1963 *Present :* **Sansoni, J., and L. B. de Silva, J.**

R. J. DARYANANI, Appellant, *and* EASTERN SILK EMPORIUM LTD., Respondent

S. C. 41/61 (Inty.)—D. C. Colombo, 23,565/S

Pleadings—Application to amend plaint—Scope of power of Court to grant it—Discretion of Court—Rules of practice regarding the exercise of the discretion—Addition of a new or alternative cause of action—Permissibility—Amendment before hearing of action—Permissibility—Civil Procedure Code, ss. 46, 93.

In the exercise of the discretion vested in Court by section 93 of the Civil Procedure Code regarding amendment of a plaint the Court should take into consideration well-established rules of practice. The rules should not be treated as though they were statutory rules or provisions of positive law of a rigid and inflexible nature. The two main rules which have emerged from the decided cases are :—

(i) the amendment should be allowed if it is necessary for the purpose of raising the real question between the parties ; and

(ii) an amendment which works an injustice to the other side should not be allowed.

There is no rule that only slips or accidental errors are to be corrected.

The Court has power to permit a plaintiff to plead an alternative cause of action by way of amending his plaint, if no injustice can possibly result to the defendant and so long as the amendment does not have the effect of converting an action of one character into an action of another and inconsistent character. (*Lebbe v. Sandanam* (1963) 64 N. L. R. 461, discussed and distinguished.)

An amendment of a plaint may be allowed under section 93 of the Civil Procedure Code before the hearing of the action. (Observations to the contrary in *Lebbe v. Sandanam* (1963) 64 N. L. R. 461, disapproved.)

The plaintiff sued the defendant by summary procedure to recover a certain sum of money due on a cheque. The defendant obtained leave to appear and defend unconditionally. Thereafter, the Court allowed an application made by the plaintiff to amend his plaint by pleading an alternative cause of action for goods sold and delivered for the same amount.

Held, that the Court was correct in allowing the alternative cause of action to be pleaded. " An amendment seeking to add a new or alternative cause of action, which is so germane and so connected with the original cause of action, should be permitted. The real subject matter being the indebtedness, no prejudice can arise from an amendment which raises such an issue. "

Per SANSONI, J.—" With regard to the addition of a new cause of action, which is the amendment that was applied for in *Lebbe v. Sandanam* . . . . . I am unable, for the reasons I have already given, to subscribe to an absolute and inflexible rule that in no circumstances may a new cause of action be added."

Per L. B. DE SILVA, J.—" The statement of the learned Chief Justice (in *Lebbe v. Sandanam*) laying down what may appear to be rules for the exercise of the discretionary power of the Courts under section 93 (of the Civil Procedure Code) are not rules of law binding on our Courts."

2——R 9783—1,883 (5/63)

APPEAL from an order of the District Court, Colombo.

Nimal Senanayake, for the Defendant-Appellant.

C. Ranganathan, for the Plaintiff-Respondent.

Cur. adv. vult.

April 4, 1963. SANSONI, J.—

The plaintiff brought this action by 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 his plaint, filing an amended plaint at the same time. This procedure was wrong, because the plaintiff should have first set out the amendments he wished to make and the defendant should have been given an opportunity to object to them. The correct procedure was later adopted and a motion to amend the plaint was filed. On the date given for objections, the defendant and his proctor were absent. The amended plaint was then accepted by the Court, and the defendant has appealed from this order.

The amendment which was allowed was the pleading of 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 question we have to decide is whether the District Judge was correct in allowing the alternative cause of action to be pleaded.

We have had the benefit of a full argument, and I wish first to touch upon some general aspects of the subject before I come to the particular question. The application for amendment is governed by section 93 of the Civil Procedure Code. It reads :—

> "At any hearing of the action, or at any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order ; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the Judge."

