

SEYLAN BANK
v
THANGAVEIL

COURT OF APPEAL
AMARATUNGA, J. AND
WIMALACHANDRA, J.
C.A. 1159/2003
D.C. HATTON M/729
JUNE 9, AND
JULY 6, 2004

Civil Procedure Code – Correction of misdescription of name – section 93 and s. 754(2) – Appealable order – Does revision lie? – Unexplained delay-Falsa demonstratio non nocet cum de corpore vel persona constat.

The plaintiff respondent sought to recover an overdraft facility granted to one Sinnamah Thangavelu. The original plaint the Defendant's name is described as Sabapathy Thangavelu - address being the same. Summons were served on Sinnamah Thangavelu. Upon summons being served Sinniah Thangavelu appeared in court, filed proxy/answer describing himself as S.Thangavelu.

When the case was called on 05.04.2002 attorney-at-law for the defendant petitioner submitted that though he had filed proxy for the defendant's Sabapathy Thangavelu, his correct name is Sinniah Thangavelu. The trial judge directed the plaintiff to correct the mistake in the caption of the plaint. The trial court accepted the amended plaint on 10.01.2003 and granted time to the defendant to file his answer.

The defendant-petitioner moved in revision.

Held :

- (1) No revision lies. The petitioner has not resorted to his statutory right of appeal with leave of court. He has not set out in his petition for revision any exceptional circumstances.
- (2) There is a delay of one year and four months in respect of the order dated 07.03.2002 and delay of 7 months from the order dated 10.01.2003. The petitioner has not explained the delay.
- (3) The amendment effected to the caption is only the correction of a clerical error in the name of the defendant. The defendant's surname and address have been correctly given.

Names are needed only to designate persons and the suit is not against names but against persons designated thereby.

A false description does not harm if there is sufficient certainty as to the object, corpus or person.

- (4) The amendment consists of the correction of a clerical error appearing only in the caption of the plaint. The mistake is not a mistake of the identity of the man but only his name. It does not fall within the category of the amendments contemplated under section 93.

AN APPLICATION for revision from the order of the District Court of Hatton.

Cases referred to:

- (1) *Jayasinghe v Gnanawathie Menike* – (1997) 3 SRI LR 410.
- (2) *Odiris Silva & Sons Ltd. v Jayawardena* – 55 NLR 335.
- (3) *Gunasekera v Abdul Latiff* – (1995) 1 SRI LR 225 (distinguished)

Cur.adv.vult

August 27, 2004

WIMALACHANDRA, J.

This is an application in revision filed by the defendant-petitioner (hereinafter referred to as the 'defendant') to revise the orders of the learned District Judge of Hatton dated 7.3.2002 and 10.01.2003.

Briefly, the facts relevant to this application are as follows:

The plaintiff-respondent (hereinafter referred to as the 'plaintiff') instituted the action bearing No. 729/M in the District Court of

Hatton against the defendant for the recovery of Rs. 90,022/- being the amount of the unpaid overdraft facility granted by the plaintiff. This overdraft facility has been granted to Sinnaiah Thangavelu of Kovilkade, Gonagala Division, Fordyce Group, Dickoya. In the original 10
 plaintiff the defendant's name was described as Sabapathy Thangavelu of Kovilkade, Gonagala Division, Fordyce Group, Dickoya. However, the summons had been served on Sinnaiah Thangavelu, and upon summons being served on him the said Sinnaiah Thangavelu appeared in Court on the summons returnable date, filed proxy and later filed answer describing himself as S. Thangavelu. When this case was called on 5.4.2002, Mr. Jothikumar, attorney-at-law appearing on behalf of the petitioner submitted that though he had filed the proxy for the defendant as Sabapathy Thangavelu his correct name is Sinnaiah Thangavelu 20
 (vide proceedings dated 5.4.2002 in the District Court of Hatton). He had stated thus:

“.....තවදුරටත් කරුණු දක්වමින් මෙම නඩුවේ පෙරකලාපිය මෙනෙක් ඉදිරිපත් කර ඇති තැනැත්තා සභාපති ත-ආවේලු බවත්, ඔහුගේ නිවැරදි නම සින්තයියා ත-ආවේලු බව කියා සිටී.”

