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

P. G. Wimalasena
Kapila Garage
Ukwatte, Avissawella.

DECEASED-PLAINITFF-APPELLANT

C.A 134/1997 (F)
D.C. Avissawella 516/L

B. H. R. Arunakumara Wickrema
Meda Mukalana
Aswatte South, Puwakpitiya.

SUBSTITUTED-PLAINTIFF-APPELLANT

Vs.

1. W. D. Podineris
2. W. D. Ariyasinghe

both of Meda Mukalana
Aswatte South, Puwakpitiya.

DECEASED-DEFENDNATS-RESPONDENTS

K. D. Suneetha Malini (Ariyasinghe)
Meda Mukalana
Aswatte South, Puwakpitiya.

SUBSTITUTED-DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Sarath Abeysinghe for the Substituted-Plaintiff-Appellant

Sandamal Rajapakse for the Defendant-Respondent

ARGUED ON: 25.9.2012

DECIDED ON: 14.11.2012

GOONERATNE J.

This is an appeal from the order of the learned District Judge of Avissawella dated 14.2.1997, rejecting the amended plaint under Section 46(2) (A) (ඒ) of the Civil Procedure Code. The learned counsel for Plaintiff-Appellant argue that the order rejecting the amended plaint is a final order and the basis of rejecting was on the ground of misjoinder of causes of action. It appears to this court that the main question that need to be dealt in this appeal is whether the order in question has the effect of a final judgment and has the effect of finally to determine or finally dispose the action. (In other words if the order given in one way disposes the matter and it should finally dispose the same even given in the other way (Vide Chettiar and

other Vs. S. N. Chettiar Bar Association Law Reports pg. 25). Can this court grant the relief prayed for in the Petition of Appeal?

Plaintiff-appellant urge that the Civil Procedure Code does not contain provisions to reject a plaint for misjoinder of causes of action and the order is manifestly an erroneous order, terminating the action. The learned counsel for appellant also submits that the defect in the plaint is only a technical defect. Appellant also invite this court to act in revision and set aside the order and grant relief to the Petitioner as prayed for in his petition of appeal.

It would be necessary to verify the several procedural steps taken from the inception of this action. Plaint dated 30.1.1989 filed in the District Court of Avissawella. Plaint bears District Court seal of 31.1.1989. Journal entry of 01.2.1989 indicates, that summons to issue. Order made by journal entry of 3.2.1989 to issue summons and serve notice of injunction and report to court. The summons returnable for 9.2.1989 and date given to file answer and objection for 29.2.1989. Objections filed on 27.2.1989. Date given to file answer and commission to issue. After several dates answer filed by journal entry of 29.1.1990. Replication of 28.2.1990 filed. The journal entry/proceedings of 12.3.1993 indicates admissions and issues recorded, and case put off for further trial for 29.6.1993. Thereafter several

dates have passed and proceedings of 16.2.1994 shows that Plaintiff's lawyer one Iddamalgoda informed court that he has taken over the case from the previous Attorney and as such moved court to file amended plaint. Court having considered the submissions has allowed the application to file amended plaint. Defendant was represented but the proceedings do not indicate that Defendant has objection to the plaint being amended at that stage.

The amended plaint dated 21.3.1994 filed (District Court seal bears the same date). Amended answer filed bears the date 14.7.1995. Replication is dated 19.2.1996. This court notes that there had been no objection taken under Section 93 of the Civil Procedure Code to file amended plaint. On 7.1.1997 trial commenced afresh and 2 admissions and 11 issues were recorded. Issue Nos. 10 & 11 raised by Defendant refer to misjoinder of causes of action and if answer to issue No. 10 is 'yes' whether plaintiff could have and maintain the actions. Trial Judge has answered issue No. 10 as 'yes' and No. 11 as 'cannot' නොහැකිය.

I would also list some of the case law on amendment of pleadings and some case law cited by counsel to ascertain, under what circumstances issue No. 10 & 11 came to be decided.

