PARAMALINGAM

v.

SIRISENA AND ANOTHER

COURT OF APPEAL
WIGNESWARAN J. (P/CA)
TILAKAWARDANE J.
CALA 97/99.
D.C. TRINCOMALEE 734/97
SEPTEMBER 27, 2000
NOVEMBER 14, 2000

Civil Procedure Code - S.93(1) (2) S.207, Act. 79 of 1988 - S.18 46 - Jus tertii - Amendment of Pleadings - Addition of a party - Laches.

The Plaintiff Respondent filed plaint on 23.9.97, against the Defendant Respondent praying for a declaration of title to the land and ejectment. Averments in the plaint indicated that, the Defendant had denied the right title and interest of the Plaintiff and claimed that he was occupying the premises with leave and licence of one 'P'.

On 25.5.98 four days before the answer due date, an application was made under S. 18 to add P. This was allowed on 29.5.1998. Amended Plaint was filed on 16.6.98 with no changes except to include the name of the added Defendant Petitioner, as an added Defendant - P. No relief was claimed against P. P filed answer, exparte trial against the original Defendant and inter partes trial against P was fixed for 24.2.99 and thereafter on 14.5.99 issues were framed and thereafter an application was made to amend the Plaint again. New Plaint was filed on 28.5.99. In this amended Plaint a declaration of title and ejectment were sought against the added Defendant - P. The District Court allowed the amendment.

Held :

(i) Per Wigneswaran J (P/CA)

> "Indeed in this case injustice may be caused to the Plaintiff Respondent by the non-allowing of the new amended Plaint in that a plea of Res Judicata might be raised in a subsequent action since the added Defendant had been named in this case though relief not claimed - but to allow amendments which are necessitated by the carelessness and negligence of the Plaintiff Respondent himself or his lawyers would be to perpetrate and perpetuate such careless and negligent behaviour by litigants and their lawyers despite the amendment brought to S.93."

(i) Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent.

(ii) P was known to claim title to the subject matter, when this case was first filed - not against P but against another - original Defendant, despite an amendment no reliefs were claimed against P. Thereafter there had been undue delay in applying for amendment which was done only after issues were framed, and on the second date of trial.

Leave to Appeal from the Order of the District Court of Trincomalee.

Cases referred to :

1. *Mackinnon Mackenzie & Co vs. Grindlays Bank Ltd.*, 1986 2 SLR 272.

2. *Gunasekera and another vs. Abdul Latiff* - 1995 2 SLR 225, 232.

S. Mahenthiran for added Defendant Petitioner.

K.S. Balakrishnan for Plaintiff Respondent.

Cur. adv. vult.

February 15, 2001

WIGNESWARAN, J. (P/CA)

This application relates to an order made by the District Judge of Trincomalee on 14.05.1999 allowing amendment to the amended plaint, after trial had started. The learned Counsel for the added Defendant Petitioner has objected to such amendment in terms of the provisions of the amended Section 93(1) and (2) of the Civil Procedure Code.

The Plaintiff-Respondent filed plaint dated 23.09.1997 against the Defendant-Respondent praying for declaration of title to the land and premises described in Schedule "C" thereto, ejectment of the Defendant-Respondent and others holding under her, damages and costs. Paragraphs 13 and 14 of the plaint read as follows:-

"13. The Defendant by her reply dated 8th December, 1996 denied the right and title of the Plaintiff to the said hut premises occupied by her and claimed to occupy with leave and license of certain Paramalingam who had no right or title or authority to give leave and licence to the Defendant.

14. A cause of action has therefore accrued to the Plaintiff to sue the Defendant for a declaration of title to the land described in Schedule "C" hereto and to eject the Defendant from the hut situated in the North-Eastern portion of the said land and for damages."

Thus the Plaintiff-Respondent knew that the Defendant-Respondent was seeking to set up *jus tertii* as her defence when he filed his original plaint. Yet he was content in filing this action for declaration of title against the Defendant-Respondent only, seeking the ejectment of the Defendant and others holding under her. No attempt was made to add Paramalingam to this case at that stage.

