1965 *Present :* **Tambiah, J., and Sirimane, J.**

J. E. SENANAYAKE, Appellant, *and* V. H. L. ANTHONISZ and another, Respondents

S. C. 131/64 (Inty.)—D. C. Kandy, 9054/MR

Pleadings—Amendment of plaint—Rules applicable—Suit between partners—Plaint filed alleging repudiation of partnership obligations—Subsequent amendment of plaint claiming dissolution of partnership—Permissibility—Partnership Act, s. 35—Civil Procedure Code, s. 46.

An amendment of the plaint should be allowed if such amendment deals with the real issues between the parties and does not convert the action of one character into an action of a different and inconsistent character.

The plaintiff, in his amended plaint of 12th September 1963, based his two causes of action on an alleged breach by the defendants of the obligations arising out of a partnership agreement entered into between the plaintiff and the defendants. He claimed the refund of Rs. 100,000 which he had paid as premium and a further sum of Rs. 100,000 as damages for the wrongful termination of his services. Subsequently, in order to bring the plaint into conformity with an issue raised at the trial, the plaintiff filed motion on 27th January 1964 seeking to amend his plaint by adding two more reliefs, namely, that the partnership should be dissolved and/or the deed of partnership should be rescinded.

Held, that the amendment should be allowed.

APPEAL from an order of the District Court, Kandy.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte* and *B. Eliyatamby*, for plaintiff-appellant.

H. V. Perera, Q.C., with *C. Ranganathan* and *Vernon Jonklaas*, for defendants-respondents.

Cur. adv. vult.

April 9, 1965. TAMBIAH, J.—

This is an appeal from an order of refusal by the learned District Judge to allow an amendment sought for by the plaintiff. The terms of the amendment are embodied in the motion filed dated 27th January 1964. The learned District Judge refused the amendment on the ground that if it was allowed the character of the action would be changed. By this motion the plaintiff merely sought to amend his prayer by adding two reliefs, namely, the dissolution of the partnership created by deed P1 and/or the rescission of the said deed.

The plaintiff, in his amended plaint dated 12th September 1963, which was accepted by court, based his two causes of action on an alleged breach on the part of the defendants of the obligations arising out of the partnership agreement entered into between the plaintiff and the defendants by deed No. 720, marked "A".

According to the terms and conditions of this deed the plaintiff and the defendants, who are doctors, agreed to become partners and the plaintiff paid the sum of Rs. 100,000 as premium to join the partnership. Clause 17 of the deed of partnership provided that in the event of the share of any partner being seized in execution under a decree of court, if the other partners so decide, the partner whose share is seized should cease to be a partner. Purporting to act under this clause the defendants, by letter dated 28.3.61, informed the plaintiff that since in March, 1961 a prohibitory notice in D. C. Kandy Case No. 3137/MR was served by the Fiscal on the plaintiff and the defendants, the plaintiff's share had been seized and therefore the plaintiff had ceased to be a partner.

The plaintiff's action is based on two causes of action. On the first cause he averred that the defendants wrongfully repudiated their obligations by purporting to act under clause 17 of the said deed of partnership and he claimed the refund of Rs. 100,000 which he paid as premium. On the second cause of action he averred that as a result of the defendant's conduct in wrongfully terminating his services he had suffered damages which he assessed at Rs. 100,000. In his prayer he asked for judgment against the defendant in a sum of Rs. 200,000 with legal interest thereon.

After the trial commenced certain issues were framed and while the plaintiff was giving evidence it transpired that he had started private practice on his own since 21st June 1961. Then the counsel for the defendant suggested certain issues arising out of this evidence which are as follows :—

16. Has the plaintiff been practising his profession from about the 28th March 1961, within a radius of 5 miles of the Municipality of Kandy ?

17. If issue 16 is answered in the affirmative—

    (*a*) can the plaintiff have and maintain this action for damages and, if so, in what sum ;

    (*b*) is the plaintiff entitled to claim a refund of the premium or any part thereof ?

On a subsequent date Counsel for the plaintiff framed the following additional issues :

24. If issue No. 5 is answered in the affirmative—

    (*a*) are the defendants entitled to credit against the plaintiff in the sum of Rs. 15,297·79 if paid to the Commissioner of Inland Revenue.

