

COLOMBO SHIPPING CO. LTD.
v.
CHIRAYU CLOTHING (PVT) LTD.

COURT OF APPEAL

SILVA, J. P/CA

RANARAJA, J.

C. A. 665/94

C.A. L.A. 224/94

D.C. COLOMBO 12238/ME

APRIL 5, 1995.

Addition of Parties – Civil Procedure Code Sections 18, 19, 21, 38, 46, 90 and 93 – Amendment of Pleadings – Applicability of the Amending Act, No. 9 of 1991 S. 93(2) – Amendments allowed only in limited circumstances – Notice under S 18.

The Respondent instituted action against the Petitioner alleging that the Respondent entered into an agreement with 'X' of U.S.A. for manufacture of garments. 'X' nominated the petitioner as the freight forwarder. The Respondent consigned the goods to 'Y' Bank of Hongkong which opened the Letters of Credit and handed over the goods to the Petitioner. The goods were shipped to U.S.A. and after clearance from 'Y' Bank the Respondent could not obtain payment. The Respondent claimed from the Petitioner on the ground that it had consigned the goods to a party other than the 'Y' Bank. The Petitioner denied having entered into any agreement with the Respondent claiming that it acted as an Agent of 'Z' Ltd., who were the agents of 'Y'. The Respondent, thereafter, sought to add 'Z' and amend the Plaint. The learned District Judge allowed the amendment.

Held:

- (i) The amendment sought should make the real issue clearer.
- (ii) The real Issue is whether the Petitioner consigned the goods to 'Y' Bank or not; adding 'Z' Ltd., will not make this issue clearer.
- (iii) The Respondent, having chosen to sue the Petitioner cannot by adding 'Z' Ltd., rectify the mistake of instituting action against the wrong party.
- (iv) Proper course is to drop the action and commence a fresh action against the proper party.
- (v) 'Z' Ltd., has been added without the requisite Notice. Hence it is also not in conformity with the requirements of Section 18.

(vi) After the amendment No. 9 of 1991, if an application is made to add a party after the first date of trial, Sec. 18, 21, 93(2) of the Code should be read together in allowing or refusing such an application.

Per Ranaraja J.

“Amendments on and after the first date of trial can now be allowed only in very limited circumstances namely, when the Court is satisfied that grave and irremediable injustice will be caused, if the amendment is not permitted and the Party is not guilty of laches”.

Cases referred to:

- (1) *Ratwatte v. Owen* – 2 N.L.R. 141.
- (2) *Kira v. Kira* – 3 C.L.R. 73.
- (3) *Don Alwis v. V.C. of Hiripitiya* – 54 N.L.R. 225.
- (4) *Loos v. Schrenguivel* – 3 C.L.R. 47.
- (5) *Banda v. Dharmaratne* – 24 N.L.R. 210.

AN APPLICATION in Revision from an Order of the District Court of Colombo.

S. Sivarasa, P.C. with *K. M. Basheer Ahamed* for Petitioner.
G. D. L. Weerasinghe for Respondent.

Cur. adv. vul

May 05, 1995.

RANARAJA, J.

The Respondent instituted action against the Petitioner alleging *inter alia*, that the respondent entered into an agreement with C. S. I. Garments Incorporated, U.S.A., (C.S.I.) for the manufacture of garments, C.S.I. nominated the petitioner as the freight forwarder/consolidator. The respondent consigned the goods, (garments) to the Philadelphia National Bank of Hong Kong, which opened the letters of credit and handed over the goods to the petitioner for shipment. The goods were shipped to U. S. A. and were cleared by the U.S. customs. The respondent was unable to obtain payment from the said Bank. Hence, the respondent claimed a sum of US \$ 24,277.33 from the petitioner on the ground that it had consigned the goods to a party other than the Philadelphia National Bank, or on the alternative ground of unjust enrichment.

