1972 *Present :* **Wijayatilake, J. and Pathirana, J.**

SHERMAN DE SILVA & CO. LTD., Appellant, *and* MRS. ARIYALATHA DE SILVA, Respondent

S. C. 172/69 (Inty.)—D. C. Colombo, 1950/Z

Pleadings—Civil Procedure Code—Section 93—Amendment of a plaint—Discretionary power of the Court—Principles which the Court should take into consideration.

Plaintiff instituted action averring in her plaint that she, as administratrix of her deceased husband's estate, was entitled to 9,907 shares in the defendant company and that the defendant company should be ordered to register the said shares in her name. Before answer was filed, she filed a motion to amend her plaint. In the proposed amended plaint she stated that the shares had been unlawfully registered in the name of one R. Sherman de Silva and prayed "for an order that the defendant company do cancel the registration of the said shares in the name of R. Sherman de Silva and to register the said shares in the name of the plaintiff as administratrix of the estate".

Held, that the amendment of the plaint should be allowed. The amendment merely sought to put the real subject matter of the action in issue even though it was done by way of the additional relief claimed. Neither the fundamental character of the suit nor its nature and scope was altered by the amendment.

Held further, that an amendment to a plaint must be considered without reference to the ultimate result of the case and quite apart from it.

APPEAL from an order of the District Court, Colombo.

C. Ranganathan, with *S. C. Crossette-Thambiah*, for the defendant-appellant.

H. W. Jayewardene, with *Varuna Basnayake* and *Miss Ivy Marasinghe*, for the plaintiff-respondent.

Cur. adv. vult.

November 23, 1972. PATHIRANA, J.—

The plaintiff-respondent is the administratrix of the estate of her late husband M. K. de Silva. Letters of Administration had been issued to her by the District Court of Colombo. Her husband was a member of the Defendant Company, and in his life-time held 9,907 ordinary fully paid shares. By her letter dated 2nd December, 1967 she had requested the Defendant Company to register the said shares in her name as administratrix of the estate of her late husband. She instituted this action on 1st February, 1968 and by her plaint she averred in paragraph 5 as follows :—

> "The Directors of the Defendant Company have wrongfully and maliciously refused to register the said shares in the name of the plaintiff as Administratrix of the estate and are maliciously and *wrongfully threatening to sell the said shares to a nominee of theirs.*"

In paragraph 6 she pleaded that :—

> " A cause of action has accrued to the plaintiff to sue the Defendant Company for an order that the defendant Company do register the said shares in the name of the plaintiff as Administratrix of the said estate ."

She had also asked for an interim injunction to restrain the Company from selling the said shares. In the prayer she has asked for an order that the Defendant Company do register the said shares in the name of the plaintiff as administratrix. On 3.2.1968 the interim injunction was ordered on the defendant Company restraining the Company from selling the said shares until the determination of the action. The Journal entry of 14.3.1968 states that the interim injunction was served on the Defendant Company. On 4.7.1968 the Defendant Company filed objections to the interim injunction together with the affidavit of R. Sherman de Silva, Managing Director and Life Director of the Company, and annexed thereto letters written between the plaintiff and the Defendant Company, and also certain resolutions passed by the Managing Director, Sherman de Silva, in pursuance of the powers vested in him.

Sherman de Silva in his affidavit admits that the plaintiff by letter dated 2nd December, 1967, requested the Defendent Company to register the said shares in the name of the plaintiff as administratrix of the estate of her late husband. He further states that by letter ' J ' dated 8th January, 1968, the plaintiff was informed that the said shares which stood in the name of her late husband were sold on 4th January, 1968 at Rs. 14.25 per share and the amount of Rs. 141,174.75, etc. was lying to the credit of the estate of her late husband, and that the plaintiff as administratrix was entitled to withdraw this sum. By letter ' L ' dated 20th January 1968, the plaintiff was further informed that the shares had been transferred in accordance with the provisions of the Articles of Association of the Company to Sherman de Silva in whose name the said shares were registered. The plaintiff by letter marked ' K ' dated 10th January 1968 had stated that at no stage had she requested the Company to sell the shares, and she added :—

> " Please note that I do not agree to this sale nor will I be a party to it."

On 20th January, 1968 by letter marked ' L ' the defendent Company forwarded a cheque for Rs. 141,174.75, etc. to the plaintiff. Presumably it has not been accepted.

