(1934) 01 MAD CK 0018

In the Madras High Court

S.R.M.A.R. Ramanathan Chettiar — APPELLANT

Vs

Rajah Sir Annamalai Chettiar and Others — RESPONDENT

Date of Decision : 19-01-1934

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 31 Rule 2

Citation : (1934) ILR (Mad) 1031 : 150 Ind. Cas. 602 : (1934) 39 LW 404 : (1934) 66 MLJ 451

Hon'ble Judges : Jackson, J

Bench : Division Bench

Judgement

Jackson, J.—The Plaintiff (Appellant) sues the sixteen Defendants on the following grounds. The Plaintiff''s father, a money-lender with

branches of his business in Burma and Cochin China, died on 24th April, 1915, leaving a widow Defendant 5 and their son, the Plaintiff, aged 3.

The father''s cousins were one Ramaswami Chetti and the present 1st Defendant. The Plaintiff''s guardian was his widowed mother, but she let the

two cousins manage the estate; and they managed jointly till October, 1918, when Ramaswami Chetti died. Then 1st Defendant assumed- sole

management, and became de facto guardian. From the time that they assumed management the cousins acted in fraud of the Plaintiff''s estate, and

in order to promote this fraud the 1st Defendant appointed sundry agents who colluded with him and participated in his breach of trust. Defendants

6 to 13 were such agents. Defendants 2 and 3 are impleaded as sons of Defendant 1; Defendant 4 as son of Ramaswami Chetti. The Plaintiff''s

mother is Defendant 5, and his cousin is Defendant 14, also an agent. These two are said to have had no real authority or part in the transactions,

and they are merely added to assist in. the determination of the facts. The 16th

Defendant is claiming right of partition with the Plaintiff and is

impleaded to preclude a possible plea of nonjoinder. The Plaintiff prays for a decree against 1st Defendant and such other Defendants as may be

found jointly and severally liable for accounts, and payment of such moneys as they may be found liable to pay. Accounts are specifically

demanded from Defendants 1, 4, 6 to 13 (13 died after the institution of the suit and his legal representative is Defendant 15).

2. Defendants 1 to 4, 8 to 12, and 15 took the plea that the suit was bad for misjoinder or multifariousness (issue 1) and the Lower Court finding

this in their favour dismissed the suit. Hence the appeal.

3. The learned Subordinate Judge rightly directed himself that Order 1, Rule 3 is the order governing this question of multifariousness; Ramendra

Nath Roy v. Brajendra Nath Dass I.L.R.(1917) Cal. 111 has been approved and followed by our Full Bench in Govindaraja Mudaliar v.

Alagappa Thambiran I.L.R.(1926)Mad. 836 : 51 M.L.J. 194 , and in the light of that ruling there can be no question but that Order 1, Rule 3

applies to joinder of causes of action as well as joinder of parties. The Subordinate Judge says that the learned Advocate-General who appeared

before him for the Defendants '' strenuously contended that Order 1, Rule 3 does not relate to joinder of causes of, action. It hardly needed the

assurance of the learned Advocate-General in our Court that this is inaccurate; for it would have been an unwarrantable trespass upon the time of a

Lower Court to argue before it that a Full Bench decision of this Court was wrong. He conceded (as indeed the Subordinate Judge also records)

that Govindaraja Mudaliar v. Alagappa Thambiran I.L.R.(1926)Mad. 836 : 51 M.L.J. 194 settled the matter, and the only questions before the

Lower Court were whether in this case there is as against the various defendants any right to relief in respect of the same transaction, and whether,

if separate suits were brought against these defendants, any common question of law and fact would arise. At the end of his 44th paragraph the

learned Judge correctly posits the question, Is the relief in respect of the same transaction ? His task at this point is clearly to decide in his own

mind what is the transaction alleged in the plaint, and whether the reliefs claimed are in respect of that transaction. Having done this he can then

refer to such rulings as are relevant to see whether they throw light upon his solution of this question of fact. But unfortunately the learned Judge has

no sooner stated the question than he becomes involved in a mass of reported decisions, and it is only by searching among his comments upon

these decisions, that one can discover what he regards the transaction to be. He says towards the end of para. 50 it is the assumption by 1st

Defendant and his brother of the position of manager, and the subsequent sole management of the 1st Defendant''; and again in para. 60, ''The only

thing that connects Defendants together is that the 1st Defendant is said to have appointed Defendants 6 to 13 as agents for the Plaintiff''s ''estate''.

