

1958 Present : Basnayake, C.J., Pulle, J., and Sinnatamby, J.

WEERAPPERUMA and another, Appellants, and DE SILVA
and another, Respondents

S. C. 220—D. C. Galle, 1218/MB

*Addition of parties—Conditions necessary for an intervenient to be added as a party—
“ Questions involved in the action ”—Civil Procedure Code, ss. 11, 14, 18—
Mortgage Act, No. 6 of 1949, s. 16.*

Where an intervenient seeks to be added as a party under section 18 of the Civil Procedure Code, any question arising on the case set up by him in his petition and not arising on the case set up in the pleadings of the parties is not a question involved in the action within the meaning of the section.

No person is entitled to be added as a party under section 16 of the Mortgage Act, No. 6 of 1949, unless there is an instrument in existence which gives him an interest in the land mortgaged on the bond which is being sued upon.

Plaintiffs-appellants instituted the present hypothecary action upon a mortgage bond No. 3514 executed by the 1st respondent on February 1, 1948. In his answer the 1st respondent asked that the action be dismissed or, in the alternative, for an order that an accounting be taken. The 2nd respondent, who had obtained a money decree against a person to whom the hypothecated property had been previously mortgaged in October, 1945, sought to be added as a party to the present action. The 1st and 2nd respondents both impugned the bond No. 3514 alleging that it was vitiated by fraud.

Held, that the Court had no power to add the 2nd respondent as a party either under section 18 of the Civil Procedure Code or under section 16 of the Mortgage Act, No. 6 of 1949.

APPPEAL from an order of the District Court, Galle.

H. V. Perera, Q.C., with *F. R. Dias* and *Neville Wijeratne*, for Plaintiffs-Appellants.

H. W. Jayewardene, Q.C., with *S. Dahanayake* and *S. D. Jayasundera*, for 2nd Defendant-Respondent.

Cur. adv. vult.

July 28, 1958. BASNAYAKE, C.J.—

This is an appeal from an order of the District Judge permitting the added 2nd defendant-respondent (hereinafter referred to as the 2nd

respondent) to this appeal to intervene in the mortgage action instituted by the appellants against the 1st defendant-respondent (hereinafter referred to as the 1st respondent).

The learned District Judge's order allowing the intervention reads—

“ Having heard both sides, in the interests of justice, I make order under Section 18 of the C. P. C. read together with Section 16 of the Mortgage Act allowing the petitioner to file answer in this case. He will however pay a sum of Rs. 52.50 as costs of today to the lawyers for the plff. I add the petitioner as the 2nd deft in the case. The 2nd deft's answer on 8.10.1956. ”

Briefly the material facts are as follows: By Bond No. 18 of 18th October 1945 (hereinafter referred to as Bond No. 18) the 1st respondent and his wife mortgaged to Don Cyrus Amarasinghe (hereinafter referred to as Cyrus) for a sum of Rs. 41,800 the lands described in the Schedule to that Bond. On 28th January 1948 the 1st respondent's wife transferred to him all her rights in the lands mortgaged by Bond No. 18. On 1st February 1948 by Bond No. 3514 (hereinafter referred to as Bond No. 3514) for a sum of Rs. 47,500 the 1st respondent mortgaged to the plaintiffs the lands mortgaged by Bond No. 18. It would appear from the attestation clause to Bond No. 3514 that at its execution the sum of Rs. 47,500 was retained in the hands of the mortgagees for the purpose of paying off the debt due on Bond No. 18. On 11th March 1949 the 2nd respondent filed an action No. 1077 Special (hereinafter referred to as action No. 1077 Special) in the District Court of Galle against Cyrus for a declaration that Cyrus held share of Bond No. 18 in trust for him. To that action the 1st respondent and his wife were made parties. The 2nd respondent succeeded in that action and decree was entered in his favour in June 1952. The material portion of the decree reads—

“ It is hereby ordered and decreed that the 1st defendant abovenamed holds a one half share of mortgage bond No. 18 dated October 1945 attested by Mr. G. D. Jayasundera of Colombo, Notary Public and of all moneys due and payable thereunder and of the security hypothecated thereby and of all moneys received by the said 1st defendant thereunder in trust for the plaintiff abovenamed.