The section deals respectively with the time at which an amendment may be made, the power of the Court to make it, and the terms upon

which it may be made. The principal point that arises in this appeal is the power of the Court, and I quote again the words of this section : " the Court shall have full power of amending in its discretion ".

It seems to me that when a statute confers a power on a Court to do something in its discretion, a higher Court cannot say more than that the Judge who has been given the power should or should not have exercised it in the particular case. And it can only say that after it has considered the facts and circumstances of that case. " A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained " — per Lord Wright in *Evans v. Bartlam* [1]. The circumstances are " 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 : " see *L. J. Leach & Co. v. Messrs. Jardine Skinner & Co.* [2]

There has arisen a body of case law dealing with the matters which should be taken into consideration by the Judge when he comes to exercise this power. They are well-established rules of practice, and should not be treated as though they were statutory rules or provisions of positive law of a rigid and inflexible nature. The two main rules which have emerged from the decided cases are :—

(i) the amendment should be allowed if it is necessary for the purpose of raising the real question between the parties ; and

(ii) an amendment which works an injustice to the other side should not be allowed.

These rules appear in the Privy Council judgment in *Australian Navigation Co. v. Smith* [3].

The first rule seems to be based on the principle that a multiplicity of actions should be avoided. Jenkins L.J. in *G. L. Baker Ltd. v. Medway Building and Supplies, Ltd.* [4] has termed it " a guiding principle of cardinal importance on this question ". It was pointed out in that case that the object of litigation is to adjudicate on the real matters at issue between the parties, and this object must be achieved even though it involves overcoming the well-known reluctance of a Court of Appeal to disturb the trial judge's exercise of a discretion. The second rule seems to follow from the principle that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any party : and the Court should not generally exercise a power which will lead to such a result.

The first rule has been given statutory force both in England and in India. O.28 r. 1 of the Rules of the Supreme Court, and O.6 r. 17 of the Indian Civil Procedure Code, which are almost in identical terms say that

[1] *(1937) A. C. at 489.*
[2] *A. I. R. (1957) S. C. 357.*
[3] *(1889) 14 A. C. 318.*
[4] *(1958) 1 W. L. R. 1216.*

" all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." Our section 93 contains no such words, but such an omission, while it may enlarge the power and widen the discretion of the Court in this respect, cannot surely restrict the amplitude of the power. It was pointed out in *Seneviratne v. Candappa* [1] that O.28 r. 1 corresponds to our section 93, and the case of *Tildesley v. Harper* [2] was cited there. Thesiger L. J. in that case said that the object of the rules of the Court is to obtain a correct issue between the parties, and the Privy Council recently, in *Bank of Ceylon, Jaffna v. Chelliahpillai* [3], said that the Civil Procedure Code gives in section 93 ample power to amend pleadings, and the case must be tried upon the issues on which the right decision of the case appears to the Court to depend, and the framing of such issues is not restricted by the pleadings. Again in *Cropper v. Smith* [4] Bowen L.J. referring to O.28, r. 1. said : " It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of *the real matter in controversy*, it is as much a matter of right on his part to have it corrected, if it can be done *without injustice*, as anything else in the case is a matter of right."

Since the necessity of error or mistake as a condition precedent to amendment loomed large in the arguments before us, I shall quote what Bowen L.J. said in that case on that matter : " The object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. . . . I know of no kind of error or mistake, which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace." In another place in his judgment he said : " It does not seem to me material to consider whether the mistake of judgment was accidental or not, if not intended to overreach. There is no rule that only slips or accidental errors are to be corrected. . . . I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine."

