

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

L. GRACE DE ALWIS, Appellant, and D. D. E. WALTER
DE ALWIS, Respondent

S. C. 148/68 (*Inty.*)—D. C. Kandy, 9859/MR

Pleadings—Framing of issues is not restricted by the pleadings—Amendment of plaint—Rule that it should not deprive the defendant of the plea of prescription—Circumstances when the rule need not be observed—Whether a new cause of action can be added when a plaint is amended—Civil Procedure Code, s. 93.

Framing of issues is not restricted by the pleadings. A case must be tried upon the "issues on which the right decision of the case appears to the court to defend". But where an amendment to a plaint would not have been allowed by the court as it would have prejudiced a plea of prescription available to the defendant in respect of a claim, an issue raising such claim should not be allowed at the stage of trial.

As a rule, a Court will not allow the setting up of a claim by an amendment of the plaint if a fresh suit on the amended claim would be barred by prescription at the date of the application to amend the plaint. However, where there are special and peculiar circumstances which require the amendment to be ordered in the interests of justice the provisions of section 93 of the Civil Procedure Code are wide enough to allow such an amendment.

Plaintiff instituted action for the recovery of two sums of money from the defendant. She averred in her plaint that, "shortly before" her marriage to the defendant, her father had given a certain sum of money and property to the defendant to be held in trust for her and to be used for her welfare. She claimed that the two sums of money became due to her upon the subsequent dissolution of her marriage on the ground of malicious desertion on the part of the defendant. The defendant filed answer denying a trust and claiming that the sum claimed by the plaintiff represented gifts given to him. Thereafter, the plaintiff moved to amend her plaint by altering the words "shortly before" to "in consideration of the said marriage". She further moved to add a new paragraph to the effect that even assuming that the sums claimed represented gifts, the defendant was liable to pay those sums.

Held, that the amendment of the plaint should be allowed. The claim on the basis of a forfeiture of benefits upon the dissolution of the marriage on the ground of malicious desertion by the defendant, although it was prescribed at the date of the motion for the amendment, was already substantially in dispute between the parties well within the period of prescription. The statement in the judgment of a Divisional Bench in *Lebbe v. Sandanam* (64 N. L. R. 461) that in no circumstances can a new cause of action be added when a plaint is amended was made *obiter* and is now not followed.

A PPEAL from an order of the District Court, Kandy.

C. Ranganathan, Q.C., with P. Navaratnarajah, Q.C., T. Sentharingam and R. D. C. de Silva, for the plaintiff-appellant.

C. Thiagalingam, Q.C., with G. Candappa, for the defendant-respondent.

Cur. adv. vult.

May 5, 1971. SAMERAWICKRAME, J.—

The plaintiff brought this action for the recovery of two sums of Rs. 15,000 and Rs. 17,500. In her plaint she averred that "shortly before" her marriage to the defendant, her father had, (a) given to the defendant a sum of Rs. 15,000 to be held in trust for her and to be used for her welfare and, (b) by a deed, gifted to the plaintiff and defendant a land; the share conveyed to the defendant was to be held by him in trust for the plaintiff and to be used for her welfare and support. She further averred that her marriage to the defendant had been dissolved by a decree of the District Court of Kandy on the ground of malicious desertion on the part of the defendant. The defendant had shortly before the

decree in the divorce case sold his half share of the land for Rs. 17,500. She claimed that the defendant held the sums of Rs. 15,000 and Rs. 17,500 in trust for her and sought the recovery of the said sums.

The defendant filed answer denying a trust and stated that the sum of money and the share of the land were given to him as gifts. He admitted the averment in the plaint in regard to the dissolution of the marriage between him and the plaintiff and further stated :—

“(a) that in D. C. Kandy Case D. 1692 the defendant sued the plaintiff for divorce on the ground of malicious desertion ;

(b) that the plaintiff made a counter charge of desertion and sued for divorce in reconviction ;

(c) that on the 3rd August 1964 the plaintiff represented to the defendant that the plaintiff had arranged to get married to a third party and that if the defendant obtained a decree against the plaintiff such marriage would not take place, and the defendant believing the said representations consented to have his action for divorce dismissed and to the plaintiff's claim for divorce being granted on condition that—

(a) the defendant obtained the custody of his children,

(b) the plaintiff was entitled to recover from the defendant only Rupees Two Hundred and Fifty (Rs. 250) as alimony until she married,

(c) the defendant pleads as a matter of law that the plaintiff is estopped from maintaining this section against the defendant.”

By an amendment to his answer he added paragraph 8 which states :—

“ 8. The defendant further states that the plaintiff not having reserved to herself, the right to claim any dowry in D. C. Kandy 1692 and not having in the said proceedings obtained the leave of court to file a fresh action for the recovery of the dowry is not entitled in law to have and maintain this suit.”