“ It is hereby also ordered and decreed that the 1st defendant abovenamed do pay to the plaintiff abovenamed the sum of Rupees Twenty Thousand Nine Hundred (Rs. 20,900) and a one half share of all interest received by the said 1st defendant under the aforesaid mortgage bond No. 18 from 14th January 1946 up to the date of this action, namely, 11th March 1949.”

An appeal from that order was dismissed. The decree holder thereupon took steps to execute his decree by obtaining writ of execution against Cyrus. He also caused him to be examined under section 219 of the Civil Procedure Code.

The 2nd respondent's application to be added as a party defendant is opposed by the plaintiffs. The material paragraphs of his application for intervention in these proceedings are as follows :—

“ 8. The M. B. No. 3514 of 1st February 1948 in suit is a false and fraudulent transaction between the 1st defendant on the one hand and the late Sumanawathie Weerapperuma, the 2nd plaintiff and the said Cyrus Amerasinghe on the other and never intended to create a valid hypothec over the premises referred to in the schedule to the plaint nor does it bear any of the essential ingredients of a mortgage and the only valid mortgage bond on the premises in suit in this action is M. B. No. 18 of 18.10.1945 referred to above and interest on the said bond has been paid up to 1947 by the 1st defendant.

“ 10. The M. B. No. 3514 of 1.2.1948 put in suit in this case is null and void and of no consequence in law as no consideration passed on it, nor was there any contract to mortgage but was executed at the instance of the said Cyrus Amerasinghe fraudulently to evade payments of the amount due to the petitioner. ”

At the hearing of the 2nd respondent's application to be added as a party defendant no oral evidence was led. The argument proceeded on the pleadings and the documents relied on by the parties.

The provision of the Civil Procedure Code which governs the addition of parties in an action is section 18. In the case of a hypothecary action section 16 of the Mortgage Act, No. 6 of 1949, also makes provision for the addition of parties.

I shall first deal with the claim of the 2nd respondent to be added as a party under section 18 of the Civil Procedure Code. That section reads—

“ 18 (1). The Court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined be struck out ; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added.

“ (2). Every order for such amendment or for alteration of parties shall state the facts and reasons which together form the ground on which the order is made. And in the case of a party being added, the added party or parties shall be named, with the designation ' added party ', in all pleadings or processes or papers entitled in the action and made after the date of the order. ”

The words of the section material to the question that arises for decision are—

“and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or as defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added.”

It would appear from the above quoted words that the grounds on which a person may be added as a party to an action are either (i) that he ought to have been joined as a plaintiff or defendant or (ii) that his presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action. I shall first deal with ground (i). Persons who ought to be joined as plaintiffs are those in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action (section 11 C. P. C.) and persons who ought to be joined as defendants are persons against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action (section 14 C. P. C.). In the instant case it is not contended that the 2nd respondent is a person who ought to have been joined as a party defendant. The contention is that he should be made a party on ground (ii) which I shall now proceed to discuss. To decide that ground for adding a party the Court must answer the following questions :—

- (1) What are the questions involved in the action? and
- (2) Is the presence of the party seeking to be added necessary in order to enable the court effectually and completely to adjudicate upon and settle them?

To answer question (1) the meaning of the expression “questions involved in the action” must first be ascertained. The expression “action” refers to the proceedings instituted by the plaintiff, against the parties named by him in the plaint, for the redress or relief he seeks from the Court. The plaint would disclose the cause of action and the answer of the defendant would disclose the grounds on which he resists the plaintiff’s claim for redress or relief. When a question is so inextricably mixed with the matters in dispute in an “action” as to be inseparable from them and the action itself cannot be decided without deciding it, the question may be said to be involved in the action. Any question arising on the case set up by an intervenient in his petition and not arising on the case set up in the pleadings of the parties is not a question involved in the action.

