# GUNASEKERA
# v.
# PUNCHIMENIKE AND OTHERS

COURT OF APPEAL
WIGNESWARAN, J. AND
TILAKAWARDANE, J.
CA NO. 113/89 (F)
DC RATNAPURA NO. 4593/L
AUGUST 25, 1999
OCTOBER 25, 1999
SEPTEMBER 20, 2000

*Civil Procedure Code s. 41, s. 46 (2), s. 86, s. 93 – When should Court act under s. 46 (2)? – Imperative nature of s. 41 – Amendment of plaint – No notice of amendment given – If plaint ineffective is the Court obliged to dismiss the Action?*

Plaint was filed seeking a declaration of title to an undivided share of a land. It was pleaded that the defendant-appellant had encroached upon a portion – the encroached portion was not described with reference to physical metes and bounds or by reference to any map or sketch. The matter was fixed for *ex parte* trial; after *ex parte* trial application was made to issue a commission to survey the land and identify same. The *ex parte* trial did not end up in a judgment. After the return of the Commissioner, the plaint was amended, a fresh *ex parte* trial was thereafter held. After the decree was served, the defendant-appellant sought to purge default, which was refused.

On appeal –

**Held:**

(i) The Court was obliged initially to have rejected the original plaint since it did not describe the portion encroached upon – s. 46 (2) (*a*) read together with s. 41, CPC.

(ii) When a plan was prepared after *ex parte* evidence had been partially led and recorded and an amended plaint filed, Court should have issued notice as per s. 93, CPC.

*Per* Wigneswaran, J.

"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."

(iii) If an *ex parte* is to be held against a party on a plaint which is innocuous and harmless, the party may keep away knowing fully well that nothing serious was going to take place.

**APPEAL** from the judgment of the District Court of Ratnapura.

**Cases referred to :**

1. *De Silva* v. *De Silva* – 77 NLR 554 at 557.
2. *Brampy* v. *Pieris* – 3 NLR 34.
3. *The Board of Directors of Ceylon Savings Bank* v. *R. Nagodavithane* – 71 NLR 90 at 92.

*N. B. D. S. Wijesekera* for 5th defendant-appellant.

*Hemasiri Withanachchi* with *S. N. Vijith Singh* for substituted plaintiff-respondents.

*Cur. adv. vult.*

November 03, 2000

**WIGNESWARAN, J.**

Plaint in this case was filed on 09. 02. 1981 seeking declaration of title to an undivided 7/8th share of a land depicted in a plan marked A dated 08. 03. 1897 said to contain 24 perches and described in the schedule thereto, for ejectment of the defendants, for damages and costs. The plaint averred that the defendants had unlawfully entered the land described in the schedule to the plaint in May, 1980, and encroached upon a portion. The encroached portion was not described in the plaint with reference to physical metes and bounds or by reference to any sketch, map or plan. No application was made in the plaint to issue a commission to have the land surveyed and the portion alleged to have been encroached upon, to be depicted therein.

It is useful at this stage to consider the provisions of section 41 of the Civil Procedure Code which reads as follows:

*"41. When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds, or by reference to a sufficient sketch, map, or plan to be appended to the plaint, and not by name only."*

Section 46 (2) of the Civil Procedure Code states that a Court may refuse to entertain a plaint when first filed and return same for amendment then and there if it found that the plaint did not state correctly the several particulars required by the earlier sections (in chapter VII) to be specified therein, which includes the provisions of section 41 above-mentioned.

Properly speaking, the Court should have in this instance acted in terms of section 46 (2) of the Civil Procedure Code and returned the plaint for amendment. It did not summons was issued and proxy was filed on behalf of 1st, 2nd, 4th and 5th defendants on 02. 11. 1981 and *ex parte* was ordered against the 2nd defendant. Though dates were given, answer was not filed.

In fact, the defendants could very well have kept quiet in this case with the type of plaint filed because writ could not have been executed in terms of a decree entered on the basis of the plaint, since the area allegedly encroached upon had not been identified and the plan mentioned in the schedule to the plaint was prepared almost 90 years earlier. In addition it is to be noted that the plaintiff was a co-owner and the other co-owner had not been made a party to the case. The area occupied by the plaintiff in lieu of her undivided 7/8th share had not been described. What portion was occupied by the 1/8th share owner, if occupied at all, was not described.

