiff, claiming to be the owner of a large piece of land, sued some twenty defendants in one suit to obtain possession of the various tenements into which the land was divided. The defendants were in possession of the several tenements respectively and had erected houses thereon. The several defendants came into possession each at a different time and in different circumstances. The title of each of the defendants was separately traceable, either from some original tenant of the plaintiff's predecessor in title or from a demise to that defendant from the plaintiff or from trespass by the defendant himself or his predecessor in occupation at some time in the past. The plaintiff alleged that there was a common issue in the case, namely, that all the defendants denied the plaintiff's title to the land.

Held, that the suit was an attempt to combine in one suit twenty suits against twenty different defendants in respect of twenty different pieces of property and upon twenty different causes of action. Order 1, r. 3 of the Civil Procedure Code permitted separate causes of action against separate defendants to be combined in one suit, provided the right to relief arose in respect or out of the same act or transaction or series of acts or transactions. The case must be one in which the issue, be it of fact or of law or both, against each of the defendants is substantially the same. Separate lettings to each tenant and separate squatting by each squatter do not constitute the same acts or the same series of acts or transactions.

Held further that the case did not come within the scope of O. 2 r. 6 of the Civil Procedure Code as the rule applied when several causes of action were properly joined in one suit and could not be conveniently tried together, but not to a case of misjoinder of causes of action.

Sein Tun Aung for the plaintiff.

De for the defendants.

The suit was originally filed by one U Kyaw. During the pendency of the suit he died, and his legal representative, the widow, was brought on the record.

* Civil Regular Suit No. 89 of 1936.

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BRAUND, J.—This suit is one by a plaintiff against some twenty defendants or sets of defendants. It is one in which the plaintiff, alleging himself to be the owner of a certain piece or parcel of land at Kemmendine, seeks to obtain possession of the various tenements into which the land is divided from the several persons who, at the date of the plaint, were in possession of them.

The plaintiff claims to be the ground landlord of the whole of this parcel, upon which, in various circumstances and at various times since the year 1905, persons—some of them as tenants and others as mere trespassers—have erected buildings. He claims individually as against those who either are his tenants or who claim through persons who were his tenants, to recover possession on the ground of breaches of their respective tenancy agreements and, as against some of the others, he claims as mere trespassers who have from time to time possessed themselves of the land.

Each of the several parcels of land now in the possession of the several defendants came into his or her possession at different times and in different circumstances. As it seems to me, wholly different questions of fact and of law may apply to each, although it is possible that there may be some common question of law which may apply to all of them.

With the assistance of the plaintiff's advocate, I have gone carefully through each of the defendant's titles and I find that the title of each of the defendants to each separate piece of land is separately traced, either from some original tenant of the plaintiff's predecessor in title or from a demise to that defendant by the plaintiff herself or from mere occupation of the land by the defendant himself or by the defendant's predecessor in occupation at some time in the past.

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It is, I think, impossible to take any other view than that this suit, in reality, is an attempt to combine in one suit twenty suits against twenty different defendants in respect of twenty different pieces of property and upon twenty different causes of action. The cause of action as against each defendant consists of all those facts which go to make up the circumstances of that particular defendant's present occupation of the land and of all those circumstances which constitute in each particular case the right of each particular defendant to remain in possession. In the case of no two of these defendants, or of no two sets of defendants, are those facts in any sense identical. Those few of the defendants who are themselves original tenants obtained their tenancies at different times and under different conditions and a considerable number of the defendants who claim to trace their title to their present occupation through predecessors who were themselves tenants of the plaintiff's predecessors in title have to rely upon earlier tenancies, which themselves arose in circumstances entirely dissimilar to each other. Finally those persons who are in possession, or whose predecessors have been in possession, as mere squatters or trespassers have to rely upon facts constituting the origins of their possession. When one comes to consider merely the question of limitation it becomes apparent at once not only how inconvenient, but how impracticable, it would become to try this matter in one suit. The defendants rely upon limitation in this case and it might involve the Court in having to try in one suit twenty or more different issues of limitation, raising an equal number of different sets of facts and considerations of law. Neither, in my view, is it necessarily a fact that there is, or may be, some question running through the case that is common to all.

