[FULL BENCH]

1914.

Present: Pereira J., Ennis J., and De Sampayo, A.J.

LONDON AND LANCASHIRE FIRE INSURANCE CO. *v.* P. & O. COMPANY *et al.*

78—D. C. Colombo, 37,533.

Joinder of parties—Alternative claim against two defendants—Joinder of causes of action—Civil Procedure Code, ss. 14 and 36.

Plaintiff, an insurance company, sued the two defendant companies to recover the value of sugar lost in the Colombo harbour consequent on a collision between the barge belonging to second defendant company and the steamer belonging to first defendant company, from which the sugar was transferred to be conveyed to shore.

The plaint averred—

9th paragraph—The loss of the said 310 bags of sugar was due to the negligence of the servants of the defendants jointly or to the negligence of the servants of one or other of the defendants, and if the said loss was not caused by the joint negligence of the defendants' servants, the plaintiff company, being unable to discover which of the defendants was liable for the said loss, sues them in the alternative.

10th paragraph.—As a separate and alternative cause of action against the second defendant company, the plaintiff company says that the second defendant company as a common carrier received the said 310 bags of sugar to be carried from the ss. Delta to the shore, and that the said bags were lost in the course of transit while in the second defendant's custody, and the second defendant wrongfully failed to deliver the same.

Held (*per* PEREIRA J. and DE SAMPAYO A.J.), that the two defendants were rightly joined in respect of the first cause of action.

Held, further (*per* PEREIRA J. and ENNIS J., *dissentiente* DE SAMPAYO A.J.), that the joinder in this action of the claim against the second defendant company on a different cause of action (10th paragraph) was not a misjoinder of causes of action.

The Court may in its discretion order a separate trial of the additional claim on the further cause of action.

PEREIRA J. *obiter.*—An objection to an action by a defendant on the ground of misjoinder or non-joinder of parties is not to be taken by way of answer. It should be taken by motion or application at the earliest opportunity.

THE facts are set out in the judgment of the Acting Additional District Judge (Mr. K. Balasingham):—

One Soolemanjee insured with the plaintiff company for a sum of 5,000 dollars 500 bags of sugar shipped on board the ss. Delta belonging to the Peninsular and Oriental Company, Limited, who is the first

1914.

London and Lancashire Fire Insurance Co. v. P. & O. Company

defendants in this case. On the arrival of the ss. Delta at Colombo 310 bags of sugar were transferred to a barge belonging to the Ceylon Wharfage Company, who is the second defendant in this case, to be conveyed from the steamer to the shore. The barge collided with the ss. Delta and was sunk and the bags of sugar were lost. The plaintiff company paid the value of the sugar in terms of the marine insurance policy and got an assignment of the rights of the consignee. The plaintiff company seek in this action to recover from the defendants the value of the 310 bags of sugar. The case is now before me for the decision of the issues as to misjoinder of parties and causes of action, namely, issues 1, 2, 3, and 3A.

The cause of action against the defendants is set out in the plaint in those terms in paragraph 9:—

> "9. The loss of the said 310 bags of sugar was due to the negligence of the servants of the defendants jointly or to the negligence of the servants of one or other of the defendants, and if the said loss was not caused by the joint negligence of the defendants' servants, the plaintiff company, being unable to discover which of the defendants was liable for the said loss, sues them in the alternative."

The cause of action set out in the paragraph is one arising out of a tort, as stated by Mr. Hayley, the counsel for the plaintiff company.

A separate and alternative cause of action is pleaded against the second defendant in these terms in paragraph 10:—

> "10. As a separate and alternative cause of action against the second defendant company, the plaintiff company says the second defendant company as a common carrier received the said 310 bags of sugar to be carried from the ss. Delta to the shore, and that the said bags were lost in the course of transit while in the second defendant's custody, and the second defendant wrongfully failed to deliver the same."

The cause of action set out in paragraph 9 of the plaint is based on a tort. The cause of action set out in paragraph 10 of the plaint is based on a contract. It is alleged that second defendant, who is a common carrier, had not delivered the bags of sugar to plaintiff. It is clear that the causes of action set out in paragraphs 9 and 10, whether based on contract or tort, are not the same. The plaint itself says in paragraph 10 that the cause of action set out in it is " a separate and alternative cause of action."

