MUTHUCUMARANA
v.
WIMALARATNE AND ANOTHER

COURT OF APPEAL
WIGNESWARAN, J.,
JAYAWICKREMA, J.
C.A. NO. 282/97
D.C. COLOMBO NO. 4763/SPL
NOVEMBER 06, 1998

Civil Procedure Code – S. 75 (e) – Property held in trust – Transfer invalid – Deed a forgery – Damages – Claim in Reconvention by way of a motion – Adverse claims set up by defendants inter se. – Motion.

The plaintiff-respondent instituted action against the first defendant-petitioner and second defendant-respondent seeking a declaration that the 1st defentant held the premises in trust for him and further sought to expunge the registration of the deed from the books maintained by the Registrar of Lands. The first defendant-petitioner claimed damages from the second defendant-respondent.

The second defendant-respondent objected to the claim in reconvention by way of a motion. The District Court upheld the objection and dismissed the first defendant-petitioner's claim for relief against the 2nd defendant-respondent.

Held:

01. There is nothing in the CPC which prohibits a party to an action filing a motion at any stage and claiming an appropriate relief.

02. The claim in reconvention has been designed by law to set off against the plaintiff's demand – the answer with its claim in reconvention should have the same effect as a plaint in a cross-action.

Per Wigneswaran, J.

> "Opposing parties who are at variance with each other are allowed to set off their individual claims against each other in the same action, there is no express provision in the CPC holding out that such a right of set off extends to defendants *inter se.*"

03. The determination of the conflict of interest between the defendants *inter se* must necessarily correlate to the determination of the primary claim by the plaintiff.

04. Unless the conflict between the defendants *inter se* has to be resolved in order to give the plaintiff the relief he claims such adverse claim need not be determined in the same action.

Per Wigneswaran, J.

"Claim for damages which the first defendant has preferred against the second defendant need not be determined to ensure that the plaintiff respondent obtained his relief."

APPLICATION for Leave to Appeal from the Order of the District Court of Colombo.

Cases referred to:

1. *Senaratne v. Perera* – 26 NLR 225.
2. *Kanagammah v. Kumarakulasingham* – 60 NLR 529.
3. *Kandavanam v. Kandasamy* – 57 NLR 241 at 242.
4. *Fernando v. Fernando* – 47 NLR 208 at 209.
5. *Banda v. Banda* – 72 NLR 475 at 476, 477.
6. *Robert Dissanayake and another v. People's Bank and another* – 1995 – 2 SLR 320.

T. Wijegunawardena for first defendant-petitioner.

S. Mahenthiran for second defendant-respondent.

Ikram Mohamed with *Ms. A. T. Shyama Fernando* for plaintiff-respondent.

Cur. adv. vult.

November 19, 1998.

WIGNESWARAN, J.

The plaintiff-respondent instituted DC Colombo Case No. 4763/Spl against the first defendant-petitioner and second defendant-respondent praying, *inter alia,* for declarations –

(i) that the first defendant held the premises in suit described in the schedule to the plaint in trust for him.

(ii) that the first defendant had no manner of right, title nor interest to transfer the said premises to the second defendant by deed No. 459 dated 19.10.1994 attested by T. D. Ranasinghe, NP, and

(iii) that deed No. 459 was an invalid deed and of no force in law and therefore its registration should be expunged from the books kept by the Registrar of Lands.

The first defendant-petitioner filed answer on 11.8.97 pleading that he was not a party to the execution of the said deed No. 459 and that such deed was a forgery enacted by the second defendant-respondent. Since he had to leave a lucrative job in the Middle East and come back to Sri Lanka due to the said action being filed, he claimed, *inter alia*, Rs. 100,000 as damages from the second defendant-respondent.

The second defendant-respondent objected to the first defendant-petitioner's claim in reconvention by way of a motion dated 26.8.1997.

The District Judge, Colombo, by order dated 16.10.97 upheld the objection and dismissed the first defendant-petitioner's claim for relief against the second defendant-respondent.

This is a leave to appeal application against the said order. The learned counsel for the second defendant-respondent has submitted that leave should be refused.

The learned counsel for the first defendant-petitioner has submitted as follows :

1. The second defendant-respondent could not have in law moved Court for relief by motion before filing his answer.

2. Since there is no conflict of interests between the plaintiff and the first defendant the latter's claim-in-reconvention should have been allowed. Allowing the claim would also avoid multiplicity of actions.

