

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

In the matter of an Application for Leave to
Appeal under Section 754 of the Civil
Procedure Code from the Order of the
Learned District Judge of Balapitiya dated
22nd October 2004, in case No. 683/P.

Kaluhara Janenona
Of Ahungalla.
Plaintiff (deceased)

T. Jinawathi De Silva
Of Hotel Road, Ahungalla.
Subsituted Plaintiff

C.A./L.A No.418/2004

Vs

1. K. Usulawathi
Of Ahungalla.
2. K. Wyman of Ahungalla
(deceased)
- 2A K. Usulawathie
Of Ahungalla.
3. Aitken Spence & Co. Ltd.
Lloyds Building
Sir Baron Jayathilake Mawatha
Colombo. 01.

4. M.Piyasena
Of Ahungalla.
5. Kaluhara Lisinnona
Of Thotawatta Road
Ahungalla.
6. Hettihandi Renuka Indraj De Silva
Of Ahungalla.
7. Ahungalla Hotels Ltd.
305, Vauxhall Street
Colombo 02.
8. Kaluhara Erin Singho
Of Thotawatta Road
Ahungalla.
9. Pettagan Chandrawathi de Silva
Of "Sirsevana" , Ahungalla.
10. Pettagan Chandrawathi Silva
11. Peoples Bank
No. 75, Sir Chittampalam A.
Gardinar Mawatha
Colombo 02.
12. Development Finance
Corporation of Ceylon
No. 73/5, Galle Road,
Colombo 03.
13. National Development Bank
No. 40. Nawam Mawatha
Colombo 02.

Defendants

AND

3. Aitken Spence &Co. Ltd.
Lloyds Building

Sir Bron Jayathilake Mawatha
Colombo 01.

7. Ahungalla Hotels Ltd.
305, Vauxhall Street,
Colombo 02.

Defendant Petitioners

Vs

T. Jinawathi De Sila
Of Hotel Road, Ahungalla.

Substituted Plaintiff respondent

1. K. Usulawathi
Of Ahungalla.
- 2A K. Usulawathie
Of Ahungalla.
4. M. Piyasena
Of Ahungalla.
5. Kaluhara Lisinnona
Of thotawatte Road
Ahungalla.
6. Hettihandi Renuka Indrajith De Silva
Of Ahungalla.
8. Kaluhara Erin Singho
Of Thotawatta Road
Colombo.
9. Pettagan Kumudu De Silva
Of "Sirsevena", Ahungalla.
10. Pettagan Chandrawathi De Silva

11. Peoples Bank
No.75, Sir Chittampalam A.
Gardinar Mawatha, Colombo 02.
 12. Development Finance
Corporation of Ceylon
NO. 73/5, Galle Road,
Colombo 03.
 - 13 National Development Bank
No. 40, Nawam Mawatha
Colombo 02.
- Defendant Respondents**

BEFORE

: Deepali Wijesundera J.

COUNSEL

: M.M.A. Gaffoor J.

: Sujith Perera for Defendant
Petitioners.

R.C. Gunaratne for Plaintiff
Respondents.

ARGUED ON

: 03rd August, 2015

DECIDED ON

: 18th December, 2015

Deepali Wijesundera J.

The plaintiff (now deceased) instituted an action to partition a land called Pitawatte alias Thinawatte alias Unawatana more fully described in the schedule to the plaint in 1982. The third and seventh defendant respondents have filed their statements of claim in December 1992 which is nearly eleven years after the plaint was filed. After the trial had commenced the defendant petitioners have moved for an alternative plan which was allowed by court in 2002 and they have taken two years to get the land surveyed and the plan made. The third and seventh defendant petitioners have made an application to amend these statements of claim thereafter. This application was refused by the learned District Judge on 22/10/2004. The District Judge has stated in his order that the petitioners have taken nearly eleven years to file their first statement of claim and that they have deliberately delayed the case by their conduct. He has also stated that the defendant petitioners did not have a proper understanding of what they were doing.

The learned counsel for the petitioners submitted that under Sec. 93 of the Civil Procedure Code amendment of pleadings should be allowed if the party seeking to amend show court that grave and irreparable injustice would be caused if the amendment is not allowed

and that the party so applying is not guilty of laches. To explain what grave and irreparable injustice is, the learned counsel has gone into detail to explain what a partition action is citing authorities which is totally out of line. The issue in the instant application is something entirely different.