On that finding issue 1 could be determined without any reference to reported cases. No one could contend that reliefs claimed against Defendants

6 to 13 arose out of the transaction of the two brothers assuming management, or 1st Defendant''s appointment of agents. But the transaction as

disclosed in the plaint is that originally 1st Defendant and his brother, and then 1st Defendant alone proceeded to embezzle the Plaintiff''s estate and

were aided and abetted by Defendants 6 to 13 who connived at the breach of trust. Suppose a Municipal Chairman along with sundry bill

collectors and clerks were to be charged for embezzling Municipal funds. The mere fact that the Chairman had appointed the subordinates would

not warrant joinder, but, if they had connived with the Chairman, then they could be jointly charged as persons committing the same offence or its

abetment in the course of the same transaction. They need not each be responsible for the whole transaction. Speaking no doubt of Plaintiffs but in

terms which will equally apply to Defendants, Vaughan Williams, L. J. observes in Stroud v. Lawson (1898) 2 Q.B. 44 , ""I do not think that the

whole of a transaction must be involved in each of the causes of action joined"". The rest of the passage is cited by the Subordinate Judge in his

52nd para.

4. The cases Universities of Oxford and Cambridge v. George Gill & Sons (1899) 1 Ch. 55 and Saccharin Corporation, Ltd. v. Wild (1899) 1

Ch. 55 cited in paras. 53 and 57 throw no light on the matter and were not cited before us in this connexion by the learned Advocate-General.

From Thompson v. London County Council (1899) 1 Q.B. 840 the Subordinate Judge in para. 55 has deduced the self-evident proposition that

injury to the plaintiff does not by itself render every act by which he was injured the same transaction. To revert to the Municipal illustration, every

one who had caused loss to the Municipality, say in one calendar year, could not be tried simultaneously. There must be a joint tort, as explained in

Bullock v. London General Omnibus Co. (1907) 1 K.B. 264, para. 58. The Subordinate Judge himself finds that Thomas v. Moore (1918) 1

K.B. 555 has no bearing on the facts of this case (it is relevant in another connexion as will be seen below) ; and that Beck In re (1918) L.J. Ch.

335 affords him no, help. At the end of twenty-seven pages of analysis which must have given the learned Judge considerable trouble, he arrives at

the correct conclusion that the question whether joinder is proper or not has to be determined with reference to the facts of each case; and he

should have come to this determination before he let himself be submerged by reported cases. In fact it is difficult to understand why many of these

cases were cited at all for the purpose of ascertaining whether the relief is in respect of the same transaction. But some time here and considerable

time below has been occupied in explaining the genesis and development of the ""English rule of procedure (O. 16, Rule 4, Rules of the Supreme

Court) which corresponds to our Order 1, Rule 3; and the cases may have been cited rather in that connexion. It is a matter more germane to the

lecture-hall than to the Court, and since in India we have the clear rule for our own procedure there is no need to discuss the growth of the English

rules. Mr. Justice Wallis, as he then was, has also deprecated the importation of English decisions into the discussion of this question in Aiyathurai

Ravuthan v. Santhu Meera Ravuthan I.L.R.(1908)Mad. 252 : 18 M.L.J. 238. As regards the phrase ''same transactions,'' the learned Advocate-

General has called our attention to Hannay & Co. v. Smurthwaite (1893) 2 Q.B. 412 , where Lord Esher finds that the conduct of the owners with

regard to loading and conveyance of certain bales is one transaction. So far it would be parallel with the alleged conduct of the 1st Defendant in

defrauding the minor. In Smurthivaite v. Hannay (1894) A.C. 494, when this case came up on appeal in the House of Lords, Lord Herschell

observed:

The consignments were delivered in the same ship and were goods of the same description. I cannot see that this makes the transaction one.. .