Thereafter on 24.3.66 the plaintiff moved to amend her plaint by altering the averment that the money was given and the deed was executed “shortly before” to “in consideration of

the said marriage". She further moved to add a new paragraph 3 (a) as follows:—

"3. (a) Even assuming that the said sum of Rs. 15,000 was a gift to the defendant, and the share of the land set out in schedule is a gift to defendant, which plaintiff does not admit, yet in the premises the defendant is liable to pay the said sum of Rs. 15,000 and convey the said half share to the plaintiff."

Objection was taken to the proposed amendment of the plaint and the learned District Judge made order allowing it. In the course of his order, he stated, "This additional paragraph neither adds an alternative cause of action nor converts an action of one character to an action of another and inconsistent character. It does not alter the nature and scope of the action and does not introduce a new cause of action. The Court has a very wide discretion to amend pleadings (vide sections 46 and 93 of the Civil Procedure Code). The restrictions on the exercise of this discretion are set out at page 288 of Volume 66 of the New Law Reports. Neither of these restrictions applies to the proposed amendment. I therefore allow the plaintiff's application and accept the amended plaint." There was an appeal against this order and this Court stated, "It appears to us to be quite clear that the new paragraph 3 (a) added to the plaint is intended to state an argument with reference to the defendant's averment that there was a gift. We agree with the learned District Judge that the new paragraph 3 (a) does not disclose either an alternative cause of action or an additional cause of action. The new paragraph 3 (a) is not intended to clarify any averment contained in the original plaint. There does not appear to be any need for its inclusion in the plaint. We set aside the order of the learned District Judge.....". The parties to the action and both Courts appear to have considered themselves bound by an apparently authoritative decision of the Divisional Bench of this Court which laid down the amendments to a plaint that were permissible and restricted them to the corrections of errors and categorically stated that there was no power to make an amendment which set up a new cause of action¹. It has been later pointed out that the statements in the Divisional Bench judgment were *obiter dicta* and that there is no inflexible rule that in no circumstances could a new cause of action be added—vide *Daryanani v. Eastern Silk Emporium Ltd*².

¹ (1963) 64 N. L. R. 461 (*Lebbe v. Sandanam*).

² (1963) 64 N. L. R. 529.

At the trial, learned counsel for the plaintiff sought to raise the following issues :—

- “ 1. (a) In consideration of the marriage between the plaintiff and defendant did the plaintiff's father gift to the defendant a sum of Rs. 15,000 ?
- (b) Was the said sum of Rs. 15,000 to be held by the defendant in trust for the plaintiff to be used for her welfare ?
2. (a) In consideration of the marriage between the plaintiff and defendant did the plaintiff's father convey to the plaintiff and defendant by deed No. 4086 of 1952 the land described in the schedule to the plaint ?
- (b) Was half share of the said land to be held by the defendant in trust for the plaintiff and to be used for her welfare and support ?
3. Did the defendant shortly prior to the decree in Case No. 1692/Divorce sell a half share of the said land for a sum of Rs. 17,500 ?
4. Was the marriage between the plaintiff and defendant dissolved by decree in Case No. 1692/D on the ground of malicious desertion of the plaintiff by the defendant ?
5. If issues (1) to (4) or any of them are answered in favour of the plaintiff, is the defendant liable to pay to the plaintiff the sum of Rs. 32,500 ? ”

Objection was taken to the words “ in consideration of the marriage ” in issues 1 (a) and 2 (a) and to issue 4. The learned District Judge by his order rejected issue 4 and directed issues 1 (a) and 2 (a) to be amended to read “ shortly before the marriage ” instead of “ in consideration of the marriage ”. The plaintiff has appealed against that order.

The learned District Judge ruled out the issues on the ground that they did not arise on the pleadings. It is no doubt correct that these issues did not arise on the pleadings. If that was the only consideration that applied, his order must necessarily stand but, as the Privy Council has stated, “ The case must be tried upon the ‘ issues on which the right decision of the case appears to the court to depend ’ and it is well settled that the framing of such issues is not restricted by the pleadings. ”—Vide *The Bank of Ceylon, Jaffna v. Chelliahpillai*¹.

¹ (1962) 64 N.L.R. 25 at 27.

Learned counsel for the defendant-respondent submitted that as this Court had rejected the amendment sought to be introduced by paragraph 3 (a) of the amended plaint, the plaintiff was precluded from raising any issue on the matters set out in the said paragraph. This Court however rejected paragraph 3 (a) because it did not set out either an alternative cause of action or an additional cause of action and was no more than an argument. Accordingly, there was no finding by this Court that any claim sought to be set out in paragraph 3 (a), if properly formulated, was not a claim which could be raised in this action. It appears to me therefore that the order of this Court does not preclude the plaintiff from setting up such a claim.

