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

CA 940/97 (F)

D.C. Galle Case No. 12244/L

Mawella Vithanwasam Samson
Paragodawatta,
Imaduwa.

Plaintiff

Vs.

Mawella Vithanwasam Hinninina
Paragodawatta,
Imaduwa.

Defendant

AND NOW

Mawella Vithanwasam Hinninina
Paragodawatta,
Imaduwa.
(Deceased)

Defendant – Appellant

1. Ambagahawattage Padmini Kariyawasam
2. Ambagahawattage Prince Jana Kumara Kariyawasam
3. Ambagahawattage Punya Sharmini Kariyawasam

All of Galgodawatta, Paragoda,

Imaduwa

Substituted Defendant – Appellants

Vs.

Mawella Vithanwasam Samson
Paragodawatta,
Imaduwa.

Plaintiff – Respondent

BEFORE: **M.M.A. GAFFOOR J**

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: **Sandamal Rajapakshe for the Substituted Defendant – Appellants**

Athula Perera with Nayomi N. Kularatne for the Plaintiff – Respondent

ARGUED ON: **25.05.2017**

WRITTEN SUBMISSIONS – **Defendant – Appellants – 17.09.2013**

Plaintiff – Respondent - 18.07.2017

DECIDED ON: **06.11.2017**

S. DEVIKA DE LIVERA TENNEKOON J

The Plaintiff – Respondent (hereinafter referred to as the Plaintiff) instituted action in the District Court of Galle by Plaint dated 21.04.1992 seeking *inter alia;*

a) A declaration of title in favour of the Plaintiff over the corpus,
b) To eject the defendant and all those who hold under her and handover peaceful and vacant possession to the Plaintiff,
c) Damages.

Summons was duly served on the Defendant – Appellant (hereinafter referred to as the Defendant) and a proxy was tendered on her behalf on 17.02.1993.

Thereafter a commission was issued to survey and identify the corpus and consequently Plan bearing No. 1767 prepared by A. A. de Silva Licensed Surveyor was tendered to Court on 18.11.1993.

On 24.08.1994 an amendment to the Plaint was sought and the same was not objected to by the learned Counsel for the Defendant (vide Journal Entry 15) and thereafter the learned Counsel for the Defendant sought time till 09.11.1994 to tender the Answer of the Defendant to Court. As the Presidential Election was due to be held on 09.11.1994 since it was declared a holiday and the case was mentioned on 22.03.1995 on which date the Defendant was granted time finally till 31.05.1995 to file Answer. When the case was called on 31.05.1995 the Defendant failed to file answer and further she was absent and unrepresented and therefore the case was fixed for *ex – parte* hearing on 09.10.1995.

When the *ex – parte* hearing commenced an application was made on behalf of the Plaintiff to re-amend the Plaint as the amended Plaint had not clearly identified the corpus (vide page 43 of the Appeal brief). Thereafter, Court having considered the application allowed for the re-amendment to the Plaint.

Thereafter *ex – parte* hearing recommenced on 16.05.1996 and after the evidence of the Plaintiff was led the learned District Judge delivered judgment on 07.06.1996 in favour of the Plaintiff and the *ex – parte* decree was served on the Defendant.

Thereafter the Defendant preferred an application under Section 86 (2) of the Civil Procedure Code by Petition dated 09.10.1996 to purge default and to vacate the *ex – parte* decree and further to be allowed to file her Answer.

The matter was thereafter fixed for inquiry on 18.12.1996 on which date the parties had agreed to conclude the matter by way of written submissions and the respective written submissions were tendered to Court.

Consequently the learned District Judge delivered order dated 27.05.1997 dismissing the application of the Defendant to vacate the *ex – parte* decree. Being aggrieved by the said order the Defendant preferred the instant appeal by Petition dated 25.07.1997 to set aside the impugned order dated 27.05.1997 and to allow for the Defendant to enter the case.

The learned Counsel for the Defendant raises a question of law which was not contained in the Petition of Appeal dated 25.07.1997, which is; Is the Plaintiff entitled to amend the Plaint after fixing the case for *ex – parte* trial?

Section 758 (2) of the Civil Procedure Code states;

> "The court in deciding any appeal shall not be confined to the grounds set forth by the appellant, but it shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of being heard on that ground."

Considering the fact that the Defendant in the instant appeal has had sufficient notice of the above ground of Appeal this Court will first consider the said question of Law raised by the learned Counsel for the Defendant.

It is evident and as admitted by the learned Counsel for the Plaintiff the amended Plaint dated 06.07.1994 was subsequently amended by Plaint dated 24.10.1995 on which the impugned judgment was delivered.

It is clear that the said amendment was allowed on an application made by the Plaintiff to clearly identify the corpus as the amended Plaint dated 06.07.1994 did not clearly reflect the corpus. The learned Counsel for the Plaintiff contends that the said amendment was only the inclusion of the 2nd paragraph with regards to the identity of the corpus and further that the relief sought in the re – amended Plaint is identical to the reliefs sought in the amended Plaint.

However, it is clear that the said amendment was allowed on the basis that the corpus was not clearly identified in the amended Plaint. Although the learned Counsel for the Plaintiff contends that the reliefs prayed for in the amended plaint could have been achieved without adding paragraph 2 referred to above, this Court finds that such relief could not have been achieved in respect on the corpus since, as admitted by the Plaintiff, the corpus was not clearly identified in amended Plaint dated 06.07.1994.

In the case of Gunasekera Vs. Punchimenike and others 2002 (2) SLR 43 Wigneshwaran J held that;

> "A Court should not allow amendment of pleadings after an ex parte trial has been ordered. The scheme of the Code had been where the defendant is absent on the day fixed for his appearance and answer, trial *ex parte* should be held either immediately or as the next step."

The learned Counsel for the Plaintiff argues that the ratio in the above judgment has no relevance to the instant Appeal as the matter ought to be distinguished on the facts. Counsel further argues that unlike in the said case no material prejudice has been caused to the Defendant by the said amendment.

It must be noted that as per Section 93(2) of the Civil Procedure Code amendment of any pleadings may be allowed only where grave and irremediable injustice will be caused if such amendment is not permitted. Section 92(2) reads;

> "On or after the day first fixed for the trial of the action and before final judgement, 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.

Therefore, this Court finds that the reason to allow the application made on behalf of the Plaintiff to amend pleadings was so that, 'grave and irremediable injustice' would not be caused to the Plaintiff.

In Gunasekera Vs. Punchimenike and others 2002 (2) SLR 43 Wigneshwaran J further held that;

> "All these observations point to the fact that the plaint cannot be allowed to be amended at this stage. The plaintiff cannot be allowed to point out the defects in his own evidence and pleadings and allowed to take steps to supplement his evidence without the knowledge of the defendant. To do so or to allow the plaintiff to do so, would open the flood gates to plaintiffs filing plaints of one sort and obtaining an ex parte decree of another sort without notice to the defendants. Any attempt to change or amend the pleadings must necessarily be preceded by notice to all parties to the action."

As such an amendment of pleadings relating to the identity of the corpus is a central issue and as such this Court finds that is bad procedure to allow for the amendment of proceedings after *ex parte* trial has been ordered and especially

where some evidence has been led *ex parte* and therefore holds with the learned Counsel for the Defendant on the question of law raised on Appeal.

For the reasons morefully described above this Appeal is allowed. The order of the learned District Judge dated 27.05.1997 is hereby set aside. The Substituted Defendant Appellants are hereby allowed to enter the case and to file Answer.

Appeal Allowed.

Judge of the Court of Appeal

M.M.A. GAFFOOR J

I Agree.

Judge of the Court of Appeal