After summons was served, the Defendant-Respondent appeared in Court and obtained a date for Proxy and Answer for 29.05.1998. On 25.05.1998, four days before the Answer due date, an application was made under Section 18 of the Civil Procedure Code to amend the plaint including the said Paramalingam as an added Defendant. This application was allowed on 29.05.1998 presumably without notice to the Defendant-Respondent and without adequately considering the contents of the affidavit dated 25.05.1998 filed by the Plaintiff-Respondent. Amended plaint dated 16.06.1998 was thereafter filed with no visible changes except to include the name of the Added Defendant-Petitioner (before this Court) as an Added Defendant. No reliefs were claimed against the Added Defendant. Summons was thereafter issued and the Added Defendant made appearance and filed Answer on 11.12.1998. Since the original Defendant was absent ex-parte trial against her and inter partes

trial against the Added Defendant were fixed for 24.02.1999 and thereafter for 14.05.1999. On 14.05.1999 issues were framed and thereafter an application was made to amend the plaint again. Application to amend the amended plaint was allowed and in fact the new amended plaint was filed on 28.05.1999.

The only difference in the new amended plaint seems to be the inclusion of the Added Defendant in paragraph 14 abovesaid (in addition to the Defendant) as a party against whom declaration of title and ejectment were sought thereby including the Added Defendant in prayers (b) and (c) to the new amended plaint.

In fact an error or mistake made by the Attorney-at-Law for the Plaintiff in not including the Added Defendant's name in paragraph 14 and prayers (b) and (c) of the amended plaint dated 16.06.1998 was sought to be corrected by the same Attorney-at-Law for the Plaintiff by applying to have a further amended plaint filed. Despite the Answer of the Added Defendant that no relief had been sought in the amended plaint dated 16.06.1998 against the Added Defendant, the Counsel for the Plaintiff had consented to start the trial on 14.05.1999 by framing issues.

There is no doubt that the Attorneys-at-Law for the Plaintiff had acted most irrationally and irresponsibly in this case. In fact there is per se lack of vigilance perceivable in the manner in which they had acted. If only the Attorney-at-Law for the Plaintiff had read the amended plaint dated 16.06.1998 before filing it with the mere addition of the Added Defendant's name in the caption (but without making the necessary corrections in the body of the amended plaint), she would have realised the shortcoming in the amended plaint filed. She did not do so.

The Counsel for the Plaintiff at least could have read the amended plaint before the first trial date (24.02.1999) or at

least before the trial started on 14.05.1999. He too had not done so.

The Added Defendant had quite rightly stated in his Answer that no relief had been claimed against him in the first Amended Plaint. At least the Answer of the Added Defendant should have been read by the Counsel for the Plaintiff before coming ready for trial on 14.05.1999. Even that he seems to have not done.

All this carelessness and lethargy on the part of the Lawyers had put the parties to this case into a mess. Unfortunately the sins of Lawyers vest on their clients who seek redress from Courts.

The learned District Judge had merely come to his conclusion that the new amended plaint must be allowed to be filed since no undue delay had ensued, overlooking the fact of utter carelessness and lack of reasonable diligence in the conduct of the Lawyers appearing for the Plaintiff-Respondent. He had not even granted costs to be paid to the Added Defendant who was not to be blamed for the crass irresponsibility on the part of the Lawyers appearing for the Plaintiff-Respondent. He had found that refusal to permit the amendment to the Amended Plaint would result in grave and irremediable injustice.

We have been directed to an unreported case of this Court CALA 55/2000 (D.C. Colombo Case No. 8975/RE) decided on 08.09.2000 by the learned Counsel for the Added Defendant-Petitioner wherein it was held by the then President of the Court of Appeal, Justice Edussuriya, that negligence and lack of vigilance on the part of the Lawyers for a party, would not be covered by the provisions of Section 93(2) of the Civil Procedure Code.

Indeed in this case injustice may be caused to the Plaintiff-Respondent by the non-allowing of the new Amended Plaint in that a plea of Res Judicata might be raised in a subsequent action since the Added Defendant had been named in this case

though reliefs not claimed. (Vide Explanation to Sec. 207 of the Civil Procedure Code). But to allow amendments (even with the payment of stiff costs) which are necessitated by the carelessness and negligence of the Plaintiff-Respondent himself or his Lawyers, would be to perpetrate and perpetuate such careless and negligent behaviour by litigants and their Lawyers despite the amendment brought to Sec. 93 of the Civil Procedure Code.

