

COLOMBO DOCKYARD LTD
VS
JAYASIRI PERERA AND OTHERS

COURT OF APPEAL,
AMARATUNGA, J., AND
WIMALACHANDRA, J.
CA 71/2003 (bg)
D. C. COLOMBO 14760/MR
JULY 15 AND
SEPTEMBER 2, 2004

Civil Procedure Code, section 93 (2) - Amendment of caption - Prejudice caused to defendants ? - Amendment not to widen scope or alter character of the action - Names are used to identify persons.

The caption of the plaint refers to the plaintiff as සීමාසහිත කොළඹ තැව් තරාකාංගනය. At the trial it was revealed that the incorporated name of the plaintiff was "Colombo Dockyard Ltd.,". The defendant took up the position that there is no incorporated body by the name of "සීමාසහිත කොළඹ තැව් තරාකාංගනය" and that the action should be dismissed. In the course of the trial the certificate of incorporation of the plaintiff company was allowed to be marked. At the trial the plaintiff's witness said that the plaintiff Company is called "Colombo Dockyard Ltd.," as well as "සීමාසහිත කොළඹ තැව් තරාකාංගනය". Thereafter the plaintiff moved to amend the caption to read the plaintiff's name as "Colombo Dockyard Ltd.," The defendant objected and the court upheld the objection.

Leave being granted, on appeal-

Held:

- (1) It appears that although the plaintiff company is registered as "Colombo Dockyard (Pvt) Ltd" it is also called and known in Sinhala as "සීමාසහිත කොළඹ තැව් තරාකාංගනය". Since the 1st defendant has been in the company for more than 12 years he should have known that the plaintiff company is also called by the name "සීමාසහිත කොළඹ තැව් තරාකාංගනය".
- (2) Names are used to identify persons; whether the plaintiff company is called either by "සීමාසහිත කොළඹ තැව් තරාකාංගනය" or "Colombo Dockyard (Pvt) Ltd.," is immaterial. The names are there to designate persons.

- (3) It seems that the proposed amendment to the caption could only refer to the plaintiff and nobody else, and by allowing the amendment no prejudice would be caused to the defendants. The effect of the amendment is merely to show that the plaintiff company called “සීමාසහිත කොළඹ තැව් තටාකාංශය”. is also called “Colombo Dockyard (Pvt) Ltd.”. By this amendment it is not the intention of the plaintiff to substitute another in place of the plaintiff company.
- (4) Under section 93 (2) court may allow an amendment of any pleadings if the court is satisfied that the plaintiff would suffer grave and irreparable injustice if the amendment is not allowed and the plaintiff has not been guilty of laches.
- (5) By this amendment the plaintiff is not seeking to widen the scope or alter the character of the action and he is not trying to bring in a new cause of action. He is merely seeking to give the court a description of the name of the plaintiff. It is to be observed that “සීමාසහිත කොළඹ තැව් තටාකාංශය”. is the Sinhala translation of “Colombo Dockyard Ltd”. The acceptance of the amendment does not cause prejudice to the defendants.

APPLICATION for leave to appeal with leave being granted.

Cases referred to :

1. *Mohinudeen and another vs Lanka Bankuwa, York Street, Colombo 1* (2001) 1 Sri LR 290
2. *Bank of Ceylon vs Ramasamy* (1985) 1 CALR 481
3. *Davis Vs Elsbys Bros Ltd* (1960) 3 ALL ER 672
4. *W. M. Mendis & Co. Vs Excise Commissioner* (1999) 1 Sri LR 351
5. *Charles Vs Samarasinghe*, Bar Journal (1998) Vol. VII, Part II Page 21
6. *Shammari Vs Premier Airline Agencies (Pvt) Ltd.*, (1988) 2 Sri LR 162

L. C. Seneviratne, P. C. with Anuraddha Dharmaratne for petitioner.

Rohan Sahabandu for respondent.

December 15, 2004

WIMALACHANDRA, J

This is an appeal against the order dated 20.02. 2003, made by the learned Additional District Judge of Colombo, refusing the application of the plaintiff - appellant to amend the caption of the plaint.