Next the pleadings filed by the parties to the action must be examined because under our system of Civil Procedure which is governed by a Code that makes specific and detailed provision in regard to pleadings,

determinations in an action should be based on a case either to be found in the pleadings or involved in or consistent with the case thereby made.

Now in the instant case the plaintiff avers—

- (a) that the 1st respondent executed a mortgage Bond No. 3514 dated 1st February 1948 binding himself to pay Sumanawathie Weerapperuma since deceased and the 2nd plaintiff a sum of Rs. 47,500 with interest thereon at 8% ,
- (b) that the 1st respondent hypothecated the lands described in the Schedule as a primary mortgage for securing the payment of the principal and interest due on the Bond,
- (c) that the 1st respondent has paid a sum of Rs. 7,000 on 11th October 1948 leaving a balance of Rs. 43,138·83 principal and interest,
- (d) that Sumanawathie Weerapperuma died on 18th December 1949 and that the 1st plaintiff is the duly appointed administratrix to her estate, and
- (e) that the total sum due at the date of action (11th May 1956) is Rs. 69,300·08.

In his answer the 1st respondent asks that the plaintiff's action be dismissed or in the alternative for an order that an accounting be taken. In support of the alternative prayer the 1st respondent states—

- (a) that in 1935 he borrowed on a Bond Rs. 10,000 at 12% interest per annum from A. D. Jayasundera now deceased hypothecating as security the lands described in the Schedule to the plaint and that thereafter he borrowed a sum of Rs. 15,000 on a secondary mortgage of the premises in favour of K. S. P. L. Thenappa Chetty,
- (b) that in 1945 he executed a primary mortgage of the lands referred to in the Schedule to the plaint in favour of Cyrus at the request of the deceased A. D. Jayasundera, and that after his death Cyrus "procured" him to execute a mortgage in favour of Cyrus's aunt Sumanawathie Weerapperuma and the 2nd plaintiff,
- (c) that the accumulated interest on each Bond was included in capital in the subsequent Bond and that the Bond in suit is invalid and cannot be enforced,
- (d) that he is entitled to an accounting for the purpose of determining the amount due to the plaintiffs,
- (e) that in action No. 1077 Special it was held that Rs. 20,900 out of the Rs. 41,800 on the Bond in favour of Cyrus belonged to the 2nd respondent and was held in trust by Cyrus,
- (f) that he is not liable to pay the plaintiffs their claim disregarding the decree in action No. 1077 Special,

- (g) that he executed the Bond sued on at the instance of Cyrus and that he believes he was made to do so in order to defraud the 2nd respondent, and
- (h) that Cyrus and Sumanawathie Weerapperuma and the 2nd plaintiff were acting in collusion to perpetrate a fraud.

Having regard to the meaning of the expression "questions involved in the action" as explained hereinbefore the following questions may be said to be involved in the instant action :

- (a) Did the 1st respondent execute a mortgage Bond as alleged in the plaint ?
- (b) Did he hypothecate the lands described in the Schedule to it as a primary mortgage for securing the payment of the principal and interest ?
- (c) Is Bond No. 3514 vitiated by fraud ?
- (d) Is the 1st respondent entitled to an accounting for the purpose of determining the true amount due from him ?

Now can it be said that the presence of the 2nd respondent is *necessary* in order to enable the Court effectually and completely to adjudicate and settle the questions set out above ? I think not. The 1st and 2nd respondents both impugn Bond No. 3514. But that does not make the latter's presence necessary in order to enable the Court to adjudicate on the questions set out above. The Court can in law decide the question whether Bond No. 3514 is vitiated by fraud without the presence of the 2nd respondent.

