ABEYWARDENA AND OTHERS

v.

EUGINAHAMY AND OTHERS

COURT OF APPEAL.
L. H. DE ALWIS, J. AND T. D. G. DE ALWIS, J.
C. A. APPLICATION No. LA 138/81. D. C. NEGOMBO No. 2160/L
JULY 9, 1984.

Pleadings – Amendment of plaint – Belated application depriving defendants of plea of prescription

The plaintiffs owned a strip of land which served as access to their land. The defendants who owned the adjoining lands acting jointly and in concert commenced using this strip as access to their respective lands from about 28.2.1970 and disputed plaintiffs' title to it. The plaintiffs filed action on 10.12.1975. After the Administration of Justice (Amendment) Law No. 25 of 1975 came into operation they filed an amended plaint on 23.12.76 on the same lines as their original plaint. The defendants filed answer on 15.7.1977 wherein they did not deny the title of the plaintiffs to the said strip of land but claimed the right to use it by prescription. On 16.7.79 the plaintiffs moved to amend their plaint by pleading more fully their title. The defendants did not object and the application was allowed on terms. The amended plaint was filed on 2.12.1980 and on 10.9.81 the defendants objected to it on the ground that acceptance of the amended plaint will deprive them of their plea of prescription. On 30.9.81 order was delivered disallowing the amendment.

Held–

By the amendment the plaintiffs were not seeking to widen the scope or alter the character of the action. No new cause of action was averred. The plaintiffs were merely seeking to elucidate their title which they had claimed in their original plaint and the amendments did not affect the plea of prescription. Belatedness of the application for amendment is not a ground for refusing the application.

Cases referred to :

(1) *Seneviratne v. Candappa (1917) 20 NLR 60.*
(2) *Punchimahattmaya, Menike and Others v. Ratnayake and Others 18 CLW 18.*
(3) *Waduganathan Chettiyar v. Sena Abdul Cassim (1952) 54 NLR 185.*

APPEAL with leave from order of the District Court, Negombo.

E. R. S. R. Coomaraswamy P.C. with *Rohan de Alwis* for petitioner.

Defendants-respondents absent and unrepresented.

Cur. adv. vult.

August 10, 1984.

L. H. DE ALWIS, J.

This is an appeal by the plaintiffs-petitioners, with the leave of this Court first obtained, from the order of the District Judge of Negombo disallowing the amended plaint filed on 2.11.1980.

The plaintiffs originally filed plaint on 10.12.75 averring that they are the owners of the land described in schedule 'A' to the plaint and that the 4 defendants claim to be entitled to the lands described in schedules B to D to the plaint, which adjoin their land. They state that they are the owners of a strip of land described in schedule E to the plaint which gave them access to their main land. Their complaint was that the defendants wrongfully, unlawfully, forcibly, jointly and in concert commenced using this strip of land as access to their respective lands from about 28.2.1970 and are disputing and denying the plaintiffs' title to the said strip of land. They prayed, inter alia, for a declaration of title to the said strip of land and for a declaration that the defendants are not entitled to use the said strip of land as a roadway to their respective lands.

After the Administration of Justice (Amendment) Law No. 25 of 1975 came into operation, the plaintiffs filed an amended plaint dated 23.12.76 on the same lines as their original plaint.

The defendants-respondents filed answer on 15.7.1977 wherein they did not deny the title of the plaintiffs-petitioners to the strip of land but claimed prescriptive user of it. When the case came on for trial on 16.7.79 the plaintiffs-petitioners moved to amend their plaint in order to plead their title more fully in accordance with the documents of title that had been listed. The defendants-respondents did not object to the motion to amend the plaint and the application was allowed on terms on 16.7.79. The amended plaint was duly filed on 2.12.80 and on 10.9.81 the defendants objected to the amended plaint on the ground that the action had been prescribed before the amended plaint was filed and that acceptance of the amended plaint would relate back to the date of the original plaint thus depriving them of taking up the plea of prescription which would cause them prejudice. The learned Judge delivered order on 30.9.81 agreeing with the contention of the defendants' counsel and disallowed the amendment of the plaint, dated 2.12.80. He directed that trial

proceed on the amended plaint of 23.12.76 filed under the provisions of the Administration of Justice Law. It is from this order that the plaintiffs now seek to appeal.

By the amendment the plaintiffs do not seek to widen the scope or alter the character of the action. No new cause of action is averred. All that the plaintiffs did was to plead their title to the strip of land described in schedule E, when the defendant's Counsel on 16.7.79 submitted that they had not done so. It is true that the first plaint was filed as far back as 10.12.75 and the second amended plaint was filed only on 2.11.80. But the lateness of the application for amendment is not a ground for refusing the application. In *Seneviratne v. Candappa* (1) Shaw, J., said :

> "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side".

In *Punchimahattmaya, Menike and Others v. Ratnayake and Others* (2) it was held that an amendment bona fide desired in order to elucidate the cases the parties wish to put forward should be allowed, even though the parties have been negligent or careless in stating their cases. The matter of the belatedness of a proposed amendment is a matter that affects the question of terms in regard to costs and postponement.

In the present case the amendment became necessary in view of the submission made by Counsel for the respondents that particulars of the plaintiffs' title to the land in schedule E had not been specified. It was in order to elucidate their title that the plaintiffs amended their plaint and they did so, on payment of costs since the trial had to be postponed.

The learned trial Judge has refused the amendment for the reason that the alleged unlawful use of the roadway as stated in the first plaint, commenced on 28.2.70 and that if the amendment of 2.11.80 were allowed, it would relate back to the date of the first plaint filed on 10.12.75 and deprive the defendants of raising the plea that they had prescribed to the strip of land in the meantime, and cause them prejudice. But in the very first plaint filed on 10.12.75 the plaintiffs had pleaded that they were entitled to the disputed strip of land and claimed ownership to it. All that they sought to do by the

amendment was to give full particulars of their title to the land in dispute. No new cause of action was raised to take the case out of prescription.

In *Waduganathan Chettiyar v. Sena Abdul Cassim* (3) it was held that a court will refuse to allow a plaint to be amended so as to include a new cause of action if such amendment, by its relation back to the date of the original plaint, is prejudicial to a plea of prescription which may be raised by the defendant in respect of the new cause of action. But that is not the case here.

In my view the learned Judge was in error in disallowing the amendment. I therefore set aside the order of the learned Judge and allow the amendment. There will be no costs of appeal in view of the belatedness of the amendment.

T. D. G. DE ALWIS, J. – I agree.

Appeal allowed.