IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of Section 5(1) of the High Court of Provinces (Special Provisions) Act No. 10 of 1996 read with Article 154H of the Constitution of the Democratic Socialist Republic of Sri Lanka and Chapter L VIII of the Code of Civil Procedure

Mohamed Lebbe Mohamed Zarook,
No. 41, Kandy Road,
Gampola.

SC (CHC) Appeal No. 22/2014
Case No. HC (Civil) 121/2005/MR

PLAINTIFF

~Vs.~

Tokyo Cement Company (Lanka) Ltd.,
No. 469/1/1, Galle Road,
Colombo 3.

DEFENDANT

AND NOW BETWEEN

Mohamed Lebbe Mohamed Zarook,
No. 41, Kandy Road,
Gampola

PLAINTIFF~APPELLANT

~Vs.~

Tokyo Cement Company (Lanka) PLC.,
No. 469/1/1, Galle Road,
Colombo 03.

DEFENDANT-RESPONDENT

BEFORE: Buwaneka Aluwihare, PC, J,
L. T. B. Dehideniya, J &
P. Padman Surasena, J

COUNSEL: Kamran Aziz with Ms. Fahama Latheef instructed by Earnest Law Chambers for the Plaintiff-Appellant.

Nihal Fernando, PC with Rajindra Jayasinghe instructed by Sudath Perera Associates for the Defendant-Respondent.

ARGUED ON: 01.02.2022

WRITTEN SUBMISSIONS: 14.03.2022

DECIDED ON: 12.01.2023

JUDGEMENT

Aluwihare, PC, J.

Introduction

(1) The Plaintiff-Appellant (hereinafter referred to as the "Plaintiff") instituted action against the Defendant-Respondent (hereinafter referred to as the "Defendant") in the Provincial High Court of the Western Province (Exercising Original Civil Jurisdiction) (hereinafter referred to as the "Commercial High Court") seeking relief as prayed for in the plaint dated 01.07.2005. The Defendant by their Answer, sought the dismissal of the Plaintiff's action. After the conclusion of the Trial, the learned Judge of the High Court, by Judgement dated 2013.09.20 dismissed the action.

Facts of the Case

(2) The Plaintiff filed this action against the Defendant on the following five causes of action,

(a) The Defendant had wrongfully seized a lorry owned by the Plaintiff and obtained Rs. 800,000/- from the Plaintiff for its release, but had refused to release the same thereafter. Therefore, the Defendant has been unjustly enriched by their unlawful conduct.

(b) The Defendant failed to pay certain incentive allowances amounting to Rs. 619,360/- owing to the Plaintiff.

(c) The Defendant failed to pay certain transport allowances amounting to Rs. 240,200/- due to the Plaintiff.

(d) The Defendant through their conduct of terminating the services of the Plaintiff as a cement distributor, prevented the Plaintiff from earning an income of Rs. 12 million thus causing damages to the Plaintiff.

(e) The Defendant through their conduct of terminating the services of the Plaintiff as a cement distributor, caused injury to the Plaintiff's goodwill and reputation causing a loss of Rs. 10 million to the Plaintiff.

(3) For the purpose of this appeal, the Plaintiff limited their arguments to *the first cause of action*, which is that the Defendant has been unjustly enriched, owing to the alleged wrongful seizure of the lorry owned by the Plaintiff.

(4) The facts material to the present appeal are as follows. The Plaintiff carries on a business called "Jinnah Hardware" as the proprietor. The Defendant is a Company that produces Cement under the name "Tokyo Cement" for the local market. On or about 1994, the Defendant appointed the Plaintiff as a distributor of "Tokyo Cement" in the Central Province.

The facts alleged by the Plaintiff

(5) The facts alleged by the Plaintiff by their Plaint dated 01.07.2005 are as follows,

(a) On or about 11.09.2003, the Plaintiff dispatched his lorry bearing No. 68-3654 together with a cheque for Rs. 112,100/- to the Defendant's Depot in Trincomalee to take delivery of an ordered consignment of Cement.

(b) The Defendant thereafter seized the lorry, retained the cheque of Rs. 112,100/- and refused to supply the said order of cement until the Plaintiff deposited a sum of Rs. 1,000,000 to the Defendant's account.

(c) The Plaintiff, upon notice of the seizure of the lorry, stopped the payment of the cheque amounting to Rs. 112,100/-.

(d) Thereafter the Plaintiff, delivered three cheques to the Defendant amounting to Rs. 500,000/-, Rs. 200,000/- and Rs. 100,000 respectively.

(e) After the said cheques were realized, the Defendant continued to refuse to release the said lorry or to supply cement to the Plaintiff.

