1967 *Present :* H. N. G. Fernando, C.J., and Alles, J.

MUNICIPAL COUNCIL OF JAFFNA, Appellant, *and*
DODWELL & CO. LTD., Respondent

S. C. 116/64 (F)—D. C. Colombo, 52431/M.

Civil procedure—Amendment of issues—Scope—Incapacity of Court to permit additional issues based upon an unpleaded cause of action which has become prescribed—Action for recovery of price of goods—Plaint based solely upon contract of sale—Whether new issues based on a claim for unjust enrichment can be framed when such claim has become prescribed—Civil Procedure Code, ss. 40, 75, 93, 146.

Contract with Municipal Council—Failure to comply with statutory formalities imposed by the Municipal Councils Ordinance, ss. 228, 229—Whether equitable relief can be claimed on ground of unjust enrichment.

Section 146 of the Civil Procedure Code does not permit a trial Court to frame issues upon an unpleaded cause of action if that cause of action has become prescribed. Accordingly, when an action is instituted claiming solely the price of goods delivered upon a contract of sale of goods, the plaintiff cannot be permitted to raise at the stage of trial new issues based upon an unpleaded cause of action relating to undue enrichment to the extent of the value of the goods delivered, if such cause of action has become prescribed at the stage when the additional issues relating to it are sought to be raised.

Jayawickreme v. Amarasuriya (20 N. L. R. 289) discussed.

Quaere, whether equitable relief on the ground of unjust enrichment can be claimed upon a contract with a Municipal Council, despite failure to comply with the requirements of sections 228 and 229 of the Municipal Councils Ordinance that the contract should have been embodied in writing and sealed with the Common Seal of the Council.

APPEAL from a judgment of the District Court, Colombo.

In this action for the recovery of a sum of Rs. 13,935·50 alleged to be the price of goods sold and delivered upon certain contracts of sale, the defendant, a Municipal Council, pleaded *inter alia* that the alleged contracts were void and/or unenforceable because they did not comply with the requirements of sections 228 and 229 of the Municipal Councils Ordinance in that they were not embodied in writing and were not duly signed, sealed and sanctioned. In the course of the trial the plaintiff was permitted by the Court to frame additional issues as to whether the defendant Council received the benefit of the said goods and, if so, what amount was due to the plaintiff on account of unjust enrichment. It was admitted that a separate action for relief under the doctrine of unjust enrichment was prescribed three years after the delivery of the goods and

1*——K 2322—2,255 (3/71)

would not have been maintainable at the time when the plaintiff sought to frame the additional issues. Nor was it suggested that an amendment of the plaint could have been properly allowed. But it was contended for the plaintiff that the new issues arose on the pleadings as they stood, and that the trial Judge rightly allowed them under section 146 of the Civil Procedure Code.

C. Ranganathan, Q.C., with *K. Nadarajah*, for the substituted defendants-appellants.

H. V. Perera, Q.C., with *B. J. Fernando*, for the plaintiff-respondent.

Cur. adv. vult.

August 28, 1967. H. N. G. FERNANDO, C.J.—

The plaint in this action was filed on 17th March 1961 and was amended on 17th June 1961. The plaint as amended (read with the account particulars filed therewith) averred that, on certain dates between 10th November 1959 and 1st April 1960, the plaintiff sold and delivered to the defendant certain goods at the price of Rs. 13,935·50, and that the defendant had failed to make payment of the said sum. The plaint continued to state that a cause of action had accrued to the plaintiff to sue the defendant for the recovery of the said sum. In the prayer, the plaintiff asked " for judgment against the defendant for the said sum of Rs. 13,935·50 with legal interest thereon ".

