

1973 Present: Wijayatilake, J., Walgampaya, J., and Pathirana, J.

J. P. DINORIS APPUHAMY, Appellant, and Mrs. J. P. SOPHIE NONA and another, Respondents

S. C. 215/69 (Inty.)—D. C. Kandy, 8644/L

Civil Procedure Code—Sections 46 (2), 93, 146—Framing of issues—Extent to which it is governed by the pleadings.

Section 146 of the Civil Procedure Code cannot be read independently of the proviso to section 46(2). Accordingly, when issues are framed by the Court at the stage of the trial of a case, issues cannot be framed which will have the effect of converting an action of one character into an action of another and inconsistent character.

Although the word “partnership” was used in several places in the pleadings, the plaintiff and the 1st defendant instituted the present action on the basis, in fact, of a co-ownership as between the two of them and on the basis of a contract of master and servant and a trust as between the two of them on the one hand and the 2nd defendant on the other.

Held, that the misdescription in the pleadings could not prevent the framing of issues on the basis of the true character of the action.

¹ (1967) 70 N.L.R. 200.

² (1968) 71 N.L.R. 138.

APPEAL from an order of the District Court, Kandy.

H. W. Jayewardene, with L. D. Guruswamy, (Miss) Ivy Marasinghe and J. C. Ratwatte, for the plaintiff-appellant.

Mark Fernando, with Maxwell A. Bastiansz, for the 1st defendant-respondent.

C. Ranganathan, with K. Shanmugalingam, for the 2nd defendant-respondent.

Cur. adv. vult.

December 31, 1973. WIJAYATILAKE, J.—

The question has arisen with regard to the propriety of the issues suggested by Counsel for the plaintiff in the course of the trial on 23.6.69. Objection was taken to these issues by Counsel who appeared for the 2nd defendant and the learned District Judge upheld these objections and he recast the issues. We have had the benefit of a very illuminating and an exhaustive argument by learned Counsel for the appellant and respondents. Mr. Jayewardene has submitted very strenuously that by virtue of Section 146 of the Civil Procedure Code, a case must be tried upon the issues on which the right decision of the case appears to the court to depend and it is well settled that the framing of such issues is not restricted by the pleadings. In this context sections 46, 93 and 146 of the Civil Procedure Code were examined thread bare. On a careful consideration of the several cases referred to by the learned Counsel in my opinion section 146 cannot be read independently of the proviso to section 46 (2). Under this proviso no amendment to a plaint shall be allowed which can have the effect of converting an action of one character into an action of another and inconsistent character. So that, at the stage of a trial of a case when the Court frames the issues such issues should have some relevance to the cause of action pleaded and one can ascertain the cause of action pleaded by reference to the pleadings. The proviso to section 46 clearly shows that an action of one character cannot be converted into an action of an inconsistent character. I am unable to agree with Mr. Jayewardene that issues can be framed which fall entirely outside the scope of the action launched. If we do adopt a procedure as suggested, it will in my opinion clearly defeat the very object of the proviso to section 46. The principal question which arises therefore is as to whether the issues now suggested by Counsel for the plaintiff have in effect converted an action of one character into an action of another and inconsistent character.

Mr. Ranganathan learned Counsel for the 2nd respondent has submitted that the issues suggested seek to convert an action based on a partnership to one of a contract between master and servant. He also submits that the action being based on a partnership the issues on the basis of a trust would not arise. He also submits that issue (1) in effect seeks to convert an action on the basis of a partnership to one of co-ownership. He accordingly very cogently contends that it would be highly objectionable to permit these issues particularly in the light of section 46 (2) of the Civil Procedure Code.

Assuming that the action is based on a partnership, in my opinion, there is much merit in these submissions and I am also inclined to agree with the reasoning of the learned District Judge, although he has not considered the concept of master and servant which Mr. Ranganathan has put in the forefront of his submission.

Therefore the question does arise whether this action is based on a partnership. We have examined the pleadings very minutely and I am of opinion that although the word "partnership" has been used in several places, on a legal interpretation of the averments there can be little doubt that the plaintiff and the 1st defendant have instituted this action on the basis of a co-ownership as between the two of them and on the basis of a contract of master and servant and a trust as between the two of them on the one hand and the 2nd defendant on the other. Paragraphs 4, 5, 7, 8 and the prayer to the plaint make this quite evident. In my opinion, therefore, the submission made by Mr. Jayewardene that this action is not based on a partnership as known to our law has to be sustained. I would therefore overrule the objection to the issues suggested on 23.6.69 and in addition frame a further issue. The issues therefore would read as follows :—

1. Were the plaintiff and the 1st defendant the owners of the business of wholesale dealers in vegetables at No. 245, Central Market, Kandy ?
2. In or about 1948 was one J. P. S. Abeywickrema entrusted with the management and control of the said business ?
3. Did the said J. P. S. Abeywickrema from and out of the said income of the said business purchase movable and immovable properties described in the schedule to the plaint ?
4. If so, is the plaintiff entitled to a declaration
 - (a) that the properties in the schedule to the plaint are the properties of the plaintiff and the 1st defendant in equal shares,

(b) that the said properties do not form part of the estate of the said J. P. S. Abeywickrema ?

5. Did J. P. S. Abeywickrema acquire the said properties out of his own funds ?
6. If issue (5) is answered in the affirmative should these properties be declared to be part of the estate of the said J. P. S. Abeywickrema which estate is being administered in case No. 2309/T D. C. Kandy ?

As would appear from paragraph (9) of the answer the said Abeywickrema died leaving as his heirs the 2nd defendant and two minor children. In the circumstances, I am of opinion that this Court should *ex mero motu* make an order which will secure the interests of these heirs, particularly the minors. I would accordingly direct the parties in possession of the properties referred to, to deposit to the credit of this case pending its final disposal the nett income derived from these properties. The District Judge shall make a suitable order with regard to the furnishing of an audited statement of accounts about once in three months.

I accordingly allow the appeal. In all the circumstances, the costs of the proceedings in the District Court shall abide the result of this action and the parties shall bear their own costs of this appeal.

WALGAMPAYA, J.—I agree.

PATHIRANA, J.—I agree.

Appeal allowed.