(f) Thereafter, the Plaintiff, sent two letters dated 17.11.2003 and 30.01.2004 demanding the release of the said lorry and supply of cement.

(g) The Defendant by their letter dated 22.03.2004 refused to comply with the Plaintiff's demand.

The facts alleged by the Defendant.

(6) The facts alleged by the Defendant are as follows,

(a) The Plaintiff, prior to instituting the present action, had instituted action before the District Court of Colombo by Case No. 7275/Spl against the Defendant based on the same facts and the same letter of demand dated 30.01.2004. In the said case, the Plaintiff had not reserved its right to

institute a separate action. Accordingly, the Defendants raised a preliminary objection that the present case is contrary to Section 34 of the Civil Procedure Code and/or is *res judicata* and therefore the Plaintiff's case should be dismissed *in limine*.

(b) It was the Defendant who facilitated the purchase of the lorry bearing No. 68-3654, by advancing a sum of Rs.1, 292,000/- in order for the Plaintiff to distribute cement to the Defendant, and that the Defendant was the registered owner of the said lorry (V8 produced along with the affidavit of the Finance Manager of the Defendant). As such the Defendant had a lien over the said lorry till any outstanding sums owing to the Defendant were paid by the Plaintiff. The Defendant admitted to having seized the lorry on or about 11.09.2003, and having kept the lorry in their possession till certain sums owed to the Defendant were settled by the Plaintiff.

(c) The payment practice that was followed for the purchase of cement by the Plaintiff was for the Plaintiff to deposit the monies directly to the Defendant's Bank Account and 'fax' the customer's copy of the credit slip to the Defendant as proof of depositing the monies. The Defendant alleged that the Plaintiff had forged credit slips (V1 to V 6) and faxed such forged slips to the Defendant in order to purchase cement.

(d) The Commercial Bank had informed that the 'Credit slip' copies faxed by the Plaintiff, did not relate to any of the vouchers in their records and as such the Bank is unable to reconcile the purported deposits (V1 to V6) with the vouchers held by the Bank(letter V3) and the copies of credit slips submitted for verification do not tally with any of the original credit slips in the possession of the Bank (letter V5) .

(e) Accordingly, the Defendant alleged that there was an outstanding sum of Rs. 1,539,900 which was due and owing from the Plaintiff to the Defendant for Cement supplied at the time the said lorry was seized by the Defendant.

(f) The payment of Rs. 800,000 by three cheques, after the seizure of the lorry is an admission by the Plaintiff that a sum of Rs. 1,539,900 is due and owing by them to the Defendant.

The Issue

(7) The learned Judge of the High Court, by Judgement dated 2013.09.20, upheld the preliminary objection raised by the Defendant and dismissed the action. The main ground of appeal raised by the Petitioner is that said dismissal of the action by the learned Judge is erroneous.

(8) At the outset, it would be apposite to determine the legality of the findings of the learned Judge of the High Court with respect to the preliminary objection raised by the Defendant. The learned Judge in his judgement finds that the action of the Plaintiff was contrary to sections 33 and 34 of the Civil Procedure Code.

(9) It must be noted that the Plaintiff in his Plaint in the Commercial High Court has alleged five distinct causes of action against the Defendant. The first cause of action distinctly relates to the alleged unlawful seizure of the lorry by the Defendant, which was also in issue in the previous case, the District Court case No. 7275/Spl filed by the Plaintiff against the Defendant. The remaining four causes of action, that is the second to fifth causes of action, are not directly related to the said seizure. These causes of action mainly arise from the termination of the services of the Plaintiff as a cement distributor and appear to mainly concern the commercial transactions that have taken place between the Plaintiff and the

Defendant. Accordingly, it is my view that each cause of action must be considered to assess any inconsistency with Sections 33 and 34 of the Civil Procedure Code in light of the District Court action filed by the Plaintiff.

(10) The second to fifth causes of action are as follows,

(a) The Defendant failed to pay certain incentive allowances amounting to Rs. 619,360/- owing to the Plaintiff.

(b) The Defendant failed to pay certain transport allowances amounting to Rs. 240,200/- due to the Plaintiff.

(c) The Defendant through their conduct of terminating the services of the Plaintiff as a cement distributor, prevented the Plaintiff from earning an income of Rs. 12 million thus causing damages to the Plaintiff.

(d) The Defendant through their conduct of terminating the services of the Plaintiff as a cement distributor, caused injury to the Plaintiff's goodwill and reputation causing a loss of Rs. 10 million to the Plaintiff.