Gower v. Couldrige [1] illustrates the principle that if you have a cause of action against A and B for a tort X, and you have quite a separate cause of action against B for the tort Y, then you cannot in one action bring claims against A and B in respect of both torts X and Y. (Per Romer L.J. in *Frankenbury v. Great Horseless Car Co.*[2])

Applying the same principle here, it is clear that plaintiff cannot join in one action the cause of actions set out in paragraphs 9 and 10 of the plaint. It may be that in England, after the amendment of the Rules and Orders in 1896, that separate causes of action, some of which affect some defendants and some all defendants, may be joined in one action if they arise out of the same transaction or series of transactions. But as our law stands at present, such a joinder of causes of action is not

[1] (1898) 1 Q. B. 352. [2] (1900) 1 Q. B. 504.

proper. Even in England " distinct causes of action against different defendants quite unconnected and not involving any common question of law or fact cannot safely be joined in one action. "

Can the plaintiff sue both the defendants in one action on the cause or causes of action set out in paragraph 9 ? It is clear that on the facts set out in paragraph 9 of the plaint plaintiff can bring one action against the two defendants in England.

But our Procedure Code is different from the English Rules and Orders in respect of the joinder of parties and causes of action.

Order XVI., rule 1, originally stood as follows: " All the persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative."

But in 1896 it was amended, and it now reads: " All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative."

Rule 4, which corresponds to section 14 of our Code (dealing with the joinder of defendants), stands as it originally did, but it was pointed out in (*1910*) *2 K. B.*, at page 367, that the alteration of rule 1 affected the scope of rule 4 as well. See also *Annual Practice, 1914, page 217.*

Section 14 of the Civil Procedure Code enacts:—

> " All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action, and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment. "

In the amended English Rule and in the new Indian Code (Order 1, rule 3) the words " in respect of the same transaction " have been especially inserted to enable actions of this kind to be brought. The words of the old Indian Act (in respect of the same matter) and of the old English Rule (" the right to any relief "), though somewhat wider than the words of section 14 of our Code, were yet found to be too narrow to admit actions of this kind.

In *Bullock v. London Great Omnibus Co.*[1] the facts were almost similar to the facts set out in paragraph 9 of the plaint. Plaintiff in that case, who was a passenger in a vehicle, sued two defendants—one the owner of the vehicle in which he was driving, and the other the owner of another vehicle—to recover, jointly or in the alternative, damages based on injuries caused by a collision of the two vehicles. The action was held to have been properly brought by reason of the amendment of Order XVI., which enabled not only the joinder of parties, but also of causes of action. (See also *9 N. L. R. 68, 16 N. L. R. 232,* and *Sadler v. Great Western Railway Co.*[2])

What is the cause of action set out in paragraph 9 of the plaint? It is the negligence of first defendant or of second defendant or of both. The collision is not the cause of action, nor is the loss sustained by the consignee the cause of action. It is true, as pointed out by Moncreiff J. in *4 N. L. R.* (at page 268), that we must interpret the term, "cause of action" by the definition of the term in our Code. Cause of action is defined in section 5 " as the wrong for the prevention or redress of

[1] (*1907*) *1 K. B. 264.* [2] (*1896*) *A. C. 450.*

1914.

London and Lancashire Fire Insurance Co. v. P. & O. Company

which an action may be brought, and includes . . . . the infliction of an affirmative injury." The first defendant's negligence perhaps resulted in the infliction of an injury, and the second defendant's negligence in the infliction of another, though the resulting loss cannot be apportioned.

What is the "wrong" complained of? The first defendant's negligent act and the second defendant's negligent act. The loss sustained by the plaintiff is not the "wrong" or the "infliction of the affirmative injury. In this case, though the damage sustained by the plaintiff may be one, the causes of action which have led to the damage are two, committed by two distinct persons (see *Thomson v. London Council* [1]). If the two defendants had acted in concert to cause damage to the plaintiff, he can bring one action against the two on the facts set out in paragraph 9.

