1972 *Present :* **G. P. A. Silva, S.P.J., and Deheragoda, J.**

D. D. L. KALUARACHCHI, Appellant, *and* CEYLON TRANSPORT BOARD, Respondent

S. C. 210/69 (Inty.)—D. C. Colombo, 68219

Prescription—Application to add a party by amending the plaint—Cause of action not prescribed at the time of such application—Order of Court made, however, after cause of action has become prescribed—Whether amendment of the plaint is permissible—Scope for joining a defendant after commencement of action—Civil Procedure Code, ss. 11–19, 21, 46.

1**—A 00306 (7/73)

The plaint in the present action would have been an acceptable one if it had been filed against A, B and C jointly, severally or in the atlernative in respect of a claim in delict. The plaint was filed originally on 14th September 1967 against A and B only. After answer was filed by A and B on 3rd February 1968 the plaintiff moved to amend the plaint and also tendered an amended plaint in which A and B as well as C figured as the defendants. This application to add a party and amend the plaint was filed on 12th September 1968, nearly four months before the cause of action was prescribed. On 18th October 1968, when the case was called for consideration of the amended plaint, an objection was filed by A and B that the amendment defeated a plea of prescription available to the defendants—presumably to C. After hearing all parties, the trial Judge made order on 5th September 1969 that, as the cause of action against the proposed added defendant was prescribed on that day, the amendment could not be allowed.

Held, that the date which was material for a successful plea of prescription was the date of the tendering of the amended plaint together with the motion to amend and not the date of the order made thereon by the Court. Accordingly, considering especially that the application for the amendment of the plaint was filed no less than four months before the cause of action was prescribed, the plaint should be allowed to be amended.

APPEAL from a judgment of the District Court, Colombo.

Mark Fernando, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *R. L. Jayasuriya* and *Miss Ivy Marasinghe*, for the respondent.

Cur. adv. vult.

June 20, 1972. G. P. A. SILVA, S.P.J.—

On 14th September, 1967, the plaintiff-appellant brought this action against two defendants, the 1st defendant being the owner of a car bearing No. 4 Sri 4014 and the 2nd being its driver at the material time, for damages suffered by the plaintiff in respect of certain injuries sustained by him as a result of a collision between the car driven by the 2nd defendant in which the plaintiff was being carried and a Ceylon Transport Board Bus bearing No. 23 Sri 1215. The plaintiff's position as disclosed by the original plaint filed on 14th September 1967 was that when he was travelling in the said car on 6th January, 1967, as a result of the negligence of the 2nd defendant, the car collided with the said bus resulting in serious injuries to the plaintiff. He assessed the mental and physical pain suffered by him, together with medical expenses and the loss suffered by him by reason of his absence from his normal pursuits, at Rs. 100,000 and claimed the amount from the two defendants.

The defendants filed answer on the 3rd February, 1968, stating that the collision was due to the sole and/or contributory negligence of the driver of bus No. 23 Sri 1215 belonging to the Ceylon Transport Board, that the collision was an inevitable accident, that in any event the policy of insurance issued in respect of the said motor car limited the damage to Rs. 2,000 and that the plaint did not disclose a cause of action against the defendants and prayed for a dismissal of the action.

Subsequent to this answer, the plaintiff revoked the proxy of the original proctor and on 12.9.68, after filing a fresh proxy, moved to amend the plaint and also tendered an amended plaint in which the two original defendants as well as the Ceylon Transport Board figured as the defendants. In addition to the averments which the plaintiff had made in the original plaint in respect of the negligence of the 2nd defendant, he averred in the amended plaint, in the alternative, that the said collision was due to the negligence of the driver of the said omnibus. He therefore pleaded that the said collision was due to the combined simultaneous and/or concurrent negligence of the drivers of the two vehicles, that he was unable in the circumstances to state due to whose negligence the collision was caused and prayed for judgment against the defendants jointly and/or severally in the sum of Rs. 100,000.

On 18.10.68 the case was called for consideration of the amended plaint and certain objections were filed by the 1st and 2nd defendants broadly under three heads :—

(1) that the amendment defeats a plea of prescription available to the defendants—presumably the 3rd defendant,

(2) that plaintiff had sued the wrong party and that there was a misjoinder of parties,

(3) that the amended plaint alters the nature and scope of the action.

A further point was taken in regard to the procedure adopted by the plaintiff to have a new party added. Before an order was made on these objections the learned District Judge issued a notice on the party proposed to be added, the Ceylon Transport Board. Certain objections were filed by the proposed 3rd defendant and after hearing all parties, on 5th September 1969 the learned District Judge held in favour of the plaintiff on all the points except the first, namely that the claim as against the proposed 3rd defendant was prescribed and that the plaint was out of time. It is against this order that the plaintiff has appealed to this Court.

