

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

In the matter of an Application for Leave to Appeal from the Order dated 22.05.2006 in D.C. Mawanella case bearing No. 610/P in terms of Section 754(2) and 757 as Amended by Act No. 38 1998.

C.A.L.A. No. 214/2006

D.C. Mawanella No. 610/P

Daliwala Gedera Padmini
Seneviratne, Adikariwatte,
Makehelwala.

Plaintiff

- Vs -

1. Alkegama Munasinghe Gedera
Sunil Alahakoon, Alkegama,
Makehelwala.
2. Bank of Ceylon, Head Office,
New Head Office Building,
Bank of Ceylon Mawatha,
Colombo 01.
3. Daliwala Gedera Kanthi
Senevirathne, Alkegama,
Makehelwala.
4. Munasinghe Mudiyanseelage
Senaratne Bandara, No. 110,

Ambagaha Junction,
Kalapaluwawa, Rajagiriya.

Defendants

AND NOW BETWEEN

Bank of Ceylon, Head Office, New
Head Office Building,
Bank of Ceylon Mawatha,
Colombo 01.

2nd Defendant Petitioner

- Vs -

Daliwala Gedera Padmini
Seneviratne, Adikariwatte,
Makehelwala.

Plaintiff Respondent

Alkegama Munasinghe Gedera Sunil
Alahakoon, Alkegama, Makehelwala.

1st Defendant Respondent

Daliwala Gedera Kanthi
Senevirathne, Alkegama,
Makehelwala.

3rd Defendant Respondent

Munasinghe Mudiyanse
Senarathne Bandara, No. 110,
Ambagaha Junction, Kalapaluwawa,
Rajagiriya.

4th Defendant Respondent

BEFORE : Deepali Wijesundera, J. &
M.M.A. Gaffoor, J.

COUNSEL : H. Withanachchi for the 2nd defendant
petitioner.
Champika Ladduwahetti for the defendant
respondents.

ARGUED ON : 27.01.2015

DECIDED ON : 26.03.2015

M.M.A. GAFFOOR, J.

The 2nd defendant petitioner has filed this leave to appeal application against the order dated 22.05.2006 of the learned District Judge of Mawanella to set aside the order of the learned District Judge rejecting the motion for amendment of pleadings and fixing the case for trial. A certified copy of the order is annexed marked P 9. Being aggrieved by the said order the petitioner seeks leave from this Court on the following grounds:-

- i. the said Order is contrary to the law and the material before Court;

- ii. that the learned trial Judge has misdirected himself by holding that in a civil action party could not seek an amendment to his original pleadings as he desired;
- iii. that the learned trial Judge has failed to consider the provisions of Section 93 of the Civil Procedure Code and the Partition Law in making the said Order;
- iv. that the application had been made on the 3rd day of trial by itself is not the criterion to summarily dismiss the said application;
- v. that the learned District Judge, has overlooked the fact that the matter in hand was a partition action in which both the corpus and the title are in dispute and the Court was under an obligation to arrive at findings regarding the same;
- vi. that the Petitioner being the only contestant in the partition case, would face irremediable harm and prejudice in the event of the said amendments are not allowed;
- vii. that in any event the refusal to allow the commission to superimpose Plan No. 2109 on the preliminary Plan, was not justified in law;

After this case was taken up for argument, both parties filed their written submissions. Written submissions on behalf of the plaintiff respondent states:-

“Journal entry No. 6 shows that the 2nd defendant Bank was represented by a Lawyer as way back as 13.11.2003. The objections to the enjoining order of the 2nd defendant is dated 22nd December 2003. The original Statement of Claim of the 2nd defendant Bank is dated 29th July 2004. In the said statement of claim, the Bank is seeking to be discharged from the case on the basis that the land they claim is a different land. (Reference is invited to the journal entry 34 dated 19.1.2006.) The Attorney-at-law for the 2nd defendant filed the list of witnesses.

