IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for leave to appeal

Court of Appeal No: CALA 337/2005

District Court of Colombo No: 24757/MR

Singapore Air Lines Limited

2nd Defendant-Appellant

Vs.

1. M.D. Buddhadasa

Plaintiff-Respondent

2. Key Travels (Pvt.) Ltd.,

1st Defendant-Respondent

Before: **Eric Basnayake J**

Counsel: S.L. Gunasekera with M.E. Wickramasinghe instructed by Paul Ratnayake Associates for the 2nd Defendant-Appellant

A.R. Surendhran P.C. with N. Kandeepan instructed by Murugesu & Neelakanthan for the 1st Defendant-Respondent

Palitha Mathew with D.Rodrigo for the Plaintiff-Respondent

Argued on: 3.2.2012

Written submissions tendered on: For the 1st Defendant-Respondent

& 2nd Defendant-Appellant: 29.3.2012

Decided on: 23.7.2012

Eric Basnayake J

1. The 2nd defendant-appellant (2nd defendant) filed this leave to appeal application inter alia to have the order dated 18.8.2005 of the learned Additional District Judge of Colombo set aside. By this order the learned Judge had answered issue No. 27 in the negative. The issue is as follows:-

"According to the matters mentioned in paragraphs 2 (a) and/ or 2 (b) and/ or (c) of the answer, should this action against the 2nd defendant be rejected *in limine?*"

Paragraphs 2 (a), (b) and (c) of the 2nd defendant's answer is as follows:-

"The 2nd defendant respectfully states that the 2nd defendant has been added as a party incorrectly in law

(a) Without following the proper law and procedure;
(b) After the 6th day of trial, after issues were determined and without giving the 2nd defendant the right to object and/ or without being heard, in denial of the principles of natural justice;

(c) When the plea of prescription was available to the 2nd defendant and the addition of the 2nd defendant therefore has caused prejudice to the 2nd defendant and has affected the legal rights of the 2nd defendant and is

wrongful and/ or unlawful and/ or illegal. The 2nd defendant respectfully prays that this action be dismissed against the 2nd defendant *in limine*".

2. Leave to appeal was granted by this court on 14.3.2011.
3. The plaintiff-respondent (Plaintiff) filed this case against the 1st defendant-respondent (1st defendant) on 28.4.2000 to claim in a sum of Rs. 2, 497,923.25 in damages. The plaintiff states in the plaint that due to the negligence of the defendants in issuing an air ticket, the plaintiff was prevented from travelling to Santiago in Chile in August, 1999. The 1st defendant filed answer on 1.12.2000 in which he moved for a dismissal of the plaintiff's action. In the answer the 1st defendant stated that the 1st defendant was a sub agent of Pyramid Air services Limited, who was a sub agent of Singapore Air Lines Limited.

4. When this case was taken up for trial the 1st defendant indicated to court an intention to make an application under section 18 of the Civil Procedure Code to add Singapore Air Lines Limited as a party. However no such application was formally made. Thereafter issues were settled between the plaintiff and the 1st defendant against whom this action was originally filed and the plaintiff's evidence was led and concluded.

5. On 3.9.2003 a petition and an affidavit were filed by the 1st defendant moving to add the 2nd defendant as a party under section 18 of the CPC. The plaintiff objected to this application. The case was fixed for objections

for 2.10.2003. On 2.10.2003 the plaintiff withdrew the objections. Hence Singapore Air Lines Limited was added as a party and summons was issued.

6. Thereafter the caption was amended and the plaintiff filed an amended plaint on 20.11.2003. The 1st defendant filed an amended answer on 17.2.2004. The 2nd defendant appeared on summons on 19.2.2004 and the case was fixed for the answer of the 2nd defendant for 17.3.2004. On 15.3.2004 objections were filed for the 2nd defendant objecting to the 2nd defendant being made a party and moving to have this case called on 16.3.2004 to support.

7. On 16.3.2004 the counsel for the 2nd defendant withdrew the objections filed and moved for a date to file answer. On this application the court rejected the objections filed and fixed the case for answer of the 2nd defendant. Answer of the 2nd defendant was filed on 13.5.2004 and the case was fixed for trial for 30.6.2004.

8. Issues had already been settled between the plaintiff and the 1st defendant prior to the addition of the 2nd defendant. After the addition of the 2nd defendant fresh issues had been tendered by all the parties. Eighteen issues were tendered on behalf of the 2nd defendant and renumbered by court as issues 23 to 40. Thereafter on the application of the 2nd defendant issue No. 27 was decided to be tried 1st as a preliminary issue.

Order of the learned Judge

9. The learned Judge after an inquiry, made order on 18.8. 2005 in which he decided issue No. 27 in the negative and fixed the case for further trial. The learned Judge conceded that the 2nd defendant was not given an opportunity to oppose prior to making him a party. The learned Judge stated that the 2nd defendant filed objections on 10.3.2004 objecting to the 2nd defendant being made a party. These objections were to be supported on 16.3.2004. On 16.3.2004 the objections were withdrawn. Hence the objections were rejected. The learned Judge held therefore that the 2nd defendant cannot be heard to say that he was not given an opportunity to object.