The petitioners stated that to address the real issue between the parties the amendment of the statement of claim has to be allowed. He has cited several judgments on amendment of pleadings which are totally irrelevant to the instant application.

On the issue of grave and irreparable injustice caused to the petitioners the learned counsel stated that the land in dispute is used as the entrance to the hotel the only five star resort in the southern province if they are not allowed to amend the statements might lose their service entrance. While admitting the partition case was filed over twenty years ago the petitioners stated they only filed their statements a few years ago.

The petitioners stated that the Supreme Court has repeatedly rejected the notion that mere delay amounts to laches, and cited the

judgments in **Abeywardena and others vs Euginahamy and others** 1984 2 SLR 231, **Punchimahatmaya menike and others vs Ratnayake and others** 18 C.I.W. 18, **Seneviratne vs Candappa** 20 NLR 150, **Peiris vs Weerasekera** 1936 38 NLR 150, **Lulu Balakumar vs Balakumar Bar Journal** 1997 Vol VII part I. In all these cases it has been decided that an amendment should be allowed if it can be made without injustice to the other party. The petitioners citing more judgments went on to argue that it has been held that the Partition Act does not prevent a person from intervening and being added as a party even after delivery of judgment. This is again totally out of the issue in the instant case.

The learned counsel for the plaintiff respondent stated that the petitioners filed their first statement of claim nearly eleven years after filing of the partition case and claimed that they were unaware of the land described in the schedule to the plaint and thereafter the seventh defendant had filed an amended statement of claim and the trial has commenced in July 2001. At the trial the learned District Judge has rejected issue No. 12 raised by the petitioners and they have not appealed against the said order. The respondent's counsel went on to explain how the petitioners have moved for dates on trial dates giving various excuses to delay the trial. The respondents stated that after

moving for time to consider the superimposition of preliminary plan marked as X6.

The respondents stated that in the amended answer the petitioners are attempting to resile not only from the position they took in their second amended statement of claim but also from the position they specifically put to the plaintiff in cross examination and is seeking to once again an exclusion of lots 3 and 4 of plan 2738.

The respondents citing the judgments in **Uberis vs Jayawardena** 62 NLR 217, **Emil Erlanger vs The New Sombrero Phosphate Company** 3 1887-1888 appeal cases 1218 stated that a party is entitle to amend his pleadings only if he satisfied court that grave and irremediable injustice will be cased to him and that he is not guilty of laches. The respondents stated that in the instant case not only the length of the delay in making the applications but also the nature of the acts done by the petitioners establish laches on the part of the petitioners and the injustice the plaintiff would suffer if the amendment is allowed.

There is no provision in the Partition Act for amendment of pleadings therefore one has to revert back to the provisions in the Civil Procedure Code for amendment of pleadings. Sec. 93 of the Civil Procedure Code deals with amendment of pleadings.

Sec. 93 (2) of the Civil Procedure Code reads thus;

“On or after the day first fixed for the trial of the action and before the final judgment. No application for the amendment of pleadings shall be allowed unless the court is satisfied, for reasons to be recorded by 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”.

It is clearly stated in the above section that a party seeking to amend the pleadings should satisfy court that grave and irremediable injustice would be caused to the said party if the amendment is not allowed and that the said party is not guilty of laches.

In the instant case the petitioners have taken over ten years to file their first statement of claim and the amendment was sought after the

trial was commenced and after twenty two years have passed since the filing of the case. Therefore he can not say his rights will be affected if the amendment was not allowed since he has been sleeping over his nights. The petitioners are undoubtedly guilty of laches. The learned district Judge has very correctly ordered that the amendment can not be allowed under *Sec. 93 of the Civil Procedure Code*.

For the afore stated reasons I affirm the order of the learned District Judge of Balapitiya dated 22/10/2004 and dismiss the application of the petitioners, with costs fixed at Rs. 100,000/=.

JUDGE OF THE COURT OF APPEAL.

M.M.A. Gaffoor J.

I agree

JUDGE OF THE COURT OF APPEAL