

Present: Lyall Grant J. and Jayewardene A.J.

1926.

FERNANDO v. PALANIAPPA CHETTY *et al.*

92--D. C. Kurunegala, 11,093.

Amendment of plaint—New defendants—Cause of action—Joinder of defendants—Civil Procedure Code, ss. 14 and 93.

In an action instituted by the plaintiff against two persons to recover a sum of money on a promissory note, the present defendant by means of a false representation made to the plaintiff's proctors had got the judgment entered against one defendant and waived the claim against the other, and had stayed execution proceedings by a false representation to the effect that the money due on the note had been paid up.

The plaintiff thereupon instituted the present action against the defendant to recover damages caused to him by the defendant's fraudulent conduct in the previous case. After issues had been framed and the date of trial fixed, the plaintiff moved to amend the plaint by the inclusion of a claim, based upon their alleged negligence, against his proctors whom he sought to add as defendants in the case.

Held, that the relief claimed against the defendants arose from the same cause of action and that they may be sued together in the same action.

A PPEAL from an order of the District Judge of Kurunegala. The facts appear from the judgment.

Soertsz, for plaintiff, appellant.

Driberg K.C. (with *Hayley* and *H. V. Perera*), for defendant, respondent.

October 4, 1926. LYALL GRANT J.—

This is an appeal from an order of the District Court of Kurunegala refusing to amend a plaint and to add certain persons as defendants.

The original plaint dated October 19, 1925, alleged that on a promissory note dated May 1, 1922, H. Don James and Baron Perera became indebted to Palaniappa Chetty in a sum of Rs. 1,300, that, on December 3, 1924, the note was endorsed for consideration to the plaintiff by Palaniappa Chetty, the defendant, through his agent, that the plaintiff sued the said H. Don James and Baron Perera in case No. 10,463 of the District Court of Kurunegala, that the said note was filed as an exhibit and that without the plaintiff's knowledge or authorization the defendant

1926.
LYALL
GRANT J.
Fernando
v.
Gomis

falsely representing himself to the plaintiff's proctors as the plaintiff's agent, got judgment entered in the plaintiff's favour against the said H. Don James only and waived the claim against Baron Perera. This was said to have occurred more than a month before the date fixed for trial.

The plaintiff further alleges that without the plaintiff's knowledge the defendant instituted proceedings for execution of judgment and falsely purporting to act as the plaintiff's agent, had them stopped and got a minute entered of record that the amount due on the note had been paid and had the note delivered to him. The plaintiff further stated that he had not up to date received any portion of the sum for which judgment was entered in his favour.

He claimed from the defendant the sum due on that judgment, namely, Rs. 1,885.

The defendant filed answer alleging that all that had been done by him including instructions given to the plaintiff's proctors was done at the instance of the plaintiff and at his request.

After these answers had been filed, issues framed, and a date fixed for trial, the plaintiff moved that the case be taken off the trial roll to enable him to amend the plaint, and to add his proctors in the former action, as defendants to this action. This was on March 10, 1926. The case was taken off the trial roll and the plaintiff given time till March 17 to amend the plaint.

The journal entry of March 17, reads as follows:—

“ Amended plaint filed. Notice added defendants for April 30.”

The amendments in the plaint consisted of adding as defendants the plaintiff's proctors in the previous case, and adding the following paragraph:—

“ The added defendants should not have taken the steps described in paragraphs 4 and 6 hereto, without definite instructions from the plaintiff. In doing so, they have acted with a want of such care as they ought to exercise, and are guilty of negligence whereby the plaintiff has suffered damages.”

Paragraph 4 refers to having judgment entered against H. Don James only, and paragraph 6 to the original defendant's action in regard to stopping execution proceedings; but paragraph 6 does not directly allege any act to have been done by the proposed added defendants.

The claim against the original defendant is altered by the addition of a claim against the added defendants, and the prayer

of the plaint is that the defendant and added defendants be condemned to pay jointly and severally the amount due on the promissory note.

1926.
LYALL
GRANT J.
Fernando
v.
Gomis

The basis of the claim is set forth in paragraph 8, which reads as follows:—

“ The plaintiff states that up to date he has not received the sum for which the judgment was entered in his favour or any portion thereof. If the defendant or the added defendant recovered the said sum, neither he nor they have handed it over to the plaintiff. If they did not recover, the defendant by his fraudulent action, and the added defendants by their want of care, have caused damage to the plaintiff in the sum aforesaid, namely, Rs. 1,885.”

Notice was issued and summons served on the added defendants. The journal entry for April 30 reads as follows:—

“ Summons served on added defendants. 2nd and 3rd present. Notice to show cause. Inquiry 14th May.”

The entry of May 11, reads as follows:—

“ Mr. Markus, for proposed added defendants, files proxy and statement of objections of the proposed added defendants.”

