JOONOOS
v.
CHANDRARATNE

SUPREME COURT.
AMERASINGHE, J., DHEERARATNE, J.
AND WADUGODAPITIYA, J.
S.C 30/90 & 31/90.
C.A.L.A. 198/90.
D.C MT. LAVINIA 2300 RE.
APRIL 01, 1992.

Landlord and tenant – Reasonable requirement – Traversal of jurisdiction – Production of copy of notice to quit – Secondary evidence – Civil Procedure Code ss. 75 (d), 76 – Evidence Ordinance ss. 65, 66 – Reconstruction of lost record.

1. What section 76 of the Civil Procedure Code requires is that the plea of want of jurisdiction should not be rolled up with other pleas and averments. It should stand alone. "Separate" and "distinct" as they appear in section 76 are words of similar signification, the latter word adding to the plea the quality of being clear and well defined. The traversal of jurisdiction must be separate from other pleas and averments. The separateness of the plea need not necessarily be achieved by that plea being taken in a separately numbered paragraph, although that ought usually to be the case. The separateness could be achieved by taking the plea in a separate paragraph or subparagraph.

Per Dheeraratne, J:

"The wording of section 76 is unsatisfactory, because, it gives sanction to a plea of bare denial of jurisdiction, which encourages a defendant to subvert civil litigation to a game of hide-and-seek. This ought not to be permitted at a time when the public outcry against laws delays is articulated louder and clearer than before. The remedy lies with the legislature and not with us."

2. In paragraph 12 of the plaint, the plaintiff averred that by letter dated 15. 01.1983 he gave one year's notice in writing of the termination of the tenancy and that a copy of the letter and a copy of the registered postal article in proof of posting that letter were annexed to the plaint. The defendant denied this averment in his answer. In this context, it would be a sheer pretence to give notice to the defendant to produce the original of the notice. Notice to produce the original is not served in order to give the opponent notice that the document mentioned in it will be used by the other party and thus enable the opponent to prepare counter evidence, but so as to exclude the objection that all reasonable steps have not been taken to procure the original document.

The requirement of the notice to produce a document is not dispensed with only in the six cases enumerated in section 66 but also, as the proviso states, in any other case in which the court thinks fit to dispense with it.

No notice to produce the notice ever need be given. No notice to produce the notice to quit in an action to recover possession of land is ever necessary. The copy of the notice could, in terms of section 66 (1) of the Evidence Ordinance, have been produced without giving notice to the defendant to produce it.

3. As the record had been lost, it could be reconstructed from the briefs of the judges of the Supreme Court and Appeal Court.

Cases referred to :-

1. *Blue Diamonds Ltd. v. Amsterdam-Rotterdam Bank* SC 17/91 SC Minutes of 23. 09. 1992.
2. *Rex v. Turner* (1910) 1 KB 346.
3. *Practice Note per Lord Goddard C.J.* (1950) 1 All ER 37.
4. *Podisingho v. Perera* 75 NLR 333.

APPEAL from the judgment of the Court of Appeal.

Miss. Maureen Seneviratne, P.C., with *Hilton Seneviratne* for defendant-appellant.

P. A. D. Samarsekera, P.C., with *Harsha Amarasekera* for plaintiff-respondent.

Cur. adv. vult.

18 May, 1993.

DHEERARATNE, J.

The Factual Background

The plaintiff-respondent (landlord) filed action on 10.1.1985 in the District Court of Mt. Lavinia to have the defendant-appellant (tenant) ejected from the demised premises on the ground of reasonable requirement. By para 1 of the plaint the plaintiff-respondent averred that the defendant resides, the land and the premises in respect of which the action is brought is situated and the cause of action set out arose, within the local limits of the District Court of Mt. Lavinia, namely at Wellawatta. In terms of section 9 of the Civil Procedure Code, it is sufficient if anyone of the above enumerated conditions existed within the local limits of the jurisdiction of the District Court of Mt. Lavinia for the action to be instituted in that court. Section 45 of the Civil Procedure Code requires every plaint to contain a statement of facts setting out the jurisdiction of the court to try and

determine the claim in respect of which the action is brought ; there is no doubt that the averments in para 1 of the plaint are sufficient to satisfy the requirements of the above-mentioned section. The plaint also averred by para 12 that by letter dated 25.1.1983, the plaintiff-respondent gave the defendant-appellant notice in writing of the termination of the tenancy and required the defendant-appellant to quit and deliver the premises on or before 31.1.1984 ; and that a copy of that letter and a copy of the postal article of registration of the letter, marked X1 and X2 respectively, were annexed and pleaded as part and parcel of the plaint.

