

1952

Present : Nagalingam A.C.J. and Gunasekara J.

DON ALWIS *et al.*, Appellants, and VILLAGE COMMITTEE
OF HIRIPITIYA, Respondent

S. C. 174-175—D. C. Inty. Kurunegala, 6,614

Amendment of plaint—Addition of party defendant—Circumstances when it will not be allowed—Civil Procedure Code, ss. 18 and 93.

Where a plaintiff has instituted action against a wrong party as the defendant the plaint cannot be subsequently amended so as to have the proper person added as a defendant. In such a case, the proper course is for the plaintiff to drop the action which has been wrongly instituted and commence a new action against the proper person who should have been made the defendant.

APPPEALS against an order of the District Court, Kurunegala.

E. G. Wikramanayake, Q.C., with *T. W. Rajaratnam*, for the 1st defendant, appellant in 174 and 2nd respondent in 175.

H. W. Jayewardene, for the 2nd defendant, appellant in 175 and 2nd respondent in 174.

N. E. Weerasooria, Q.C., with *J. A. L. Cooray* and *W. D. Gunasekere*, for the plaintiff respondent in both appeals.

Cur. adv. vult.

May 15, 1952. GUNASEKARA J.—

These are appeals by the two defendants against an order made by the learned Additional District Judge on the 9th July, 1951, allowing an application made on behalf of the plaintiff for amendment of the plaint and for the addition of the second defendant as a party.

The plaintiff, who is the Village Committee of Hiripitiya, instituted this action on the 12th July, 1950, alleging that the first defendant Don Alwis was holding a fair within the village area of Hiripitiya in violation of the Committee's by-laws and of a right that it claimed to regulate the holding of fairs, and praying for an injunction restraining him from holding a fair within that area without a licence from the Committee's Chairman and for damages in a sum of Rs. 5,000. Upon an *ex parte* application made on the plaintiff's behalf an interim injunction was granted to accompany the summons and it was served on the first defendant on the 15th July. In an affidavit dated the 13th July that was filed in support of this application the Chairman declared that this defendant was "unlawfully and forcibly . . . holding and running a fair on his land called Nika-dalupothehena within the Village Committee Area of Hiripitiya every Sunday". He also stated—

"I personally know and have seen the defendant running this fair and have visited the fair to satisfy myself personally that it is being held."

On the 19th July the plaintiff Committee's proctors filed another affidavit by the Chairman alleging a disobedience of the injunction and moved that the injunction be enforced by the punishment of the first defendant as for a contempt of court. He stated in that affidavit that notwithstanding the injunction the defendant "did openly hold and run the fair" and that he "made a complaint to the Wellawa Police on Sunday the 16th July and four Police Officers were present at the spot and witnessed this act of the defendant". After an inquiry into the alleged contempt the first defendant was acquitted on the 28th August. On the 30th August he filed his answer to the plaint, denying that he was holding a fair and denying the plaintiff's claim. He claimed in reconvention a sum of Rs. 10,000 as damages suffered by him in consequence of wrongful acts alleged to have been done by the plaintiff in connection with the issue of

the interim injunction and the subsequent proceedings on the charge of contempt. This claim was denied by the plaintiff in a replication filed on the 19th September. The first defendant had in the meantime applied to the District Court on the 1st August for a dissolution of the interim injunction, and that application was granted on the 25th September. On the 10th October an application was made on behalf of the plaintiff for amendment of the plaint. It is the order made upon this application that is the subject of these appeals.

It had been alleged in the plaint that the defendant Don Alwis "applied for a permit to hold a fair and his application was refused", and that "in spite of the said refusal the defendant on the 24th October, 1948, established and continues to hold a fair within the said area without a licence issued in that behalf by the Chairman in violation of the said by-laws and in contravention of the plaintiff's right to regulate the holding of fairs in the said area in terms of the said by-laws". The principal amendments sought to be made in the plaint were the addition of the name of the present second defendant, Don Davith, as a party defendant; the inclusion of averments to the following effect—

- (a) that the first defendant stated that the application for a permit was made by him not on his own behalf but on that of the second defendant, and the plaintiff was unaware whether it was made on behalf of the one or the other,
- (b) that the fair was established and was being held by the first or the second defendant or by both of them, and
- (c) that a cause of action had accrued to the plaintiff to sue the defendants for an injunction restraining either or both of them from holding the fair and for damages in Rs. 5,000 as against either or both of them; [and the addition in the prayer of a claim for relief against the second defendant].

