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

C.A. Case No.203/2002

D.C. Kandy Case No.17449/L

Upul Palitha Mahanama
No.5, Nilani Udyanaya,
Bokundara, Piliyandala.
Substituted-DEFENDANT-PETITIONER-APPELLANT

-Vs-

Wijayahenagedara Sumanawathie
Poththapitiya, Manikdiwela.
PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Rohan Sahabandu, PC with S.D. Withanage for the Substituted-Defendant-Petitioner-Appellant Sanjeewa Ranaweera for the Plaintiff-Respondent
Argued on	:	13.06.2017
Decided on	:	25.05.2018

A.H.M.D. Nawaz, J.

Here is a case where the learned District Judge of Kandy refused the application of the Defendant in the case to amend his answer, whilst at the same time permitting the withdrawal of the plaintiff's action. The Court granted leave to appeal to the

Defendant and the propriety of the order of the District Judge has been canvassed before me by the Defendant. In order to understand the issue in its correct perspective, an ascertainment of facts becomes necessary.

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted an action on or about 31.05.1993 seeking a declaration of title to the land described in the schedule to the plaint and the ejectment of the original Defendant.

The Plaintiff averred in the plaint that Lot 1 was owned by one Sirimala and he died intestate without leaving an administrable estate and the said estate devolved on the Plaintiff, one Seelawathie, one Dharmasena, Rupasinghe and Lionel.

It was the position of the Plaintiff that the original Defendant who was the sister of the Plaintiff's father was permitted to reside in the premises in question, which was a boutique room.

The Plaintiff further averred that since 13.02.1993, the original Defendant had been unlawfully and illegally preventing the Plaintiff-Respondent from entering the premises in question and on that premise sought the ejectment of the original Defendant from the premises in question and damages.

The original Defendant filed answer and averred that the aforesaid Sirimala had transferred the property in question along with other lands by Deed bearing No.2250 dated 07.03.1982 to her and claimed prescriptive as well as paper title.

After the demise of the original Defendant the present Defendant-Petitioner (her son who will be hereinafter sometimes referred to as the Defendant) was substituted on 23.07.1997. At this point of time the Plaintiff sought to amend the plaint.

The Substituted-Defendant-Petitioner objected to the amendment on the basis that the Plaintiff was seeking to change the scope of the action as the original action was founded on the basis that the corpus was owned by the Plaintiff and by the amended plaint the Plaintiff sought to plead that the original owner had 4 children and therefore was seeking a declaration that the corpus belonged to the 4 children of the late Sirimala.

The objection was overruled and the Plaintiff was permitted to amend the Plaint on 23.07.1997.

The Substituted-Defendant by his amended answer sought the dismissal of the action.

The parties recorded 26 issues and the matter was fixed for trial on 25.06.2000.

The Substituted-Defendant leaving the premises

The Substituted-Defendant has averred in his application for leave to appeal that his father who had been occupying the premises fell ill and had to be removed to Colombo from Kandy.

This Defendant further states that while his father was away, and the premises remained locked up, the Plaintiff-Respondent had forcibly entered the premises and went into occupation. In other words there was an ejectment of the Defendant otherwise than though the process of Court.

The Defendant-Petitioner sought restoration under Section 839 of the Civil Procedure Code.

The Court after inquiry rejected the application for restoration on 12.07.2000, solely on the basis that the Defendant-Petitioner had not shown that his application related to the corpus as the Defendant had referred to a new plan in support of the premises.

Application to amend the answer

The Defendant further states that having failed in his attempt to secure restoration of the premises, he sought permission of Court to amend the answer on 09.11.2001 to include damages which accrued due to the forcible ejectment, which he assessed at Rs.2,500,000/- for illegal and unauthorized entry into the corpus.

The Defendant further asserts in his petition that when the question of the amended answer was taken up, the Plaintiff-Respondent sought permission of Court to withdraw his action. The Defendant resisted this application for withdrawal as he had lodged a cross claim in his amended answer. The Court after having reserved its order for 17.05.2002, held that (i) there is no cross claim (ii) and the Plaintiff is entitled to

withdraw the action under Section 406(1) of the Civil Procedure Code, and permitted the withdrawal of the plaintiff's action.