The crucial question that arises for decision therefore is as regards the event in this case which is material for a successful plea of prescription. Is it the tendering of the amended plaint together with the motion to amend or the making of the order thereon by the Court ?

In order to decide this question, it is not irrelevant to consider the attitude of the legislature to the joinder of parties having either a community of interest as plaintiffs or having a liability, either jointly or severally, in respect of the cause of action. Clearly, in my view, sections 11 to 18 of the Civil Procedure Code favour the joining of several plaintiffs or several defendants in those circumstances and do not favour a multiplicity of actions. Normally, these provisions seem to contemplate the joining of such parties as plaintiffs or defendants at the commencement of the litigation. Where, however, there is a failure of the parties

themselves to do so at the commencement of the litigation, that is, at the stage of the pleadings, section 18 gives the power to the Court at any time, either upon or without such application and on such terms as the Court thinks just, to order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle the questions involved in the action be added. This language, while not making it obligatory on a party or on the Court to join all the parties that may appropriately be joined, certainly indicates a desire on the part of the legislature that such parties be joined. Furthermore, where the party instituting or defending the action fails to make use of this permitted right, the Court is empowered to do so *mero motu*. The obvious purpose of this provision seems to be to avoid a multiplicity of actions in respect of a matter which can conveniently be disposed of in one action. Not only does such a course result in a saving of time and expense to the litigant and a saving of time and expense to the state but the presence of all the parties before Court in certain circumstances would enable the Court to have a better assessment of the facts and result in a more just decision of the matter in dispute.

It must be noted that the failure to have all the parties before the Court at the commencement of the action may be due to many reasons. A plaintiff, for instance, may not in the first place know who all the defendants are; secondly he may not know in what way some other party or parties who should have been made defendants have a liability to be sued; thirdly he may not realise the position of a party not originally joined until the party who has been cited as defendant discloses it in the answer and, lastly, he may in the first instance receive wrong legal advice. Whatever the reason for not joining a particular defendant may be, the provisions referred to above would appear to allow full scope for joining a defendant after the commencement of the action in the circumstances set out therein, the only limitation being what is contemplated in the proviso to Section 46, namely, that no amendment will be allowed which would have the effect of converting an action of one character into an action of another and inconsistent character.

In the instant case, the rejection by the learned District Judge of the objections regarding misjoinder, the alteration of the nature and scope of the action and the procedure adopted by the plaintiff shows that the proposed amendment was not vitiated by any of those considerations and we are therefore not called upon to decide those matters. The District Judge however held that on the day he made the order after inquiry the cause of action against the proposed added defendant was prescribed and that was the only reason why the amendment was not allowed.

A number of cases were cited to us by counsel for the respondent to show that no amendment to add a party defendant could take place except after obtaining an order of Court in terms of sections 18 and 19 of the Civil Procedure Code. Counsel for the appellant, while conceding that position, submitted that the learned District Judge was wrong in holding that the cause of action so far as the proposed added defendant was concerned was prescribed, taking the material date to be the date of his inquiry and decision. His contention was that all that was within the power of the plaintiff was to make the application to Court to amend the plaint and to add the third defendant which he did well before the cause of action was prescribed and that he should not be penalised because the Court did not hear and decide the application before the date on which prescription started to run. In my view this submission must succeed. The application to add the party together with the amended plaint was filed on the 12th September 1968, nearly four months before the question of prescription could arise. The court first fixed this application for consideration in October 1968 and allowed him to file objections which were subsequently filed. Even on this day, prescription had not begun to operate against the plaintiff. On the day of the inquiry he decided to notice the proposed added defendant and fixed the matter for hearing on a date after the period of prescription had been completed. Without doubt, if that day is considered for the purpose of prescription, the amendment could not be allowed.

In interpreting the provisions contained in Sections 18 and 19, it would I think be quite iniquitous to make a question of prescription such as the one before us dependent on the vagaries of the inquiry by Court. If the application to add the party is made and the amended plaint is filed before the commencement of the period of prescription, in the event of the application itself being allowed, the only fair course seems to me to date back the consent of the Court to the date of filing of the amended plaint. Else one is confronted with the situation that the same amended plaint will not be prescribed in a Court in which work is disposed of expeditiously while it will be prescribed in a Court where the Judge is compelled to be slow. A rule of law should not be made to depend on a fortuitous circumstance which will vary with each court. It may even be different if the application is made by a party leaving no time at all for the Court to decide the question, for instance, where a party files such application on the last available date after the Court has adjourned for the day. But where the application itself is filed in reasonable time, in this case about 4 months before the crucial date, and for a reason such as rush of work, ill health of the Judge, absence of staff, insurgent activities in the area, which prevents the Court from sitting or any other extraneous cause, the Court does not deal with the application before a certain disability starts operating to the applicant's disadvantage, it would be most unfair to penalise a party and deprive him of a legal remedy available to him. There is nothing in the provisions to suggest that an applicant in this situation should file his application within a specified period to enable the Court to decide the question. Nor does

