1971 *Present :* **Samerawickrame, J., and Thamotheram, J.**

H. WERAGAMA and another, Appellants, *and* S. N. K. G. BANDARA and another, Respondents

S. C. 88/67 (F)—D. C. Ratnapura, 4674

Civil Procedure Code—Misjoinder of plaintiffs and causes of action —Scope of Sections 17 and 36 (1)—Issues—Power of Court to grant relief on issues not framed at the stage of trial—Limitations thereon.

Buddhist ecclesiastical law—Maha Saman Dewale of Ratnapura—Claim to office of Maha Kapurala—Absence of proof of such office— Whether the Court can then declare the claimant to be a Kapurala without framing relevant issues.

Where A has a cause of action against two defendants and B has a separate cause of action against the same two defendants, they cannot, under our law, unite them in one action on the grounds that both causes of action arise from the same acts or series of acts or that in determining them the same question of law or fact arises.

The first and second plaintiffs claimed to be declared the hereditary Maha Kapurala and Kapurala respectively of the Etul Kattale department of the Maha Saman Dewale at Ratnapura. They averred that their rights to work at the Dewale were denied by the first and second defendants. The first defendant was the Basnayake Nilame of the Pita Kattale division of the same Dewale.

Held, that even a concerted attempt by the defendants acting in collusion to oust the plaintiffs as alleged in the plaint would involve a denial of the respective rights of each plaintiff by the two defendants and would give rise to a separate cause of action in favour of each plaintiff against both defendants. There was therefore, according to Section 17 of the Civil Procedure Code, a misjoinder of plaintiffs and causes of action. It is, however, clear law that an action will not be dismissed on the ground of such a misjoinder but that one party plaintiff will be permitted to proceed with his claim. Admittedly, the claim of the second plaintiff could be struck out.

In regard to the first plaintiff, although he sought a declaration that he was the Maha Kapurala of the Maha Saman Dewale, the trial Judge held that it had not been proved that there was an office of Maha Kapurala of the Dewale. Nevertheless he answered issues framed relating to the first plaintiff's claim to be Maha Kapurala as though they related to a claim to be Kapurala and granted him a declaration that he was a Kapurala of the Dewale.

Held, that the trial Judge erred in granting the first plaintiff relief not prayed for and not claimed in the action by him and that on his finding that there was no office of Maha Kapurala in the Saman Dewale at Ratnapura, he should have dismissed the first plaintiff's action.

APPEAL from a judgment of the District Court, Ratnapura.

H. W. Jayewardene, Q.C., with *H. Wanigatunga, L. C. Seneviratne* and *G. H. S. Samaraweera,* for the 1st substituted-defendant-appellant.

H. Wanigatunga, with *H. L. K. Karawita,* for the 2nd defendant-appellant.

G. G. Mendis, with *Miss A. P. Abeyratne, Asoka de Z. Gunawardena* and *G. Dayasiri,* for the plaintiffs-respondents.

Cur. adv. vult.

1*—A 09779—8,000 (74/09)

March 6, 1971. SAMERAWICKRAME. J.—

Learned counsel for the defendants-appellants submitted that there was in this action a misjoinder of plaintiffs and causes of action. The plea of misjoinder was taken in the answer and an issue was framed on it. In the plaint the plaintiffs stated that the Maha Saman Dewale situated at Ratnapura was organised to consist of two divisions or departments called the Etul Kattale and the Pita Kattale. The Etul Kattale had as its head the Maha Kapurala and the Pita Kattale had as its head the Basnayaka Nilame. The first defendant as Basnayaka Nilame could insist on the due performance of religious rites and observances but could not interfere in the appointment, dismissal or duties of the officers of the Etul Kattale. The plaint set out that the first plaintiff held the hereditary office of Maha Kapurala and the second plaintiff held the hereditary office of Kapurala. The plaint then set out the grounds of complaint which the plaintiffs had and, *inter alia,* stated in paragraphs 15, 17 and 18 as follows :—

> " 15. On or about the 9th day of October 1961 the first defendant acting in collusion with the second defendant wrongfully and unlawfully prevented the first plaintiff from carrying out his duties and functions as Maha Kapurala within the sanctum of the deity, in violation of the customs of the Dewale.
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> 17. The first defendant now wrongfully claims for himself the right to appoint and dismiss officers of the Etul Kattale and Kapuralas in particular and has threatened to dismiss the second plaintiff from his hereditary office of Kapurala.
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> 18. The plaintiffs have good reason to believe that the first and second defendants are acting in collusion to oust the two hereditary Kapuralas from the Dewale and to place the Etul Kattale of the Dewale in the charge of the second defendant under the first defendant."