But it cannot possibly be contended that the two defendants were acting in concert in this case. No doubt the word "jointly" is used in paragraph 9 of the plaint, but it is clear from the context that "jointly" is not used there in the sense of acting in concert.

It may also be noted that there is no provision in our Code similar to Order XVI., rule 7, of the English Rules and Orders. Even if that rule (7) can be read into section 14 of our Code, it is doubtful if that rule would apply to the facts of this case to justify the joinder of the causes of action set out in paragraphs 9 and 10. For, as Mr. Schneider, who appeared for the first defendant, pointed out, the authority quoted by Mr. Hayley himself (*4 Halsbury 95*) shows that the plaintiff has no doubt as to the liability of the second defendant as a common carrier. It is only when "plaintiff is in doubt as to the person from whom he is entitled to redress" he may ask the Court to adjudicate which, if any, of the defendants is liable.

I hold that there is a misjoinder of parties and causes of action.

The plaintiff must elect between the defendants. The name of the other defendant should be struck out and the plaint amended. If plaintiff elects to proceed against the second defendant (Wharfage Company), the causes of action set out in paragraphs 9 and 10 may be joined.

I order the plaintiff to pay the costs of the party whose name is to be struck out. The costs of the other party will abide the event.

Hayley, for plaintiff, appellant.

Bawa, K.C., for first defendant, respondent.

Samarawickreme, for second defendant, respondent.

Cur. adv. vult.

October 8, 1914. DE SAMPAYO A.J.—

His Lordship set out paragraphs 9 and 10 of the plaint, and continued:—

The defendants took exception to the constitution of the action, and two questions arose for consideration: (1) Whether the two defendants were rightly joined in respect of the first cause of action; and (2) whether it was within the competence of the plaintiff to

[1] *(1889) 1 Q. B. 840, at p. 844.*

make the claim against the second defendant alone on the second cause of action. There is no difficulty in holding that the District Judge was wrong in his opinion that the action was badly constituted so far as the first cause of action is concerned. That cause of action is the loss of the goods by reason of the negligence of both the defendants jointly or of the negligence of one or other of them, and section 14 of the Civil Procedure Code quite justifies the joinder of the two defendants and the claim of relief in the alternative. I therefore think the dismissal of the plaintiff's action as regards the first cause of action cannot be sustained.

But on the question as to the regularity of the joinder of the second cause of action, I regret I am unable to take the same view as my learned brothers. That cause of action is founded upon the alleged liability of the second defendant as a common carrier, whether there was negligence or not, and is distinct and separate from that alleged against both the defendants in the 9th paragraph of the plaint. Can it be joined in the same action? That question depends upon the construction to be placed on section 36 of the Code. Section 14, already referred to, is concerned only with the matter of joinder of parties, and leaves untouched the matter of joinder of causes of action, which is dealt with by section 36. The latter section is preceded by a provision (section 35, sub-section (1)) that in an action relating to immovable property no other claim, on any cause of action, shall be made except with the leave of the Court, except in certain specified cases, and by a further provision (section 35, sub-section (2)) that no claim by or against an executor or administrator or heir as such shall be joined with claims by or against him personally. Then, section 36 enacts that, "subject to the rules contained in the last section, the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly." I think it is correct to say that the general rule of law is that a plaintiff must bring one action for one cause of action, except so far as it is otherwise provided. Now, when section 36 permitted the joinder of several causes of action "against the same defendant or the same defendants jointly," did it also permit a plaintiff to unite distinct causes of action against separate defendants? To my mind it is impossible to say so. It is clear that the section only recognises the joinder of several causes of action against the defendant if there be one defendant, or against the defendants jointly if there be several defendants. This seems to be the construction put up by the Courts of India on the corresponding section 45 of the old Indian Procedure Code. The leading case on the subject is *Narasingh Das v. Mangal Dubey*.[1] See also *Muthappa Chetty v. Muthu Palani Chetty*,[2] and the comments on the rules in question in Ameer Ali and Woodroffe's *Civil Procedure*, *pp. 581 and 589*. The result of all the authorities is that joint

[1] *I. L. R. 5. All. 163.*

[2] *I. L. R. 27 Mad. 80.*

1914.