Answer of the defendant-appellant was filed on 24.7.1985, which contained among other averments, a claim-in-reconvention for recovery of a sum of money alleged to represent overpayment of rent. The only averments in the answer which seek to traverse averments Nos. 1 (jurisdiction) and 12 (notice to quit) of the plaint are the following ; and I set them out in full :–

> *"1. The defendant denies all and singular the averments contained in the plaint except those specifically admitted here.*
> *2. Answering paragraphs 1, 7, 12, 13, 14, 15, 16, 18 and 19 of the plaint the defendant denies the averments contained therein and puts the plaintiff to the strict proof thereof".*

The trial commenced on 27.8.1987 ; admissions were recorded and issues raised. Among the plaintiff-respondent's issues, was the issue "has this court jurisdiction to hear and determine the action".

The plaintiff-respondent giving evidence sought to produce as P1 a copy of the notice of termination of the tenancy referred to in the plaint. Objection was taken to the production of a copy of that notice by learned President's Counsel for the defendant-appellant on the ground that no notice had been given to the defendant-appellant to produce the original. Learned counsel for both sides made submissions to the learned District Judge on sections 65 and 66 of the Evidence Ordinance. On application of counsel for the plaintiff-respondent to give him an opportunity to submit in support of his submission a treatise on the law of evidence, which he did not have in his possession at that time, the learned trial Judge postponed the hearing for 30.9.1987. After several dates of postponement of the hearing for diverse reasons, the case came up for trial again on 27.2.1990.

On that day, the case came up before a different judge, the former having gone on transfer. Learned counsel for the defendant-appellant invited the court to disregard the issues raised and the evidence already led and to commence the trial *de novo*. Court allowed that application ; admissions were recorded afresh and counsel for both sides raised issues. No issue was raised on behalf of the plaintiff-respondent on the question of jurisdiction of the court to hear and determine the action, but among the issues raised by learned counsel for the defendant-appellant was the following :–

(7) Has the court the jurisdiction to hear and determine this case?

Learned counsel for the plaintiff-respondent objected to the above issue on the ground that the answer did not conform to the requirements of section 76 of the Civil Procedure Code in order to enable learned counsel for the defendant-appellant to raise such an issue. The court upheld the objection. Learned counsel for the defendant-appellant then applied for a postponement of the trial to enable her either to amend the pleadings or to canvass the correctness of the learned trial Judge's order 'in a higher court'. This application was disallowed.

The plaintiff-respondent was thereafter called to give evidence and at the stage she sought to produce a copy of the notice to quit dated 25.1.1983 (P12), it was objected to by learned counsel for the defendant-appellant on the same ground as was urged at the abortive trial. The learned trial Judge overruled the objection and the plaintiff-respondent continued to give evidence in examination-in-chief and thereafter her cross examination commenced. When the trial was adjourned that day the plaintiff-respondent was still under cross examination and the trial was fixed for 4.5.90, 24.5.90 and 26.6.90.

On 14.4.1990, leave to appeal and revision applications were filed on behalf of the defendant-appellant in the Court of Appeal seeking to canvass the correctness of both interlocutory orders made by the learned trial Judge on 27.2.1990. Further proceedings before the District Court were stayed by order of the Court of Appeal until the revision application was disposed of finally. By judgment of the Court of Appeal dated 24.7.1990 both applications were dismissed and the present appeal is the sequel.

The Order Upholding the Objection to the Issue on Jurisdiction.

