HATTON NATIONAL BANK
v.
SILVA AND ANOTHER

COURT OF APPEAL.
DE SILVA, J.,
WEERASURIYA, J.
C.A. NO. 201/98 (REV).
FEBRUARY 03, 1999.

Civil Procedure Code s. 4 – Amendment No. 9 of 1991 – S. 93 (2) – Amendment of pleadings – Enjoining Order dissolved – Money released – New cause of action to sue for damages – Additional prayers brought in – Change of scope of action.

The plaintiff-respondent filed action against the 1st defendant-respondent and the 2nd defendant-petitioner (Bank) seeking a declaration that the plaintiff is not liable to pay the 1st defendant a certain sum of money in respect of unsettled bills, and that the 1st defendant is not entitled to demand from the 2nd defendant the said sum or any sum of money on the Bank guarantee, and to restrain the 2nd defendant from paying the 1st defendant, on the Bank guarantee. The enjoining order granted was later dissolved and the 2nd defendant, released the money to the 1st defendant under the guarantee bond.

The trial though fixed for 28.11.96 and 11.3.97 did not take place, but the plaintiff thereafter sought to amend the plaint. It was contended that, when the interim injunction was refused without waiting for the final decision the 2nd defendant Bank had paid the money to the 1st plaintiff, and therefore due to the said act of the 2nd defendant a cause of action arose to sue the defendants to claim damages from them. The plaintiff also sought to bring 2 additional prayers. The District Court allowed the amendment.

Held:

Per de Silva, J.

> "On a perusal of the Order it is clear that in permitting the amendment the Court has been influenced by the fact that when the enjoining order was set aside by Court, the 2nd defendant had paid the money before the final

determination; if this reasoning is correct then there is no necessity for a party to seek injunctive relief. It would be sufficient merely to institute an action to tie the hands of all the parties to an action."

1. When a Bank has given a guarantee it is required to honour such guarantee according to its terms.

2. By the said amendment the plaintiff was seeking to bring in a completely new cause of action against both defendants for damages, thereby altering the scope and nature of the action.

3. The plaintiff cannot amend the plaint to include a new cause of action which arose after the institution of the action.

APPLICATION in Revision from an Order of the District Court of Colombo.

Cases referred to:

1. *Colombo Shipping Co., Ltd. v. Chirayn Clothing (Pvt) Ltd.* – [1995] 2 Sri L.R. 97.
2. *Kuruppuarachchi v. Andreas* – [1996] 2 Sri L.R. 11.
3. *Ekanayake v. Ekanayake* – 63 NLR 188.
4. *Thirumany and Another v. Kulandavelu* – 66 NLR 285.
5. *Lakdawalla v. Muriyiah* – 67 NLW 47.
6. *Lebbe v. Sandenam* – 64 NLR 461.
7. *Senanayake v. Anthonisz* – 69 LR 225.

Shamil Perera with *Ms Indrani Gunasekera* for 2nd defendant-petitioner.

S. Srikantha with *Ms M. J. M. Jaleel* for plaintiff-respondent.

Ms Menaka Munasinghe for 1st defendant-respondent.

Cur. adv. vult.

March 26, 1999.

DE SILVA, J.

By this application the 2nd defendant-petitioner seeks to revise the order of the learned Additional District Judge dated 24th February, 1998, wherein the Additional District Judge allowed the application of the plaintiff-respondent to amend the plaint.

The plaintiff-respondent (hereinafter referred to as plaintiff) filed action against the 1st defendant-respondent (hereinafter referred to as the 1st defendant) and the 2nd defendant-petitioner (hereinafter referred to as the 2nd defendant) in April, 1996, claiming, *inter-alia* –

(*a*) a declaration that the plaintiff is not liable to pay the 1st defendant the sum of Rs. 486,077.95 in respect of any unsettled bills.

(*b*) a declaration that the 1st defendant is not entitled to demand from the 2nd defendant the said sum or any sum of money on the Bank guarantee.

(*c*) enjoining order, an interim injunction, and

(*d*) a permanent injunction restraining the 2nd defendant paying the 1st defendant on the Bank guarantee.

The Court after hearing submissions of counsel for the plaintiff issued an enjoining order as prayed for in the plaint. Thereafter, objections were filed by the 1st and 2nd defendants and after inquiry the Court made order on the 20th of June, 1996, dissolving the enjoining order and refusing the application for an interim injunction. The plaintiff did not appeal against the said order. In consequence of the aforesaid order the 2nd defendant released the money to the 1st defendant under the guarantee bond.

The trial in the case was fixed for the 28th of November, 1996. However, the trial was not taken up on that day and it was refixed for the 11th of March, 1997. The plaintiff, thereafter, sought to amend the plaint.

