RAJASINGHAM
v.
SENEVIRATNE AND ANOTHER

COURT OF APPEAL
WIGNESWARAN, J., AND
TILAKAWARDANE, J.
CA NO. 1056/96 (F)
DC COLOMBO NO. 4907/ZL
MARCH 23, 2000 AND
JULY 4, 2000

Civil Procedure Code – Sections 93 and 150 – Appellant did not contest the plaint as reliefs prayed for did not affect her – Amendment of plaint – Relief sought against appellant – No notice by court given to the appellant – Ex parte judgment against appellant – Applicability of section 93 – Character of case changed – Permissibility – Illegality of proceedings.

The plaintiff-respondent filed action against the Commissioner of National Housing (CNH) and the 2nd defendant-appellant, for a declaration that the plaintiff-respondent was entitled to use lot 2, her access to her land. The 2nd defendant-appellant did not contest the plaint since the reliefs prayed for did not affect her.

The plaintiff-respondent filed amended plaint with permission of Court. The amended plaint contained an additional prayer which sought an order and decree on the defendant-appellant to demolish and remove structures constructed by her on certain lots. The case went *ex parte* against the 2nd defendant, on the amended plaint.

The application to set aside the *ex parte* judgment was rejected.

On appeal –

Held:

(1) The journal shows that a copy of the amended plaint had been sent by registered post by the plaintiff. 'Under no circumstances should parties arrogate to themselves the functions of Court unless the Court directs them to do so. Sending of notices statutorily expected from Court should not be substituted by parties taking such facts upon themselves'.

(2) The amended plaint refers to an encroachment by the 2nd defendant the character of the case seemed entirely changed. Whether the 2nd defendant was present in Court or not it was the duty of Court to have *ex mero motu* considered the effect of the amendment.

(3) The amendment to the plaint took place without conforming to s. 93; under s. 93 it was the Court which should have given notice to the 2nd defendant. Notice under s. 93 is not to be presumed. It has to be real.

Per Wigneswaran, J.

"When the order fixing the case for *ex parte* trial itself was questionable the nature of evidence placed by the 2nd defendant to set aside the *ex parte* decree becomes irrelevant.

It was also contended that –

(i) parties and their legal representatives were expected to be present in Court on a regular calling date; and

(ii) whether notice was given of amendment of plaint to the 2nd defendant or not is irrelevant in an application to set aside the *ex parte* decree.

Held, further –

(1) The 2nd defendant had already filed answer that she was not contesting the plaintiff's original plaint since no relief was claimed against her. She was entitled to keep away on a regular calling date expecting the case to take its normal course with the plaintiff, prosecuting the original plaint.

(2) If notice of amendment of pleadings is not given in terms of the law to the party affected, if the Court does not consider (whether the affected party is before Court or not) the feasibility of the amendment prayed for and act in terms of the law, all proceedings thereafter would become tainted with illegality, whatever the shortcomings in the defendant's conduct might be. A Court of law should not be an apathetic bystander under these conditions.

APPEAL from judgment of the District Court of Colombo.

K. Kanag Iswaran, PC with *Anil Tittawela* for 2nd defendant-appellant.

Romesh de Silva, PC with *Saumya Amarasekera* for plaintiff-respondent

Cur. adv. vult.

October 18, 2001

WIGNESWARAN, J.

This is an appeal against the order dated 25. 10. 1996 made by the Additional District Judge, Colombo, refusing to set aside an *ex parte* judgment dated 04. 12. 1990 entered against the 2nd defendant-appellant. There is also reference in the Petition of Appeal dated 18. 12. 1996 to an appeal against an incidental order dated 24. 01. 1991 permitting amendment of judgment and decree dated 04. 12. 1990.

The plaintiff-respondent filed this action on 22. 02. 1985 against the Commissioner of National Housing and the 2nd defendant-appellant, a neighbour of the plaintiff-respondent, for a declaration that the plaintiff-respondent was entitled to us lot 2 depicted in Plan No. 2058 dated 07. 03. 1977 made by H. Anil Peiris, Licensed Surveyor, as part and parcel of a road reservation which she claimed as her access to Inner Bagatalle Road and described in the fourth schedule to the plaint. Even though lots 3, 6, 7 and 11 (part) depicted in Plan No. PP Ko/1410 dated 27. 09. 1971 authenticated by the Surveyor-General and lots 1 and 2 in Plan No. 2058 abovesaid (in extent 16.50 perches) are mentioned in the fourth schedule to the plaint, what appeared as road reservations over which right of way had been given to the plaintiff under Instrument of Disposition No. 1082 dated 01. 06. 1976 were only lots 7 and 11 in PP Ko/1410 dated 27. 09. 1971 abovesaid. The plaintiff also prayed for a declaration that the Commissioner of National Housing had no right to convey the dominium in lot 2 or any part of the road reservations to the 2nd defendant absolutely.

The 2nd defendant-appellant by answer dated 04. 09. 1985 stated that the substantive relief sought being a declaratory relief against the Commissioner of National Housing, the 1st defendant, she would abide by any order made by Court. The plaint dated 22. 02. 1985 did not seek the demolition of any structure or ask for any relief which might have prejudiced the 2nd defendant-appellant in any way. The abovesaid answer meant that the 2nd defendant-appellant was not interested in contesting the plaint dated 22.02.1985 since the reliefs prayed for did not affect her.

When this case came up for trial on 30. 05. 1986 the Counsel for plaintiff informed Court that this case (No. 4907/ZL) was connected to case No. 4705/ZL. Thereby, trial in this case was postponed for 24. 10. 1986.

It is to be noted that case No. 4705/ZL was mentioned in paragraph 20 of the plaint dated 22. 02. 1985 as one filed against Nissanka Dabare for a declaration of the plaintiff's right to the full and unimpeded user of the roadway described in the fourth schedule to the present plaint.

This case was not taken up for trial on 24. 10. 1986. Awaiting decision in case No. 4705/ZL the trial in this case was taken out of the trial roll and postponed a number of times from 24. 10. 1986 until around 23. 01. 1990 when a date was obtained for an amended plaint to be filed. A copy of the judgment in case No. 4705/ZL seems to have been not filed nor its determination referred to, after awaiting so long for its decision. But, an application to amend the plaint in this case was made and readily granted. How the Court allowed a date to file amended plaint without taking steps under section 93 of the Civil Procedure Code remains unclear as per the relevant journal entry.

Section 93 as on 23. 01. 1990 before section 2 of Act No. 9 of 1991 came into operation, but after the enactment of section 9 of Act No. 79 of 1988 read as follows :

"93. (1) *The Court may, in exceptional circumstances and for reasons to be recorded, at any hearing of the action, or at any time in the presence of, or after reasonable notice to all the parties to the action, before final judgment, amend all pleadings and processes in the action by way of addition, or of alteration or of omission.*

(2) *Every order for amendment made under this section shall be upon such terms as to costs and postponement of the date fixed for*

the filing of answer, or replication, or for the hearing of the case or otherwise, as the Court may think fit.

(3) *The amendments or additions made in pursuance of an order under this section shall be clearly written on the pleadings or processes affected by the order; or if it cannot be conveniently so done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the judge."*

The burden of giving notice under the above section was cast on the Court. The reasons which constituted exceptional circumstances leading to amendment of pleadings also was to be recorded. Of course journal entry 43 in this case speaks of a copy of the amended plaint being sent and the relevant registered article receipt being filed. But, this was not done in consequence of any order of Court. In any event the Court was not to expect parties to send notices on their own by registered post when the burden was cast on the Court to give notice.

Many reasons contributed to reverting back to the provisions of the Civil Procedure Code with regard to service of summons and notices in preference to the provisions of the Administration of Justice Law in this regard. In the case of service of summons and notices, service through Fiscal officers was preferred to sending them by registered post since the latter mode of service, even by Court, was found to be unsatisfactory despite Return Cards being expected to be signed by recipients.

In this instance the notice had been allegedly sent by registered post without any order from Court. Apparently, a copy of the motion containing the proposed amendments to the plaint had been sent by registered post only on 05. 02. 1990 when the case was scheduled to be called on 08. 02. 1990. On 15. 02. 1990, there is a journal entry to the effect that copy of amended plaint had been sent by registered post presumably by the plaintiff. Under no circumstances

should parties arrogate to themselves the functions of Court unless the Court directs them to do so. Sending of notices statutorily expected from Court should not be substituted by parties taking such tasks upon themselves. Before amendment was allowed, in this instance, the Court should have taken sufficient care to see that notice of the desire on the part of the plaintiff to amend the plaint was given to the 2nd defendant, specially on account of the answer already filed by her.

The amended plaint filed contained an additional prayer which sought an order and decree on the 2nd defendant-appellant abovenamed to demolish and remove the structures constructed by her on lots 2A, 6A and 7A in Plan No: 4242 dated 20. 01. 1988 made by S. D. Liyanasuriya, Licensed Surveyor. There was no reference to a Plan by Surveyor Liyanasuriya in the original plaint. The amended paragraphs 10 (*a*), (*b*) and (*c*) in place of the original paragraph 10 was completely different. The new paragraph sought to aver what was *contemplated* by the Commissioner of National Housing and purportedly *intended* by him. Thereby, the plaintiff called the contents of her own deed erroneous having based her original plaint on the same deed. The right of way claimed was now amended to read from "lots 7 and 11 in Plan No. Ko / 1410" etc. to "lots 6 and 7 in plan No. Ko / 1410" etc. New paragraph 22 (*a*) referred to a Survey by Surveyor Liyanasuriya *after* the institution of this action. The new paragraph 22 (*b*) spoke of an *encroachment* by the 2nd defendant. The character of this case seemed entirely changed by the said amendment. The Court seems to have not considered all this. It had curiously allowed such an amendment. Whether the 2nd defendant was present in Court or not, it was the duty of Court to have *ex mero motu* considered the effect of the amendment. In view of the contents of explanation 2 of section 150 of the Civil Procedure Code it was the duty of Court to have checked whether the amended plaint sought to place on record a case materially different to that which was originally filed. Here, was a declaratory action filed against the 1st defendant claiming no relief against the 2nd defendant. Then suddenly an amended plaint is filed averring that

the 2nd defendant had encroached and asking for relief highly prejudicial to the interests of the 2nd defendant and the Court does not question the propriety of such action nor does it give notice on its own to the 2nd defendant. More so, in view of the type of answer filed by the 2nd defendant in this case, in absolute trust.

Finally, the case comes up for *ex parte* trial against the 2nd defendant on 16. 10. 1990 and judgment was delivered against her on 05. 12. 1990.

But, in fairness to the Additional District Judge it must be noted that the *ex parte* judgment dated 04. 12. 1990 delivered on 05. 12. 1990 was based on the original plaint dated 22. 02. 1985 and not on the amended plaint dated 05. 02. 1990. This judgment and decree did not affect the interests of the 2nd defendant.

But, on 15. 01. 1991 the plaintiff filed a motion and sought the amendment of the judgment and decree. There was no notice given to the 2nd defendant. On 24. 01. 1991 the Court permitted the application to amend. It is not clear whether the learned Additional District Judge considered the effect of such amendment before allowing the application. If he considered the effects he would no doubt have noticed the material difference between the reliefs prayed for in the original plaint and the amended plaint.

When copy of the amended decree was served on the 2nd defendant, she moved to vacate the *ex parte* judgment and decree in terms of section 86 of the Civil Procedure Code. The Additional District Judge as per journal entry 63 dated 25. 02. 1991 rejected the application in chambers on the basis that the Petition and Affidavit had not been properly stamped. This became the subject-matter of appeal in Court of Appeal Case No. CA 194/91 and Supreme Court case No. SC 5/93 and by order dated 26. 07. 1995 the Supreme Court directed the District Court to inquire into the application under section 86 of the Civil Procedure Code.

On 25. 10. 1996 the Additional District Judge, Colombo, disallowed the application to set aside the *ex parte* judgment. The present appeal is against the orders dated 25. 10. 1996, 04. 12. 1990 (*ex parte* judgment) and 24. 01. 1991 (amendment of decree).

On the face of it, the amendment to the plaint took place without conforming to the provisions of section 93 of the Civil Procedure Code. Under that section it was the Court which should have given notice to the 2nd defendant. It should have gathered all parties together before it on its own volition. In this instance it was absolutely essential that this was done due to the type of answer filed by the 2nd defendant. Several calling dates were given without taking this case up for trial on the basis that it was to be called with case No. 4705/ZL. This meant that parties awaited the decision in case No. 4705/ZL. When an application was suddenly made on 08. 02. 1990 to amend plaint, immediately the Court should have noticed the 2nd defendant irrespective of whether the plaintiff had sent a copy of motion to amend or a copy of draft amended plaint to 2nd defendant by registered post. Even after notice by Court, if the 2nd defendant was not present in Court, *yet* the Court was under obligation to consider whether the amended plaint sought to change the whole character of the original plaint filed in this case and whether it was materially different or not to the original plaint filed. None of these have been done.

The learned President's Counsel on behalf of the plaintiff-respondent, who is herself a respected President's Counsel, has sought to argue as follows :

(i) No evidence was led on behalf of the 2nd defendant to set aside the *ex parte* decree entered against her.

This could be answered promptly and tersely. When the order fixing the case for *ex parte* trial itself was questionable the nature

of evidence placed by the 2nd defendant to set aside the *ex parte* decree becomes irrelevant.

(ii) Notice of the amendment of the plaint was, in fact, given to both defendants.

This is not so. The notice was expected to be given by Court in terms of section 93 of the Civil Procedure Code and not by the plaintiff. In any event, in terms of the law (as on the relevant date) the Court could have allowed amendment only "in exceptional circumstances and for reasons to be recorded". No such exceptional circumstances were identified nor reasons for allowing amendment recorded.

(iii) The parties and their legal representatives were expected to be present in Court on a regular calling date.

Not in this instance. The 2nd defendant had already filed answer that she was not contesting the plaintiff's original plaint since no relief was claimed against her. She was entitled to keep away on a regular calling date expecting the case to take its normal course with the plaintiff prosecuting the original plaint. Any change in course should have had the attention of the 2nd defendant, specially when such change was going to affect her adversely. Any such change in course should have been undertaken after notice to all parties by Court. Not only that. Even if she was absent from Court after notice, the Court was under obligation to inquire into the feasibility of allowing an amended plaint in this instance materially different from the original plaint filed.

(iv) Whether notice was given of amendment of plaint to the 2nd defendant or not is irrelevant in an application to set aside the *ex parte* decree.

This is an astounding submission. If this submission is accepted what it would mean is, that a plaintiff has a right to do anything he or she likes and obtain an *ex parte* decree in whatsoever manner he or she wishes and the only relief that a defendant who had defaulted in appearance but adversely affected by the decree has, is to make out a proper case for his absence. If not, the *ex parte* decree could be executed, come what may. The serious flaw in this argument lies in making the Court a party to all the machinations of a plaintiff. As in this case, if an amended plaint is filed materially prejudical to the (2nd) defendant and of a different character to the original plaint and if the (2nd) defendant keeps away on the calling date, the amended plaint must be accepted by the Court because the (2nd) defendant is not before Court and then an *ex parte* trial should be held and the burden will shift thereafter on the (2nd) defendant. The prayers in the plaint would have to be granted because the (2nd) defendant is not before Court. Until the (2nd) defendant purges his default, woe be *unto him. The decree can thereafter be executed howsoever* unreasonable it might be.

We are afraid a Court should not be made a party to such sterile proceedings. A Court of law should not be an apathetic bystander under these conditions. If notice of amendment of pleadings is not given in terms of the law to the party affected, if the Court does not consider (whether the affected party is before Court or not) the feasibility of the amendment prayed for and act in terms of the law, all proceedings thereafter would become tainted with illegality, whatever the shortcomings in the defendant's conduct might be.

In this case all proceedings as from 08. 02. 1990 when the plaintiff moved to amend the plaint and such application was allowed without notice to the 2nd defendant-appellant, became tainted with illegality.

(v) Prior to 16. 10. 1990 plaintiff's lawyer filed a list of witnesses and documents with notice to the registered Attorney-at-law for the 2nd defendant. The 2nd defendant must, therefore, be presumed to have had notice.

The notice contemplated under section 93 of the Civil Procedure Code is not to be presumed. It has to be real. The Court should oversee the issue of notice on parties and satisfy itself that all parties did receive notice. Not only that. When amendment was allowed the exceptional circumstances that gave rise to such amendment should have been recorded in terms of the then 260
existing provisions of the law.

Thus, we find no difficulty in coming to the conclusion that all steps taken after 24. 02. 1990 were tainted with illegality. We do not need the extra documents filed by the 2nd defendant-appellant with her written submissions in this Court to come to our decision. Hence, the objections with regard to the filing of extra documents is not being considered by us in this judgment.

We set aside the orders dated 04. 12. 1990, 24. 01. 1991 and 25. 10. 1991 made by the Additional District Judge, Colombo, in this case and direct the learned Additional District Judge to give notice 270
to parties with regard to the application for amendment of plaint, have an inquiry in this regard and thereafter proceed according to law.

The appeal is allowed with incurred costs payable by the plaintiff-respondent to the 2nd defendant-appellant.

TILAKAWARDANE, J. – I agree.

Appeal allowed.