

URAGODA
v
JAYASINGHE AND OTHERS

SUPREME COURT
ISMAIL, J.
DE SILVA, J. AND
JAYASINGHE, J.
S.C. APPEAL NO. 73/2002
C.A./L.A. NO 332/2000
D.C. COLOMBO CASE NO. 20652/ MR
18 JUNE and 31 JULY, 2003

Civil Procedure Code – Alleged misjoinder of defendants and causes of action – Issues raised after the commencement of trial – Duty to set up such issues at the earliest possible opportunity – Sections 18, 22 and 91 of the Code – May an action be dismissed for misjoinder of causes of action?

The plaintiff consulted Dr. Uragoda (the 1st defendant) at the “Glass House” of which the 2nd to 6th defendants were partners, for fever and cough. As advised, the plaintiff obtained an X- ray, from the Glass House, on the basis of which Dr. Uragoda treated the plaintiff for tuberculosis. Since the plaintiff did

not recover he took a 2nd X-ray from another institution. That X-ray showed no tuberculosis. On Dr.Uragoda's treatment thereafter, the plaintiff recovered; whereupon the plaintiff sued Dr. Uragoda and 2nd to 6th defendants for damages.

At the trial on 17.01.2000 issues were raised by the 1st defendant *inter alia* stating that there was a misjoinder of defendants and of causes of action which issues the defendants, applied to be taken up as preliminary issues of law.

On 20.10.2000 the District Judge held in favour of the plaintiff on the said issues.

Held:

1. Section 22 of the Civil Procedure Code ("the Code") requires issues of misjoinder of parties to be raised at the earliest possible opportunity before the hearing but in this case issues were raised after the trial commenced.

2. The issue of misjoinder of parties ought to have been taken by motion in terms of section 91 read with section 18 of the Code.

3. The Court has no power to dismiss an action for misjoinder of causes of action.

4. As such the plaintiff was entitled to succeed on the issues relating to misjoinder.

Cases referred to:

1. *Adlin Fernando and Another v Lionel Fernando and Others* (1995) 2 Sri LR 25
2. *Podihamy v Simon Appuhamy* 47 NLR 503 at 504
3. *Ameer v Kulatunge* (1996) 2 Sri LR 398
4. *Appuhamy v Pagnananda* 67 NLR 89

APPEAL from the judgment of the Court of Appeal

S.L. Gunasekera with *Shanaka de Livera* for appellant.

W.Dayaratne for plaintiff-respondent

Romesh de Silva, P.C. with *Hiran de Alwis* and *Sugath Caldera* for 2nd to 6th defendant-respondents

October 15 2003

DE SILVA, J.

The short point which arises for consideration in this appeal is whether there is a misjoinder of defendants and causes of action and if so the effect of such misjoinder. The objection to misjoinder was taken up by the defendant-appellants in the District Court and this was overruled. The defendant-appellant's leave to appeal applications, viz. C.A. 332/2000 and 337/2000 to the Court of Appeal were also unsuccessful mainly on the ground that the defendants have failed to take up the objection of misjoinder at the earliest opportunity but have taken it up only at the stage of framing issues, that is after commencing the trial in the case on 17.05.2002. Hence the present appeal by the 1st respondent-appellant to this Court. 10

In this action the plaintiff-respondent (hereinafter referred to as plaintiff) instituted an action against the 1st respondent-defendant-appellant and 2nd -6th defendant-respondents (hereinafter referred to as 1-6 defendants) averring in the plaint *inter alia* as follows:

On the 31st October 1996 the plaintiff consulted the 1st defendant who is a Medical Specialist to obtain treatment for fever and a cough at the 'Glass House' where a medical channel service and a medical laboratory are run by the 2nd-6th defendants. On the advice of the 1st defendant the plaintiff got an X-ray from the 'Glass House' and immediately saw the 1st defendant with the said X-ray. Having examined the X-ray the 1st defendant informed the plaintiff that he is suffering from tuberculosis and prescribed drugs for 15 days. 20

As there was no improvement in his condition the plaintiff consulted the 1st defendant once more on the 11th of November 1996 and he was informed that the X-ray obtained from 'Glass House' was not correct and was advised to get another X-ray from another institution. The plaintiff thereupon got another X-ray from a different institution and tendered the same to the 1st defendant who upon examining it, informed the plaintiff that he was not suffering from tuberculosis and that he had only a cough and advised the plaintiff to stop taking drugs prescribed earlier and to take some 30

other drug. The plaintiff did so and had good results.

Thereafter the plaintiff sued 1st defendant and 2nd -6th defendants for damages and estimated his damages at Rs.1,500,000 and prayed for judgment against 1st-6th defendants jointly and severally.