Luinona Vs. Gunasekera 60 NLR 346, when pleadings are amended due regard must be given to provisions of Section 93 of the Civil Procedure Code. Wijewardena Vs. Lenora 60 NLR 457 Section 93 of the Code confers on the court vide discretion to amend pleadings. Vethavanam vs. Ratnam 60 NLR at 23, Dealing with exceptions when plaint is defective in some material point and court by an oversight omit to notice defect, the Defendant discovering the defect may properly call the attention of court, then it is the duty of court to act as if it ought to have done in the first instance, either reject the plaint or return it to Plaintiff for amendment (Bonzer CJ in Read Vs. Samsudeen 1 NLR 292) Dingiri Appuhamy's case 67 NLR 90. There is no provision to dismiss an action where there is misjoinder, without affording Plaintiff to amend Plaint. Kanagasabapathy vs. Kanagasabai 25 NLR 175. In cases of misjoinder, possible to allow Plaintiff to amend plaint and restrict his claim. In Mendis Vs. Excise Commissioner 1999 (1) SLR 351 object of rules of procedure is to decide the rights of parties and not to punish for mistakes or short comings. Wijeratne Vs. Weeratunge 1999(1) SLR 332. Sec. 46(2) court is bound to afford to the Plaintiff's opportunity to supply deficiency in stamping.

The proceedings of 7.1.1997 indicates that counsel for Plaintiff has objected on the basis that (a) original answer and amended answer does

not refer to misjoinder of cause of action. (b) When issues raised on the first occasion no mention of misjoinder of cause of action. Learned counsel for Defendant replied by stating that this is a question of law and refer to Section 35 of the code, and claim that there is no compliance with Section 35. As such learned counsel for Defendant had emphasized that the case cannot proceed or Plaintiff cannot have and maintain the action in the absence of compliance with Section 35 of the Civil Procedure Code. If not correctly amended court can reject the plaint. In these circumstances counsel submit that plaint could be dismissed.

It is in this background and in all the above factual circumstances that the trial judge had to make an order. Let me examine the learned District Judge's Order. In the order the following points are noted.

(1) 2 causes of action could be identified in the amended plaint. Viz. declaration of title to the land described in the schedule to the plaint. The other is when Defendant forcibly occupy and obstruction caused by Defendant to lot 13 the road way.

(2) The later cause of action stated in plaint counsel could pleaded only with leave of court under Section 35 of the Civil Procedure Code (joinder of claim). It is permissible to unite several causes of action only under Section 36 of the Code.

(3) Under Section 46(2) (F) plaint could be returned for amendment.

(4) Under Section 46(2) (i) when plaint is returned for amendment within a fixed time and it is not done plaint could be rejected.

(5) Since the plaint was not amended at the initial stage in terms of the Civil Procedure Code plaint need to be rejected.

(6) Reference made to Section 93 of the Civil Procedure Code. The trial judge explain the position as follows:

මෙම නීතිමය ප්‍රතිපාදන අනුව නඩුවක් විභාගයට ගැනීමෙන් පසුව උත්තරවාද සංසෝධනයට පාර්ශවකරුවකුට අවස්ථාවක් දීමට අධිකරණයට ඇති බලය සීමා කර ඇත. එහෙයින් මෙම නඩුව ද විභාගයට ගැනීමෙන් පසු පැමිණිල්ලේ ඇති ඌණතාවයන් මත විත්තියෙන් නීතිමය විසඳිය යුතු ප්‍රශ්නයන්ද නගා ඇති අවස්ථාවක පැමිණිල්ල සංශෝධනය කිරීමට පැමිණිලිකරුට අවස්ථාවක් දීමට අධිකරණයට හැකියාවක් නැත. එසේ අවස්ථාවක් දීම උත්තරවාද සංසෝධනය සම්බන්ධයෙන් පනවා ඇති නව නීතිමය ප්‍රතිපාදනයන්ට පටහැනිව වනු ඇත.

In the above circumstances this court observes that there are two fundamental and basic errors committed by the Plaintiff in the amended plaint which was filed after a fairly long lapse of time from the date of the original plaint. Though it went unnoticed in the first instance and the absence or raising the objection in the amended answer would not exonerate the Plaintiff from adhering with legal procedural requirements. The two errors are very clearly identified by the learned trial judge (1 – 6 above). The Civil Procedure Code is designed in such a way to cure defects by resort to

reasonable procedure. Section 46 of the Code gives the instances where court could refuse to entertain plaint. Section 46 contemplates either to return the plaint for amendment of plaint and reject the plaint in circumstances referred to in Section 46(2) (g) to (k). Rejection would not mean that the party concerned cannot file fresh plaint. Code contemplates opportunities to forward fresh plaint to enable the party to prosecute his or her case. However application of Section 46 of the Code does not end at that point. The law clearly provides for emergence of another principle of law which has been very correctly considered by the trial judge. These are the provisions on Amendment of pleadings in Section 93 of the Code. The Section itself was amended by Acts of 1988 and 1991 which gave a different flavour to amendments to make it mandatory in certain instances. Section 93 (2) reads thus:

(2) On or after the day first fixed for the trial of the action and before the final judgment, no application for the amendment of any pleadings shall be allowed unless the court is satisfied, for reasons to be recorded by the court that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches.