    (*b*) is the plaintiff entitled to practice his profession within a radius of 5 miles from the Municipality of Kandy ; and

    (*c*) is the plaintiff entitled to have the agreement marked P1 rescinded and/or the partnership dissolved ?

In order to bring the plaint into conformity with the issue 24 (*c*) the plaintiff filed motion amending his plaint by adding two more reliefs, namely, that the partnership should be dissolved and/or in the alternative the deed of partnership should be rescinded.

The principles governing the amendment of a plaint have been clearly set out by my Lord the Chief Justice who, after an exhaustive review of all the authorities, laid down the following propositions (vide *Daryanani v. Eastern Silk Emporium Ltd.* [1])

" Two main rules which have emerged from the decided cases are :—

1. the amendment should be allowed if it is necessary for the purpose of raising the real question between the parties ; and

2. an amendment which works an injustice to the other side should not be allowed."

The first rule is based on the principle that a multiplicity of actions should be avoided. The second rule is based on the ground that where injustice would be caused to the other side by allowing an amendment it should be refused. It is also a cardinal rule that an amendment should not be allowed if the effect of it would be to convert the action of one character into an action of an inconsistent character. This principle is deducible not only from the proviso to section 46 of the Civil Procedure Code but is also axiomatic in view of the fact that the function of pleadings is to clarify the issues so that the real issues between the parties may be tried and not to allow parties to side track the real issues by bringing a new action which is inconsistent with the one that has already been brought. This principle has been recognised in a number of cases in Ceylon (vide *Thirumala v. Kulandavelu* [2] ; *Daryanani v. Eastern Silk Emporium* [3] ; *Wijewardena v. Lenora* [4]).

The Counsel for the respondent contended that if the amendment sought is allowed the action would be changed into an action of a different and inconsistent character. In support of his contention he stated that the plaintiff in his plaint elected to accept the alleged repudiation but the plaintiff by his amendment is now trying to set up an inconsistent case by asking the court to hold that the partnership was still subsisting. He also urged that the plaint sought to be amended is based on two causes of action arising out of the alleged breach of contract and the prayer for dissolution of partnership changes this action into an action of an inconsistent character. He also submitted that the reliefs claimed in the amendment are inconsistent with the reliefs claimed in the plaint and the causes of action set out in the plaint are recognised by Common Law but the causes of action for dissolution are found in section 35 of the Partnership Act.

[1] *(1963) 64 N. L. R. 529 at 531.*

[2] *(1964) 66 N. L. R. 285.*

[3] *(1963) 64 N. L. R. at 531.*

[4] *(1958) 60 N. L. R. 457*

The cardinal rules governing the amendment of pleadings have already been stated. There is clear authority for the proposition that a plaintiff may even rely upon several different rights or claims in the alternative, although they may be inconsistent (vide *Philipps v. Philipps*[1]). In *Daryanani v. Eastern Silk Emporium* (supra) my Lord the Chief Justice said (vide 64 N. L. R. 533) :

> "If then, a plaintiff can set up inconsistent claims in the alternative in the plaint to start with, it is difficult to see why, on principle, he cannot be allowed to amend the plaint by pleading an inconsistent claim in the alternative at a later stage. Whether such an amendment should be allowed or not depends upon the circumstances of the case and various other considerations."

Subject to the restriction stated, a wide discretion is given to a judge to amend pleadings. In support of his contention counsel for the respondent cited the dictum of Lord Normand in *Heyman v. Darwins, Ltd.*[2] In that case the respondent contracted with an American firm whereby the latter were to act as their selling agent over a wide area. The agreement contained an arbitration clause under which if any disputes arose between the parties they had to refer the matter for arbitration. The appellant in that case brought an action on the footing that the respondent had repudiated the agreement and asked for a writ against them claiming a declaration to that effect and also claimed damages under different heads. The appellant contended that the respondent having accepted the repudiation, the contract ceased to exist for all purposes and the respondent could not therefore rely on the arbitration clause. The House of Lords held that even where there had been a total breach of a contract by one party so as to relieve the other party of the obligations under the contract, still the arbitration clause, if its terms are wide enough, would remain. Lord Simon in the course of his speech said : "The fresh head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party repudiates it. That is not so." He cited with approval the dictum of Scrutton L.J. in *Bolding v. London Edinburgh Insurance Co. Ltd.*[3] which is as follows :

> "If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and, even if he does not may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance."