The petitioner denied having entered into any agreement with the respondent. It claimed to have acted at all times as agent of Buyers Consolidators Ltd.; of Hong Kong, who were in turn the agents of C.S.I.

The matter was fixed for trial on 10.6.93, on which day, the trial was refixed for 27.10.93. On 6.9.93, the respondent made an application under Section 18 of the Civil Procedure Code to add Buyers Consolidators Ltd; (added defendant), as a defendant and also amend the plaint. The petitioner objected to the respondent's application. The Additional District Judge however allowed the application on 30.9.94. These applications in Revision and leave to appeal are from that order.

The petitioner has adduced four grounds why the order cannot be sustained. Namely, (1) There is no agreement pleaded between the respondent and the petitioner. (2) An action brought against a wrong party cannot be converted by adding a new party. (3) The proper procedure in seeking to add the new party has not been followed. (4) The application for the amendment of pleadings cannot be allowed due to laches on the part of the respondent.

In reply, the respondent has submitted that Section 18 of the Civil Procedure Code permits Court to add a party as a defendant in order to, (1) avoid a multiplicity of actions, and (2) to diminish the cost of litigation. It is further submitted that an amendment necessitated by the addition of a party, is not an amendment contemplated by Section 93 of the Code. In any event, it is urged, the amendment should be allowed as otherwise it would cause grave and irreparable injustice to the respondent.

Section 18 of the Code reads:

(1) The court may on or before the hearing upon the application of either party, and on such terms as the court thinks just, order the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that

the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added.

The words "all questions involved in that action" in the Section circumscribe the power of Court to add or strike out a party to an action. The provisions of the Section were never intended to apply to a person against whom the plaintiff did not disclose a cause of action.

The respondent has sought to amend paragraphs 16.17 and 22 of the plaint by substituting the word "defendants" in place of the word "defendant". In none of these paragraphs is it alleged that the respondent had any agreement with the added defendant. In paragraph 11 of the original plaint, it is alleged that the petitioners acting as agent of C.S.I. promised the respondent, payment of US \$ 24,277,31. This paragraph remains unamended except for the substitution of the words "first defendant" for the word "defendant". It is the same in the amended paragraph 12, which avers that the respondent handed over the consignment of goods to the petitioner. The basis on which the added defendant is sought to be made liable in damages is not set out in any other paragraph of the amended plaint. In other words, the addition of Buyers Consolidators Ltd. will neither help to settle any question in the action nor avoid a multiplicity of actions and reduce the cost of litigation.

The principle by which a Court ought to be guided in deciding to alter a pleading is that the alteration will make the real issues clear. *Ratwatte v. Owen* ⁽¹⁾. The complaint of the respondent against the petitioner is that it had consigned the goods to a party other than the Philadelphia National Bank. The real issue between the petitioner and the respondent appears to be whether the petitioner consigned the goods to Philadelphia National Bank or not. Adding Buyers Consolidators will in no way make the issue any clearer. Nor will such a course enable Court to effectively and completely adjudicate upon and settle all questions involved in the respondent's action against the petitioner.

It appears that the intention of the respondent is to rely on the averments in the answer filed by the petitioner, that it acted as agent of Buyers Consolidators Ltd.; to make the latter liable. The respondent having chosen to sue the petitioner, cannot by adding Buyers Consolidators Ltd.; as a defendant, seek to rectify the mistake of instituting the action against the wrong party. The proper course is for the respondent to drop the action which it has wrongly instituted and commence a fresh action against the proper party, who should have been made the defendant in the first instance. *Kira v. Kira* ⁽²⁾. *Don Alwis v. V.C. of Hiripitiya* ⁽³⁾. In the present action, documents 4(a) to 4(c) show clearly that the receipt of goods was acknowledged by the petitioner on behalf of Buyers Consolidators Ltd. These documents also disclose that the goods were in fact consigned to Philadelphia National Bank.