3. It is open to Court to adjudicate upon adverse claims set up by defendants *inter se Senaratne v. Perera*[1] and *Kanagammah v. Kumarakulasingham*[2].

Consequently, the learned counsel has prayed that the order of the District Judge, Colombo, dated 16.10.1997 be set aside and the first defendant-petitioner's answer containing the claim in reconvention dated 11.8.97 be accepted. The counsel for plaintiff-respondent too has expressed similar sentiments in his submissions. These submissions would now be considered in detail.

1. Right of a co-defendant to act by way of motion before filing answer.

There is nothing in the Civil Procedure Code which prohibits a party to an action filing a motion at any stage and claiming an appropriate relief. A motion is a document which moves Court to act. Filing of a motion may not be a step in the regular procedure, which procedure lays down the type of pleadings that should be filed. But it is nevertheless an *application to* Court *made in* the course of an action *incidental* to the procedure adopted by Court either Regular or Summary, calling upon the Court for its intervention.

Section 46 (2) of the Civil Procedure Code gives right to the Court to refuse to entertain a plaint or reject a plaint. This right can be used by Court *ex mero motu* though generally due to the large number of cases filed in a Court of Law in present times, the Court does not have the time to look initially into the matters set out in section 46 or 47 of the Civil Procedure Code until the Court's attention is drawn either by the Registrar of the Court or subsequently by a party to the action. Suppose a Court has patent lack of jurisdiction to entertain a plaint in its Court, the Registrar of the Court has the right to bring this matter to the notice of Court not by motion but by an endorsement made on the journal. Similarly a party to an action could bring any matter incidental to the action which needs the attention and intervention of Court to the notice of the latter by motion. (vide section 91 of the Civil Procedure Code). A Court's right to entertain such application by motion and act upon them derives sanction apart from specific provisions in law, from also the inherent authority

granted to it by law to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court (vide section 839 of the Civil Procedure Code).

In the instant case it appears that answer had been filed by the second defendant-respondent on 24.1.97 long before the date of filing motion (26.8.97) though not properly minuted. The cash receipt No. C476230 dated 24.1.97 refers to "උත්" and "විරෝ" in respect of case No. 4763/Spl. This would mean that stamp fees had been tendered for "answer" (උත්තරය) and "objections" (විරෝධතා) what was due to be filed as per Journal Entry dated 24.1.97 were – . . . What were filed appear to have been answer, statement of objections with affidavit even though the journal entry only refers to" . . .

If the answer was not filed on 24.1.97 when it was due, the journal entry would have referred to a date being given for answer or at least stated, 'answer not filed'. We must, therefore, presume that answer of the second defendant-respondent was filed on 24.1.97 in view of the certified copies with endorsement from Registrar, District Court, being filed.

The motion filed by the second defendant-respondent dated 26.8.97 became necessary due to the claim in reconvention filed by the first defendant-petitioner through his answer dated 11.8.97.

Since motion dated 26.8.97 had been filed by the second defendant-respondent *subsequent* to the date of filing his answer for the reasons enumerated above, the first submission by the learned counsel for the first defendant-petitioner would fail.

2. No conflict of interests between plaintiff and the first defendant – Court must avoid multiplicity of actions.

Section 75 (*e*) of the Civil Procedure Code states, *inter alia*, as follows : ". . . . A claim in reconvention duly set up in the answer shall have the same effect as a plaint in a cross action so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim . . .".

The claim in reconvention therefore had been designed by law to set off against the plaintiff's demand, any claim a defendant could legally recover from him. The answer with its claim in reconvention shall then have the same effect as a plaint in a cross action. This enables the Court to pronounce a final judgment in respect of both the original claim by the plaintiff and the later set off claimed by the defendant. The goal of avoidance of multiplicity of actions is obtained when opposing parties to an action who are at variance with each other are allowed to set their individual claims against each other in the same action. There is no express provision in the Civil Procedure Code holding out that such a right of set off extends to defendants *inter se.* Incidentally illustrations (*f*) and (*g*) of Rule 6 of Order viii of the first schedule to the Indian Code of Civil Procedure (1908) state as follows :

> "(*f*) A and B sue C for Rs. 1,000. C cannot set off debt due to him by A *alone.*
>
> (*g*) A sues B and C for Rs. 1,000. B cannot set off a debt due to him *alone* by A."