The learned District Judge after considering the submissions made by counsel and all the relevant facts, made order on the same day (5.4.2002) directing the plaintiff to correct the mistake relating to the name of the defendant in the caption of the plaintiff. As 30
 directed, the plaintiff tendered the amended plaintiff, consisting of the correction of the defendant's name only in the caption of the plaintiff, on 24.5.2002.

The defendant filed a statement of objection to the amended caption of the plaintiff on 4.10.2002. The learned Judge made order on 10.01.2003 accepting the amended plaintiff and on the same day the Court granted time till 7.3.2003 for the filing of the amended answer. It is against the orders dated 7.3.2003 and 10.1.2003 the defendant made this application in revision.

The learned Counsel for the plaintiff raised the following preliminary objections to the application in revision. 40

- (i) the plaintiff has made this application on 17.7.2003, seven months after the order dated 10.01.2003.

- (ii) the plaintiff has not made any attempt to explain the delay.
- (iii) the plaintiff has failed to exercise the statutory right of appeal against the orders dated 10.01.2003 and 7.3.2003, and the plaintiff has failed to disclose the exceptional circumstances warranting the exercise of the revisionary jurisdiction of this court.
- (iv) On 5.2.2002 the learned Judge made order to correct the misdescription of the name of the defendant and ordered the plaintiff to effect the amendment to the caption by tendering an amended plaint. The court accepted the amended plaint on 24.5.2002. The plaintiff has not challenged the aforesaid orders dated 5.2.2002 and 24.5.2002. 50

I shall first deal with the preliminary objections raised by the plaintiff.

Where the law has provided for a right of appeal, and if the petitioner without exercising that right of appeal seeks the revisionary power of this court, the court would exercise such powers only in exceptional circumstances. 60

There is a right of appeal against the impugned order of the learned District Judge with the leave of this Court in terms of section 754(2) of the Civil Procedure Code. However the petitioner has not exercised this right. In these circumstances, the revisionary powers of this court may be exercised only if the petitioner's application discloses exceptional circumstances warranting the exercise of the revisionary jurisdiction of this court.

The petitioner has not resorted to his statutory right of appeal with leave of this court. Moreover he has not set out in his petition for revision any exceptional circumstances, as to why he failed to file a leave to appeal application as provided by law. 70

It is now settled law that revisionary power would be exercised even though there is a right of appeal only if there is the existence of special circumstances necessitating the indulgence by court to exercise the revisionary remedy. In the instant case the petitioner has not explained his failure to exercise the right of appeal in terms of section 754(2) of the Civil Procedure Code. Nor has he established any exceptional circumstances to invoke the revisionary jurisdiction. 80

In this application in revision the petitioner seeks to set aside the orders dated 7.3.2002 and 10.01.2002 made by the learned District Judge. The petitioner has filed this application on 17.7.2003. It appears that there is a delay of one year and four months in respect of the order dated 7.3.2002 and a delay of seven months from the order dated 10.01.2003. The petitioner has not explained the delay. Unexplained and unreasonable delay in seeking relief by way of revision, which is a discretionary remedy, is a factor which will disentitle the petitioner to it. An application for judicial review should be made promptly unless there are good reasons for the delay. The failure on the part of the petitioner to explain the delay satisfactorily is by itself fatal to the application. 90

For these reasons I uphold the preliminary objections raised by the respondent and on this ground alone this application warrants dismissal without going into the merits.

However, I shall briefly examine whether there is any merit in the petitioner's application. It appears to me that the most important order made by the learned Judge is the order made on 5.4.2002 wherein the learned Judge directed the respondent to correct the name of the defendant and amend the caption of the plaint. 100

Accordingly, as directed by the learned Judge on 5.4.2002 the plaintiff tendered the amended plaint (marked "X6"), amending the caption of the plaint, substituting the name of Sinnaiah Thangavelu for the name of Sabapathy Thangavelu. It is to be noted that the Court granted permission on 5.4.2002 to amend the caption of the plaint. However the defendant has not appealed against that order nor has he sought to revise the same. Accordingly, the order dated 5.4.2002 stands unchallenged.