This dictum which refers to executory contracts does not support the contention that where one party elects to accept the repudiation of a contract by another party the contract is *ab initio* invalid.

[1] *(1878) 4 Q. B. D. 127.*
[2] *(1942) 1 A. E. R. 337.*
[3] *(1932) Lloyds Law Reports 487.*

In the instant case, the plaintiff has not taken up the position that the contract of partnership contained in deed P1 had come to an end. The plaintiff had taken up the stand that the defendants purporting to act under clause 17 of the said partnership deed had wrongfully taken up the position that the plaintiff was not a partner and by the wrongful repudiation of the defendants' obligation under the said deed the plaintiff was entitled to the reliefs claimed in his amended plaint. The dictum relied on by Mr. H. V. Perera which has been referred to, therefore has no application to the facts of this case.

In the instant case, the plaintiff has not sought to amend the body of his plaint. The reliefs that the plaintiff is now seeking for are consequent on the issues raised by the counsel for the defendant which suggest that it was the plaintiff who had repudiated his terms and obligations under the deed of partnership by practising on his own. Even if one party accepts the repudiation of the other party the contract itself is not abrogated (vide Chitty on Contracts, Vol. 1, 22nd Edition, p. 323). Lord Normand said (vide 1942) 1 A. E. R. at 34: "However, repudiation by one party alone does not terminate the contract. It takes two to end it ; by repudiation on one side and acceptance of the repudiation on the other."

In *Chettyar Firm v. Maung Min Maung and others*[1] Baguley J., after stating the proposition that amendments should not be allowed which change the nature of a suit into one of an inconsistent character said (vide 1933 A. I. R. Rangoon, at 249) :

> "It will be seen therefore that the one thing which must not be altered by an amendment is the fundamental character of the suit ; and I understand that the fundamental character of a suit must refer to the *foundation on which a suit is based. It is the foundation on which a suit is based and not the prayer in the plaint that determines its fundamental character.*"

The same view was taken in *Kasinath Das v. Sadasiv Patnaik*[2].

Examples of amendments which alter the nature of the suit into one of an inconsistent character are found in the decisions of our courts and other countries. It has been held that a person cannot alter a cause of action based on a lease into one for a declaration of title (vide *Pathirana v. Jayasundara*[3]). A plaint based on a written agreement cannot be allowed or be amended by the substitution of another written contract (vide *Ma Shwe Mya v. Maung Mo Hnaung*[4]). A plaint based on a cause of action based on contract cannot be amended in such a way so as to substitute a cause of action to one based on tort (vide 1933 A. I. R. Rangoon 247). When the plaintiff comes to court basing his claim on a contract of partnership he would not be allowed to amend his plaint on the basis of a breach of trust (vide *Thirumalay v. Kulandavelu*[5]).

[1] *(1933) A. I. R. Rangoon p. 247.* [2] *(1893) I. L. R. 20 Cal. 805 at 809.*
[3] *(1955) 58 N. L. R. 169.* [4] *(1922) A. I. R. P. C. 249.*
[5] *(1964) 66 N. L. R. 285.*

In the instant case the foundation of the plaintiff's case is to be found in the body of the plaint. The plaintiff is not asking for amendment of any averments in the body of the plaint but is merely asking for additional reliefs. By the amendment sought he is not altering the nature of his action.

In view of the position taken up by the defendant at the trial it will be a denial of justice if the plaintiff is not allowed to amend his plaint in terms of the motion filed by him. For these reasons, I am of the view that the learned Judge misdirected himself by holding that the amendment would alter the nature of the action. I set aside the order of the learned District Judge refusing the amendment and allow the amendment asked for in the plaintiff's motion dated 27th January 1964.

The appellant is entitled to costs of appeal as well as the costs of inquiry in the District Court.

SIRIMANE, J.—I agree. *Appeal allowed.*