

1949

Present: Wijeyewardene C.J. and Nagalingam J.

DE MEL, Appellant, and THENUWARA, Respondent

*S. C. 41—D. C. Colombo, 13,629**Civil Procedure Code—Action on contract—No claim in reconvention—Right to replication—New cause of action—Section 79.*

Plaintiff sued the defendant for a sum of money due on the purchase and sale of rubber coupons as brokers for the defendant. In his answer the defendant pleaded that he was, to the knowledge of the plaintiff, a broker and was not therefore liable. Plaintiff sought to plead by way of replication a custom of the trade by which a broker was personally liable. Defendant objected on the ground that the replication sought to introduce a new cause of action.

Held, that the replication did not introduce a new cause of action but merely served to bring out clearly the real issue between the parties.

APPEAL from a judgment of the District Judge, Colombo.

H. V. Perera, K.C., with *Corbett Jayewardene*, for plaintiff appellant.

E. B. Wikramanayake, K.C., with *J. M. Jayamane*, for defendant respondent.

April 7, 1949. WIJEYWARDENE C.J.—

The plaint in this case alleged that the defendant employed the plaintiff company as brokers for the purchase and sale of rubber coupons. The plaintiff company claimed a sum of money as due to them on various transactions in respect of the purchase and sale of rubber coupons entered into by them in the course of such employment.

The defendant filed answer pleading, *inter alia*, that the plaintiff company knew that the defendant was acting as a broker on behalf of his principals in employing the plaintiff company and that the defendant was not, therefore, liable to make any payment.

The trial was postponed on several occasions. The journal entry relevant to the postponement granted on February 6, 1946, shows that the defendant knew and admitted that "a question of usage in the rubber coupon market was involved" in this case.

On February 11, 1947, the plaintiff company moved to file a pleading under section 79 setting out, *inter alia*, a usage of the trade in the rubber coupon market that brokers who enter into contracts for the purchase and sale of rubber do not disclose the names of their principals and are personally liable on such contracts. The defendant objected to the filing of the pleading on the ground that it sought to introduce a new cause of action. The District Judge made order refusing to allow the pleading to be filed.

I am of opinion that the pleading does not introduce a new cause of action (*vide* section 5 of the Civil Procedure Code). The cause of action remains the same, namely, the breach of contract referred to in the plaint. The pleading sets out merely an implied term of the contract. It serves to bring out prominently and clearly some of the real issues between the parties.

I set aside the order of the District Judge and direct the plaintiff's pleading to be filed in Court.

The defendant will pay the plaintiff company the costs of this appeal and the costs of March 10, 1947, in the District Court.

NAGALINGAM J.—I agree.

Appeal allowed.