It is, therefore, clear that before the plaint was filed on 1st February 1968, the plaintiff was aware that the defendant Company registered or purported to register the said shares in the name of the Life Director R. Sherman de Silva. 16th August 1968 was a date fixed for inquiry into the interim injunction, on which date the case was taken off the inquiry roll and 23rd September, 1968 was fixed as the date for answer.

Before answer was filed, on 19th September, 1968, the plaintiff filed a motion to amend her plaint. In the proposed amended plaint, paragraph 5 of the original plaint was repeated and a new paragraph 6 was added as follows :—

> " The defendent has wrongfully and maliciously registered the said 9,907 shares of the late Mr. M. K. de Silva in the name of R. Sherman de Silva. The plaintiff states that the said R. Sherman de Silva has acquired no title to or interest in the said shares. "

In the new paragraph 7 she says :—

> " A cause of action has accrued to the plaintiff to sue the Defendent Company to cancel the registration of the said shares in the name of R. Sherman de Silva and to register the said shares in the name of the plaintiff as administratrix of the estate of the deceased. "

The prayer (*a*) for the interim injunction remained, and the prayer (*b*) states as follows :—

> " For an order that the Defendant Company do cancel the registration of the said shares in the name of R. Sherman de Silva and to register the said shares in the name of the plaintiff as Administratrix of the said estate. "

The objections to the amended plaint by the Defendant Company were filed on 6th December 1968 stating that the proposed amended plaint altered the scope and the nature of the action ; that it prejudiced the defendant ; that the plaintiff pleaded a new cause of action different from the cause of action pleaded in the original plaint, and that the amendment was not made bona fide.

The learned District Judge by his order dated 29th April, 1969 allowed the motion to amend and accepted the amended plaint. His reasons are that in order to effect the registration of the shares in the name of the plaintiff as administratrix it is necessary to set aside the sale in favour of Sherman de Silva. The mere fact that she now asks for an additional remedy does not

alter the scope of the action. This is merely ancillary to the main application that she be registered as the owner of the shares as administratrix of the estate of the late M. K. de Silva. He further added that no prejudice would be caused to any party by the amendment, and if the rights of Sherman de Silva as a purchaser would be affected by any order made on the amended plaint, it was a matter that could be remedied either by one of the parties themselves adding Sherman de Silva as a party to the action or by the Court *ex mero motu*. He, however, held that the plaintiff was clearly aware by the letters produced at the time the plaint was filed that the shares had been sold to Sherman de Silva and that he had been registered as the owner of the shares, and in the circumstances the interim injunction was of no avail and he therefore ordered the dissolution of the interim injunction.

Under Section 93 of the Civil Procedure Code, the Court has full power of amending a plaint in its discretion, but this discretion must be exercised judicially and not arbitrarily. The circumstances under which an Appeal Court would review the exercise of the discretion are set out by Jenkins L.J., in *G. L. Baker Ltd. v. Medway Building & Supplies Ltd.*[1] (1958) 1 W.L.R. 1216 at 1231 : " I would make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying that there is no doubt whatever in granting or refusing of an application for such leave is eminently a matter for the discretion of the Judge with which this Court should not in ordinary circumstances interfere unless satisfied that the Judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties. "

There are two main rules of practice that have emerged from the decided cases regarding the principles which a Court should take into consideration when it exercises the power to amend the plaint. Firstly, the amendment should be allowed, if it is necessary for the purpose of clarifying or raising the real question or issues between the parties. This rule is based on the principle that a multiplicity of actions should be avoided. The whole purpose of pleading is to define, clarify and to limit the issues which are to be the subject of the pending contest. *Daryanani v. Eastern Silk Emporium Ltd.*[2]—64 N.L.R. 529 at 531.

Secondly, an amendment which works an injustice to the other side should not be allowed, namely, an amendment :—

(*a*) which alters the nature or scope of the action or which has the effect of converting an action of one character into an action of another or inconsistent character ;

[1] *(1958) 1 W. L. R. 1216 at 1231.* [2] *(1963) 64 N. L. R. 529 at 531.*

(*b*) which has the effect of taking the action out of the provisions governing the limitation of actions in the Prescription Ordinance or any other enactment of law ;

(*c*) which has the effect of prejudicing the rights of the other side existing at the date of the proposed amendment, or which is made mala fide.

Mr. Ranganathan for the appellant has argued that the amendment is made mala fide and he refers to para 5 of the original plaint where the plaintiff had stated that the Defendant Company was maliciously and wrongfully threatening to sell the said shares to a nominee of theirs, and on this averment improperly obtained an interim injunction against the Defendant Company, when she knew that at the time the plaint was filed, the shares were already registered in the name of R. Sherman de Silva. In the amended plaint, however, the additional relief is claimed on the basis that the shares had already been disposed of in the name of R. Sherman de Silva. I can understand the allegation of mala fides being made in regard to the interim injunction. The learned District Judge has quite rightly for this reason dissolved the interim injunction.