It is this order of the learned District Judge of Kandy dated 17.05.2002 that was impugned in this application for leave to appeal. This Court granted leave and the substantive matter has been gone into before this Court and the question before this Court is whether it was quite correct for the learned District Judge to have allowed the application for withdrawal by holding that there was no cross claim. In fact the cross claim for damages had been embodied in the amended answer that was rejected.

There are two issues that are immanent in this appeal. Here was a Defendant who was attempting to file an amended answer dated 09.11.2001 embodying a claim for damages. The Defendant alleged that damages arose due to the act of the Plaintiff in forcibly ejecting him when he was away from the premises. The amended answer also prays for restoration. The record reveals that the Plaintiff took forcible possession of the premises between the date on which issues were raised and the date to which the trial stood adjourned. Is he entitled to file an amended answer in the circumstances praying for restoration and damages? The learned Additional District judge rejected this application to file the amended answer on the basis that the elements of Section 93(2) of the CPC had not been satisfied.

Secondly the learned District Judge allowed the application for withdrawal of the plaint. In fact as it is apparent upon the record, the application for withdrawal of action came about possibly because the Plaintiff had already secured possession of the premises through self help.

But the learned Additional District Judge allowed the application for withdrawal of the action and rejected the application to file the amended answer in one composite order dated 17.05.2002.

Mr. Rohan Sahabandu, PC assailed the order dated 17.05.2002 on several grounds and it is indeed apposite to consider first the order of the learned Additional District Judge on

withdrawal and thereafter appraise his order on the application for an amended answer.

Was the order allowing the Plaintiff to withdraw the action correct?

The learned Additional District Judge has permitted the withdrawal of the action under Section 406(1) of the CPC. In fact this provision occurs under chapter XXVI of the Code and in terms of Section 406(1), the Court could permit a Plaintiff to withdraw an action only if Court is satisfied that:-

i. The action must fail by reason of some formal defect.

   This was not a case which was sought to be withdrawn on account of a formal defect. Here, there is no apparent formal defect and the Plaintiff makes the application to withdraw as he has obtained possession of the premises illegally, that was his intention.

The Plaintiff could not then have come under this element of the provision.

ii. There are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action.

As the learned President's Counsel submitted, there was no application by the Plaintiff that he was withdrawing the action, with liberty to file a fresh action. It is only in the above two situations namely Section 406(1) (a) and Section 406(1)(b) that the Plaintiff is entitled to withdraw his action.

If the Plaintiff cannot come under Section 406(1) of the CPC then he cannot withdraw his action as of right.

In the absence of any cogent reasons adduced for withdrawal, the necessary ingredients for withdrawal had not been satisfied and as such there was no warrant for the learned District Judge to have permitted the withdrawal. The Plaintiff gives no reasons for withdrawal nor does the learned District Judge set out any reasons for withdrawal. What was it that impelled the District Judge to permit the withdrawal? Except for the

bare assertion that the Plaintiff is entitled to withdraw the action under Section 406(1), the learned Additional District Judge does not give any reason whether this particular Plaintiff who resorted to stealth to evict the Defendant would come within Section 406(1) of the CPC. If the learned Additional District Judge states in his order that the Plaintiff was entitled to make use of Section 406(1) of the CPC, I find it odd enough that here was a Plaintiff who was securing that order despite the fact that he had taken the law into his own hands. Thus this Court must be able to ascertain the reasons for the order the learned Additional District Judge made on 17.5.2002 but sadly enough that order is as empty as Mother Hubbard's cupboard without any reasons. Giving reasons for one's decision is of universal application regardless of the nature of the proceedings and the Civil Procedure Code itself teems with provisions which impose the requirement to provide reasons. Section 406(1) of the CPC is one such provision as it requires the learned District Judge to be satisfied for an order of withdrawal to be made.

In fact in the case of ***Padfield v. Minister for Agriculture, Fisheries and Food*** (1968) AC 997 (HL) - a seminal case on giving reasons Lord Upjohn observed –"if he does not give any reason for his decision, it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that *he had no good reason of reaching that conclusion....*". In the same breath Lord Pearce too echoed the same notion- "If he gives no reason whatever for taking a contrary course, the court may infer that he had no good reason.....". Though *Padfield* is one of the leading administrative law cases, it was in fact an action for a declaration rather than an application for a prerogative order. So the order dated 17.05.2002 has to be struck down as arbitrary.