The defendant, the Municipal Council of Jaffna, filed answer on 17th October 1961, and pleaded, *inter alia*, that—

" (*a*) the alleged contracts sued on by the plaintiff were for the supply of articles to the Council and involved an estimated expenditure of more than one thousand five hundred rupees ;

(*b*) in the absence of any writing or writings embodying the said contracts and signed by the Mayor and the Municipal Commissioner and sealed with the Common Seal of the Council the alleged contracts are void and/or unenforceable in law and/or do not bind the Council ;

(*c*) the alleged contracts were not sanctioned by the Council nor were the provisions of Sections 228 and 229 of the Municipal Councils Ordinance No. 29 of 1947 complied with ; and the said contracts are therefore void and/or unenforceable in law and/or do not bind the Council. "

Issues were framed on 11th June 1962 on the basis of the pleadings as above summarised. Thereafter the plaintiff's first witness was called,

but his evidence was interrupted on 31st January 1964 by an application by plaintiff's counsel to frame the following additional issues :—

" (9) Did the plaintiff sell and deliver and/or supply to the defendant goods as set out in the account particulars marked A ?

(10) If issue 9 is answered in the affirmative—

(*a*) Did the defendant Council receive the benefit of the said goods ?

(*b*) If so, what amount is due to the plaintiff on account of unjust enrichment ?

(*c*) In the alternative is the plaintiff entitled to an order to recover the said goods from the defendant ? "

The defence objected to these additional issues on the ground that they did not arise on the pleadings, and could only be raised if the plaint was amended. It was further objected that such an amendment should not be permitted because it would enable the plaintiff to rely upon a new cause of action which at the stage of amendment was already prescribed. The learned trial Judge over ruled these objections and entertained the new issues without first ordering an amendment of the plaint. In appeal from the Judge's order, counsel for the defendant has argued in the circumstances that the trial Judge erred in law in allowing the new issues to be framed, because they involve a cause of action not pleaded in the plaint.

It has been common ground at the stage of appeal that an action for the relief available under the doctrine of unjust enrichment in the circumstances of the present case would be prescribed upon the expiry of a period of 3 years from the time of the delivery of the goods to the defendant. It is not therefore disputed that a separate action by the plaintiff for such relief would not have been maintainable at the time when the plaintiff sought to frame the additional issues. It follows that, if an amendment of the plaint had been necessary in order to enable the plaintiff to raise the additional issues, the amendment should not have been allowed and the new issues should not have been framed. Neither at the trial, nor in appeal, was it suggested that such an amendment of the plaint could have been properly allowed.

But counsel for the plaintiff has argued that the new issues properly arise on the pleadings as they stand, and that the trial Judge rightly allowed them under Section 146 of the Code. I will attempt to set out the pith of the argument. The plaint no doubt was intended only to contain the averments necessary in an action for the enforcement of a buyer's obligation under a contract of sale : it averred a sale and delivery of goods to the defendant and a failure of the defendant to pay the sum due as the purchase price ; it further claimed the relief available to a seller under a contract of sale, namely the right to a decree ordering the buyer to pay that sum, and it prayed for that relief. But when the

defendant pleaded that the contract of sale was void, there was in dispute between the parties, not (or not only) the question whether the defendant was liable to perform an obligation under a contract of sale, but (or but also) the question whether the defendant, having accepted delivery of goods under a void contract, had been unjustly enriched thereby, and was accordingly liable to perform an obligation accruing under the doctrine of unjust enrichment. It was argued that the requirements of Section 40 of the Code were satisfied : that the plaint contained a statement of the facts and circumstances constituting the cause of action, i.e., the refusal of the defendant to fulfil his obligation to compensate the plaintiff on the basis of an unjust enrichment derived by the defendant ; and that a demand for such compensation had been made in the plaint, when the prayer asked for a decree for the payment of the sum of Rs. 13,935·50.

In testing the validity of this argument, the prudent course for me is to first decide what would be the minimum content of a plaint designed, in the circumstances of this case, to sue the defendant upon a cause of action consisting of his failure to perform an obligation alleged to arise under the principle of law which is here invoked. (I will omit formal details.) What are " the circumstances constituting the cause of action " of which there must be a statement ? (Section 40 (*d*).) These are in my opinion—

(1) that the plaintiff delivered goods to the defendant ;

(2) that the delivery and acceptance of the goods purported to be under a valid contract of sale ;

(3) that there was not in law a valid contract of sale ;

(4) that by accepting and retaining the goods the defendant derived a benefit which it is unjust for him to retain ;

(5) that the defendant is therefore liable to restore the goods to the plaintiff or compensate the plaintiff to the extent of the value of the benefit derived.