(11) It is quite evident on the face of the Plaint that the second to fifth causes of action relate to commercial transactions between the Plaintiff and the Defendant. The second and third causes of action relate to recovering certain incentive allowances and transport allowances allegedly due and owing from the Defendant to the Plaintiff. The fourth cause of action pertains to deprivation of the Plaintiff's ability to earn income by the conduct of the Defendant. The fifth cause of action relates to an alleged harm to the Plaintiff's goodwill and reputation. These causes of

action, *prima facie* does not appear to be related to the unlawful seizure of the lorry. The Plaintiff's contention that the present action is distinct from the previous action filed by the Plaintiff, in District Court Case No. 7275/Spl, *prima facie*, appears to have some merit **only with regards to the second to fifth causes of action.**

(12) The learned High Court Judge, while dismissing the Plaintiff's action on the preliminary objection raised, has proceeded to assess the merits of all the causes of action alleged by the Plaintiff, without prejudice to the preliminary objection raised. Accordingly, the learned High Court judge has found that the Plaintiff has not sufficiently proven their case with respect to the second to fifth causes of action. Although the Plaintiff has preferred this appeal against the said judgement, in the present appeal, the Plaintiff has restricted their submissions to the first cause of action. Accordingly, the Plaintiff has not canvassed before this court any of the findings of the learned High Court Judge with respect to the second to fifth causes of action.

(13) Even though the Plaintiff did not challenge the findings of the learned High Court Judge in respect of the merits of the second to fifth causes of action this Court has given its mind to the findings of the learned High Court judge and we find no material error regarding the conclusions reached by the learned High Court Judge with regards to the merits of the said causes of action. Therefore, for the purposes of this appeal, it is immaterial whether the second to fifth cause of action are in fact barred by Sections 33 and 34 of the Civil Procedure Code. Accordingly, the same need not be determined by this Court.

(14) The material issue at hand is whether the first cause of action of the Plaintiff, the unjust enrichment of the Defendant as a result of their alleged unlawful seizure

of the lorry of the Plaintiff, is contrary to Sections 33 and 34 of the Civil Procedure Code, in light of the District Court case No 7275/Spl filed by the Plaintiff.

(15) The Plaintiff in their submissions before this Court stated that the unlawful seizure of the lorry is a transaction that resulted in two distinct causes of action, first for the recovery of the possession of the lorry and secondly for the recovery of the money given by the Plaintiff to the Defendant in order to get the said lorry released. The Contention by the learned Counsel for the Plaintiff was that, although flowing from the same transaction, these two actions related to two distinct causes of action.

(16) The learned President's Counsel for the Defendant submitted that the claim in the present action arises from the same transaction as in the District Court Case No. 7275/Spl. He further submitted that the payment of Rs. 800,000/- which is sought to be recovered by the Plaintiff, is intrinsically interwoven to the cause of action in the District Court case. Accordingly, the learned President's Counsel argued that the present action is contrary to Section 34 of the Civil Procedure Code and that the Learned High Court Judge was correct in dismissing the Plaintiff's action.

(17) It must be noted that neither the Counsel for the Plaintiff, nor the Defendant, focused on Section 33 of the Civil Procedure Code in their submissions before this Court. The main focus of the submissions was with regards to Section 34 of the Code and whether the previous action filed by the Plaintiff in the District Court and the present action flow from the same cause of action.

(18) I am of the view that Section 33 of the Civil Procedure Code [Hereinafter the CPC] is key in determining this appeal. In fact, the learned High Court Judge in his judgement dated 2013.09.20 at page 12 has referred to Section 33 of the CPC and stated,

"ඉහත කරුණු අනුව දිසා අධිකරණයේ නඩුවට පාදක වූ ලොරිය රඳවා ගැනීම, එහි ලියාපදිංචි අයිතිය නොපැවරීම පිළිබඳ ආරවුල පාශ්වයන් අතර වූ සිමෙන්ති බෙදාහැරීමේ ගණුදෙනු වලින් ස්වාධීනව නොපිහිටන බව පෙනී යන නිසා **මේ සියලු කාරණා සිවිල් නඩු විධාන සංග්‍රහයේ 33 වගන්තියට ප්‍රකාරව වැඩිදුර නඩුකිරීම් ඇති නොවන ලෙස එක නඩුවෙන්ම මතු කල යුතු කරුණු බවට වැඩි බරින් තීරණය කරමි.**"

(19) It would be pertinent at this stage to refer to Section 33 of the Civil Procedure Code which reads thus;

> "Every regular action shall, **as far as practicable**, be so framed as to afford ground for a final decision upon the subjects in dispute, and **so to prevent further litigation concerning them**."[Emphasis added]

(20) Although most judgements refer to Section 33 of the CPC solely as a means to interpret Section 34 of the Civil Procedure Code, I am of the view that Section 33, imposes certain limitations on the types of actions that could be filed by a Plaintiff, quite independent of Section 34.