In the circumstances the order of the learned District Judge dated 17.05.2002 is void and I proceed to set aside the withdrawal. In that eventuality the case would be yet pending and the question arises whether the learned District Judge could then entertain the amended answer dated 09.11.2001.

Can the District Judge entertain the application to file an amended answer?

I have stated that in the same order as the learned Additional District Judge permitted the withdrawal namely the order dated 17.05.2002, he rejected the application of the Defendant to file an amended answer. The rejection of this application is based on unexplained laches in terms of Section 93(2) of the CPC and what was being sought to be put in issue in the amended answer had already been gone into by Court under Section 839 of the Code. In fact consequent to the forcible eviction the Defendant invoked the inherent jurisdiction of Court under Section 839 of the Code to have himself restored to possession. The learned District Judge laments in his order dated 17.05.2002 that the same issue was being agitated in the amended answer. The application under Section 839 of the Code had been rejected because the substituted-Defendant could not show that the application under Section 839 related to the same corpus, as there was a new plan in place in respect of the premises. It is borne out by the pleadings that there had also been an application for an interim order preventing the Plaintiff from altering the subject-matter.

In any event the fact remains that the action for declaration of title and ejectment was pending when the Plaintiff took the law into her own hands and ejected the Defendant. A somewhat identical situation occurred in ***Seneviratne v. Francis Abeykoon*** (1986) 2 Sri L.R. 1.

The Plaintiff landlord after his appeal from a judgment dismissing his action for eviction of his tenant-the Defendant was abated, forcibly took possession of the premises let alleging abandonment and consequential deterioration of the premises. The Defendant-tenant denied abandonment and applied to the Trial Court to restore him to possession The Court granted the application.

The Plaintiff then filed an application for revision of this order. The question was whether in the absence of a decree restoring possession of the premises to the defendant-tenant', the Court still had the power to make an order that possession be restored to the Defendant which the Fiscal could execute.

Tambiah, J. (as His Lordship then was) eloquently opined:

> *"Since the plaintiff had taken the law into his hands and forcibly evicted the defendant alleging abandonment and deterioration of the premises, the Court could in the interests of justice resort to its inherent powers saved under s. 839 of the Civil Procedure Code and make order of restoration of possession for the Fiscal to execute even though the Civil Procedure Code provided for such restoration to possession only on a decree to that end entered under s. 217 (c) of the Civil Procedure Code."*

So the invocation of Section 839 in this case was properly done and this shows that one need not even amend an answer to agitate the cause of action that had arisen. It was open to the Defendant to file a petition and affidavit to pray for restoration by virtue of Section 839 of the CPC. The power is inherent in Court to restore possession. Call it a new cause of action or what you may, the petitioner in a Section 839 application needs to show that he was ejected by extra legal methods. Three Judges of the Supreme Court (Tambiah, J. Ranasinghe, J. and L.H. de Alwis, J.) condemned a forcible eviction of a tenant through extra legal methods and declared that it was open to the Defendant to secure repossession through the inherent powers of Court-see how Sarath N. Silva, J. (as His Lordship then was) followed this principle in ***Esabella Perera Hamine v. Emalia Perera Hamine*** (1990) 1 Sri L.R .8. Unfortunately this action in the case of the Defendant failed in the District Court because a new plan in relation to the premises had been put in.

In the amended answer that was sought to be filed after the failure of Section 839 proceedings, there is no gainsaying that the substituted-Defendant has sought restoration and damages. Upon a perusal of the pleadings in the case, it would appear that there is no doubt about the identity of the corpus to which the substituted-Defendant wants restoration. There is no prejudice that the Plaintiff could complain of as she is quite aware of the premises from which the Defendant states he was ejected.

Rights of parties to be determined as at the time of institution of action

So what would then be the impediment to an amended answer being filed to secure restoration and damages? Mr. Rohan Sahabandu, PC himself saw the impediment in the way of the principle that rights of parties must be determined as at the time of the institution of the action and Mr. Ranaweera for the Plaintiff too made submissions that since the eviction of the Defendant took place long after the institution of the action, it is a new cause of action for which a fresh action must be filed. In fact there is a long line of cases which have enshrined this principle in law-see ***Silva v. Fernando*** 15 N.L.R 499 (PC); ***Sherieff v. Marikkar*** 27 N.L.R 349 at 350; ***Eminona v. Mohideen*** 32 N.L.R 145 at 147; ***Lenorahamy v. Abraham*** 43 N.L.R 68 at 69; ***Kader Mohideen & Co. Ltd., v. Nagoor Gany*** 60 N.L.R 16 at 19; ***Sirisena v. Doreen de Silva and Others*** (1998) 3 Sri L.R. 197; ***HNB v. Silva*** (1999) 3 Sri L.R. 113; ***Jayaratne v. Jayaratne and Another*** (2002) 3 Sri L.R. 331.