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It is said by the plaintiff's advocate that there is a common issue here, namely the issue that all the defendants, among other things, deny the plaintiff's title to the land. It is said that the defendants with one voice set up, against the plaintiff, a title in some third party or third parties. That is, it is said, the common factor which makes it proper that these particular cases should all be tried as one. Even that, however, is by no means proved. It may well be that to some of these defendants it is open to deny the plaintiff's title, whereas to others it is not. One only has to read section 116 of the Evidence Act, which says that no tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such a tenant had at the beginning of the tenancy a title to such immoveable property. In the case of those persons who claim to derive their title through an original tenant, that involves trying separately issues of whether the particular defendant traces his title through an original tenant. It involves enquiring whether each particular defendant is himself a tenant or claims through a tenant. It involves enquiring whether the tenancy is now continuing. As it seems to me, upon that ground it involves different considerations in each case. On the other hand, it may be that in the case of trespassers—I am not, of course, deciding this—no question as to section 116 will arise. It is not, in my view, true by any means to say that there is one common question of law as to the plaintiff's own title which is applicable to each of these cases.

There is another point made by the plaintiff. He says that in 1925 there was an agreement by the defendants to certain suits which had been started then to the effect that, in the matter in dispute as to the title of the plaintiff's predecessors, they would abide by the

result of certain other proceedings. For myself, I see great difficulties in that contention. But apart from that, even though that did constitute a feature common to all defendants, it would not, in my view, justify twenty cases such as these being tried as one. Order 1, rule 3 of the Code of Civil Procedure is the rule which regulates matters of this kind. It is the only rule which deals with the joining together of causes of action against different defendants. Order 2 deals with the combining of different causes of action as between the same parties. But Order 1 rule 3 says :

> " All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

That makes provision for what, upon any footing, must be the exceptional case of combining in one suit *separate* causes of action against *separate* defendants. But it provides that, before that ought to be done, the right to relief must arise in respect of or out of the same " act or transaction or series of acts or transactions." It is, I think, impossible in this case to say that the right to relief against these defendants, which depends upon terms of occupation varying in each case, arises out of " the same act or transaction or series of acts or transactions." It seems to me to be quite clearly contemplated that in order to qualify under this rule, the case must be one in which the issue,—be it an issue of fact or an issue of law or both—against each of the defendants is substantially the same. That appears to me to become plainer when one sees that it is still permitted to make use of this rule even where the relief against some of the defendants is merely ancillary to the

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relief claimed against the others. It is to be no obstacle to a plaintiff availing himself of Order 1, rule 3, if while the case against the defendants is substantially the same, certain "ancillary" relief is necessary against some and not against others. What is objectionable is that the cases against each of them should be different and should arise out of separate transactions. It seems to me to be impossible in this case to say that the causes of action against the defendants in any sense arise out of the same acts or out of the same transactions. Separate lettings to each tenant and separate "squatting" by each squatter do not constitute, in my view, the same acts or the same series of acts or transactions. Notwithstanding the possibility that they may have some common feature running through them, there is so much that is not common that, in my view, it would be improper to treat this as a case under Order 1, rule 3 and the matter is one for the discretion of the Court.

The learned advocate who has appeared for the plaintiff agrees with me in thinking that, generally speaking, there are three classes of defendants here. There is, first of all, that class of occupant who is himself the tenant. There is, secondly, that class of occupant who claims to trace his title through some previous tenant, whether by inheritance or otherwise. Thirdly, there is that class of person who is a mere trespasser.