The defendant did not dispute the fact that he has been a constituent of the plaintiff bank and his account number and address have been correctly indicated. It is to be observed that the defendant has acted on the basis that he is the defendant cited in the caption of the plaint and accepted the summons, filed proxy and answer. The learned District Judge has clearly observed this fact in his order dated 10.01.2003. His observations at page 2 of the order are as follows: 110

“මෙහිදී මුල් පැමිණිල්ලට අනුව සභාපති ත-ගවේදු යන විත්තිකරු වෙනුවෙන් සිත්තයිසා ත-ගවේදු ඉදිරිපත් වී පැමිණිල්ලට පිළිතුරු දී ඇති අතර මෙම ණය මුදලට විෂය වූ ගිණුමද පිළිගෙන ඇත.”

The amendment effected to the caption of the plaint is only the correction of a clerical error in the name of the defendant. The defendant's surname (i.e. Thangavelu) and address have been correctly stated. In the case of *Jayasinghe v Gnanawathie Menike* (1) *Jayasuriya, J.* held that:

“It is an old and rational maxim of law that where the party to a transaction or the subject of a transaction is actually and corporeally present, the calling of either by a wrong name is immaterial:

-Names are needed only to designate persons and the suit is not against names but against persons designated thereby-”

Jayasuriya, J. in the course of his judgment at pages 413 and 414 observed:

“I wish to refer to certain decisions of the Supreme Court where more serious and grave misdescriptions and errors in regard to the enumeration of names of parties have been effected lawfully by the courts. In the decision in *Odiris Silva and Sons Limited v Jayawardene*(2) a misdescription in the plaint and continuing error as to the name of the defendant was held to have been lawfully rectified. The plaintiff in that action mistakenly named in the caption the defendant as Odiris Silva and Sons when in fact, the defendant was an incorporated body designated as Odiris Silva and Sons Ltd. The amendment which was effected in the lower court, amidst strenuous objections, was *upheld* as a correct and lawful order by the Supreme Court which proceeded to hold that for the purpose of reckoning the period of prescription, the action against the Incorporated Company must be taken to have been instituted on the date of the original plaint and not upon amendment of the caption of the plaint.”

Justice Jayasuriya went on to state as follows (at Page 415):

"As Justice Kenueman has remarked: 'Names only designate persons but a suit is not against names but against persons designated thereby'. The learned District Judge has effected a mere correction in one name in the caption acting on the often quoted legal *maxim-Falsa demonstratio non nocet cum de corpore vel persona constat*. (A false description does not harm if there be sufficient certainty as to the object corpus or person) A latent ambiguity of this nature can always be corrected by a trial Judge in the exercise of his inherent power to secure the ends of Justice."

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The defendant relied on the judgment in the case of *Gunasekera v Abdul Latiff* ⁽³⁾ where Ranaraja, J. observed that the amendment of 1991 has for the first time taken away the power of court *ex mero motu* to amend pleadings. An amendment could be allowed only upon an application of a party. Here Ranaraja, J. was referring to section 93 of the Civil Procedure Code as amended by Act, No. 9 of 1991. In this case the Court of Appeal was called upon to decide whether the application made by the defendant after several dates of trial, would be allowed.

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In the instant case the facts are different to the facts in the case of *Gunasekera v Abdul Latiff (Supra)*. Here the learned District Judge was called upon to correct the misdescription relating to the defendant's name. The learned District Judge directed to amend the caption of the plaint substituting the name of Sinnaiah Thangavelu for Sabapathy Thangavelu. It is an amendment consisting of the correction of a clerical error appearing only in the caption of the plaint. The mistake is not a mistake of the identity of the man but only his name.

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His Lordship Jayasuriya in *Jayasinghe v Gnanawathie Menjike (Supra)* held that the District Judge was perfectly entitled to have effected a correction of the misdescription in one's name in the caption of the plaint, and also held at pages 416 and 417 that the amendment effected did not fall within the category of the amendments contemplated in section 93 of the Civil Procedure Code. His Lordship further held that, the learned Judge has effected the amendment in the exercise of his inherent powers.

In these circumstances, I hold that there is no merit in this application and I accordingly, dismiss this application in revision with costs fixed at Rs.5250/= payable by the defendant-petitioner to the plaintiff-respondent. 190 001

AMARATUNGA, J.

I agree.

Application dismissed.