5. But he does not say, ""I cannot see that the conduct of the owners makes the

transaction one"" and therefore Lord Esher stands uncontradicted.

The learned Advocate-General is disposed to adopt as the definition of a transaction, a group of facts so connected as to be referred to by a single

name; and both conduct on the voyage, and embezzlement of the minor''s estate would fall within this definition. Of the other cases cited before us

Frankenburg v. The Great Horseless Carriage Company (1900) 1 Q.B. 504 and Drincqbier v. Wood (1899) 1 Ch. 393 turn on the issue of a

prospectus, and Compania Sansinena de Carries Congeladas v. Houlder Brothers & Co., Ltd. (1910) 2 K.B. 354 on damage to frozen meat and

none of these cases helps to the decision whether the fraud of a trustee and his abettors amounts to a transaction. We find the transaction or series

of transactions out of which this case arises to be the scheme of embezzlement in which 1st Defendant, the father of 4th Defendant and Defendants

6 to 13 are said to have connived and if separate suits were brought against the respective Defendants one common question at least would arise.

Did the 1st Defendant ever intermeddle with the estate? Assuming as we must assume at this preliminary stage that the intermeddling is true, the

next question is in what manner the relief should be sought. It is not disputed that a minor may elect to sue a fraudulent trustee either for damages

or for an account; of Dormer v. Fortescue (1744) 3 Atk. 124 : 26 E.R. 875, Hicks v. Sallitt (1854) 3 De G.M. & G. 780 : 43 E.R. 307 and

Howard v. Earl of Shrewsbury (1874) L.R. 17 Eq. 378; but it is argued that Defendants 6 to 13 are either the agents of 1st Defendant, and as

such not accountable to the cestui que trust, or are the direct agents of the Plaintiff who can be sued no doubt for account, but can never be sued

all together in the same suit. But this argument overlooks the main allegations in the plaint. The 1st Defendant acted in fraud of the Plaintiff''s estate

and Defendants 6 to 13 connived at that fraud. In these circumstances the cestui que trust can certainly call upon the agent who fraudulently mixed

himself up with a breach of trust for an account [Lewin on Trusts, Ed. 13, pp. 203-4 and p. 471, ''derivative titles from a'' trespasser''] Ramendra

Nath Roy v. Brajendra Nath Dass I.L.R.(1917)Cal. 111 ; Soar v. Ashwell (1893) 2 Q.B. 390 , where a person has assumed either with or

without consent to act as a* trustee he must discharge himself by accounting to his cestui que trust and again ''a person where he has knowingly assisted a nominated trustee in a fraudulent disposition of property will be treated as if he were an ex parte trustee'' and again, p. 403 ""the proper

suit is .. . by the cestui qui trusts against both the trustees and their agent seeking to make both liable"".

All parties to a breach of trust are equally liable; there is between them no primary liability"": Wilson v. Moore (1833) 1 My. & K. 125 : 39 E.R.

629 .

6. A servant is as liable as his master in the case of a wrongdoer; when the doctrine that the possession of an agent is the possession of a principal

has no application: Sharland v. Mildon (1846) 5 Hare 468 : 67 E.R. 997 . Obviously then it would not be a pure suit for account as between

principal and agent. But it is next contended that supposing the charge of fraud breaks down, the Plaintiff will then proceed against these various

agents on the contractual basis. The reiterated insistence in the plaint that the accounting should be ""along with"" 1st Defendant makes it unlikely that

this was ever the Plaintiff''s intention, and now we have the assurance of his learned Advocate that this apprehension is illusory. The case against all

the Defendants must stand or fall on the allegation that 1st Defendant was committing fraud at which they or those whom they represent connived.