The provisions of our Code and that of the Indian Code of Civil Procedure with regard to claims in reconvention are similar though the phraseology is different.

By prohibiting individual claims being set off where the plaintiffs are joint or defendants are joint, the Indian law has expressly delineated the parameters within which counter claims can be made.

No such illustrations adorn our Code. But the principle governing claims to set off cannot be any different. A Court must be presumed to have been statutorily enjoined to determine a claim made by a plaintiff or a set of plaintiffs on the one hand and a counter claim by a defendant against such plaintiff or set of plaintiffs jointly on the other *or* counter claim by a set of defendants jointly against such plaintiff or set of plaintiffs jointly. A claim for set off which is different in character to the claim made by the plaintiff must necessarily be examined thoroughly by the Court to ensure that it falls within the

category of a cross claim. When claims by defendant/defendants against plaintiff/plaintiffs are subject to such scrutiny on account of the wording of section 75 (*e*) of our Civil Procedure Code where Court has to ensure that the claim in reconvention falls within the scope of a crossaction, how much more circumspective would a Court have to be in entertaining substantive claims for relief preferred by defendants *inter se?*

Unless the allowing of such claims by defendants *inter se* would enable the Court to determine whether the relief asked for by the plaintiff (or against him upon a claim in reconvention) ought to be granted such applications must be rejected. But the formal decree cannot award substantive relief except in favour of the plaintiff or against him. (vide Justice Gratiaen in *Kandavanam v. Kandasamy*[3]).

If this test is applied to the case in hand it would be found that the right to claim damages by the first defendant against the second defendant could only arise after the determination of the matters in issue between the plaintiff and the second defendant or for that matter between the plaintiff and the first and second defendants. The claim made by the first defendant against the second defendant in this instance arises consequent to the filing of action by the plaintiff. The right of the first defendant to such a claim did not exist at the time the plaintiff filed his action. The first defendant has made out in his claim in reconvention that he was employed in a lucrative employment in the Middle East and that when he was informed about an action instituted against him and the second defendant by the plaintiff, he had to come back from the Middle East leaving his employment. He alleged that the second defendant's unlawful and fraudulent act had caused him damages and thereby claimed Rs. 100,000 as damages with a further sum of Rs. 5,000 per month as continuing damages. Clearly this claim can in no way help the Court to determine whether the relief claimed by the plaintiff against the first and second defendants ought to be granted or not.

It was pointed out that there was no conflict of interests between the plaintiff and the first defendant and therefore the claim in recovention against the second defendant should have been allowed.

The fact that there is no conflict of interests between the plaintiff and the first defendant does not necessarily mean that any claim made by the first defendant should be appended to the plaintiff's claim. The plaintiff in this instance has claimed declaration of title and cancellation of the deed of transfer No. 459 dated 19.10.1994 attested by T. D. Ranasinghe, Notary Public. The claim of the first defendant is for damages sustained by him claimed from the second defendant *consequent* to the filing of action by the plaintiff against him (first defendant) and the second defendant. The two causes of action are different and are in no way connected to each other. The first defendant need not have come over to Sri Lanka leaving his lucrative job in the Middle East. He could have denied the averments against him in the plaint and confirmed his ignorance of the execution of deed No. 459 allegedly fraudulent. He need have come to Sri Lanka if at all, only to deny his signature on deed No. 459 at the time of trial. The money claim made by the first defendant is not against the plaintiff who filed the case against him. It is against the second defendant claiming in effect that due to the second defendant acting fraudulently the plaintiff was forced to file action against him and the second defendant and consequent to such action being filed against him by the plaintiff the first defendant had sustained damages and such damages have to be paid by the second defendant. The claim of the first defendant is therefore a cause of action which in reality arises if at all only after the plaintiff obtains his decree against the second defendant. If the plaintiff proves collusion between first and second defendants the basis for the claim in reconvention would fail. The causes of action are different and they arise at different times. They are not connected to each other. Under such circumstances the mere fact that there appears to be no conflict of interests between the plaintiff and the first defendant does not necessarily give the first defendant the right to make his claim in reconvention as claimed in

this case, since the claim in no way helps the Court to reach its conclusion in the main case set up by the plaintiff, nor the claim in reconvention set up by the second defendant against the plaintiff.