In the proposed amended plaint from paragraphs 19 – 23 plaintiff has set out what transpired in Court after the institution of the action by the plaintiff and when the interim injunction was refused without waiting for the final decision of Court the 2nd defendant Bank paid the money to the 1st defendant. In paragraph 24 it is specifically stated that due to the said act of the 2nd defendant a cause of action arose to the plaintiff to sue the defendants to claim damages from them. Furthermore, the plaintiff by the said amendment sought to bring two additional prayers, namely –

(*a*) for a declaration that the 1st defendant had no right in law to claim and/or demand from the 2nd defendant Bank any sum of money on the said guarantee and to be paid any sum by the Bank.

(*b*) for an order directing the defendants jointly and severally to pay the plaintiff a sum of Rs. 500,000 by way of damages with interest from date of institution of the action till date of decree till payment in full.

Both defendants objected to the said amendments and after inquiry the learned Judge by order dated 24th February, 1998, permitted the plaintiff to amend the plaint.

At the hearing of this application Mr. Shamil Perera, learned counsel for the 2nd defendant-petitioner, submitted that –

(*a*) in making the said order the Additional District Judge has not given due consideration to the provisions of section 93 (2) of the Civil Procedure Code, and

(*b*) that by the said amendment plaintiff was seeking to bring in a completely new cause of action against the 2nd defendant. Both these matters will be dealt with together for convenience.

Section 93 (2) of the Civil Procedure Code as amended by Act No. 9 of 1991 reads as follows:

> "On or after the day first fixed for the trial of the action and before final judgment, no application for the amendment of any pleadings shall be allowed unless the Court is satisfied for reasons to be recorded 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."

Learned counsel contended that the plaintiff in his application to amend the plaint has not placed any material before Court to "satisfy Court that grave and irremediable injustice would be caused to him" if amendment is not permitted.

Ranaraja, J. in *Colombo Shipping Co., Ltd. v. Chirayn Clothing (Pvt) Ltd.*[1] at 102 observed as follows:

"The amendments to pleading on or after the first date of trial can now be allowed only in very limited circumstances, namely, when the Court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party applying is not guilty of laches. The onus of proving that both these conditions are fulfilled lies squarely on the party seeking the amendment. The Court is obliged to record the reasons as to how it came to be satisfied that the two conditions have been met."

In *Kuruppuarachchi v. Andreas*[2] Chief Justice G. P. S. de Silva after examining the case law stated that "while the Court earlier discouraged amendment of pleadings on the date of trial, now the Court is precluded from allowing such amendments save on the ground postulated in the subsection".

On a perusal of the order of the Additional District Judge it is clear that in permitting the amendment the learned Additional District Judge has been influenced by the fact that when the enjoining order was set aside by the Additional District Judge before whom the matter came up, the 2nd defendant had paid the money before the final determination made by Court on the matters in dispute.

If this reasoning is correct then there is no necessity for a party to seek injunctive relief. It would be sufficient merely to institute an action in the District Court to tie the hands of all the parties to an action. The learned Judge has failed to address his mind to the question that when a Bank has given a guarantee, it is required to honour such guarantee according to its terms.

It is to be noted that by the said amendment the plaintiff was seeking to bring in a completely new cause of action against both the defendants for damages and thereby altering the scope and nature of the plaintiff's action. In *Ekanayake v. Ekanayaka*[3] Chief Justice Basnayake stated that "It has been said over and over again that the use of the machinery of amendment of pleadings was not to be permitted for the conversion of an action of one character to that of another". The same view had been expressed in the following cases *Thirumany and Another v. Kulandavelu*[4], *Lakdawalle v. Muriyiah*[5] and *Lebbe v. Sandanam*[6], *Senanayaka v. Anthonisz*[7].

Proviso to section 46 of the Civil Procedure Code reads as follows: "no amendment shall be allowed which would have the effect of converting an action of one character into an action of another and inconsistent character".

It is a fundamental principle that the rights of parties are determined at the time of filing action. In the instant case plaintiff sought a declaration and injunctive relief. When the injunction was refused by Court and when the 2nd defendant discharged his obligation, the plaintiff was trying to change the scope of his action to claim damages by amending the pleadings.

If the 2nd defendant Bank has wrongfully/or fraudulently made payment to the 1st defendant then a cause of action, if any, has arisen from the date of payment. The plaintiff cannot amend the plaint to include a new cause of action which arose after the institution of the action.

The learned Additional District Judge has permitted the amendment on the basis that it would cause prejudice to the plaintiff if such an amendment was not allowed. However, the learned Judge has failed to consider that the amendment has altered the scope of the action and brought in a new cause of action and changed the character of the original plaint.

Counsel for the plaintiff in his written submissions has conceded the fact that amendments were necessitated due to the acts of the defendants after the institution of the action.

The amendments that were sought in this instant case are not for the purpose of correcting any mistake, defect, slips or omission but to introduce a new cause of action.

In these circumstances I hold that the order of the learned Additional District Judge dated 24th February, 1997, is erroneous and cannot be supported in law. I allow the application and set aside the said order dated 24.02.1997 with costs.

WEERASURIYA, J. – I agree.

Application allowed.