Learned counsel for the defendant-respondent further submitted that a claim on the basis of a forfeiture of benefits upon the dissolution of the marriage on the ground of malicious desertion by his client was prescribed at the date issue was sought to be raised. He submitted further that as an amendment to the plaint would not be allowed which would prejudice a plea of prescription that had become available to the defendant, an issue to raise such a claim should not be allowed. I am in agreement with the submission that if an amendment of the plaint to raise this claim would not be allowed, an issue raising such a claim should not be allowed. It is necessary therefore to consider whether on the facts of this case an amendment of the plaint to set up a claim on the basis of a forfeiture of benefits should not be allowed. As a rule, a Court will not allow the setting up of a claim by an amendment if a fresh suit on the amended claim would be barred by prescription at the date of the application to amend the plaint. It would appear however, that where there are special and peculiar circumstances the Court will allow such an amendment. The case of *Weldon v. Neal*¹ laid down the rule that an amendment will not be allowed which would prejudice a plea of limitation which had accrued to the defendant but Lord Esher in his judgment also stated, "Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."

In the case of *Charan Das v. Amir Khan*² the Privy Council stated "That there was full power to make the amendment cannot be disputed, and though such a power should not as a

¹ (1887) 19 Q. B. D. 394.

² A. I. R. 1921 (P.O.) 50.

rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of the case.....". In that case the amendment was allowed.

In *P. H. Patil v. K. S. Patil*¹, the Supreme Court of India stated, "It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice."

Section 93 of the Civil Procedure Code states that "the Court shall have full power of amending in its discretion." It is for the Court therefore to consider all the circumstances and to make such order as is required in the interests of justice. Upon the new claim the plaintiff is seeking the very same relief which she sought in the plaint but upon a different ground which in law constitutes a different cause of action. The ground relied on is the forfeiture of benefits received by a party upon the dissolution of the marriage by reason of malicious desertion committed by him. The grant of benefits and the dissolution of the marriage on the ground of malicious desertion were set out in the original plaint. In his answer the defendant set out facts and circumstances which afford a defence to a claim on the basis of a forfeiture of benefits. The amendment that the plaintiff sought to be made to the plaint, though it failed to formulate the claim properly, did seek to raise it. It appears to me therefore that the claim now sought to be made by the plaintiff, though it was then not properly and exactly formulated, was already substantially in dispute between the parties well within the period of prescription. Accordingly, this is not a case where the defendant is taken by surprise by the assertion of facts to raise a claim for the first time after the period of prescription in respect of it had elapsed. Finally, statements in an apparently authoritative Divisional Bench judgment which were later shown to be *obiter* and are now not followed but which were regarded at the time as binding and were then followed², had prevented the plaintiff from having her plaint amended to set out this

¹ *A. I. R. 1957 (s.c.) 363.*

² (1964) 66 *N. L. R. 288 (Thirumalay v. Kulandavelu).*

claim. Do these circumstances outweigh the consideration that the effect of the amendment would be to take away the defendant's plea of prescription and do they therefore, require the court to order amendment in the interests of justice? In my opinion, they do. I would stress that it is not any of the circumstances taken singly but the cumulative effect of all the circumstances that have that effect. I would also stress that the rule is that an amendment that deprives the defendant of the plea of prescription would not be allowed and that it is only by way of exception where there are special and peculiar circumstances which require the amendment to be ordered in the interests of justice that a court will make order making such amendment.

I hold that on the facts of this case an amendment to the plaint to set up a claim on the basis of a forfeiture of benefits should be allowed. Accordingly, I hold that the plaintiff should have been allowed to raise issues to set up such a claim. I allow the appeal and set aside the order of the learned District Judge upholding the objection to the issues framed on behalf of the plaintiff-appellant.

I think it desirable that the plaint should be amended setting out the new claim sought to be raised. The plaintiff is accordingly given leave to amend the plaint setting out fully the facts and circumstances on which she relies for her claim on the basis of a forfeiture of benefits upon the dissolution of the marriage on the ground of malicious desertion by the defendant. It will not be open to the defendant to object to the amendment on the ground that it sets out a claim that is prescribed. The defendant will of course be permitted to amend his answer to meet the claim made by the amendment of the plaint.

The consent order made on 19th July, 1968 that the plaintiff should pay Rs. 367.50 as costs will stand. Though the plaintiff-appellant has succeeded in her appeal, the claim that she is now allowed to set up is one which might well have been put forward in the original plaint. By her failure to do so delay has been caused to the determination of this case and I am not therefore disposed to grant her costs. Each party will bear his or her costs of appeal.

ALLES, J.—I agree.

Appeal allowed.