DE SAMPAYO A.J.

London and Lancashire Fire Insurance Co. v. P. & O. Company

interest is a condition precedent to the joinder of several causes of action against several defendants, the test being whether there is community of interest in the causes to be determined. In *Mullick Kefait v. Sheo Pershad*[1] it was held that there was no provision in the Indian Procedure Code allowing distinct causes of action against distinct sets of defendants (that is to say, causes of action in which the defendants are not all jointly interested) to be united in the same action. By reason of the example given under section 35 of our Civil Procedure Code there is one instance with us in which two causes of action against two separate defendants may be joined, but that is confined to the case of a suit relating to immovable property and to the causes therein specified. But this does not justify the reading of section 36 in any other sense than that above indicated. That section and the two following sections no doubt proceed to provide that in case of inconvenience the Court may order separate trials of the several causes of action, or may order any of such causes of action to be excluded, but that pre-supposes that the several causes of action have, in the first instance, been properly joined. Nor do the English rules of procedure, so much wider as they are than our rules, afford any support to the joinder of the two causes of action in this case. Order XVIII., rule 1, enacts that, subject to the other rules of that Order, the plaintiff may unite in the same action several causes of action. It has however been held as settled law that two separate causes of action cannot be charged against two defendants in one action. This is the principle of the decision in *Sadler v. Great Western Railway Company*.[2] In *Burstall v. Beyfus* [3] it is laid down that, where the cause of action against one defendant is totally disconnected with that against the other defendants, except so far as it arises out of any incident in the same transaction, there is a misjoinder, and that it is not the case contemplated by Order XVIII., rule 1. This decision seems to me exactly to fit the circumstances of this case.

I would set aside the judgment appealed against and send the case back for trial of the first cause of action, excluding the second cause of action and amending the plaint accordingly, if necessary.

There should be no order as to costs in either Court.

PEREIRA J.—

His Lordship set out the facts, and continued:—

The argument in appeal was practically confined to the questions raised by the defendants in their answers as to misjoinder of parties and causes of action. The plaintiff company claims the right to recover from the one defendant or the other in the alternative, and this right is based on the provision of section 14 of the Civil

[1] *I. L. R. 23 Cal. 826.* [2] *L. R. 1 C. A. 450.*

[3] *L. R. 26 Ch. D. 35.*

Procedure Code, which provides that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. The plaintiffs aver a further and special cause of action, based, as I understand it, on contract against the second defendant company. In the respective answers of the two defendant companies, objection, as already observed, was taken to the plaintiff's claim on the ground of the misjoinder of defendants and causes of action, and issues Nos. 1, 2, 3, and 3A were framed on this objection. Now, it seems to me that an objection on the ground of the misjoinder or non-joinder of parties is not a defence to the plaintiffs' claim to be taken by way of answer. Section 22 of the Civil Procedure Code enacts that such an objection should be taken at the earliest possible opportunity, and if it were not so taken, it should be deemed to have been waived by the defendants. The objection should have been taken by way of a motion or application to put the plaintiffs to their choice as to the name of the defendant to be struck off the record and of the defendant to be retained. Clearly the answer is no place for such an objection. Section 75 makes provision as to what an answer should contain. It provides that it should contain, *inter alia*, a statement admitting or denying the several averments of the plaint, and setting forth in detail plainly and concisely the matters of facts and law and the circumstances of the case upon which the defendant means to rely for his defence. There is no averment in the plaint as to joinder of parties, and misjoinder or non-joinder is no defence as a matter of law or of fact to the claim made by the plaintiffs. Anyway, under section 146 of the Code the answer has no place in the framing of issues, and no issue whatever should have been framed on the question of misjoinder. However, all the parties appear to have acquiesced in the irregular proceeding in the Court below, and I shall therefore confine myself to the points actually pressed in appeal. The two questions are: (1) Whether the plaintiffs had a right, under section 14 of the Code, to make a claim against the first defendant company, and to make the same claim in the alternative against the second defendant company; and (2) whether the plaintiffs had any right, under section 36 of the Code, to declare on an additional cause of action against the second defendant company. I find no difficulty whatever in answering both these questions in the affirmative. As regards the first, the position taken up by the plaintiffs is this. Our cause of action is the infliction of an affirmative injury on us by either of the defendant companies by reason of its negligence. We cannot say which company inflicted the injury. It is for the Court to determine that matter. We claim in the alternative. Clearly, such a claim can be made under section 14 of the Civil Procedure Code. Anyway, it is not necessary to labour the point, because the question involved has already been

1914.

