

FERNANDO
v.
LAKSHMAN PERERA

COURT OF APPEAL
JAYASINGHE, J.
JAYAWICKREMA, J.
C. A. No. 786/97
D. C. MORATUWA 172/L
9TH JUNE, 2000
20TH, 31ST OCTOBER, 2000

Civil Procedure Code - S.35(1), S.46 - Leave of Court not obtained - Misjoinder of causes of action - Interim Injunction refused - Non compliance with imperative requirements - Is it total?

The District Court refused the interim injunction sought by the Plaintiff Petitioner on the basis that there is a misjoinder of causes of action - S.35(1).

It was contended that, as the Plaintiff Petitioner sought declaration not only that he is entitled to the land but also further declaration inter alia to invalidate two Deeds, it violated the provisions of S.35(1) Civil Procedure Code as in an action instituted in terms of S.35, no other claim or cause of action shall be made unless with the leave of court, except in cases enumerated therein.

Held :

- (1) The Plaintiff gives full details regarding the conduct of the Respondents to deprive the Plaintiff's right to own and possess the subject matter of the action.
- (2) The Plaintiff pleads in paragraph 17 that a cause of action has arisen to evict the Defendant and place the Plaintiff in possession of the land.
- (3) There is only one cause of action. The prayer for invalidation of the two deeds is consequential to prevent the Respondents from alienating the land.
- (4) It is wrong to prevent the alleged actions of the Defendants and to invalidate any illegal transfers or alienation.

APPLICATION in Revision from the order of the District Court of Moratuwa.

Cases referred to :

1. *Appuhamy v. Diyonis* - 12 NLR 382
2. *Raman Chetty v. Carpan Kangany* - 1 SLR 242
3. *Fernando v. Wass* - 9 SCC 189
4. *Thirumalay v. Kulandavelu* - 66 NLR 285
5. *Fernando v. Fernando* - 39 NLR 145
6. *Shiba v. Prayas* - 59 C 1399 -A 1932 PC 213
7. *Ganesh v. Jewach* - 8 CWN 146
8. *Giyana v. Kandasamy* - 10 M 375
9. *New M Co. v. Shankar* - A 1941 B 247
10. *Sachi v. Rajchand* - A 1950 C 333
11. *Chiddabaram v. Ramasami* - 5 M 161
12. *Lloyd v. G.W & M.D Co.* - 1907 - 23 TR 570
13. *Satish v. Ashrafuddin* - 8 CLJ 198
14. *Adlin Fernando v. Lionel Fernando* - 1995 2 SLR 25

Manohara R. de Silva with *Devika Samaranyake* for Plaintiff Petitioner.
P.A.D. Samarasekare P.C., for Defendant Respondents.

Cur. adv. vult.

December 05, 1999.

JAYAWICKRAMA, J.

This is an application to revise, set aside or vacate the order dated 27.08.1997 made by the learned District Judge of Moratuwa refusing the interim injunction sought by the Plaintiff-Petitioner on the basis that there is a misjoinder of causes of action within the meaning of Section 35(1) of the Civil Procedure Code.

On an application made by the Plaintiff-Petitioner, the learned District Judge on 14.12.1995 issued an enjoining order preventing the 2nd Respondent from alienating the premises described in the second schedule to the plaint.

Thereafter the learned District Judge by his order dated 27.08.1997, vacated the enjoining order and refused to issue an interim injunction as prayed for by the Plaintiff-Petitioner. The learned District Judge in making the order has come to the conclusion that due to misjoinder of causes of action the Plaintiff cannot succeed in his action. There are no other reasons stated for the refusal of the interim injunction by the learned District Judge.

The learned President's Counsel for the 2nd Defendant-Respondent submitted that in an action instituted in terms of Section 35, no other claim or cause of action shall be made unless with the leave of Court, except in the cases enumerated therein and the Section itself is worded in imperative terms. He contended that to obtain a declaration of title in his favour in respect of the subject matter of the action, the Plaintiff-Petitioner ought to clear two more hurdles in that the notarial documents bearing Nos. 51 and 3054, will have to be set aside by Court and the degree of success to be derived by the Plaintiff-Petitioner is dependant on the other claims or declarations sought. He further submitted that the remedy of an injunction being an extraordinary relief granted in exceptional circumstances, when all ingredients have been strictly complied with, non compliance with the imperative requirement of seeking leave or the observance in breach of such provision, no doubt create an obstacle in the way of Court granting relief. The learned President's Counsel further submitted that the Plaintiff-Petitioner sought a declaration not only that he is entitled to the land morefully described in the second schedule to the plaint but also further declaration inter alia to invalidate deed No. 3054 dated 20. 05. 1993 and Agreement to sell bearing No. 51 dated 07. 03. 1995.

The plaint of the Plaintiff dated 13. 12. 1995 gives full details regarding the conduct of the Respondents to deprive the Plaintiff's right to own and possess the subject matter of this action. In paragraph 17 of the plaint he states that a cause of action has arisen to evict the Defendant and place the

Plaintiff in possession of the land. On a perusal of this plaint I find that there is only one cause of action as per Paragraph 17 of the plaint. The prayer for invalidation of two deeds referred to above is consequential to the main cause of action to obtain declaration of title to this land. For this purpose it is necessary to prevent the 1st and the 2nd Respondents from alienating the land by way of transferring, selling, agreeing to sell and mortgaging the said land. Under Section 35(1)(b) of the Civil Procedure Code the Plaintiff in an action for declaration of title to immovable property is entitled to make a claim for damages for breach of any contract under which the property or any part thereof is held; or consequential on the trespass which constitute the cause of action. In the instant case the claim to invalidate the deed and agreement itself is consequential to the main cause of action to obtain a declaration of title. It is necessary to prevent the alleged actions of the Defendant and to invalidate any illegal transfers or alienations. It is abundantly clear on a reading of the plaint which states in minute detail the alleged conduct of the Defendant to alienate the property which is the subject matter of this action, that the only cause of action is to obtain a declaration of title and possession of the subject matter.