In his petition of the 1st August, 1950, asking that the interim injunction be dissolved, the first defendant appellant had denied that "he applied for and was refused for himself a permit to hold a fair", and had stated that since 1942 it was the present second defendant appellant and not he himself who held "the said fair", and that the second defendant appellant had held a licence for several years and was refused one in 1948; and further that these facts were within the knowledge of the plaintiff inasmuch as they had been alleged and proved in several cases in the Rural Court where the plaintiff had unsuccessfully prosecuted him for breach of the by-laws in question. Replying to the statements in this petition the plaintiff had alleged in a "statement of objections" filed on the 21st August that "the position taken up by the defendant petitioner in some of the said cases was that he ran the fair himself and in others that it was run by his brother, B. D. David Appuhamy", but that "in fact the person who ran the fair was the defendant-petitioner". The learned District Judge holds that the first defendant appellant "has as if it were disclosed a party and stated that it was the party disclosed by him who is conducting the fair", and that "the plaintiff is entitled to have the party disclosed in the original defendant's petition added as a defendant". Having reached this finding that the plaintiff is "entitled" to have the

second defendant added as a party, the learned Judge refers to the power given to the Court by section 93 of the Civil Procedure Code to amend pleadings at its discretion and holds that the plaintiff's application is one made in good faith, and that the amendment asked for would not alter the nature and scope of the action, and is not one that would embarrass the defendants or defeat a plea of prescription that might otherwise be open to the second defendant. For these reasons he added the second defendant as a party and allowed the application for amendment of the plaint.

"The principle by which a Court ought to be guided in deciding to alter a pleading is that the alteration will make the real issues clear." (*Per Lawrie J. in Ratwatte v. Owen*¹). The real issue of fact between the plaintiff and the first defendant appellant, who was the only defendant in the case before the plaint was amended, was and is the question whether the fair was established or being held by the latter. This is the real issue between them, whether the plaintiff's case is that the first defendant acted on his own behalf or on behalf of the second defendant. The issue is clear enough upon the pleadings as they stood before the amendment of the plaint and it is not made any clearer by the amendment. Actually the object of the plaintiff's application for amendment of the plaint appears to be to enable him to proceed in this action against the second defendant if he has wrongly instituted it against the first; but in that event "the proper course is for the plaintiff to drop the action which has been wrongly instituted and commence a new action against the proper person who should have been made the defendant": *Kira v. Kira*². The learned Judge appears to have lost sight of the principle by which a Court should be guided in the exercise of its discretion under section 93, and the order for the amendment of the plaint must be set aside.

It seems to me that it follows that there is no warrant for the order adding the second defendant as a party. Section 18 of the Civil Procedure Code empowers a Court to order "that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added". It is only the amendment of the plaint by the averment of a cause of action against the second defendant, Don Davith, and a claim to relief against him that would render necessary his presence before the Court as a party. His presence as a party is not necessary to enable the Court "effectually and completely to adjudicate upon and settle" all the questions involved in the plaintiff's action against the first defendant-appellant.

I would allow both appeals and set aside the order made by the learned Additional District Judge on the 9th July, 1951, and substitute for it an order refusing the plaintiff's application for amendment of the plaint and the addition of the second defendant appellant as a party defendant. The plaintiff respondent will pay the costs of the defendants-appellant in both Courts.

NAGALINGAM A.C.J.—I agree.

Appeals allowed.

¹ (1896) 2 N. L. R. 141.

² (1921) 3 C. L. Rec. 73.