

1964 *Present* : Basnayake, C.J., Abeyesundere, J., and
Sri Skanda Rajah, J.

S. THIRUMALAY and another, Appellants, and
P. KULANDAVELU, Respondent

S. C. 106/61 (Inty.)—D. C. Hatton, 5907

Pleadings—Amendment of plaint—Scope—Alternative cause of action—No provision for pleading it—Civil Procedure Code, ss. 36, 46, 93.

Plaintiff filed a plaint basing his action on a contract of partnership. He sought to amend the plaint subsequently by adding an alternative cause of action based on trust.

Held, that a plaint cannot be amended so as to convert an action of one character to an action of another and inconsistent character.

Held further, that, while section 36 of the Civil Procedure Code permits 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. The Court has therefore no power to amend a plaint by adding an alternative cause of action.

APPEAL from a judgment of the District Court, Hatton.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne* and *I. S. de Silva*, for the defendants-appellants.

C. Ranganathan, with *M. T. M. Sivardeen* and *Mark Fernando*, for the plaintiff-respondent.

June 2, 1964. BASNAYAKE, C.J.—

The plaintiff-respondent instituted this action on 2nd May 1960 against the defendants-appellants for the recovery of a sum of Rs. 5,000. The material statements in the plaint are as follows :—

“ 2. Prior to the dates material to this action S. Thirumalay, S. K. Sellamuttu, P. Ramasamy, V. Vaithilingam, P. Tharmalingam Nadar and S. Thangiah Nadar were carrying on business together under the name, style and firm of “ S. T. T. R. V. Thirumalay & Co.” at No. 42 Tillicoultry Bazaar, Lindula.

3. On or about the 17th day of December 1954, the plaintiff above-named joined the said business having contributed as his capital an aggregate sum of Rs. 3,250.00.

4. At all times material to this action the said business was carried on by the plaintiff and the defendants, the others mentioned in paragraph 2 above having from time to time retired from the said business.

5. On or about the 22nd day of June 1958 the plaintiff abovenamed gave notice to the defendants that he would cease to be a partner of the said Firm as from the 30th day of September 1959.

6. The defendants agreed and undertook to pay to the plaintiff his capital and share of profits after going into the accounts.

7. On the 1st day of September 1959 the defendants wrongfully and without notice to the plaintiff intimated to the Registrar of Business Names that the plaintiff was no longer a partner of the said Firm and had the plaintiff's name expunged from the said Register.

8. Notwithstanding their undertaking to pay to the plaintiff his capital and share of profits the defendants have failed and neglected to pay the said sum to the plaintiff though thereto often demanded.

9. Apart from his capital of Rs. 3,250.00 the plaintiff estimates his share of the profits upto date at Rs. 1,750.00 which aggregate sum of Rs. 5,000.00 or any part thereof the defendants have failed and neglected to pay."

The defendants filed answer denying that a cause of action had accrued to the plaintiff and pleaded that on the averments contained in the plaint the plaintiff was not entitled to maintain this action as the partnership agreement pleaded was of no force or avail in law as it was not in writing (s. 18 (c) Prevention of Frauds Ordinance). That answer was filed on 6th September 1960. The case was fixed for trial on 24th January 1961. On that day the Proctor for the plaintiff moved for a postponement of the trial on the ground that he wished to amend his plaint. The learned District Judge made order—"Take case off trial roll. Call case 7.2.61 for amended plaint". On 7th February 1961 an entirely new plaint called "amended plaint" was filed. It contained paragraphs 2 to 9 of the plaint that was filed on 2nd May 1960 and six further paragraphs under the heading "for an alternative cause of action". Those paragraphs are as follows :—

"10. The plaintiff advanced to the defendants abovenamed a sum of Rs. 3,250.00 which sum the defendants employed in the trade or business of S. T. T. R. Thirumalay & Co., at No. 42 Tillicoultry Bazaar, Lindula.

11. The said trade or business was carried on by monies advanced by the plaintiff and the defendants abovenamed and the defendants were in control and possession of the said business partly on their own behalf and partly on behalf of the plaintiff as trustees.

12. The defendants abovenamed are trustees for the plaintiff to the extent of Rs. 3,250.00 advanced by the plaintiff to the defendants.

13. During the conduct of the said business the defendants as trustees gained for themselves pecuniary advantage and thereby hold for the benefit of the plaintiff his proportionate share of the advantage so gained and which the plaintiff assesses at Rs. 1,750.00.

14. The defendants as such trustees agreed and undertook to pay to the plaintiff the said aggregate sum of Rs. 5,000.00, but notwithstanding such undertaking have failed and neglected to pay the said sum to the plaintiff though thereto often demanded.

15. A cause of action has therefore accrued to the plaintiff to sue the defendants jointly and severally for the said sum of Rs. 5,000.00."

Objections were taken by the defendants to the proposed amendments of the plaint on the grounds—

" (a) that it seeks to bring in a new cause of action.

(b) that it will result in depriving the Defendants of defences otherwise available to them.

(c) that it seeks to alter the scope of the action."

The additions to the plaint sought to convert the action from an action on a partnership to an action based on a trust. It has been held by this Court that an amendment which would have the effect of converting an action of one character to an action of another and inconsistent character cannot be made (*Lebbe v. Sandam*¹). There is a further objection to the amendment, and that is that, while section 36 permits the 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. The Court has therefore no power to amend a plaint by adding an alternative cause of action. The learned District Judge held the view that no prejudice would be caused to the defendants by the proposed amendment and allowed the application of the plaintiff to file the proposed amendment. In our opinion the learned District Judge should not have amended the plaint by adding an alternative cause of action.

We therefore allow the appeal with costs, set aside the order of the learned District Judge and send the case back for trial of the action on the plaint originally filed.

ABEYESUNDERE, J.—I agree.

SRI SKANDA RAJAH, J.—

I agree that the appeal should be allowed with costs. As this is a question of importance, which arises frequently in courts of first instance, I would like to state my own view very briefly.

"The whole purpose of pleadings is to define, to clarify and to limit the issues which are to be the subject of the pending contest."—*Jones v. Skelton*². For this reason the Courts have been very liberal in exercising the wide discretion vested in them under sections 46 and 93 of the

¹ (1963) 64 N. L. R. 461.

² (1963) 1 W. L. R. 1362 P. C. at 1373.

Civil Procedure Code which, in my opinion, should be read together in permitting an amendment at any stage of the action. This discretion, however, is subject to two restrictions, namely,

(1) “. . . no amendment shall be allowed which would have the effect of converting an action of one character into an action of another and inconsistent character ;” (Proviso to section 46),

and

(2) “ No amendment shall be allowed which works an injustice to the other side, for example, an amendment which would have the effect of depriving the other side of a plea of prescription.”

The amendment proposed in this case would fall within the first restriction. The plaintiff came into Court basing his action on a contract of partnership. The proposed amendment or substitution (the latter being the more appropriate term) is on the basis of a completely different legal relation, namely, trust. This would convert the action into “ one of another and inconsistent character ”. In S. C. 99/62 (Interlocutory)—D. C. Colombo 52707/M (S. C. Minutes of 29.5.64) this Court expressed itself as follows :—

“ Where a plaintiff bases his claim on a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation.”—*per Sri Skanda Rajah, J.*

Appeal allowed.