When answer was not filed on 22. 11. 1982 the case was fixed for *ex parte* trial on 26. 01. 1983 against all the defendants. Attorney-at-law for the plaintiff then moved to amend the plaint. In fact, an

amended plaint was filed on 29. 08. 1983 which was no different from the plaint filed on 09. 02. 1981. The *ex parte* trial also took place on 29. 08. 1983. At the end of the *ex parte* trial an application was made to issue a commission to a Court Surveyor to survey the land mentioned in the schedule to the plaint to properly identify same, since the plan mentioned in the plaint and marked P11, was very old. This application was allowed by the Acting District Judge. The *ex parte* trial on that day did not end up in a judgment and decree. If judgment and decree were entered as per plaint and documents tendered to Court on that day, a writ based on such decree could not have been properly executed since the land could not have been identified on the basis of the boundaries mentioned in the schedule to the plaint. The only recognisable boundary, the southern boundary, had changed.

Thereafter, commission was issued, and Plan No. 432 dated 11. 11. 1984 was prepared by Court Commissioner M. Samarasekera, Licensed Surveyor. The land surveyed was in two lots with a V C Road running in between. A superimposition of a photostat copy of Plan A prepared in 1897 was also done after the new survey, with the only available fixation data being a roadway to the south of the land described in the original plaint, which according to the Surveyor had been "abandoned" at the time of survey. In other words the land which the plaintiff sought to obtain declaration of title and ejectment did not exist in reality as described in the plaint. *It must also be noted that for superimposition purposes photostat copies are to be avoided since they lack accuracy.*

On 12. 09. 1985 application was made to amend the plaint again and the application was granted. On 29. 11. 1985 amended plaint was filed. Declaration and ejectment were claimed in respect of the land depicted in the new plan. Inquiry with regard to the amended plaint filed on 29. 11. 1985 was held before the then District Judge on 18. 11. 1986. It appears that on 18. 11. 1986 the question arose as to whether notice under section 93 of the Civil Procedure Code with regard to amendment of the plaint should be sent to the defendants.

The then District Judge had determined on 11. 12. 1986 that since the *ex parte* trial had already started and the plan was prepared only during the course of the *ex parte* trial and the defendants were not before Court as at that date, notice was not necessary. Thereafter, *ex parte* trial was not continued as from where it was left off on 29. 08. 1983. The defendants' names were called out (without issuing notice on them) and since they were not present, a fresh *ex parte* trial was ordered and held on 03. 03. 1987 and judgment entered on that day itself. A copy of the decree was served on the 5th defendant-appellant. He filed papers to purge his default on the grounds that –

(1) there was no personal service of summons, and that

(2) no notice of amendment of plaint was given to him.

After inquiry the then District Judge made order on 21. 04. 1989 dismissing the application and refusing to set aside the *ex parte* decree.

*This is an appeal against the said order dated 21. 04. 1989.*

The learned Counsel for the 5th defendant-appellant has submitted as follows:

(i) The amended plaint filed without notice to the defendants was a clear violation of section 93 of the Civil Procedure Code.

(ii) The plaint could not have been amended after *ex parte* trial was fixed. *De Silva* v *De Silva*[1]

(iii) Lot 2 on Plan No. 432 is to the south of the road, while the southern boundary to the land mentioned in the original plaint was road. Thus, a different portion of land has been brought in by amending the plaint.

The learned Counsel for the plaintiff-respondent argued that what was before Court for determination was whether there was sufficient material placed before the District Court to purge the 5th defendant's default. The latter cannot challenge the validity of the *ex parte* judgment or the merits of the case. In any event the Attorney-at-law for the 5th defendant was present in Court on 26. 01. 1983 when application was made to file amended plaint as well as on 29. 08. 1983 when application for a commission to survey the land in dispute was made. So too the 5th defendant-appellant was present at the time of survey by the Court Commissioner on 03. 08. 1984. The amended plaint only identified the disputed land better. The amended plaint had not changed the scope nor nature of the action. The extent of land claimed is in any event less than 24 perches (viz. 17.5 perches). He referred to *Brampy v. Pieris*[2] to support his view that a plaintiff was entitled to supplement his evidence in cases of this nature. He further argued that the phrase "after reasonable notice to all the parties" in section 93 necessarily meant parties before Court and not parties who have kept away.

All these submissions would presently be examined.

Basically, it must be noted that if judgment and decree were entered as per the plaint dated 09. 02. 1981 or amended plaint dated 29. 08. 1983 and the other documents filed on 29. 08. 1983, a writ issued on such a decree would have been impossible to execute. The land which was the subject-matter of this action would not have been identified as per the boundaries given on the writ (based on the schedule to the plaint). The defendants, therefore, would not have been affected or prejudiced by a decree being entered as per the original plaint or the amended plaint dated 29. 08. 1983. In fact, the Court was obliged initially to have rejected the original plaint since it did not describe the portion encroached upon. But, when a plan was prepared after *ex parte* evidence had been partially led and recorded and an amended plaint was thereafter filed, the Court should have issued notice as per section 93 of the Civil Procedure Code.

