

SHAMMARI
v.
PREMIER AIRLINE AGENCIES (PVT) LTD.

COURT OF APPEAL
ISMAIL, J., P/CA
WEERASURIYA, J.
C.A NO. 428/96
D.C COLOMBO NO. 15471/MR
JULY 20, 1998

Civil Procedure Code s. 65 and s. 93 (2) – Amendment of caption – Misnomer – Laches

The plaintiff-respondent instituted action against the defendant-petitioner as agent and Country Manager for Saudi Arabian Airlines. The defendant-petitioner filed answer stating among other things that he was only an employee. The plaintiff-respondent thereafter sought to amend the caption of the plaint by naming Saudi Arabian Airlines Corporation (S.A.A.C) as the defendant. This application was allowed by the District Court.

On Appeal

- Held:** (i) It is manifest that except in one paragraph, the defendant is referred to as a corporate body and the reliefs prayed for were based on the accrual of a cause of action against S.A.A.C.
- (ii) There could have been no doubt in the mind of the defendant when he was served with summons that it was S.A.A.C that the plaintiff intended to sue and that he had been named wrongly as the defendant.

It is apparent that naming T. K. A. I. Shammari as the defendant in the caption was a mistake.

- (iii) Question of laches cannot be determined only by considering the number of trial dates or the period of time that had elapsed, delay *per se* does not amount to laches and the circumstances of the particular case have to be taken into account.

Held further:

- (iv) Having made order to accept the amended plaint in which S.A.A.C was named as the defendant, the District Judge had erred in making an order requiring T. K. A. I. Shammari to amend his answer.

APPLICATION in revision from the order of the District Court of Colombo.

Cases referred to:

1. *Don Alwis v. Village Committee of Ampitiya* – 54 N.L.R 225.
2. *Bank of Ceylon v. Vellaiyan Ramasamy* –1986 1 C.A.L.R 481.
3. *Velupillai v. The Chairman, Urban Development Council* – 39 N.L.R 464.
4. *C. A. Odiris Silva & Sons Ltd. v. P. Jayawardena* – 55 N.L.R 335.
5. *Davis v. Elsby Brothers Ltd.* – 1960 3 AER 472.
6. *Lulu Balakumar v. Balasingham Balakumar* SC 125/94 – SCM 11.9.95.
7. *British Ceylon Corporation v. Lionel Edwards Ltd.* – 32 N.L.R 143.

Nihal Fernando for defendant-petitioner.

Geoffrey Alagaratnam with M. Adamaly for plaintiff-respondent.

Cur. adv. vult.

September 21, 1998

WEERASURIYA, J.

This is an application seeking to revise the order of the District Judge of Colombo, dated 14.06.1996 allowing the amended plaint filed by the plaintiff-respondent. The facts as set out by the defendant-petitioner are briefly as follows:

The plaintiff-respondent instituted action against the defendant-petitioner, in the District Court of Colombo, as Agent and Country Manager for Saudi Arabian Airlines praying *inter alia* for judgment in a sum of Rs. 2,363,310/- with interest. The defendant-petitioner filed answer averring *inter alia*, that the plaintiff's action was misconceived

in law and that the plaint did not disclose a cause of action against him and that he was only an employee of the Saudi Arabian Airlines as Agent and Country Manager in Sri Lanka. The case was taken up for trial on 25.04.1995 and postponed for 06.05.1995. In the meantime, on 23.05.1995 plaintiff-respondent moved to amend the caption of the plaint by naming Saudi Arabian Airlines Corporation as the defendant on the ground that the defendant-petitioner in his answer had pleaded that he was an employee of Saudi Arabian Airlines. On this application, the defendant-petitioner filed objections on 07.09.1995 and learned District Judge by her order dated 19.06.1996, allowed the application to amend the caption.