There must further be in the plaint a demand of the relief claimed, in this context a demand for the restoration or compensation mentioned at (5) above.

The " circumstances " which I have mentioned at (1) and (2) above are also circumstances which need to be stated in a plaint in an action to enforce a buyer's liability under a contract of sale. They were perforce stated in the plaint in the instant case. But none of the other circumstances which I have listed are stated in this plaint ; and these are the very circumstances, a statement of which distinguished a plaint which pleads the cause of action based on unjust enrichment. I doubt very much whether any counsel who drafts a plaint in terms of the present

one, or any other counsel who reads such a plaint filed against the defendant, would imagine that its terms would entitle a Judge to frame an issue that the defendant was in some manner unjustly enriched.

Indeed, the argument of plaintiff's counsel is certainly not based upon the contents of the plaint alone. His argument depends very much on the defendant's plea that the alleged contract was void. The fact thus pleaded is said to establish the existence of a new dispute between the parties, namely a dispute as to the defendant's liabilities arising on the basis of an unjust enrichment.

There are at least two distinct grounds which compel me to reject this argument. The first is that Section 40 of the Code requires the *plaint* to state the circumstances which constitute the pleaded cause of action. If the cause of action is dependent on the nullity of a contract, then the plaint must aver the fact of nullity. The plaintiff cannot claim that he must be regarded as having duly averred that fact because the defendant has subsequently averred it. A statement in an answer, in denial of contrary statement in a plaint, cannot in common sense be regarded as the plaintiff's statement for the purposes of Section 40 (*d*). Nor can it be said that the plaint contained a demand for the relief available under the doctrine of unjust enrichment, namely restoration of the actual benefit derived, i.e., the goods or, in the alternative, the value of the benefit. The plaint prayed only for the sum of Rs. 13,935·50, which represents, not the benefit derived, but the contractual purchase price of the goods.

The defendant's plea that the contract sued upon was void was a denial in terms of Section 75 of the Code of the essential fact upon which the plaintiff's action depended. Had the plaintiff stated to Court that he accepted that denial as correct, then his action had to be dismissed. He did not so state in this case, instead the very denial was put in issue as a matter in dispute. How then can it be said that the Judge should have framed an issue on the basis that the denial had been accepted by the plaintiff as correct ? A dispute on the question whether the defendant is liable to make restitution under the doctrine of unjust enrichment could not arise unless and until the plaintiff, by amendment of his pleadings, set out new circumstances alleged to give rise to that liability.

I must reject for these reasons the plaintiff's contention that the new issues numbered (9) and (10) a, b and c were properly framed at the trial.

Peiris v. Municipal Council, Galle [1] supports very strongly the admission by the trial Judge of the additional issues. In that case, a firm of architects had been employed by the Municipal Council of Galle for the purpose of the construction of a Town Hall. A total sum of Rs. 84,000 became due to the architects as remuneration for work actually performed, and a part of this sum was paid by the Council, leaving a balance of about Rs. 30,000. The architects sued the Council for this amount and

[1] *(1963) 65 N. L. R. 555.*

the trial Court held that the amount would have been due to them. But the action was dismissed on the ground that the contract was void as it was not under Seal. Nevertheless it was held in appeal that the trial Judge could and should have framed an issue of "unjust enrichment" on the part of the defendant, and the case was remitted to the trial Court for that issue to be tried.

The question whether the issue based on alleged unjust enrichment could arise on the plaint in that case was disposed of by Tambiah J. in the following paragraph :—

> " The plaint has been drafted in such a manner that all the averments necessary to raise the issue of undue enrichment are contained therein. The duty of raising the necessary issues for a just decision of a case rests on the Judge. In the instant case, it is with reluctance that the learned District Judge has dismissed the plaintiff's claim. He has held that since the plaintiffs had performed their part of the contract without any negligence and had given the defendant the benefit of a Town Hall, it would be a travesty of justice if some relief is not given to the plaintiffs.