(21) It must be noted that Section 33 does not refer to the term "cause of action". The term used in the section is "subjects in dispute". The term "subjects in dispute" is much wider than the term "cause of action". Many distinct causes of action may arise from the same subjects in dispute. Therefore, quite independent of whether the two actions flow from the same cause of action, if two actions relate to the same "subjects in dispute", Section 33 requires that these matters be tried together as far as practicable so as to prevent further litigation concerning them.

(22) It must be noted that Section 33 of the CPC does not strictly require that all distinct causes of actions arising out of the same subjects in dispute always be tried in the same action. They must only be tried together so far as the same is ***practicable***. Distinct causes of action, although arising out of the same "subjects in dispute"

may be far apart in time, or involve completely different parties so as to not enable the same to be tried conveniently in one action. However, when different causes of action arise out of a sequence of events which are so proximate, involving the same parties, and relating to the same subjects in dispute, Section 33 of the CPC requires that the same be tried in a single action so far as practicable. In such an instance, if parties decide to file distinct actions, relating to the same "subjects in dispute," it would be incumbent upon them to satisfy the court that such matters could not have been conveniently tried in a single action. If the Parties fail to satisfy the court in that regard, it would be open for the court to dismiss such action for non-compliance with Section 33.

(23) The purpose of this section is explained in the section itself. If Parties were allowed to file distinct actions pertaining to the same subjects in dispute without any restriction, this could definitely lead to multiplicity of litigation concerning the same dispute and might cause inconvenience as far as the administration of Justice is concerned. As Chief Justice Sharvananda observed in the case of **Mackinons vs. Grindlays Bank 1986(2) SLR 272** *" All rules of court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and subordinate to that purpose."*

(24) The need for a finality in litigation is echoed in several decided judgements. In ***Pedris v. Mohideen*** **(1923) 25 N.L.R. 105**, at Page 111 it was held by Schneider J.,

> *"The policy of the Civil Procedure Code is to prevent a multiplicity of actions. It is, therefore, enacted in section 33: 'Every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them.'"*

(25) In ***Miguel Appuhamy v Appuhamy*** **(1938) 40 N.L.R. 200** the issue was whether a Plaintiff, who has sued one of several joint-tort-feasors for the recovery of a share of the damage caused to him and has obtained judgment against him, could maintain a subsequent action against any of the other tort-feasors upon the same cause of action., Kretser J. Stated, [at pg. 204];

> *"This view [that the Plaintiff cannot maintain a subsequent action], accords with the maxim of the law Reipublicae interest ut sit finis litium, which we find embodied in section 33 of our Civil Procedure Code. That section says, "Every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so as to prevent further litigation concerning them ".*

After referring to Sections 33 and 34 of the Civil Procedure Code, Kretser J. went on to state; *"This section is very wide in its scope and emphatic in its language. It embodies the policy of our law. It clearly refuses to recognize division of a claim."*

At page 205, Kretser J. goes on to state that, "*On grounds of convenience too a multiplicity of actions is to be deplored. Take the present plaintiff's conduct. He claimed Rs. 300 from one wrongdoer and now claims Rs. 300 from another. There is no statement in the plaint as to what his total damages were but it was later taken to be Rs. 900. Had he been free to sue he might have gone on suing each of the five for Rs. 300. Had his damages to be estimated in the first case it would mean that the trial would be concerned with a claim for Rs. 900. Even if Rs. 300 were clearly due in that case it would not be so clearly due in the following cases. Besides the quantum of damages might be differently estimated by different Judges."*

(26) In ***Mammoo v. Menon*** **(1964) 66 N.L.R. 289** the issue was whether a landlord who, before the notice to quit sent by him to his monthly tenant has taken effect,

sues the tenant for recovery of arrears of rent but not for ejectment, is entitled to bring a separate action in ejectment after the same notice to quit has taken effect. At Page 292 Basnayake CJ. Observed;

> *"The basic principles of the law of Res Judicata have been written into our Civil Procedure Code. Its provisions are designed as far as may be to prevent a multiplicity of actions."*

(27) In several decided judgements, actions have been dismissed on the basis that they relate to claims that ought to have been raised on a previous action which had been instituted between the same parties.

