
HAPUARATCHI AND ANOTHER**vs.****DHANAPALA AND ANOTHER**

COURT OF APPEAL.
SOMAWANSA, J, (P/CA) AND
WIMALACHANDRA, J.
CALA 186/2004.
DC KANDY 32523/MR.
MARCH 30, 2005.

Civil Procedure Code, sections 17, 22, 36 and 37 - Misjoinder of parties and causes of action - Objection to be taken when?

The plaintiff-respondent instituted action seeking damages from the 1st and 2nd defendants-respondents.

The defendants-petitioners filed a motion and sought the dismissal of the plaint on the basis that the plaintiff-respondent has misjoined cause of action and defendants.

The trial judge after inquiry rejected the objections on the basis that the objections are premature and contrary to section 22.

HELD:

- (1) The 1st and 2nd defendant-petitioners have taken up these objections of misjoinder of parties at the correct stage and certainly are not premature, "An objection to non-joinder of parties shall be taken at the earliest possible opportunity, otherwise such objections will be considered to have been waived"

Held further :

- (2) The contesting defendants-petitioners have complied with the provisions in section 22. Rules of Procedure would allow them to reiterate this objection in their answer and thereafter raise issues based on those objections and seek dismissal of the action.
- (3) There are no compelling reasons to grant leave to appeal against the impugned order, for there is no prejudice caused to the contesting defendant-petitioners in that they could re-agitate this matter as the trial judge has not rejected the objection.

APPLICATION for leave to appeal, from an order of the District Court of Kandy.

Cases referred to :

1. *John Singho vs. Julius Appu* - 10 NLR 351
2. *London and Lancashire Fire Insurance Co. vs. P & O Company* - 18 NLR 15
3. *Dingiri Appuhamy vs. Talakotuwe Pangananda Thero* - 67 NLR 89
4. *Waharaka alias Moratota Sobita Thero vs. Amunugama Ratnapala Thero* 1981 1 NLR 201
5. *Kudhoos vs. Toonor* - 41 NLR 251
6. *Alden Fernando vs. Lionel Fernando* 1995 2 Sri LR 25
7. *Cologan and Another vs. Udeshi* 1996 2 Sri LR 220

L. P. A. Chitranganie with K. de Mel for defendant-petitioners.

A. A. de Silva, P. C. with Jayalath Hissella for plaintiff-respondent.

Cur.adv.vult.

July 22, 2005

ANDREW SOMAWANSA, J. (P/CA)

The plaintiff-respondent instituted action in the District Court of Kandy seeking as damages Rs. 3000,000/- Rs. 2000,000/- and Rs. 2000,000/- from the 1st and 2nd defendants-respondents respectively.

The plaintiff-respondent has taken up the position that the 1st and 2nd defendants-petitioners are running a business of conducting courses of counseling under the name of Institute of Psychological Studies and the 3rd defendant-respondent is a Lecturer in the said Institute, that the plaintiff-respondent joined the said course on 07.07.2002 which was due to end on 19.12.2002, that on the payment of fees by the plaintiff-respondent the 1st and 2nd defendants-petitioners entered into an agreement to enroll her

to the course, that the 1st defendant-petitioner having heard the tales carried by the 3rd defendant-respondent defamed the plaintiff-respondent on the 28th and 29th December, 2002 and on 5th January 2003. The 2nd defendant-petitioner having heard the tales carried by the 3rd defendant-respondent defamed the plaintiff-respondent over the telephone, that the 1st and 2nd defendants-petitioners did not allow the plaintiff-respondent to follow the said course and that the defendants do not have the proper knowledge and qualifications in counseling. In the premiss, the plaintiff-respondent claimed the aforesaid sums of money as damages from the three defendants.

The 1st and 2nd defendants-petitioners filed a motion dated 28.10.2003 and sought the dismissal of the plaint on the basis that the plaintiff-respondent has misjoined cause of action and defendants. This matter was inquired into and at the conclusion of the inquiry the learned District Judge by his order dated 14.05.2004 rejected the objections of the 1st and 2nd defendants-petitioners on the basis that the objections taken by the 1st and 2nd defendants-petitioners are premature and contrary to the provisions contained in section 22 of the Civil Procedure Code. The said section reads as follows:

“All objections for want of parties, or for joinder 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 defendant.”

It is to be seen that the 1st and 2nd defendants-petitioners have taken up these objections for misjoinder of parties at the correct stage and certainly *not premature in terms of provisions contained in section 22 of the Civil Procedure Code*. In the case of *John Sinno vs. Julis Appu*⁽¹⁾. The head note reads as follows:

“An objection to non-joinder of parties should be taken at the earliest possible opportunity, otherwise such objections will be considered to have been waived.”