It cannot therefore be said that this case is bad for mis joinder because it will develop into a mere suit against disconnected agents for account.

They are sued for account each as a fraudulent trustee since the Plaintiff has elected to seek equitable relief in this manner instead of bringing a suit

for damages. Once (assuming the facts to be true) it is established that the Plaintiff has a legitimate cause of action against the Defendants, which

justifies his demand for equitable relief by way of accounting, and it is also established that there is a transaction or series of transactions which

would justify the joinder of these causes of action in one suit, then the only practical consideration is whether it would be more convenient for the

Defendants to be joined in one trial, or severally relegated to separate trials. At first blush it may seem surprising that the Plaintiff did not leave this

for the Defendants to decide, and petition the Court to allow an amendment to that effect if Defendants so desired. But the solution is not quite so

simple as this. Wyllie v. Ellice (1848) 6 Hare 505 : 67 E.R. 1264, which is authority for Plaintiff''s suing 1st Defendant in equity as bailiff, guardian or trustee is also authority for the dismissal of the suit if other persons who entered on the estate are not joined as parties. (Of. Order 31, Rule 2,

Civil Procedure Code.) The learned Advocate-General was prepared to argue that this rule would not apply to the facts of this case, but

nevertheless, to put it no higher, the Plaintiff would undoubtedly subject himself to the risk of the rule being cited against him if he failed to join

Defendants 6 to 13 with Defendant 1 and the suit might then have been held bad not for misjoinder but for non-joinder. Dextrum Scylla latus,

laevum implacata Charybdis. Therefore the only course open to the Plaintiff was to abide the decision of the Court before he applied, if at all, for

amendment. This seems to have been recognized by the parties at the time of the trial. When it became incumbent upon the Defendants under

Order 13, Rule 1 to produce the documents upon which they relied, the learned Advocate-General moved that the question of misjoinder should

be taken up as a preliminary issue and he could then produce his documents. And the Court agreed that it was only after the question of misjoinder

was settled one way or the other, that the real hearing would begin. Of course if they liked, the Defendants could have duly filed their documents at

the first hearing, and could then have fought out the 1st issue whether the suit is bad for misjoinder as part of the main action. Instead of this, they

refrained from filing documents, and insisted that the hearing of Issue I should be only a preliminary skirmish. To argue afterwards that this was the

main action is scarcely consistent. It is a surprising argument that to dismiss a suit for multifariousness is the normal course. At this preliminary stage

the function of the Court is simply to see that the pieces are set up aright for a fair game. It is not necessary to argue whether in extreme cases the

Court has the power to dismiss a suit for misjoinder, because to any one who has imbibed the spirit of our Code of Procedure the Court''s duty is

abundantly clear. If a joinder of plaintiffs may embarrass the trial, the Court interferes (O. 1, Rule 2). No suit shall be defeated by reason of

misjoinder of parties (Order 1, Rule 9) ; for the determination of the real matter in dispute persons may be substituted (Order 1, Rule 10). The

Court may without the application of either party order the name of any party improperly joined as defendant to be struck out [Order 1, Rule

10(2)]. All objections on the ground of misjoinder of parties shall be taken before the settlement of issues (O. 1, Rule 13). Where it appears to the

Court that any causes of action joined in one suit cannot be conveniently tried together the Court may order separate trials (O. 2, Rule 6). The

Court may at any stage order to be amended any matter in any pleading which may embarrass the trial (O. 6, Rule 16). The Court may at any

stage of the proceeding allow either party to amend his pleadings (O. 6, Rule 17). It was argued that under this last rule a Court can only allow

upon application. Obviously the initiative must come from the party. A Court cannot compel an amendment (of. Venkatachella Chetti and Others

Vs. C.K. Narayana Aiyar and Others, and will not draft it itself. But a Court should not prevent what it is empowered to allow; and having regard

to the circumstances of this case, and the evident understanding between the parties that only its frame was under consideration, that the real

hearing of the suit had not begun, the Court should undoubtedly have given the plaintiff an opportunity to elect, as soon as it had decided that the

plaint in its present form was unsustainable. The whole trend of the leading English cases is towards liberality in this respect. Scrutton, L. J.

observes:

The result of the later decisions is that you must look at the language of the rules and construe them liberally, and where there are common

questions of law or fact involved in different causes of action you should include all parties in one action."" Payne v. British Time Recorder Co.