(28) In ***Ponniah v. Payhamy*** **(1905) 8 N.L.R. 375**, the question of res judicata with regards to an action for land was considered. At page 376 Layard C.J. held,

> *"Now, the subject in dispute in both these actions was the right of the defendants to retain possession of the land in dispute as against the superior title of the plaintiff. Section 33 of our Civil Procedure Code provides that "every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them." The original action ought then to have been so framed as to set out every title that the plaintiff might have claimed to the land in dispute. It cannot be said in this case that the plaintiff was unaware of his title by conveyance, because it is admitted that he was aware of it at the time the original action was brought."*

(29) In the case of ***Vanderpoorten v. Peiris*** **(1937) 39 N.L.R. 5**, the Plaintiff had sued the Defendant to recover arrears of rent due on an indenture of lease and for a cancellation of the lease on the ground that the defendant sublet the premises contrary to the terms of the lease. The Plaintiff thereafter instituted another action to recover damages for the failure of the Defendant to keep the premises leased in

proper order and condition. The issue was whether the subsequent action was maintainable. The finding that the Plaintiffs could have brought the claims made at the subsequent action at the previous action was a material fact which influenced the Court in finding that the subsequent judgement was barred by the previous action. Poyser J. in allowing the appeal, declared;

"As previously pointed out, however, the plaintiffs could easily have ascertained, if they did not already know, the damage caused to the premises by the defendant and particularly so the construction of the concrete floors and could have without difficulty included in the previous action a claim in respect of these matters."

(30) The principle outlined in Section 33, which is that quite independent of whether the two actions flow from the same cause of action, if two actions relate to the same "subjects in dispute", these matters be tried together as far as practicable so as to prevent further litigation concerning them, is very similar to the principle of "constructive res judicata" recognized in India. The case of ***State of Uttar Pradesh v. Nawab Hussain*** [1977] AIR 1680, is the landmark judgement in this regard. In the Judgement delivered by Shinghaal J. it was held that;

> *"But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and Somervell L.J., has answered it as follows in* ***Greenhalgh v. Mallard;***
>
> "*I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly*

could; have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata, by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata, which, in reality, is an aspect or amplification of the general principle."

(31) Considering the foregoing, I entertain the view that Section 33 of our Civil Procedure Code recognises a principle very similar to the aforementioned principle of "constructive res judicata" recognised in India.

(32) Applying the provisions embodied in Section 33 of the CPC to the facts of the instant case, I take the view that the first cause of action in the present action is a matter that the Plaintiff ought to have raised in the action filed by him in the District Court Case, in case No. 7275/Spl.

(33) Even if the Plaintiff's argument is accepted, that is, the action filed in the District Court and the first cause of action in the present action relate to two separate causes of action stemming from the same transaction, it is quite evident to the Court that both actions relate to the same "subjects in dispute", which is the lorry bearing No. 68-3654, which was alleged to have been unlawfully seized by the Defendant. It does not appear to Court that the Plaintiff has substantiated as to why the relief sought in the District Court action, and the first cause of action in the present case, could not be tried together in the same action. In my opinion the claim to obtain ownership and possession of the lorry as well as the claim to

recover the money given to the Defendant in order to get the lorry released, could have been conveniently tried in the same action. The two wrongs alleged to have been committed by the Defendant, namely the unlawful seizure of the lorry followed by the request to pay for its release and the subsequent refusal to release the lorry even upon the payment of a sum are so proximate, and arising between the same parties that it appears to be convenient to try the same in a single action.

(34) In this regard the following facts may be highlighted.

(a) There are many similarities between the Plaint filed by the Plaintiff in the present case and of that was filed in the District Court Case No. 7275/Spl. Paragraphs [1] – [8] are identical in both Plaints. Paragraphs [9] – [11] in the Plaint in the present case is identical to paragraphs [14] – [16] of the Plaint in the District Court action. Paragraphs [12] – [19] of the Plaint in the present case is identical to [18] – [25] of the District Court action with a few minor changes. Accordingly, almost all paragraphs setting out the facts of the case are identical.

(b) The documents annexed to the Plaint in the present case marked 'P1' to 'P36(28)' are identical to the documents annexed to the Plaint in the District Court Case marked 'P1' to 'P36(28)'.

(c) Both actions have been filed on the same letter of demand marked 'P11' with the Plaint in both actions. Page 3 of the said Letter of Demand states as follows,

"The irresponsible and unreasonable acts of your Officers have caused substantial and irreparable losses and damages to our client. We have

been instructed to specify the said losses and damages together with the amounts payable to our client as follows:

a) The earned incentive allowance of Rs. 619,360/-

b) The entitled transport allowance of Rs. 240,200/-

c) The aggregate sum of Rs. 800,000/- tendered as a deposit/-

d) The lorry bearing No: 68-3654 valued at Rs. 1.5 million.

e) Prospective income of Rs. 50,000/- per month from the said lorry.

f) Prospective income of Rs. 100,000/- per month from the business.

g) Loss of Good Will and Reputation estimated at Rs. 10 million."

