

ADLIN FERNANDO AND ANOTHER
V.
LIONEL FERNANDO AND OTHERS

COURT OF APPEAL.
S. N. SILVA, J. (P/CA)
RANARAJA, J.
CA.LA. 104/87
C.A. REVISION 915/87
D.C. PANADURA 17914/L
MARCH 14, 1995.

Gift – Deed of Gift – Revocation – Action – Cause of action – Civil Procedure Code, Sections, 11, 14, 18, 22, 36, 37, 90. Joinder of Causes of Action and Parties. Objection – Applicability of Rules and Procedure.

The plaintiffs-petitioners instituted action against the respondents jointly – and severally for a declaration that several deeds of Gift are null and void or, in the alternative, sought revocation of same, and damages.

When the petitioners filed plaint, they also moved Court for Leave to join the causes of action and parties to the action, and on accepting the plaint, to issue summons on the respondents.

The petitioners – the donors allege that, the 1st respondent acting jointly with the 2nd and 3rd respondents obtained their signatures by deceit.

The defendants raised the objection of misjoinder of parties and causes of action, which was upheld by Court.

Held:

(1) That provisions of the Civil Procedure Code relating to the joinder of causes of action and parties are rules of procedure and NOT substantive law. Courts should adopt a common sense approach in deciding questions of misjoinder or non-joinder.

(2) Section 18 permits Court on or before the hearing upon application of either party to strike out the name of any party improperly joined. Section 36 provides that if any cause of action cannot be conveniently tried, for Court *ex mero motu* or on the application of the defendants with notice to the plaintiff at any time before the hearing or on agreement of the parties after the commencement of the hearing to order separate trials of any cause of action.

(3) It is not open to the Defendant to await the framing of Issues and then, without prior notice to the plaintiff, frame Issues on misjoinder of parties or causes of action.

APPLICATION for revision of the order of the District Court of Panadura.

P. A. D. Samarasekera, P.C. with *K. Sri Gunawardena* for petitioners.

Faisz Musthapha, P.C. with *S. Jayawardena* for respondents.

Cur. adv. vult.

March 20, 1995.

RANARAJA, J.

This is an application in revision from the order of the District Judge dated 24.7.87. By that order the learned Judge held that there was a misjoinder of plaintiffs and causes of action and that the petitioners could not proceed with the action as constituted.

The petitioners instituted action against the respondents jointly and severally, for a declaration that the Deeds of gift Nos. 335, 336, 337 and 338 dated 9.4.80 and attested by P. D. G. Wimalaratne, Notary Public, are null and void or in the alternative, for a revocation of the said Deeds and damages. The donor on Deeds Nos: 335 and 337 is the first petitioner and the donees are the 4th and 2nd respondents respectively. Deed No: 336 is a gift by the 2nd petitioner in favour of the 3rd respondent. Both petitioners are the donors on Deed No: 338 in favour of the 1st respondent. Each Deed is in respect of a different property. The 1st respondent has accepted the gifts in favour of the 2nd to 4th respondents. The 4th respondent who was a major at the relevant time, denies any knowledge of the gift in his favour. The petitioners are two sisters. The 2nd petitioner is deaf and dumb from birth. The 1st respondent is their brother. The 2nd and 3rd respondents are the children of the 1st respondent. The 4th respondent is a son of another brother of the petitioners.

The petitioners allege that the 1st respondent, who was a Government Agent at the relevant time, on the pretext that the signatures of the petitioners were needed on certain papers to be filed in respect of a claim for compensation for land acquired by the state for road expansion from the petitioners, acting jointly with the

2nd and 3rd respondents, obtained the signatures of the petitioners on the said Deeds by deceit. On this basis, the petitioners seek to have the said Deeds declared null and void, or in the alternative revoked. The petitioners are in possession of the properties gifted on the four Deeds. However, they have added a claim for damages in a sum of Rs. 50,000/- against the first three respondents.

An "action" includes a proceeding for a redress of a wrong and a "cause of action" is a wrong for the redress of which an action may be brought. A "wrong" includes a denial of a right. In the instant case, the petitioners seek a redress from a denial of a right, namely the denial of their title to the properties which have allegedly been gifted to the respondents on the four Deeds. The basis of the denial of their right is the fraudulent act of the 1st to 3rd respondents in obtaining their signatures on the Deeds by deceit.