Also in the case of *London and Lancashire Fire Insurance Co. vs. P. & O. Company*⁽²⁾ Pereira, J (obiter) :

“An objection to an action by a defendant on the ground of misjoinder or non-joinder of parties is not to be taken by way of answer. It should be taken by motion or application at the earliest opportunity.”

Also at 21 Pereira, J observed:

“Now, it seems to me that an objection on the ground of misjoinder or non-joinder of parties is not a defence to the plaintiffs’ claim to be taken by way of answer. Section 22 of the Civil Procedure Code enacts that such an objection should be taken at the earliest possible opportunity, and if it were not so taken, it should be deemed to have been waived by the defendants.”

In this respect the provisions contained in sections 36 and 37 of the Civil Procedure Code also become relevant and the said sections reads as follows:

“36. (1) Subject to the rules contained in the last section, the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants may unite such causes of action in the same action.

But if it appears to the court that any such cause of action cannot be conveniently tried or disposed of together, the court may, at any time before the hearing, of its own motion or on the application of any defendant, in both cases either in the presence of, or upon notice to, the plaintiff, or at any subsequent stage of the action if the parties agree, order separate trial of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

(2) When causes of action are united, the jurisdiction of the court as regards the action shall depend on the amount or value of the aggregate

subject-matters at the date of instituting the action, whether or not an order has been made under the second paragraph of subsection (1)".

37. "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 the court for an order confining the action to such of the causes of action as may be conveniently disposed of in one action."

Order of Court thereon is contained in section 38 of the Civil Procedure Code which reads as follows:

"38. (1) If, on the hearing of such application, it appears to the court that the causes of action are such as cannot all be conveniently disposed of in one action, the court may order any of such causes of action to be excluded, and may direct the plaint to be amended accordingly, and may make such order as to costs as may be just"

In the order of the learned District Judge it is to be seen that she has made reference to section 17 of the Civil Procedure Code as well, which reads as follows :

"No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

In the case of *Dingiri Appuhamy vs. Talakolawewe Pangananda Thera*⁽³⁾

Court observed:

"There is no provision in the Civil Procedure Code or any other law requiring an action to be dismissed where there is a misjoinder of causes of action. It is therefore, improper for the court to dismiss an action on the ground of misjoinder of defendants and causes of action without giving an opportunity to the plaintiff to amend his plaint."

It was held in that case:

“That there was a misjoinder of defendants and causes of action. In as much as, under section 17 of the Civil Procedure Code, no action should be defeated by reason of misjoinder of parties, the plaintiffs should be given an opportunity to amend their plaint so that the action should proceed against the 1st defendant only .”

In *Waharaka alias Moratota Sobitha Therav. Amunugama Ratnapala Thero* ⁽⁴⁾ section 17 of the Civil Procedure Code enjoins a Judge not to dismiss an action for misjoinder or non-joinder of parties.

Also in *Kudhoos vs. Joonoos* ⁽⁵⁾:

A Court is not bound to dismiss an action on the ground of misjoinder of parties and causes of action. In such a case the Court may on application made in the exercise of its discretion strike out one or more plaintiffs and give an opportunity for amendment of the pleadings, so as to make the plaint conform to the requirements of section 17 of the Civil Procedure Code.

In *Aldin Fernando vs. Lionel Fernando* ⁽⁶⁾ it was 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 Courts 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.”

In the case of *Colgan and Another vs. Udeshi* (J) G. P. S. de Silva, CJ stated :

“It is well to remember that a Court should not be fettered by technical objections on matters of procedure.”

On a consideration of the aforesaid authorities I would disagree with the finding of the learned District Judge that the objections raised by the 1st and 2nd defendants-petitioners on the basis of misjoinder of causes of action as well as parties are premature. My considered view is that the contesting defendants-petitioners have raised this objection at the correct time. Be that as it may, the learned District Judge has not in his order completely rejected the objection taken by the contesting defendants-petitioners but only says they are premature. In the circumstances the contesting defendants-petitioners have complied with the provisions contained in section 22 of the Civil Procedure Code. Rules of procedure would allow them to reiterate this objection in their answer and thereafter raise issues based on those objections and seek dismissal of the action. In the circumstances my considered view is that there is no compelling reason for this Court to grant leave to appeal against the impugned order of the learned District Judge, for there is no prejudice caused to the contesting defendants-petitioners, in that they could reargue this matter. On the other hand, the plaintiff-respondent is aware of the objections taken to the plaint. It is up to him to decide whether to amend the plaint or not in view of the objection taken by the contesting defendants-petitioners to the plaint. Either way he will have to face the consequences.

For the above reasons, I do not intend to interfere with the order of the learned District Judge and accordingly the application for leave to appeal will stand dismissed. Parties will bear their own costs.

WIMALACHANDRA J. — *I agree.*

Application dismissed.