At the hearing of this application learned counsel for the petitioner submitted the following matters:

(1) that the caption of the plaint could be amended only to correct a mistake in the name of the plaintiff or defendant and that it was not open to the plaintiff to substitute a completely different person in place of the defendant;

(2) that the plaintiff-respondent was not entitled to amend the plaint in terms of section 93 (2) of the Civil Procedure Code particularly in that he was guilty of laches.

It is common ground that the plaintiff-respondent by plaint dated 23.09.94, instituted action against T. K. A. I. Shammari, Country Manager and Agent for Saudi Arabian Airlines. However, paragraphs 2 of the plaint referred to the defendant as a body corporate who could sue and be sued in its own name that its Country Manager was T. K. Shammari. Nevertheless, paragraph 4 of the plaint disclosed that the defendant resided within the jurisdiction of the District Court of Colombo.

It is manifest that other than this paragraph, all other paragraphs referred to the defendant as a corporate body and the reliefs prayed for were based on the accrual of a cause of action against Saudi Arabian Airlines. The motion dated 25.05.1995 sought an amendment of the caption to include the name of Saudi Arabian Airlines Corporation as the defendant C/o T. K. A. I. Shammari, its Country Manager and Agent.

Learned counsel for the defendant-petitioner submitted that in the case of *Don Alwis v. Village Committee of Hiripitiya*⁽¹⁾ it was held that, where the plaintiff had instituted action against a wrong party as the defendant, the plaint cannot be subsequently amended so as to have the proper person added as a defendant and that the proper course for the plaintiff was to drop the action which had been wrongly instituted and commence a new action against the proper person who should have been made the defendant.

Learned counsel for the plaintiff-respondent cited the case of *The Bank of Ceylon v. Vellaiyan Ramasamy*⁽²⁾ where it was held that, a mistake could be corrected where the mistake was in the name, description or designation of the defendant which does not mislead the parties on the question of identity of the person intended to be sued.

It is to be observed that in the case of *Don Alwis v. Village Committee of Hiripitiya (Supra)* the plaintiff Village Committee had instituted action alleging that Don Alwis was holding a fair within the village area of Hiripitiya in violation of the Committee's by-laws and of a right that it claimed to regulate the holding of fairs and prayed for an injunction restraining him from holding a fair within that area without a licence from the Chairman of Village Committee and for damages. Subsequently, the plaintiff moved to amend the plaint by the addition of another person as a party defendant along with several averments based on the averments in the answer of the defendant. The proposed amendment sought to include the averment that the fair was being held by the 1st defendant or the 2nd defendant or by both of them. Thus, it would be seen that addition of a new party defendant was necessitated due to the doubt created as to the person against whom a cause of action had accrued to the Village Committee.

In the case of *The Bank of Ceylon v. Vellaiyan Ramasamy (Supra)* the plaintiff instituted action against the Manager, Bank of Ceylon, Agriculture Service Centre, Kilinochchi, for whom proxy was filed by Mr. Mahesan which was later revoked and another Attorney-at-law filed a proxy for the Bank of Ceylon Central Office, Colombo, which was accepted by Court and it was given time to file answer. There was no doubt on a reading of the plaint that the plaintiff intended to sue the Bank of Ceylon for the recovery of Rs. 25,000/- which he alleged, had been deposited in his savings account. Further, the

conduct of the Manager in revoking his proxy and allowing the Bank of Ceylon to come into the case showed clearly that action was intended against the Bank of Ceylon and not against the Manager personally. The description given in the plaint left no one in doubt that, the plaintiff intended to sue Bank of Ceylon and not its Manager in his personal capacity. It was a clear case of a misdescription of the defendant in the caption of the plaint. This process could be described as a correction of a misnomer, since in all the circumstances of the case, there could have been no doubt who it was that the plaintiff intended to sue.

In the case of *Vellupillai v. The Chairman, Urban District Council*⁽³⁾ where the plaintiff had a cause of action against the Urban District Council and by a mistake named the Chairman of the Council as the defendant in the plaint and at the trial where an issue was raised that the action had not been properly instituted, it was held that the plaintiff should be allowed to amend the caption by substituting the Council in place of the Chairman. In this case, there was no doubt that the plaintiff intended to sue the Urban District Council and the wording of the plaint itself was to the effect that the cause of action was against the Urban District Council.