Section 11 of the Civil Procedure Code permits all persons in whom the right to relief claimed is alleged to exist jointly, severally or in the alternative, in respect of the same cause of action, to be joined as plaintiffs, subject to the condition that plaintiffs cannot join in respect of distinct causes of action. Similarly, Section 14 of the Code permits all persons against whom the right to any relief is alleged to exist, jointly, severally or in the alternative in the same cause of action to be joined as defendants. Section 36 of the Code permits plaintiffs having causes of action in which they are jointly interested against the same defendants to unite such causes of action in the same action.

When the petitioners filed plaint on 30.7.82, they also moved Court for leave to join the causes of action and parties to the action, and on accepting the plaint, to issue summons on the respondents. The copy of the journal entries filed show that the plaint has been accepted and an order for the issue of summons on all the respondents has been made on 9.9.82.

What is of importance however is, that the provisions of the Civil Procedure Code relating to the joinder of causes of action and parties, are rules of procedure and not substantive law. It follows, that Courts should adopt a common sense approach in deciding questions of misjoinder or non-joinder. Section 18 permits Courts on or before the

hearing upon application of either party to strike out the name of any party improperly joined as plaintiff or defendant. Section 36 provides, if any cause of action cannot be conveniently tried or disposed of together, for Court to *ex mero motu* or on the application of the defendants with notice to the plaintiff, **at any time before the hearing**, or on **agreement of the parties after the commencement of the hearing**, to order separate trials of any causes of action. In which event, Court may order some causes of action to be excluded and direct the plaint in the action to be amended accordingly. Thus it is clear that if any objection to misjoinder of causes of action is raised by the defendants, it has to be done before the hearing. It is not open to a defendant to await the framing of issues by the plaintiff, and then without prior notice to the plaintiff, frame issue on misjoinder of parties or causes of action. The rationale behind these provisions is that Court should not be called upon to embark upon an inquiry into whether there was a misjoinder of parties or causes of action, after the trial proper has commenced, and thereby sidetrack the Court from deciding the substantial issues in the case, into deciding questions of procedure.

The overriding factors for consideration of Court should be whether: (a) it can conveniently try and dispose of the causes of action before it and (b) all parties necessary in order to enable it to effectually and completely adjudicate upon and settle all questions involved in the action are present as parties. The proper course in such instance is to follow the provisions in sections 22 and 37 of the Code.

Section 22 provides:

"All objections for want of parties, or for joinder of parties who have no interest in the action, or for the misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest opportunity, and **in all cases before the hearing. Any such objection not so taken shall be deemed to have been waived by the defendant.**

Similarly section 37 Provides:

"Any defendant alleging that the plaintiff has united in the same action several causes of action, which cannot be conveniently

disposed of in one action, may at **any time before the hearing** apply to Court for an order confining the action to such of the causes of action as may be conveniently disposed of in one action.”

What procedure should the respondents then have followed in raising the objections to the misjoinder of plaintiffs and causes of action? The answer is provided in section 90 of the Code. Such objections should have been taken before the hearing, by way of motion and a memorandum in writing. The failure to follow these steps by the respondents, by itself, was a sufficient ground to refuse him permission to frame an issue on misjoinder, let alone answer the issue in the affirmative. The order dated 24.7.87 is accordingly set aside.

Where a plaintiff insists on proceeding with a trial on causes of action or defendants wrongly joined, Court has the discretion to give judgment in favour of one or more of the plaintiffs as may be entitled to the relief claimed, on the evidence led at the trial, under the provisions of Section 11 of the Code, or give judgment against one or more defendants, as may be found to be liable according to their respective liabilities, under Section 14. In other words, it is the duty of Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Court is not empowered to dismiss an action for misjoinder or non-joinder of parties or misjoinder of causes of action.

In the instant case the evidence that has to be led, to set aside each of the relevant Deeds, will be the same. It will certainly be convenient for Court to decide the validity of the said Deeds at one trial. No obvious prejudice will be caused to any of the defendants by adopting such a course.

The Learned Judge has failed to follow the rules of procedure set out in the several Sections in the Civil Procedure Code referred to. Therefore, the application for revision of the order of the Learned District Judge is allowed with costs.

This order will bind the parties in the connected leave to appeal application No: 104/87.

S. N. SILVA, J. – I agree.

Application allowed.
