

Present : De Sampayo A.C.J. and Garvin A.J.

1923.

KANAGASABAPATHY v. KANAGASABAI *et al.*

71—D. C. Jaffna, 17,548.

Joinder of parties and causes of action—Civil Procedure Code, ss. 14 and 36.

Plaintiff alleged that his deceased father assigned certain bonds to first defendant and certain other bonds to second defendant in trust for the plaintiff and that defendants were appointed executors of his father's will, and that defendants as executors recovered moneys due on certain notes and had not accounted for the same. The plaintiff claimed on the first cause of action the value of the bonds and notes.

As a second cause of action plaintiff alleged that the defendants sold nineteen lands belonging to his father's estate and had not accounted for the same.

For a third cause of action the plaintiff alleged that first defendant has, since his father's death, been in possession of all the lands belonging to plaintiff and had appropriated the rents and profits.

Held, that the plaint was bad for misjoinder of parties and causes of action.

The effect of section 36 of the Civil Procedure Code is to enable the plaintiff to join several causes of action (1) against the defendant if there is one defendant, and (2) against the defendants, if there are several, provided in the latter case the several defendants are jointly liable.

THE facts are set out in the judgment.

Samarawickreme (with him *Rajaratnam*), for defendants, appellants.

Hayley (with him *James Joseph*), for plaintiff, respondent.

June 27, 1923. DE SAMPAYO A.C.J.—

The question is whether in this case there is a misjoinder of parties and of causes of action. The facts as alleged in the plaint are as follows :—One A. Kandiah, the plaintiff's father, on January 2, 1903, by deed No. 12,551 assigned to the first defendant the

1928.

DE SAMPAYO
A.C.J.*Kanaga-
sabapathy v.
Kanagasabai*

bonds specified in schedule B of the plaint of the total value of Rs. 2,319·19, and he also on the same date by deed No. 12,550 assigned to the second defendant the bonds specified in schedule A of the value of Rs. 4,191·42. According to the plaintiff these assignments were made to the two defendants respectively in trust for the plaintiff for the purpose of recovering the amounts due and re-investing them for the plaintiff's benefit. He complains that the defendants respectively made certain recoveries and re-invested the money in a business carried on by the defendants at Trincomalee. He further says that his father, Kandiah, died on January 7, 1903, leaving a last will, of which he appointed the defendants as executors, and that Kandiah left him surviving, his son, the plaintiff, and two daughters, Meenadchipillai and Nagamma, of whom the latter had been dowried. He then proceeds to say that Kandiah was entitled to Rs. 3,082·85 on promissory notes specified in schedule C, and that the defendants as executors recovered this sum, but have not accounted to plaintiff for the same. He accordingly claims from the defendants on the first cause of action the value of the bonds and the promissory notes.

As a second cause of action the plaintiff says that the defendants as executors fraudulently and with a view to cause loss to him and his sister Meenadchipillai sold away nineteen lands belonging to Kandiah's estate and specified in schedule D, and of the present value of Rs. 6,470, of which he claims half, namely, Rs. 3,235, from the defendants.

The plaintiff's third cause of action is that the first defendant has since Kandiah's death been in possession of all the lands belonging to the plaintiff and specified in schedule E, and that there is due to him in respect of the rents and profits of the lands the sum of Rs. 12,539·90.

With regard to the alleged trusts, the assignments do not create any trust, but it would seem that the plaintiff depends on some constructive trusts attaching to the assignments. In any case, the defendants are not joint trustees; each of them can only be a trustee in respect of the bonds separately assigned to each. The breach of trust can only mean that each defendant invested in the Trincomalee business the money recovered on the bond assigned to him separately.

As regards the promissory notes, the defendants as executors are, of course, liable to account for them in the testamentary suit, and the plaintiff's proper course would have been to proceed under the provisions of the Civil Procedure Code in that suit. Assuming, however, that a separate action may be brought, the question is whether the action is properly constituted.

It will be noticed from the above recital of facts, (1) that the two defendants are joined together with regard to claims which should

be made against them separately for the breaches of trust ; (2) that with regard to the promissory notes the defendants are sued in their capacity of executors and not as trustees, and Meenadchi is not joined ; (3) that a similar remark applies to the plaintiff's second cause of action with regard to the sale of nineteen lands ; and (4) that the claim on the third cause of action is against the first defendant only, and in his personal capacity.

Section 14 of the Civil Procedure Code is that which provides for the joinder of several persons as defendants. It declares 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 causes of action." The last words are essential, and I think that in respect, at all events, of the plaintiff's first and third causes of action, the provision of the above section has been contravened. The other section bearing on the subject is section 36, which provides for the plaintiff uniting in the same action several claims against the same defendant or the same defendants jointly. I do not think that this section justifies the joinder of the third cause of action against the first defendant alone with the previous causes of action against both the defendants. I regret that I am unable to follow the reasoning of Pereira and Ennis JJ. in *London and Lancashire Fire Insurance Co. v. P and O. Company*¹ on this point. It appears to me that the effect of section 36 is to enable the plaintiff to join several causes of action, (1) against the defendant, if there is one defendant, and (2) against the defendants, if there are several, provided in the latter case the several defendants are jointly liable. This is the view taken in the Indian Courts—*Mullick Kefait Hossein v. Sheo Pershad Singh*,² *Umabai v. Bhan Balwant*.³ In my opinion there has been a misjoinder of defendants and causes of action in this case.

Section 35 (2) prohibits a claim against executors or administrators being joined with claims against them personally, but in view of my opinion on the other points, it is not necessary to discuss the application of that provision to this case.

In cases of misjoinder of parties or causes of action, it is often possible to allow a plaintiff to amend the plaint and restrict his claim. In any case, very extensive amendments would be necessary, and as plaintiff must, in any event, pay the costs up to date, it is more convenient to put an end to the present case, and leave plaintiff to commence other action or actions *de novo*.

I would, therefore, allow this appeal and dismiss the plaintiff's action, with costs in both Courts, with liberty to him, however, to bring other properly constituted action or actions on the same cause or causes of action.

1923.

DE SAMPAYO
A.C.J.*Kanaga-*
sabaiathiy v.
*Kanagas abai*¹ (1914) 18 N. L. R. 15.² I. L. R. 23 Cal. 821.³ I. L. R. 34 Bom. 358.

1923.

GARVIN A.J.—

*Kanaga-
saba v. Kanagasaba*

I am in complete agreement with the opinion expressed by my Lord, and have the same difficulty in applying the same reasoning in the case of the *London and Lancashire Fire Insurance Co. v. P. and O. Company (supra)* to the circumstances of this case. Section 36 permits the joinder in one action of several causes of action only in two cases—(1) against the same defendant; (2) against the same defendants jointly. It seems to me that it is within these limits only that simultaneous operation can be given to sections 14 and 36.

Set aside.