The plea of want of jurisdiction being a dilatory plea, the law was consistent in requiring such a plea to be taken up by a defendant at the earliest opportunity. See section 39 of the Judicature Act No. 2 of 1978, section 43 of the Administration of Justice Law. No. 44 of 1973 and section 71 of the Courts Ordinance No. 1 of 1889. As far as general requisites of an answer of a defendant are concerned, section 75 (d) of the Civil Procedure Code specifies, an answer shall contain a statement admitting or denying the several averments of the plaint, setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence ; this statement shall be drawn in duly numbered paragraphs, referring by numbers, where necessary, to paragraphs of the plaint. The averments of the answer of the defendant-appellant, no doubt, conform to these requirements, in the sense that the averment of the plaintiff regarding jurisdiction is denied. But section 76 of the Civil Procedure Code requires a defendant intending to rely on the defence of want of jurisdiction to conform to an additional formality and that section reads :–

> "If the defendant intends to dispute the averment in the plaint as to jurisdiction of the court, he must do so by a separate and distinct plea, expressly traversing such averment."

"Separate" and "distinct" are words of similar signification, the latter word adding to the plea the quality of being clear and welldefined. It may be asked ; separate from what? The obvious answer seems to be – separate from other pleas and averments. What the section requires is that the plea of want of jurisdiction should not be rolled up with other pleas and averments. It should stand alone. The word "expressly" means as opposed to impliedly and the word "traverse" is synonymous with the word "deny". Odgers on pleading and practice 19th edition page 128 defines "traverse" as "the express contradiction of an allegation of fact in an opponent's pleadings ; it is generally a contradiction in the very terms of the allegations. It is, as a rule, framed in the negative because the fact which it denies is, as a rule, alleged in the affirmative." The word "plea" means "any contention put forward by a defendant by way of answer to the plaintiff's declaration." (see Oxford Companion to Law, David M. Walker, 1980).

The plea could be either a negative or a positive contention and generally, even a bare denial constitutes a plea. (For instances of inadequacy of a bare denial to form a plea see the observations of Fernando, J. in *Blue Diamonds Ltd. v Amsterdam-Rotterdam Bank* [1]. The separateness of the plea need not necessarily be achieved by that plea being taken in a separately numbered paragraph, although that ought usually to be the case. The separateness could be achieved by taking the plea in a separate paragraph or subparagraph. The denial of jurisdiction in the defendant's answer fully reproduced elsewhere in this judgment patently lacks that quality of separateness and the learned trial Judge was correct in upholding the objection raised on behalf of the plaintiff-respondent.

It was not obligatory on the part of the defendant-appellant, in terms of section 76 of the Civil Procedure Code, to have disclosed in his pleadings, the factual basis of his plea of want of jurisdiction ; such a factual basis remained undisclosed, even during the argument before us. The wording of section 76 is unsatisfactory, because, it gives sanction to a plea of bare denial of jurisdiction, which encourages a defendant to subvert civil litigation to a game of hide-and-seek. This ought not to be permitted at a time when the public outcry against laws delays is articulated louder and clearer than before. The remedy lies with the legislature and not with us.

I may observe for the sake of completeness, that in terms of the proviso to section 39 of the Judicature Act No. 2 of 1978, if it should appear to the learned trial Judge in the course of the proceedings that the action was brought in that court when it has no jurisdiction, intentionally and with previous knowledge of the want of jurisdiction, he shall be entitled at his discretion to refuse to proceed further and declare the proceedings null and void.

The Order Disallowing the Objection to Produce a Copy of the Notice to Quit.

Section 65 of the Evidence Ordinance *inter alia* provides that secondary evidence may be given of the existence, condition, or contents of a document, when the original **is shown or appears to be** in the possession or power of the person against whom the document is sought to be proved and when, after notice mentioned in section 66, such person does not produce it. Section 66 reads :–

"Secondary evidence of the contents of the document referred to in section 65 subsection (1), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney-at-law, such notice to produce it as is prescribed by law ; and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case ;

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the court thinks fit to dispense with it :–

(1) when the document to be proved is itself a notice" ;
(2 to 6 are omitted).

