

1958            *Present*: K. D. de Silva, J., and T. S. Fernando, J.

K. VETHAVANAM and two others, Appellants, and J. RETNAM,  
Respondent

*S. C. 300—D. C. Batticaloa, 1,005/L*

*Partition action—Rejection of plaint after acceptance—Legality—Partition Act, No. 16 of 1951, ss. 4, 7, 8, 70—Civil Procedure Code, s. 46.*

Where, in an action instituted under the Partition Act, No. 16 of 1951, the plaint, which had already been accepted by the Court, was subsequently rejected on the ground of non-disclosure of a party—

*Held*, that once a plaint is accepted and is not *ex facie* defective, the Court has no power to reject it subsequently under section 7, read with section 4, of the Partition Act, No. 16 of 1951.

<sup>1</sup> (1889) 9 S. C. C. 32.

<sup>2</sup> (1889) 1 S. C. R. 73.

**A**PPEAL from an order of the District Court, Batticaloa.

*Walter Jayawardene*, with *F. X. J. Rasanayagam*, for the plaintiffs-appellants.

*C. Ranganathan*, with *M. Shanmugalingam*, for the defendant-respondent.

*Cur. adv. vult.*

April 2, 1958. K. D. DE SILVA, J.—

This is a partition action instituted under the provisions of the Partition Act, No. 16 of 1951. The plaint was accepted by the Court on June 28, 1954, and thereafter the various steps required by the provisions of the Act were complied with and the case came up for trial on March 20, 1956.

In the plaint the plaintiffs who are three in number allotted to themselves  $\frac{7}{8}$ th shares of the land while the balance  $\frac{1}{8}$ th was given to the defendant. The defendant raised two points of contest at the trial. The 1st was in regard to the identity of the corpus to be partitioned and the other was the claim set up by him to the entire land based on a prescriptive title. According to the plaintiffs their mother Parapathipillai was entitled to an undivided  $\frac{1}{3}$ th share. In the pleadings it was stated that on the death of Parapathipillai her  $\frac{1}{3}$ th share devolved on her three children who are the plaintiffs. At the trial the 1st plaintiff in proving the pedigree stated in evidence-in-chief that on the death of his mother Parapathipillai her share devolved not only on her three children but that half of her rights was inherited by her husband who was alive. Thereupon the counsel for the plaintiffs moved to amend the plaint by adding the plaintiffs' father as a party to the action. This was opposed by the counsel for the defendant and the learned District Judge by his order dated March 23, 1956, held that the plaintiffs had failed to comply with the provisions of section 4 of the Partition Act and proceeded to reject the plaint with costs. This appeal is from that order.

Section 7 of the Act enacts that where a plaintiff fails to comply with the requirements of sections 4, 5 or 6 the Court may—

- (a) return the plaint so that the plaintiff may, then and there or within such time as may be fixed by the court, comply with those requirements, or
- (b) reject the plaint.

The section also provides that nothing contained therein shall affect the right of the Court to reject the plaint on any ground specified in section 46 of the Civil Procedure Code. Section 8 sets out the procedure to be followed by the Court on the acceptance of the plaint. The question for decision which arises on this appeal is whether the Court is entitled to reject a plaint, which has already been accepted by it, on the ground of

non-compliance with the provisions of section 4. The only section which makes provision for rejecting a plaint is section 7. Section 4 enacts that a plaint shall contain the particulars set out in clauses *a*, *b*, *c* and *d* of that section. The clauses which are relevant to this appeal are *c* and *d*. Clause *c* reads :—

“ The names and addresses of all persons who are entitled or claim to be entitled to any right, share, or interest to, of or in that land or to any improvements made or effected on or to that land, and the nature and extent of any such right, share, interest or improvements, so far as such particulars are known to the plaintiff or can be ascertained by him. ”

Clause (*d*) requires that a pedigree showing the devolution of title should be appended to the plaint. Admittedly, the name of the plaintiffs' father was not disclosed either in the plaint or in the pedigree filed therewith. It cannot reasonably be suggested that the plaintiffs were not aware that their father was a co-owner of this land.