A very clear message is given to litigants that amendment cannot be permitted if the party concerned is guilty of laches. The other

requirement to support and amendment is to establish that grave and irremediable injustice is caused to the party concerned.

The original plaint filed in the year 1989. The amended plaint filed in 1994. (lapse of about 5 years). Even the amended plaint filed in 1994 was not in order due to the matters highlighted by the trial judge in (1) – (6) above. Having held an inquiry, on written submissions, court had no alternative but to reject the amended plaint. Delay not explained and the points to excuse the application of Section 93(2) of the Code remain unexplained.

In Gunasekera Vs. Abdul Latiff 1995(1) SLR 225, court will grant relief under Section 93(3), only if the delay can be reasonably explained. Provisions of Section 93(2) of the Civil Procedure Code are intended to be used when amendments to pleadings are necessitated by unforeseen circumstances,

The case in hand does not indicate any of the matters discussed in the above case.

In Colombo Shipping Co. Ltd vs. Chirayn Clothing 9Pvt) Ltd., 1995(2) SLR 97. amendments on and after the first date of trial can now be allowed only in very limited circumstances namely, when the court is

satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and party is not guilty of laches.

Avudiappan Vs. Indian Overseas Bank 1995(2) SLR 131..

The amendment contemplated by Seciton 93(2) are those that are necessitated due to unforeseen circumstances. Laches does not mean deliberate delay, it means delay which cannot be reasonably explained. The plaint was filed in July 1988, the amendment was sought in September 1994. No explanation was forthcoming from the respondent for the delay. Such a delay in seeking amendment of pleadings on the 5th day of trial cannot be countenanced.

Per Wigneswaran J. in Paramaligam vs. Sirisena 2001(2) SLR 239.

Held:

Per Wigneswaran J.

"Indeed in this case injustice may be caused to the plaintiff respondent by the non-allowing of the new amended plaint in that a plea of res judicata might be raised in a subsequent action since the added defendant had been named in this case though relief not claimed – but to allow amendments which are necessitated by the carelessness and negligence of the plaintiff-respondent himself or his lawyers would be to perpetrate and perpetuate such careless and negligent behaviour by litigants and their lawyers despite the amendment brought to section 93"

Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent.

When a party is in breach of Section 93 of the Code, it is possible to argue that no further steps could be taken to prosecute the case. However the question that needs to be considered inter alia is the question of right of appeal. Is the order canvassed a final order between the parties, which enable the party concerned to prefer an appeal? Over the years the attitude of the court changed significantly as observed, in the case of Chettiar and others vs. Chettiar case, this aspect would tend to confuse the task.

In the above case it was held:

(a) in terms of Section 754(5) of the Civil Procedure Code a judgment would mean any judgment or order having the effect of a 'final judgment' made by any Civil Court and an order would mean the final expression of any decision in any civil action, proceeding or matter, which is not a judgment.

(b) Although there had been two tests – 'Order approach test' and 'Application approach test', the correct test to determine when an order is having the effect of a judgment within the meaning of Section 754 the correct test to be followed is the order approach. An order having the effect of a final judgment is an order whichever it is given it will finally determine the action (In other words if the order given in one way disposes the matter and it should finally dispose the same even given in the other way).

At pgs. 29/30..