Submission of the learned counsel for the 2nd defendant

10. The learned counsel submitted that according to the plaint the cause of action arose in August, 1999. This cause of action prescribed in August, 2001. The 1st defendant made an application to add the 2nd defendant as a party on 2.9.2003. At the time of making this application this action was prescribed against the 2nd defendant.
11. The learned counsel submitted that when this application was made the plaintiff objected to this application. However as the plaintiff withdrew the objections, the court, without first issuing notice on the 2nd defendant to show cause as to why he should not be made a party, issued summons on the 2nd defendant after adding him as a party. Soon after this addition, the

plaint was amended and the 1st defendant filed an amended answer. Only thereafter did the 2nd defendant appeared in court.

12. The learned counsel submitted that although he filed objections to the addition, he could not have done it as he was already added. Therefore he withdrew the objections and took up the objection in the answer.

Submission of the learned President's Counsel for the 1st defendant

13. The learned President's Counsel submitted that the 2nd defendant has sought to challenge the correctness of the order dated 2.10.2003. In terms of journal entry No. 22, on 2.10.2003 the learned Judge (Judge who held office previously) made Singapore Air Lines a party and ordered to amend the caption and issue summons.

14. The learned President's Counsel submitted that the crucial question that arises in these proceedings is whether the petitioner (2nd defendant) is entitled to challenge the correctness of an order made by the then Additional District Judge before his successor in office without challenging the earlier order in the Court of Appeal? The learned counsel submitted that the 2nd defendant is not entitled to challenge the correctness of the order of the then Additional District Judge dated 2.10.2003.

15. The above argument is untenable and cannot be accepted. The crucial question in this case is whether a party could be added without first giving him an opportunity to show cause as to why he should not be added. The 2nd defendant could not challenge the order dated 2.10.2003 for the reason that by then he was not a party. The 2nd defendant could not file objections effectively as the order was already made adding him as a party. The 2nd

defendant correctly challenged the addition in the answer and later on in the issues.

The correct procedure

16. It is to be noted that the whole procedure adopted in this case was flawed. The correct procedure is for the party seeking to bring a 3rd person to obtain ex-parte an order giving leave to serve notice on the person whom he desires to bring in and the question whether that person ought to be joined should be considered and dealt with in his presence (Schneider J in Banda vs. Dharmaratne (24 NLR 210) quoting Loos vs. Scharenguivel 3 C.L.R. 47). Where a defendant is added, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and a copy of the amended plaint shall be served on the new defendant and on the original defendants (section 22 CPC).

17. In this case no opportunity was afforded to the 2nd defendant to express his rights for the addition. In Corea vs. Pieris 13 N.L.R. 212 Wood Renton J held that (at pg. 217) "the decision under the modern English Rules of Court seem to me to show that a party will not be added where the effect of the addition is to deprive him of a defence which he would otherwise have under the Statute of Limitations (Weldon vs. Neal (1887) 19 QBD 394, Doyle vs. Kaufman (1887) 3 QBD 7, Steward vs. The North Metropolitan Tramway Co. (1885) 16 QBD 173).

18. In this case (Corea's) 'A' who was in 'B' s estate, defamed 'C' in 1904 by doing an act within the scope of his authority and in the course of his employment. In 1905 'C' brought an action for defamation against 'A' for

damages and in 1907 moved and got 'B', the principal of 'A' to be made a party defendant to the action.

19. Wood Renton J held (at pg. 215) that "the action is one for damages, and, in virtue of the provisions of Section 10 of Ordinance No. 22 of 1871, it must be brought within two years from the time when the cause of action arose, that is to say, from the date of publication of the libel. The libel was published on February 6, 1904. H.J. Pieris was made an added party on October 29, 1908. It is obvious, therefore, that, if at that date the plaintiff had filed a fresh plaint against him in respect of the publication of the libel by Joseph Peiris on February 6, 1904, there would have been no answer to his plea of prescription". The court held that the cause of action against the added party was prescribed. Wood Renton J held that he was doubtful whether H.J. Pieris would have been made a party if the plea of prescription was raised.

20. In the light of the above authorities I am of the view that issue No. 27 should have been answered in the affirmative as the 2nd defendant was successful in his defence on prescription. As the case against the 2nd defendant was prescribed at the time of the application for the addition, the application for the addition should have been dismissed. I am of the view that the learned Judge has erred in his order with regard to answering issue No. 27. Therefore the order dated 18.8.2005 is set aside. The appeal is allowed with costs payable by the 1st defendant to the 2nd defendant. The case to proceed against the 1st defendant.

Judge of the Court of Appeal