It is most unfortunate that the Plaintiff-Respondent has to suffer in this case due to the lack of vigilance on the part of his Lawyers. But when interpreting the present Section 93(2) of the Civil Procedure Code we must be conscious of the reasons which necessitated amendments to the old Section 93.

The old Section 93 read as follows:-

"93. At any hearing of the action, or any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the Judge."

Chief Justice Sharvananda had stated around 14.05.1986 in interpreting the abovesaid old Section 93 in *Mackinnon Mackenzie & Co. Vs. Grindlay's Bank Ltd.*[1] as follows at 279.

"Provisions for the amendment of pleadings are intended for promoting the ends of justice and

not for defeating them. The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence. However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

Thereafter came the Amending Act No. 79 of 1988 where Section 93 was amended to read as follows:-

93. (1) The court may, in exceptional circumstances and for reasons to be recorded, at any hearing of the action, or at any time in the presence of, or after reasonable notice to all the parties to the actions, before final judgment, amend all pleadings and processes in the action by way of addition, or of alteration or of omission.

(2). Every order for amendment made under this section shall be upon such terms as to costs and postponement of the date fixed for the filing of answer, or replication, or for the hearing of the case or otherwise, as the court may think fit.

(3) The amendments or additions made in pursuance of an order under this section shall be clearly written on the pleadings or processes affected by the order; or if it cannot be conveniently so done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the judge."

Thus the earlier section which gave Court considerable discretion in deciding on amendment of pleadings was changed. The phrase "the Court may in exceptional circumstances and for reasons to be recorded" replaced the earlier phrase "the Court shall have full power of amending in its discretion."

Then came Amending Act No. 9 of 1991 which changed the earlier amended Section 93 to read as follows:-

"93. (1) Upon application made to it before the day first fixed for trial of the action, in the presence of, or after reasonable notice to all the parties to the action, the court shall have full power of amending in its discretion, all pleadings in the action, by way of addition, or alteration, or of omission.

(2) 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 by the Court, 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.

(3) Any application for amendment of pleadings which may be allowed by the Court under subsection (1) or (2) shall be upon such terms as to costs and postponement or otherwise as the Court may think fit.

(4) The additions or alterations or omissions shall be clearly made on the face of the pleading affected by the Order; or if this cannot conveniently be done, a fair copy of the pleading as altered shall be appended in the record of the action to the

pleading amended. Every such addition or alteration or omission shall be signed by the Judge."

Thus a distinction was between "before the day first fixed for trial" and "on or after the day first fixed for the trial." The Court's discretion was unfettered with regard to amendments before the first date of trial subject to an application having to be made to do it with notice to all other parties. But its powers on or after the first date of trial were severely curtailed. The present Section 93 has come through many vicissitudes. It is under subsections (1) and (2) of the present Section 93 that the learned Counsel for the Added Defendant-Petitioner objected to the amendment.

Justice *Ranaraja in Gunasekera and another Vs. Abdul Latiff*[2] at 232 stated as follows:-

"The amendments to pleadings on or after the first date of trial can now be allowed only in very limited circumstances. It prohibits court from allowing an application for amendment at this stage unless (1) it is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted, and (2) the party applying has not been guilty of laches. On no other ground can court allow an application for an amendment of pleadings. Furthermore, court is obliged to record reasons for concluding that the two conditions referred to have been satisfied."

Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent. Lord Camden said "Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence; when these

are wanting the Court is passive and does nothing."

The learned District Judge in this instance has come to the conclusion that there had been no undue delay in applying for amendment since on the first date of trial the case had to be re-fixed for trial owing to the alms-giving relating to the deceased son of the Plaintiff falling on that date. But the delay should have been considered from an anterior date. As stated earlier the Plaintiff knew of a third party's interest in the subject matter of this case (Vide para 13 of Plaint dated 23.09.1997). The Plaintiff had already amended the plaint and added such third party to this case but had failed to ask for any relief against him. There were two dates of trial and it was only on the second date of trial, after issues had been framed, did the Plaintiff move to amend the plaint to include reliefs against the Added Defendant. Therefore there had been utter callousness and delay on the part of the Plaintiff and his Lawyers in seeking to apply for amendment.