The avoidance of injustice to the other party, which is the second rule of practice I have referred to, requires that the Court should refuse, save in exceptional cases, to allow an amendment which would cause an injustice. Lord Esher, M.R. in *Weldon v. Neal* [5], referred to the settled rule of practice that amendments are not admissible when they prejudice

[1] *(1917) 20 N. L. R. 60.*
[2] *(1878) 10 Ch. D. 393.*
[3] *(1962) 64 N. L. R. p. 25.*
[4] *(1884) 26 Ch. D. 700.*
[5] *(1887) 19 Q. B. D. 394.*

the rights of the opposite party as existing at the date of such amendments. To allow such an amendment would be to enable the plaintiff to take away an existing right from the defendant, a proceeding which he thought would be improper and unjust. He added : " 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. " The Privy Council judgment in *Charan Das v. Amir Khan* [1], decided that the power to make an amendment should not as a 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. Here again it was pointed out that " there are cases where such considerations are outweighed by the special circumstances of the case ". There are many decisions of this Court which have applied this rule in other situations also.

In the case before us, the District Judge has exercised his discretion and allowed the alternative cause of action to be pleaded. Mr. Senanayake's first objection was that, since it is a new cause of action, the amendment could not, as a matter of law, have been allowed. This raises the question whether a new cause of action can never be added by amendment. I think I can best answer that question by referring to the case of *Sarafalli Mahomedalli v. Mahasukhbhai Jechandbhai* [2], where it was held that in an action on a promissory note, an amendment claiming in the alternative on the consideration may be allowed, even though the cause of action on the promissory note is distinct from the cause of action on the loan which gave rise in the promissory note. Beaumont, C.J. said : " Whether in any particular case the amendment is asked for at too late a stage, or in circumstances which make it unfair to grant the leave, is another matter, but as a mere proposition of law I see no reason why an amendment of this nature should not be allowed at the trial or even in appeal. " Rangnekar, J. who agreed said : " There is clear authority for the proposition that the plaintiff may rely upon several different rights or claims alternatively although they may be inconsistent : see *Philipps v. Philipps* [3]. . . . . If then, a plaintiff can set up inconsistent claims in the alternative in the plaint to start with, it is difficult to see why, on principle, he cannot be allowed to amend the plaint by pleading an inconsistent claim in the alternative at a later stage. Whether such an amendment should be allowed or not depends upon the circumstances of the case and various other considerations."

The learned judges distinguished an earlier Privy Council judgment in *Ma Shwe Mya v. Maung Mo Hnaung* [4], where the action was brought on a contract made in 1912 : the plaintiff failed to establish that contract, and then sought by amendment to base the cause of action on another contract altogether made in 1903. The Privy Council said that the plaintiff could not be allowed to substitute the latter cause of action for the former, or to change in this way the

[1] *A. I. R. (1921) P. C. 50.*
[2] *A. I. R. (1933) Bombay 476.*
[3] *(1878) 4 Q. B. D. 127.*
[4] *A. I. R. (1922) P. C. 249.*

subject matter of the action, for the real question in contest between the parties on the pleadings was the existence and the character of the agreement alleged to have been made in 1912. One can easily see that such an amendment should not be allowed, because it would offend against the first rule of practice by seeking to change, rather than clarify, the real question between the parties. An analogous rule of practice is that an amendment should not be allowed if it has the effect of converting an action of one character into an action of another and inconsistent character. See also Section 46 of our Code. 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. The real subject matter being the indebtedness, no prejudice can arise from an amendment which raises such an issue.

Another objection which Mr. Senanayake urged was that the amendment should not have been allowed because it was sought to be made before the hearing of the action and he relied, in support of both objections I have dealt with, on the case of *Lebbe v. Sandanam* [1]. In that case Basnayake C.J. said that the Court may not exercise the power under section 93 before the hearing, and he interpreted the words " at any time " to mean " at any time after the hearing and not at any time before the hearing ". With great respect, I am unable to agree with that view of what the words " at any time " mean. The clear words of the section " postponement of day for filing answer or replication " are sufficient to show that amendments can be applied for even before the pleadings are closed. I have also always understood the rule to be that an amendment should be applied for as early as possible and as soon as it becomes apparent that it would be necessary. Only in this way can unnecessary delays be avoided. Applications for amendment at the trial have always been discouraged, because the other party has been put to the expense and trouble of getting ready for trial. The Court would require to be satisfied as to the *bona fides* of an application made at a trial, where the party should have applied earlier to amend his pleading. I am not referring here to amendments that become necessary owing to some development that arises *ex improviso*. An amendment which is sought unduly late may be suspected also of being *mala fide*, and a Court would refuse an amendment so tainted. In *Tildesley v. Harper* [2], Bramwell L.J. said : " My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise ". Costs may in most cases be a sufficient compensation if the application is made as late as the trial stage, but the Judge may, in a particular case, doubt the efficacy of that medicine. Several authorities on this point are to be found in the notes to O.28 r. 1, in The Annual Practice, and I do not wish to lengthen this judgment by making particular reference to them. On matters such