Briefly, the facts relevant to this appeal are as follows:-

The caption refers to the plaintiff in Sinhala as “සීමාසහිත කොළඹ නැව් තටාකාංගනය”. At the trial it was revealed that the incorporated name of the plaintiff was Colombo Dockyard Limited. The defendants’ position is that there is no incorporated body by the name of “සීමාසහිත කොළඹ නැව් තටාකාංගනය” and that the plaintiff’s action should accordingly be dismissed. In the course of the trial, it was moved to mark the Certificate of Incorporation of the plaintiff company on behalf of the plaintiff which was objected to by the defendants. The learned Additional District Judge delivered her order dated 3.5.2000, wherein she allowed the said document to be marked on the ground that the said document establishes the fact that the plaintiff is a duly incorporated company and that it has been pleaded in the plaint. On 17. 01. 2002 the plaintiff’s witness said under cross examination that the plaintiff company is called “Colombo Dockyard Limited” as well “සීමාසහිත කොළඹ නැව් තටාකාංගනය.” After the conclusion of the evidence of the said witness, the plaintiff moved to amend the caption of the plaint to read the plaintiff’s name as Colombo Dockyard Limited. In the caption of the plaint the plaintiff is described as “සීමාසහිත කොළඹ නැව් තටාකාංගනය”. The defendants opposed this application. Thereafter the learned Judge directed the parties to file written submissions in respect of the said application. The learned Additional District Judge delivered her order on 20. 02. 2003 refusing the application to amend the caption and fixed the case for further trial. It is against this order the appellant has filed this appeal.

Admittedly, the 1st defendant (respondent) was employed with the plaintiff from 1979. It is also admitted that the 1st defendant vacated his post in the plaintiff - company on or about 10. 08. 1992. The question that arises is, was the 1st defendant as a person who was employed in the plaintiff, company aware that the plaintiff - company was also called in Sinhala as “සීමාසහිත කොළඹ නැව් තටාකාංගනය” and that both names namely, The Colombo Dockyard and “සීමාසහිත කොළඹ නැව් තටාකාංගනය”. were used to identify the plaintiff - company. The 1st defendant cannot say he is not aware that the plaintiff - company is registered under the

Companies Act as the "Colombo Dockyard (Pvt) Limited" as evident by the agreement marked P1(a) where the 1st defendant was a party to the said agreement. In the answer filed by the 1st defendant, in paragraph six he has stated that Colombo Dockyard (Pvt) Limited has terminated his services.

The documents produced marked "A1" to "B1" and "C1" to "C5" show that the plaintiff - company is also called "සීමාසහිත කොළඹ නැව් තටාකාංගනය" In "A1" to "B1" and "C1" to "C13" the address stated is identical to the address given in the plaint.

In these circumstances it appears to me that although the plaintiff - company is registered as "Colombo Dockyard (Pvt) Limited" it is also called and known in Sinhala as "සීමාසහිත කොළඹ නැව් තටාකාංගනය" Since the 1st defendant had been in the plaintiff company for more than 12 years, he should have known that the plaintiff company is also called by the "සීමාසහිත කොළඹ නැව් තටාකාංගනය" (Vide "C1", "C2", "C3", "C4" and "C5").

The learned President's Counsel for the plaintiff appellant cited the Supreme Court case of *Mohinudeen and another Vs. Lanka Bankuwa York Street, Colombo 1* ⁽¹⁾. In this case the plaintiff bank, incorporated under the Bank of Ceylon Ordinance, instituted action against the defendants for the recovery of a sum of Rs.19,811,503/92. In the caption of the plaint, the plaintiff was referred to as "Lanka Bankuwa". At the trial the parties raised 26 issues. Of the issues raised, two issues were tried as preliminary issues. They are issues No. 14 and No. 16,. What is relevant for the present case before us is issue No. 14. It reads as follows: "(read with Paragraph 7 (a) of the answer); whether the plaintiff had *locus standi* to institute legal proceedings in that no legal person had been incorporated (in terms of the Bank of Ceylon Ordinance) under the name of "Lanka Bankuwa."?"

