

**EDMUND PERERA  
VS  
NIMALARATNE AND ANOTHER**

COURT OF APPEAL.  
SOMAWANSA, J. (P/CA) AND  
WIMALACHANDRA, J.,  
CALA 389/2004(LG).  
DC GAMPAHA 58/L.  
SEPTEMBER 16, 2005.

*Civil Procedure Code - Sections 146 (1), 146 (2) and 147 - Objection to jurisdiction pleaded - Not put in issue - Could it be raised half way through the trial? - Judicature Act, section 39 - National Environment Act, No. 47 of 1980 - Does it oust the jurisdiction of the District Court to deal with nuisance?*

The plaintiff-petitioner instituted action seeking an order to abate a nuisance and to recover damages. The defendant-respondents while denying

the averments in the plaint averred that court has no jurisdiction "according to statute law." No issue was raised on jurisdiction. Half way through the trial the defendants-respondents raised an issue on jurisdiction. The trial Judge accepted the issue.

#### **HELD -**

- (1) There was a conscious decision to drop the objection to jurisdiction raised in the answer.
- (2) Once a decision is made not to proceed with the objection to jurisdiction though pleaded it is to be seen that in terms of section 39 Judicature Act such court shall be taken and held to have jurisdiction over such action.
- (3) If the objection to jurisdiction had been raised at the commencement of the trial then section 147 would come into operation and that would have been an issue on which court could have proceeded to hear and dispose of this action without calling for evidence.

#### **HELD FURTHER -**

- (4) In relation to the two issues raised on jurisdiction it would be quite impossible to understand the basis as the issues are vague and framed in terms of utmost generality; the pleadings as well as the issues on jurisdiction are defective.
- (5) There is nothing in the Acts for the protection of the Environment which has taken away the jurisdiction of the District Court to deal with problems of nuisance ; the new issue raised based on "statutory law" is vague.

**APPLICATION** for Leave to Appeal from an Order of the District Court of Gampaha with leave being granted.

#### **Cases referred to :**

1. *Mariamma vs Oriental Government Security and Life Insurance Company Ltd.*, - 57 NLR 145 at 149.
2. *Melis vs. Adonisa* - 57 NLR 303 (distinguished)
3. *Rodrigo vs. Raymond* (2002) 2 Sri LR 78
4. *Mrs. R. M. Jalaldeen vs. Dr. H. Rajaratnam* (1986) 1 CALR 640
5. *Seneviratne vs. Francis Fonseka* (1986) 2 Sri LR 1

*P. A. D. Samarasekera, P. C. with S. C. B. Walgampaya, P. C. and S. A. D. S. Suraweera* for plaintiff petitioners.

*M. Premachandra* for defendant - respondents.

*Cur. adv. vult.*

September 16, 2005

**ANDREW SOMAWANSA, J. (P/CA)**

The present application for leave to appeal and the appeal for leave if granted both relate to the important question as to whether an objection to jurisdiction which though pleaded had not been put in issue could be raised half way through the trial.

When this application for leave was taken up for inquiry it was agreed that both the question of leave and the main appeal could be decided on written submissions and accordingly both parties have tendered their written submissions.

The facts in brief are as follows : The plaintiff-petitioner' instituted the instant action in the District Court of Gampaha seeking an order to abate a nuisance and to recover damages from the defendants -respondents. The plaintiff-petitioners position was that the defendants-respondents were causing a nuisance by conducting and / or carrying on a 'day care centre' adjacent to the plaintiff-petitioner's house causing nuisance. The defendants-respondents while denying the averments pleaded by the plaintiff-petitioner in paragraph 2 of the answer denied the jurisdiction of Court stating that the Court had no jurisdiction according to statutory law. There was no mention however as to the statute which took away the jurisdiction of the Court to hear the case.

At the commencement of the trial though the defendants-respondents raised 16 issues significantly they did not raise any issue objecting to the jurisdiction of Court or regarding the statute law referred to in paragraph 2 of their answer. Thereafter evidence of the plaintiff-petitioner and one other witness was recorded and while the 3rd witness the wife of the plaintiff-petitioner was giving evidence counsel for the defendants-respondents sought to raise the following issues which reads as follows :

24. අ මෙම නඩුවට ඉදිරිපත් කර ඇති උත්තරයේ 2 වන ඡේදයේ සඳහන්ව ඇති කරුණක් මත එනම් මෙම අධිකරණයට මෙම නඩුව විභාග කිරීමට ව්‍යවස්ථාපිත නීතිය යටතේ බාධාවක් ඇද්ද?

ආ. එසේ නම් එම කරුණ මත පැමිණිල්ල නිෂ්ප්‍රභා කල යුතුද?