3. *The case law regarding claims by defendants inter se.*

The case law submitted to us by counsel on both sides deal mainly with *res judicata* as between defendants *inter se.*

In *Senaratne v. Perera* (*Supra*) it was pointed out in effect that when a plaintiff cannot obtain the relief he claims without an adjudication between the defendants *inter se*, claims by defendants *inter se* could be entertained and determined. Or, when adverse claims are set up by the defendants to an action the Court may adjudicate upon the claim of such defendants among themselves. In the instant case the plaintiff's case is not dependent on the first defendant's claims in reconvention but vice versa. There are also no adverse claims by the defendants *inter se* as against the plaintiff in this case to be determined by Court. Suppose two defendants claim title adversely to certain shares of a property to which the plaintiff is claiming title then the determination of the respective title or lack of title of the defendants *inter se* would become relevant and therefore the Court would be obliged to determine such adverse claims. Such adverse claims are not before Court in this instance.

Thus, the principle that has to be adopted in such cases would be to examine whether there is conflict of interest between the defendants *inter se* and whether such conflict has to be resolved or determined in order to give the plaintiff the relief he claims. (vide *Fernando v. Fernando*[4] at 209 and *Banda v. Banda*[5] at 476 and 477). The determination of the conflict of interest between the defendants *inter se* must necessarily correlate to the determination of the primary claim by the plaintiff. Otherwise we would allow irrelevant and independent claims which should form the basis for separate actions to be included in a case and thus made the task of the Court to determine the main matters in issue difficult and cumbersome.

In *Kanagammah v. Kumarakulasingham (supra)* at page 534 Justice Weerasooriya stated as follows :

"Mr. Chelvanayakam, however, referred us to the case of *Senaratne v. Perera et al (supra)* which is also a decision of a bench of two Judges. That case would appear to be an authority for the view that it is open to a Court to adjudicate upon adverse claims set up by defendants *inter se* and *unconnected with the claim of the plaintiff,* and an adjudication on such claims will be *res judicata* between the adversary defendants as well as between the plaintiff and the defendants. The judgment of Jayawardena, AJ. in that case (with which Bertram, CJ. agreed) does not appear to have been considered in *Kandavanam et al. v. Kandasamy et al. (supra).*"

These observations were of obiter in the above case. It is useful to go back to *Senaratne v. Perera et al. (supra)* and examine the position. At page 229 referring to adverse claims set up by defendants to an action Justice Jayawardena said: "Instances of the second exception are equally rare, for Courts are reluctant to enter upon an inquiry into the disputes arising between the defendants *inter se* and unconnected with the claim of the plaintiff, when once the plaintiff's rights have been adjudicated upon. But, there may be instances in which the Court has been induced to decide issues arising between co-defendants and to define their rights and obligations. In such a case, the decision would be binding between the defendants between whom the issue had arisen. There is nothing in our Statute law to prevent a *res judicata* between co-defendants".

These observations must be read with the principles recognized after the aforesaid judgment in many subsequent judgments such as *Fernando v. Fernando (supra)*, *Banda v. Banda (supra)* and *Kandavanam v. Kandasamy (supra).* The principle is that unless the conflict between defendants *inter se* has to be resolved in order to give the plaintiff the relief he claims such adverse claims need not be determined in the same action.

Justice Ranarajah in *Robert Dassanayake and another v. People's Bank and another*[6] stated thus : "Learned President's Counsel submitted

that the decision in *Kanagammah v. Kumarakulasingham* (*supra*) supports the proposition that a defendant may add another as a defendant where the former has a claim against the latter and it is open to a Court to adjudicate upon adverse claims set up by defendants *inter se.* This decision is based on the judgment of Jayawardena, AJ. in *Senaratne v. Perera (supra).* But, on reading that judgment it appears that it does not go so far, but supports the proposition that when the plaintiff cannot obtain the relief he claims without an adjudication between the defendant and another, such other party may be added as defendant.

In the present case we find that the claim for damages which the first defendant has preferred against the second defendant need not be determined to ensure that the plaintiff-respondent obtained his relief.

We, therefore, find that the order of the learned District Judge dated 16.10.97 need not be interfered with. We refuse to grant leave in this case and dismiss the application with costs payable by the first defendant-appellant to the second defendant-respondent only, plaintiff-respondent will bear his own costs.

JAYAWICKREMA, J. – I agree.

Application dismissed.