

1965

*Present : Sri Skanda Rajah, J., and Alles, J.*J. E. D. MARTIN, Appellant, *and* S. THENUWARA, Respondent*S. C. 110 (Inty.)/1964—D. C. Colombo, 58601/M**Amendment of pleadings—Scope—Civil Procedure Code, ss. 93, 146.*

Pleadings may be amended after issues which do not strictly arise from the pleadings are permitted to be framed.

**A**PPEAL from an order of the District Court, Colombo.

*H. W. Jayewardene, Q.C.*, with *Cecil de S. Wijeratne*, for defendant-appellant.

*C. Ranganathan, Q.C.*, with *Vernon Martin*, for plaintiff-respondent.

*Cur. adv. vult.*

October 8, 1965. SRI SKANDA RAJAH, J.—

The plaintiff is the administrator of the estate of the late Dr. A. S. Thenuwara, who was the owner of the premises in question.

The plaint averred that Dr. Thenuwara left a last will in which his widow Catherine was named executrix. She proved the will in D. Cs Colombo 16607/T and became entitled to the premises. She rented the premises to the defendant from 1st June, 1956. Later it was held that Catherine was not entitled to succeed to her husband's estate as she was aware of the plot to kill her husband. In consequence probate was recalled and plaintiff was appointed administrator of the estate. Therefore, the contract of tenancy was null and void and the defendant was a trespasser. The prayer was for a declaration that the premises were part of the estate of the late Dr. Thenuwara, ejectment of the defendant and damages.

The answer admitted the averments in the plaint but maintained that the tenancy was valid, the plaintiff had recognised the defendant as tenant of the premises and prayed that the action be dismissed.

On these pleadings the plaintiff sought to frame the following, among other issues :—

“ In the event of the Court holding that the defendant is a tenant of the estate as from 1.9.57, is the plaintiff entitled to claim from the defendant all rents from 1.9.57 ? ”

The defendant objected. The objection was upheld. The plaintiff was, however, given the opportunity to amend the plaint.

Thereafter, the plaintiff filed an amended plaint in which he set out every averment in the original plaint and added :—

“ In the alternative the plaintiff states that the defendant was in occupation of the said premises as from 1st June, 1956, as a tenant under the estate of the late Dr. A. S. Thenuwara on a monthly rental of Rs. 200 and the plaintiff as administrator of the estate of the late Dr. Thenuwara is entitled to claim from the defendant all rents from 1st June, 1956, to the end of January, 1963.”

To this averment, objection was taken unsuccessfully. Hence this appeal by the defendant.

As was pointed out by me in *Thirumalay v. Kulandavelu*<sup>1</sup>, the whole purpose of pleadings is to define, to clarify and to limit the issues which are to be the subject of the pending contest.

The scope of the action may be determined by the pleadings, i.e., the plaint and answer. On the plaint and answer the above issue arose for consideration and it should not have been disallowed.

In recent times, there has been a tendency to insist that pleadings should be amended before issues which do not strictly arise from the pleadings are permitted to be framed. This tendency has been the result of losing sight of the observations of this Court in some of the earlier decisions, e.g., *Attorney-General v. Smith*<sup>2</sup> and *Silva v. Obeyesekera*<sup>3</sup>.

In *Attorney-General v. Smith* (supra) at 241, Layard, C.J., compared our system of pleadings with those in England and India and went on to say, “ By section 146 of our Code, if the parties are agreed, the issues may be stated by them ; if not agreed, then the Court must frame them (see *Fernando v. Soysa*, 2 N. L. R. 41). In this case ; the defendant’s counsel, i.e., pleader, expressed a wish to have a further issue settled. *There is no necessity under our law to restrict the issues to the pleadings*, as was done in this case ; it appears to me to be contrary to our law, and I think the Judge should have allowed an issue to be framed as to whether the burns contributed to the death of the deceased.”

In *Silva v. Obeyesekera* (supra) at 107, Bertram, C.J., said, “ Counsel for the plaintiff raised the objection that these issues did not arise on the pleadings, and that defendant should have got his answer amended so as to raise these issues. On this objection being taken, the learned District Judge disallowed the issues. Here the learned Judge was led into a mistake. No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and *it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings.*”

<sup>1</sup> (1964) 66 N. L. R. 285 at 287.

<sup>2</sup> (1905) 8 N. L. R. 229.

<sup>3</sup> (1923) 24 N. L. R. 97.

In the recent case of *The Bank of Ceylon, Jaffna v. Chelliahpillai* Lord Devlin said, “*The Civil Procedure Code gives in section 93 ample power to amend pleadings. Moreover, 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 ; see section 146 of the Code. Attorney-General v. Smith (supra) and Silva v. Obeyesekera (supra) ”.*

In permitting the amendment in the present case, the learned Judge was trying to grant relief on the basis of the defence set up. The defendant cannot, therefore, be heard to complain that he is prejudiced by this amendment.

The above are the reasons for the order we made dismissing the appeal with costs.

ALLES, J.—I agree.

*Appeal dismissed.*

