

HANAFFI
v.
NALLAMMA

SUPREME COURT,
G. P. S. DE SILVA, CJ,
PERERA, J. AND
SHIRANI BANDARANAYAKE, J.
S.C. APPEAL NO. 157//96
C.A. APPEAL NO. 717/91 (F)
D.C. RATNAPURA 4879/RE
JUNE 18, 1997
OCTOBER 6, 16, 1997.

Landlord and Tenant – Addition of a party – Pleadings and issues – Civil Procedure Code – S. 146 (2).

The Plaintiff sued the 1st defendant (tenant) for ejection. As the 1st defendant had left the Island, summons could not be served on him but was affixed to the premises. On the summons returnable date the 2nd defendant appeared and claimed to be the tenant, and applied to be added as a defendant. He was added on the order of the court. He filed answer. The plaintiff filed replication denying the 2nd defendant's claims and praying for his ejection. At the trial, issues were raised on behalf of the plaintiff and the 2nd defendant. In the mean time the 1st defendant had died whereupon the court permitted the case to proceed against the 2nd defendant in terms of s. 393 of the Civil Procedure Code. After trial the District Judge entered judgment for the plaintiff. It was urged on behalf of the 2nd defendant that the plaint did not disclose a cause of action against the 2nd defendant and that the judgment against him was bad in the absence of an amended plaint.

Held:

There was no reference to the 1st defendant in the issues; and there was no issue as to whether the plaint disclosed a cause of action. Once issues are framed the case which the court has to hear and determine becomes crystallised in the issues and the pleadings recede to the background. On the basis of the issues raised by the parties the crucial issue was whether the 2nd defendant was tenant under the plaintiff; and that in the light of the issues framed and the evidence on record the District Court rightly entered judgment for the plaintiff against the 2nd defendant.

APPEAL from the judgment of the Court of Appeal.

Faisz Musthapha, PC with Sanjeeewa Jayawardena for the plaintiff-appellant.

A. K. Premadasa, PC with C. E. Silva for substituted 2nd defendant-respondent.

Cur. adv. vult.

23rd October, 1997

G. P. S. DE SILVA, CJ

The plaintiff instituted these proceedings on 14. 7 81 for the ejection of the 1st defendant (tenant) on the grounds that he had ceased to occupy the premises in suit without reasonable cause for a continuous period of not less than 6 months (section 28 of the Rent Act) and that he was in arrears of rent for a period exceeding 3 months.

On 10.11.81 the Fiscal informed court that the 1st defendant had left the Island and therefore summons could not be served on him but was affixed to the front wall of the premises. On the same day one P. Kandasamy appeared in court and stated that he was the tenant of the premises in suit and moved that he be added as a defendant. The plaintiff objected to this application. The court, however, made order allowing the application and P. Kandasamy was added as the 2nd defendant. The District Court fixed the case for *ex parte* trial against the 1st defendant and permitted the 2nd defendant to file his answer.

The 2nd defendant filed his answer on 6. 10. 82. In his answer the 2nd defendant specifically answered the averments in the plaint and further pleaded that the 1st defendant left the premises in 1969, and that he (2nd defendant) paid rent to the plaintiff till 1973; thereafter he deposited the rent with the local authority until 1977. In short, his position was that from 1969 he succeeded to the tenancy and paid rent to the plaintiff. He further pleaded that he spent Rs. 7,500/- for the repairs of the premises on account of which he claimed a *jus retentionis*. What is more, he prayed for an order of court to enable him to deposit in court the sum of Rs. 5,100/- being rent for the period December 1977 to December 1982.

Thereafter the plaintiff filed a replication dated 7. 2. 83 pleading, inter alia, (a) that the 2nd defendant was never a tenant under the plaintiff, (b) that the 2nd defendant was in forcible and unlawful occupation of the premises. In his replication the plaintiff prayed for the ejectment of the 2nd defendant and for restoration of the premises to him. It is to be noted that no amended plaint was filed although the court made order adding P. Kandasamy as the 2nd defendant.

At the trial on 21. 4. 88 (*ex parte* against the 1st defendant) issues were raised on behalf of the plaintiff and the 2nd defendant. The plaintiff gave evidence, evidence was led on his behalf, and the plaintiff's case was closed on 21. 4. 88. The trial was resumed on 17. 1. 90 and on the day the 2nd defendant produced the death certificate of the 1st defendant which was marked as VI. Counsel for the plaintiff indicated to court that he was not taking steps to substitute any person in the room of the deceased 1st defendant. His position was that the case could proceed against the 2nd defendant in terms of section 393 of the Civil Procedure Code. The court made order that the plaintiff was entitled to proceed against the 2nd defendant only. When the trial was resumed on a subsequent date counsel for the 2nd defendant informed court that he was closing his case without leading any other evidence. Written submissions were filed and the District Court entered judgment *ex parte* against the 1st defendant (apparently by an oversight) and entered judgment in favour of the plaintiff against the 2nd defendant. The 2nd defendant appealed against the judgment to the Court of Appeal. The Court of Appeal allowed the appeal and set aside the judgment of the District Court. The plaintiff had now preferred an appeal to this court against the judgment of the Court of Appeal.