On May 14, parties appeared and two questions were argued:—

- (1) Whether the amendment should be admitted.
- (2) Whether the proposed defendants should be added.

On May 17, the learned District Judge made his order, upholding the objection that the amendment was irregular and that the parties and the cause of action had been misjoined. The District Judge allowed the plaintiff to withdraw the original plaint and proceed against the original defendant and to institute a new action and proceed against the added defendants for damages. Against this order the plaintiff has appealed.

The first objection taken to the District Judge's order was that he had on March 17, allowed the amendment of the plaint and that he could not therefore disallow it.

It is difficult to discover from a perusal of the journal entries what the effect of the various orders was intended to be. On the whole it appears to me that the District Judge did not regard himself as having amended the plaint or as having added new defendants; and that the argument of May 14 was for the purpose of enabling him to make up his mind whether he would exercise his powers under section 93 of the Civil Procedure Code to amend the plaint, and, under section 18 of the Civil Procedure Code, to add the names of the proctors as added defendants.

1926.

LYALL
GRANT J.*Fernando
v.
Gomis*

In his order, however, the reason given by the District Judge for refusing to allow the proceedings to be amended was that the amendments in the plaint were not made by the Court but by the plaintiff and that the requirements of section 93 of the Civil Procedure Code were not complied with.

So far as I can see, however, the only requirements of section 93 of the Civil Procedure Code, which were not complied with relate to acts which have to be performed by the District Judge.

Having disallowed the amendment the District Judge refused to add the proposed defendants. This order necessarily followed his refusal to allow the amendment.

The reasons given for the order cannot stand, but the important question is whether the order itself is substantially a proper one. Section 14 allows all persons to be joined as defendants against whom the right to relief is alleged to exist, whether jointly or severally or in the alternative in respect of the same cause of action.

The claim against the defendants in the amended plaint is joint and several. It is based on an allegation that by their combined action they caused damage to the plaintiff. But the difficult question arises whether the right to relief arises in respect of the same cause of action.

“ Cause of action ” is defined in section 5 as “ the wrong for the prevention or redress of which an action may be brought,” and includes “ the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury.

In order to decide whether or not the same cause of action lies against both defendants, it is necessary to examine closely what the injury was of which complaint was made.

The first injury complained of was having judgment entered against H. Don James only. This could not have been done by the defendant without the co-operation of the added defendants, and the same presumably applies to the transactions in regard to the execution proceedings.

The injury complained of was the result of the combined action of all the defendants.

It seems to me clear that such a state of affairs implies the joint infliction of an affirmative injury, and accordingly one cause of action.

It has been argued that the case against the first defendant rests upon fraud, and the case against the added defendants merely on negligence; but I do not think that this distinction between the motives of the parties has the result of differentiating

causes of action. Whatever the motives may have been, the injury inflicted is one and the same. It is not the case of separate and unconnected acts, each of which might give rise to a claim in tort, but it is the case of one act done to the prejudice of the plaintiff by the defendants in combination.

1926.
 LYALL
 GRANT J.
 ———
 Fernando
 v.
 Gomis

This is the principle underlying the decision in the case of *Aitken Spence & Co. v. (1) The Ceylon Wharfage Co. Ltd., (2) The Bibby Steamship Co. Ltd.*¹

In that case Brown A.J. said:—

“ In the case of a transaction the inception of which was originally a contract out of which arises the same relief, that relief might be simultaneously sought against two persons albeit if these had been separate actions, the process would have been different in the two actions.”

That decision is in conformity with decision in *The Honduras Inter-Oceanic Railway Co. v. Lefevre and Tucker*,² and in *Fraunenberg v. The Great Horseless Carriage Co.*³

This is not a case where the only connection between the two causes of action against the defendants is that the measure of relief granted against one may have to be ascertained by the relief granted against the other, and it is distinguishable on that ground from the case of *Greenwood v. Greenwood and Armitage*.⁴

It seems to me that the case against all the defendants can be most conveniently tried in one action. The order of the District Judge will be set aside and the case remitted to him with directions to add the proctors as defendants and to amend paragraph 6 of the plaint so as to raise a clear issue against them under that paragraph.

In paragraph 6 words should be inserted to show that the acts there complained of were done by the added defendants.

The plaintiff is entitled to the costs of this appeal, and to the costs of the proceedings of May 14 of the District Court of Kurunegala.

JAYEWARDENE A.J.—I agree.

Appeal allowed.

¹ (1900) 4 N. L. R. 263.

² (1877) L. R. 2 Exchequer Div. 301.

³ (1900) 1 Q. B. Law Rep. 504.

⁴ (1908) Law Times Rep., Vol. C., New Series, 68.