

1937

Present : Hearne J. and Fernando A.J.

FERNANDO *et al.* v. FERNANDO.

88—D. C. Colombo, 483.

Joinder of causes of action—Misjoinder of parties—Civil Procedure Code, ss. 14 and 36.

Where two causes of action are joined in one action against two defendants, in one of which it is claimed that the defendants are jointly liable and in the other it is claimed that one defendant is solely liable,—

Held, that there was a misjoinder of parties and causes of action.

Kanagasabapathy v. Kanagasabai (25 N. L. R. 173) followed.

London and Lancashire Fire Insurance Co. (18 N. L. R. 15) not followed.

Held further, in such a case the Supreme Court may remit the action to the trial Court for such amendments in the pleadings as may enable the plaintiffs to regularize the proceedings.

PLAINTIFFS who are the children of the first defendant claimed that on deed No. 3,004 of February 17, 1885, the first defendant became entitled to an undivided half share of certain property subject to a *fidei commissum* in favour of her children. The first defendant instituted a partition action for this property in 1911, and decree for sale was entered. At the sale the first defendant purchased a divided block for Rs. 41,600 and having obtained from Court an order of credit for Rs. 24,870 being half the proceeds of sale realized from the entire property, paid into Court the balance sum of Rs. 16,730 and obtained a certificate of title in her favour for the said block. Plaintiffs claimed that by reason of these facts the first defendant held 2487/4160 shares of the said divided block subject to the *fidei commissum* or alternatively in trust for the beneficiaries under the deed of 1885.

In the alternative the plaintiffs stated that the first defendant fraudulently concealed from the Court the existence of the *fidei commissum* and obtained a decree for sale in the partition action causing damage to the beneficiaries under the deed of 1885 to the extent of Rs. 24,870. The plaintiffs claimed this sum as damages from the first defendant, the said sum to be declared subject to the terms and conditions set out in the deed of 1885 or alternatively in trust for the beneficiaries under the said deed.

The plaintiffs further stated that the first defendant fraudulently and collusively with the second defendant in order to defeat the rights of the plaintiffs gifted the said block in 1920 to the second defendant.

The plaintiffs therefore prayed—

- (i.) For a declaration that the first and second defendants hold 2487/4160 shares of the said land subject to the terms, conditions, and restrictions set forth in the deed of 1885 or in trust for the beneficiaries referred to in the said deed.
- (ii.) In the alternative for a declaration that the sum of Rs. 24,870 which represented the half share of the proceeds of sale be held in trust by the first defendant subject to the conditions

set out in the deed of 1885 or in trust for the beneficiaries under the said deed and that the first defendant be ordered to bring the said sum into Court within a fixed period.

- (iii.) In the alternative that the first defendant be ordered to pay into Court a sum of Rs. 24,870 as damages and that the said sum be declared subject to the conditions set forth in the deed of 1885.

The defendants pleaded that there was a misjoinder of parties and causes of action. The learned District Judge held that there was no misjoinder. The second defendant appealed from that order.

H. V. Perera, K.C. (with him *Amarasekera, Weerasooria, and E. B. Wikramanayake*), for appellant.—There is a clear misjoinder on the face of the plaint. The cause of action against the first defendant arises from the sale under the partition decree. The second defendant was no party to that. The cause of action against the second defendant is his assertion of title to the property. This cause of action does not touch the first defendant. There is not even a prayer to have the deed declared null and void in which case the first defendant might be a necessary party to an action brought for that purpose. The plaintiffs cannot get over the difficulty by merely alleging that the defendants are both liable on all the causes of action. One must inquire whether they are liable in law. Sections 14 and 36 of the Code must be read together. Under those sections two persons cannot be joined in one action in respect of more than one cause of action, unless the defendants are jointly liable in respect of each cause of action. See *Kanagasabapathy v. Kanagasabai*¹. The case of *The London and Lancashire Fire Insurance Co. v. P. & O. Co.*² was wrongly decided. De Sampayo J. dissented and his dissenting judgment has been subsequently followed. See also *Sivakaminathan v. Anthony*³. If there is a misjoinder of parties and causes of action the action should be dismissed. (*Abrahams Singho v. Jayaneris*⁴.)

