

1952

Present : **Rose C.J. and Pulle J.**

WADUGANATHAN CHETTIAR, Appellant, *and*
SENA ABDUL CASSIM, Respondent

S. C. 6—D.C. Kurunegala, 19,467

Pleadings—Amendment of plaint—Scope of—Effect on plea of prescription—Relevant factor.

A Court will refuse to allow a plaint to be amended so as to include a new cause of action if such amendment, by its relation back to the date of the original plaint, is prejudicial to a plea of prescription which may be raised by the defendant in respect of the new cause of action.

APPPEAL from a judgment of the District Court, Kurunegala.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the plaintiff appellant.

E. G. Wikramanayake, Q.C., with *H. W. Jayewardene* and *D. R. P. Goonetilleke*, for the defendant respondent.

Cur. adv. vult.

March 5, 1952. PULLE J.—

A plaint was filed by the appellant in this case on the 18th July, 1938, praying for a declaration of title to seven allotments of lands, ejection of the defendant and other ancillary reliefs. He alleged that he was the purchaser of these lands at a sale held in execution of a mortgage decree against one Uduma Lebbe. The case is still in the stage of pleadings and the question to be determined is whether the learned District Judge was wrong in refusing to grant an amendment of the plaint dated the 8th November, 1950.

The answer to the plaint was filed on the 5th December, 1938. The defendant pleaded that by a Crown Grant dated the 26th March, 1938, he became the owner of the lands described in Schedule A to the answer and that by Crown Grants dated respectively the 16th December, 1932, and 8th May, 1937, three persons became entitled to the lands described in Schedules B and C and that by a deed dated 1st October, 1937, the defendant obtained a conveyance of the interests of the three grantees. The defendant further stated that he was unaware whether the lands described in the plaint were identical with those in Schedules A, B and C and that if any of the lands described in the plaint came within the Crown Grants then the plaintiff had no cause of action against him.

For reasons which are not material to this appeal the case was put off from time to time and on the 13th May, 1941, the plaintiff delivered a replication in which he stated that Uduma Lebbe the mortgagor against whom the lands were sold and the Crown Grantees had acted in collusion to defraud the mortgagee and the purchasers at the mortgage sale and that "the defendant and those from whom the defendant derives title if any hold the said lands for the benefit of the plaintiff". In this replication the plaintiff asked that judgment be entered as prayed for in the plaint. On the 2nd July, 1941, the plaintiff's Proctors filed a list of issues and the trial was fixed for the 28th November, 1941. Owing to the pendency of a connected case No. 19,466 the trial was put off with the consent of the parties. The case was restored to the roll on the 3rd May, 1950, and thereafter on 19th July, 1950, the defendant filed an amended answer. To this the plaintiff filed an amended replication on the 28th September, 1950, joining issue with the defendant on the matters raised in the answers and again prayed that judgment be entered "as prayed for in the plaint". The amended replication of the 28th September, 1950, was followed by yet another amended replication dated 12th October, 1950. It purported to embody all previous amendments and it set out a new amendment in paragraph 4. It is material to read this paragraph :

"The plaintiff further states that the defendant holds in trust for the plaintiff and/or to the extent necessary to satisfy plaintiff's claim the title if any of the defendant based on the said settlement orders and/or Crown Grants in favour of the defendant and that the plaintiff is entitled to a declaration to that effect and to a conveyance of the said lands in plaintiff's favour and for ejection of the defendant."

This replication prayed for judgment as asked for in the plaint and in terms of the paragraph quoted above. The defendant objected to the

amendment but it was allowed conditionally and, admittedly, the present position is that the amended replication of the 12th October, 1950, is a part of the pleadings in the case.

By a still further amended answer of the 1st November, 1950, the defendant having set out certain defences previously taken by him took the point that the plaintiff was not entitled by way of replication to set up a trust or ask for a declaration or conveyance in terms of the prayer in the replication of 12th October, 1950. It was at this stage that the plaintiff sought to file the amended plaint which is the subject of this appeal. The amended plaint embodied in two new paragraphs the plaintiff's claim that the defendant held the lands in trust for him. The prayer in the original plaint was altered to the extent that relief was claimed in the alternative for a declaration that the lands were held in trust and that the defendant be ordered to execute a conveyance in plaintiff's favour.

The amendment was resisted on the grounds that—

- (a) it altered the scope of the original action ;
- (b) it disclosed a cause of action which was prescribed ; and
- (c) it imported into the original plaint a fresh claim for relief which could not be joined with the original claim.

In my opinion the first two grounds of objection taken together are substantial. The plaintiff instituted the action on the footing that he had a superior title to the defendant's and that the defendant was a trespasser and asked for a declaration in his favour and ejection of the defendant. The amendment seeks to make out, as an alternative cause of action, that the title to the property remained in the defendant and that he held it in trust for the plaintiff and that the defendant was liable to execute in favour of the former a good and valid conveyance. I accept the contention of the learned Counsel for the respondent that the plaint in its amended form is not analogous to one which sets out a single cause of action with alternative reliefs. The plaint incorporates two distinct causes of action with the reliefs appropriate to each. Had the amendments been made shortly after the answer was filed in 1938 it is possible that the grounds of objection now urged might not have been sustained. The picture in 1950 is very much altered. The defendant states that an amendment in 1950 which would relate back, by twelve years, to the date of the plaint would seriously prejudice a plea of prescription. I accept this contention. The plaintiff alleges that his predecessor in title, Uduma Lebbe, and the defendant and others were party to a conspiracy to defraud persons claiming title under Uduma Lebbe and that in the circumstances mentioned the defendant as a Crown Grantee or claiming under Crown Grants became a trustee for the plaintiff. Learned Counsel for the appellants while conceding the principle that an amendment prejudicial to a plea of prescription ought to be refused contended that the new claim was not prescribed by reason of the provision in section 111 (5) of the Trusts Ordinance (Cap. 72) to the effect that prescription does not run where the constructive trust sought to be enforced is regarded by the law of England as an express trust. Assuming

that the plaintiff is right in regarding the defendant as the trustee of a constructive trust, I am far from being satisfied that such a constructive trust is treated as an express trust by the law of England. The two cases cited, *Perumal v. Harding*¹ and *Arunasalam Chetty v. Somasundram Chetty*², are clearly distinguishable. In both cases the persons who took conveyances in their own names were regarded as agents who stood in a fiduciary relationship to their principals.

It was further argued that inasmuch as the list of issues tendered on the 2nd July, 1941, by the Proctors for the plaintiff and accepted by Court without objection contained four issues relating to the alleged trust and that as the amended replication of the 12th October, 1950, with the prayer embodied in it was also accepted by Court, the amendment of the plaint merely reflected in a single document the substance of the various replications. The defendant, however, states that the plaintiff is perfectly free to raise any issue arising on the pleadings as they stand now but contends that he too should be equally free to raise any issue on the pleadings but without the embarrassment of meeting an amended plaint which would relate back a new cause of action to the date of the plaint. In my opinion the defendant's contention is right.

I would dismiss the appeal with costs.

ROSE C.J.—I agree.

Appeal dismissed.