I am reluctant that these proceedings should be wholly wasted. I have been prepared, therefore, to treat this suit as a suit against any one of the defendants whom the plaintiff's advocate may select and to proceed with it on that footing with suitable amendments to the pleadings. He has selected the first defendant. I shall, accordingly, in the first place, direct that this suit, be continued henceforth as between the plaintiff

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and the first defendant. As ancillary to that, I shall direct the plaintiff to deliver within fourteen days an amended plaint as against the first defendant. The first defendant will then have liberty within a further period of fourteen days to deliver an amended written statement. I have pointed out already that, in my view, the plaintiff's case is a quite simple one as against each individual defendant and that it need not be pleaded with anything like the prolixity of the present pleadings.

The plaintiff's advocate has invited my attention to Order 2, rule 6, and has asked me to maintain this suit as it is, and to order separate trials of the three issues that I have mentioned. In my view, for the reasons that I have expressed, this is a case of misjoinder of causes of action, not as between a plaintiff and a defendant, but as between a plaintiff and different defendants. It is not, in my view, a matter which is within the scope of Order 2 at all, and in particular it is not one, I think, that is covered by Order 2, rule 6. I agree with the note of the learned author of Mulla's "Code of Civil Procedure" at page 504 where he says that this rule does not apply to cases of misjoinder of causes of action but to cases where several causes of action have been *properly* joined in one suit and the causes of action so joined cannot conveniently be tried together.

It remains therefore for me to consider what I must do as regards the remaining defendants.

I have offered to permit the suit to be withdrawn as against them, with liberty to bring a new one, but that offer has been declined. I do not think I have any jurisdiction under Order 23, rule 1, to make an order to that effect unless I am asked to make it by the plaintiff. In this case the plaintiff's advocate does not accept my offer to permit him to withdraw the suit under Order 3, rule 1, and, accordingly, though with some regret, I am

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compelled to dismiss the suit as against all the defendants other than the first.

No extra costs have been incurred by reason of the present misjoinder of defendants and, accordingly, I shall dismiss the suit as against these defendants with no order as to costs.

[*Feb. 14, 1938.* Upon appeal (Civil First Appeal No. 93 of 1937) it was intimated that the Court would feel bound to dismiss the appeal. But, the plaintiff's advocate alleging at the last moment that the plaintiff could by amendment of the plaint plead a common cause of action, she was allowed by the Court to apply to file an amended plaint on the Original Side upon paying the whole of the defendants' costs of the appeal and the case was remitted to the Original Side accordingly.]

FULL BENCH (CRIMINAL).

Before Mr. Justice Baguley, Mr. Justice Mosely, and Mr. Justice Ba U.

1938

Apl. 8.

U AUNG PE *v.* THE KING.*

Defamation—False information to a public servant—Defamatory statement in information—No complaint by public servant—Prosecution by person defamed—Two distinct offences—Intent to defame—Penal Code, ss. 182, 499, 500—Criminal Procedure Code, s. 195.

A complaint for defamation by the person aggrieved by it can be entertained by a Court notwithstanding that the accused could have been prosecuted on the same facts under s. 182 of the Penal Code on the complaint of a public servant. The two offences are fundamentally distinct in nature, although they may arise out of one and the same statement of the accused.

The defamatory statement does not fall within any of the exceptions to s. 499 by reason merely of the fact that it is punishable as an offence under s. 182, or any other section of the Penal Code; nor is s. 500 of the Penal Code included in the list of sections contained in s. 195 (1)(*b*) of the Criminal Procedure Code.

Krishna Row v. *Appasawmi*, 1 Weir, 585; *Ramsebak Lal* v. *Muneswar Singh*, I.L.R. 37 Cal. 604; *Satish Chandra* v. *De*, I.L.R. 48 Cal. 388, followed.

Queen-Empress v. *Mi Gywet*, (1897-1901) U.B.R. 279; *Swee Ing* v. *Koon Han*, A.I.R. (1935) Ran. 163, overruled.

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* Criminal Revision No. 21B of 1938 from the order of the Headquarters Magistrate (1) of Insein in Cr. Regular Trial No. 244 of 1937.