The 1st defendant petitioner filed his answer denying liability and sought the dismissal of the plaintiff's action or to return the same for amendment in terms of section 46(2) of the Civil Procedure Code. 40

The 2nd-6th defendants jointly filed their answers denying the several averments of the plaint and sought dismissal of the action. When this case was taken up for trial on the 17th of January 2000, 11 admissions and 29 issues were recorded and the counsel for defendants moved that issue numbers 17-22 raised by the 1st defendant and issue numbers 26,27 and 28 raised by the 2nd -6th defendants be tried as preliminary issues of law and accordingly the Court allowed the said application. 50

The said issues are as follows:

- (17) Does the plaint not disclose a cause of action for the plaintiff to sue the 1st defendant?
- (18) Is there a misjoinder of defendants in the plaint?
- (19) Is there a misjoinder of causes of action in the plaint?
- (20) Is the plaint not in accordance with the provisions of section 40(d) of the Civil Procedure Code?
- (21) Can the plaintiff have and maintain this action as presently constituted? 60
- (22) If one or more of the aforesaid issues 17-21 are answered in favour of the 1st defendant should the plaint be rejected in terms of section 46(2) (d) of the Civil Procedure Code?
- (26) Does the plaint disclose a cause of action against the 2nd-6th defendants?
- (27) Is there a misjoinder of parties?

(28) Is the plaint not in conformity with the provisions of the Civil Procedure Code?

On the written submissions tendered by parties the learned District Judge pronounced the order on 20.10.2000 answering the above issues in favour of the plaintiff. The Court of Appeal too dismissed the leave to appeal application on 17.05.2002. 70

Learned counsel for the 1st defendant contended that the Court of Appeal erred in coming to the conclusion that there was a delay in raising the objection regarding the misjoinder because in the answer itself the defendants referred to this fact and the District Judge should have taken action under provisions of section 46(2) of the Civil Procedure Code.

It is to be noted that a trial before a District Court is not a trial on the pleadings but a trial on the issues and the trial commences with the framing of the issues. The issues in the action were framed and accepted on the 17.01.2000. Thus the Court of Appeal was correct when it came to the conclusion that the "trial has already commenced on 17.01.2000." 80

Section 22 of the Civil Procedure Code provides that "all objections for want of parties who have no interest in the action or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity and in all cases before the hearing and any such objection not so taken shall be deemed to have been waived by the defendants". 90

Section 18 of the Civil Procedure Code permits Court on or before the hearing upon application of either party to strike out the name of any party improperly joined as plaintiff or defendant.

The question then arises as to what procedure the defendants should have then followed in raising the objection of the misjoinder of defendants and causes of action. Section 91 of the Civil Procedure Code provides the answer. Such objection should have been taken before the hearing by way of a motion and a memorandum in writing.

In these circumstances the observations of Ranaraja, J. in *Adlin Fernando and another v Lionel Fernando and others* ⁽¹⁾ are relevant and appropriate. The paramount factors for consideration of court should be whether:

- (a) it can conveniently try and dispose of the causes of action before it;
- (b) all parties necessary in order to enable it to effectively and completely adjudicate and settle all questions involved in the action are present as parties.

Ranaraja, J. further observed that “what is important 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 the Courts should adopt a common sense approach in deciding questions of misjoinder or non joinder”.

Dias, J. also voiced similar sentiments in *Podihamy v Simon Appuhamy* ⁽²⁾ in the following terms. “It is well to remember that the court should not be fettered by technical objections on matters of procedure.”

In the instant case the learned Counsel for the 1st defendant as well as 2nd-6th defendants admitted that on the facts alleged in the plaint 1st defendant and 2nd-6th defendants could be sued separately but not in the same action.

It is to be noted that “an action” is a proceeding for the prevention or redress of a wrong; “cause of action” is the wrong for the prevention or redress of which an action may be brought and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury”.

Section 14 of the Civil Procedure Code states that “all persons may be joined as defendants 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, and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities without any amendment.”

It is abundantly clear from the above that 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 interest of the parties actually before it. 140

In the instant case the plaintiff has based his cause of action on the ground of negligence of the defendants. Therefore I hold that there is no misjoinder of defendants or causes of action.

Evidence has to be led to ascertain whether the defendants are liable and if so what amount to be paid to the plaintiff. It will certainly be convenient to Court to decide the above at one trial.

At this juncture it is pertinent to note the comments made by former Chief Justice G.P.S. de Silva in *Ameer v Kulatunge*⁽³⁾ Citing *Appuhamy v Pagnananda Thero* ⁽⁴⁾ that "court cannot dismiss an action on the ground of misjoinder of causes of action. 150

For the reasons stated above the appeal fails and is dismissed with costs fixed at Rs. 20,000/-.

ISMAIL J. – I agree.

JAYASINGHE, J. – I agree.

Appeal dismissed.