It prayed for a declaration that the first and second plaintiffs are Maha Kapurala and Kapurala respectively of the Maha Saman Dewale and that the plaintiffs are entitled to perform rites and observances belonging to the Etul Kattale of the said dewale and for a permanent injunction restraining the defendants from preventing the plaintiffs from performing the customary rites and ceremonies at the said dewale and interfering in the affairs of the Etul Kattale or sanctum of the said dewale.

It appears to me that the grounds of complaint set out in the plaint touching each of the plaintiffs involve a denial of the rights of the first plaintiff as holder of the office of Maha

Kapurala and a challenge to and a threatened denial of the rights of the second plaintiff as holder of the office of Kapurala. Even a concerted attempt by the defendants acting in collusion to oust the plaintiffs as alleged in paragraph 18 of the plaint would involve a denial of the respective rights of each plaintiff by the two defendants and would give rise to a separate cause of action in favour of each plaintiff against both defendants.

Learned counsel for the plaintiffs-respondents submitted that the interests of the first plaintiff and the second plaintiff are identical in that both were concerned in getting a declaration that the offices of Maha Kapurala and Kapurala were hereditary, and that the defendants had no right to make appointments to the said offices or to dismiss the holders of the said offices. The first defendant's claim to appoint and dismiss the holders of the offices of Maha Kapurala and Kapurala was undoubtedly a denial of the rights of the plaintiffs. It appears to me however that that claim amounted to both a denial of the rights of the first plaintiff and a denial of the rights of the second plaintiff and gave rise to separate causes of action in favour of each of them. The plaintiffs have alleged further acts in respect of each of those causes of action, namely, that on 9th October, 1961, the defendants wrongfully and unlawfully prevented the first plaintiff from carrying out the duties of the Maha Kapurala and that the first defendant threatened to dismiss the second plaintiff from the office of Kapurala.

Where A has a cause of action against two defendants and B has a separate cause of action against the same two defendants they cannot, under our law, unite them in one action on the grounds that both causes of action arise from the same acts or series of acts or that in determining them the same question of law or fact arises. Our Civil Procedure Code contains no provision corresponding to Order 1 rule 1 of the Indian Act which reads :—

> "All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise."

On the contrary, Section 17 of the Civil Procedure Code provides :—

> "Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action."

In *Don Simon Appuhami v. Marthelis Rosa*[1] two persons who were arrested and charged together with the same offence in the same case and were acquitted, sued in one action for damages for malicious arrest and malicious prosecution. It was held that the cause of action accruing to each was separate and distinct and that the two causes of action should not have been combined and that the suit was bad for misjoinder of causes of action. Under the Indian Civil Procedure Code of 1882, the material provisions of which were almost identical with the provisions of our Civil Procedure Code it has been held that one wrongful act by a defendant or defendants which injured more than one person gave rise to distinct causes of action which may not be joined in one action. The editor and proprietor of a newspaper published articles which referred to the "Calcutta Police" without naming individuals. Six members of the Calcutta Police Force jointly sued for damages for libel alleging that the articles were directed against them. It was held that injury may have been caused by one act of collective libel to several individuals but the causes of action of the persons injured would none the less remain separate and distinct—vide *Aldridge v. Barrow*[2]. Where A and B were assaulted by C at an interview at C's house and jointly sued for damages for assault, it was held that the assault on A and that on B constituted two distinct causes of action and the suit was therefore bad for misjoinder—vide *Varajlal v. Ramdat*[3]. Where several trustees of a temple were removed from the office of trustees by a resolution of the District Temple Committee and filed a suit for a declaration that their removal was without just cause it was held that the dismissal of each trustee gave rise to a distinct cause of action and that the suit was bad for misjoinder—vide *Ramanuja v. Devanayaka*[4].

The second part of the first paragraph of s. 36 (1) of the Civil Procedure Code is relevant and reads :—

> "and any plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants may unite such causes of action in the same action."