It was held *inter alia* by the Supreme Court that the use of the name "Lanka Bankuwa" did not mislead the defendants. Hector Yapa, J. who delivered the judgment made the following observation at pages 294 - 295:

"There is no doubt that the legislature by the Bank of Ceylon Ordinance has created a body corporate called the "Bank of Ceylon"

which is empowered to carry on the business of banking with the right to sue and be sued in its corporate name. Therefore, when the plaint is filed in Sinhala on behalf of the institution called the Bank of Ceylon, it would be fair and logical to use the name "Lanka Bankuwa" the term used in Sinhala by the Bank of Ceylon itself. Besides, the Bank of Ceylon over the years has continued to use the term "Lanka Bankuwa" in their dealings with the public and today the term "Lanka Bankuwa" is synonymous with the term Bank of Ceylon. Hence it would appear that the learned High Court Judge has correctly held that the Bank of Ceylon has the locus standi to file actions using the Sinhala-name of the Bank of Ceylon namely the Lanka Bankuwa. Besides, the appellants would have received their bank statements and other documents from the Bank of Ceylon on the letter heads giving the name of the Bank of Ceylon in Sinhala as Lanka Bankuwa and therefore there is no question of the appellants or any one else for that matter being misled that the reference was not to the Bank of Ceylon."

In the instant case it appears that the plaintiff - appellant is called by both names, namely, "සීමාසහිත කොළඹ තැව් නටාකාංගනය" and "Colombo Dockyard (Pvt) Limited". As stated above this is borne out by the documents produced marked "A1" to "A5", "B1" and "C1" to "C5". Moreover, the 1st defendant respondent who was employed with the plaintiff - appellant from 1979 to 1992 would have known that the plaintiff - appellant "Colombo Dockyard Ltd" is also called "සීමාසහිත කොළඹ තැව් නටාකාංගනය"

In the case of *the Bank of the Ceylon Vs. Ramasamy* ⁽²⁾ at page 481 the Court of Appeal considered the question whether misnomer of a defendant is fatal to an action brought against him. In this case the plaintiff respondent instituted action in the District Court against the Manager, Bank of Ceylon Agricultural Service Centre, Kilinochchi and proxy was filed on behalf of the Manager. Thereafter proxy was revoked and proxy of the Bank of Ceylon was filed by another attorney at law. The learned District Judge held that it was necessary to add the Bank of Ceylon as a party defendant. The petitioner, the Bank of Ceylon, appealed from that order. It was held in this case that the description given to the defendant could only refer to the Bank of Ceylon and that the insertion in the plaint of the Manager, Bank of Ceylon as defendant was a misnomer which could be corrected. It is clear that a mistake can be corrected where the mistake is in the name, description or designation of a defendant which

does not mislead the parties on the question of identity of the person intended to be sued and even where in such circumstances, the person described as the defendant is non-existent, the mistake can be corrected.

Moonemale, J. at 487 in *Bank of Ceylon vs. Ramasamy* (supra) cited the test to be applied in cases of misnomer prescribed by Devlin, L. J. in *Davis Vs. Elsby Bros (3) Ltd*. It reads as follows:

“The test must be; How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he could say to himself, ‘of course it must mean me, but they have got my name wrong,’ then there is a case of misnomer. If on the other hand, he would say: ‘I cannot tell from the document itself whether they mean me or not. I shall have to make inquires,’ then it seems to me that one is getting beyond the realm of misnomer. One or the factors which must operate on the mind of the recipient of the document and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer.”

It is to be noted that the names are used to identify persons. Whether the plaintiff - company is called either by “සිමොන් කොළඹ තැව් නැවතාගනය” or “Colombo Dockyard (Pvt) Ltd.” is immaterial. The names are there to designate persons.

In the case of *W. M. Mendis & Co. Vs. Excise Commissioner*⁽⁴⁾ it was held that names in the caption of a plaint are used only to designate persons, and that the action is not instituted against names but against persons designated thereby.

In this case the plaintiff - petitioner instituted action against the defendant - respondent to recover a certain sum of money. The defendant was named in the plaint as the “Excise Commissioner”. The attorney at law for the defendant filed the proxy of the defendant and the said proxy was signed by N. N. F. Chandraratna. The answer filed by the defendant stated that the defendant named therein is neither a natural person nor a juristic person and pleaded that the plaintiff cannot maintain the action. The trial in this case was fixed for 4. 12. 1996. After the trial was fixed the plaintiff filed a motion seeking permission to amend the plaint to read as W. N. F.

Chandraratne Excise Commissioner, now known and designated as "Commissioner - General of Excise". The defendant objected to the amendment. J. A. N. de Silva, J. at page 356 made the following observations :

"..... One has to be alive to the often quoted legal maxim, namely, *Falsa demonstratio non nocet cum de corpore vel persona constat* (a false description does not harm if there be sufficient certainty as to the subject matter or the person) and *Falsa demonstratio non nocet cum de corpore vel persona constat* (any inaccuracy in description is to be over - looked if the subject matter or person is well known.)"