The counsel for the plaintiff-petitioner objected to the said issues being raised and both parties having agreed to tender written submissions on this matter tendered their written submissions and the learned District Judge by her order dated 30.09.2004 over-ruled the objections of the plaintiff-petitioner and accepted the aforesaid two issues. It is from the aforesaid order that the plaintiff-petitioner has preferred this application for leave to appeal.

It is submitted by counsel for the plaintiff-petitioner that the objection to jurisdiction in this case is one which was never properly pleaded with clarity and precision. At the stage of raising issues it was abandoned and the trial commenced by the parties submitting themselves to the jurisdiction of the Court. Therefore there is no right in any party to re-agitate the question of jurisdiction. In any event, the objection to jurisdiction raised in this case is not a valid objection as there is nothing in the Acts for the Protection of the Environment or any other Act which has ousted the jurisdiction which the District Court has always enjoyed to prohibit private nuisance as part of the Roman Dutch Law. He further submits that for the moment all that we need to submit is that these issues could not have been permitted at this stage and in the vague terms in which they were proposed. The case has to go to trial on the other issues as agreed at the commencement of the trial where jurisdiction of the Court was not considered as a matter in issue between the parties. I would say there is merit in this argument.

It is to be seen that there was a conscious decision to drop the objection to jurisdiction raised in paragraph 2 of the answer. It follows that at the commencement of the trial the jurisdiction of Court was not a material proposition of law on which the parties were at variance and in fact the parties were agreed as to the question of fact and law to be decided between them as stated by them to Court in the form of issues in terms of sub-section (1) of section 146 of the Civil Procedure Code and there was no occasion for the learned District Judge to act under sub-section (2) of section 146 of the Civil Procedure Code. For sub-section (2) of section 146 came into operation only in cases where the parties are not agreed as to the question of fact or law to be decided between them.

At this point it would be useful to examine section 39 of the Judicature Act which deals with 'objection to jurisdiction'. The section and the proviso reads as follows :

*"Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter.*

*Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."*

Section 146 of the Civil Procedure Code reads as follows :

*"146 (1) "On the day fixed for the hearing of the action, or on any other day to which the hearing is adjourned, if the parties are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and the court shall proceed to determine the same.*

*(2) If the parties, however, are not so agreed, the court shall, upon the allegations made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to record the issues on which the right decision of the case appears to the court to depend.."*

In the instant action as stated above in terms of section 146(1) parties were agreed as to the question of fact or law to be decided between them and have stated the same to Court in the form of issues. Sub-section (2) of section 146 never came into operation as the parties were agreed on the issues. In the circumstances once a decision is made not to proceed with

objection to jurisdiction though pleaded it is to be seen that in terms of section 39 of the Judicature Act such Court shall be taken and held to have jurisdiction over such action, proceeding or matter. In any event, if the objection to jurisdiction had been raised at the commencement of the trial then section 147 of the Civil Procedure Code would have come into operation and that would have been an issue on which Court could have proceeded to hear and dispose of this action without calling for evidence. In any event, the objection to jurisdiction embodied in the issues did not arise on the basis of any evidence given by the plaintiff-petitioner or his witnesses in the course of the trial, but is sought to canvas in the form of an issue solely on the basis that they had a right to do so as it was pleaded in the answer. It is to be noted that when the plaintiff-petitioner objected to the issue being raised at the trial stage the defendants-respondents did not offer any explanation as to why they did not raise this issue at the time the issues were raised but relied on the fact that it was pleaded in the answer.

Let us now consider the objection to jurisdiction taken in the answer. The defendants-respondents have pleaded in paragraph 2 of the answer that the Court has no jurisdiction to hear the case under statutory law. What statute is referred to by the defendants-respondents is nowhere stated in the answer. Counsel for the defendants-respondents submits that the defendants-respondents were entitled in law to take up the position in their answer that there was a statutory bar to the maintainability of the action and that there was no duty cast upon the defendants-respondents to reveal their total defence to the plaintiff-petitioner in their pleadings. However in their written submissions the defendants-respondents have explained their position fully and the written submissions tendered to the original Court is reproduced in paragraph 27 of the written submissions. However as neither the answer nor the issues raised by the defendants-respondents say what this statutory law that takes away the jurisdiction of the District Court how is the plaintiff-petitioner to meet such an objection to jurisdiction? Is the plaintiff-petitioner expected to know the entire gamut of statutory laws in operation in this country? No doubt until the reference in the written submissions of the defendants-respondents to the National Environmental Act No. 47 of 1980 even the Court was kept in the dark.