In the case of *C. A. Odiris Silva and Sons Ltd. v. P. Jayawardene*⁽⁴⁾ where a plaint mistakenly named the defendant as "Odiris Silva and Sons" when, in fact, defendant was Odiris Silva and Sons Ltd., Court allowed the plaintiff to amend the caption of the plaint, the effect of which was merely a correction of an error in the name by which the defendant was described. In the circumstances, it is manifest that facts in these cases are clearly distinguishable from the facts in the case of *Don Alwis v. Village Committee of Hiripitiya* (*supra*).

The test prescribed by Dewlin, L.J. in *Davis v. Elsby Brothers Ltd.*⁽⁵⁾ to be applied in cases of misnomer was quoted in the case of *The Bank of Ceylon v. Vellaiyan Ramasamy* (*supra*) 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 ~~do~~ tell from the document itself whether they mean me or not.

I shall have to make inquiries, "then it seems to me that one is getting beyond the realm of misnomer. One of 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".

Relying on this test there could have been no doubt in the mind of the defendant in the instant case when he was served with summons that it was Saudi Arabian Airlines Corporation that the plaintiff intended to sue and that he had been named wrongly as the defendant. On a careful reading of the plaint, it would be apparent that naming T. K. A. I. Shammari as the defendant in the caption was a mistake on the part of the plaintiff-respondent.

The learned District Judge upon a consideration of the facts, had taken the view that the amendment sought was in respect of an error in the description of the defendant which was unlikely to mislead the parties in identifying the defendant and that the amended plaint made no change in respect of the character and scope of the action.

In regard to the question of laches in terms of section 93 (2) of the Civil Procedure Code, the learned District Judge had held that to determine the question whether or not a person was guilty of laches the circumstances under which the amendment was sought should be considered and that delay was not the sole reason.

In the unreported case of *Lulu Balakumar v. Balasingham Balakumar*⁽⁶⁾ it was observed that the question of laches cannot be determined only by considering the number of trial dates or the period of time that had elapsed and that circumstances are relevant. Thus delay *per se* does not amount to laches and the circumstances of the particular case have to be taken into account.

Section 65 of the Civil Procedure Code provides that:

"65 – In an action relating to any business or work against a person who does not reside within the local limits of the

jurisdiction of the court from which the summons issued, service on any manager or agent who at the time of the service personally carries on such business or work for such person within such limits shall be deemed good service; and for the purpose of this section the master of a ship is the agent of his owner or charterer."

In the case of *British Ceylon Corporation v. Lionel Edwards Ltd.*⁽⁷⁾ where the appellant company acted as the agent of a company resident abroad it was held that in an action against the foreign company, summons may be served under section 65 of the Civil Procedure Code on the appellant company as its agent.

Learned counsel for the defendant-petitioner submitted that the District Judge had granted time to the defendant-petitioner to file an amended answer. However, in her order dated 14.06.96 allowing the amended plaint, no reference had been made to an amended answer, which could be described as a procedural step upon the acceptance of an amended plaint. It would appear that the correct procedure the plaintiff-respondent could resort to would be to make an application for service of summons on the defendant as correctly inserted in the caption.

In the circumstances, it seems to me that having made order to accept the amended plaint in which Saudi Arabian Airlines Corporation was named as the defendant, the District Judge had erred in making an order requiring T. K. A. I. Shammari to amend his answer.

The learned District Judge had rightly come to a finding that, the amended plaint does not violate the provisions of section 93 (2) of the Civil Procedure Code. In the result, the direction requiring T. K. A. I. Shammari to amend his answer is set aside.

Subject to this variation, I affirm the order of the District Judge dated 14.06.1996 and dismiss this application with costs.

ISMAIL, J., P/CA – I agree.

Application dismissed.