The 1st defendant who was employed with the plaintiff company for a period of 12 years should have known that the plaintiff is also called by the name "සීමාසහිත කොළඹ නැව් තටාකාංගනය" In the circumstances I cannot see any prejudice that would be caused to the 1st defendant by allowing the amendment to the caption sought by the plaintiff. the 2nd and 3rd defendants' liabilities flow from the 1st defendant, and hence there would be no prejudice caused to them as well, by this amendment.

It seems to me that the proposed amendment to the caption could only refer to the plaintiff and nobody else any by allowing this amendment no prejudice would be caused to the defendants. The effect of the amendment is merely to show that the plaintiff - company is called "සීමාසහිත කොළඹ නැව් තටාකාංගනය" and is also called "Colombo Dockyard (Pvt) Ltd." By this amendment it is not the intention of the plaintiff to substitute another in place of the plaintiff - company.

Another objection taken by the defendant is that the plaintiff is not entitled to amend the caption of the plaint after the case has been fixed for trial. This objection is based on Section 93 (2) of the Civil Procedure Code.

Section 93 (2) of the Civil Procedure Code (as amended) states thus:

"On or after the first day 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 by Court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and the party so applying has not been guilty of laches"

Accordingly, the Court may allow an amendment of any pleadings if the Court is satisfied that the plaintiff would suffer grave and irreparable injustice if the amendment is not allowed and the plaintiff has not been guilty of laches.

When the plaintiff's witness was giving evidence, he said that the name of the plaintiff - company is “සී/ස කලමිටු ඩොක් යාඪ්ඩ් ” and he sought to produce the Certificate of Incorporation of the plaintiff -company which was objected to by the 1st defendant. The learned District Judge allowed to produce the document. The witness continued to give evidence on the next day, and he said the plaintiff is called and known as “Colombo Dockyard (Private) Ltd.” as well as “සීමාසහිත කොළඹ නැව් තටාකාංගනය”.

The witness stated (proceedings of the District Court dated 17. 1. 2002 at page 5) that the plaintiff is called “Colombo Dockyard Ltd.” as well as “සීමාසහිත කොළඹ නැව් තටාකාංගනය”. “ Thereafter the plaintiff sought to amend the caption from “සීමාසහිත කොළඹ නැව් තටාකාංගනය” to “Colombo Dockyard Ltd”.

By this amendment the plaintiff is not seeking to widen the scope or alter the character of the action and he is not trying to bring in a new cause of action. He is merely seeking to give the correct description of the name of the plaintiff, the “Colombo Dockyard Limited”. It is to be observed that “සීමාසහිත කොළඹ නැව් තටාකාංගනය” “ is the Sinhala translation of “Colombo Dockyard Limited”.

I am of the view that if the Court allows the amendment, no prejudice would be caused to the 1st defendant and the 2nd 3rd defendants. On the other hand if the proposed amendment is refused, grave injustice would be caused to the plaintiff.

The need for the amendment sought by the plaintiff arose unexpectedly, and the acceptance of the amendment does not cause prejudice to the defendants. Hence, the amendment should be allowed. (*See Charles Vs. Samarasinghe*⁽⁵⁾).

The fact that the plaintiff is called by both names, namely “සීමාසහිත කොළඹ නැව් තටාකාංගනය” and “Colombo Dockyard Ltd”. was first disclosed at the trial whilst the plaintiff's witness was giving evidence. In the

circumstances it appears that the delay in seeking this amendment is not a deliberate delay.

In the case of *Shammari Vs. Premier Airline Agencies (Pvt) Ltd.*,⁽⁶⁾ Weerasuriya, J. held that the question of laches cannot be determined only by considering the number of trial dates or the period of time that had elapsed, as delay *per se* does not amount to laches and the circumstances of the particular case have to be taken into account.

In these circumstances, it is my considered view that the amendment to the caption of the plaint sought by the plaintiff does not violate the provisions of Section 93 (2) of the Civil Procedure Code. The amendment would cause no prejudice to the defendants.

For these reasons, the order of the learned Additional District Judge dated 20. 02. 2003 is set aside. The application is accordingly allowed, but without costs.

AMERATUNGA, J - I agree.

Appeal allowed.
