1951 *Present :* **Gratiaen J. and Pulle J.**

WISMALOMA *et al.*, Appellants, *and* ALAPATHA, Respondents

S. C. 246—D. C. Ratnapura, 7,863

Misjoinder of defendants and of causes of action—Amendment of plaint—Circumstances when it will be allowed.

Plaintiff instituted action for declaration of title to a land against five defendants claiming that " acting jointly and in concert " they were in forcible and unlawful possession of it. An issue of misjoinder of defendants and of causes of action was raised at the commencement of the trial. It was established that the subject-matter of the action was a land which consisted of separate allotments which were possessed by separate groups of defendants independently and without any concerted action.

Held, that there was misjoinder of defendants and of causes of action.

Held further, that as the plaintiff had throughout the trial unreasonably persisted in denying such misjoinder, upon the merits of the case, he should not be given an opportunity by the Court of Appeal to amend the plaint so as to enable him to proceed against some of the defendants.

APPEAL from a judgment of the District Court, Ratnapura.

H. W. Jayawardena, for the 3rd, 4th and 5th defendants appellants.

C. V. Ranawake, with *B. S. C. Ratwatte*, for the plaintiff respondent.

Cur. adv. vult.

May 10, 1951. GRATIAEN J.—

The question argued before us in this appeal raises a fundamental objection to the constitution of the action in its present form. On 29th June, 1945, the plaintiff, claiming to be the sole owner of an entire land (comprising lots 1, 2, 3, 4 and 5 depicted in the plan P1 filed of record) complained that the defendants, five in number, " acting jointly and in concert " were in forcible and unlawful possession of his property. He accordingly claimed a declaration of title to the entire land as against all the defendants, and to certain consequential relief.

The 1st defendant filed answer denying that he had claimed or possessed any part of the land since December, 1943. His position is that he had never claimed any interests in lots 4 or 5, but that he had been the sole owner of a separate land (comprising only lots 1, 2 and 3), which he sold to the 3rd, 4th and 5th defendants by two conveyances of 21st December, 1943, and that since this date the 3rd, 4th and 5th defendants were in exclusive possession of these allotments. The 3rd, 4th and 5th defendants filed pleadings to the same effect, while the 2nd defendant in his answer claimed to be in exclusive possession of lots 4 and 5 which formed a separate land and he disclaimed any interests in the land comprising lots 1, 2 and 3 claimed exclusively by the 3rd, 4th and 5th defendants. All five defendants specifically denied the plaintiff's allegation that they had acted jointly or in concert to dispossess him of the larger land which he claimed to be his. They accordingly pleaded that the action was bad for misjoinder of defendants and of causes of action. An issue of misjoinder was raised at the commencement of the trial. The learned District Judge ruled against the defendants on this issue at the conclusion of the trial on all the issues, but without discussion of the matters which arose for his consideration on this point. Mr. Jayawardene, who argued the appeal of the 3rd, 4th and 5th defendants before us, contended that the plea of misjoinder was entitled to succeed on the admitted facts, and he claimed that this objection was fatal to the plaintiff's action. In my opinion this argument is sound.

Admittedly, the averments in the plaint, if true, would have justified the institution of these proceedings against the defendants based on a single cause of action alleged to have been committed by all of them acting in concert. It is equally apparent that if this averment was found to be untrue, the basis of the action in its present form was destroyed. The fundamental question on the plea of misjoinder was therefore a question of fact. If the truth was that the 2nd defendant, acting quite independently of the other defendants, had entered into possession of lots 4 and 5 (which he claimed in his own right as a separate land)—and that the other defendants had similarly entered into possession of only lots 1, 2 and 3 (which they claimed in their own right as a separate land), it would have been necessary for the plaintiff to vindicate his alleged rights against each group of defendants in separate proceedings based on the single cause of action committed by him or them respectively. Mr. Ranawake contended, however, that, even if the plaintiff could not

prove that the defendants had acted in concert to dispossess him, a single action was maintainable because the measure of his rights was his claim to be restored to possession of a single land comprising all the divided allotments possessed by separate groups of defendants. With great respect, I think that this theory has long since been exploded. I need only refer to the ruling of the majority of the Divisional Court in *Lowe v. Fernando*,[1] where the plaintiff claimed the entirety of a block of land in a single action against a number of defendants who were severally in possession of separate and defined portions of it. It was held that there was a misjoinder of defendants and of causes of action *in the absence of proof that the defendants had acted in concert in depriving the plaintiff of the possession of the entire block.* It is necessary not merely to *aver* but also to *establish* the " acting in concert ". If the plaintiff in such circumstances prefers to institute one case against all the defendants, his action must stand or fall on his success or failure in proving that his alleged dispossession was the result of concerted action on the part of the defendants. The rules relating to a misjoinder of defendants and of causes of action are intended, and particularly in cases dealing with disputes relating to immovable property, to prevent the embarrassment which is necessarily caused when the investigation of a defendant's claim to a particular allotment of land is complicated by a contemporaneous investigation into the dispute concerning some other allotment in which he has no interest whatsoever. I would respectfully adopt the observations of Hearne J. in *Ettaman v. Naraynan* [2], where he said that " plaintiff will not be permitted, by a false allegation in his plaint, to make it appear that there is no misjoinder, when in point of fact, on the withdrawal of that allegation, misjoinder at once arises. In other words, he will not be permitted to proceed with a suit which may be embarrassing by reason of multifariousness merely because by a false allegation in the plaint he has concealed such multifariousness ".