[1] *(1963) 64 N. L. R. 461.* [2] *(1878) 10 Ch. D. 393.*

as this I think considerable assistance can be found in English and Indian authorities, and judges of this Court have consistently looked in those directions for enlightenment. In the case of *Lebbe v. Sandanam (supra)*, the amendment in question was applied for at the trial, and I therefore think that the observations of the learned Chief Justice on this point were not necessary for the decision of that appeal.

How liberally the Courts have construed the power to amend pleadings also appears from cases where the plaintiff has failed to plead an alternative cause of action which could have been pleaded. In *Sriniwas Ram Kumar v. Mahabir Prasad* [1] decided by the Supreme Court of India, the plaintiff alleging that the 2nd defendant had agreed to sell him a house which the 2nd defendant later sold to the 1st defendant sued to enforce specific performance of the contract. The plaintiff's case was that he had also paid Rs. 30,000 as part of the purchase price. The 2nd defendant denied the agreement and pleaded that the sum of Rs. 30,000 had been received by him as a loan. The trial Judge accepted the 2nd defendant's case and rejected that of the plaintiff. He dismissed the claim for specific performance but entered a money decree in plaintiff's favour for the sum of Rs. 30,000 as the loan had been admitted. The High Court affirmed the findings of the trial Judge, but held that no money decree should have been granted as no case of a loan was made by the plaintiff in his plaint and no relief was claimed on that basis. Accordingly, the plaintiff's action was dismissed in its entirety.

The Supreme Court accepted the concurrent findings of fact, but held that the High Court had taken "an undoubtedly rigid and technical view" in reversing the trial Judge's grant of a money decree. Mukherjee J. said : "It is true that it was no part of the plaintiff's case as made in the plaint that the sum of Rs. 30,000 was advanced by way of loan to the defendants second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative." After referring to the rule that the Court cannot grant relief to a plaintiff on a case not put forward in his plaint, the learned Judge said : "But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. . . . In such circumstances where no injustice can possibly result to the defendant it may not be proper to drive the plaintiff to a separate suit."

[1] *A. I. R. (1951) S. C. 177.*

A Privy Council decision *A. I. R. (1943) P. C. 29* was cited in support. It was a case where an action was brought on a mortgage which the defendant pleaded was void. That plea was upheld, but the Privy Council held that it was open to the plaintiff in such circumstances to repudiate the transaction and claim relief in the form of restitution. Although no such alternative claim was made in the plaint, the Privy Council allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the plaintiff should not be referred to a separate action.

These cases show, to my mind, that there is no rule that a new or alternative cause of action can never be added. A plaintiff who comes into Court alleging that he paid money as part consideration for a purchase is not precluded from also pleading that the money was given by way of loan ; and a plaintiff who sues to enforce a mortgage security in his favour is not precluded from also pleading that he should be granted restitution altogether outside the mortgage transaction. Such amendments are permissible in order that " the real question between the parties " may be brought out.