(1921) 2 K.B. 1

7. The whole of Scrutton, L.J.''s remarks on p. 16 have a very close bearing upon our case. And along with this may be read a summary of the

whole matter by the same learned Judge leading to the same conclusion in Harwood v. Statesman Publishing Co. (1929) 141 L.T. 54 Cf. Thomas

v. Moore (1918) 1 K.B. 555

8. In Frankenburg v. The Great Horseless Carriage Co. (1900) 1 Q.B. 504 the Judge in Chambers after a finding of misjoinder of defendants gave

the plaintiff 10 days in which to decide if he would split up his plaint into several actions, and against this order the plaintiff appealed. The Master of

the Rolls observes at p. 509:

It would be a startling novelty and a most deplorable thing for our practice and procedure if such actions as these could be summarily disposed of

and stopped in this way. Certainly we have no authority for doing anything of the kind. There is no single case which comes anywhere near it, and I

will not be the first to undo and unsettle what has been the established practice for years.

9. Substantial justice would be sacrificed to a wretched technicality. "" These citations suffice to dispel any illusion that in England dismissal on

account of multifariousness is the normal course, and the Indian cases are not otherwise.

10. We gave the Plaintiffs time to consider their position, Afzal Shah v. Lachmi Narain I.L.R.(1917) All. 7 . Where a suit has been directed against

a number of defendants and the allegations in the plaint disclose that the causes of action against the several defendants are not only separable but

separate it is not permissible for a Court of law to dismiss the suit. Substantial justice should in no case be allowed to be sacrificed to a wretched

technicality, Shyam Behari Mal Vs. Maha Prasad and Others, .

11. When a Court is of opinion that a suit is bad for multifariousness it ought to give the plaintiff an opportunity to amend his plaint and to elect:

Limaya v. Watve (1923) Pat. 276 : 76 I.C. 950.

12. Even in Muthappa Chetty v. Muthu Palani Chetty I.L.R.(1903) Mad. 80, which is specially relied upon by the learned Sub-Judge (para. 108)

although the appellate Court declined to interfere with the trial Court''s discretion it observed (p. 84 ad im) "" the proper course for the Court of first

instance to have adopted would have been to have returned the plaint for amendment."" Cf. Janokinath Mookerjee v. Ramrunjun Chuckerbutty

I.L.R.(1879)Cal. 949 and Gur Prosad v. Gur Prosad (1914) 19 C.L.J. 316.

13. Cases can no doubt be found which have been dismissed for multifariousness--the Lower Court cites several in its judgment; and, as observed

at the outset of this discussion, no one denies that the Court has the power of dismissal; but enough has been said to show that its power generally

should be exercised with a liberal discretion; and in this case there can be no question but that Plaintiff should have been allowed to elect. The

learned Sub-Judge records in his 96th para, that the learned Advocate for the Plaintiff never represented that in case the Court found the suit bad

for multifariousness he should have been given this opportunity. He tells us, and this is not traversed by the other side, that he directed the attention

of the Court to p. 459 of Mulla''s commentary on the CPC (Edition 9) where it is observed that the Court may direct the plaintiffs to elect.

Probably all that the Sub-Judge means is that he had received no application; but, as already pointed out, until the Court decided that there was

misjoinder the plaintiff might well find a legal difficulty in separating the defendants and bringing several suits.

14. We have no hesitation in finding that the Lower Court should have given the Plaintiff an opportunity to elect, and if we had found the suit bad

for multifariousness we should have ordered to that effect.