Departures from the rule

In my view the principle that rights of parties must be determined as at the time of the institution of the action is not an inflexible rule. There are situations which permit departures from this rule. I view the decision of Pereira, J. in ***Arnunachalam v. Mohamedu*** 17 N.L.R 255 as one such exception to the rule. The learned Judge held that a claim in reconvention may be made in respect of a cause of action that accrued at any time before the filing of the answer. In other words it is not necessary that the cause of action should have arisen before the institution of the action. If that be so, here was a cause of action of forcible eviction which the Defendant alleges resulted in damages. It arose after the institution of action and later than the original answer. The Defendant could not have pleaded it in his original answer. *The law cannot expect the performance of what is impossible-lex non cogit ad impossibilia.*

There is nothing that could prevent the Defendant to include the new cause of action in his amended answer because it arose before the amended answer. There is an added element that fortifies this reasoning. If the restoration to possession could be asked for

in a Section 839 application, the nature of relief is such that it is capable of being sought in an amended answer. Having pleaded for ejectment of the Defendant in his plaint, the Plaintiff secured the relief extra legally. In this situation the Defendant cannot be asked to institute a new action to obtain damages. If he can seek the equitable relief of inherent powers to obtain restitution, I do not see any reason why that equity cannot follow law in the form of an amended answer and give the Defendant his relief. Restoration of possession could be sought in a Section 839 action which is equitable in nature and such equitable considerations should temper and pervade the agitation of the same relief by way of an amended answer. In the process damages which ensued owing to the forcible ejectment could be sought in an amended answer. For equity follows the law-***Aequitas sequitur legem***. This maxim is resorted to where the Common Law such as a strict rule that rights of parties must be determined as at the time of the action would appear to ignore some important factor or circumstance which bears upon the fairness of the matter before Court. The important factor that shocks the conscience of Court in this case is that the Plaintiff used extra legal methods to evict the Defendant whilst his very action for ejectment was pending in Court. The law in such a situation grants an equitable remedy of restoration by way of Section 839 of the CPC-***Seneviratne v. Francis Abeykoon*** *(supra)*; ***Esabella Perera Hamine v. Emalia Perera Hamine*** *(supra)*. This equitable consideration must facilitate the same matter being raised in an amended answer. Therefore the fact that rights of parties must be decided as at the time of action is not an inflexible rule. It admits of exceptions such as the filing of an amended answer in the circumstances I have enunciated above.

No doubt there are restraints enacted by Section 93(2) of the CPC which imposes limits on amendment of pleadings. Laches being an inhibiting factor to amendment, I would not attribute the Defendant with laches. Since the iniquitous act of ejectment, he had been prompt in seeking his relief. He quite rightly invoked Section 839 of the Code. He again sought an injunction. All these attempts at legal redress were apparent on the record for the learned Additional District Judge to observe and he cannot

possibly shut out this amended answer on the ground of delay. Secondly any forcible ejectment from some premises is bound to cause damages and there is a quantification of damages in the amended answer. Grave and irremediable injustice can be gleaned from the averments of the amended answer and I take the view that the learned Additional District Judge was in error when he rejected the application to file the amended answer without having considered relevant case law and equities in this case.

In the circumstances I would set aside the order of the learned Additional District Judge dated 17.05.2002 that rejected the application to file the amended answer dated 09.11.2001. The same order dated 17.05.2002 as to withdrawal of the plaint is also set aside.

So in a nutshell, now that the order of withdrawal of the case has been set aside, I direct the learned District Judge of Kandy to accept the amended answer dated 09.11.2001 and expeditiously conclude the trial on the pleadings that are ordered to be accepted.

The case is remanded to the District Court of Kandy to proceed to trial. The appeal of the Substituted-Defendant-Petitioner-Appellant is thus allowed with costs payable by the Plaintiff-Respondent-Respondent.

JUDGE OF THE COURT OF APPEAL