I would say that pleadings and issues in such wide terms defeat the object of pleadings and of raising issues when the object of pleadings and

issues is to identify with precision the matters which have to be decided in the case and to give notice of such matters to the opposing parties. In relation to the two issues raised on jurisdiction by the defendants-respondents, it is to be seen that it would be quite impossible for the plaintiff-petitioner or for that matter anyone even for the Court to understand the basis on which the objection was taken therein by the defendants-respondents. In the original Court the objection was taken to these two issues by the plaintiff-petitioner was not on the basis that they were not pleaded but on the basis that they were vague and framed in terms of utmost generality.

In the case of *Mariamamma vs The Oriental Government Security and Life Assurance Company Ltd.* <sup>(1)</sup>Per Gratiaen, J at 149 :

*"The defendant's pleadings were defective, and the plaintiff (let it be conceded) had not been as vigilant as he should have been to protect herself against surprise. But it was still the Judge's duty to control the trial. He should have ordered the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge had ascertained for himself "the propositions of fact or of law" upon which the parties were at variance".*

Applying this proposition of law laid down in that case to the instant action I would say the pleadings as well as the issues on jurisdiction is defective. The submission of counsel for the defendants-respondents that there is no duty cast upon the defendants-respondents to reveal their total defence to the plaintiff-petitioner is unacceptable and should be rejected in toto.

It is to be seen that the reference made in the written submissions of the defendants-respondents to the National Environmental Act No. 47 of 1980 as amended find no mention in the answer, in any of the issues or in the evidence in the trial up to the time the new issues were sought to be raised. What the defendants-respondents are seeking to do in the written submissions is to describe the plaintiff-petitioner's action as one based on sound pollution and thus coming under the Environmental Protection Act. The plaintiff-petitioner's case is a straight forward case to prohibit a nuisance. Such actions are well known as part of our law of delict. It comes under the wider subject of wrongs against property and nuisance

are described under 2 heads : viz : public nuisance and private nuisance. The instant action is one of private nuisance which is a part of our law long before the Acts for the Protection of the Environment were enacted. There is nothing in any of these enactments which has taken away the jurisdiction of the District Court to deal with problems of nuisance.

It appears that counsel for the defendants-respondents as well as the learned District Judge placed reliance on the decision in *Melis vs. Adonisa* <sup>(2)</sup> In fact the learned District Judge in his order refers to that decision and held that the failure of a party to raise an issue in the first instance is not a bar to the issue being raised at a later stage and had decided to accept issue no. 24. *Melis vs. Adonisa (supra)* is no authority to be followed in the instant action for in that case the main issue that was considered was the awarding of costs in respect of additional issues raised.

In the case of *Rodrigo vs. Raymond* <sup>(3)</sup> the facts were as follows :

The plaintiff-respondent instituted action, *inter alia*, for the ejection of the defendant-petitioner from the premises in suit.

After the plaintiff-respondent's evidence the defendants-petitioner sought to formulate three issues which were based on the value of the action and the jurisdiction of the Court to entertain the respondent's case.

The District Court rejected the additional issues.

It was contended that the action cannot be maintained without first obtaining a certificate of non-settlement from the Mediation Board.

It was held :

*"The defendants-petitioner has failed to formulate an issue relating to the jurisdiction of the Court at the commencement of the trial. His failure to frame an issue on such a vital matter will amount to a waiver of objections in regard to lack of jurisdiction of Court to hear and determine the respondent's action. The defendants-petitioner is deemed to have consented and submitted to the jurisdiction of the court and he cannot now be permitted to challenge the jurisdiction".*



---

It was also observed in that decision at page 83 as follows :

*" Moreover, it should be stated that when the admissions were recorded at the commencement of the trial, the parties have in clear terms admitted the jurisdiction of the Court. Therefore, the defendant cannot be permitted at this late stage after several dates of trial to deny jurisdiction of the Court. The defendant had ample opportunity of objecting to the jurisdiction of the Court, if he has chosen or elected to waive such objections, he cannot subsequently be permitted to challenge it. The defendant should not be allowed to blow hot and cold at the same time, in this matter. The defendant is deemed to have submitted to the jurisdiction of the Court".*

In this respect the decision in *Mrs. R. M. Jalaldeen vs. Dr. H. Rajaratnam* <sup>(4)</sup> and *Seneviratne vs. Francis Fonseka Abeykoon* <sup>(5)</sup> is also relevant.

For the foregoing reasons leave to appeal is granted and the appeal is allowed. The order of the learned District Judge dated 30.09.2004 is set aside. I also make order rejecting issue no. 24 raised on behalf of the defendants-respondents. The defendants-respondents will pay a sum of Rs. 15,000/- as costs of this application.

**WIMALACHANDRA, J.,** — I agree.

*Appeal allowed.*

---