This must be read with the provision in s. 17 which I have set out which states that nothing in the Code should be deemed to enable plaintiffs to join in respect of distinct causes of action. It is clear that a cause of action in favour of one plaintiff cannot be united with a separate cause of action in favour of another plaintiff. Both plaintiffs must be jointly interested in each cause of action. In my view the term "interested" in s. 36 (1)

[1] *(1906) 9 N.L.R. 68.*
[2] *(1907) 34 Cal. 662.*
[3] *(1922) 26 Bom. 259.*
[4] *(1885) 8 Madras 361.*

does not mean having an interest from affection, curiosity, novelty or the like but having an interest in the sense of having a pecuniary or other claim or legal rights or liabilities that may be affected. It does not appear to me that the 2nd plaintiff is interested in that sense in the cause of action in favour of the 1st plaintiff nor that the 1st plaintiff is interested in the cause of action in favour of the 2nd plaintiff.

I therefore hold that there is a misjoinder of plaintiffs and causes of actions. It is now clear law that an action will not be dismissed on the ground of such a misjoinder but that one party plaintiff will be permitted to proceed with his claim. Learned counsel for the appellants submitted that the action was really that of the first plaintiff and that the second plaintiff had at the most a *quia timet* action which was filed while he still held the office of Kapurala. It is doubtful whether, in any event, any cause of action had arisen. Learned counsel for the respondents while contending that there was no misjoinder agreed that in the event of the Court holding that there was such misjoinder, it was the claim of the second plaintiff that should be struck out. I accordingly make order striking out the claim of the second plaintiff.

The plaint averred that the Maha Kapurala was the Head of the Etul Kattale and that by custom the office of Maha Kapurala was in the family of the first plaintiff and the first plaintiff was the holder of the office. The relief prayed for was a declaration that the first plaintiff was the Maha Kapurala of the Maha Saman Dewale and for a permanent injunction restraining the defendants from preventing the plaintiff from performing the customary rites and ceremonies at the said dewale and from interfering in the affairs of the Etul Kattale. In evidence the first plaintiff said that the sole responsibility of the dewale was with the Maha Kapurala. He has the custody of all the articles in the Hadunkudama, Madamale and Udamale. He supervises the work of the other officers of the Etul Kattale and has the right to supervise even the work of the Kapuralas. He alone may enter the Udamale. The other Kapurala may only with his permission go beyond the Madamale. As Kapu Nayaka of the Saman Dewale he has the right to appoint the Kapuwa at Sri Pada. He asked that he be declared entitled to the Maha Kapuralaship of the dewale. When questioned in cross-examination, he said that the Maha Kapuralaship is a distinct office from that of kapurala.

The learned District Judge held that it had not been proved that there is an office of Maha Kapurala in this dewale. On that finding the first plaintiff's claim failed. The learned District Judge however answered issues framed relating to the first

plaintiff's claim to be Maha Kapurala as though they related to a claim to be kapurala and granted him a declaration that he is a kapurala of the Maha Saman Dewale. Learned counsel for the appellants submitted that the learned District Judge erred in granting a declaration that was neither prayed for in the plaint nor claimed in the action.

In written submissions made to us after the argument was over learned counsel for the respondents made the point that it was open to the District Judge to frame an issue at any stage. Up to the end of the trial the claim of the first plaintiff was to be declared the Maha Kapurala of the dewale. He said that from the 19th of October, 1961, he had been forcibly prevented from working at the dewale by the first defendant. The trial was concluded on 3rd January, 1966, and judgment was delivered about an year later. By the time the District Judge came to frame an issue as to the right of the first plaintiff to the office of kapurala, a claim by him to that office would have been barred by prescription. A Court may not allow a plaintiff to make an amendment to the plaint which would relate back to the date of the original plaint if that will prejudice a plea of prescription which the defendant has. In the same way, in my view, a Court may not raise an issue as to a matter not raised in the plaint which might prejudice a plea of prescription. It appears to me therefore that the District Court could not, at the stage of judgment, have raised *ex mero motu,* the issue as to the right of the first plaintiff to the office of kapurala not claimed in the plaint without hearing what the defendants had to urge against the raising of that issue on the ground of prejudice to a plea of prescription.