In *Jayawickreme v. Amarasuriya*[1] Lord Atkinson, who delivered the opinion of the Privy Council posed the question 'Are they' (the parties to the case) 'to be denied justice because their pleader has chosen to overstate his client's case, and the Judge to frame an issue embodying that overstatement ? '. In that case, the relevant issue was framed by their Lordships of the Privy Council in granting relief to the appellant. In the instant case too, the learned District Judge should have framed the issue and should have tried it."

In *Jayawickreme v. Amarasuriya*[2], the cause of action quite plainly stated in the plaint was the failure of the defendant to fulfil a promise made by him to make certain cash payments to the plaintiff. In setting out the circumstances which led to the making of the promise, the plaint had earlier stated—

(1) that the defendant had held certain property under an alleged trust for the plaintiff ;

(2) that the plaintiff had threatened an action against the defendant to enforce the alleged trust obligation ; and

(3) that the promise sued upon was made in consideration of the plaintiff's agreement not to institute the threatened action based on trust.

[1] *(1918) 20 N. L. R. at 297.*

[2] *(1918) 20 N. L. R. 289.*

The Courts in Ceylon held that—

(*a*) there had been no trust as alleged,

(*b*) the threatened action would have been one based on an invalid claim of trust, and the compromise of such a claim was not *justa causa* for the defendant's promise,

(*c*) the promise was made out of generosity or of moral duty, and as such was not made for *justa causa*.

On these grounds the action was dismissed in Ceylon.

The Privy Council agreed with the finding at (*a*) above, but held that both the compromise of an invalid claim and the motive of generosity or moral duty constitute *justa causa* under Roman Dutch Law. The promise sued upon was therefore enforceable. Their Lordships stated :

> " that the female plaintiff had long asserted a claim to the land the deceased defendant had derived from his father ; that there was a dispute between them as to whether this claim was good ; that she threatened to institute proceedings to enforce it, and that the deceased defendant agreed to compromise with her by paying her Rs. 150,000 on the instalments described in satisfaction of this claim. The validity of the claim, or the ultimate success of the suit brought to enforce it, is entirely beside the point. On those facts the plaintiffs were, in their Lordships' opinion, entitled to succeed in the present action. The question is, Are they to be denied justice because their pleader has chosen to overstate his clients' case, and the Judge to frame an issue embodying that overstatement ? "

Every circumstance mentioned in this statement of their Lordships' decision had been pleaded by the plaintiff in her plaint. The decision therefore gives no semblance of approval to the framing of issues on matters not involved in the plaintiff's pleadings.

Some observations were, however, made concerning the issue to be decided :—

> " If the learned District Judge . . . had amended the issue so as to suit the facts proved, he should, in their Lordships' opinion have given a decree in favour of the plaintiff for the sum sued for. "

This was only a reference to the " overstatements " in the pleadings and in the issues framed, i.e., the superfluous averment that there had been originally a trust of property ; and the superfluous addition (to the necessary averment of the compromise of a threatened action) that the threatened claim was a valid claim of trust. These superfluous averments, their Lordships held, did not alter the fact that the plaintiff had proved her case, i.e., a promise to pay money in consideration of the compromise of a claim in a threatened action, since the legal validity of the claim was a superfluous matter, the issue should have been amended in order to excise therefrom that superfluous matter. Their Lordships

surely did not intend to approve the framing of *new* issues, as the plaintiff in the present case has sought to do—that is issues additional to those previously framed. They contemplated only the amendment of an issue, by retaining the relevant parts of an existing issue and deleting what was irrelevant or " over stated ".

In substance, the issue which had been framed at the trial in *Jayawickreme v. Amarasuriya* was :—

(*a*) Did the defendant promise to pay the plaintiff Rs. 180,000 ?

(*b*) Was the promise made in consideration of the plaintiff's refraining from instituting an action against the defendant ?

(*c*) Was the threatened action one for the enforcement of an alleged trust ?

(*d*) Was the alleged trust valid in law ?