(35) These facts make it evident that the Plaintiff knew of all relevant facts necessary to bring the present action, at the time of filing the action in the District Court. These facts also indicate that the claims made by the Plaintiff, in the present action and the District Court action arise from incidents that are so closely connected that the Plaintiff ought to have tried all claims in a single action. There is no explanation as to why the Plaintiff failed to do so. The Plaintiff has not reserved his right to institute a separate action in respect of these claims either.

(36) Even if the present claim and the District Court action arise out of two causes of action, there is no bar against the Plaintiff combining the two causes of action. The Civil Procedure Code does not prevent a Plaintiff from combining different causes of action. Most Plaints entertained by Courts disclose multiple causes of action. In fact, the Plaint of the Plaintiff in the current action discloses five causes of action and prays relief for all five. Accordingly, the Plaintiff ought to have tried the first cause of action in the present action, in the previous action filed by the Plaintiff in the District Court.

(37) The learned High Court Judge has approached this issue in a different perspective. The learned Judge has held that the unlawful seizure of the lorry and the subsequent demand of money for its release was intricately connected with the underlying commercial transactions between the Plaintiff and the Defendant. He reasons his deduction on the following facts,

(a) The lorry in question had initially been purchased by the Defendant and the Defendant had 'resold' the same to the Plaintiff on the basis that the Plaintiff would pay the purchase price in 36 installments, for the purpose of distributing Defendant's Cement.

(b) The Plaintiff was obliged to make payment for the lorry in 36 monthly installments. The Plaintiff had alleged that on or about 29.04.2002 they had completely settled all 36 monthly installments and had become the lawful owner and possessor of the lorry. However, according to Plaintiff's own document 'පැ 35' the Defendant had continued to be the registered owner of the said lorry despite the fact.

(c) Subsequent to the alleged unlawful seizure of the lorry, the highly unusual payment of Rs. 800,000/- made to the Defendant by the Plaintiff, solely on the request made by the Defendant.

(d) The failure of the Plaintiff to lodge a complaint regarding the alleged unlawful seizure of its lorry.

(38) The learned High Court Judge, based on the above observations has deduced that the Defendant may in fact have a lien over the lorry for any unpaid sums by the Plaintiff, as claimed by the Defendant. Accordingly, the learned Judge has held

that the unlawful seizure of the lorry, as being a part of the larger commercial arrangements between the Parties. The learned Judge observes that the Plaintiff is also aware of this fact based on the fact that the letter of demand, marked 'P11' has been annexed in the present action and the District Court action. Therefore, the judge finds that the issue pertaining to the ownership and possession of the lorry could not be decided independently of the underlying commercial transactions between parties. The learned Judge concludes that all these matters should have been determined in one action, so as to prevent a multiplicity of litigation, as per Section 33 of the Civil Procedure Code.

(39) Whether or not the unlawful seizure of the lorry was directly connected with the underlying commercial transactions between the Parties is a question of fact that ought to be determined at Trial. The learned High Court Judge has found that there is sufficient evidence to establish that such a connection exists. I find no defects in the reasoning of the learned Judge. The history of the ownership of the lorry as well as the Plaintiff's behaviour immediately subsequent to the seizure of the lorry is evidence that such a connection exists. Accordingly, the learned Judge has held that all these issues ought to have been tried in one action to prevent further litigation on the same issues as required by Section 33 of the Civil Procedure Code.

(40) I find the reasoning of the judge, with respect to the first cause of action of the Plaintiff in the present case to be sound. If the alleged unlawful seizure of the lorry was in fact connected with the underlying commercial transactions between the parties, then the underlying commercial transactions between the Parties would be directly connected with the issue of ownership and possession of the lorry bearing No. 68-3654, which is the "subjects in dispute" in the District Court case No 7275/Spl. Accordingly, it was incumbent upon the Plaintiff to show reasons as to why the two claims, the first for ownership and possession of the lorry, and

the latter for recovery of sums of money, were not filed in a single action. In the absence of the same, the learned Judge was entitled to hold that the present action was contrary to Section 33 of the Civil Procedure Code as it leads to a multiplicity of litigation.

(41) The Sections of the Civil Procedure Code which relate to Amendment of Pleadings and Claims in Reconvention are all aimed at preventing multiplicity of litigation. It is in the interest of Justice that all claims that can conveniently be disposed of in a single action be tried in a single action. Otherwise, the same facts would have to be established, the same documents would have to be proven, and the same witnesses would have to be led, as has happened in the present instance, in two different courts. Such methods of litigation are undoubtedly an abuse of the process of court and contrary to Section 33 of the Civil Procedure Code.