With regard to the addition of a new cause of action, which is the amendment that was applied for in *Lebbe v. Sandanam*, the ultimate finding was that the plaintiff's case as asserted in his evidence did not justify the amendment asked for, because the plaintiff had repeatedly repudiated the position which was sought to be covered by the amendment. In other words, the application to amend would appear to have been made *mala fide*, and its final refusal would appear to have proceeded on that ground. With very great respect, I am unable, for the reasons I have already given, to subscribe to an absolute and inflexible rule that in no circumstances may a new cause of action be added. As Beaumont, C.J. said in the case I have already referred to : " If the real subject matter of the dispute between the parties can only be put in issue by an amendment even though it be by the addition of a cause of action, then I see no reason why the amendment should not be allowed." In *Haniffa v. Cader* [1] it was held that an omission to make certain persons original plaintiffs was no reason for not adding them later, even if that involved the addition of new causes of action, because the amendment did not enlarge the claim originally made or cause any prejudice to the defendants.

Many years ago an appeal came up before De Sampayo, J. in the case of *Sockalingam Chetty v. Kathitha Bebe* [2]. That was an action on a promissory note and an application was made to add an alternative cause of action for money lent. The application was disallowed in the lower Court and in appeal De Sampayo J. said : " An amendment of this kind which is not intended to cure any defect in the original plaint but to add a further cause or causes of action is purely within the discretion of the Court. I think that while, if the Commissioner

[1] *(1941) 42 N. L. R. 403.* [2] *(1916) 2 C. W. R. 55.*

thought fit, the amendment might have been allowed, subject to terms, I do not think, now that the case as brought has entirely failed for the reason already stated, that this Court should interfere on appeal." It should be noted that the learned Judge did not base his decision on the ground that the Court had no power to allow the amendment, but on the importance he attached to the manner in which the trial Judge had exercised his discretion.

In England also it has been held that in an action on a promissory note the Court has power to allow an amendment of a plaint by the addition of an alternative cause of action for goods sold and delivered, even where the action was filed by way of what corresponds to summary procedure under our Code—see *Thomas v. Alderton Ltd.* [1], which was followed in *Noorbhoy v. Mohideen Pitche* [2].

Finally, on the question whether we ought to interfere with the order under appeal, there is the valuable dictum of Jenkins L.J. in *G. L. Baker Ltd. v. Medway Building & Supplies Ltd.* [3] "There is no doubt whatever that the granting or refusal of an application (for leave to amend) 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". Neither alternative has been shown to appear in the order under appeal, and I would dismiss the appeal with costs.

L. B. de Silva, J.—

The plaintiff-respondent sued the defendant-appellant on a cheque or bill of exchange by way of Summary Procedure. The defendant obtained leave to defend the action. In view of certain legal defences raised, the plaintiff sought to amend his plaint by pleading an alternate cause of action for goods sold and delivered for the same amount.

The learned District Judge allowed the motion to amend the plaint. The defendant appealed from that Order. Two main questions have arisen for decision in this appeal.

(a) Can the plaintiff move to amend his pleadings before the hearing of the case ?

(b) Can the plaintiff plead an alternate cause of action by way of amendment to his plaint ?

Counsel for the Appellant relied on the decision of the Divisional Court in *Lebbe v. Sandanam* [4] in support of both objections. The judgment of the bench was delivered by his Lordship the Chief Justice Basnayake. In that case, the question whether pleadings could be amended before the hearing of the case did not arise for decision, as the application to amend the plaint was made after the trial had commenced.

[1] *(1928) 1 K. B. D. 638.*
[2] *(1921) 31 N. L. R. 3.*
[3] *(1958) 1 W. L. R. 1216.*
[4] *(1963) 64 N. L. R. 461.*

His Lordship stated, " The Court may not exercise that power (of amendment) before the hearing or after final judgment. The words ' at any time ' in the context mean at any time after the hearing and not at any time before the hearing. That power is conferred on the Court for the reason that it is only at the hearing or at any time thereafter that the Court would be in a position to decide whether having regard to the evidence there should be an amendment of the pleadings."