The allegation of mala fides cannot, however, be sustained in respect of the amendment proposed. In the original plaint the foundation of the plaintiff's case was based on the allegation that the defendant wrongfully and unlawfully refused to register the said shares in the name of the plaintiff as administratrix. In the amended plaint, she says in effect that the refusal was due to the fact that the defendant had wrongfully and maliciously registered the said shares in the name of Sherman de Silva. Two material facts are therefore not controverted by the parties, namely :—

(*a*) the refusal on the part of the Company to register the said shares in the name of the plaintiff ;

(*b*) that the said shares were registered by the Company in the name of R. Sherman de Silva.

The parties are only at issue on the question of the legality of :—

(*a*) the refusal to register ;

(*b*) the registration of the shares.

I do not think, therefore, the charge of mala fides can succeed as the amendment does not necessarily cause any injustice to the Defendant Company. In this context we have to keep in mind the affidavit filed by three of the Directors of the Company

who have stated that the application for registration of the shares in the name of the plaintiff as administratrix made on 2.12.1967 was not placed before the Board of Directors.

The next objection to the amended plaint is that it introduces a distinct cause of action and therefore alters the nature and scope of the action. If one examines the plaint and the amended plaint, it is clear that what is alleged as the second cause of action, namely, the wrongful and malicious registration of the shares by the Company in the name of R. Sherman de Silva, has a direct causal connection to what is pleaded in the original plaint and also repeated in the amended plaint, namely, the wrongful and malicious refusal to register the said shares in the name of the plaintiff as Administratrix. The wrongful and malicious refusal to register the said shares in the name of the plaintiff arises and springs from the alleged wrongful registration of the said shares in the name of Sherman de Silva.

Even if the plaintiff went to trial on the original plaint, the position taken up by the Defendant Company in the affidavit, namely, that the Company was entitled to refuse to register the said shares in her name, as the Articles of Association of the Company permitted the Company to register the said shares in the name of Sherman de Silva, was a matter which would necessarily have to be put forward as a defence by the Defendant Company. The same matters have also to be gone into and put in issue even if the trial proceeds on the amended plaint. In this connection I have to agree with the observation made by Sansoni *J.*, in *Daryanani v. Eastern Silk Emporium Ltd., 64 N.L.R. 529* at *534.*[1] When he states :—" But an amendment seeking to add a cause of action which is so germane to and so connected with the original cause of action should be permitted. " In that case the plaintiff brought an action in the form of summary procedure to recover a sum of Rs. 7,449.96 upon a cheque drawn in his favour by the defendant. The defendant applied for and obtained leave to appear and defend unconditionally. The plaintiff thereafter moved to amend the plaint pleading an alternative cause of action for goods sold and delivered. The identical amount claimed in the original plaint was claimed on the new cause of action. The amendment was allowed as the real subject matter being " indebtedness " no prejudice was caused to the other side. Likewise in the instant case, the foundation of the plaintiff's case is based on the refusal to register the said shares by the Company in the name of the plaintiff as administratrix. The observations made by Baguley J., in *Chettiar Firm v. Maung Min Maung and others*—(1933) *A.E.R. Rangoon—page* 247 *at* 249[2] cited by

[1] *(1963) 64 N. L. R. 529 at 534.* [2] *(1933) A. E. R. (Rangoon) 247 at 249.*

Tambiah J., in *Senanayake v. Anthoniz,* 69 N.L.R. 225 at 227[1], are therefore apposite, "It would be seen therefore that the one thing which must not be altered by the amendment is the fundamental character of the suit, and I understand that the fundamental character of the suit must refer to the foundation on which a suit is based. It is the *foundation* on which the suit is based and not the prayer of the plaint that determines the fundamental character."

The proposed amendment merely seeks to put the real subject matter of the action in issue even though it is done by way of the additional relief claimed. In my view, the fundamental character of the suit has therefore not been altered by the amendment.

The next objection is that the reliefs claimed in the plaint and in the amended plaint are different and therefore the nature and scope of the action have been altered. In the original plaint the relief claimed is only for an order that the Defendant Company do register the said shares in the name of the plaintiff as administratrix, while in the amended plaint there is an additional relief for an order that the Defendant Company do cancel the registration of the said shares in the name of R. Sherman de Silva.

