

**SENEVIRATNE
VS
HERATH AND ANOTHER**

COURT OF APPEAL

WIJAYARATNE, J.

CA 423/03 (Rev.)

D. C. Kuliapitiya No. 11813/L

OCTOBER 11, 2004

Civil Procedure Code - Section 93 (2) - amendment of Pleadings - after 10 days of trial - Circumstances - when could court grant relief ? - Question of presumption ? - Could it be considered at the stage of amendment of the Plaintiff?

The Plaintiff - Petitioner instituted action on 18.11.97 after several postponements of the trial, on the 10th date of trial the Plaintiff Petitioner in person moved to amend the Plaintiff. The Defendants objected to same, and the trial Judge refused the application, on the ground of laches. The plaintiff moved in revision.

Held

- (i) It is apparent that the Plaintiff-Petitioner had explained his delay as all registered Attorneys at Law had withdrawn from the case, in view of the fact that the 2nd defendant is a colleague in practice. It is beyond argument that the Plaintiff Petitioner was driven to this situation by several Attorneys at Law who having accepted the brief from the Petitioner but have later declined to appear.
- (ii) It is in these circumstances that the Plaintiff was compelled to ultimately seek to amend the Plaintiff himself after 10 days of trial fixed. None of the Attorneys at Law have proceeded to take any steps worthwhile.

The circumstances of withdrawal of the Attorney - at Law is a circumstance the District Judge should have considered.

per Wijayarathne J

" The presence of such circumstances even in view of the provisions of subsections 1 and 2 of Section 93 warrant the amendment being allowed"

- (iii) changing the scope of action and that provisions relating to presumption barred the inclusion or addition of a new land-need not be considered at the stage of the amendment of the Plaintiff.

APPLICATION in Revision from an Order of the District Judge of Kuliapitiya**Cases referred to :**

1. *Hatton National Bank Ltd., vs Whittal Baustead Ltd., 1978/79 - 2 Sri LR 25*
2. *Mackinnon Mackenzie & Co. of Ceylon Ltd., vs Grindlays Bank 1986 2 CALR 279*

S. A. D. S. Suraweera with Dushantha Eritawela for petitioner
M. C. Jayaratne with Ms. Sobha Adhikari for 1st and 2nd respondents.

July 4, 2005

cur adv vult

Wijayarathe, J.

This is an application for the revision of the order dated 21.12.2002 (P3a) made by the learned District Judge of Kuliapitiya dismissing the application of the plaintiff-petitioner to amend the plaint. The plaintiff-petitioner instituted the relevant action by his plaint dated 18.11.1997 and after due procedure, the case came up for trial on 09.09.98 and on 20.01.99 when the case came up for trial, the action was dismissed due to non-attendance of the plaintiff-petitioner. However the case restored to the roll of pending cases by order dated 24.05.2000, has come up for trial on the days before the plaintiff-petitioner in person moved to amend the plaint. The Several postponements of trial was granted on account of the Attorney-at-Law for plaintiff-petitioner moving to be released from the case on personal grounds of not agreeing to appear against the 2nd defendant-respondent a fellow practitioner of law.

However the amendment was objected to by the 1st and 2nd respondents on grounds of laches and the amendment being likely to change the scope of the action as it proposed to bring in new land. The learned District Judge having considered the application and the objection refused the application to amend on grounds of laches when plaintiff-petitioner presented the same on the 10th date of trial without any reason for delay being adduced.

Upon the perusal of the order it appears that the learned District Judge has considered vide ***Hatton National Bank Ltd. vs. Whittal Baustead Ltd¹⁾***, (1978/79) 2 SLR 25, *Makinon Mackenzie & Co. of Ceylon Ltd. Vs. Grindlays Bank Ltd²⁾*.

The amendment proposed to describe in a separate schedule the lot 2 already referred to in the original plaint. The amendment will serve the purpose of the determination of the real question raised through-out the plaint and will help effectually adjudicate upon the dispute between parties. The learned District Judge considered only the matter of delay but failed to consider other grounds urged by the defendant-respondents. They urged that amendment proposed to bring in new land, lot 2, changed the scope of the action.

The parties who moved this Court to dispose of the matter by way of written submissions already tendered by the parties have also urged that bringing in 2nd land namely lot 2 after 4 years was barred by the provision of the Prescription Ordinance.

It is apparent on the draft amended plaint that the plaintiff-petitioner explained his delay as all registered Attorneys-at-Law withdrawing in view of 2nd defendant being their colleague in practice. This is a fact borne out by the record of the case itself. The learned District Judge should have seen the explanation and considered whether it was reasonable explanation. It is beyond argument that the plaintiff-petitioner was driven to this situation by several of Attorneys-at-Law who having accepted the brief from him have later decline to appear. It is in those circumstances that the plaintiff was compelled to ultimately seek to amend the plaint himself after ten days of trial fixed. It is also evident on record that none of those AALs have proceeded to take any step worthwhile in the prosecution of the plaintiff-petitioner's case and the number of dates of trial increased only with their withdrawals. It is the considered view of the supreme Court that it is the right of a litigant to have the services of a lawyer in presenting his case to a Court of Law. In such situation the circumstances of withdrawal of the AALs is a circumstance the learned District Judge should have considered.

The presence of such circumstances even in view of the provisions of sub sections 1 and 2 of section 93 warrants the amendment being allowed.

The ground the learned District Judge did not consider, that amendment proposed to being in new land, ie ; lot 2, change the scope of the action and provisions relating to prescription barred the inclusion or addition of new land need to be considered at least at this stage. Perusal of the original plaint dated 18.11.1997 in paragraphs 4, 5, 6, 7 and 8 setting out the facts disclosing the cause of action has already included lot 2 in plan No. 702 referred to therein as relevant land to the cause of action. Therefore addition of a schedule morefully describing lot 2 cannot in law be considered as bringing in new land or addition of cause of action that would changed the scope of the action. For the same reason there cannot be a question of prescription that the Court could have considered at the stage of amendment of the plaint, though the defendant - respondents rights to raise such a plea is not affected by acceptance of the amendment.

The circumstances of the case of the plaintiff-petitioner being abandoned by several of AALs who initially agreed with him to appear for him and the circumstances of the learned District Judge not having considered all material grounds urged, provides, in my view, exceptional circumstances for the intervention of this Court in the exercise of its revisionary jurisdiction.

Accordingly the order of learned District Judge dated 21.12.2002 refusing the amendment of plaint is revised and set aside and the application for the amendment of the plaint is allowed. The learned District Judge of Kuliyaipitiya is directed to accept the amended plaint as per draft dated 21.01.2002, follow due procedures and proceed to trial according to law.

Application for revision allowed with costs.

Application allowed.