

1913.

Present : Wood Renton A.C.J. and Ennis J.MOHIDEEN *v.* PITCHE

276—D. C. Colombo, 35,807.

Action on an agreement to claim shortages—Previous action to claim a portion of shortages—Is action barred?—Civil Procedure Code, s. 34.

Plaintiff and defendant entered into an agreement by which plaintiff agreed to sell for defendant in Europe Ceylon produce, and defendant agreed to make good shortages on the transactions on receipt of the accounts of the sales. Plaintiff sued to recover the value of some of the shortages. The defendant pleaded that the action was barred by section 34, Civil Procedure Code, inasmuch as in a previous case plaintiff had already sued for the recovery of the amount of similar shortages under the same agreement, but had failed to include in that action the subject-matter of the present claim, although the account sales in respect of the various consignments with which it deals had been received by him before the institution of the first case.

Held, that the action was barred.

THE facts appear from the judgment.

H. J. C. Pereira (with him *F. M. de Saram*), for the appellant.

A. St. V. Jayewardene (with him *F. H. B. Koch* and *Sansoni*), for respondent.

October 10, 1913. WOOD RENTON A.C.J.—

This appeal must be decided on the materials presented by the plaint and by the admission of the parties themselves at the trial. Shortly stated, the facts are these. The plaintiff alleges that he and the defendant entered into an agreement in or about the month of February, 1912, by which he was to sell for the defendant in Europe Ceylon produce delivered to him by the defendant for that purpose on certain terms, of which the only material one was that the defendant was to be liable to make good shortages on the transactions on receipt of the accounts of the sales. In the present case the plaintiff sues to recover the value of some of these shortages. The defendant meets him by the plea that the action is barred by section 34 of the Civil Procedure Code, inasmuch as in a previous case (D. C. Colombo, No. 34,939) he had already sued for the recovery of the amount of similar shortages under the same agreement, but had failed to include in that action the subject-matter of the present claim, although the account sales in respect of the various consignments with which it deals had been received by him before the institution of case No. 24,939. The learned District

Judge has held that in these circumstances the claim is barred, and has dismissed the plaintiff's action with costs. The plaintiff appeals. In my opinion the decision of the learned District Judge is right. It was conceded by the plaintiff's counsel at the argument in the District Court that the agreement sued upon in this case is the same as that sued upon in the previous action, and, as I have already said, that the account sales were in the plaintiff's hands when that action was instituted. The cause of action is the same in both cases. It is the alleged failure of the defendant to discharge the obligation imposed upon him by the agreement sued upon to make good shortages, although the condition precedent to that obligation taking effect had been complied with. The plaintiff might have stood in a different position if he had not had at his disposal the materials necessary for including in the claim in the prior action the subject-matter of the present one. But admittedly those materials were at his disposal, and there is nothing either in the plaint or in the admissions in the District Court to show that the ascertainment of the subject-matter of the present claim was other than a mere question of computation. I think that the appeal should be dismissed with costs.

ENNIS J.—I agree.

Appeal dismissed.

1913.

WOOD
RENTON
A.C.J.

*Mohideen
v. Pitche*