(42) I therefore hold that the present action is contrary to Section 33 of the Civil Procedure Code and an abuse of the process of Court. I find that the Plaintiff's first cause of action in the present action is contrary to S. 33 of the Civil Procedure Code as it relates to the same subjects in dispute as in the District Court Case No 7275/Spl, and the two claims could have been conveniently been tried in the same action. I also affirm the Judgement of the learned High Court Judge that the Plaintiff's first cause of action, although concerning certain commercial transactions between the Parties, is directly connected with the subjects in dispute in the District Court Case No7275 and therefore should have been raised in the said action, to prevent a multiplicity of litigation.

(43) The submissions of both parties at the appeal mainly focused on whether the present action filed by the Plaintiff and the District Court action, relates to the

same cause of action or distinct causes of action. The same may be analysed at this stage.

(44) It would be pertinent, at this point to refer to S. 34 of the Civil Procedure Code which reads as follows;

> "(1) Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any court.
>
> (2) If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.
>
> (3) For the purpose of this Section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

(45) The purpose of both Section 33 and 34 of the Civil Procedure Code is to prevent multiplicity of litigation as specified in Section 33.

(46) In contrast to Section 33 which Parties are required to follow as far as practicable, Section 34 is to be strictly followed by the Parties. The term "cause of action" is narrower in scope than the term "subjects in dispute". Parties are strictly required

to present all claims which they wish to bring before the court, arising out of the same cause of action in a single action.

(47) The definition for the term "cause of action" is set out in Section 5 of the Code. The section states,

> "Cause of action" is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury.

(48) "Cause of action" was defined as follows by Lascelles J. in ***Samichi v Peiris*** **(1913) 16 N.L.R. 257** at 261,

> "*The true 'cause of action,' it seems to me, is the right in virtue of which this claim is made; the foundation of the claim which, in this case, is the right claimed under the assignment. This was the true cause on which the action was founded.*"

(49) The submission of the Plaintiff, as stated earlier was that the unlawful seizure of the lorry and the demand of payment for its release was a transaction which resulted in two causes of action, the first, for the recovery of the possession of the lorry and the second for the recovery of money given in order to get the lorry released.

(50) The cause of action refers to, the underlying wrong committed by a Party, which gives another party the right or entitlement to seek relief. This construction supports the definition of "cause of action" set out in Section 5 of the Code. Section 5 describes a "cause of action" as the wrong for the prevention or redress of which an action may be brought. This construction is also supported by the words of Section 34. Section 34 speaks of a **claim** that a plaintiff is entitled to make in

respect of a **cause of action**. Accordingly, it flows that the Plaintiff is entitled to make claims or pray for reliefs upon a cause of action.

(51) In the District Court case, the basis of the action appears to be the unlawful seizure of the lorry owned by the Plaintiff by the Defendant. In the present case, the basis of the first cause of action appears to be the Defendant's demand of money for the release of the lorry, and the subsequent refusal by the Defendant to release the lorry, which followed in sequence to the unlawful seizure of the lorry. The question to be determined is whether these two actions constitute two separate causes of action or constitute a series of steps of one continuing act.

(52) The better view, in my opinion is that these two actions relate to two separate, but closely linked, causes of action. The cause of action in the District Court or the wrong sought to be redressed in the District Court was the unlawful seizure of the lorry by the Defendant on or about 11.09.2003. The cause of action for the present action, or the wrong alleged by the Plaintiff in the present case is the money demanded by the Defendant for the release of the lorry and the subsequent refusal to release the same. It is clear that the second cause of action inevitably flows from the first cause of action. Accordingly, the two causes of action are linked. However, they are two distinct wrongs or two distinct causes of actions that the Plaintiff alleges that the Defendant has committed.

(53) Had the Defendant not demanded payment for the release of the lorry, subsequent to which the Plaintiff paid Rs. 800,000/- to the Defendant, the District Court action to recover the ownership and possession of the lorry would still be maintainable. However, in such circumstances there would be no ground for the present action to arise since no payment of money would have been made to the Defendant by the Plaintiff and thereby no unjust enrichment would have

occurred. This in my view indicates that the two claims in question concern two causes of action.

(54) I am of the view that the objective of Section 34 of the Code is to prevent parties from filing separate actions to claim **different reliefs in respect of the same cause of action**. This has been held in ***Palaniappa v Saminathan*** **(1913) 17 N.L.R 56** where at page 60, Lord Moulton describing Section 34 declared,

> *"It is directed to securing the exhaustion of the 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 from the same transactions."*

(55) For example, when a wrong is committed by a Party, the other party could sue for the rectification of such wrong and also for the party injured to be paid compensation for the loss suffered. If the injured Party files an action, praying for rectification of the wrong, but fails to pray for compensation as a relief, then such party cannot bring a separate action alleging the same wrong and praying for compensation for the loss suffered. In this example, since both reliefs are claimed from the same cause of action, or the same wrong that is alleged, Section 34 would be a fetter, in maintaining the subsequent action.