(Reference is invited to journal entry 37 of the 30.1.2006). The matter was fixed for trial for 3.4.2006. On 3.4.2006, the trial was postponed to 22.5.2006. On 2.5.2006, (journal entry 40) the Attorney-at-law for the Bank filed an amended statement of claim and wanted the matter to be called on 22.5.2006 to support the motion seeking a commission. On 22.5.2006 the learned District Judge rejected the application of the 2nd defendant Bank. The 2nd defendant did not show any cause for the delay. The petitioner, in paragraph 13 sub paragraph (3) finds fault with the learned District Judge for not following provisions of Section 93 of the Civil Procedure Code. He states that on the contrary, that section requires the petitioner to cure laches but it appears that there is no attempt by the petitioner to do so before the learned District Judge. It is manifest from the record that the application to amend the statement of claim was made long after the matter was first fixed for trial. Therefore, the discretion of the learned District Judge is not restricted and he was quite right in rejecting the attempt to amend the statement of claim belatedly. It must be noted that the amendment sought is not a mere clerical mistake. In the original statement of claim the Bank took up the position that their land was different to the corpus which is the subject matter of the case and wanted to be discharged from the case. The Bank has taken a very very long time to realize that they need to have a commission. Furthermore, the amendment is on a basis that is totally different to the original statement of claim. If the amendment is allowed at this late stage, all the other parties would again have to amend their statements of claims which would cause grave injustice and prejudice to the other parties merely on account of the Bank's negligence. It is undoubtedly clear that the Bank's application is merely to harass the other parties to this action and that the learned District Judge was correct in law in rejecting the application."

Before we come to a conclusion we wish to ascertain the facts of the case which is very much essential. The plaintiff respondent instituted the above styled action to partition the land called "Pallanhenawatta" bounded on the north by Kopandeniya Ivura, East by Canal which divided the Galbokkegalas, south by Meegahakotuwe Watte, and west by Epitahawatta Ivura, containing in extent 2 kurakkan Neliya.

Plaintiff respondent in her amended plaint dated 18.03.2004 (P1 at page 21) had pleaded inter alia as follows:

- a) that one of the original owners, namely, Munasingedara Punchirala who became entitled to an undivided 3/4th share by deed bearing No. 15689 dated 25.08.1903 transferred his share to Munasingedara Mudiyanse;
- b) that by Deed of Transfer bearing No. 4812 dated 27.05.1950 said Mudiyanse conveyed the above said 3/4th share to Karunawathie Munasinghe who conveyed her rights to the plaintiff by deeds No. 233 and No. 34;
- c) that the plaintiff had transferred half of her 3/4th share to the 3rd defendant by deed bearing No. 2428 dated 09.08.2003;
- d) that the other original owner Munasinghe Mudiyanse Kavirala who was entitled to the balance 1/4th share died intestate leaving his children, Munasinghe Mudiyanse Tikiri Menika, Ranmenika and Siyathu who transferred their shares to Munasinghe Mudiyanse Punchibanda by Deed bearing No. 260 dated 03.04.1947.
- e) that the above said Punchibanda transferred his undivided 1/4th share to the 1st defendant by deed bearing No. 8002 dated 05.11.1987;

A commission was issued to K.S. Panditharatne, Licensed Surveyor, and the Preliminary plan bearing No. 4858 dated 09.02.2005 was prepared

by him and was filed of record; (Vide: the said preliminary plan and the connected report marked "P2" (at page 97) and "P3" respectively). The 1st and 3rd defendants filed their statement of claim (P 4 page 53) on 16.12.2005, the 1st defendant filed another statement of claim (P 5) stating, inter alia, that he was entitled to divided 1/4th share. The petitioner filed its statement of claim (P 6 - page 50) praying inter alia, for a declaration that the land depicted in plan bearing No. 2109 did not fall within the subject matter of this partition action and to discharge the petitioner from the proceedings.

The petitioner had taken up the position that one Senarath Bandara had mortgaged a land called "Epitagahawatte" depicted in plan No. 2109 to the petitioner Bank by Bonds No. 162, No. 1748 and No. 2535. In the meantime the 4th defendant, who was the mortgagor under the said Bonds intervened in this action. Thereafter, the case was fixed for trial on 30.01.2006 and the petitioner filed its list of witnesses and the documents on 19.01.2006. The trial got postponed on two occasions and was to be commenced on 22.05.2006. (Vide: Journal Entries P7) In the meantime on 25.04.2006, the petitioner tendered an amended Statement of Claim praying inter alia for the following reliefs:

- i) issuance of a commission to superimpose plan bearing No. 2109 dated 23.10.1994, prepared by M.R. Seneviratne, Licensed Surveyor, on the Preliminary Plan bearing No. 4858;
- ii) exclusion of the land morefully described in the second schedule to the Statement of Claim from the subject matter of the Partition action;

The petitioner in its Amended Statement of Claim (P 8 - page 43) had stated inter alia as follows:

- i) that the land "Epitgahawatte" morefully described in the 1st schedule to the said Statement, devolved on the 4th defendant by virtue of deed No. 5591 dated 29.03.1937 and after possessing the land for over 24 years the 4th defendant effected a division of the said land by plan No. 2109 dated 23.10.1999;
- ii) that at the time of institution of this action by Mortgage Bonds bearing No. 162 dated 19.05.1995, No. 1748 dated 25.11.1996 and No. 2535 dated 20.09.1999, the 4th defendant had mortgaged Lots 1 and 2 depicted in Plan No. 2109 to the 2nd defendant Bank as security to obtain loan facilities;
- iii) that owing to the default on the re-payment of the said loans, the mortgaged property was sold by public auction on 03.11.2003, in terms of the provisions of Bank of Ceylon Ordinance and the said Lots 1 and 2 were subsequently transferred to the 2nd defendant Bank by a Certificate of Sale bearing No. 235 dated 17.03.2004.
- iv) that the land sought to be partitioned was an undivided portion of the land belonging to the petitioner and the plaintiff was not a co-owner of the said land;
- v) that it had become necessary to superimpose plan No. 2109 dated 23.10.1994, upon plan No. 4858 dated 09.02.2005 for a proper adjudication of this case.

When the case was taken up on 22.05.2006, the motion for amendment was supported and the learned District Judge rejected the said application and proceeded to take up the case for trial. At the trial the 2nd defendant petitioner indicated to Court of its intention to make an amendment under Section 93 of the Civil Procedure Code. This application was rejected and leave to appeal was granted.

Section 93 of the Civil Procedure Code provides that, 'upon application made to it before the date first fixed for trial of the action in the presence of, or after reasonable notice to all the parties to the action, the Court shall have full power of amending in its discretion, all pleadings in the action, by way of addition, or alternation, or of omission. Subsection (2) of Section 93 states that on or after the day first fixed for the trial of the action and before final judgment no application for 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 grounds and that the party so applying has not been guilty of laches. Under section 93 of the Civil Procedure Code regarding amendment of the plaint, the Court should take into consideration well established rules of practice. The rules should not be treated as though they were statutory rules or provisions of positive law of a rigid and inflexible nature. The two main rules which have emerged from the decided cases are:-

- (i) the amendment should be allowed if it is necessary for the purpose of raising the real question between the parties.
- (ii) An amendment which works an injustice to the other side should not be allowed. See ***Darayani vs. Eastern Silk Emporium Ltd*** 64 NLR 529. The limitations enumerated in ***Lebbe vs. Sandanam*** 64 NLR 461 were disapproved in this case.

Therefore the first rule is based on the principle that a multiplicity of action should be avoided. The second rule is based on the ground that where injustice would be caused to the other side by allowing an amendment it should be refused. There is also a cardinal principle of law followed by Courts that an amendment should not be allowed if the

effect of it would be to convert the action of one character into an action of a different and inconsistent character.

In the case of ***Ratwatte vs. Owen 2 NLR 141***, Lawrie J., observed that, "The principle by which a Court ought to be guided in deciding to alter a pleading is that alteration will make the real issue clear. Withers J., in the same case said, 'After a plaint has once been accepted, it should not, as a general rule, be amended until after the issues have been settled. The office of an amendment will generally at that stage be to square the plaint with the issues framed.'"

In the case of ***Anushka Wethasinghe Vs. Nimal Weerakody and Others 1981(2) Sri Lanka Law Reports page 423, Soza J.*** held that:-

"The granting of leave to appeal depend on the circumstances of each case. But the guidelines are:-

- (1) The Court will discourage appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage.
- (2) Leave to appeal will not be granted from every incidental order relating to the admission or rejection of evidence for to do so would be to open the floodgates to interminable litigation. But the incidental order goes to the root of the matter it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage; then leave to appeal will be granted.

In this case, I am of the view that the amendment sought and the application to superimpose the plan must be allowed, which I think will

clinch the issue between the parties correctly, and therefore this application can be allowed.

In the light of above authorities I am of the view that the pleading should be amended for the purpose of settling the real issues between the parties and also allow the commission sought by the 2nd defendant petitioner, because the superimposition will make the corpus in dispute very clear to decide on the real subject matter.

Considering the above facts the Order dated 22.05.2006 is set aside. Appeal is allowed and the 2nd defendant petitioner to bear the costs of the appeal.

JUDGE ~~OF THE~~ COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

KRL/-