It will be observed that the requirement of the notice to produce a document is not dispensed with only in the six cases enumerated in the section, but also as the proviso states, in any other case in which the court thinks fit to dispense with it. By para 12 of the plaint, the plaintiff-respondent averred that by letter dated 15.1.1983, he gave one year's notice in writing of the termination of the tenancy and that a copy of the letter and a copy of the registered postal article in proof of posting that letter were annexed to the plaint. By paras 1 and 2 of the answer, the defendant-appellant denied the plaintiff-respondent's averment. The direct inference of that denial is that the plaintiff-respondent did not send such a notice to the defendant-appellant and therefore the defendant-appellant did not receive the same. In this context, it would be a sheer pretence to give notice to the defendant-appellant to produce the original of the notice. It is difficult to imagine that the law expects the plaintiff-respondent to indulge in such a meaningless charade. Notice to produce (the original) is not served in order to give the opponent notice that the document mentioned in it will be used by the other party, and thus enable the opponent to prepare counter evidence, but so as to exclude the objection that all reasonable steps have not been taken to procure the original document. See Cross on Evidence (1985) 6th Edition 605 ; Law of Evidence C. D. Field (1990) 11th edition 2779. It seems to me that the learned trial Judge exercised that discretion in terms of section 66 and admitted the

copy of the notice to be produced and I am unable to say that he was in error when he did so.

Since arguments in the Court of Appeal and in this court proceeded on another basis as to whether the notice to produce the document could have been dispensed with by the learned trial Judge in terms of subsection (1) of section 66, namely on the footing that the document itself is a notice, I would now examine that position. It may be observed that the terminology used in the section is "when the document to be produced is itself **a notice**" and not "itself **such a notice**".

Learned President's Counsel for the defendant-appellant relied on the case of *Rex v. Turner* [2] to support the contention that the word "notice" in section 66 (1) refers only to a notice to produce. I am unable to agree that any part of that judgment supports her contention. That very case was referred to much later in the Practice Note reported in [3] and this is what Lord Goddard C.J. had to say :-

> "The other point is that I am told there has been an inquiry from the quarter sessions, or a point has been raised at a certain borough quarter sessions, whether or not a police officer can give evidence of the contents of the notice that he serves on the prisoner without giving a notice to produce it. I am surprised this question should have been raised because I thought it was a well known rule of evidence relating to documents that no notice to produce the notice ever need be given. The classic case, of course, *is a notice to quit where an action is brought to recover possession of land.* (emphasis added) No notice to produce the notice is ever necessary, and, if authority were wanted, it was so expressly ruled by this court in *R. V. Turner* [2] in which Channell, LJ., pointed out that, if you had to give notice to produce the notice, you would have to give notice to produce the notice to produce, and so *ad infinitum.* if ever the question is raised again, chairmen of quarter sessions can rest assured that it is not necessary to give notice to produce the notice which has been served on the prisoner.

See also Monir, Law of Evidence (1986) at page 811.

I hold that the document too could have been admitted in terms of section 66 (1) of the Evidence Ordinance without notice being given to the defendant-appellant to produce the same. Before I part with this point, let me say a word about the case of *Podisingho v. Perera* [4] reference to which has been made in the judgment of the Court of Appeal. It seems to me that any reference to that case was premature and irrelevant, as it deals with adequacy or probative value of an item of secondary evidence, which should concern the learned trial Judge only at a later stage of the proceedings before him and not at the stage production of that document as secondary evidence was sought.

Conclusion

I hold that the learned District Judge came to the correct conclusion on both interlocutory matters. The appeal is dismissed with costs of this court fixed at Rs. 10,000 payable by the defendant-appellant to the plaintiff-respondent. We are informed by the parties that the record in this case had been destroyed by fire during the civil disturbances. Therefore in order to avoid any further confusion and delay I direct :–

(1) the Registrar of this Court to transmit to the learned District Judge Mt. Lavinia, immediately, a copy of the Judge's brief of this Court together with a copy of the Judge's brief of the Court of Appeal, to enable the learned District Judge to reconstruct the record of the case ;

(2) the learned District Judge to reconstruct the record with the aid of copies of briefs referred to in (1) above where copies of the proceedings of the District Court are available ;

(3) the learned District Judge to give precedence to this case and to conclude the same as expeditiously as possible ;

(4) the learned District Judge to have this case called in open court on 2nd June 1993 to fix dates of further trial. The parties will take notice of that date.

AMERASINGHE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal dismissed.