If an *ex parte* is to be held against a party on a plaint which is innocuous and harmless, that party may keep away knowing full well that nothing serious was going to take place. It is akin to an accused person not leading any evidence on his behalf and keeping mum in Court when he is certain that the prosecution cannot prove a *prima facie* case against him. But, after obtaining an order for *ex parte* trial if a plaintiff would take steps to include into the original ineffective plaint matters which may adversely affect and prejudice the defendants, the Court would be duty bound to give notice of any such amendment. In fact, a Court should not allow amendment of pleadings after an *ex parte* trial has been ordered. According to section 84 of the Civil Procedure Code on the default of the defendant "the Court shall proceed to hear the case *ex parte* forthwith or on such other day as the Court may fix". The scheme of the Civil Procedure 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" (vide Vythialingam, J. in *De Silva* v *De Silva* (*supra*) at 557). Siva Supramaniam, J. said in *The Board of Directors of Ceylon Savings Bank* v *R. Nagodavitane*[3] at 92: "The words 'shall proceed to hear the case *ex parte*' therefore mean that the next step the Court shall take is to hear the case *ex parte*. The hearing need not necessarily be on the same day". When this judgment was given, the word "forthwith" was not included in the said section.

Vythialingam, J. went on to say in *De Silva* v. *De Silva* (*supra*) at page 559 "... that it is an imperative provision of law that where the defendant is in default, the Court should proceed to trial *ex parte* as the next step and enter *decree nisi* (under the earlier provisions of the section) or dismiss the plaintiff's action if he fails to prove his case". That meant, if the plaint was ineffective, the Court was obliged to dismiss the plaintiff's action, and not salvage it behind the back of the defendants.

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. At least those parties who would be affected by the decree that shall be passed on such amended pleadings, must necessarily be given notice whether they are before Court or "deliberately and contumaciously kept away from the judicial proceedings and who had shown scant respect for the due process of law", (to quote the learned Counsel for the plaintiff-respondent). The latter observation of the Counsel was most unfortunate, because it appears that the registered Attorney-at-law for the 5th defendant-appellant Mr. F. R. Weerasekera of the Ratnapura Bar who had filed proxy for the defendants and taken dates to file answer, was ill for a long period of time and is said to have died somewhere in 1988. (vide paragraph 16 of the petition of appeal).

As stated earlier the plaint in this instance should have been refused to be entertained in the first instance in terms of section 46 (2) (a) read together with section 41 of the Civil Procedure Code. Since that was not done, the Court should have acted under section 93 by giving reasonable notice to all the defendants when the plaint was to be amended. After all an amended plaint would be a fresh plaint on which the case would be continued, abandoning the earlier plaint. The defendants were, therefore, entitled to notice. May be they would not have been entitled to costs as per section 93. Since such notice was not given, at least at the stage of inquiry into the application to purge default, the denial of notice to the defendants, should have been taken into consideration and order made accordingly. Even at that stage this was not done. The learned District Judge seems to have been under the impression that the Attorney-at-Law for the defendants was present in Court when an application to amend the plaint was made on 26. 01. 1983. This is incorrect. Journal entry 14

of 26. 01. 1983 no doubt refers to appearances of registered Attorneys-at-Law for the plaintiff and the defendants. But, such appearances are inserted in the journal entries by clerks of Court on the basis of the proxies filed *prior* to the case being taken up in open Court. In this instance the journal entry does not state "ඇවිත්" to come to the conclusion that when the case was called, both Attorneys-at-Law were present in Court. Therefore, it was wrong to have come to the conclusion that the Attorney-at-Law for the defendants had notice of an application to amend plaint. Presumably, he was not present in Court on 26. 01. 1983. In any event he had no status on 26. 01. 1983 when the case had been already fixed for *ex parte* trial on 22. 11. 1982.

*Brampy* v. *Pieris* (*supra*) has no bearing to the present case. There was no amendment of pleadings contemplated in the case referred to.

Therefore, we find that the allowing of amendment of the plaint after the case was fixed for *ex parte* trial without notices to all parties who would have been affected by such amendment was tainted with illegality. A Court cannot allow amendment of pleadings without notice to all parties who shall be affected by such amendment.

We, therefore, set aside the orders dated 22. 11. 1982, 11. 12. 1986, 03. 03. 1987 (and decree dated 03. 03. 1987) and order dated 21. 04. 1989 and quash all proceedings thereafter undertaken and direct the District Judge, Ratnapura, to give notice to all defendants (including the 3rd defendant) with regard to the amended plaint filed, thereafter receive any objections that may be tendered, inquire into same and proceed therefrom according to law. Parties shall bear their own costs.

**TILAKAWARDANE, J.** – I agree.

*Appeal allowed.*