a single authority cited to us even indirectly point to the materiality of the date of decision by Court. For these reasons, when a reasonable construction of the section which avoids hardship or harshness is possible, namely, that when the Court allows the application, the amended plaint with the added party which the Court sanctions becomes a good plaint, I think a Court should necessarily lean to that view. This should be particularly so where the party has done everything within its power to secure compliance and the delay has been occasioned after his application was taken cognizance of by the Court.

A contrary decision on this point will also lead to a curious result which could never have been contemplated by the relevant provisions. There is no question in this case that if, in the first instance, the two original defendants and the Ceylon Transport Board were made defendants from whom a claim was made jointly, severally or in the alternative, the plaint would have been an acceptable one. The learned District Judge's findings in regard to the objections other than the one which related to prescription confirm that he indeed took that view. Sections 18 and 19 which encourage the avoidance of a multiplicity of actions empower the Court to join parties at a stage subsequent to the commencement. The present decision will entirely defeat the object of these provisions. In these circumstances, a Court should not permit itself to be baulked or hampered by objections of a technical nature which are lacking in real substance but must give a construction to the provision which it can bear so as to enable a party with a just grievance to obtain his legal remedy.

The 1st and 2nd defendants, if their contention was right, should have welcomed the plaintiff adding the Ceylon Transport Board as the 3rd defendant and its addition would have helped the effectual decision of the case. This indeed appears to be the test which a Court should apply—vide *Chartered Bank v. de Silva*,[1] 67 N.L.R. 135. It is very strange, however, that these two defendants far from welcoming such addition should have raised objections to the Ceylon Transport Board being joined on several grounds which did not find favour with the learned District Judge and that one of their grounds of objection should have been that the proposed addition would defeat a plea of prescription available to the defendants. It is also noteworthy that these objections were filed on the 18th October 1968, about three months before prescription would commence. I cannot escape the feeling that the 1st and 2nd defendants, who would perhaps have gained from the joinder of the Ceylon Transport Board, raised this plea,—which was appropriately one for the Ceylon Transport Board to raise—in connivance with the Ceylon Transport Board, in order to defeat the claim of the plaintiff. The question arises then as to whether frivolous objections were raised by these defendants in bad faith with the object, *inter alia*, of having the decision of the Court postponed for a date after prescription had started to operate against the

[1] *(1964) 67 N. L. R. 135.*

plaintiff. This sort of situation too justifies me in the view I have already expressed that when a plaintiff has done everything in his power to add a party and amend his pleadings on a date before an objection on the ground of prescription can be raised it would be wholly inequitable and unjust to permit the date of such amendment to depend on the date of the decision thereon by the Court over which the party seeking to amend has no control.

It was submitted by counsel for the respondent that section 21 of the Civil Procedure Code contemplated adding the party first and serving of the amended plaint thereafter. Reliance was also placed on Section 19 which provided that proceedings as against an added defendant shall be deemed to commence on the service of the summons. I do not think that both these provisions militate against the argument that so far as a plaintiff who wishes to add a defendant is concerned he is within time so long as he has filed the necessary papers and made the necessary application. These provisions are intended, in my view, to ensure that a third party who is subsequently added should also have notice of proceedings having been commenced against him, just as a defendant in the first instance has to receive notice of the institution of an action and becomes bound to fulfil his obligations as a defendant only after the service of summons.

There are many instances in law where a party is obliged to take a certain step subject to approval by a Court or by any person who is vested with the authority to approve or reject it as irregular. In all these instances a power to reject necessarily implies a power to approve; for, the step so taken will be considered valid only if it is not rejected on some ground of non-compliance with an essential requirement. In such cases, once the step is approved, such a step will be deemed to have been so taken on the date on which it is taken and not on the day it is approved.

For the above reasons, I think that the learned District Judge was in error in holding that the addition was prejudicial to the party proposed to be added, in a plea of prescription. I accordingly set aside this order made by the learned District Judge on the 5th September, 1969, and make order allowing the application to add the respondent as a party.

The appellant is entitled to the costs of this appeal as well as to half the costs incurred in the lower Court in respect of the application to add the respondent as a defendant.

DEHERAGODA, J.—I agree.

Order set aside.