Mr. Jayewardene for the plaintiff respondent has pointed out that the issues between the parties and the fundamental character of the suit as set out in the plaint have not been altered and the claim for an additional relief is merely to achieve the object for which the original action was brought, as otherwise there will be an incongruous situation where both the name of the Administratrix and the name of Sherman de Silva will appear in the register of shares if the plaintiff ultimately succeeds in the action. The additional relief claimed is merely ancillary to the original relief in order to give full effect to the original relief, and therefore it does not alter the nature and scope of the action.

Mr. Ranganathan has, however, argued that the prayer for the cancellation of the registration of the shares in the name of R. Sherman de Silva amounts to a rectification of the register under Section 99 of the Companies Ordinance (Chapter 144), and that by reason of the special procedure introduced by Section 360 (b) of Act 15 of 1964, this relief can only be claimed by way of summary procedure and not by regular action.

Mr. Jayewardene's position is that Section 99 of the Companies Ordinance does not apply to the facts of this case, and the special procedure envisaged by Section 360 (b) is only open to "any person in his capacity of holder of shares in such Company", and the plaintiff is not yet a holder of shares as such and she cannot resort to this special procedure. While there is much force

[1] *(1965) 69 N. L. R. 225 at 227.*

in the argument of Mr. Jayewardene, I do not think that this contention of Mr. Ranganathan can be taken into account at this stage when the amendment to the plaint is considered by the Court. The substantive rights of parties are not adjudicated by the Court at the stage of the amendment of the plaint. It is not for the Court to decide in anticipation when considering an application to amend the plaint whether the relief sought by way of amendment will be ultimately rejected by the Court on the ground that the relief claimed calls for a special procedure, other than that by way of regular procedure, and therefore on that account disallow the amended plaint. The amendment to the plaint has to be considered without reference to the ultimate result of the case and quite apart from it, and the only consideration should be whether it conforms or not to the principles I have set out above. So long as the additional relief claimed in the amended plaint does not come into conflict with these rules, leave to amend should be given. In this connection, I will refer again to the case of *Senanayake v. Anthonisz*[1]—*69 N.L.R. 225.* This was a case in which the plaintiff brought an action against the defendants on two causes of action arising out of a partnership agreement. The defendants purporting to act under a clause in the agreement informed the plaintiff that he ceased to be a partner. On the first cause of action the plaintiff averred that the defendants wrongfully repudiated the obligation under the deed of partnership and claimed a refund of Rs. 100,000 which he paid as premium. On the second cause of action, he pleaded that as a result of the defendant's conduct in wrongfully terminating the services he had suffered damages in a sum of Rs. 100,000. After the trial commenced and certain issues were framed, the plaintiff sought to amend the plaint by adding two additional reliefs, viz :—

(*a*) that the partnership should be dissolved or

(b) in the alternative the deed of partnership should be rescinded.

The amendment was refused by the District Judge. On appeal it was allowed, despite the contention of the defendants that the reliefs claimed in the amendment are inconsistent with the relief claimed in the plaint as the cause of action set out in the plaint was one recognised by common law, while the cause of action for dissolution is found in Section 35 of the Partnership Act. Tambiah J., held that as the plaintiff was merely asking for additional relief by the amendment, he was not therefore altering the nature of the action. I am of the view that the additional relief in the instant case which is ancillary and is merely calculated to

[1] *(1965) 69 N. L. R. 225.*

give effect to the original relief, does not alter the nature and scope of the action. Mr. Ranganathan has cited a number of cases in support of his argument that the amendment should not be allowed. He referred among others, to *Don Alwis v. Village Committees of Hiripitiya* [1]—*54 N.L.R. 225; Wijewardene v. Lenora* [2] *64 N.L.R. 529; Ekanayake v. Ekanayake* [3]—*63 N.L.R. 188;* and *Municipal Council, Jaffna v. Dodwell Company Ltd., Colombo* [4]—*73 C.L.W. 41.* These decisions are not helpful as the facts can be clearly distinguished.

As I have observed earlier, the plaintiff complains of a wrong and the foundation of the alleged wrong, is the same in both the plaint and the amended plaint. In effect the relief claimed by her is substantially the same. I, therefore, hold that the District Judge has acted correctly in permitting the amendment. It is also my view that in the interests of justice the amendment should be allowed as no prejudice would be caused to the Defendant Company. Furthermore, the acceptance of this amendment would obviate a multiplicity of actions.

The appeal is, therefore, dismissed with costs.

WIJAYATILAKE. J.—I agree.

Appeal dismissed.