It was contended on behalf of the plaintiffs that the Court is not entitled to reject a plaint once it has been accepted. Although the District Judge in his order does not refer to the section under which he made the order rejecting the plaint the counsel for the respondent conceded that this order was made under section 7. His contention was that the Court was entitled to reject a plaint under that section at any stage of the proceedings. In support of his argument he pointed out that at the stage the plaint is presented to Court for acceptance the Court has no material before it to reject the plaint on the ground of non-disclosure of parties. I agree with that submission to a certain extent. However, there may be instances where it is apparent *ex facie* from the plaint that the names of all the parties who are entitled to shares of the land are not set out. For example, if it was shown in the plaint that Parapathipillai, the plaintiffs' mother was entitled to  $\frac{1}{3}$ th share but there was no averment as to the devolution of that share the Court has material before it anterior to the acceptance of the plaint to hold that the provisions of section 4 (*c*) have not been complied with and reject the plaint under section 7. But once it was disclosed in the plaint that Parapathipillai's share devolved on her three children only, the court, it is true, has no material before it to reject the plaint before accepting it, on the ground that Parapathipillai's husband has not been made a party. However, it is incorrect, as indicated earlier, to say that in no case is the Court in a position to ascertain, before the acceptance of the plaint, that a necessary party has not been joined.

The scheme of the Act and the sequence of sections 7 and 8 would appear to indicate that the provisions of section 7 are to operate only before the acceptance of the plaint. There are other sections in the Act which confer the power on the Court to penalize a plaintiff who fails to comply with certain requirements other than those set out in sections 4, 5 and 6. However, the noncompliance with those provisions does not empower the Court to reject the plaint.

It is true that section 7 of the Act does not specifically restrict the power of the Court to reject the plaint to a stage before the acceptance of the plaint. But the sequence of this section and the sections which precede and follow it does show that the rejection of the plaint must be before its acceptance. This sequence illustrates the orderly evolution of a partition action.

The second proviso to section 46 of the Civil Procedure Code is analogous to section 7 (b) of the Partition Act and that proviso sets out circumstances under which a plaint is to be rejected. Section 46 of the Civil Procedure Code has been interpreted in several cases. In *Fernando v. Soysa*<sup>1</sup> it was held that once a plaint is accepted by a Court it cannot be returned for amendment. That decision was followed in *Mohideen v. Gnanaprakasan*<sup>2</sup>. In *Annappillai v. Sinnakunchi*<sup>3</sup> Garvin J. while citing those decisions with approval observed :—

“ Once the Court has accepted the plaint and directed it to be filed the provisions of section 46 can no longer be resorted to. ”

But there is another series of cases dealing with an exception to the principle enunciated in the three cases cited above. This exception is based on the principle of *nunc pro tunc*. That principle would apply where there is something *ex facie* defective in the plaint which necessitates its rejection, but due to an oversight, it has not been rejected. In *Read v. Samsudeen*<sup>4</sup> Bonser, C.J. stated :—

“ If the plaint is defective in some material point and that appears on the face of the plaint but by some oversight the Court has omitted to notice the defect, then the defendant on discovering the defect, may properly call the attention of the Court to the point, and then it will be the duty of the Court to act as it ought to have done in the first instance, either to reject the plaint or to return it to the plaintiff for amendment. ”

That case was followed in *Soysa v. Soysa*<sup>5</sup> and *Avva Ummah v. Casinader*<sup>6</sup>.

In the instant case the plaint is not *ex facie* defective. Therefore the *nunc pro tunc* principle is not applicable to it. The counsel for the respondent, however, submitted that section 7 of the Partition Act should not be construed on the analogy of section 46 of the Civil Procedure Code because, he alleged, that the former section is wider than the latter and the consequences of a partition decree were far-reaching in nature. I am unable to agree with that view. If a Court is entitled to reject a plaint at any stage of the proceedings it should have been clearly so stated in the Act itself. Great hardship is likely to be caused to innocent parties if a plaint is to be rejected at a late stage of the proceedings in the action. After the acceptance of the plaint if it is found that the plaintiff has failed

<sup>1</sup> (1896) 2 N. L. R. 40.

<sup>2</sup> (1910) 14 N. L. R. 33.

<sup>3</sup> (1937) 14 Times of Ceylon Law Reports 134.

<sup>4</sup> (1895) 1 N. L. R. 292.

<sup>5</sup> (1913) 17 N. L. R. 180.

<sup>6</sup> (1922) 24 N. L. R. 199.

to join a necessary party he can be penalized by entering an order for costs against him as contemplated by section 70 (1). Section 70 (1) reads :—

- (1) The Court may at any time before interlocutory decree is entered in a partition action add as a party to the action, on such terms as to the payment or prepayment of costs as the court may order,—
- (a) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or
  - (b) any person who, claiming an interest in the land, applies to be added as a party to the action.

If in the opinion of the Court a person should be made a party to the action it is the imperative duty of the Court to add him, according to the terms of this section.

In my view, once a plaint is accepted, the Court has no power to reject it, except on the principle of *nunc pro tunc*. Therefore I set aside the order appealed from and direct the District Judge to allow the plaintiffs to amend the plaint as desired by them. The defendant-respondent will pay the costs of this appeal to the plaintiffs.

T. S. FERNANDO, J.—I agree.

*Order set aside.*

---