

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

Deepthi Swineetha Bogollagama,
No. 43/13,
Longdon Place,
Colombo 7.
Defendant-Appellant

CASE NO: CA/355/2005/LA

DC COLOMBO CASE NO: 20230/L

Vs.

W.R. Rohini Wickramathunga,
No. 20/05,
Station Lane,
Nugegoda.
Plaintiff-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Manohara de Silva, P.C., with Mrs. P. Narendran for
the Appellant.

Nuwan de Silva for the Respondent.

Decided on: 07.09.2018

Samayawardhena, J.

The plaintiff instituted this action against the defendant in the District Court of Colombo on 12.03.2004 seeking a declaration that Deed No. 185 dated 06.02.1994 by which the defendant is alleged to have got title to the land in suit is a fraudulent Deed.

The defendant filed the answer seeking dismissal of the plaintiff's action (instituted more than ten years after the execution of the said Deed) *inter alia* on the basis that the alleged cause of action of the plaintiff on the face of the plaint is prescribed in law and the plaintiff has not complied with section 44 of the Civil Procedure Code.

A few days before the case was to be taken up for trial, the plaintiff moved to amend the plaint (a) to say that she came to know about the execution of the alleged fraudulent Deed around December 2001 and then (b) to claim exemption from the law of prescription in terms of section 44 of the Civil Procedure Code.

The plaintiff in the original plaint did state the date of execution of the Deed but did not state when she came to know about the execution of the same. Nor did she claim exemption from prescription as contemplated in section 44 of the Civil Procedure Code.

The application for amendment makes it abundantly clear that the cause of action as it stood in the original plaint was *ex facie* prescribed, for otherwise there was no reason for the plaintiff to expressly plead exemption from the law of prescription in the amended plaint.

This application for amendment was objected to by the defendant, but the District Judge overruled that objection and accepted the amended plaint by order dated 31.08.2005. It is against this order the defendant has preferred this appeal with leave obtained.

When this case came up before me for the first time on 29.08.2018 counsel for both parties agreed Judgment being pronounced by me on the written submissions already filed of record.

"An action for declaration that a notarially executed Deed is null and void is prescribed within 3 years of the date of execution of the Deed in terms of section 10 of the Prescription Ordinance." (Ranasinghe v. De Silva¹)

However, when a plaintiff seeks cancellation of a notarially executed Deed upon concealed fraud, the three year period begins to run not from the date of execution of the Deed but *"from the time of the discovery of the fraud, or from the time the party defrauded might by due diligence have come to know of it."* (Kirthisinghe v. Perera², Dodwell & Co. Ltd. v. John³)

Under section 93(1) of the Civil Procedure Code the Court has the full discretion to allow or disallow any application for amendment of pleadings if it is made before the day first fixed for trial of the action. However this discretion cannot be exercised arbitrarily or capriciously, but judicially, guided by time-tested principles enunciated by the Superior Courts in an array of decisions.

One such principle is that an amendment *"which has the effect of taking the action out of the provisions governing the limitation of*

¹ (1976) 78 NLR 500

² (1922) 23 NLR 279

³ (1915) 18 NLR 133 (SC) and (1918) 20 NLR 206 (PC)

actions in the Prescription Ordinance or any other enactment of law" shall not be allowed (*Lebbe v. Sandanam*⁴, *Sherman de Silva & Co. Ltd. v. Ariyalatha de Silva*⁵), particularly, if it causes grave prejudice to the opposite party. Needless to say that an amendment which shuts out the plea of prescription causes prejudice to the party who takes up such a plea. This is exactly what the plaintiff in the instant action did by amending the plaint.

Section 44 of the Civil Procedure Code dictates that: "*If the cause of action arose beyond the period ordinarily allowed by any law for instituting the action, the plaint must show the ground upon which exemption from such law is claimed.*" It is significant to note that the word used here is not "*may*" or "*shall*", but "*must*" pointing to the fact that it is mandatory.

The learned District Judge in the impugned order states that as the plaintiff in paragraph 24 of the plaint has explained the reasons for the delay, section 44 of the Civil Procedure Code is satisfied and therefore no prejudice is caused to the defendant by allowing the amendment. The District Judge has manifestly misdirected himself on law on that point.

Paragraph 24 of the plaint which the District Judge has referred in order to allow the amendment does not speak about when the plaintiff came to know about the execution of the Deed, but the reasons for the delay in filing the action, which are irrelevant to the plea of prescription raised by the defendant.

Counsel for the defendant in his written submissions has stated that, in the circumstances of this case, the District Judge could in

⁴ (1963) 64 NLR 461

⁵ (1972) 77 NLR 275

terms of section 46(2) of the Civil Procedure Code return the plaint for amendment even without any application from the plaintiff. This submission is clearly untenable in law as paragraph (i) of the second proviso to section 46(2) expressly states that "*When the action appears from the statement in the plaint to be barred by any positive rule of law*", "*the plaint shall be rejected [not returned for amendment]; but such rejection shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.*"

The impugned order of the District Judge is set aside and the appeal is allowed with costs both here and Court below.

Judge of the Court of Appeal