Justice Dheeraratne in Ranjit v. Kusumawathi (supra) had examined several cases including those which were referred to by Sharvananda, J., (as he then was) in Siriwardena v Air Ceylon Ltd. (Supra), Subramaniam Chetty v. Soysa (supra), Palaniappa Chetty v. Mercantile Bank of India et.al. ((1942) 43 N.L.R 352), Settlement Officers v. Vander Pooten (supra), Fernando v. Chettiambaram Chettiar ((1948) 49 N.L.R.217), Usoof v Nadarajah Chettiar ((1957) 58 N.L.R. 436), Usoof v The National Bank of India Ltd. (supra), Arlis Appuhamy et.at Simon ((1947) 48 N.L.R. 298), Marikar v Dharmapala Unanse ((1934) 36 N.L.R 201), Rasheed Ali v Mohamed Ali and others ((1981) 1 Sri L.R. 262) and Siriwardena v air Ceylon Ltd. (supra)), and had come to the conclusion that the determination whether an order in a civil proceedings is a judgment or an order having the effect of a final judgment ahs not been an easy task for Courts.

An analysis of the English cases, further strengthens the point that the question of determining the status of a judgment or an order had not only been difficult, but many judges in different jurisdictions for centuries had been saddled with the complexity of the problem in differentiating a judgment form an order having effect of a final judgment and an interlocutory order. For instance in Salaman v. Warner ((1891) Q.B.D. 734) the question before Court was to decide as to whether an order dismissing an action made upon the hearing of a point of a point of law raised by the pleadings before the trial, is a final order.

Considering the test that should be adopted to decide a 'final judgment or order' or an 'order' in terms of section 754 (5) of the Civil Procedure Coe, Justice Dheeraratne in Ranjit v. Kusumawathi and others (supra) had referred to the two tests, which was referred to as the 'Order approach' and the 'application approach' by Sir John Donaldson MR., in White v. Brunton ((1984) 2 All E.R. 606).

The order approach had been adopted in Shubrook v Tufnell ((1882) 9 Q.B.D. 621) whereas the application approach was adopted in Salaman v Warner (supra). Later in

Bozson v Altrincham Urban District Council (supra), the Court had considered the question as to whether an order made in an action was final or interlocutory and reverted to the order approach. In deciding so, Lord Alverstone, C.3., states thus:

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order: but if it does not, it is then, in my opinion, an interlocutory order."

The watershed in the long line of decisions, which considered the test to determine a 'final judgment or order' or an 'order', in my view, was the decision of Lord Denning, MR., in salter Rex and Co. v Ghosh ((1971) 2 All ER 865). After considering the decision in Bozson (supra), Hunt v Allied Bakeries Ltd. ((1956) 3 All E.R. 513) and Salaman v Warner (supra), Lord Denning, MR., had held that in determining whether an application is final or interlocutory, regard must be had to the nature of the application and not to the nature of the order,

Which the Court eventually makes and since an application for a new trial if granted would clearly be interlocutory and where it is refused it is still be interlocutory. Examining the question at issue, Lord Denning, MR, not only described the difficulties faced, but also pointed out the test to determine such issue. According to Lord Denning MR,

> "There is a note in the Supreme Court Practice 1970 under RSC Ord. 59, r 4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutor. In Standard Discount Co. v. La Grange and Salaman v Warner, Lord Esher MR said that the test was the nature of the application to the Court and not the nature of the order which the Court eventually made, But in Bozson v Altrincham Urban District Council, the Court said that the test was the nature of the order as made. Lord Alverstone C.J. said that the test is: 'Does the judgment or order, as made,. Finally dispose of the rights of the parties?

> Lord Alverstone C.J. was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord. 14 (even apart from the new rule) has always been regarded as interlocutory and notice of appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution – every such order is regarded as interlocutory: See Hunt v Allied Bakeries Ltd., so I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory. It was so held in an unreported case, Anglo – Auto Finance (Commercial) Ltd. V. Robert Dick, and we should follow it today.

"This question of 'final' or 'interlocutory' is so uncertain, that the only thing for practitioners to do is to look up the practice, books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way" (emphasis added).

It needs to be understood that in the case in hand if the trial judge gave the order in favour of the Plaintiff, then trial would have to proceed to the end with a judgment. The above dicta support the view that the order of the trial judge though conclude that Plaintiff cannot have and maintain the action cannot in view of the above dicta be considered to be final.

In all the above circumstances I hold that Plaintiff-Appellant has no right of Appeal. In any event this court cannot fault the order of the

learned District Judge. This court though have the powers in terms of the law to exercise powers in revision, is not inclined to do so after a lapse of so many years from the institution of action in the original court. As such this court affirm the order of the learned District Judge and dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL