LANKA ORIENT LEASING COMPANY LTD.
v.
ALI AND ANOTHER

COURT OF APPEAL.
DE SILVA, J.,
JAYAWICKRAMA, J.
C.A. NO. 840/97.
DC REV. NO. 3918/M.
MARCH 18, 1999.
JULY 6 AND 26, 1999.

Civil Procedure Code – S. 146 (2) – Amendment of Answer to reject – Plaint in limine – As Court has no jurisdiction in view of Arbitration Clause – Necessary amendment.

Held:

1. The arbitration agreement was part and parcel of the plaint.

2. The amendment is a necessary amendment on which the right decision of the case appears to depend.

APPLICATION in Revision from the order of the Additional District Judge of Colombo.

Romesh de Silva, PC with *L. B. J. Peiris* for the plaintiff-petitioner.

S. A. Parathalingam, PC with *M. F. Musthapa* for defendant-respondents.

Cur. adv. vult.

September 03, 1999.

JAYAWICKRAMA, J.

This is an application to revise the order dated 06.10.1997 of the learned Additional District Judge of Colombo allowing to amend the answer of the defendant.

The plaintiff-petitioner instituted this action on 13.05.1988 against the defendant-respondent jointly and severally for the recovery of Rs. 700,269 with interest thereon and also for the recovery of the property described in the schedule to the plaint.

When the matter came up for trial on 12.11.1996 it was submitted on behalf of the 1st defendant-respondent that the documents annexed to the plaint marked A and B had not been served on him and that, therefore, it was necessary for him to amend the answer. The petitioner refuted the same but without prejudice to his rights agreed to hand over copies of same to the 1st defendant-respondent and accordingly they were served on the registered Attorneys to the 1st defendant by registered post. The petitioner also reserved his rights to object to the amended answer after it was tendered. Thereafter, on 10.12.1996 amended answer was tendered on behalf of the 1st defendant-respondent and the petitioner filed objections thereto and when this matter came up for inquiry on 05.05.1997 it was submitted on behalf of the 1st defendant-respondent that in view of the conditions contained in the document "A" the matter had to be referred to arbitration and that the District Court had no jurisdiction to hear this matter.

On 06.10.1997 the Additional District Judge made his order allowing the amended answer on the basis that according to the procedure of 12.11.1996 when the 1st defendant-respondent sought permission to amend the answer the petitioner had not objected to the amended answer and therefore the petitioner cannot now object to the amendment of the answer.

The learned Additional District Judge in his order dated 06.10.1997 has stated as follows:

'මෙම නඩුවේ 96.11.12 දින විභාග සටහන් අනුව විත්තිකරුට සංශෝධිත උත්තර ඉදිරිපත් කිරීමට ඉඩදීම පිළිබඳව පැමිණිල්ලෙන් විරුද්ධ වී නැත. මේ අනුව අධිකරණය විසින් විත්තිකරුට සංශෝධිත උත්තරයක් ඉදිරිපත් කිරීමට අවසර දී ඇත. විත්තිකරුට එම උත්තර ඉදිරිපත් කිරීමට දී ඇති එම අයිතියට දැන් පැමිණිල්ලට තර්ක කළ නොහැකිය.'

On a perusal of the proceedings dated 12.11.1996 we find that the above statement of the learned Additional District Judge is erroneous. The proceedings of 12.11.1996 relevant to this application is as follows:

"ඒ එකඟතාවය අනුව විත්තිකරුට උත්තර සංශෝධිත කිරීමට දිනයක් ඉල්ලා සිටී. පැමිණිලිකරු එම ඉල්ලීමට විරුද්ධ නැත. නමුත් සංශෝධිත උත්තරය ඉදිරිපත් කළාට පසු එම පංශෝධිත උත්තරයට කිසියම් විරෝධිතාවක් තිබේනම් එය ඉදිරිපත් කිරීමට පැමිණිල්ල අයිතිය රඳවා ගනී."

It is abundantly clear that the plaintiff has not objected only to the granting of a date for the amendment of the answer to be tendered to Court but subject to his objections, if any. Although the reasoning of the learned Additional District Judge allowing the amendment is erroneous, we are unable to agree with the contention that the decision to allow the amendment is also erroneous.

According to the amended answer dated 10.12.1996 the only amendment that the defendant sought to make was that ". . . the plaint should be rejected *in limine* as this Court has no jurisdiction to entertain this plaint and/or hear and determine this action in view of the arbitration clause in the agreement marked A annexed to the plaint". This action is based on the agreement marked A which is annexed to the plaint. By Article 24 of the agreement marked PIA which is part and parcel of the plaint which is the arbitration clause referred to above, the parties have agreed to "refer all disputes, differences and questions whatsoever which may, from time to time, or at any time hereafter arise or occur between the parties to arbitration". This agreement being part and parcel of the plaint even without an amendment of the answer an issue could have been raised at the trial under section 146 (2) of the Civil Procedure Code, according to which "where parties are not agreed as to questions of fact or of law to be decided between them, the Court shall upon the allegation made in the plaint, or in answer to interrogatories delivered in the action, or *upon the contents of documents produced by either party* . . . proceed to record the issues on which the right decision of the case appears to the Court to depend".

It is to be noted that according to the proceedings dated 05.05.1997 this matter has been raised before the learned District Judge. Accordingly, the 1st defendant pointed out that in view of the agreement marked "A" the Court has no jurisdiction to hear this matter as it has to be referred to arbitration. On that date the learned Additional District Judge made order that the question whether this matter should go before an arbitrator or not be decided on written submissions tendered by the parties and a date was given to tender written submissions. On written submissions being tendered the learned Additional District Judge without making an order on that matter, on 17.07.1997 ordered that as the matter fixed for inquiry on 05.05.1997 was regarding the objections raised by the petitioner to the application made by the 1st defendant-respondent to amend the answer, the 1st defendant-respondent to tender written submissions on the same. Although the learned Additional District Judge decided on 05.05.1997 to make order regarding the question of arbitration on written submissions tendered by the parties without making such an order he directed the parties again to make written submissions regarding the question of amendment of the answer.

In considering all the above facts and specially the arbitration clause referred to above in the agreement marked A which is part and parcel of the plaint we are of the view that the amendment sought to be made by the defendant is in accordance with the pleadings of this case. In view of the submissions made before us; the direction of the learned District Judge dated 05.05.1997 and the contents of Article 24 of the agreement marked 'A' we are of the view that this amendment is a necessary amendment "on which the right decision of the case appears to depend". The amendment sought to be made by the defendant is solely based on the document marked "A" which is part and parcel of the plaint. In view of the above reasons we are of the view that there are no valid reasons to interfere with the order made by the learned Additional District Judge allowing the amended answer dated 06.10.1997. Hence, this application for revision is dismissed with Rs. 2,500 as costs to be paid by the plaintiff-petitioner to the defendant-respondent.

DE SILVA, J. – I agree.

Application dismissed.