Hayley, K.C. (with him *D. W. Fernando*), for plaintiffs, respondents.—The case of *The London and Lancashire Fire Insurance Co.* is a Full Bench decision and is binding on this Court. It is none the less a three-Judge decision although there was a dissenting judgment (*Appusingho v. Girigoris*⁵.) This decision is made binding in all future cases by section 41 of the Courts Ordinance. In any event the case was rightly decided. Otherwise the explanation to section 35 would have no meaning. Cause of action is not the same as the relief claimed. A plaintiff can claim relief in the alternative on one cause of action. This point was specially reserved for the consideration of three Judges in the *Fire Insurance Case* and the decision in that case should be followed.

H. V. Perera, K.C., in reply.

Cur. adv. vult.

September 20, 1937. HEARNE J.—

This is an appeal which concerns a question of alleged misjoinder on which conflicting views have been expressed by Judges of this Court. I shall state in the first place what appears to me to be the law on the subject.

¹ (1923) 25 N. L. R. 173.

² (1914) 18 N. L. R. 15.

³ 3 C. L. W. 51.

⁴ 14 C. L. Rec. 121.

⁵ 3 Bal. (N. C.) 20.

Section 14, C. P. C., which deals with the joinder of parties reads, "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative in respect of the same cause of action" There has been no difference of opinion that the section justifies the joinder of, for instance, two defendants with a claim for relief in the alternative.

Section 36, C. P. C., deals with the joinder of causes of action. It enacts that "Subject to the rules contained in the last section, the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly" In my opinion this section, interpreted by itself, means that, subject to the rules in section 35 as to claims which may be joined with a suit for the recovery of immovable property, where there are two defendants and two causes of action, both defendants must be jointly interested in each of the two causes of action.

This is the view which was taken in *Kanagasabapathy v. Kanagasabai*¹ and in the minority judgment in *The London and Lancashire Fire Insurance Co. v. P. & O. Co.*²

If section 14 and section 36 are read together, as I think they must, the joint, several, or alternative liability of defendants mentioned in section 14 means a joint, several, or alternative liability in respect of one or several causes of action, which cause or causes of action are united in the same suit against the same defendants jointly; in other words, while the cause or causes of action must be joint as to all defendants, the relief asked may be joint, several, or in the alternative.

The question that has exercised my mind is whether we are bound by the majority decision in *The London and Lancashire Fire Insurance Co. v. P. & O. Co.* (*supra*) which, according to the report, is designated a Full Bench decision. In *Kanagasabapathy v. Kanagasabai* (*supra*) there were two Judges only who took the same view. It would appear that the decision in *The London and Lancashire Fire Insurance Co. v. P. & O. Co.* was not a Full Bench decision. At that time there were four Judges and "a judgment of three Judges when four Judges constituted a Full Bench is not a judgment of the Full Bench" (*Jane Nona v. Leo*³). On the other hand even if the decision in *The London and Lancashire Fire Insurance Co. v. P. & O. Co.* is to be regarded merely as a two-Judge decision "it is not competent for a Bench of two Judges to overrule a judgment of two Judges" (*Jane Nona v. Leo*.) which is what the Judges in *Kanagasabapathy v. Kanagasabai* (*supra*) did. In the difficult position in which we find ourselves, I have decided to follow the two-Judge decision with which I agree.

The plaint in the present case may have been framed very differently. In the form, however, in which it has been framed it is bad for misjoinder on the authority of *Kanagasabapathy v. Kanagasabai* (*supra*.) The first cause of action is one on which it is claimed that the first and second defendants are jointly liable, and the second cause of action is one on which it is claimed that the first defendant is solely liable. It was pointed out by Counsel for the appellants that while the averments in paragraphs 3, 4, and

¹ (1923) 25 N. L. R. 173.

³ (1923) 25 N. L. R. 241.

² (1914) 18 N. L. R. 15.

5 of the plaint gave rise, as it was claimed, to a cause of action against the first defendant alone, the prayer asked for relief against the first and second defendants jointly. On the other hand while, in regard to the alternative cause of action, fraud was alleged against the first defendant to which it was further alleged the second defendant was a party, relief was claimed against the first defendant only. I refer to the pleadings only for the purpose of indicating that it is possible that amendments may be made in them which would enable the action to be brought within the rules which regulate the bringing of actions. I follow *Sivakaminathan v. Anthony* in the order which I propose.

I would allow the appeal with costs and would remit the case to the trial Court for the purpose of enabling the plaintiffs to make such application as they are advised to make. I need hardly add that the Judge's discretion in allowing or disallowing any proposed amendment is completely unfettered by this order.

FERNANDO A.J.—I agree.

Appeal allowed.