When one examines the evidence of the plaintiff himself, it becomes abundantly clear that his averment that the defendants had acted in concert could not be substantiated. " The first defendant and his wife and children ", he admitted, " claimed lots 1, 2 and 3 separately by themselves as a separate land. They entered the land separately. At a later stage the 2nd defendant entered lots 4 and 5 and he is possessing it separately as a separate land ". His correspondence with the parties at various times before the action was instituted proves beyond doubt that he realised that each set of defendants had acted independently of the other in asserting their respective claims. For instance, his proctor's letter P18 of 7th February, 1940, addressed to the 1st defendant and his later letter P16 of 18th January, 1945, addressed to the 2nd defendant negatives entirely the idea of concerted action. As against this, the only attempt (I can hardly call it a serious one) which he made at the trial to prove " concert " was his suggestion made in re-examination, that the 1st and 2nd defendants were cousins. I do not see what bearing this circumstance by itself can have on the question.

[1] *(1915) 16 N. L. R. 389.* [2] *(1938) 18 C. L. Rec. 111.*

I would hold that the plaintiff has failed entirely to establish the truth of his averment which was fundamental to the recognition of his right to proceed against all the defendants in the same proceedings. The action, in its present form, is therefore bad for misjoinder of defendants and of causes of action.

The only question which remains for decision is whether we should make order dismissing the plaintiff's action *in toto* or whether we should accede to Mr. Ranawake's request, made to us at the concluding stages of the argument in appeal, that the plaintiff should even now be permitted, by an appropriate amendment of his pleadings, to restrict his action *either* to a claim against the 2nd defendant in respect of lots 4 and 5 only, *or* to a claim against the 3rd, 4th and 5th defendants in respect of lots 1, 2 and 3.

An examination of earlier rulings of this Court indicates that there were two schools of thought as to the procedure which should be adopted where an action is held to be wrongly constituted for misjoinder of causes of action coupled with a misjoinder of defendants. On the one hand there is the view that in such cases the Court has no discretion to discharge one or some of the defendants and to allow the plaintiff to proceed against others. *Abraham Singho v. Jayaneris* [1] and *Ettaman v. Naraynan* (*supra*). On the other hand, there is the more lenient view that it is permissible, in appropriate cases, to allow a plaintiff to amend the plaint by restricting his claim. *Kanagasabapathy v. Kanagasabai* [2] and *Sivakamanathan v. Anthony* [3]. It would seem that the latter view has been preferred in more recent years. *Fernando v. Fernando* [4]; *Tambimuttu v. Ratnasingham* [5]; *Kudhoos v. Joonoos* [6] and *Podihamy v. Seimon Appu* [7].

My own opinion is that, having regard not only to the more recent decisions of this Court but also to the wide powers vested in Judges under the Civil Procedure Code to allow an amendment of pleadings at any stage of the proceedings, we are not precluded by law (even as an appellate tribunal) from granting the plaintiff's application to be permitted, after appropriate amendments of the pleadings, to restrict his action even at this late stage to a single cause of action against a single group of defendants (the other group being discharged from the action with a suitable order for costs). But it seems to me that the plaintiff cannot claim this privilege *as of right*. On the contrary, the discretion vested in the Court must be judicially exercised after consideration of all relevant circumstances such as the conduct of the parties and the belatedness of the application. If the matter be approached in this way in regard to the present proceedings, it seems to me that it would not be proper to allow the plaintiff to amend his pleadings at this stage and to proceed with his action *de novo* though in a restricted form. The action was instituted nearly 6 years ago. The difficulty in which the plaintiff now finds himself is referable solely to his own persistence in a position which, from the facts within his personal knowledge, he could not

[1] *(1930) 14 C. L. Rec. 121.*
[2] *(1923) 25 N. L. R. 173.*
[3] *(1935) 3 C. L. W. 51.*
[4] *(1937) 39 N. L. R. 145.*
[5] *(1938) 40 N. L. R. 253.*
[6] *(1939) 41 N. L. R. 251.*
[7] *(1946) 47 N. L. R. 503.*

reasonably hope to establish. His position was demonstrably untenable when, at a very early stage of the trial, he admitted all the facts which negatived his allegation that the defendants were acting in concert. That was the latest point of time when he should have realised that he should apply to discharge one set of defendants from the action and to proceed only against the others. Instead, he continued to contest the plea of misjoinder even in this Court. To exercise a discretion in his favour now is only to encourage his stubbornness. I would therefore set aside the judgment appealed from and dismiss the plaintiff's action with costs both here and in the Court below. It will of course be open to the plaintiff, if so advised, to institute separate proceedings against each defendant or group of defendants.

PULLE J.—I agree.

Appeal allowed.