I agree with the reasons given in my brother's judgment which I had the privilege to read, that there is no justification for placing a restricted meaning on the words " at any time " in section 93 of the Civil Procedure Code, as stated by my Lord the Chief Justice in the case cited. The section reads, " At any hearing of the action, or any time in the presence of or after reasonable notice to, all the parties to the action before final judgment, the Court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission."

The reference in the section to the postponement of the day for filing answer or replication, appear to clearly indicate that the amendment may be allowed on or before the day fixed for filing of the answer or replication. Apart from this reason, convenience and the interests of justice demand that an amendment of the pleadings should be made as early as possible. Immediately after a plaint is accepted, a plaintiff may realise that his plaint needs some amendment. Surely it is not reasonable to think that this section deliberately forbids him from applying to Court to amend his plaint till after the defendant has filed his answer and the case comes up for trial. Such a procedure will entail unnecessary delay, expense to parties and inconvenience to witnesses, as the trial will almost invariably be postponed if the application to amend the pleadings were allowed at that stage.

The words used in the section " at any time . . . . before final judgment " are of the widest import. There must be very strong and cogent reasons to give these words such a restricted meaning. If it becomes necessary in any case to hear some evidence before allowing the amendment, I see no reason why such evidence may not be led before the hearing of the case, for this particular purpose. It has been the normal practice of our Courts to allow such amendments before the hearing. It has been held in *Hipgrave v. Case*[1] that the Court will not readily allow at the trial an amendment, the necessity for which was abundantly apparent months ago and then not asked for.

With all respect to the learned Chief Justice, I beg to disagree with his dicta that the Court may not exercise its power under section 93 of the Civil Procedure Code to allow the amendment of pleadings before the hearing of a case.

[1] *28 Ch. D. 361.*

On the second question, his Lordship the Chief Justice has stated in *Lebbe v. Sandanam*[1], after considering the meaning of the word "amend" in legal procedure, "The concept that an amendment is the correction of an error runs through all the definitions cited above and the definitions in the recognised English dictionaries, such as the Oxford English Dictionary, Standard Dictionary, and Webster's New International Dictionary. The Court's power is therefore limited to the correction of errors in pleadings. If there is no error, then the Court cannot act under section 93. The words 'by way of addition, or of alteration, or of omission' suggest that errors of both commission and omission are contemplated. As the power is limited to the correction of errors, it follows then that the Court has no power to make alterations—

(*a*) which set up a new case,

(*b*) which have the effect of converting an action of one character into an action of another character,

(*c*) which have the effect of taking the action out of the provisions governing the limitation of actions in the Prescription Ordinance or any other enactment or law,

(*d*) which have the effect of the addition of a new cause of action,

(*e*) which have the effect of prejudicing the rights of the other side existing at the date of the proposed amendment, and

(*f*) which have the effect of changing the substance or essence of the action."

Does this statement lay down a rigid rule of law or is it a statement for the practical guidance of the Courts in the exercise of the discretion given to them under section 93 of the Civil Procedure Code ? This section gives our Courts the most ample power to allow the amendment of pleadings and this power is only limited by its discretion. There is no doubt that the Court must exercise this power judicially and it is not vested with an absolute or arbitrary power.

Unless the Legislature has passed laws limiting the exercise of this power either directly or by Rules or Orders having the force of law, the Courts have no power to lay down rigid and inflexible rules for the exercise of a judicial discretion. The normally accepted rules or principles for the exercise of such a discretion, enunciated by the Courts of the highest authority, are therefore only meant for the practical guidance of other Courts. They do not have the force of law. In that sense, I hold that the statement of the learned Chief Justice laying down what may appear to be rules for the exercise of the discretionary power of the Courts under section 93, are not rules of law binding on our Courts. We are, therefore, free in this case to consider if there are good reasons to set aside the exercise of the discretion by the learned trial judge who allowed the amendment.