The decision of the Privy Council was that (*a*) and (*b*) had to be answered in the affirmative, and that the plaintiff was in law entitled to judgment on those answers. The trial Judge should therefore have deleted from the issues the " over-stated " points (*c*) and (*d*), the decision of which could have no bearing in law upon the results of the action.

I am satisfied that *Jayawickreme v. Amarasuriya* is in no way a precedent for the framing in the present action of the new issues accepted by the trial Judge. I must add my confident opinion that the judgment decided much less than is sometimes claimed for it.

Counsel for the plaintiff relied also on the judgment of the Privy Council in *Bank of Ceylon v. Chelliahpillai*[1]. The defendant had mortgaged certain goods with the Bank by a bond of 1951 to secure future advances. In 1952, he mortgaged a land as additional security for the due payment of the amount then due to the Bank. The earlier bond contained the usual personal covenant for repayment, but the second bond did not.

The Bank sued the defendant upon the second bond only, but prayed for judgment against the defendant in the sum due and also for a hypothecary decree for the sale of the land mortgaged by this bond. In answer, the defendant pleaded that " no claim for the payment of the sum of money can be made on the second bond ".

As to this plea in the answer, the Privy Council made the following observations :—

" The Civil Procedure Code gives in Section 93 ample power to amend pleadings. Moreover, the case must be tried upon the 'issues on which the right decision of the case appears to the Court to depend '

[1] *(1962) 64 N. L. R. 25.*

and it is well settled that the framing of such issues is not restricted by the pleadings; see Section 146 of the Code, *Attorney-General v. Smith*[1] and *Silva v. Obeysekera*[2]. By either of these means a point that is interesting and difficult but far removed from the merits of the case might have been taken out of the controversy."

As I understood it, their Lordships here suggested that the omission to plead and sue upon the personal covenant *might* have been rectified by an amendment of the plaint under Section 93; or else that the Court *might* have framed an issue based on the personal covenant in the earlier bond, despite the omission in the pleadings. I respectfully agree that the first course suggested could in all probability have been adopted without infringement of the principle that an amendment will not be permitted if it introduces a new cause of action which has become prescribed. As to the second course suggested, I note for present purposes that their Lordships did not even contemplate an amendment of the issues at the stage of appeal. They instead affirmed the decisions in Ceylon that the plaintiff Bank could not obtain a decree on the personal covenant, and was entitled only to a decree upon the hypothecation actually pleaded in the plaint. I cannot think that their Lordships intended to state, even *obiter*, that Section 146 permits a trial Court to frame issues upon an unpleaded cause of action, if that cause has then become prescribed.

To return now to the case of *Peiris v. Municipal Council, Galle*, we were referred to the plaint filed in that case. Counsel for the defendant has pointed to certain features in the plaint which may have led Tambiah J. to think that it contained a statement of circumstances appropriate to constitute a cause of action based on unjust enrichment. With great respect, I am unable to construe that plaint in the same sense. The judgment contains no explanation of the reasons in favour of that construction or of the reasons for holding that the cause of action based on unjust enrichment had not become prescribed—both of which matters are of fundamental importance in connection with the framing of new issues.

I must add that I do not concur in the opinion which perhaps influenced the decision in *Peiris v. Municipal Council, Galle*, namely that it would be a travesty of justice to deny some relief to a plaintiff whose claim against a Municipal Council is based on a contract not under seal. The requirement of the seal being one imposed by Statute, a person who acts on the faith of such a contract has only himself to blame for ignoring the law. It is not clear to me therefore that such a person's hands are so clean that they are fit to receive equitable relief. But in the instant case, it is not necessary for me to decide whether or not the doctrine of unjust enrichment does apply to such cases.

The appeal is allowed with costs, and the order allowing the new issues 9 and 10 is set aside. The trial will proceed on the other issues.

[1] *(1905) 8 N. L. R. 229 at 241.* [2] *(1922) 24 N. L. R. 97 at 107.*

Post Scriptum—This judgment was ready for delivery in October, 1966. But delivery was delayed on application by Counsel that an order for substitution of parties may be necessary. Such an order was made on 2nd August, 1967.

ALLES, J.—I agree.

Appeal allowed.