The 2nd respondent's only claim to be added as a party is based on the decree in action No. 1077 Special. Now what is the legal effect of that decree which is dated 11th June 1952 and entered in proceedings which commenced on 11th March 1949 more than a year after the date of execution of mortgage Bond No. 3514 ? While no doubt the first part of the decree declared that Cyrus held a half share of Bond No. 18 and all monies due and payable thereunder and of the security hypothecated thereby and of all moneys received by him in trust from the 2nd respondent it is clear from the second part of the decree, by which Cyrus was ordered to pay Rs. 20,900 and half share of interest, that it proceeded on the basis that Bond No. 18 was validly discharged by the payment by the mortgagor to Cyrus of the principal and interest due on that Bond. No trust in respect of Bond No. 18 could exist, if that Bond had been discharged, and, if there was a trust, no order as worded in the second part of the decree could have been made. The two parts of the decree being mutually exclusive the interpretation I place on the decree as a whole is that it is one for payment of money only. That it was so understood by the 2nd respondent himself is clear from the steps taken by him to recover the amount decreed. I am therefore of opinion that the Court has no power to add the 2nd respondent as a party under section 18 of the Civil Procedure Code.

The next question is—Can he be added as a party under section 16 of the Mortgage Act, No. 6 of 1949? That section reads—

“ Every person having an interest in the mortgaged land by virtue of an instrument to which the mortgage in suit has priority, but who is not a person entitled to notice of the action as hereinbefore defined, shall be bound by every order, decree or sale or thing done in the hypothecary action.

“ Provided, however, that any such person may at any time before the entry of the decree in the action be added as a party on application made by him in that behalf upon such terms as the Court may impose, but any person so added shall be bound by every finding or order previously made in the action and by the proceedings previously taken therein except in so far as the Court may in its discretion otherwise order.”

The decree entered in favour of the 2nd respondent is in two parts. As stated above the first part decrees that Cyrus held one half share of Bond No. 18 and one half of all moneys due and payable thereunder and of the security hypothecated thereby and of all moneys received by him thereunder in trust for the 2nd respondent. The second part orders and decrees Cyrus to pay to the 2nd respondent the sum of Rs. 20,900 and one half share of all the interest received by him on the Bond up to the date of the action, viz., 11th March 1949. The plaintiff in the action in which the 2nd respondent sued Cyrus is not before us. The order contained in the second part of the decree must be presumed to have been made in terms of the prayer in the plaintiff. Cyrus is no longer a trustee of the money. He is a judgment-debtor obliged by the decree to pay the amount decreed to the judgment-creditor, who has taken steps to have the decree executed. The 2nd respondent did not name the mortgagees on Bond No. 3514 as parties to his action against Cyrus although the Bond was executed over a year before its institution. They are not therefore bound by the decree against Cyrus and the 1st respondent. The 2nd respondent is not a person having any interest in the mortgaged lands by virtue of an instrument to which the mortgage in suit has priority, because there is no instrument in existence which gives him an interest in the land mortgaged on Bond No. 3514.

The learned District Judge was therefore wrong in adding him as a party defendant. I must not omit to point out that the learned Judge has failed to comply with the requirements of section 18 (2) of the Civil Procedure Code that every order for amendment or for alteration of parties shall state the facts and the reasons which together form the ground on which the order is made. He states—

“ Having heard both sides, in the interests of justice, I make order under section 18 of the C. P. C. read together with section 16 of the Mortgage Act allowing the petitioner to file answer in this case. He will however pay a sum of Rs. 52·50 as costs of today to the lawyers for the plaintiff. I add the petitioner as the 2nd defendant in the case. The 2nd defendant's answer on 8.10.1956.”

It is important that Judges of first instance should scrupulously observe the requirements of the Civil Procedure Code. I notice a growing tendency among Judges of first instance not to examine closely the provisions of the Code when making orders on matters of procedure that come up before them and I cannot emphasise too strongly the need for a Judge to examine the Code with meticulous care when deciding such matters.

I would therefore set aside the order of the District Judge and send the case back for trial of the issues involved in the action against the 1st respondent.

I direct that the 2nd respondent do pay the costs of the appellants both here and below.

PULLE, J.—I agree.

SINNETAMBY, J.—I agree.

Appeal allowed.