(56) Applying this principle to the facts of the present case, if the Plaintiff in District Court Case No 7275/Spl failed to pray for damages for the loss caused by the unlawful seizure of their lorry, such claim for damages cannot be prayed in the present action. However, the present claim concerns a cause of action closely connected but technically separate to that alleged in the District Court case.

(57) Nonetheless, such technical arguments should not function as an excuse for a Party to divide claims that ought to have been tried together. The mere fact that the two claims relate to two distinct causes of action does not explain the need to institute two separate actions.

(58) The Plaintiff has relied on several decisions to support their contention that, two distinct actions can be maintained from two separate causes of action that flow from the same transaction.

(59) In the case of ***Allagasamy v. The Kalutara Co., Limited*** **(1911) 14 N.L.R. 262** cited on behalf of the Plaintiff A kangany, sued the second defendant (the superintendent of an estate) in the Court of Requests for " pence money " due to him in respect of a gang of coolies. The defendant pleaded that the coolies had been transferred from plaintiff's gang to another gang, and that therefore no "pence money" was due to the plaintiff. Ultimately a portion of his claim was admitted and paid, and it was recorded that the Plaintiff Kangany was allowed to withdraw his action. The Kangany then brought the subsequent action, against the first defendant company and the second defendant to recover a sum of Rs. 10,000 as damages for the wrongful transfer of the coolies. The defendants took a plea of res judicata but the court held that the action was maintainable.

(60) The position taken up in **Allagasamy** [supra] could be distinguished from the present case. Middleton, J stated that; [at page 267]

> *"There is nothing to show that at the time of the institution of the Court of requests case, the plaintiff was aware, that he could have claimed any other relief than that sought for in that case, and I think, therefore, that under section 207 of the Civil Procedure Code he is not now estopped from claiming the relief demanded in the present action."*

In the said case, the Plaintiff could not have maintained both claims concurrently in the same action as he was unaware that he could have claimed any other relief. The position is clearly distinct in the present case since the Plaintiff was aware of all the relevant information to bring the present action, at the time of instituting the first action.

(61) The Plaintiff also relied on the decision in ***Kandiah v Kandasamy*** **(1967) 73 N.L.R. 105** in support of their contention. In the said case, the first action by the Plaintiff against the Defendant had been to recover his share of profits for the first half-year. The second action filed by the Plaintiff was to recover his share of profits for the second half-year. The final action was filed by the Plaintiff to recover his share of capital of the partnership business. At page 107 T. S. Fernando J. states,

> *"The present case was founded on an entirely different cause of action, viz, the refusal or failure to pay back to the plaintiff his share of the capital contributed by him, and section 34 provides no bar to that claim."*

The facts of the said case are quite distinct to the present as the causes of action were entirely distinct, and not connected as in the present action.

(62) The Plaintiff has also cited certain judgements, namely, ***Palaniappa v Saminathan*** **(1913) 17 N.L.R 56** and ***Fernando v The Village Council of Andiambalama Palatha*** **(1975) 78 N.L.R. 4** which have held that Section 34 of the Code does not require a Plaintiff to include all causes of action arising from the same transaction. I am in agreement with this position. The court, however, had not considered the impact of Section 33 of the Code in any of these cases. In contrast, the learned High Court Judge has specifically relied on Sections 33 and 34 in arriving at his conclusions.

(63) As mentioned earlier, although being two distinct causes of action, the claims are so proximate and closely connected that it is in the interest of Justice that they are tried in the same action. The filing of two separate actions by the Plaintiff is contrary to Section 33 as both those issues could have been framed in a single action, and conveniently been disposed of. If this court were to allow the present action, which appears extremely similar to the previous action instituted by the Plaintiff in the District Court, to proceed the court would be paving the way for abuse of court process.

(64) I find that the Plaintiff's action, although not contrary to Section 34 of the Civil Procedure Code, offends Section 33 of the Code. There is no reason to adjudicate on the arguments put forward by the Parties with regards to the merits of the matter, since the preliminary objection against the present action stands. Accordingly, the Judgement of the learned High Court Judge with regards to the preliminary objection under Sections 33 and 34 of the Civil Procedure Code is affirmed, accordingly the appeal is dismissed.

The Defendant is entitled to the costs of this appeal.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA
I agree

JUDGE OF THE SUPREME COURT

JUSTICE PADAMN SURASENA
I agree

JUDGE OF THE SUPREME COURT