[1] *(1963) 64 N. L. R. 461.*

In this connection, I wish to refer to the judgment of the learned Chief Justice in *Wijewardene v. Lenora*[1]. His Lordship stated in that case, " It (section 93) must be read subject to the limitation that an amendment which has the effect of converting an action of one character into an action of another or inconsistent character cannot be made thereunder. Apart from that limitation the discretion vested in the trial Judge by section 93 is unrestricted and should not be fettered by judicial interpretation. Unrestricted though it be, it must be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour. Its exercise must be uninfluenced by irrelevant considerations, must not be arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to discharge his office ought to confine himself. (*Sharp v. Wakefield*)[2]. "

In *Evans v. Bartlam*[3], the House of Lords considered the exercise of a judicial discretion to set aside a judgment by default and the powers of a Court of Appeal to over-ride that discretion. Under the R. S. C. Orders, the discretion was in terms unconditional. Lord Atkin stated at p. 650, " The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion." Having considered certain rules guiding such discretion he said, " If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

But, in any case, in my opinion, the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not, in my opinion, exist. "

At page 651, Lord Russel of Killowen stated, " It was argued by Counsel for the respondent that, before the Court or a Judge could exercise the power conferred by this rule, the applicant was bound to prove—

(*a*) that he had some serious defence to the action, and

(*b*) that he had some satisfactory explanation for his failure to enter his appearance to the writ.

It was said that, until these two matters had been proved, the door was closed to the judicial discretion, in other words, that *the proof of these two matters was a condition precedent to the existence* or (what amounts

[1] *(1958) 60 N. L. R. at 463.* [2] *(1891) A. C. 173 at 179.*
[3] *(1937) (2) A. E. R. 646.*

to the same thing) *to the exercise of the judicial discretion.* For myself *I can find no justification for this view in any of the authorities which were cited in the argument ; nor, if such authority existed, could it be easily justified in face of the wording of the rule. It would be adding a limitation which the rule does not impose.*"

Lord Wright at p. 655 stated, " R.S.C. Order 27, r. 15, gives a discretion untrammelled in terms. He quoted with approval the words of Bowen L.J. in *Gardner v. Jay* [1], ' when a tribunal is invested by Act of Parliament or by rules with a discretion, without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the rules did not fetter the discretion of the Judge why should the Court do so ? ' ".

He further said, " Similarly, it has been held by the Court of Appeal, in *Hope v. Great Western Railway Company* [2] that the discretion to grant or refuse a jury in King's Bench cases is in truth, as it is in terms, unfettered. It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, *though in matters of discretion no one case can be an authority for another.* As Kay L.J. said in *Jenkins v. Bushby* [3] at p. 495, '*the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion* ' ".

Sufficient has been said to show that the dictum in *Lebbe v. Sandanam* [4] is not a pronouncement on the Law which is binding on this Court. I may mention that in that case, His Lordship the Chief Justice considered the merits of the application and gave his decision.

There are numerous cases [5] in which the plaintiff has been allowed to plead an alternate cause of action by way of amendment to his plaint.

I hold that there is no bar to the plaintiff pleading an alternate cause of action by way of an amendment to his plaint, so long as he does not thereby convert his action to another of an inconsistent character.

In this Appeal no other reasons have been urged that the learned District Judge has improperly exercised his discretion in allowing the amendment to the plaint. I entirely agree with the reasons set out in his judgment by my brother Sansoni J. I dismiss the appeal with costs.

Appeal dismissed.

[1] *(1885) 29 Ch. D. at 58 (137 L. T. 656).*
[2] *(1937) 1 A. E. R. 625.*
[3] *(1891) 1 Ch. 484.*
[4] *(1963) 64 N. L. R. 461.*
[5] *See* *(a) 31 N. L. R. 3.*
(b) (1928) 1 K. B. 638.
(c) A. I. R. (1923) Bombay 476.
(d) I. L. R. (1898) 25 Calcutta 372