In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka

CA 503/97 F
DC Matugama 1612/L

Madduma Arachchige
Dayawathie Wijesinghe,
No 490, "Sethsiri",
Owitigala, Matugama.
Plaintiff-Appellant

Vs

1. Wannakuwatta Waduge
Alson Fernando,
Sirikandura Road,
The farm, Badugama,
Matugama
2. P. Rathnawathie
Rodrigo, 267, Kaudewala,
Andaragaha Road
, Panadura .
Defendant-Respondents

Before: A W A Salam,J

Counsel : Sanath Jayathilaka for the plaintiff-appellant and Dr S F A Cooray for the defendant-respondent.

Argued on: 24.08.2011.

Written Submissions filed on : 12.09.2011.

Decided on: 09.01.2012.

A W Abdus Salam, J

This is an appeal from the order of the learned district judge of Matugama dated 9.7.1997 dismissing the plaintiff's action based on the failure of the plaintiff to follow the Provisions of Section 35 of the Civil Procedure Code.

The facts briefly are that the plaintiff filed action against the defendants pleading interalia that she is the owner of the subject matter of the action described in the schedule to the plaint and she having borrowed a sum of Rs 20,000/ from the 1st defendant by deed of transfer No 4123 dated 15 October 1990, transferred it to him reserving the right to call for a re-transfer upon the payment of Rs 30,000/- within a period of one year. The plaintiff further pleaded that in September 1991 she offered said sum of Rs 30,000/- to obtain a retransfer but the 1st defendant refused to accept the money and retransfer it to the plaintiff. The plaintiff maintained that she continued to be in possession despite the paper title being in the name of the 1st defendant. In the meantime the plaintiff has obtained an advance payment of rent for three months and given the land and premises on rent to the 2nd defendant at the monthly rental of Rs 125/-. The plaintiff alleged that on 6. 10.1991 the 2nd defendant left the premises and the 1st defendant then demolished the building that stood on the subject matter.

The plaintiff accused the 1st defendant of having breached the trust by demolishing the building and sought inter alia a declaration that deed No 4123 is null and void. She further sought an order directing the 1st defendant to retransfer the property of the plaintiff or in the alternative to direct the 1st defendant to pay the plaintiff a sum of Rs 130,000/- as

compensation. Subsequent to the demolition of the building in question the 1st defendant has transferred the subject matter to the 2nd defendant and therefore the plaintiff also sought relief against the 2nd defendant directing the retransfer of the property in question to the plaintiff. He also sought a declaration that the deed of transfer in favour of the 2nd defendant declared null and void.

The matter of the dispute between the plaintiff on one hand and a the 1st and 2nd defendants on the other hand proceeded to trial on 19 February 1997. At the commencement of the trial 2 admissions and 18 issues were recorded by the learned district judge. Later submissions were made by the Counsel for the defendants as to the misjoinder of causes of action. The issues raised on behalf of the defendants as regards the misjoinder of causes of action are reproduced below.

16. Has the plaintiff the right to claim the relief for a retransfer and relief based on laisio enormis?
17. Is the claim for a retransfer and cancellation of the deed based on *laisio enormis* contrary to law?
18. If the above issues are answered in the affirmative can the plaint be maintained?

When the above issues, namely 16,17 and 18 were accepted the learned district judge was of the view that they should be tried as preliminary issues as to the maintainability of the action and therefore granted permission to both parties to tender written submissions on that limited question. Quite strikingly, the question as to whether the failure on the part of the plaintiff to obtain the leave of court in terms of section 35 of the CPC was never put in issue.

However, the learned district judge by his order dated 9.7.1997 dealt at length as to the applicability of section 35 to the present case and dismissed the plaintiff's action.

The learned counsel for the appellant has submitted that the law requires the trial judge to answer the issues and in terms of section 187 of the CPC the judgment has to contain a concise statement of the case, the points for determination and the decision thereon.

Even if section 35 of the CPC is applicable to the present case, the learned district judge should have given his mind to the fact that summons had been issued on the defendants and they have filed their answers and the matter came up for trial when objections were raised. Nowhere in the said issues the defendants raised the question of the plaintiff not having obtained the leave of court to present the plaint in the manner he chose to do.

In the case of Fernando vs Waas 1891 9 SCC 189 the plaintiff who had purchased some properties sued the vendor for a declaration and in the alternative to refund the consideration. He also sued the person who was in possession for ejectment and damages. When the question of misjoinder was raised it was held that when the plaint is accepted, it is presumed that the court had granted leave in terms of section 35.

In the case of Appuhamy Vs Dionis it was held 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. Hutchinson C. J. emphasized as far as he could see it seems convenient that the lessee should be allowed to join in the same action in a claim against the lessor for damages in case he does not defend the title.

In the case of Adlin Fernando And Another V. Lionel Fernando and Others 1995 2 SLR 25 it was held that provisions of the Civil Procedure Code relating to the joinder of causes of action and parties are rules of procedure and not sustentative law and the Courts should adopt a common sense approach in deciding questions of misjoinder or non-joinder. In that judgment it was also emphasized that Section 18 permits Court on or before the hearing upon application of either party to strike out the name of any party improperly joined. Section 36 provides that if any cause of action cannot be conveniently tried, for Court *ex mero motu* or on the application of the defendants with notice to the plaintiff at any time before the hearing or on agreement of the parties after the commencement of the hearing to order separate trials of any cause of action. Further, it was observed in the same judgment that it is not open to the Defendant to await the framing of Issues and then, without prior notice to the plaintiff, frame Issues on misjoinder of parties or causes of action.

As has been submitted by the learned counsel there has been no proper adjudication of the preliminary questions of law raised by the defendants and the learned trial judge has clearly stepped out of his authority to decide matters relating to section 35 without answering the preliminary issues. As such the learned district judge has clearly erred himself with regard to the application of the law which has ended up in a serious miscarriage of Justice and therefore the impugned

judgment cannot be allowed to stand. In the circumstances, I have no option but to set aside the impugned judgment and send this case back for rehearing. The learned district judge is at liberty to decide the preliminary question raised by the defendant afresh.

There shall be no costs.

Judge of the Court of Appeal