I am also not satisfied that all matters pertinent to a claim by the first plaintiff to the office of kapurala were before the Court to the same extent as they would have been if the claim had been made in the plaint and was in controversy in the action. To meet the case that was put forward by the first plaintiff it was sufficient for the defendants to show that there was no office of Maha Kapurala in this dewale. The defendants pleaded certain matters to show that the first plaintiff was not qualified to be a kapurala at all but this was with reference to his claim to be Maha Kapurala. If the first plaintiff's claim was not to the office of Maha kapurala but to that of kapurala it may have been possible for the defendants to aver and establish that under certain circumstances or conditions a person who had a valid hereditary claim to the office of kapurala was disentitled to hold that office and to be recognized and accepted

by the Basnayake Nilame and that such circumstances or conditions existed in the case of the first plaintiff. There was cross-examination of the first plaintiff as to his conduct when he was manager at Sri Pada. If the defendants had an opportunity to aver, raise issues and lead evidence of circumstances and/or conditions disentitling the first plaintiff from holding the office of kapurala there may have been further evidence in regard to this and other matters may have been raised. In the way that the trial proceeded, no occasion arose for the defendants to put forward the position that there were circumstances and/or conditions which would disentitle a person with a valid hereditary claim to the office of kapurala from holding it and/or being recognized and accepted by the Basnayake Nilame. In the action the first plaintiff claimed to hold the office of Maha Kapurala which he said was supreme in regard to the Etul Kattale and was not inferior to the office of Basnayake Nilame. The second plaintiff did claim the office of kapurala but it would appear that the defendants recognized him as a person both suitable and qualified to hold that office. The dispute, if any, between the second plaintiff and the defendants turned upon his hereditary right to that office in view of the claim of the first defendant to appoint and dismiss kapuralas.

The learned District Judge did not in fact frame any fresh issues. Had he addressed his mind to the question of raising issues at the stage of judgment, it would have been apparent to him that the defendants had to be given an opportunity of being heard and of raising matters arising out of the issues that were to be raised.

Learned counsel for the respondents relied on the case of *Jayawickrame v. Amarasuriya.*[1] In that case the plaintiff sought to enforce a promise and agreement by the defendant to pay a sum of Rs. 150,000 in five annual instalments of Rs. 30,000 each. She alleged that there was a trust binding on the defendant in her favour and that she had threatened to file action and that an agreement had been arrived at on the basis that the plaintiff should refrain from instituting the proposed action and should not assert title to any share of certain properties and that the defendants should, in consideration, pay her a sum of Rs. 150.000 in five yearly instalments. She alleged that the defendant had in fact paid a sum of Rs. 24,500 in pursuance of the agreement. The defendant pleaded that payments had been made by him out of generosity. The learned District Judge in that action held that there was no enforceable trust in favour of the plaintiff and that she had accordingly failed to prove the compromise relied on by her. He held however that the payments made by the

[1] *(1918) 20 N.L.R. 289.*

defendant were not made out of generosity but that the defendant had done so in pursuance of a moral obligation arising from an oral direction given to him by his deceased father to look after the plaintiff which the plaintiff, bona fide, though wrongly claimed had given rise to a trust. In order to discharge that moral obligation he had agreed to pay a sum of Rs. 150,000 in instalments within five years. The learned District Judge held that the plaintiff had failed to prove the *justa causa* pleaded by her and that the moral obligation did not constitute an adequate *justa causa debendi* for the pact to pay Rs. 150,000. The Privy Council held that under the Roman Dutch Law, a promise made in pursuance of a moral obligation was enforceable and that there was a *justa causa debendi.* They added, " If at the trial, which did not take place before a jury, the learned District Judge, who had full control over the record, had amended the issue so as to suit the facts proved, he should, in their Lordships' opinion, have given a decree in favour of the plaintiffs for the sum sued for. He did not do so. He, on the contrary, seized upon the word 'trust' used in the fifth paragraph of the plaint, and having found that no trust existed, decided against the plaintiffs, although they had established before him a good and meritorious cause of action according to the system of law applicable to the case." It would be observed that the plaintiff was awarded the relief claimed in the plaint and upon a finding arrived at by the District Judge in respect of matters that were in controversy at the trial. I am of the view that this case is to be distinguished from the case under consideration by me.

I hold that the learned District Judge erred in granting the first plaintiff relief not prayed for and not claimed in the action by him and that on his finding that there was no office of Maha Kapurala in the Saman Dewale at Ratnapura, he should have dismissed the first plaintiff's action.

We heard arguments on the matters which I have dealt with and intimated to counsel that we would inform them if we desire to hear further arguments on the other points. However, in view of the findings I have arrived at, it is unnecessary to hear arguments on other points. I allow the appeal and dismiss the first plaintiff's action. I have already earlier in my judgment made order striking out the action of the second plaintiff. The defendants-appellants will be entitled to costs of appeal payable by the first and second plaintiffs-respondents and to costs of the trial payable by the first plaintiff-respondent.

THAMOTHERAM, J.—I agree.

Appeal allowed.