The learned Additional District Judge has commented that the respondent had made the application for the addition of Buyers Consolidators Ltd; under Section 93 and not under Section 18 of the Civil Procedure Code, hence no notice need be served of the application on the party sought to be added. The caption to the application clearly shows that the application was one made under Section 18 of the Code. Besides, as will be explained later, this is not a correct interpretation of either Section 18 or Section 93. In the matter of an application to add a party in terms of Section 18 of the Code, it has been pointed out in *Loos v. Schrenguivel* ⁽⁴⁾ and adopted with approval in *Banda v. Dharmaratne* ⁽⁵⁾, the procedure that should be followed is for the party seeking to bring a third party to obtain *ex parte*, an order giving leave to serve a notice on the person whom he desires to add, and the question whether such party ought to be joined should be considered and dealt with in his presence and in that of the parties already on record. No such application has been made in the instant case. Buyers Consolidators Ltd; has been added without the requisite notice and in its absence. Hence the procedure followed is not in conformity with the requirements as set out in the above judgments. The requirement of notice to the party to be added is to give him an opportunity to show cause why he ought not be added at the stage of application for addition, rather than compelling him to raise objections to addition in his answer or by way of motion

and memorandum in writing under Section 90 of the Code, and thereby prolong the proceedings.

Section 21 of the Civil Procedure Code provides:

"When a defendant is added, the plaint shall unless court directs otherwise, be amended in such manner as may be necessary, and a copy of the amended plaint shall be served on the new defendant and on the original defendants."

Provision for the amendments to pleadings is made by Section 93, which is the pivotal Section on amendments to pleadings, in Chapter XV of the Code. As that Section stood prior to the amendments by Act No. 79 of 1988 and Act No. 9 of 1991, it posed no problem when an amendment was necessitated by adding a party as a defendant under Section 18 of the Code, as it was entirely within the discretion of the Court to permit amendments to pleadings. Since the amendment by Act, No. 9 of 1991, if an application is made to add a party as a defendant after the first date of trial, Sections 18, 21 and 93(2) of the Code have to be read together, in allowing or refusing such an application. As noted earlier, each Section cannot be considered in isolation. The position would be the same even when amendments are sought under other Sections of the Code, as for instance, Sections 38 and 46 of the Code.

Section 93(2) (as amended) provides:

"On or after the first day 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 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."

The amendments to pleadings on or after the first date of trial can now be allowed only in very limited circumstances, namely, when the Court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party applying is not guilty

of laches. The onus of proving that both these conditions are fulfilled lies squarely on the party seeking the amendment. The Court is also obliged to record the reasons as to how it came to be satisfied that the two conditions have been met.

The respondent has nowhere in the affidavit filed in support of its application to add Buyers Consolidators Ltd. as a defendant, stated that it would suffer irremediable injustice if the application is not allowed. The learned Judge has himself not stated how or why he was convinced that irremediable injustice would be caused if the party was not added and the amendments disallowed.

The respondent by 9.8.91 had documents 4(a) to 4(c) in its hands. That is, at least ten months before it instituted this action. The petitioner has specifically pleaded that it was the agent of Buyers Consolidators Ltd. in its answer dated 5.2.93. Yet no attempt was made by the respondent to add Buyers Consolidators Ltd; as a defendant till after the first date of trial. No explanation has been forthcoming from the respondent for the delay in making the application to add Buyers Consolidators Ltd. as a party defendant. There has obviously been a lack of due diligence on the part of the respondent which deprives it of the right to amend its plaint under Section 93(2) of the Code. The learned Judge has not given reasons for excusing the delay of over two years taken by the respondent to realise that it had a cause of action against the added defendant. In the circumstances the order dated 30.9.94 cannot be allowed to stand. It is accordingly set aside.

The application in revision is allowed with costs.

The connected leave to appeal application C.A. L.A. 224/94 stands dismissed without costs.

S. N. SILVA, J. P/CA – I agree.

Revision application allowed.