PEREIRA J.

London and Lancashire Fire Insurance Co. v. P. & O. Company

authoritatively decided by this Court in the case of *Aitken, Spence & Co. v. The Ceylon Wharfage Company and the Bibby Steamship Company.*[1] With regard to the second question, I have found it difficult to understand the argument addressed to us. Section 36 of the Civil Procedure Code provides that the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly. It has been said that the word "same" here refers to a person who has already been made a defendant in an action. I do not think so. The word has to be understood with reference to the expression "several causes of action." It is merely intended to imply the sameness, so to say, of the defendants on the different causes of action referred to in the section. In the present case the plaintiffs have two causes of action against the second defendant company. They, therefore, have two causes of action against the same defendant, and if in place of the second defendant company there had been a group of individuals named in the plaint, it could have been said that the plaintiffs had two causes of action against the same defendants jointly. So that section 36 has no reference to any particular number of defendants already named in a particular action. It stands by itself, and may be applied to any one or more defendants in an action who are sought to be made liable alternatively to any other defendant in the same action. In other words section 14 and section 36 of the Civil Procedure Code may be combined and allowed simultaneous operation in any case. There is no doubt as to the possibility of such a proceeding resulting in great inconvenience, although I have not been able to perceive the possibility of inconvenience in the present case so far; but there is a safeguard against inconvenience in the latter part of section 36, which provides that the Court may in its discretion order a separate trial of any cause of action declared upon under that section, or make such other order as may be necessary or expedient for the separate disposal thereof, that is to say, may even refer the plaintiff to a separate action.

For the reasons given above I would set aside the order appealed from and allow the appeal with costs, without prejudice, of course, to the right of the District Judge to make order under the concluding portion of paragraph 2 of section 36, if in the course of the trial he find such order necessary or expedient.

ENNIS J.—

In this case objection was taken that the plaintiff's claim in the alternative against the first and second defendants was a misjoinder of defendants, and the joinder of a claim against the second defendant on a different cause of action was a misjoinder of causes of action. The only point reserved for the Full Court was the second. In my

[1] *(1900) 4 N. L. R. 263.*

opinion section 36 of the Code of Civil Procedure permits of a joinder of causes of action in the circumstances of this case. That section lays down the general rule with regard to joinder of causes of action, and is subject to the exceptions mentioned in section 35. It provides that separate causes of action may be united against "the same defendant or the same defendants jointly." It is argued for the appellants that this rule applies only when all the defendants are common to both causes of action, and that the rule does not apply where one or more of several defendants in one cause of action do not appear as defendants in the other. Indian cases have been cited in support of this contention, but in my opinion these cases are not in point, because the Indian Code does not contain the illustration found in section 35 of the Ceylon Code. The Ceylon Code must be read in the light of that illustration, which is an instance of a joinder of causes of action with the leave of the Court where only one defendant is common to both actions. The leave of the Court in section 35 is required in order that the exception found in that section to the rule laid down in section 36 may be set aside. It is not, in my opinion, intended that the Court should grant leave to join causes of action in a manner repugnant to section 36, and therefore section 36 should be read with the wider interpretation, so that the illustration in section 35 could not be repugnant to the principle of section 36 in any event. I am convinced that this is the right construction to be placed on section 36 because of the rule in section 33, which provides that every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects (note, not causes of action) in dispute.

I see no reason to restrict the operation of the example in section 35 to the particular case therein contemplated. The example was followed with approval in the Ceylon case *Fernando v. Waas*,[1] and is in accord with the practice in England.

I agree with the order proposed by my brother Pereira.

Set aside.

[1] 9 S. C. Cr 189.