Not only that. The learned District Judge should have checked whether the proposed amendment was covered by the general bar set out in the proviso to Section 46 of the Civil Procedure Code which reads as follows:-

> **"Provided that 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;"**

Here was an action brought against a person who was in occupation of the premises in suit, claimed by the Plaintiff himself as a licensee under another person named Paramalingam and known to the Plaintiff at the time of filing this action (vide para 13 of the original plaint). The Plaintiff should have filed this action against such third party (the Added Defendant Paramalingam) under whom the original Defendant claimed license. Instead, this action was filed against the original Defendant describing him as a trespasser without seeking any

relief against the said Sellappah Paramalingam. The cause of action against the original Defendant was thus his personal unlawful occupation.

But the affidavit dated 25.05.1998 seeking to add "S. Paramalingam" as a party to this case refers to another action bearing D.C. Trincomalee Case No. 667/96 wherein the said "S. Paramalingam" was the Plaintiff and judgment had been entered in the said S. Paramalingam's favour with regard to the same subject premises to this action against one P.A. Pakkiyathurai and P. Wijayarajan and the said "S. Paramalingam" had been handed over possession of the same land and premises consequent to writ being issued in that case. In fact the Plaintiff in this case had been admittedly ejected from the subject matter of this action in that action. (Vide paragraphs 3 and 5 of the affidavit of the Plaintiff-Respondent dated 25.05.1998).

If as he claims in paragraph 6 of the affidavit the ownership of the subject matter of this action had to be decided, then this action should have been filed in the first instance against Sellappah Paramalingam and not against the original Defendant in this case. Having filed this action against a known agent of the principal Sellappah Paramalingam the Plaintiff sought by his affidavit dated 25.05.1998 to convert the action against the agent into an action against the principal. The causes of action therefore seem to be different. The tone of the original plaint in this case was that while the Plaintiff was the owner, the original Defendant had crept into the land and premises without any manner of title mentioning a third party's name as his licenser. But the affidavit dated 25.05.1998 sought to convert this action into an action relating to title and ownership against the Added Defendant when the Plaintiff knew right along that his title was being disputed by Sellappah Paramalingam and that the original Defendant was only an agent or licensee of the said Paramalingam.

Thus this dubious action seems to have more to it than meets the eye. In any event Sellappah Paramalingam was known

to claim title to the subject matter of this action when this case was first filed not against Paramalingam but against another (the original Defendant). Thereafter despite an amendment no reliefs were claimed against the added Defendant. Thereafter there had been undue delay in applying for amendment and only after issues were framed on the second date of trial did the Plaintiff move to amend the plaint. And the existing amended Section 93 when examining whether grave and irremediable injustice will be caused if amendment was not permitted cannot be said to include cases where negligence and lack of vigilance on the part of the Lawyers are involved. The provisions of Section 93(2) of the Civil Procedure Code are intended to be used generally when "amendments to pleadings are necessitated by unforeseen circumstances" [per **Justice Ranaraja at** 236 (Supra)]. If any other interpretation is given, such as allowing a mistake or error creeping in despite the circumstances being foreseen, then the amendment made by Act No. 9 of 1991 would lose its purpose and importance.

This was a clear cut case where the Plaintiff right along knew who his adversary was (viz. the Added Defendant) but did not seek to file this action against him but against a known licensee of such person. Thereafter he did not show due diligence in prosecuting this case but was callous and indifferent even after obtaining a right to amend the original plaint. In any event the Plaintiff was precluded from amending his amended plaint since the reasons which promted such amendments were not unforeseen.

The learned District Judge had erred in his decision to allow such an amendment.

We set aside the order dated 14.05.1999 permitting such an amendment to the amended plaint dated 16.06.1998 and make order to reject the new amended plaint dated 28.05.1999. The trial will now proceed with the amended plaint dated 16.06.1998.

The Plaintiff Respondent will pay the taxed costs of this leave to appeal application to the Added Defendant-Petitioner. Registrar of this Court should forward the record of this case to the District Court of Trincomalee forthwith.

TILAKAWARDANE, J. - I agree.

Application allowed.

Amended plaint dated 27.05.1999 rejected.