Mr. A. K. Premadasa, for the 2nd defendant-respondent strenuously contended that the Court of Appeal was correct in setting aside the judgment of the District Court. Counsel submitted that in an action for ejectment where a party is added, it is essential that an amended plaint should be filed and that in the amended plaint there has to be a prayer for the ejectment of the added party. The plaint as it stood sought no relief against the 2nd defendant. Counsel further urged that a replication cannot take the place of an amended plaint and that it was not open to the plaintiff to seek ejectment of the 2nd defendant by way of a replication. Counsel stressed that in the plaint there is no prayer for the ejectment of the 2nd defendant; nor was

there a cause of action disclosed in the plaint against the 2nd defendant. Mr. Premadasa submitted that the Court of Appeal was correct when it held that "judgment could not have been entered against the 2nd defendant as the plaint stood without amendment. Court cannot grant relief except that prayed for in the plaint unless on the agreement of parties."

Mr. Musthapha for the plaintiff-appellant emphasized that at no stage was an objection taken to the filing of the replication; that it was the 2nd defendant who sought to be added as a party to the proceedings and the court allowed the addition despite the objections taken on behalf of the plaintiff. Mr. Musthapha urged that although there may be an irregularity in the manner of pleading, yet the replication became a part of the pleadings in the case **since no objection was taken by the 2nd defendant**. Mr. Musthapha further pointed out that the replication specifically referred to the averments in the answer and in the prayer the relief prayed for was, inter alia, the ejection of the 2nd defendant. The 2nd defendant not having objected to the filing of the replication, cannot now take up the position that the District Court did not have jurisdiction to enter judgment granting the relief prayed for in the replication.

It seems to me that the submissions of Mr. Premadasa in regard to the pleadings amount to no more than an irregularity in the pleadings. It is certainly not a matter which constitutes a bar to the plaintiff maintaining the action. The case proceeded to trial on the issues and therefore it is very relevant to consider the issues that were raised at the trial – a matter which was not adequately considered by the Court of Appeal.

The plaintiff raised the following issues:

- (1) Is the 2nd defendant the tenant of the plaintiff?
- (2) If issue No. (1) is answered in the negative is the plaintiff entitled to eject the 2nd defendant?

The issues raised on behalf of the 2nd defendant read thus:

- (a) Was the 2nd defendant accepted by the plaintiff as his tenant?

- (b) Did the plaintiff refuse to issue receipts for the payment of rent made to him by the 2nd defendant?
- (c) Does the conduct of the plaintiff preclude him from refusing to accept the 2nd defendant as his tenant?
- (d) In the event of the above issues being answered in favour of the 2nd defendant, can the plaintiff have and maintain this action?
- (e) in any event has the 2nd defendant effected repairs to the premises in suit at his own expense as averred in paragraph 6 of his answer?
- (f) If so, is he entitled to recover the said expenses from the plaintiff and to continue to occupy the premises until payment is made.

It is seen that there is no reference at all to the 1st defendant in the issues. What is more, there is no issue as to whether the plaint disclosed a cause of action. What is relevant for present purposes and what needs to be stressed is that once issues are framed, the case which the court has to hear and determine become crystallized in the issues. It is the duty of the court "to record the issues on which the *right decision* of the case appears to the court to depend" (section 146 (2) of the Civil Procedure Code). Since the case is not tried on the pleadings, once issues are raised and accepted by the court the pleadings recede to the background. The Court of Appeal was in error in harking back to the pleadings and focusing on the "validity" and the "legality" of the pleadings.

On a reading of the issues it is clear that the crucial issue in the case was whether the 2nd defendant was the tenant under the plaintiff. The District Court rightly held that there was no evidence on record in support of the 2nd defendant's claim of tenancy under the plaintiff. Viewed in the light of the issues framed and the evidence on record the District Court rightly entered judgment for the plaintiff against the 2nd defendant. The question whether an amended plaint should have been filed and whether it was permissible for the plaintiff to file a replication are now not material and do not really arise for consideration on this appeal.

For these reasons the appeal is allowed, the judgment of the Court of Appeal is set aside and the judgment of the District Court (except the *ex-parte* judgment against the 1st defendant which is a nullity) is restored. (The 2nd defendant died while the appeal was pending and the widow has now been substituted).

On a careful consideration of all the facts and circumstances, I direct writ of ejectment not to issue till **30th April 1999**. The plaintiff is entitled to take out writ without notice after 30th April 1999 and to be placed in possession of the premises in suit. I make no order as to costs.

PERERA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal allowed.