It was held in *Appuhamy vs. Diyonis*⁽¹⁾ that in an action by a lessee of land for recovery of possession and damages against a person who has ejected him from the land, the Judge has power, even after the filing of the plaint, to grant special leave to join an alternative claim against the lessor for damages and for the refund of purchase money.

It was held in *Ramen Chetty vs. Carpan Kangany*⁽²⁾ that the action can be sustained under the exception mentioned in Section 34 of the Code, and the words in the section "except with leave of the Court obtained before the hearing", mean that if a Plaintiff has omitted a part of his claim, he may, before that claim is heard, ask the leave of Court to sue for the omitted remedy.

In *Fernando vs. Wass*⁽³⁾ it was held that a claim to recover land from a party in wrongful possession may be joined with an alternative claim against the vendor of the land to the Plaintiff for refund of the price upon failure to warrant and defend the title.

Subject to the provisions of Section 35 of the Code, the Plaintiff may unite in the same action several causes of action against the same Defendant or Defendants jointly. Any Plaintiff having a cause of action in which they are jointly interested against the same Defendant or Defendants may unite such cause of action in the same action. However, if the Court thinks that they cannot be conveniently disposed of together, the Court may, on its own motion or on the application of any Defendant, order separate trials of any such cause of action.

It was held in *Thirumalay v. Kulandavelu*⁽⁴⁾ that although it is permissible for a Plaintiff to unite in the same action several causes of action, there is no provision in the Code for pleading causes of action in the alternative. Therefore, the Court has no power to amend a plaint by adding alternative cause of action. (Vide *Fernando v. Fernando*⁽⁵⁾).

In India, according to the corresponding section in the Civil Procedure Code, where in such a suit, it is sought to join claims other than those specified in the three clauses, (R.4), leave of the Court must first be obtained; and leave may be obtained if the claim is of such a nature that it can be conveniently tried with a suit for recovery of immovable property.

The R.4 of the Indian Civil Procedure Code which is similar to our Section 35 is as follows:-

“No cause of action shall, unless with the leave of the Court be joined with a suit for the recovery of immovable property, except:-

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof; and
- (b) claims for damages for breach of any contract under which the property or any part thereof is held; and
- (c) claims in which the relief sought is based on the same causes of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

No leave is necessary when the claims in a suit for recovery of immovable property are based on the same cause of action. (Vide *Shiba vs. Prayag*⁽⁶⁾). Examples where no leave is necessary are as follows:-

- (1) when a person seeks to recover both immovable and movable property by setting up the same title based on the same cause of action (*Gunesh vs. Jewach*⁽⁷⁾; *Giyana vs. Kandasami*⁽⁸⁾).
- (2) when a suit for recovery of land claims such as declaration of title, receiver, injunction, account of rents or other claims not founded on any new cause of action are made. The joinder of specific performance possession is not dependent upon the leave of Court (*New M Co. vs. Shankar*⁽⁹⁾).
- (3) Suit for specific performance and damages for delay in completion of sale (*Sachi vs. Raichand*⁽¹⁰⁾).

Claims for damages and claims for mesne profit are regarded as distinct and separate causes of action from the cause of action for recovery of immovable property, and r.4 says that they may be joined together, whereas otherwise they could not be joined together because of the general principle contained in the opening words r.4 (*Sarkar's Law of Civil*

Procedure 8th Edition 1996 page 554 to 556). The Rule does not forbid the joinder of several causes of action entitling the Plaintiff to recover several immovable properties, but a joinder with such causes of action of other causes of action of a different character except in the cases specified in the clauses (*Chiddabaram vs. Ramasami*⁽¹¹⁾).

Under the English Rule leave is not conditional precedent to jurisdiction and it may in good cause be granted even after institution of suit. (*Lloyd vs. GW & MD Co.*⁽¹²⁾). As the Rule regarding leave is for the benefit of the Defendant; he may by his conduct waive it. There being no objection until the trial, the objection as to leave was held waived (*Satish vs. Ashrufuddin*⁽¹³⁾).

It was held in *Adlin Fernando vs. Lionel Fernando*⁽¹⁴⁾ 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 common sense approach in deciding question of misjoinder or non-joinder.

In view of the above principles of law I am unable to agree with the contention of the learned President's Counsel for the 2nd Defendant-Respondent.

In *Appuhamy vs. Dyonis*(*Supra*) 384 Middleton, J. observed -

"According to the provisions of Section 35 and the example thereto, the Judge, no doubt, was strictly right, but the provisions of our Code to be found in Section 46 show that the presentment of a plaint is subject to the approval of the Judge, and his reception of the plaint, in this case was a tacit waiver of the terms of Section 35. It seems to me, therefore, that it was a case in which the Judge might well have exercised his discretion, and have made the order requisite under Section 35 at a later period in the action".