15. It remains to consider special pleas which were advanced on behalf of Defendant 4, and also on behalf of Defendants 8, 11 and 15.

16. It is argued by Mr. Varadachari that even admitting that Defendants 1 and 6 to 13 are liable to account either as tortfeasors or agents his client

4th Defendant fills neither part. His father may have been liable, but he took no part in the transaction. The terms of Order 1, Rule 3 are rather

broader than that: "" relief in respect of the same transaction "". The Plaintiff has sought relief from the 4th Defendant by way of accounting, and Mr.

Srinivasa Aiyangar concedes that possibly when the suit has passed beyond this preliminary stage that relief may be found to be misconceived. But

at present we are dealing with the plaint as it stands, and since Plaintiff is demanding a relief from 4th Defendant arising out of this transaction his

joinder seems to be proper. It is difficult to see how it would convenience him to be relegated to a separate suit, and in any case it seems that he

would wish to be impleaded in this suit. Because in 18(6) of the plaint it is stated that moneys from the Plaintiff''s firms were sent to the 4th

Defendant''s firm under the direction of the 1st Defendant; and it does not seem clear at this stage of the case that this is a mere matter of banking.

It is possible that 4th Defendant''s firm is accused of wrongfully absorbing into its assets assets which belonged to the Plaintiff. Quite apart from the

ultimate decision upon the merits of the claim against 4th Defendant we are not prepared to find at this stage that he is improperly joined. This

accords with Chelamanna v. Rama Row (1911) 10 M.L.T. 232 , which runs very much on all fours with our case.

17. On behalf of Defendants 8, 11, 15, it is urged that their agencies are widely separable in time and place, and it is not reasonable to suppose

that there is one transaction or even series of transactions. It is no fault of the

Plaintiff that his firm has wide ramifications or that his minority was of

long duration. The only logical period to adopt would seem to be from the death of Plaintiff''s father up to the date of suit. If shorter periods were

taken the division would be quite arbitrary, and there would be every risk of overlapping. And it is to be noted that in the course of the profuse

argument that has ranged round this preliminary issue no one has ever suggested that the Defendants would find it more convenient to be relegated

to several suits. Their sole object has been to defeat the suit for multifariousness, not to reconstitute it upon some more rational scheme.

18. We see no reason therefore to treat Defendants 4, 8, 11, 15 differently from the other Defendants; and find as regards all of them that there is

no misjoinder.

19. Accordingly the appeal is allowed with costs as against Defendants 1 to 4, 8 to 12 and 15 here and in Lower Court. 6th Defendant claims

costs in this appeal--his claim can abide the determination of the suit when it will be considered on its merits by the Lower Court. The Lower

Court must proceed with the suit. Since the principal counsel engaged come from Madras there may be inevitable delays: but there should be no

delay in the filing of documents. Order 13, Rule 1 is peremptory and the misunderstanding which led to its being disregarded is a regrettable feature

of this case.

20. In our Court as in the Lower Court the learned Advocate-General confines himself to registering a protest that Govindaraja Mudaliar v.

Alagappa Thambiran I.L.R.(1926) Mad. 836 : 51 M.L.J. 194 is wrongly decided. The Full Bench decision is as binding upon our Bench as it was

upon the Subordinate Judge, and since it was pronounced almost ten years ago nothing has arisen to shake its validity. On the contrary the

Bombay High Court which once held a different opinion is now aligned with Calcutta and Madras, Bhagvan Gokul Ji and Co. Vs. Balku Babaji, ,

and even if we were so disposed we could hardly ask for a reference to another Full Bench merely on the ground that all these Courts in our

opinion had failed to appreciate the law, especially when in mere questions of procedure the rule that usually prevails is stare decisis. This is not to

imply that we ourselves have seen reason to doubt the ruling. The point has not been argued before us, and Govindaraja Mudaliar v. Alagappa

Thambiran ILR (1926) Mad. 836 : 51 M.L.J. 194 , unless it is reversed by a superior Court, must stand as the accepted law.

